

**(2005) 09 DEL CK 0130**

**In the Delhi High Court**

**Case No :** Criminal Appeal No's. 409 and 461 of 2001

Shri L.K. Jain

APPELLANT

Vs

The State <BR> Balam Singh Vs C.B.I.

RESPONDENT

**Date of Decision :** 16-09-2005

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 154, 161, 162, 313, 61  
Penal Code, 1860 (IPC) — Section 120A, 120B  
Prevention of Corruption Act, 1988 — Section 13(1), 13(2), 20, 7

**Citation :** (2005) 124 DLT 371

**Hon'ble Judges :** Ramesh Chand Jain, J

**Bench :** Single Bench

**Advocate :** K.B. Andley, P.R. Thakur, Vinay Thakur and M.L. Yadav, for the Appellant; Neelam Grover, for the Respondent

## Judgement

R.C. Jain, J.—These two criminal appeals are directed against the common judgment and order dated 24.5.2001 passed by the Special Judge, Delhi, thereby, convicting the appellant L.K. Jain (for short to be referred as A-1) of the offence punishable under Sections 120-B IPC, Sections 7 and 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 (hereinafter to be referred as the "Act") and for the substantive offences punishable u/s 7, 13(2) read with Section 13(1)(d) of the Act. Vide the same judgment, the appellant Balam Singh (hereinafter to be referred as A-2) has been convicted of the offence punishable under Sections 120-B IPC read with Section 7 and 13(2) read with section 13(1)(d) of the Prevention of Corruption Act 1988 Vide separate order of the even date, A-1 L.K. Jain has been sentenced to undergo rigorous imprisonment for 5 years and to pay a fine of Rs. 1 lac or in default of payment of fine to suffer further simple imprisonment for a period of one year. As the offences were considered to be connected one so the learned trial court chose not to pass separate sentences for each offence. A-2 Balam Singh has been sentenced to rigorous imprisonment for a period of three years and to pay a fine of Rs. 20,000/- or in default of payment of fine to further undergo simple

imprisonment for three months.

2. The two appellants were prosecuted by the CBI on the basic allegations that while A-1 L.K. Jain was working as Junior Engineer (Civil) Building Department, Sadar Paharganj Zone, Municipal Corporation of Delhi and A-2 Balam Singh was working as Beldar in the same zone during the period of middle of October, 1996 had entered into a criminal conspiracy to obtain illegal gratification of Rs. 3 lacs/1.5 lacs from a certain Ritesh Chand Gupta, building contractor who was making certain constructions at premises No. 2524 Gali Churi Walan, Bazar Sita Ram, Delhi, and pursuant to the said conspiracy demanded and obtained an illegal gratification of Rs. 20,000/- as first installment from Shri Ritesh Chand Gupta in the afternoon of 16.10.1996. According to the prosecution case on 15.10.1996 A-1 L.K. Jain had gone to the above numbered premises and demanded a bribe of Rs. 3 lacs from Ritesh Chand Gupta for permitting the construction to continue otherwise he threatened the demolition of the construction. On 16.10.1996, Ritesh Chand Gupta lodged a report (Ex.PW2/B) with Inspector S.R. Singh of CBI, trap laying officer alleging that he was engaged in the work of building contractor and was raising some constructions at premises No. 2524 Gali Churi Walan, Bazar Sita Ram, Delhi belonging to Shri Ajay Kumar Gupta; that on 15.10.1996 at about 2.00 p.m. A-1 L.K. Jain Junior Engineer, MCD came to the aforesaid site and demanded a bribe of Rs. 3 lacs for allowing him to continue the construction at the site failing which he threatened to get the construction demolished. A-1 L.K. Jain had asked the complainant to pay the bribe money in installments and to pay the first installment of Rs. 20,000/- on 16.10.1996 at about 2.00 p.m. when he (L.K. Jain) would visit the site again in order to collect the money. On the basis of the said complaint a case was registered and investigation entrusted to Inspector S.R. Singh who constituted a trap party of CBI officials and two independent witnesses namely S.C. Sharma and Pradeep Chand. The complainant Ritesh Chand Gupta produced a sum of Rs. 20,000/- in currency notes, its number noted down and the currency notes were treated with phenolphthalein powder and the demonstration regarding reaction of the phenolphthalein powder with the solution of Sodium Carbonate was given and other pre-trap formalities completed and recorded in the handing over memo prepared in presence of witnesses. Witness S.C. Sharma was directed to act as shadow witness and the complainant was told to hand over the bribe money to the accused or to any other person at his direction on specific demand of the accused. On 16.10.1996, the party reached the office of Shiv Satellite. The complainant Ritesh Chand Gupta and shadow witness were directed to go into the office while the other two witnesses were directed to take position near the back door of the office room and to over hear the conversation and also to see the transaction through the slits of the back door.

