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(2017) 04 MP CK 0062

In the Madhya Pradesh High Court

Case No : 429 of 2014

Niharika Tiwari Vs The State of Madhya Pradesh? and others

Date of Decision : 20-04-2017

Acts Referred:

Code of Criminal Procedure, 1973, Section 374(2) - Appeals from convictions
Prevention of Corruption Act, 1988, Section 7, Section 13(2), <a href=6460

Citation : (2017) 04 MP CK 0062

Hon'ble Judges : S.K. Gangele, Anurag Shrivastava

Bench : Division Bench

Advocate : J.K. Jain

Judgement

1. Feeling aggrieved by the judgment of conviction and order of sentence dated 27.01.2016, passed by learned Additional Sessions Judge & Special Judge (CBI) Jabalpur, in Special Case No.13/2009 convicting appellant under Section 7 and Section 13(1)(d) read with Section 13(2) of Prevention of Corruption Act, 1988 (for brevity "the Act") and thereby sentencing him to R.I for two years and fine of Rs.5,000/- and R.I of three years and fine of Rs.10,000/- respectively. In default stipulation the appellant has preferred present appeal under Section 374 (2) of Code of Criminal Procedure, 1973.

2. In brief, the case of prosecution is that at the relevant point of time the appellant Guman Singh was serving on the post of Field Officer, State Bank of India, Kareli Branch, District Narsinghpur (M.P). The complainant Ashish Kumar Nema proprietor M/s Ashish Computer Point, Kareli had been given cash credit limit (C.C Limit) of Rs.80,000/- by the Bank. Later on, on the request of complainant this C.C. limit was enhanced from Rs.80,000/- to Rs.2,90,000/- in the month of August, 2005. The complainant had issued various cheques from his C.C. Account for payment but on 13.09.2008 he came to know that the cheques were not being passed by the Bank and there was hold imposed on his account at the instance of appellant. The complainant met the appellant and enquired about his account then it was informed to him by appellant that he has

stopped the payment of cheque issued by the complainant and to lift the hold appellant demanded Rs.5,000/- from the complainant for honorouing the cheque issued by him.

3. Since the complainant was not keen enough to give illegal gratification to the appellant, as a result of which he sent a complaint to Superintendent of Police (C.B.I.) Jabalpur by Fax on 14.09.2008. Inspector V. Shyamdas Nayak (PW-10) on preliminary enquiry verified the complaint and thereafter, FIR (Ex.P/22) was registered on 15.09.2008 and the case was entrusted to Inspector Manoj Sharma (PW-11). Manoj Sharma constituted a trap team and proceeded to Kareli and met complainant and laid a trap. On 15.09.2008 at about 4:00 O'' clock evening, the trap team went to Bank. The complainant alongwith shadow witness Deendayal Badodiya (PW-6) went to meet the appellant with the tainted Rs.5,000/-. It is alleged that the appellant demanded Rs.5,000/- from the complainant for lifting the hold on his Bank account. The appellant gave money and signaled the trap party. Inspector Manoj Sharma approached to appellant and took search of his person and recovered tainted money from his pocket, the money was seized a panchanama of trap proceeding was prepared and after performing other necessary investigation and getting sanction the charge sheet was submitted before Special Judge.

4. The trial Court has framed the charge for offences under Section 7 and 13(1)(d) and 13(2) of Prevention of Corruption Act, 1988. The appellant abjured guilt, thereafter prosecution has examined 12 witnesses and the appellant has examined 8 witnesses in his defense.

5. In his defense the appellant has not denied that the Rs.5,000/- was given to him by complainant. It is stated that the complainant has old C.C limit of Rs.80,000/-. He had already withdrawn Rs.54,000/-. Later on, he had issued a cheque of Rs.30,000/- which could not be honoured due to shortage of fund in his account. On 13.09.2008, complainant enquired about non-payment of cheque from appellant then he was told that if he would deposit Rs.5,000/- which is falling short in his account then only the cheque could be honoured. The complainant gave him a deposit slip of Rs.5,000/- (Ex.D/2) and promised him to give Rs.5,000/- on 15.09.2008. Thereafter, on 15.09.2008 complainant gave him aforesaid Rs.5,000/- for deposit in his Bank account which is recovered from him during trap. The appellant did not make any demand of bribe and the amount recovered from him is not an illegal gratification. The appellant is innocent and he is falsely implicated.

6. Learned trial Court after appreciating and marshaling the evidence found the appellant guilty under Section 7 and 13(1)(d) and 13(2) of Prevention of Corruption Act, and sentenced him, which we have mentioned hereinabove.

