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**(2012) 04 BOM CK 0074**  
**In the Bombay High Court**  
**Case No : Criminal Appeal No. 380 of 2003**

Rajesh Mopkar

APPELLANT

Vs

Central Bureau of Investigation, Nagpur

RESPONDENT

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**Date of Decision :** 26-04-2012

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 313  
Evidence Act, 1872 — Section 114, 157, 3, 4(1)  
Penal Code, 1860 (IPC) — Section 161  
Prevention of Corruption Act, 1947 — Section 4, 4(1), 5(1)  
Prevention of Corruption Act, 1988 — Section 13(1), 13(2), 20, 20(1), 7

**Citation :** (2012) BomCR(Cri) 618

**Hon'ble Judges :** T.V. Nalawade, J

**Bench :** Single Bench

**Advocate :** M.M. Sudame, for the Appellant; S.A. Ahirkar, Spl.P.P., for the Respondent

**Final Decision :** Dismissed

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## Judgement

T.V. Nalawade, J.—This appeal is filed against the Judgment and Order passed in Special Case No. 12/2003 which was pending in the Court of Special Judge, Nagpur. The appellant is convicted and sentenced for the offences punishable under Sections 7 and Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988. Both the sides are heard. This Court has perused the original record. In short, the case of the prosecution can be stated as under:

Original complainant Arun Mahant was working as L.I.C., Agent in Nagpur. The appellant was working as a Clerk in Income Tax Office, Nagpur. Shri Lohe and Shri Kherde were also working as L.I.C. Agents in Nagpur and they were the friends of the original complainant. Shri Lohe had received two forms which are known as 16A forms for refund of income tax of Rs. 1662/and Rs. 600/ respectively from the office of L.I.C.. Similarly, Shri Kherde had received one such form for refund of Rs. 1100/. These persons had handed over these three forms for submitting them in the Income Tax Office, Nagpur and after submission

of the forms they were to get refund.

2. On 2.9.1993, Shri Mahant visited the Income Tax Office. He collected three ITS blank forms which were to be submitted along with aforesaid three forms. As per the instructions received from the other staff members of Income Tax Office, the complainant submitted the forms before the accused / appellant Mopkar. The accused accepted the forms and he demanded bribe of Rs. 40/per form for giving acknowledgment receipts in respect of the three forms. The accused demanded Rs. 100/as bribe amount in respect of the work of one Smt. Bopche, who is also the colleague of them and whose work was already done by the accused on 6.8.1993. The accused then asked the complainant Mahant to come with total amount of Rs. 220/on 6.9.1993. On that day, though the accused accepted the forms, he did not give acknowledgment receipts.

3. The complainant had no desire to pay the bribe money and so he approached C.B.I. Office, Nagpur for making complaint. On 6.9.1993, the complaint was received by C.B.I., Office. One Mr. Rishikant was working as Dy. S.P., and Mr. Sinha was working as P.I. in this office. They prepared plan of action after receiving of the complaint.

4. Two independent panch witnesses were collected by the aforesaid office and to them the complainant was introduced. The complainant was shown to the panch witnesses. The demonstration of use and detection of phenolphthalein powder was given in the office to the complainant and to the panch witnesses. The complainant had brought money. To the amount of Rs. 220/phenolphthalein powder was applied. The numbers of these notes were also noted. On that day, the complainant gave two complaints against two different staff members of Income Tax Office and so the bribe amount in respect of two traps was kept in two different pockets of the clothes of the complainant. Instructions were given to the complainant not to touch the bribe amount and not to hand over the amount to the accused unless it was demanded. The panch witness Shri Abhyankar was to remain with the complainant as a shadow witness and other panch witness Shri Totade was to remain with the team of the officers who were to effect the raid after receiving predecided signal from the complainant.

5. All the aforesaid persons then went to the office of the Income Tax, Nagpur. The other staff member of the Income Tax Office who had demanded bribe from the complainant was working on the first floor and that trap was laid first in time. After handing over the bribe amount to the employee from the first floor, the complainant went to the ground floor, where the present accused was sitting. There, panch witness Shri Abhyankar joined him. The complainant and Shri Abhyankar approached the accused at his table at about 3.10.p.m..

6. After reaching the table of the accused, the complainant asked the accused about his work. The accused said that work was not yet done. The accused then asked the complainant about money. When the complainant asked about the specific figure, the accused said that it was already told to the complainant.

However, the accused wrote the amount as Rs.  $100 + 120 = 220$  on a paper and has scratched that amount. Complainant Mahant asked for acknowledgment receipts but the accused said that the amount should be given immediately and acknowledgment would be given on the next day. The complainant then took out the tainted money from the pocket of his pant and tendered it to the accused. The accused accepted the amount by right hand and kept money in left hand upper pocket of his shirt. The complainant then came out of the office. Outside the office there is a passage, corridor and there the complainant gave the signal. The officers of the C.B.I. and the panch witness Shri Totade were already present in the passage and they rushed to the table of the complainant. Two police officers held two hands of the accused and officer Sinha disclosed identity of the officers and the panch witnesses to the accused. Officer Shri Sinha asked the name of the accused and he also asked about the amount of Rs. 220/. Accused replied that he had accepted the amount from the complainant and the amount was kept by him in the pocket of his shirt. When the incident was going on, the other staff members of the Income Tax Office gathered there and they started shouting. To avoid the trouble, the officers took the accused and the panchas to one cabin of the office and there further action was taken.