3. The prosecution case proceeded further that on 16.10.1996 at about 5.20 p.m. A-1 L.K. Jain along with A-2 Balam Singh came to the office room and asked the shadow witness to go outside. Shri S.C. Sharma came out and took position in front of the office in such a way that he was able to see the

transactions between the complainant and the accused. A-1 L.K. Jain demanded the bribe amount from the complainant and accepted it through A-2 Balam Singh who was accompanying him. The conversation as over-heard by the independent witness Pradeep Chand. As soon as A-2 Balam Singh accepted the amount of bribe, Inspector S.R. Singh challenged both the accused by telling them that they had accepted the bribe on which both A-1 and A-2 got confused and kept mum. Tainted money of Rs. 20,000/- was then recovered from the left side pant pocket of A-2 Balam Singh and number of G.C. notes tallied with the numbers recorded in the handing over memo. Thereafter left hand wash and left side pant pocket wash of A-2 Balam Singh was taken into two separate colourless solutions of Sodium Carbonate, which turned pink. After usual investigation and obtaining the prosecution sanction prosecuted both the appellants.

4. In order to substantiate the charges prosecution examined nine witnesses in all including P.W.1 V.S. Sharma, Additional Commissioner (E) Municipal Corporation of Delhi in order to prove the prosecution sanction, P.W.2 Ritesh Chand Gupta, the complainant, P.W.3 S.C. Sharma and P.W.5 Pradeep Chand, Assistants, Food Corporation of India, the two trap witnesses, P.W.4 K.S. Chhabra, Senior Scientific officer, P.W. 6 Ghansham Dass Mehra, Head Clerk, Building department, Sadar Paharganj Zone, MCD, P.W.7 Mahavir Singh, Assistant Engineer, Sanitation and Conversation department, Civil Line Zone, MCD, P.W. 8 S.R. Singh trap laying and investigating officer and P.W.9 Inspector H.S Karmyal, the subsequent investigating officer of the case.

5. After the closure of the prosecution evidence, the two accused were examined under the provisions of Section 313 of the Code and incriminating evidence, material and circumstances were put to them. A-1 L.K. Jain admitted his status as Junior Engineer between 12.10.1996 to 4.11.1996 in the area of Churi Walan. He, however, denied the allegations in regard to the demand of illegal gratification or having entered into a conspiracy with Balam Singh and feigned ignorance about Balam Singh having received he amount of Rs. 20,000/-. In his written submission X-1 filed by him A-1 L.K. Jain came up with a defense plea that before his posting in the Sadar Paharganj Zone, Municipal Corporation of Delhi he was working in Div. XI (maintenance division)Shadhara South Zone, MCD and was ordered to be transferred from the said division to the Building Department/Sadar Paharganj Zone, M.C.D. vide office order dated 17.5.1996 (Ex. PW7/DA) but since he was not interested in the posting in Building Department, so he proceeded on leave w.e.f. 24.5.1996 (Ex.PW 7/DB). Meanwhile, Dr. A.K. Walia, the area M.L.A. insisted for cancellation of his transfer from Div. XI and thereafter several office orders and circulars dated 27.5.1996 (Ex.PW7/DC), circular dated 6.6.1996 ( E. PW7/DD) were issued directing him to join the Building Department and finally pursuant to office order dated 17.6.1996 (Ex.PW7/DE), he had to join his duty in Div. XI. on 18.6.1996 and was relieved from Div. XI for joining Bldg.Deppt/SPZ. After joining he bldg.deptt/SPZ on 18.6.1996, he proceeded on leave from 19.6.1996 (Ex.PW7/DC) and thereby managed to keep himself away from the responsibility of building activity.

Against his wishes and in his absence vide office order dated 4.10.1996 (D-12) he was ordered to take over the charge of the area of Bazar Sita Ram from the Junior Engineer Y.S. Chauhan. He remained on leave thereafter and joined back his duty on 14.10.1996. On 16.10.1996 Sh. Satish Chand Khandelwal, area M.L.A. called him in his office and gave him a hand written complaint (Ex.PW.7/DN) regarding unauthorised construction being in progress at property No. 2524, Churi Walan and directed him to visit the spot forthwith. Accordingly he went to the said property and found that huge construction was being carried out at the said premises. He enquired about the sanctioned drawings/plans from the persons engaged in construction work at the site and a person working there was sent for calling the owner/builder. A-1 inspected the building up and down and started making rough sketches of the construction. A-2 Balam Singh, who was working as balder in demolition squad of the building department, also came there along with the person who was sent for calling the owner/builder. Balam Singh requested him (A-1) to come along with him to see the drawings at the office of the owner/builder so he went with him to the office where he was introduced to Ratish Chand Gupta who offered him a seat and asked him for tea etc. but he refused to take anything. Thereafter A-1 enquired about the owner of the property No. 2524. In between Shri Gupta asked Sh. S.C. Sharma to go out of the room on the advice of Balam Singh and informed him that Ajay Kumar Gupta was the owner of the property and that he had already shown the sanctioned drawings of the building in question to the previous engineer Sh. Y.S. Chauhan when he visited the site along with Balam Singh. When he (A-1) insisted on seeing the drawings and relevant papers, Mr. Gupta told him to come of the next day. On this Balam Singh advised him to go away by saying "Saheb aap chaliye main sab samjha deta hoon". A-1 L.K. Jain then came out in the street and moved towards his scooter when suddenly some persons caught him and took him to the office of the complainant and challenged him that he had demanded and accepted a sum of Rs. 20,000/- as bribe from Ritesh Chand Gupta, which he denied. According to him after that Sh. Y.S. Chauhan was again given the charge of the bldg.deptt/SPZ on 18.10.1999.

