Criminal Appeal (S.J.) No. 376 of 2012

[*Against the judgment of conviction and order of sentence dated 23.03.2012 passed by learned Special Judge, CBI, Ranchi (other than A.H.D.) in RC 07(A)/2003(R)]*

Faizur Rahman .... …. Appellant

--Versus--

The State of Jharkhand through C.B.I. …. …. …. Respondent

For the Appellant : Mr. A.K. Kashyap, Sr. Advocate
Mr. D.K. Prasad, Advocate
Ms. Satya Shatakshi, Amicus Curiae

For the CBI : Mr. Anil Kumar, ASGI
Ms. Chandana Kumari, A.C. to ASGI
Mr. Nitish Parth Sarthi, A.C. to ASGI

PRESENT

HON'BLE MR. JUSTICE GAUTAM KUMAR CHOUDHARY

By Court Heard the parties.

1. This Criminal appeal is directed against the Judgment of conviction and order of sentence passed by learned Special Judge, CBI (Other than A.H.D., Ranchi) in R. C. 07(A)/2003(R), whereby the appellant has been held guilty for the offence under Section 7 P. C. Act and under Section 13(1)(d) read with Section 13(2) of the P.C. Act, 1988 and sentenced to undergo RI for two years and to pay fine of Rs.10,000/- for the offence punishable under Section 7 of the P.C. Act and to undergo RI for two and half years and fine of Rs.10,000/- for the offence punishable under Section 13(1)(d) read with Section 13(2) of the P.C. Act and in default, to undergo SI of one year.

2. The complainant is Smt. Violet Kachhap who was senior Telephone Operator in Central Mines Planning and Design Institute Ltd.(CMPDIL) and had applied for sanction of study advance of Rs.60,000/- two months ago, which was forwarded to the office of the Regional Commissioner, Coal Mines Provident Fund, Ranchi (C.M.P.F). On 31.03.2003, complainant contacted the appellant/accused who was posted as Upper Division Clerk (UDC) in C.M.P.F office had made a demand of Rs.2,000/- as illegal gratification for getting the said advance sanctioned and asked her to make the said payment on the very same day at 5 P.M.

3. On the said complaint, S.P., CBI, Ranchi directed Sri B. C. Chourasaia, Inspector of C.B.I. to verify the allegation and after verification, CBI registered FIR being R. C. 07(A)/2003(R) under Section 7 of the P.C. Act against the appellant/accused.

4. After completion of pre-trap memorandum, on 31.03.2003, the trap team was led by Inspector K.K Singh. Two independent witnesses were also taken with the trap team and the trap was laid in which the complainant approached the appellant to make the payment of the said amount of Rs.2,000/- at the office of the Coalmines Provident Fund Commissioner at Kanke Road, Gonda, Ranchi. At 4.30 p.m. the Appellant was approached

by the Complainant along with shadow witness Sushil Stephen Lugun. The Appellant asked the Complainant whether she had brought the money. When the complainant answered in the affirmative, she was asked to come down to the ground floor. The Complainant offered the tainted G.C notes to the Appellant, who took it in his right hand and thereafter he counted it by using both hands. The tainted money was kept by him in his black bag and then he assured to get the work done. Witness Shyam Sundar Prasad and Inspector K.K Singh bet witness to the conversation and acceptance of bribe. The C.B.I trap team apprehended the accused. The fingers of the appellant poured in the solution of Sodium Carbonate which turned into pink after getting touch with his fingers. The G.C notes which were kept in the very handbag where compared from the pre-trap memorandum. The G.C notes were seized and the trap team along with the complainant and the accused returned to CBI office at about 5.20 p.m..

5. The CBI submitted charge-sheet and after cognizance, the accused was put on trial under Sections 7 and 13(1)(d) r/w 13(2) of the PC Act,1988. Altogether 11 witnesses were examined on behalf of the prosecution and Exhibit-1 to Exhibit-12 were adduced into evidence. Material exhibits like notes of denomination of 100 Rupees of 20 Pieces were seized which have been made material exhibits as I to IX on behalf of the prosecution. Statement of the accused was recorded under Section 313 of the Cr.P.C. Defence is of innocence, but no specific defence has been pleaded.