7. Phenolphthalein powder (in short powder) was detected on both the hands of the accused. The tainted amount of Rs. 220/was recovered from the shirt pocket of the accused and powder was detected on the pocket and on the amount also. Numbers of currency notes tallied with the numbers which were noted in pre-trap panchanama which was prepared in the office of the C.B.I. The cash amount and the shirt were taken over. The powder was detected on the hands of Mahant the complainant and also on the hands of pancha witness Totade who had taken out the bribe amount from the shirt pocket of the accused. The solution used to different testing was separately taken over and it was closed and sealed in separate bottles. Officer Mr. Sinha then asked the accused to produce the relevant papers and forms submitted by the complainant. The accused initially denied existence of such forms. The search of the drawer of the table of the accused was taken and then accused showed his bag which was near his table. The search of the bag was taken and from his bag, three forms known as 16A forms were recovered. One I.T.S. Form bearing signature of Mr. Kherde was also recovered. Three forms were the same which were submitted by the complainant on 2.9.1993. All these articles were taken over under post-trap panchanama. Separate seizure form was prepared and a copy of it was given to the accused. Signature of accused was obtained on the original seizure form.

8. Officer Shri Sinha made some investigation like recording of the statements of the panch witnesses and complainant. Some investigation was made by other Officer Shri Kelkar. After completion of the investigation, the matter was submitted before the sanctioning authority and the sanction came to be accorded. Officer Shri Kelkar filed the charge sheet against the appellant for the aforesaid offences.

9. The accused denied the charge. The first panch witness Shri Abhyankar, on post-trap panchanama could not be examined as he was dead. The prosecution examined remaining pancha Shri Totade, the complainant and two colleagues of the complainant viz. Shri Kherde and Shri Lohe, Shri Sinha and Shri kelkar and the competent authority. The complainant did not give evidence wholeheartedly against the accused and so he was declared hostile. The trial court has relied upon some evidence of the complainant and the evidence of other witnesses is believed by the trial court for giving conviction.

10. In the appeal it was submitted for the appellant that the complainant has not given evidence on the alleged demand dated 2.9.1993 and so it was not possible for the prosecution to prove any offence against the accused. It was also submitted that when there was no substantive evidence of shadow witness Shri Abhyankar, it was not possible for the prosecution to prove that on 6.9.1993 the demand was again made or that bribe amount was accepted or obtained by the accused. Some law points are also raised for the appellant. The learned APP made submissions in support of the decision of the trial court.

11. The original complainant Shri Mahant (P.W.5) has not given evidence that on 2.9.1993 demand of bribe was made to him by the accused. But, the evidence is given on the following facts by the complainant.

i) His visit to Income Tax Office on 2.9.1993 and handing over of three forms issued by the L.I.C. and which are known as 16A forms and which were in respect of Mr. Lohe and Mr. Kherde;

ii) The accused asked him to come to the office lateron.

iii) He went to C.B.I. Office on 6.9.1993 and he gave complaint against the accused. He admits the contents of the complaint which is at Exh. 23, which bears his signature and which was written by him.

iv) The requisite procedure was followed by the Office of the C.B.I. like collecting panch witnesses, giving demonstration of use and detection of phenolphthalein powder, collecting amount of Rs. 220/from him for laying the trap, application of phenolphthalein powder to the currency notes, keeping all the notes in a pocket of his trouser by the officer and preparation of pre-trap panchanama in the office of C.B.I..

v) On 6.9.1993 two traps were arranged by the officers of C.B.I. on the basis of the two separate complaints given by him against two different employees of Income Tax Office working in the same building though on different floors.

vi) Trap was arranged on first floor and after handing over the amount to the employee working on first floor, he went to ground floor where the accused from the present case was working and on the ground floor panch Abhyankar joined him.

vii) After reaching the table of the accused he asked the accused as to whether

accused had done his work.

viii) Accused asked him whether he had done work. After that he tendered the tainted amount to the accused, accused accepted the amount and kept the amount in pocket of his clothes.

ix) He gave signal to raiding party after giving the amount to the accused.

x) The raiding party went to the table of the accused and held the accused.

xi) The accused was taken to a cabin from his table.

xii) He on his own had gone to C.B.I. Office to give complaint. The details in respect of three 16A forms of Shri Lohe and Shri Kherde were given by him to CBI Office. Nobody from C.B.I. was known to him prior to 6.9.1993 and nobody from CBI Office having no interest as such against the accused.

xiii) The three forms submitted by him and the three 16A forms recovered by C.B.I. Office from the bag of the accused are the same.

xiv) I.T.S. Form (Exh. 29) which bears signature of Shri Kherde was submitted by him with three 16A forms and address of Shri Kherde appearing as Exh. 29 was filled by him.

xv) There were instructions to him of C.B.I. Officers not to touch tainted amount till demand of amount of Rs. 220/was made by the accused.

xvi) The second panch went to the table of the 12 Cri. Appeal No. 380/2003 accused with team of officers when he gave signal.

xvii) The panch witness Abhyankar pointed out the accused to the officer of C.B.I..

xviii) He had mentioned about the transactions in respect of Mrs. Bopche also in the complaint given to C.B.I..

xix) He voluntarily took part in the action of trap laid by C.B.I. Office and there was no compulsion as such.

xx) Mr. Deo, other employee against whom trap was laid had demanded money from him and he had given complaint against Mr. Deo also.

xxi) He had given the complaint only after consulting Shri Lohe and Shri Kherde.

xxii) After the trap, he informed to Mr. Lohe and Mr. Kherde that accused Mopkar was caught in trap and lastly.

xxiii) he says that " it is not that the complaint at Exh. 23 is a false complaint."