6. A-2 Balam Singh admitted that he was working as Beldar in the building department Sadar Paharganj Zone on 15.10.1996 and had accompanied A-1 L.K. Jain to the office of the complainant. A-2 Balam Singh also admitted that G.C. Notes of Rs. 20,000/- were recovered from his pocket and colour less solution was prepared and the currency notes were seized after it were tallied with the numbers in the memo. He, however, denied any conspiracy with A-1 L.K. Jain and came out with a defense that he did not know that the amount of Rs. 20,000/- given to him was in the nature of bribe. The appellants did not lead any evidence in their defense.

7. The learned trial court on a consideration of the evidence and material obtaining on record, convicted and sentenced the two appellants as above. Aggrieved by the same, the appellants have come up in the present appeals.

8. I have heard Mr. P.R. Thakur, learned counsel representing A-1 L.K. Jain and Mr. K.B. Andley, learned senior counsel representing A-2 Balam Singh and Ms. Neelam Grover learned counsel representing the respondent/CBI at length and have given my thoughtful consideration to their respective submissions.

9. Learned counsel representing the appellants have vehemently urged that the conviction of appellants as recorded by the learned trial court is erroneous and unsustainable in law inasmuch as the same is based on contradictory and irreconcilable findings and observations made by the learned Special Judge himself in the impugned judgment. Mr. Thakur has taken pains in referring to those findings and observations of the learned Special Judge as also to the depositions of material witnesses namely P.2 Ritesh Chand Gupta-complainant, P.W.3 S.C. Sharma, and P.W.5 Pradeep Chand, the two witnesses who comprised the trap party. It is pertinent to note here that PW-2 Ritesh Chand Gupta-complainant has failed to support the prosecution case on material aspects and so he was permitted to be cross-examined by the public prosecutor. This witness did not support his version contained in his first ever complaining statement (Ex.P.W.2/B) which formed the basis of registration of the case. He took a complete somersault in that behalf by deposing that on 15.10.1996 A-2 Balam Singh (not A-1 L.K. Jain, whose name finds mention in Ex.PW.2/B) had come to the site of construction and had demanded bribe money. He denied having made any statement u/s 61 Cr.P.C. to Inspector S.R. Singh PW8 on 18.10.1996 and also denied the suggestion of the public prosecutor that he had mentioned in the complaint Ex.PW2/B that on 15.10.1996, A-1 L.K. Jain had visited the spot or demanded the bribe. He even denied the suggestion that A-1 L.K. Jain had threatened him to get the construction demolished in case demanded amount was not paid. The witness was duly confronted with the complaint Ex.PW.2/B, yet he maintained his deposition in the Court. The witness in his cross-examination by the public prosecutor no doubt admitted that some conversation had taken place between him and A-1 L.K. Jain on 16.10.1996 but denied the suggestion that after the said conversation, he took out Rs. 20,000/- and extended the same to A1 L.K. Jain or that A-1 L.K. Jain pointed out towards A-2 Balam Singh saying that same may be given to him. He was confronted with his previous statement but without any success. He also denied the suggestion of the public prosecutor that on the direction of A-1 L.K. Jain, he (witness) passed on the said amount of Rs. 20,000/- to A-2 Balam Singh. On the other hand, when cross-examined on behalf of A-1 L.K. Jain, the witness stated that at the time A-2 Balam Singh had taken the bribe money, A-1 L.K. Jain as not present and had already left his office after saying that he (the witness) should show him the site plan. The witness categorically denied that any talks about payment of Rs. 1,50,000/- took place between him and A-2 Balam Singh in presence of A1 L.K. Jain. Later the complainant made categorical statement that he did not have any conversation with A-1 L.K. Jain regarding the payment of bribe. It may also be noticed that complainant admitted that the complaint Ex.PW2/B was written by him on the basis of a draft prepared by Inspector S.R. Singh as he did not know

how to prepare a complaint. This witness when cross-examined by the public prosecutor denied the suggestion that handing over memo (Ex.PW2/D) was prepared on 16.10.1996 but clarified that his signatures had been obtained on the said memo on 18.10.1996 in the office of CBI. He denied the suggestion of the public prosecutor that the said memo was in fact prepared on 16.10.1996 or that the same was signed by him on that day. This part of the testimony of the complainant would show that the proceedings including preparation of handing over memo were manipulated subsequently after a few days of the said incident.

10. After evaluating the testimony of this witness the learned Special judge observed as under in paragraph 196, 197 and 219 of the impugned judgment:

"196. Even if, we do so and hold that complaint Ex.P.W.2/B was written by Shri Ratish Chand Gupta, on his own and he mentioned the name of A-1 L.K. Jain as the person, who had come on 15.10.1996 to demand illegal gratification, the prosecution cannot take any benefit from the fact, because the said complaint is only in the nature of an FIR and not a substantive evidence. It can be confronted to Shri Ratish Chand Gupta and it was actually confronted to him, but the he remained steady that A-1 L.K.J in had not come on 15.10.1996 to demand illegal gratification. There was no other witness at the time of his alleged visit to the site i.e. 2524, Churiwalan, Bazar Sita Ram, Delhi on 15.10.1996 and since there is no substantive evidence to prove that A- L.K. Jain had actually gone on that day, we would extend benefit of doubt to him and hold that prosecution had failed to prove that A-1 L.K. Jain had demanded illegal gratification on 15.10.1996."