7. It is argued by appellant that the complainant had a cash credit limit of Rs.80,000/-. This limit has been enhanced from Rs.80,000/- to Rs.2,90,000/- but necessary formalities of registration of mortgage paper has to be completed

and for that complainant cannot operate his enhanced limit of Rs.2,90,000/-. Apart from this, the complainant has shifted his shop from Kareli to Narsinghpur without informing the Bank, and for aforesaid reason his account has been put on hold by the appellant. These facts are not denied. It is also admitted by the complainant that he had already withdrawn Rs.54,000/- from his C.C. Limit of Rs.80,000/- and thereafter he had issued a cheque of Rs.30,000/- in favour of Neha Naiyyar. On 13.09.2008, the complainant met the appellant and asked for clearance of aforesaid cheque. He promised to appellant that he would deposit Rs.5,000/- on 15.09.2008 and gave a deposit slip (Ex.D/2) also to the appellant. On the date of incident, the complainant gave Rs.5,000/- to appellant as promised before. The trial Court did not appreciate the evidence of prosecution witnesses and also of defense and wrongly disbelieved the deposit slip (Ex.D/2) and also the defense of appellant. The prosecution has not produced the tape conversion, which was recorded at the time of incident. Therefore, an adverse inference can be drawn against the prosecution.

8. Considering the rival contentions of learned counsel for the parties and on perusal of record, it appears that during the trap, the tainted money Rs.5,000/- has been recovered from the appellant. Hon''ble Apex Court in case law N. Sunkanna Vs. State of A.P. (2016) 1 SCC 713 held as under:- "It is settled law that mere possession and recovery of currency notes from accused without proof of demand will not bring home the offender under Section 7, since demand of illegal gratification is sine quo non to constitute the said offence. The above also will be conclusive in so far as the offence under Section 13 (1)(d) is concerned as 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 established."

Thus the burden to prove the accusation against the appellant for the offence punishable u/s 7 r/w 13(1)(d) of the Act with regard to acceptance of illegal gratification from the complainant PW lies on the prosecution.

9. The only material available is the recovery of the tainted currency notes from the possession of the accused. In fact such possession is admitted by accused himself. Mere possession and recovery of currency notes from the accused without proof of demand will not bring home the offence under sec.7. The above also will be conclusive in so for as the offence u/s 13 (1)(d)(1) and (2) is concerned as in the absence of prove of any demand for illegal gratification the use of corrupt or illegal means or abuse of position as public servant to obtain any valuable thing or pecuniary advantage cannot be held to be established. B. Jayraj v. State of A.P. (2014)13 SCC 55 :AIR 2014 SC (supp)1837

10. It is not disputed that at the relevant time the appellant was posted as Field Officer in the State Bank of India Branch Kareli. The complainant Ashish Nema (PW-4) was maintaining the account in the Bank, he had been given cash credit (CC) facility of Rs.80,000/- by the Bank on the name of his firm M/s Ashish Computer Point, Kareli. It is also not disputed that the complainant had applied

for enhancement of CC limit from Rs.80,000/- to Rs.2,90,000/- which had been accepted by the Bank. Prosecution witness N.S Thakur, Branch Manager of SBI (PW-1) deposed that the complainant had been given CC facility of Rs.80,000/- by the Bank, later on he had applied for enhancement of the limit upto Rs.2,90,000/-. The proposal Ex.P/1 for the same was recommended and sanctioned by the appellant on 19.08.2008 and for collateral security of enhanced CC limit the complainant has to deposit the registered document of equitable mortgage of his property. This witness further deposed that as per Bank circular Ex.P/21 registration of mortgage was necessary for enhancement of CC limit. The complainant was directed to submit the registered mortgage deed of his property and there was a hold set on his operation of Bank account above the limit of Rs.80,000/-. Above fact is also affirmed by prosecution witness Manmohan Singh Sethi (PW-2) and Jagdish Prasad Dubey (PW-7) the Chief Manager of SBI in their statement. Witness (PW-7) in para Nos.9 and 10 deposed that the complainant has executed the letter of arrangement (Ex.P/11) dated 19.08.2008 and guarantee agreement (Ex.P/12) wherein the condition for submission of documents of mortgage of property for collateral security is clearly mentioned. The complainant (PW-4) in his statement has also admitted the above facts and in crossexamination para 39 deposed that after sanction of the enhanced CC limit he was informed by the Bank that he has to get the mortgage deed of the property registered by Sub Registrar. The document (Ex.P/1) shows that the enhancement of CC limit was sanctioned on 19.08.2008. On the same date the documents Ex.P/2, P/11 and P/12 were executed. Therefore, it can be inferred that the complainant was informed by the Bank on 19.08.2008 that he has to deposit the duly registered mortgage paper of property in the Bank in order to get the enhanced CC limit facility. N.S. Thakur (PW-1) in cross-examination para-10 deposed that the complainant had got registration of mortgage on 24.10.2008. Manmohan Singh Sethi (PW-2) deposed that complainant had deposited the registered mortgage deed in the Bank on 12.12.2007. The complainant (PW-4) has also admitted that he has deposited the registered mortgage papers in the Bank after the incident (See cross-examination para 29). Thus, from above facts, it is clear that on the date of incident i.e 15.09.2008 the complainant had not completed the formalities of registration of mortgage deed of property, therefore, he was not entitled to get enhanced CC limit facility of Rs.2,90,000/- from the Bank.