12. Though the complainant has tried to say that the contents of the complaint were dictated by one of the officers of the C.B.I., the aforesaid evidence and admitted facts show that all the information was supplied by the complainant. It was not possible for the officer of C.B.I. to have information about the aforesaid

facts and so it is not possible to infer that there was any compulsion on the complainant to make complaint against the present accused. Most of the aforesaid facts, which are in respect of the incidents which took place prior to the trap, are mentioned in the complaint Exh. 23 and so Exh. 23 can be used as a corroborative piece of evidence u/s 157 of the Evidence Act to the aforesaid evidence. The portion from Exh. 23 as mentioned above, about the demand dated 2.9.1993, is proved as contradiction by the prosecution in the evidence of P.W.6 Sinha.

13. It is not a rule of law that the evidence of hostile witness, who makes different statements at different times, should be rejected in toto. It can be said that the evidence of such witness needs a close scrutiny and necessary caution needs to be shown while relying on the evidence of hostile witness. To ascertain the truth, the evidence of such witness can be compared with other evidence on record. If the evidence appears to be consistent with other evidence on record and the court is satisfied with the truthfulness of that part, the court can accept and rely upon that part of the evidence. Thus, it is the job of the court to find out what portion of the evidence is true and reliable.

14. At the time of the scrutiny of the evidence in the case like the present one, the court is also required to keep in mind that many times, for the complainant, it becomes difficult to give evidence against the accused. The complainant is required to visit such office in future also in connection with the work and many times the employees show unity and there is always a possibility of harassment. In this case, one circumstance brought on record by defence is that some of the employees had virtually tried to resist by shouting. Thus, on one hand the witnesses feel that they may not get cooperation in the office of accused, if the evidence is given against the accused and on the other hand the witnesses have fear of action from the court for giving false evidence. Thus, the witness is put in dilemma and he gives evidence partly in favour of the accused and partly in favour of the prosecution.

15. Let us see the other evidence to find out the truth. The pre-trap panchanama, Exh. 24 and post-trap panchanama, Exh. 30 are duly proved by the prosecution in the evidence of panch witness Shri Totade (P.W.1). The evidence shows that panch witness Shri Abhyankar who is dead, was working as Deputy Manager in the Zonal Office of the Bank of Maharashtra, Nagpur and second panch witness Shri Totade (P.W.1) was working as Manager in the Zonal Office of the State Bank of India, Nagpur. There is nothing on record to show or create any probability that they had interest in favour of the complainant or against the accused. Thus, the independent witnesses were used by the investigating agency.

16. Shri Totade (P.W.1) has given evidence that in the office of C.B.I. they were allowed to read the complaint and after reading the complaint both the panch witnesses had made some queries to the complainant. He has given evidence that they were satisfied about the queries which they had made and then they

signed on the complaint. It shows that the panch witnesses had ascertained that the complainant had a real grievance. Shri Totade has given evidence that Shri Mahant the complainant produced the amount of Rs. 220/for laying the trap. He has given evidence that Shri Abhyankar was to remain in the company of the complainant and the amount was to be tendered if it was demanded. He has given evidence that demonstration of use and detection of powder was given in the office of C.B.I. to all of them. He has deposed that specific instructions were given to the complainant that the amount was not to be tendered unless that was demanded by the accused. There is evidence with regard to the pre-trap record but that need not be discussed. The pre-trap panchnama Exh. 24 is consistent with the substantive evidence of P.W.1 and it has given corroboration to the evidence of Shri Totade. This evidence is consistent with the aforesaid facts which are brought on record in the evidence of the complainant.

17. Shri Totade (P.W.1) has given evidence that as per the demand of the accused, the complainant gave amount to the accused. He has given evidence that the complainant gave predecided signal and then the second group of trap team went near the table of the accused. He has deposed that when Mr. Sinha (P.W.6) questioned the accused and asked about bribe money the accused told him that he had kept money in left chest pocket of his shirt. He has given evidence that in one chamber of the office further action was taken and formalities were followed.

18. Shri Totade (P.W.1) has given evidence that phenolphthalein powder was detected on the fingers of both the hands of the accused. He has given evidence that tainted money of Rs. 220/was recovered from the possession of the accused and the numbers on these notes tallied with the numbers noted in pre-trap panchnama. He has given specific evidence that he had taken out that amount from the chest pocket of the shirt of the accused. He has deposed that phenolphthalein powder was detected on the chest pocket of the shirt of the accused. He has given evidence that phenolphthalein powder was detected on the hands of the complainant and also on his own hands. He has given evidence that the solution used for testing the hands, notes, shirt were kept in different bottles and they were properly closed and sealed.

19. Shri Totade (P.W.1) has given evidence that Abhyankar, the deceased panch witness narrated the incident which had taken place at the table of the accused when the bribe money was accepted by the accused. He has deposed that narration made by Shri Abhyankar was recorded in post-trap panchnama. He has given evidence that three forms known as 16A forms were recovered from the bag of the accused and Exhs. 26 to 28 are the same. He has identified remaining one ITS form, Exh. 29 which bears the signature of Shri Kherde and it was also recovered from the bag of the accused. He has given evidence that seizure memorandum, Exh. 25 was separately prepared. The contents of Exhs. 25 and 30 are consistent with the substantive evidence of Shri Totade and they give corroboration u/s 157 of the Evidence Act to the substantive evidence.