"197. Though, the position of law is well established that complaint is not a substantive evidence and cannot be read, we have to refer to the authority of the Hon'ble Supreme Court reported as State of Bombay v. Rusy Mistry and Anr. 1960 CrI.D.J.532 : AIR 1960 SC-391, cited by Shri B.L. Kalra, learned counsel for A-1 L.K. Jain in support of his submission that on the basis of complaint Ex.P.W.2/B, we cannot hold that on 15.10.1996 A-1 L.K. Jain had gone to the site of construction 2524 and demanded illegal gratification. The learned counsel had made reference to a part of para No. 7 of the aforesaid judgment, which inter-alia is as under:

"The first information report is the information recorded u/s 154 of the Cr.P.C. It is an information given to a police officer relating to the commission of an offence. It is also an information given by an informant on which the investigation is commenced. It must be distinguished from information received after the commencement of the investigation which is covered by Section 161 and 162 of the Cr.P.C. It is well settled that the first information report is not substantive evidence, but cannily be used to corroborate or contradict the evidence of the informant given in court or to impeach his credit. It follows that a Judge cannot place such a report before the jury as substantive evidence, but can only refer to that portion of it which has been used for one or other of the aforesaid purposes.

219. With respect, all the three authorities cited are quite of the mark with the question arising in this case. There is no ambiguity in the statements of Ratish Chand Gupta, S.C. Sharma and Pardeep Chand. Shri Ratish Chand substantially supported the prosecution story and implicated accused L.K. Jain in the matter of making demand and also in the matter of implying directions to Balam Singh to receive the amount. But when he was cross examined 7 months later, he tried to exclude accused L.K. Jain. Relationship between contractors and junior engineers (building) is so close that there need to be any, no wonder at his subsequent attempt of Ratish Chand Gupta. However, the initial statement appears more reliable, than the subsequent detraction there from. Still we will not base our conviction on the statement of Ratish Chand Gupta, in view of the fact that he chose to contradict himself during the course of same statement."

11. Similarly the other shadow witnesses PW.3 S.C. Sharma and PW5 Pradeep Chand have not supported the prosecution case in material particulars and were allowed to be cross-examined by the public prosecutor. The learned Trial court has adversely commented upon the conduct and veracity of these witnesses in para 220 of the judgment as under:

"220. Shadow witness S.C. Sharma and Pardeep Chand have very little credibility. They have already appeared in 8 or 11 cases of CBI. They were like weather cocks when they say something in favor of accused L.K. Jain, the accused is not entitled to plead that they should be relied upon."

12. After a detailed survey of the testimony of the three witnesses namely PW-2 Ratish Chand Gupta, PW-3 S.C. Sharma and PW-5 Pradeep Chand, the learned Trial Court clearly held that neither of these witnesses were reliable witnesses because PW-2 Ratish Chand Gupta had not only failed to support the prosecution case on material aspects in regard to the demand of illegal gratification made by A-I L.K. Jain on 15.10.1996 but gave contradictory versions at various stages of his deposition i.e in examination-in-chief, cross examination by the Additional Public Prosecutor and during the cross-examination by the accused persons. The testimony of other two witnesses i.e. PW-3 S.C. Sharma and PW-5 Pradeep Chand were discarded as credible witnesses because they were like weather cocks having already appeared in eight or eleven cases of CBI. However, the Court in para 220 of the Order of the Judgment observed that if their testimony would not be of any help to the prosecution, because of their incredibility, the accused would also not be entitled to rely upon that part of the testimony which favors them. The law with regard to the intrinsic value to be placed on the testimony of the hostile witnesses who are cross-examined by the party calling them, is well-settled through a cantina of decisions of Apex Court and needs no repetition. It is well settled that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution choose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed of the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof.

However, if in a given case is whole of the testimony of witness is totally shaken, the witness stands squarely discredited and the Court should as a matter of prudence discard his evidence in toto.

13. Despite having found that none of the above named three witnesses are credible witnesses, the learned Trial Court still relied upon the testimony of Ratish Chand Gupta so far as the incident of 16.10.1996 was concerned more particularly in regard to the alleged conversation which A-I L.K. Jain is stated to have had with Ratish Chand Gupta relatable to the demand of illegal gratification. Besides, the Court also relied upon the following four circumstances against the accused A-1 L.K. Jain:

(i) He visited the office of Shiv Satellite on 2550, Churiwalan, Bazar Site Ram, Delhi, where he had no business to go;

(ii) He was arrested at about date, time and place as mentioned in the charge by the raiding party;

(iii) There was no question of sanction plans, that he went there to check the plans is unconvincing. He was not supposed to obey the commands of the contractor.

(iv) It is his submission that as per letter of the M.L.A., he visited the site, 2524, must know that commercial complex was put on. He being junior engineer must have know that at the said place commercial complex could not have been sanctioned at II.