6. The impugned judgment of conviction and order of sentence has been assailed on the ground that the appellant was not the authorized person to sanction the said advance in favour of the complainant.

7. The sanction for prosecution in this case was accorded by one Rajesh Kumar, Commissioner, Coal Mines Provident Fund and he has been examined as P.W.1. It is submitted that the order granting sanction must be demonstrative of the fact that there had been proper application of mind on the part of the sanctioning authority as held by the Hon'ble Supreme Court in the judgment reported in **2008 Crl. Law Jrl. 347 SC**. The deposition of P.W.1 does not disclose that he had applied his judicial mind to the materials collected in this case.

8. Argument is without any substance, as the sanction has been accorded by the Commissioner, Provident Fund Colliery, Dhanbad, who has been examined as PW-1 and he has proved sanction for prosecution, which has been marked as Ext-1. It is rightly argued by the learned ASGI that deposition of P.W. 1 during cross examination will show that before granting sanction for prosecution, the witness had perused FIR, statement of accused, CBI report and other relevant documents.

9. It is argued that provision of holding preliminary enquiry as required under Clause 9.1 of CBI manual, has been given a complete go by. This will be apparent from breakneck speed in which the complaint was taken, preliminary enquiry was held, trap team was

constituted, all in one day. As per Exhibit 5, the complaint was filed on 31.03.2003 and Inspector, CBI, B.K. Chourasia was deputed to hold preliminary enquiry and pursuant to the said order, preliminary enquiry report has been submitted (Annexure-9) which does not state the time when the said enquiry was held. However, B.C. Chourasia has been examined as P.W. 6 and he has admitted in his deposition at para 1 that he had not gone to the office of the appellant to verify the complaint, rather the said complaint was verified by examining the complainant. This is not proper mode in which the complaint is required to be verified and accused is entitled to acquittal on this ground alone in view of ratio laid down by the Hon'ble Supreme Court in Shashi Kant Versus CBI, 2007 1 Eastern Cr. Cases 157 SC Para 11 and (2012) 4 JLJR 378.

10. Contra argument is advanced by the learned ASGI which is difficult to resist and dispute is that it is not factually correct to state that no preliminary enquiry was held, which will be apparent from the deposition of PW 6 that he had made the enquiry by making personal enquiries from the complainant. It is further submitted that it is not mandatory requirement under per 9.1 of the CBI Manual, that in preliminary enquiry the Verifying Officer should visit the office where the demand has been made. The nature of enquiry itself is discreet. Therefore, it is not expected that it should be conducted in any manner that it catches public attention. Reliance is placed on ***CBI v. Thommandru Hannah Vijayalakshmi*, (2021) 18 SCC 135 : 2021 SCC OnLine SC 923 at page 162**

> **19.** Specifically with reference to the provisions of the CBI Manual, the decision noted : (*Lalita Kumari case* [*Lalita Kumari* v. *State of U.P.*, (2014) 2 SCC 1, paras 31-35, 37-39, 83-86, 89-92, 93-96, 101-105, 106-107, 111-112, 114-119 and 120 : (2014) 1 SCC (Cri) 524] , SCC pp. 50-51, para 89)
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> > "*89*. Besides, the learned Senior Counsel relied on the special procedures prescribed under the CBI Manual to be read into Section 154. *It is true that the concept of "preliminary inquiry" is contained in Chapter IX of the Crime Manual of CBI. However, this Crime Manual is not a statute and has not been enacted by the legislature. It is a set of administrative orders issued for internal guidance of CBI officers. It cannot supersede the Code. Moreover, in the absence of any indication to the contrary in the Code itself, the provisions of the CBI Crime Manual cannot be relied upon to import the concept of holding of preliminary inquiry in the scheme of the Code of Criminal Procedure*. At this juncture, it is also pertinent to submit that CBI is constituted under a special Act, namely, the Delhi Special Police Establishment Act, 1946 and it derives its power to investigate from this Act."
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> > (emphasis supplied)

In view of the law exposited above, there cannot be two views that the object of preliminary inquiry is to assure that no one is persecuted on false and frivolous charges. No specific mode has been laid down as to how the said enquiry, as it is confined to drawing subjective satisfaction, before the FIR is lodged and the law is set into motion. Under the circumstance argument raised on this ground fails.