20. During the cross examination of Shri Totade, it was suggested to him that he was not present in the vicinity when the tainted money was obtained or accepted by the accused and he was not in a position to listen the conversions which was going on between the accused and the complainant. This suggestion is denied by Mr. Totade. No contradiction in relation to any part of the substantive evidence given by Mr. Totade is pointed out and proved by the defence. It was argued for the appellant that the part of post-trap panchanama containing narrations made by Mr. Abhyankar cannot be used. There is force in this submission. Even if that part is excluded from the consideration, there is aforesaid evidence which remained unshaken.

21. The evidence of Mr. Sinha (P.W.6), who received the complaint and who prepared both the pre and post trap panchanama, shows that the action was taken by his office only because the complainant had approached the office to make two complaints. He has deposed that written complaint was submitted by the complainant. The evidence of Mr. Sinha on incidents which took place before the trap and after the trap is similar in nature to the evidence of Mr. Totade. The evidence of Mr. Sinha (P.W.6) shows that accused was not known to him prior to the raid. His evidence shows that in a separate chamber, personal search of the accused was taken by the panch witness Mr. Totade and tainted money the amount of Rs. 220/was recovered by Mr. Totade from the left pocket of the shirt of the accused. He has deposed that from the bag of the accused, three forms titled as 16A forms were recovered and one ITS form of Mr. Kherde was also recovered. His evidence is consistent with the panchanamas at Exhs. 24 and 30.

22. The cross examination of Mr. Sinha (P.W.6) is made by the defence mainly in respect of two ITS blank forms which were not recovered when it is the case of the prosecution that the complainant had submitted three ITS forms. Further, it was the case of the prosecution that three blank ITS forms were submitted but one ITS form was recovered on which there is a signature of Mr. Kherde. This court has no hesitation to observe that this circumstance is not creating reasonable doubt with regard to the case of the prosecution. The complainant has turned hostile and the forms were given in the custody of the accused on 2.9.1993. Three forms, which are titled as 16 A forms, cannot be created by anybody other than L.I.C. Office. Whatever is recovered from the custody of the accused is admitted by him and there is evidence of two colleagues of the accused viz. Mr. Lohe and Mr. Kherde in this regard.

23. Mr. Kherde (P.W.4) has given evidence that he had handed over his one 16A form to the complainant for submission and he had also handed over one ITS form. He has admitted his signature appearing on ITS form, Exh. 29 recovered from the custody of the accused. He has given evidence that the complainant had informed to him prior to the trap that the accused had demanded bribe money and the complainant wanted to take action against the accused. He has deposed that he had given his consent for taking action by saying as O.K.. He has deposed that it was informed by the complainant before the trap that the

accused had demanded Rs. 40/per form. Nothing is brought on record during the cross examination of Shri Kherde to create doubt about his version. As the forms are recovered from the custody of accused, there is circumstantial check to the evidence of this witness.

24. Similar evidence is given by Shri Lohe (P.W.2). He has deposed that he had handed over two forms known as 16A forms to the complainant for submission to the Income Tax Department. He has identified Exhs. 26 and 27 which are recovered from the custody of the accused. He has deposed that complainant had informed him that demand of bribe was made by the accused. He had said to the complainant that no bribe money should be given to the accused. There is specific evidence that the demand was of Rs. 40/per form. The evidence of Mr. Lohe has circumstantial check as his two forms are recovered from the custody of the accused. Nothing could be brought in the cross examination of Mr. Lohe to discredit him. This court sees no reason to disbelieve both Mr. Lohe and Mr. Kherde.

25. The aforesaid evidence of Mr. Lohe and Mr. Kherde is consistent with the evidence of the complainant which is already quoted. There was virtually no reason for these two witnesses to give false evidence against the accused. Thus, there is evidence of these two witnesses, the evidence of panch witness Mr. Totade and Officer Mr. Sinha to corroborate the evidence on few facts given by the complainant against the accused. Bottles of the solution used for testing were produced in the court and they are also identified by the panch witness. The report of the Laboratory at Exh. 49 is consistent with the case of the prosecution.

26. As against the aforesaid evidence given against the accused, there is no specific and convincing defence taken by the accused. The tenor of cross examination of the aforesaid witnesses made for the accused shows that virtually no specific case was suggested for the accused. In the statement given u/s 313 of Cr.P.C. the accused has admitted many of the aforesaid facts. In answer to question no. 6, he has admitted that forms at Exhs. 26 to 28 were handed over to him by the complainant. In answer to question no.17, the accused has admitted that ITS form at Exh. 29 of Shri Kherde was also handed over to him by the complainant. In reply to question no. 28, the accused has admitted that the complainant and one person had come to his table at the relevant time, at the time of trap. In reply to question no. 29, the accused has admitted that when C.B.I. Officer came after receiving signal, the panch witness Shri Abhyankar was near his table. The answers to question nos. 51 and 53 show that Phenolphthalein powder was detected on his one hand and on left pocket of his shirt. In reply to question no. 57, the accused has admitted that currency notes of Rs. 220/having same numbers as noted in pre trap panchanana were found with him. In reply to question no.63, he has admitted that panch Totade had recovered this amount from chest pocket of his shirt. In reply to questions 71 and 90 the accused has admitted that the Forms at Exhs. 26 to 29 were

recovered from him during the post trap panchanama.