14. It would appear that the learned Trial Court has heavily relied upon the answers given by the two accused in their examination u/s 313 Cr.P.C. Even after doing so, the learned Trial Court concluded that there was no substantive evidence on record to prove that A-I L.K. Jain had gone to the site on 15.10.1996 and had demanded illegal gratification from the complainant Ratish Chand Gupta. That would mean that there was no prior demand of illegal gratification by any of the two accused on 15.10.1996. Alleged demand of illegal gratification by A-1 L.K. Jain on 15.10.1996 was the very edifice on which the entire prosecution case rested and once such demand was not established, the entire prosecution must crumble down. Despite this it appears that the learned Trial Court based the conviction of the accused entirely on what transpired in and outside the office of Shiv Satellite at 2524 Gali Churi Walan, Bazar Sita Ram, Delhi on the evening of 16.10.1996 and more particularly the conversation which took place between the complainant and accused A-1 which PW-2 Ratish Chand Gupta when cross-examined on behalf of the accused totally disowned. This Court is at a loss to find out as to what prompted the learned Trial Court to accept that art of the prosecution case in regard to the conversation between the complainant and A-1 L.K. Jain on 16.10.1996, especially when the witness was so erratic that in the cross-examination by the accused he totally denied having had any such conversation with the said accused. No other witness over-heard the conversation because according to one witness, the office is situated at such



a busy road where there was lot of traffic and its passing sound make it almost impossible to hear any conversation.

15. It is pertinent to note that the alleged conversation between the complainant and A-I L.K. Jain which was treated to be so incriminating against the accused was not put to him in his examination u/s 313 Cr.P.C. as an incriminating piece of evidence and his Explanation not obtained. This would show that the learned Trial Court did not consider the alleged conversation as an incriminating piece of evidence against A-1 L.K. Jain and so did not considered it necessary to put to him. The circumstances relied upon by the learned Trial Court at best show that the accused persons had actually visited the site and the office of Shiv Satellite. The circumstances relied upon by the learned Trial Court against the accused A-I are inconsequential and not inculpatory to A-I. In any case it is not disputed that A-I L.K. Jain was the Junior Engineer of the area and it was a part of his duty to visit the site wherever unauthorised construction was reportedly going on. In the present case, he has reasons to be present at the site of construction because he was asked by the area M.L.A. Sh. Satish chand Khandelwal, to look into the complaint in regard to the unauthorised construction being carried on at site No. 2524 Gali Churi Walan, Bazar Sita Raj, Delhi. Even taking all the circumstances into consideration, either individually or collectively, at best it will establish that the appellants were in a position to extort illegal gratification but their presence at the site by itself will not lead to a conclusion that they had gone there for the purpose of obtaining illegal gratification and had accepted the same.

16. Mr. P.R. Thakur, learned counsel representing the appellant has then pointed out that the learned trial court has made incorrect record of factual narration of the deposition made by the witnesses and has pointed out that while PW-5 Pradeep stated in his evidence that he could not hear the conversation amongst the complainant and A-1, the learned trial court recorded that the said witness could hear the conversation. Similarly PW-8-Inspector S.R. Singh, trap laying officer also stated that he did not over hear the conversation but the learned trial court has recorded in the affirmative. PW-3/S.C. Sharma admitted that he did not hear the conversation between the complainant and A-1 and he could not see from outside as to what happened in the office of Shiv Satellite. Therefore, it is manifest that neither any of the shadow witnesses nor the trap laying officer heard the conversation and saw what was transpiring between the complainant and the appellants inside the office of Shiv Satellite.

17. On the face of the evidence and material obtaining on record the important question is as to whether the learned trial court was justified in inferring a conspiracy between the two appellants to commit the offences of obtaining illegal gratification from the complainant-Ritesh Chand Gupta and pursuant to that appellant A-1 having demanded a certain amount of money that is Rs. 3 lacs or 1.5 lacs from him in order to permit him to carry on the unauthorised construction at the site and recording the finding of guilty against the appellants. Since both the appellants have been found guilty of the offence punishable u/s

120B IPC in the first instance, it is imperative to examine in depth the question as to whether on the face of the facts and circumstances alleged and the material brought on record by the prosecution, the two appellants can be said to have entered into a criminal conspiracy to commit the offence of obtaining illegal gratification from the complainant-Ritesh Chand Gupta.

18. The offence of criminal conspiracy is defined in Section 120-A IPC. The gist of the offence of criminal conspiracy is an agreement to break the law although a formal agreement of the parties concerned is not essential to the formation of a criminal conspiracy but it is also well-settled that a conspiracy consists not merely in the intention of two or more persons, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. Mere evidence of association is not sufficient to lead to the inference of conspiracy. Truly it is very rare that one can lay hand on direct evidence of conspiracy because the conspiracy is generally hatched between two or more persons in secrecy and at time and place which may not be easily detected. More often it is the circumstantial evidence which is pressed in service to establish the guilt of criminal conspiracy and based on such circumstances an inference is raised in regard to an agreement between two or more persons as talked of in the Section.