11. It is argued that the shadow witnesses who were said to be involved in the said trap, namely, P.W.3 and P.W.7, have not supported the case of the prosecution and were declared

hostile. In view of the independent witnesses having turned hostile, there is no corroborative evidence regarding the conversation that took place between the complainant and the accused at the time of trap.

12. Learned ASGI, has argued that PW3 has admitted in para 1 of his deposition that on the said date he had visited the CBI office and no cross-examination has been done on this point. At least the presence of one of the shadow witness is proved with the CBI team immediately before the incidence.

13. Witnesses turning hostile is one of the banes of criminal adjudicatory process. It reflects either of the two possibilities. Either the prosecution has manufactured a false story where the independent witness refuses to toe the official line. The other possibility is that he is committing perjury under fear or in order to favour the accused. It is for this reason that mere turning of hostile of the shadow witness cannot by itself be fatal to the entire prosecution, but has to be looked into the background of other evidence on record. It has been held in **Neeraj Dutta Vs State (NCT of Delhi) (2023) 4 SCC 731**, "(f) In the event of complainant turns 'hostile', or has died or is unavailable to let in his evidence during trial, demand of illegal gratification can be proved by letting in the evidence of any other witness who can again let in evidence, either orally or by documentary evidence or the presumption can prove the case by circumstantial evidence. The trial does not abate nor does it result in an order of acquittal of the accused public servant."

14. In the present case, factum of trap and the seizure of tainted currency note has been adequately proved by the deposition of other witnesses being PWs. 4, 6, 8, 9, 10 and 11. Mere turning of shadow witness hostile is not fatal to the prosecution case. Unless the evidence of trap suffers from material contradiction or inherent improbabilities, it cannot be brushed aside on the ground that it has not been corroborated by the account of independent witness. It has been held in ***Prakash Chand v. State (Delhi Admn.)*** **[(1979) 3 SCC 90]** that a trap witness may perhaps be considered as a person interested in the success of the trap may entitle a court to view his evidence as that of an interested witness. Where the circumstances justify it, a court may refuse to act upon the uncorroborated testimony of a trap witness. On the other hand a court may well be justified in acting upon the uncorroborated testimony of a trap witness, if the court is satisfied from the facts and circumstances of the case that the witness is a witness of truth.

15. As per the case of the prosecution set out in the FIR and the trap memorandum after the receipt of the bribe amount, the accused had kept it in the bag inside the dickey of his scooter. Neither the bag nor the scooter was seized by the raiding party. Mere turning of hand into pink is not a conclusive evidence to prove the ingredient of offence under Section 7 or under Section 13(1)(d) of the P. C. Act. In the present case, as per the case of the prosecution, the accused had counted the money by his both hands, but only his right hand was dipped into the solution of Sodium Bicarbonate and not his left hand.

16. Learned counsel on behalf of the Appellant is right when he argues that turning of hand into pink on the touch with the chemical solution is not a conclusive prove. But, this is of no help to the defence cause, as in the present case there are sufficient oral evidence who have proved the factum of the case, which has been corroborated by Ext-7 which is the chemical analysis report of the CFSL.

17. It is further argued that K.K. Singh was Inspector of CBI, who has led the trap team and at the same time, he has been made Investigating Officer which was impermissible.

18. There is no law that the informant or the one leading the trap team cannot be the investigating officer. The test is whether any prejudice has been caused on that count. It has been held in **AIR 2023 SC 4627 Sathyan Vs State of Kerala** wherein it has been held "The concept of bias has been delved into by a two Judge Bench of this Court in *N.K. Bajpai* v. *Union of India* as follows:—

> **"48.** Bias must be shown to be present. Probability of bias, possibility of bias and reasonable suspicion that bias might have affected the decision are terms of different connotations. They broadly fall under two categories i.e. suspicion of bias and likelihood of bias. Likelihood of bias would be the possibility of bias and bias which can be shown to be present, while suspicion of bias would be the probability or reasonable suspicion of bias. The former lead to vitiation of action, while the latter could hardly be the foundation for further examination of action with reference to the facts and circumstances of a given case. The correct test would be to examine whether there appears to be a real danger of bias or whether there is only a probability or even a preponderance of probability of such bias, in the circumstances of a given case. If it falls in the prior category, the decision would attract judicial chastisement but if it falls in the latter, it would hardly affect the decision, much less adversely".

