

(2017) 08 BOM CK 0167
In the Bombay High Court
Case No : 263 of 2002

Jagdish Dhanurdhar Kalbage

APPELLANT

Vs

State of Maharashtra through Anti Corruption Bureau

RESPONDENT

Date of Decision : 18-08-2017

Acts Referred:

[Indian Penal Code, 1860](#), [Section 165A](#)
- .
[Prevention of Corruption Act, 1988](#), [Section 7](#)
[Section 13\(2\)](#), [Section 13\(1\)\(d\)](#) -
Public

Citation : (2017) 08 BOM CK 0167

Hon'ble Judges : Rohit B. Deo

Bench : SINGLE BENCH

Advocate : R.M. Ahirrao, A.V. Palshikar

Final Decision : Allowed

Judgement

1. The appellant seeks to assail judgment and order dated 06.05.2002 in Special Case 1/1999 delivered by the Special Judge, Washim by and under which the appellant is convicted for offences punishable under sections 7, 13(1)(d) read with section 13(2) of Prevention of Corruption Act, 1988 and is sentenced to suffer rigorous imprisonment for two years and to pay a fine of Rs.1000/.

2. Shri Ahirrao, the learned counsel for the appellant would urge that the judgment impugned militates against the established position of law that proof that the accused demanded illegal gratification and voluntarily received the same is a sine quo none for constituting offences punishable under sections 7 or 13 (1) (d) read with section 13(2) of the Prevention of Corruption Act, 1988 (hereinafter referred to as "the Act"). He would further urge that the reasoning of the learned Trial Court for holding that the demand is proved dangerously borders on perversity.

3. The learned counsel Shri Ahirrao, relies on the recent judgment of the Apex

Court in *Mukhtiar Singh* (since deceased) through his L.R. vs. *State of Punjab* 2017(7) SCALE 702 and in particular on the observations of the Hon"ble Supreme Court in paragraph 14, 15 and 25, which read thus:

"14. The indispensability of the proof of demand and illegal gratification in establishing a charge under Sections 7 and 13 of the Act, has by now engaged the attention of this Court on umpteen occasions. In *A. Subair vs. State of Kerala*, this Court propounded that the prosecution in order to prove the charge under the above provisions has to establish by proper proof, the demand and acceptance of the illegal gratification and till that is accomplished, the accused should be considered to be innocent. Carrying this enunciation further, it was expounded in *State of Kerala vs. C.P. Rao* that mere recovery by itself of the amount said to have been paid by way of illegal gratification would not prove the charge against the accused and in absence of any evidence to prove payment of bribe or to show that the accused had voluntarily accepted the money knowing it to be bribe, conviction cannot be sustained.

15. In *P. Satyanarayana Murthy* (supra), this Court took note of its verdict in *B. Jayaraj vs. State of A.P.* underlining that mere possession and recovery of currency notes from an accused without proof of demand would not establish an offence under Section 7 as well as Section 13(1)(d)(i) and (ii) of the Act. It was recounted as well that in the absence of any proof of demand for illegal gratification, the use of corrupt or illegal means or abuse of position as a public servant to obtain any valuable thing or pecuniary advantage cannot be held to be proved. Not only the proof of demand thus was held to be an indispensable essentiality and an inflexible statutory mandate for an offence under Sections 7 and 13 of the Act, it was held as well qua Section 20 of the Act, that any presumption thereunder would arise only on such proof of demand. This Court thus in *P. Satyanarayana Murthy* (supra) on a survey of its earlier decisions on the prerequisites of Sections 7 and 13 and the proof thereof summed up its conclusions as hereunder:

"23. The proof of demand of illegal gratification, thus, is the gravamen of the offence under Sections 7 and 13(1)(d)(i) and (ii) of the Act and in absence thereof, unmistakably the charge therefor, would fail. Mere acceptance of any amount allegedly by way of illegal gratification or recovery thereof, dehors the proof of demand, ipso facto, would thus not be sufficient to bring home the charge under these two sections of the Act. As a corollary, failure of the prosecution to prove the demand for illegal gratification would be fatal and mere recovery of the amount from the person accused of the offence under Sections 7 and 13 of the Act would not entail his conviction thereunder.