11. N.S. Thakur (PW-1),deposed that there was a hold set on the Bank account of complainant due to non-compliance of condition in respect of deposit of mortgage papers for collateral security. He further deposed that the complainant had not deposited the registered mortgage deed of the property in the Bank, which is essential for enhancement of CC limit. Manmohan Singh Sethi (PW-2) in para Nos. 5 and 6 of his statement also corroborates the above facts by describing the procedure of Bank and stated that the account of complainant was set in hold on 10.09.2008 for want of equitable mortgage papers of the property as per Bank circular (Ex.P/21). PW-1 in cross-examination para Nos. 11 and 12

deposed that the complainant got the registration of mortgage deed on 24.10.2008 and submitted this to the Bank. Prior to this he was making Bank transaction under old limit of Rs.80,000/-. This shows that the hold was only set for making transaction for enhanced CC limit of Rs.2,90,000/-, there was no hold for transaction upto Rs.80,000/- under old limit. Manmohan Singh Sethi (PW-2) who is a Bank officer in his statement para-5 deposed that whenever an Officer of Bank finds that certain document has to be collected or got to be executed from the customer he can set hold in his Bank account. The Bank circular Ex.P-21 clause 2(v) reads as under:- "To ensure the registration, the Branch Manager should disburse the loan amount only after registration of declaration by mortgager in the registrar office concerned and its submission to the Branch"

Therefore, from the evidence of prosecution, it is establish that the appellant has legally set the hold in the account of complainant in order to obtain the registered mortgage deed of his property for collateral security purposes, for enhanced CC limit. The Bank has never said this act, wrong or unauthorized.

12. Complainant (PW-4) deposed that he had issued a cheque of Rs.30,000/- dated 13.09.2008 on the name of Neha Naiyar wife of Swapnil Naiyar. On 13.09.2008 he received information from Swapnil Naiyar that the cheque was not being honoured by the Bank, than the complainant went to SBI Branch Kareli and met appellant Guman Singh. Appellant told him that he had set a hold in his account and if he wants to remove it then he has to pay Rs.5000/- to him. Appellant told him that on Monday i.e. 15.09.2008 if he would pay Rs.5000/- to him than appellant would remove the hold. Thereafter the complainant lodged a report in C.B.I. and on 15.09.2008 under the direction of C.B.I. Inspector Manoj Sharma (PW-11) again he went in the Bank at about 5:00 clock evening and met the appellant and asked about his Bank account. Appellant told him unless he would pay Rs.5,000/- his account would not be operated. Then complainant gave Rs.5,000/- to the appellant who was later on caught by C.B.I. Inspector.

13. Complainant (PW-4) in his cross-examination para Nos.23 and 24 has admitted that his cash credit limit was Rs.80,000/-, out of this limit he has already withdrawn Rs.54,000/-. It means there was only Rs.26,000/- amount was left in cash credit account of complainant at the time of incident. Naturally, the cheque of Rs.30,000/- issued by the complainant cannot be encashed because of shortage of fund in his account.

14. It is the defense of the appellant that the complainant has old C.C limit of Rs.80,000/-. He had already withdrawn Rs.54,000/-. Later on, he had issued a cheque of Rs.30,000/- which could not be honoured due to shortage of fund in his account. On 13.09.2008, complainant enquired about non-payment of cheque from appellant then he was told that if he would deposit Rs.5,000/- which is falling short in his account then only the cheque could be honoured. The complainant gave him a deposit slip of Rs.5,000/- (Ex.D/2) and promised him to give Rs.5,000/- on 15.09.2008. Thereafter, on 15.09.2008 complainant gave him aforesaid Rs.5,000/- for deposit in his Bank account which is recovered from him

during trap.