In the present case the plea of bias of is not supported by any material from which an inference can be drawn that the officer who was leading the trap team and subsequently conducted the investigation had any personal bias, or that his actions smacked of reasonable suspicion. Under the circumstance the mere plea of bias on this count is of no consequence.

19. The offer and acceptance part is proved by the trap witness(es). It cannot be lost sight that in corruption cases, the demand and acceptance are made by the accused clandestinely. It is consistent case of the complainant that the demand had been made for getting the work sanctioned by the accused which was complained and thereafter the trap had been laid in which the appellant was caught red-handed with the tainted money. Where foundational facts are proved, it is sufficient to draw a presumption under Section 20 of the P. C. Act, that illegal gratification was taken. There is nothing on record to suggest that the complainant had any grudge to falsely implicate the appellant merely because most of the trap witnesses were official witnesses and the same cannot be ground to discard their testimony.

20. On the point of law, it is submitted that in view of ratio laid down by Hon'ble Supreme Court in Neeraj Dutta case (supra) , there is a distinction drawn between Section

7 and Section 13(1)(d) of Prevention of Corruption Act. Section 7 will be attracted in cases where there is offer and acceptance of bribe, whereas under Section 13(1)(d), will come into play where the acceptance is in pursuant to the demand made by the public servant. It is definite case of the prosecution that demand was made leading to the acceptance of bribe amount therefore, it will not be the case of Section 7, but of Section 13(1)(d) of the P.C. Act. Under Section 20 P.C. Act a presumption can be drawn under Section 7 and 13(1)(a)(b) of the P.C. Act and not under Section 13(1)(d) of the P.C. Act.

21. It is difficult to agree with the ingenuous piece of argument advanced by the learned senior counsel on the behalf of the Appellant. Their Lordships in this case (Neeraj Dutta) while delineating the distinction between Sections 7 and 13(1) (d) of the P.C. Act held that while in case of former, mere offer and acceptance is sufficient to constitute the offence, whereas in the latter case the acceptance should be preceded by a demand which is a case of obtainment.

22. Giving and taking bribe is often a clandestine affair, and although offer and acceptance can be proved, proof of the object or purpose in such cases is practically problematic. Taking a pragmatic view of the nature of offence, under the legislative scheme, once an offer and acceptance is proved in a charge under Section 7, presumption of law under Section 20 is raised that such acceptance or obtainment was for performing or to cause performance of public duty improperly or dishonestly either by himself or by any other public servant. These are mandatory presumption of law which is to be drawn once the foundational fact is proved.

23. Additionally there is an option of drawing a presumption of fact, regarding the object or motive of accepting such bribe on an offer. Presumption after all is a principle of law directing that if a party proves certain facts called the basic, foundational, or underlying facts—an inferential additional fact is accepted as presumed fact. A presumption is not evidence, but operates as substitute for evidence. In law, to 'presume' means 'to take as proved until evidence is introduced tending to rebut the presumed fact.' Presumption of fact is an inference drawn under Section 114 of the Evidence Act. The court is not bound to draw any presumption of fact and it is within its discretion to draw presumption or not.

24. Under Section 13(1)(d) of the P.C. Act the very *obtainment* by demand of illegal gratification and its acceptance completes the offence. No more fact needs to be proved by drawing inference from the proved foundational facts. Therefore, Section 20 does not apply in cases under Section 13(1)(d) of the P.C. Act.

25. In cases where there is evidence of demand having been made, before the offer and acceptance of bribe in trap case, it will not mean that since there is an element of demand, therefore Section 7 will not apply. In such cases both Section 7 and Section 13(1)(d) will be made out. It has been held in ***State v. A. Parthiban*, (2006) 11 SCC 473**

> **8.** Every acceptance of illegal gratification whether preceded by a demand or not, would be covered by Section 7 of the Act. But if the acceptance of an illegal gratification is in pursuance of a demand by the public servant, then it would also fall under Section 13(1)(*d*) of the Act.