27. The accused has filed additional statement in writing u/s 313 of Cr.P.C.. In that statement he has admitted that on 2.9.1993 the forms were left with him by the complainant. He has contended in the written statement that on the date of trap, due to compulsion of the Officer of C.B.I., he took tainted money by his right hand from the table and he kept the amount in the left pocket of his shirt by using left hand. No such suggestions were given either to the complainant or to Mr. Sinha during their cross examination. Such suggestions were also not given to Shri Totade.

28. The accused has examined one Smt. Darvekar (D.W.1) who was also working in the Income Tax Office at the relevant time as a defence witness. She has deposed that on the day of the trap she was on duty and she was present in the same hall where trap was laid. She has deposed that when two officers from C.B.I. held two hands of the accused, she started shouting. She has deposed that one officer directed the accused to take the amount and when they were taking the accused to a chamber, accused got puzzled and kept the amount which was lying on the table in his shirt pocket by using right hand. She has deposed that as currency notes were not properly kept in the chest pocket by right hand, the accused also used his left hand for keeping the amount properly in his chest pocket. The accused has not examined himself to give such evidence. Such story is not there in 313 Cr.P.C. statement also.

29. The cross examination of Smt. Darvekar shows that she has not told the complete truth. She has avoided to give evidence with regard to the visit of the complainant and panch witness Mr. Abhyankar. Her evidence shows that C.B.I. had filed a case under the Prevention of Corruption Act against her husband prior to the present trap and her husband was convicted. She has admitted that C.B.I. Officer disclosed their identity when they came near the table of the accused. Her evidence shows that she or her colleagues did not approach the Higher Officer of Income Tax to tell the incident which, according to her, happened on that day. She has admitted that the incident which she described in the court first time was not even told to her husband by her. The trial court has not believed this witness and this court does not find any reason to interfere in that finding.

30. The discussion made above shows that there is more than sufficient evidence given by the prosecution which is consistent with the evidence given by the complainant on many facts. In view of this circumstance, the trial court has held that the aforesaid evidence can be used against the accused and this court hold that no error is committed by the trial court in relying on that part of the evidence. Further, the prosecution has proved the recovery of the tainted money from the pocket of the shirt of the accused. The accused has also admitted recovery of tainted money from him and that admission is there in 313 Cr.P.C. statement. There is circumstantial check to the case of the prosecution as there is a recovery of the forms which were handed over to the accused by the

complainant. For the circumstantial check, there is also evidence of Mr. Lohe and Mr. Kherde. Even in the evidence of the complainant, there is specific statement that accused had asked the complainant about his own work. Only after putting such question by the accused, tainted money was tendered by the complainant to the accused. The accused had accepted this amount and kept it in pocket of his shirt. The evidence given by the complainant with regard to the questions put by the accused is sufficient to infer that at the time of the incident, accused had reminded him of demand made in the past.

31. The evidence of Sanctioning authority (P.W.3), Smt. Darvekar (D.W.1) and the defence taken by the accused shows that further processing of the forms was to be done by the accused. The work of giving acknowledgment could have been done by the accused. He had accepted the forms. There is no evidence on record to show that officially any amount was required to be paid by the complainant at the time of submission of these forms or getting acknowledgment receipt. It is also not the case of the accused that he accepted the amount as legal remuneration or as the charges in respect of any forms or any processing. Thus, the amount which was accepted by the accused during the trap needs to be treated as an amount of gratification. Forms were tendered on 2nd September, 1993 but they were not processed even on 6th September, 1993 when the trap was laid and this circumstance also supports the case of the prosecution.

32. The charge against the accused/appellant was framed for the offences punishable under Sections 7 & 13 (1) (d) r/w section 13(2) of the Prevention of Corruption Act, 1988.

33. Section 13(1)(d) reads as under:

"13. Criminal misconduct by a public servant( 1) A public servant is said to commit the offence of criminal misconduct,

(d) If he,

(i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest; or"

Thus, the prosecution is required to prove only two things viz. i) the accused used his official position, post in Government office and ii) accused extracted, obtained money.

34. It was not necessary for the prosecution for proving the offence punishable u/s 13(1)(d) r/w 13(2) to prove that there was some work of the complainant and for doing that work the amount was obtained by the accused. This section simply prohibits a public servant from obtaining pecuniary advantage or valuable thing

and so it was necessary for the prosecution to prove that the amount of Rs. 220/ was obtained by the accused as a public servant.

35. In the case reported in *Hazari Lal Vs. State (Delhi Administration)*, , the Apex Court has discussed Sections 3 and 114 of the Evidence Act. It is observed by the Apex Court that the act of "obtaining" can be proved from circumstantial evidence and there is no necessity that the act of obtaining must be proved by direct evidence. In that case, there was a charge for the offence u/s 5 (1)(d) of Prevention of Corruption Act, 1947 and this section is similar to the new section viz. Section 13(1)(d) of Prevention of Corruption Act, 1988.