15. Complainant (PW-4) in cross-examination para 24 has categorically admitted that when he had informed the appellant that he had issued a cheque of Rs.30,000/- which is not being encashed. The appellant told him that in his cash credit limit of Rs.80,000/- there is shortage of fund available, therefore, this cheque of Rs.30,000/- is not being honoured by the Bank. Appellant asked the complainant to give him Rs.5,000/-. Complainant (PW-4) also admits that he had signed a deposit slip of Rs.5,000/- (Ex.D/2).

16. The appellant has examined Deputy Manager Viju Raj (DW-1) who was working with him at the time of incident. Viju Raj deposed that his cabin is adjacent to the cabin of appellant in the Bank. On 13.09.2008 he saw the complainant came to meet appellant in the Bank. He was talking about clearance of cheque, there was shortage of Rs.5,000/- to clear the cheque, therefore, complainant told the appellant that he is giving the deposit slip and will send the money later on. The statement of this witness remained unchallenged in cross-examination. There his statement can be believed.

17. Thus, from the aforesaid evidence, it appears that although the Bank has sanctioned the enhancement of cash credit limit of Rs.2,90,000/- in favour of complainant, but because of non-submission of registered document of mortgage of property for collateral security against CC limit in the Bank, the complainant was not allowed to operate his Bank account above CC limit of Rs.80,000/- and a hold was set in his account by the appellant. It is also evident that the complainant was allowed to operate his Bank account up to his old CC limit of Rs.80,000/-. The appellant had already withdrawn Rs.54,000/- from his account and only 26,000/- was left in his account. The complainant had issued a cheque of Rs.30,000/- dated 13.09.2008 in favour of Neha Naiyar. Since, there was no sufficient amount available in the account of complainant this cheque could not be en-cashed by the Bank. This fact is also corroborated by the statement of Swapnil Naiyar (PW-8) who had deposed that on 13.09.2008 when he produced the cheque (Ex.P/8) of Rs.30,000/- given by complainant in the Bank, he was informed that there was no sufficient fund available in Bank account of complainant, therefore, cheque could not be encashed. Thereafter, he had informed the complainant about above facts on the same day.

18. Naturally, on 13.09.2008 the complainant was mainly concerned with the payment of the cheque of Rs.30,000/- given by him to Smt. Neha Naiyar. In cross-examination para 23,24 he admits that on the same day i.e 13.09.2008 he called on appellant and enquired about the payment of cheque then he was informed by the appellant that due to shortage of fund in his account his cheque was not being honoured. Appellant had asked him to bring Rs.5,000/-. Naturally, this amount would have been deposited in the Bank account of complainant to make good the shortage of fund to meet the cheque amount. For this purpose the appellant has also taken the deposit slip of Rs.5,000/- from complainant on his assurance that he would send the amount on next working day i.e.

15.09.2008. The complainant has given no explanation why he has given the deposit slip (Ex.D/2) to appellant. If amount would have been given as illegal gratification then there would be no justification for signing of deposit slip by complainant. This shows that the complainant is not telling the truth and concealing the fact.

19. Complainant knew this fact very well that until he submits the registered mortgage papers of the property in the Bank he cannot get enhanced CC limit of Rs.2,90,000/-. On the date of incident i.e. 15.09.2008 mortgage papers were not got registered by the complainant. Therefore without necessary documents of mortgage of property for collateral security, appellant can not allow him to operate account to the extent of extended CC limit of 290000/- ignoring Bank circular Ex.P-21. It is beyond appellant''s power. Thus, it is not believable that, the appellant had demanded the money, for the purpose of allowing complainant to operate his account to the extent of cash credit limit of Rs.2,90,000/-.

20. Thus, the defense of the appellant appears to be probable and reliable. The explanation given by the appellant seems to be acceptable. From above discussions it appears that on 13.09.2008, the complainant called on appellant and after knowing the fact that the cheque (Ex.P/8) is not being encased because of shortage of fund, he told the appellant that he is giving deposit slip to him now and will send Rs.5,000/- for deposit in his account so that the cheque could be honored. On assurance of complainant, the appellant had removed the hold on 15.09.2008 and the cheque was encashed even before the deposit of shortage amount. The information given by the Bank (Ex.P/17) shows that the hold was removed on 15.09.2008 at 11:23 a.m. prior to payment of Rs.5000/-by complainant to appellant. This is general practice followed in Banks in order to provide better services to customer, that in case of shortage of fund in account, or the payment exceeding CC limit the Bank officer may allow the payment of cheque on assurance of customer that he would deposit the sufficient amount in his account later on.(see PW-1 para-15). Therefore this defense of appellant is also believable that at the time of incident the complainant gave him Rs.5000/- for deposit in his bank account to make good the amount found short in payment of cheque. Since cheque was already encashed in early hours of the day therefore payment of money for its encashment later on by complainant to appellant becomes improbable and doubtful. Thus the statement of complainant that at the time of Trap the appellant demanded money for himself as bribe becomes doubtful. The complainant admits that he had been given voice recorder by the CBI, and he has recorded the conversation between him and appellant at the time of trap and handed over to CBI inspector, but this tap-recorded conversation or transcript is not produced by prosecution. Therefore an adverse inference can be drawn against the prosecution.