19. In the present case also no direct evidence was led by the prosecution to establish the conspiracy between the appellants and it has essentially relied upon certain circumstances. What are those circumstances and whether all or how many of them can be said to have been established on record and to what inference they can lead is a question which will decide the fate of the present case. From a reading of the charge-sheet, the deposition of the witnesses and observations made by the learned trial court in the impugned judgment, the following circumstances can be said to have been relied upon by the prosecution in order to establish the offence of criminal conspiracy between the two appellants:

(i).A-1 was posted and working as Junior Engineer (Civil) Building Department, Sadar Paharganj Zone, Municipal Corporation of Delhi, he having taken the charge of the said post on 14.10.1996 i.e. two days prior to the date of incident and had the occasion and opportunity to obtain illegal gratification from the complainant-Ritesh Chand Gupta who was raising unauthorised construction at premises No. 2524 Gali Churi Walan, Bazar Sita Ram, Delhi under the threat of demolition of said unauthorised construction.

(ii).A-2-Balam Singh was working as Beldar under A-2-L.K. Jain and earlier with the previous Junior Engineer Chauhan and had the occasion and opportunity to demand illegal gratification either for himself and or for himself and for A-1/L.K. Jain on the premises that L.K. Jain used A-2 Balam Singh as the hands to translate their motive of obtaining illegal gratification.

(iii) On 15.10.1996, A-1 visited the site and demanded a bribe of Rs. 3 lacs from the complainant-Ritesh Chand Gupta for permitting the construction to go on

failing which he threatened to demolish the construction.

(iv) Both A-1 and A-2 had visited the site of construction in the afternoon/evening of 16.10.1996 and were present in the office of Shiv Satellite and had a conversation with the complainant which conversation signified their intention to obtain illegal gratification;

(v) Acceptance of illegal gratification in the shape of tainted G.C. notes of Rs. 20,000/- by A-2/ Balam Singh on behalf of A-1 and recovery of the said tainted money from the pocket of A-2/Balam Singh soon after they emerged from the office of Shiv Satel lite.

20. So far as circumstances (i) and (ii) are concerned, there is no dispute that A-1/L.K. Jain was working as a Junior Engineer (Civil) Building Department, Sadar Paharganj Zone, MCD. He having assumed the charge on 14.10.1996 but still there are circumstances put forth by way of defense which needs to be considered.

21. The prosecution at best can be said to have established that A-I L.K. Jain and A-2 Balam Singh were working as Junior Engineer (Civil) and Beldar respectively in the Building Department, Sadar Paharganj Zone, Municipal Corporation of Delhi during the relevant period and by virtue of their duties and responsibilities in relation to monitor the unauthorised constructions in their area were in a position to extort money/illegal gratification from the complainant in order to show favor to him by abusing their official position. This leads us nowhere because based on such presumption no further presumption can be raised that the two appellants had in fact entered into a conspiracy to obtain illegal gratification from the complainant-Ritesh Chand Gupta for allowing him to carry on the unauthorised construction at the above site because the case of the prosecution that the appellants had visited the site on 15.10.1996 to obtain illegal gratification has been totally shattered through the testimony of PW-2-Ritesh Chand Gupta. The only circumstance that both the appellants visited the site of construction on the afternoon of 16.10.1996 and thereafter went to the office of Ritesh Chand Gupta by itself is not sufficient to establish criminal conspiracy between the two. Cogent and probable defense has been led on record from the side of A-1 L.K. Jain that he was called by the Area M.L.A., Sh. Satish Chand Chandeliers, on the morning of 16.10.1996 who asked him to visit the site of unauthorised construction and take necessary action in that behalf by writing a note/slip exhibit PW7/DN and on receipt of the same he proceeded to the spot on scooter and on reaching there prepared sketches marked as Ex.X-I and X-2 of the unauthorised construction which was being carried out at the site. This sketch of the note of the MLA Ex. PW7/DN were recovered from the personal search of the appellant after his apprehension vide personal search memo Ex.PW-1/A. This would show that the presence of A-I L.K. Jain and even for that reason A-2 Balam Singh at the spot could be for the purpose of enquiry into the complaint in regard to the unauthorised constructions rather than for the purpose of receipt of the illegal gratification of Rs. 20,000/-. It is also established that the

labourers working at the site had taken the appellant to the office of Shiv Satellite at 2524 Gali Churi Walan, Bazar Sita Ram, Delhi where PW-2 Ritish Chand Gupta was present and from him A-1 asked the sanction plans who could not produce the same and so he left the place.

22. As noticed above the most important circumstance which formed the basis of registration of the case is the demand of a sum of Rs. 3 lacs by way of illegal gratification by A-1 from the complainant-Ritesh Chand Gupta on 15.10.1996 as finds mention in exhibit PW2/B. This circumstance has not at all been established at the trial because complainant-Ritesh Chand Gupta has clearly taken a somersault in this behalf and put up a contrary version by stating that it was not A-1/L.K. Jain who had come to him on 15.10.1996 and demanded money but it was A-2- Balam Singh who had made the demand for the money. This has changed the entire complexion of the prosecution case because the basis of the prosecution case was that it was A-1-L.K. Jain who visited the complainant on 15.10.1996 and demanded the money. The learned trial court has discarded the testimony of this witness as that of an unreliable witness and rightly so because a witness who gives mutually inconsistent version of one incident at different states in the course of his deposition has to be branded as untruthful witness. Because either his recorded statement as contained in Ex.PW2/B was correct or his deposition in the Court was correct or both of the same were false because both of them cannot be correct/true at the same time by any stretch of imagination. Admittedly A-1 L.K. Jain had not visited the site of construction on 15.10.1996 in presence of A-2 and demanded the money in presence of each raising a reasonable inference that they did so pursuant to a conspiracy or common intention. Even if we believe the statement of PW-2-Ratish Chand Gupta that it was A-2 Balam Singh who had gone to the site on 15.10.1996 and demanded money, this could be at best considered his individual act and not an act pursuant to any conspiracy between him and A-1. So even this circumstance cannot be said to have been established.