36. The Apex Court has discussed Sections 3 and 114 of the Evidence Act in the case reported in 2001 Cr. L.J. 515 (SC) *M. Narsinga Rao vs. State of AP*, also and the observations made by Fletcher Mounton L.J. In *Hawkins vs. Powells* (1911) 1 K.B. 988, are quoted by the Apex Court as under:

"Proof does not mean proof to rigid mathematical demonstration as that is impossible. It must mean such evidence as would induce a reasonable man to come to a particular conclusion."

37. The definition of term "proved" is given in Section 3 of the Evidence Act as under:

"Proved---A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

38. The provision of Section 3 of Evidence Act shows that the fact can be proved in two ways and there is discretion to the court in that regard. The court may presume the existence of any fact, fact proved which it believes to exist. This inference can be drawn by the Court on the basis of the facts and circumstances of a particular case. The second mode is using the belief of ordinary prudent man.

39. Section 114 and illustration (a) of Evidence Act provides as under:

"114. Court may presume existence of certain facts-The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

The court may presume

(a) That a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession."

Thus, when tainted money is recovered from the possession of a public servant, it is up to him to explain as to how he came in possession of such money.

40. In the aforesaid regard, the Apex Court held in *Hazari Lal's* case (cited

supra) that illustration (a) to Section 114 is similar in nature. So, if accused does not give reasonable explanation, the Court can presume the existence of the fact like the fact of obtaining money which it thinks likely to have happened having regard to the facts of the case. The factual presumption which is discretionary presumption provided u/s 114 of the Evidence Act can be used by the Court for coming to the conclusion, for proof of fact as provided u/s 3 of the Evidence Act. The prosecution has proved recovery of tainted money from the accused. The accused has not given plausible explanation. There is independent corroboration to the evidence of the complainant on this fact. In Hazari Lal's Case (cited supra), the Apex Court has further observed that the conviction in such a case can be based even on the evidence of the police officer who laid the trap if evidence is found reliable. In the present case, this court holds that there is no reason to disbelieve the Police Officer Mr. Sinha, who laid the trap. There is also no reason to disbelieve the panch witness Shri Totade, who is an independent witness. In view of the facts of this case, this Court holds that presumption u/s 114 of the Evidence Act, needs to be used and it's use is justified. Thus, there is sufficient evidence for proving the offence punishable u/s 13(1)(d) read with section 13(2) of the Prevention of Corruption Act beyond reasonable doubt. The trial Court has not committed any error in holding the appellant guilty of this offence.

41. Section 7 of the Prevention of Corruption Act, 1988 runs as under:

"7. Public Servant taking gratification other than legal remuneration in respect of an official act- Whoever, being, or expecting to be a public servant, accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person or for rendering or attempting to render any service or disservice to any person, with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company referred to in clause ( c ) of section 2, or with any public servant, whether named or otherwise, shall be punishable with imprisonment which shall be not less than six months but which may extend to five years and shall also be liable to fine.

Explanation-(d) "A motive or reward for doing". A person who receives a gratification as a motive or reward for doing what he does not intend or is not in a position to do, or has not done, comes within this expression."

42. Thus, for proving the offence punishable u/s 7, the following things are required to be proved in the case like the present one;(a)The accused accepted or obtained; (b)any gratification whatsoever other than legal remuneration; and (c ) as a motive or reward for doing any official functions, rendering or attempting to render any service with Government Department, Office etc.. As per explanation (d) to Section 7 when such a public servant receives gratification

as a motive or reward for doing what he does not intend or is not in a position to do or has not done, comes within this expression "motive or rewards for doing".

43. Discussion is already made about the act of the accused of obtaining the amount of Rs. 220/from the complainant as gratification. The prosecution can prove the offence punishable u/s 7 by proving even "acceptance" of gratification. Thus, there is option to prove either obtaining of gratification or acceptance of gratification. For proving the act of obtaining, efforts on the part of the accused is required to be shown so that it can be inferred that the amount was virtually extracted by the accused. However, the proof of such nature is not necessary for proving that the accused accepted the gratification.

44. There are also some other conditions which are required to be proved for proving the offence u/s 7 which are already quoted. The prosecution is required to show that gratification was other than legal remuneration and it was accepted as a motive or reward for doing some official functions with regard to the complainant. However, it always needs to be kept in mind the due to explanation (d) of section 7 of the Act, the fact that the accused was not in a position to do such function, cannot help the accused. If there was representation or conduct of the accused to the effect that accused was in a position to do said function, section 7 can be used against him.

45. Section 7 of the Prevention of Corruption Act, 1988 is similar to Section 161 of the Indian Penal Code (now deleted). While interpreting the provisions of section 161 of the Indian Penal Code, in the case reported in Shiv Raj Singh Vs. Delhi Administration, , the apex Court has made the following observations.

"When a public servant is charged u/s 161 of the Indian Penal code and it is alleged that illegal gratification was taken by him for doing or procuring an official act, it is not necessary for the court to consider whether or not the accused was capable of doing or intended to do such an act".

Similar observations are made by the Apex Court in other case reported in Chaturdas Bhagwandas Patel Vs. The State of Gujarat, .

46. In the present case, the facts that the accused had accepted the forms from the complainant and the forms were recovered from the custody of the accused on 6.9.1993 are sufficient to fulfill the aforesaid requirements. Further, there is specific evidence of the complainant, defence witness Smt. Darvekar and also of competent authority in this regard.