21. The evidence of shadow witness is also not fully reliable. Shadow witness PW-6 deposed that at the time of trap the complainant asked the appellant, when he could withdraw the money from his account, the appellant told him that

until he pays Rs.5000/- he could not withdraw the amount. In cross examination para- 33 he deposed that he cannot say whether the amount was demanded for payment of cheque or not. This shows that PW-6 is not certain whether the appellant had demanded the money for payment of cheque or for himself.

22. The trial Court disbelieved the defense of appellant only on the ground that appellant did not produce the deposit slip Ex.D-2 at the time of trap and did not mention the receipt of Rs.5000/- in his Hand balance book, no date is written in Ex.D-2 and it is not produced from Bank records. The reasons given by Trial Court is not acceptable .As per appellant the amount Rs.5000/- was to be deposited in account of complainant. The deposit slip was signed by him. The date in this slip is to be written when the amount is given by him for deposit. At the time of signing of slip complainant had not given the amount therefore date was left blank in it. On 15 .09.2008 as soon as the complainant had given the money the appellant was apprehended by CBI, there was no time to make entry in cash on hand book, since amount was given after Bank working hours the amount has to be deposited on 16,09,2008, therefore date was not written. Since the deposit slip was not submitted in Bank along with amount therefore it remained with appellant. It may be possible that investigating officer might have ignored the defense taken by appellant at the time of Trap and overlooked the deposit slip.

23. Hon''ble Supreme Court in case law State of Punjab v. Madan Mohan Lal Verma 2013 Cr.L.J.4050 observed as under:- "The law in issue is well settled that demand of illegal gratification is sine quo non for constituting an offence under the Act 1988. Mere recovery of tainted money is not sufficient to convict the accused when substantive evidence in the case is not reliable, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as a bribe. Mere receipt of the amount by the accused is not sufficient to fasten the guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification. Hence ,the burden rests on the accused to displace the statutory presumption raised under sec.20 of the Act 1988, by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in sec.7 of the Act 1988. While invoking the provisions of sec.20 of the Act, the Court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. However, before the accused is called upon to explain how the amount in question is found in his possession, the foundational fact must be proved by the prosecution. The complainant is an interested and partisan witness concerned with the success of the trap and his evidence must be tested in the same way as that of any interested witness. In a proper case the Court may look for independent corroboration."

Thus the accused is not required to prove his defense beyond reasonable doubt, but it is to be proved by preponderance of probability. In the present case, considering the evidence adduced by both parties it appears that the accused/ appellant had received the money from complainant to deposit it in his bank account, for which the complainant had already given him deposit slip Ex.D-2. It can be said that the amount was received as bribe or illegal gratification. The findings of Trial Court in this regard is erroneous and not sustainable.

24. Hon''ble Supreme Court in case law B. Jayraj v. State of A.P. (2014)13 SCC 55 :AIR 2014 SC (supp)1837 observed as under:- "The only material available is the recovery of the tainted currency notes from the possession of the accused. In fact such possession is admitted by accused himself. Mere possession and recovery of currency notes from the accused without proof of demand will not bring home the offence under sec.7. The above also will be conclusive in so for as the offence u/s 13 (1)(d)(1) and (2) is concerned as in the absence of prove of any demand for illegal gratification the use of corrupt or illegal means or abuse of position as public servant to obtain any valuable thing or pecuniary advantage cannot be held to be established."

25. From above discussion we are of the opinion, that the case, set up by the accused-appellant must be accepted and it must be held that the accused-appellant has successfully rebutted the presumption drawn against him under sec.4 of the Act by preponderance of probability and the finding recorded by the learned Trial Court in this regard is not sustainable. It is not proved that appellant had received money from complainant as bribe or illegal gratification. The prosecution has failed to establish the guilt of appellant-accused for the offences under section 7 and 13(1)(d) and 13(2) of Prevention of Corruption Act.

26. Hence the appeal is allowed, the impugned conviction and sentence imposed by Trial Court is hereby set aside and appellant is acquitted of the charges for offence punishable 7 and 13(1)(d) and 13(2) of Prevention of Corruption Act, his bail bonds stand discharged, the fine deposited by appellant be returned to him after period of appeal, if no order is passed otherwise in it.