23. Ms. Neelam Grover, learned counsel representing the CBI has urged that there is sufficient and cogent material on record to establish the recovery of the amount of Rs. 20,000/- in Government currency notes from A-2 Balam Singh. In this connection, she has urged that the testimony of trap laying officer S.R. Singh remained intact and can be safely relied and acted upon to uphold the conviction of the two appellants. In this connection reliance is placed to the decision of the Supreme Court in the case of State of U.P. Vs. Zakaullah, . In that case the Supreme Court considered the question as to whether the conviction could be based on the testimony of the Trap Laying officer alone even if the complainant was found to be an interested person in the false implication of the accused and the panch witnesses having not supported the prosecution case. The Supreme Court laid down that the evidence of trapping officer could be relied and acted upon so as to record the conviction because the said witness has no interest against the respondent and the mere fact that he was interested in the success of the case and the trapping officer was also investigating officer was no

ground to discard this testimony. The evidence of such witness could be acted upon even without the help of any corroboration.

24. Although there is a great deal of inconsistency even in regard to the recovery of currency notes of Rs. 20,000/- from the pocket of A-2 Balam Singh e.g. whether it was recovered from the left or right pocket or accepted by A-2 Balam Singh but still relying and acting upon the testimony of the trap laying officer S.R. Singh in this case, it can be said that the prosecution has been able to prove the recovery of the tainted money from the possession of A-2 Balam Singh. That recovery by A-2 Balam Singh in absence of any evidence forthcoming cannot be presumed to be on behalf of A-1 L.K. Jain or pursuant to a conspiracy between the two persons. This Court having already held that there is no sufficient and cogent evidence brought on record to establish the conspiracy between the two.

25. Mr. Thakur, learned counsel for appellant A-I has submitted that the prosecution has miserably failed to prove any demand of illegal gratification by A-1 L.K. Jain or its acceptance by him on 16.10.1996. For offence u/s 7 of the Prevention of Corruption Act 1988, it is necessary to prove that the public servant has accepted or obtained or agreed to accept or admitted to have obtained any gratification other than illegal gratification, as a motive or reward for doing or for fore-bearing to do any official act in order to show favor or disfavor to any person. So far as the question of demand of illegal gratification is concerned, as noticed above the only witness who could prove such a demand either by one or both the appellants is PW-2 Ratish Chand Gupta. Because of self-contradictory stand taken by him in his deposition as compared to the stand taken by him in his complaining statement dated 15.10.1996 (Ex.P.W.2/B) which formed the basis for registration of the FIR, his testimony has been discarded by the learned Special Judge. He has been branded as a unreliable witness because at one point of time he said that it was L.K. Jain who had demanded the illegal gratification at the time of his visit on 15.10.1996 while in the deposition he stated that it was A-2 Balam Singh who had made such a demand. Not only this, the prosecution has also miserably failed to establish that either A-1 or A-2 had in fact demanded any money as illegal gratification immediately before the recovery of a sum of Rs. 20,000/- from A-2 Balam Singh on 16.10.1996. The acceptance envisaged by Section 7 of the Act has necessarily to be conscious acceptance and no presumption can be raised about the acceptance merely because the amount was actually recovered from the pocket of the accused.

26. Now coming to the question as to whether substantive offences punishable u/s 7, 13(2) read with Section 13(1)(d) of the Act can be said to have been established against the appellants or any one of them, it may be noted at once that the prosecution has failed to prove that appellant A-1 L.K. Jain had made any demand for illegal gratification either on 15.10.1996 or 16.10.1996 or that the tainted money was paid or recovered from the possession of A-1 L.K. Jain. Presence of A-1 L.K. Jain at the spot and his apprehension by the CBI officials from the street outside the office of Shiv Satellite Cable after the tainted money

was recovered from the possession of A-2 Balam Singh has, however, been established. In the opinion of this Court, these circumstances are inconsequential so far as the appellant-L.K. Jain is concerned because this Court has found that the prosecution has failed to establish the charge of conspiracy. A-2 Balam Singh in his examination u/s 313 Cr.P.C. no doubt accepted the recovery of tainted money from his pant-pocket but he never came up with a plea that he had accepted the said money on behalf of A-1 L.K. Jain or for himself (Balam Singh), knowing fully well that if he did not take up the said plea, perhaps he alone could be held guilty on account of his individual act of having obtained the illegal gratification. The learned trial court has not been consistent in its approach so far as the role of A-1 L.K. Jain is concerned. During the course of discussion of evidence brought on record, the learned trial court, it appears, was not prepared to believe the three material witnesses i.e. the complainant-S.C. Sharma and Pradeep Sharma because of the inconsistent stand taken by them at different stages of their depositions. Yet strangely, the trial court recorded the finding of guilty against both the accused. The finding of guilty, Therefore, clearly falls under the domain of surmises and conjectures. On the other hand, it would appear that the appellant-L.K. Jain had put-forth the defense which was quite probable and plausible, having regard to the totality of the facts and circumstances of the case. This Court has, Therefore, no hesitation in holding that the prosecution had failed to bring the guilt home by means of cogent and reliable evidence, at least, against A-1 L.K. Jain.