47. The prosecution is required to prove that gratification (other than legal remuneration) was accepted as a motive or reward for proving the offence u/s 7. u/s 20 of the Prevention of Corruption Act, 1988, compulsory presumption is provided in this regard. Section 20(1) of the Prevention of Corruption Act, 1988 runs as under:

"20.Presumption where public servant accepts gratification other than legal remuneration( 1) Where, in any trial of an offence punishable u/s 7 or section 11

or clause (a) or clause (b) of subsection (1) of section 13 it is proved that an accused person has accepted or obtained or has agreed to accept or attempted to obtain for himself, or for any other person, any gratification (other than legal remuneration) or any valuable thing from any person, it shall be presumed, unless the contrary is proved, that he accepted or obtained or agreed to accept or attempted to obtain that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in section 7 or, as the case may be, without consideration or for a consideration which he knows to be inadequate".

48. The provision of Section 20 of the Prevention of Corruption Act, 1988, shows that as soon as the prosecution proves that the accused accepted the gratification (other than legal remuneration), the court is bound to presume unless contrary is proved that the accused accepted such gratification as a motive or reward as described in section 7 of the Act. Section 20 shows that the burden was on the accused to rebut this presumption. The law settled with regard to the nature of burden shows that offering of only plausible explanation is not sufficient to rebut such presumption.

49. Much was argued for the defence on the nature of burden of proof on accused as described in section 20 of the Prevention of Corruption Act, 1988. On this point for the State the case reported in Dhanvantrai Balwantrai Desai Vs. State of Maharashtra, was cited. This case was decided by Five Judges of the Apex Court. The apex Court has laid down the following things in this reported case.

- i) The statutory presumption u/s 4 of the Prevention of Corruption Act, 1947 must be drawn if it is shown that valuable thing has been received. (Receipt of gratification other than legal remuneration for section 7 of Prevention of Corruption Act, 1988 needs to be proved).
- ii) There is difference in presumptions available u/s 114 of the Evidence Act and section 4(1) of the Prevention of Corruption Act, 1947.

50. The presumption available u/s 4(1) of the old Prevention of Corruption Act is similar to the presumption available u/s 20 of the Prevention of Corruption Act, 1988 on one point that they are statutory presumptions and the words are used that the court shall presume unless contrary is proved. The discussion made by the Apex Court makes it clear that the court may draw the presumption available u/s 114 of the Evidence Act in view of the facts of that case but that option is not available when the pre condition laid down u/s 4(1) of the old Prevention of Corruption Act is satisfied. For the purpose of Section 7 of the Prevention of Corruption Act, 1988 it can be said that as soon as the prosecution establishes that the accused has accepted or obtained any gratification whatever, other than legal remuneration, the court is bound to raise presumption under this section and court is bound to presume that the accused received said gratification as a motive or reward as defined u/s 7 of the Prevention of Corruption Act, 1988.

51. The observations made by the Apex Court in the case of Dhanvantrai (cited supra) show that it is open to the accused to show that money was legally due to him or that he received it under transaction or arrangement which was lawful. The burden resting on the accused, in such a case would not be as light as in the case where presumption is available u/s 114 of the Evidence Act. To rebut the presumption made available u/s 114 of the Evidence Act, the accused can give reasonable and probable explanation and rebut the presumption. The Apex Court has observed that for rebutting the presumption available in section 4(1) of the Prevention of Corruption Act, 1947, it is necessary that the presumption must be rebutted by proof viz. the fact is said to be proved when its existence is directly established or when upon the material before it the court finds its existence to be so probable that a reasonable man would act on this supposition that it exists. The apex Court has observed that unless the explanation is supported by proof, the presumption created by section 4(1) of the Prevention of Corruption Act, 1947 cannot be said to be rebutted.

52. In Dhanvantrai's case (cited supra), the Apex court referred the case reported in The State of Madras Vs. A. Vaidyanatha Iyer, . In the previous case, the Apex Court had observed that the term used u/s 4(1) "shall be presumed" has same meaning as given in definition of "shall presume" in the Evidence Act. The definition of "shall presume" is given u/s 4 of the Evidence Act as follows:

"Shall presume" Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved."

53. The discussion of the evidence already made shows that the accused failed to discharge the burden even to rebut presumption available u/s 114 of the Evidence Act. Thus the burden shown in Section 20 of the Act of 1988 is not at all discharged. So this court has no hesitation to hold that the tainted amount of Rs. 220/was received by the accused as a motive or reward as described in section 7 of the Prevention of Corruption Act, 1988.

54. For the appellant many reported cases were cited on aforesaid point of burden of proof on accused u/s 20 of the Prevention of Corruption Act, 1988. The cases are as under:

- i) Banarsi Dass Vs. State of Haryana,
- ii) C.M. Girish Babu Vs. CBI, Cochin, High Court of Kerala,
- iii) V.D. Jhangan Vs. State of Uttar Pradesh,
- iv) 2005 ALL MR (Cri) 2322. Dnyaneshwar s/o Laxmanrao Wankhede vs. State of Maharashtra.

A copy of decision given by Apex Court in Criminal Appeal No. 1350/2009 (State of Maharashtra vs. Dnyaneshwar Laxman Rao Wankhede) was also produced.