25. It would thus be patent from the materials on record that the evidence with regard to the demand of illegal gratification either of Rs.3,000/which had been paid or of Rs.2,000/as made on the day of trap operation is wholly inadequate to comply with the prerequisites to constitute the ingredients of the offence with which the original accused had been charged. Not only the date or time of first

demand/payment is not forthcoming and the allegation to that effect is rather omnibus, vague and sweeping, even the person in whose presence Rs.3,000/at the first instance is alleged to have been paid i.e. Santosh Singh Lamberdar, has neither been produced in the investigation nor at the trial. In other words, the bald allegation of the complainant with regard to the demand and payment of Rs.3,000/as well as the demand of Rs.2,000/has remained uncorroborated. Further to reiterate, his statement to this effect lacks in material facts and particulars and per se cannot form the foundation of a decisive conclusion that such demand in fact had been made by the original accused. Viewed in this perspective, the statement of complainant and the Inspector Satpal, the shadow witness in isolation that the original accused had enquired as to whether money had been brought or not, can by no means constitute demand as enjoined in law as an ingredient of the offence levelled against the original accused. Such a stray query ipso facto in absence of any other cogent and persuasive evidence on record cannot amount to a demand to be a constituent of the offence under Section 7 or 13 of the Act."

4. Shri Ahirrao, the learned counsel further relies on another relatively recent judgment of the Hon"ble Apex Court in Krishan Chander vs. State of Delhi (2016) 3 SCC 108 and invites my attention to the observations in paragraph 35, 36 and 37 which read thus:

"35. It is wellsettled position of law that the demand for the bribe money is sine qua non to convict the accused for the offences punishable under Sections 7 and 13(1)(d) read with Section 13(2) o the PC Act. The same legal principle has been held by this Court in B. Jayaraj, A. Subair and P. Satyanarayan Murthy upon which reliance is rightly placed by the learned Senior Counsel on behalf of the appellant.

36. The relevant para 7 from B. Jayaraj case reads thus : (SCC p.58).

"7. Insofar as the offence under Section 7 is concerned, it is a settled position in law that demand of illegal gratification is sine qua non to constitute the said offence and mere recovery of currency notes cannot constitute the offence under Section 7 unless it is proved beyond all reasonable doubt that the accused voluntarily accepted the money knowing it to be a bribe. The above position has been succinctly laid down in several judgments of this Court. By way of illustration reference may be made to the decision in C.M. Sharma v. State of A.P.and C.M. Girish Babu v. CBI."

(emphasis supplied)

37. In P. Satyanarayana Murthy, it was held by this Court as under: (SCC p.159, paras 21-23)

"21. In State of Kerala and another vs. C.P. Rao, this Court, reiterating its earlier dictum, visavis the same offences, held that mere recovery by itself, would not prove the charge against the accused and in absence of any evidence to prove

payment of bribe or to show that the accused had voluntarily accepted the money knowing it to be bribe, conviction cannot be sustained.

22. In a recent enunciation by this Court to discern the imperative prerequisites of Sections 7 and 13 of the Act, it has been underlined in *B. Jayaraj* in unequivocal terms, that mere possession and recovery of currency notes from an accused without proof of demand would not establish an offence under Sections 7 as well as 13(1)(d)(i)&(ii) of the Act. It has been propounded that in the absence of any proof of demand for illegal gratification, the use of corrupt or illegal means or abuse of position as a public servant to obtain any valuable thing or pecuniary advantage cannot be held to be proved. The proof of demand, thus, has been held to be an indispensable essentiality and of permeating mandate for an offence under Sections 7 and 13 of the Act. Qua Section 20 of the Act, which permits a presumption as envisaged therein, it has been held that while it is extendable only to an offence under Section 7 and not to those under Section 13(1)(d) (i)&(ii) of the Act, it is contingent as well on the proof of acceptance of illegal gratification for doing or forbearing to do any official act. Such proof of acceptance of illegal gratification, it was emphasized, could follow only if there was proof of demand. Axiomatically, it was held that in absence of proof of demand, such legal presumption under Section 20 of the Act would also not arise.