27. This Court is at a loss to know as to why even after recording a finding that de-hors the offence of criminal conspiracy having been established, still he thought it fit to record the conviction for the offence of criminal conspiracy as well as substantive offences. It is not the case of the prosecution that any of the two appellants acted individually or in isolation and, Therefore, each of the two appellants would be responsible for their individual acts. Admittedly the money was not given to or accepted by A-1 L.K. Jain. If we ignore the alleged conversation between the complainant and A-1 L.K. Jain, there is no other evidence on the basis of which appellant A-I could be convicted.

28. The accused in his statement of defense which it tendered during the course of examination u/s 313 Cr.P.C. has urged that until 2-3 days prior to 16.10.1996 and 2-3 days latter of that date other Junior Engineer by the name of Chauhan was the Junior Engineer in charge and A-2 Balam Singh was attached to him as beldar. The very fact that the said engineer was transferred few days before the incident and was brought back and resumed his duties and thereafter the construction at large scale as carried on without any rancor lends credit to the version of A-1 that he might have been falsely implicated else such a large construction could not have been carried out subsequently.

29. In view of the above discussion it must be held that the prosecution has failed to discharge the onus of proving that either appellant A-1 or A-2 had accepted or obtained or agreed to accept or attempted to obtain any illegal

gratification. The evidence led by the prosecution is so scant and self-destructive that no reliance can be placed on any of the three witnesses namely PW-2 Ratish Chand Gupta, PW-3 S.C. Sharma and PW-5 Pradeep Chand. This case has in fact presented a very piquant situation inasmuch as what was expected of the prosecution to prove has not been established by means of cogent and reliable evidence and what can be said to have been proved is contrary to the stand of the prosecution. Therefore, it cannot be pressed into service nor any conviction can be based on those proved facts. In the opinion of the Court, once the very edifice on which the prosecution case was built has been badly shaken, the learned Trial Court was not justified in raising a presumption about the demand and acceptance of illegal gratification by the two accused. The factum of recovery of tainted money from A-2 Balam Singh at best raises strong suspicion about the said accused having obtained the said amount as a part of the illegal gratification bet suspicion, howsoever, strong cannot take the place of proof. The factum of recovery of money cannot be considered in isolation and all attendant circumstances prior and at the time of recovery along with the probabilities of the case are also required to be considered.

30. So far as A-2 Balam Singh is concerned, no doubt the prosecution has emerged successful in proving that a sum of Rs. 20,000/- in Government currency, bearing the same number as contained in the handing over Memo, was recovered from the possession of A-2 Balam Singh soon after he and A-1 L.K. Jain had come out of the room of the Shiv Satellite Cable. Mrs. Neelam Grover, learned counsel representing the CBI has vehemently urged that on the face of this factual position, this Court must raise a presumption as envisaged by Section 20 of the Act. It is true that the law enjoins upon a Court trying the offences u/s 7, 11 or Clauses (a), (b) of Sub-section 13 of the Act to draw a presumption that the gratification was accepted or obtained by the accused as motive or reward, but before such a presumption is raised, the prosecution must establish that the accused has accepted or obtained gratification other than legal gratification. In the case of *Suraj Mal v. State (Delhi Administration)* (1979) 4 CC 725 the Supreme Court held that mere recovery of money divorced from the circumstances under which it is paid is not sufficient to convict the accused when the substantive evidence in the case is not reliable. As noticed above in the case in hand, the prosecution has not been able to establish that even A-2 Balam Singh made any direct or indirect demand of illegal gratification from the complainant-Ratish Chand Gupta. That part of the testimony of Ratish Chand Gupta where he stated that A-2 Balam Singh and not A-1 L.K. Jain had demanded the money on 15.10.1996 has been totally discarded by the learned trial Court. No such demand is alleged by A-2 Balam Singh on 16.10.1996. Onus to prove that A-2 Balam Singh had accepted the money was heavy on the prosecution which on the facts and circumstances of the case and the material obtaining on record, cannot be said to have been discharged by it. If the initial onus is not discharged, then presumption as envisaged by Section 20 cannot be raised. On the face of this factual and legal position, the learned trial court was

not justified in recording the finding of guilty even against A-2 Balam Singh for the substantive offences punishable under Sections 7, 13(1)(a) and (d) of the Act.

31. For the foregoing reasons, this Court must conclude that the conviction and sentence of the appellants is legally unsustainable and cannot be upheld. Consequently, both the appeals are allowed, conviction and sentence of the appellants as recorded by the Trial Court is hereby set aside and both the appellants are acquitted of the charges.