55. The only case reported in AIR 1966 Supreme Court, 1762 was decided by the Bench of three Judges of the Apex Court and remaining cases were decided by

the Bench of two Judges. In this case, the Apex Court has observed that the aforesaid onus can be discharged by the accused on preponderance of probability. In view of the observations made by the Larger Bench in the case of Dhanvantrai (cited supra) and in view of section 3 of the Evidence Act, it can be said that the Apex Court has observed in the cases cited for the appellant that the accused has to prove that his case is more probable than the case of the prosecution. Thus, in these reported cases also, the law is not laid down that the burden imposed on the accused u/s 20 of the Prevention of Corruption Act, 1988, can be rebutted by simply offering a reasonable and probable explanation.

56. In the case reported in Panalal Damodar Rathi Vs. State of Maharashtra, which is cited for the appellant, the necessity of corroboration to the evidence of the complainant is discussed by the Apex Court. There can not be any dispute over this proposition. This Court has already discussed the material which is available in corroboration. To the evidence of the complainant, corroboration is available in many ways in this case. Corroboration can be available from the direct evidence and also from the circumstantial evidence and in the present case there is corroboration of both kinds.

57. One case reported in 1975 CRI. L.J., 517 (Vishnu Krishna Belurkar and another vs. The State of Maharashtra) was cited for the appellant on the point of use of the contents of the panchanamas.

58. In the present case, the panch witness Shri Abhyankar a shadow witness could not be examined as he was dead. The post-trap panchanama contains some narrations made by Shri Abhyankar in respect of the acceptance or obtaining tainted money by the accused. It was suggested that as Shri Abhayankar has not given evidence, that part of the panchanama cannot be said to be proved. This Court has discussed the substantive evidence of the complainant on that point and further there was no necessity of such direct evidence in view of the availability of the circumstantial evidence in this case. The post-trap panchanama on other points can be used for corroboration of the evidence given by the panch witness Shri Totade. The Apex Court has laid down that such contents are not falling u/s 162 of Cr.P.C. and they can be used for corroboration u/s 157 of the Evidence Act.

59. In the case like the present one, generally many kinds of arguments are advanced like one quoted above. In trap cases, there are generally two panchanamas like pre-trap and post-trap panchanamas. The Police Officers and two panch witnesses remain present when the pre-trap panchanama is prepared in the office. The complainant is also there as it is he who produces the money for trap and the formalities of pre-trap panchanama are completed in his presence. Thus, on the incidents which are described in pre-trap panchanama, there can be evidence from the two pancha witnesses, the police officer whose names are mentioned in pre-trap panchanama and also the police officer who has signed the panchanama. Even the complainant can give substantive evidence on the events mentioned in pre-trap panchanama. This panchanama can be

proved in the evidence of any panch witness and when both the panchas are not available or they turn hostile, in the evidence of the police officer who has prepared it.

60. The post-trap panchanama contains two main parts viz. i) narration of incident of acceptance or obtaining of bribe amount by the accused and ii) the incident of recovery of tainted money from the possession of the accused. The shadow witness like the witness Shri Abhyankar and the complainant can be available for giving substantive evidence in respect of acceptance or obtaining of bribe money by the accused. Thus, there can be direct evidence of any one of such two witnesses for proving acceptance or obtaining of the bribe money by the accused. It is already observed that acceptance or obtaining of bribe money by the accused can also be proved by circumstantial evidence, by proving its recovery from the possession of the accused. The second part of the post-trap panchanama which contains recovery can be proved by giving substantive evidence of the second panch witness like pancha witness Shri Totade in the present case and the police officer who laid the trap like Shri Sinha. This panchanama can be proved in the evidence of the witness like Shri Totade and when witness turns hostile, it can be proved in the evidence of the police officer like Shri Sinha. Thus, when the complainant is hostile or not available or he gives evidence of the nature like the present one, the case can be proved by the prosecution by using some of the evidence given by the complainant and by using the other evidence for the purpose of corroboration. Similarly, if both panch witnesses turn hostile or they are not available, the case can be proved on the basis of the evidence of the complainant and the evidence of police officer who laid the trap and other circumstantial evidence. In a peculiar case like the case described in Hazari Lal's case (cited supra), the conviction can be based only on the basis of the evidence of police officer if his evidence is found reliable. As the police officer signs and prepares both the panchanamas like in present case, both the documents can be proved in his evidence. Thus, the facts and circumstances of each and every case are different and it is up to the court to decide as to whether a particular fact is proved or not proved. The effect of non examination of a witness or turning hostile of a witness including the complainant, would always depend on the facts and circumstances of that case. In the present case, the circumstance like the complainant has turned hostile, has not damaged the prosecution case.

61. The competency of sanctioning authority is not challenged in this case. That can be seen in replies given to questions put to the accused u/s 313 Cr.P.C. statement. P.W.3 Shri Solaman has given evidence that the papers of investigation were made available to him. In the evidence, he has referred the relevant material which made out the case for sanction. The original sanction order is proved as Exh. 33 and the relevant material with regard to the trap is discussed in the order. No error or material irregularity or material omissions could be pointed out for the defence.

62. The discussion of evidence and law made above shows that the trial court has not committed any error in holding the appellant guilty of both the offences for which he was charged and tried. The trial court has sentenced the appellant with imprisonment of 15 months and to pay a fine of Rs. 1500/for each offence. This sentence is also reasonable. In the result, this court holds that no case is made out for interference in the decision of the trial court and so the following order.

The appeal stands dismissed. The appellant to surrender to the bail bonds. The trial court is to take steps for sending the appellant to jail for undergoing the sentence.