23. The proof of demand of illegal gratification, thus, is the gravamen of the offence under Sections 7 and 13(1) (d) (i)&(ii) of the Act and in absence thereof, unmistakably the charge therefore, would fail. Mere acceptance of any amount allegedly by way of illegal gratification or recovery thereof, dehors the proof of demand, ipso facto, would thus not be sufficient to bring home the charge under these two sections of the Act. As a corollary, failure of the prosecution to prove the demand for illegal gratification would be fatal and mere recovery of the amount from the person accused of the offence under Sections 7 or 13 of the Act would not entail his conviction thereunder."

(emphasis supplied)

5. Shri Ahirrao, the learned counsel would further urge that the Hon'ble Supreme Court in *Pannalal Damodar Rathi vs. State of Maharashtra*, 1988 SCC (Criminal) 121 has held that after the introduction of section 165A in the Indian Penal Code, a bribe giver is equally guilty and his testimony is not on a better footing than that of accomplice. The learned counsel would urge that the complainant and the panch witnesses are partisan witnesses since they are interested in the success of the trap. The learned counsel would urge that unless the testimony of the complainant or the panch is corroborated in material particulars and is otherwise found wholly reliable and trustworthy, it would be unsafe to convict the accused on the basis of such testimony. The learned counsel would urge that the accused who is facing a trial under the Prevention of Corruption Act, 1988 is presumed to be innocent unless and until the guilt is established beyond reasonable doubt and an offence punishable under the Prevention of Corruption Act cannot be treated differently than any other criminal

offence. The presumption of innocence which is available to the accused is absolute and does not shift.

6. Per contra, the learned A.P.P. Shri Palshikar made a valiant attempt to support the judgment impugned. He would urge that the complainant has proved not only the initial demand on 17.09.1988, he has also proved the demand on the date of the trap.

7. He would submit that the testimony of the complainant is P.W.1 who has examined as P.W.1 is corroborated by the recovery of the tainted currency note from the left side pocket of the pant worn by the accused.

8. I have anxiously and minutely scrutinized the record, particularly as the reasoning of the learned Special Judge for holding that the accused demanded illegal gratification on 18.09.1988 is fallacious and indeed perverse. The shadow panch who is examined as P.W.4 does not even refer to any demand made by the accused. P.W.4 states in the examination in chief that the accused expressed that he was in a hurry. This expression of the accused that he was in a hurry is treated as a demand by the learned Special Judge. I am afraid, that the finding recorded by the learned Sessions Judge is clearly perverse.

9. The version of the complainant who is examined as P.W.1 is that he is the Chairman of a Cooperative Society and the accused who then was an Auditor was visiting the premises of the Society to conduct the audit. According to P.W.1, when the accused conveyed that there were irregularities in the accounts of the Society, P.W.1 requested the accused that a favourable audit report be given and that the audit fees be reduced. In response to the said request, the accused is alleged to have demanded an amount of Rs.2000/as illegal gratification. This initial demand is absolutely uncorroborated.

10. The defence of the accused is of thrusting. The evidence as to what transpired on 18.09.1988 creates sufficient doubt in the prosecution version and probalises the defence. Both the complainant P.W.1 and the shadow panch P.W.4 have deposed that on 18.09.1988 twenty currency notes of Rs.100/ denomination were offered by the complainant to the accused, the accused received the currency note with his right hand and put the same in the left side pocket of his pant. It is neither the version of P.W.1 nor P.W.4 nor of any witness than the accused counted the notes with both hands. Strangely, the evidence is that both the hands of the accused tested positive in the phenolphthalein test. Firstly, I find it difficult to believe that the accused who was admittedly sitting in a sitting position could have physically managed to put the currency note in the left side pocket of the pant with his right hand. Secondly, since it is neither the version of the complainant nor that of the shadow panch that the accused touched the currency note with his left hand, there is absolutely no explanation as to how the left hand of the accused turned purple when dipped in the solution of sodium carbonate. This would probalize the defence of thrusting on the touchstone of preponderance of the probabilities.

11. The prosecution has miserably failed to bring home the charge much less beyond reasonable doubt.
12. The judgment impugned is set aside. The accused is acquitted of offences punishable under sections 7, 13(1)(d) read with section 13(2) of Prevention of Corruption Act, 1988.
13. The bail bond stands discharged.
14. The appeal is allowed. The fine amount paid, if any, by the appellant shall be refunded to him.