26. Once there is direct evidence in a trap case, of offer and acceptance of bribe, statutory mandatory presumption under Section 20 shall be raised. Situation will not be altered merely because of preceding demand. Demand will not drive out the case out from the fold of Section 7. It has therefore held in Neeraj Dutta case (supra)

> **88.4.** (*d*) In order to prove the fact in issue, namely, the demand and acceptance of illegal gratification by the public servant, the following aspects have to be borne in mind:
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> (*i*) if there is an *offer to pay by the bribe-giver* without there being any demand from the public servant and the latter simply accepts the offer and receives the illegal gratification, it is a *case of acceptance* as per Section 7 of the Act. In such a case, there need not be a prior demand by the public servant.
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> (*ii*) On the other hand, *if the public servant makes a demand* and the bribe-giver accepts the demand and tenders the demanded gratification which in turn is received by the public servant, it is *a case of obtainment*. In the case of obtainment, the prior demand for illegal gratification emanates from the public servant. This is an offence under Sections 13(1)(*d*)(*i*) and (*ii*) of the Act.
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> (*iii*) In both cases of (*i*) and (*ii*) above, the offer by the bribe-giver and the demand by the public servant respectively have to be proved by the prosecution as a fact in issue. In other words, mere acceptance or receipt of an illegal gratification without anything more would not make it an offence under Section 7 or Sections 13(1)(*d*)(*i*) and (*ii*), respectively of the Act. Therefore, under Section 7 of the Act, in order to bring home the offence, there must be an offer which emanates from the bribe-giver which is accepted by the public servant which would make it an offence. Similarly, a prior demand by the public servant when accepted by the bribe-giver and in turn there is a payment made which is received by the public servant, would be an offence of obtainment under Sections 13(1)(*d*)(*i*) and (*ii*) of the Act.

27. In the present case there is direct evidence of the complainant that demand had been made, by the accused. Offer and acceptance has also been proved by direct evidence of the trap team, documentary evidence of the seizure list, post-trap memorandum, material exhibits of the seizure of currency notes etc. and the CFSL report the chemical analysis test of Sodium Bicarbonate and Phenolphthalein. These prove both demand, offer, acceptance and recovery of the tainted money.

28. There is no presumption of law that the testimony of official witnesses should be approached with initial distrust. The presumption of fact is the other way round that the official acts have been duly conducted unless and until there is material to show that the testimony of the official witnesses are not worthy of trust, the same cannot be discarded. It has been held in **Sathyan Vs State of Kerala 2023 SCC On Line SC 986** that the law is well settled that if the evidence of such a police officer is found to be reliable, trustworthy then basing the conviction thereupon, cannot be questioned, and the same shall stand on firm ground.

29. In view of the above discussion this Court is of the view that there is no infirmity in the Judgment of conviction under Sections 7 and Section 13(2) read with Section 13(1)(d) of the P.C Act.

30. On the point of sentence it has been rightly argued by the learned Senior Counsel on behalf of the appellant there is an error in sentencing the convict both under Section 7 and 13 (2). While there is no bar to conviction under both these sections, however sentence cannot be imposed under both these Sections in view of Section 71 of the I.P.C. It has been held in ***State v. A. Parthiban*, (2006) 11 SCC 473**

> **5.** The stand that the respondent could not have been simultaneously convicted for the offences relatable to Section 7 and Section 13(2) read with Section 13(1)(*d*) of the Act, as held by the High Court is clearly unacceptable. Section 71 IPC provides the complete answer. The same reads as follows:
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> "71. *Limit of punishment of offence made up of several offences.*—Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such of his offences, unless it be so expressly provided.
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> Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or
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> where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence,
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> the offender shall not be punished with a more severe punishment than the court which tries him could award for any one of such offences."

On the point of sentence, considering the age and the criminal antecedent as well as protracted nature of litigation, a sentence of RI for one year under Section 7 of the P.C. Act, with a fine of Rs 10,000/- will meet the ends of justice. In default of payment of fine, the appellant shall undergo simple imprisonment of three months.

Criminal Appeal is dismissed with modification of sentence. Bail earlier granted is cancelled and the Appellant is directed to surrender before the learned Court below within two weeks of the order.

Let L.C.R. along with a copy of this Judgment be sent to the court concerned at once.

(Gautam Kumar Choudhary, J.)

Jharkhand High Court, Ranchi
Dated, 6th March, 2024
NAFR/AKT/Sandeep/Anit