IN THE HIGH COURT OF ORISSA, CUTTACK

CRLA No. 172 of 2007

Appeal from the judgment and order dated 22.03.2007 passed by the Special Judge (Vigilance), Berhampur, Ganjam in G.R. Case No. 38 of 1998 (V)/T.R. No.73 of 2000.

Pradeepta Kumar Praharaj ……… Appellant

-Versus-

State of Odisha (Vig.) ……… Respondent

For Appellant: - Mr. Satya Smruti Mohanty

For Respondent: - Mr. M.S. Rizvi
Addl. Standing Counsel
(Vigilance)

P R E S E N T:

THE HONOURABLE MR. JUSTICE S.K. SAHOO

Date of Argument: 03.08.2023 Date of Judgment: 21.08.2023

S.K. SAHOO, J. The appellant Pradeepta Kumar Praharaj faced trial in the Court of learned Special Judge (Vigilance), Berhampur, Ganjam in G.R. Case No. 38 of 1998 (V)/T.R. No.73 of 2000 for offences punishable under section 7 and section 13(2) read with section 13(1)(d) of the Prevention of Corruption Act, 1988 (hereinafter '1988 Act') on the accusation that on 14.09.1998

being a public servant employed as an Asst. Surgeon in Project Hospital, Khatiguda in the district of Nabarangpur, he accepted Rs.300/- (rupees three hundred only) from the informant Gajendra Nayak (P.W.5) by way of illegal gratification, other than legal remuneration as a motive or reward for doing an official act i.e. for issuing his medico-legal opinion in respect of the injury sustained by the informant and obtained pecuniary advantage of such amount from P.W.5 by corrupt or illegal means and thereby abused his position as a public servant.

The learned trial Court vide impugned judgment and order dated 22.03.2007 found the appellant guilty of the offences charged and sentenced him to undergo R.I. for six months and to pay a fine of Rs.1,000/-, in default, to undergo R.I. for three months more for the offence under section 7 of the 1988 Act and further to undergo R.I. for one year and to pay a fine of Rs.2,000/-, in default, to undergo R.I. for six months more for the offence under section 13(2) read with section 13(1)(d) of the 1988 Act and both the substantive sentences of imprisonment were directed to run concurrently.

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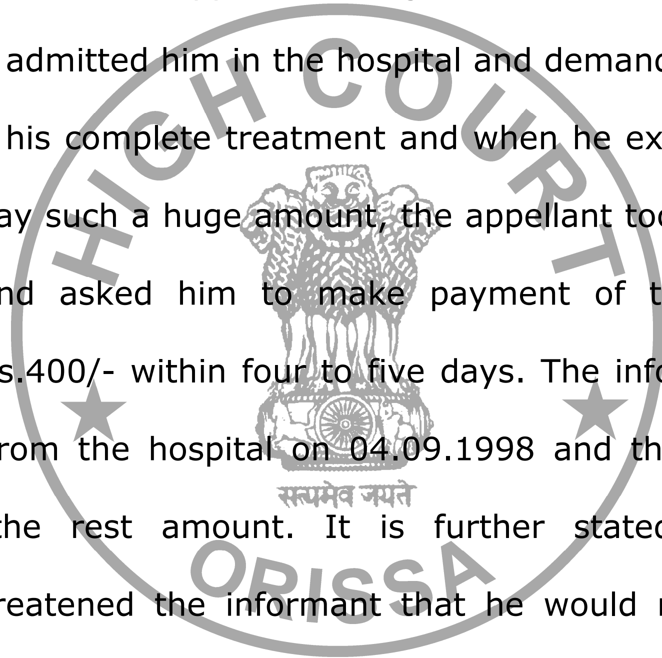
<u>The Prosecution Case</u>:

2. The factual matrix of the prosecution case, as per the written report presented by P.W.5 Gajendra Nayak before

the Deputy Superintendent of Police, Vigilance, Jeypore on 13.09.1998 is that on 23.08.1998, he had been to village Upara Gadigaon under Khatiguda police station to see his relatives and one Prabhudan Harijan of that village had assaulted him there by means of a 'Tenta' causing severe bleeding injury on his right palm. Thereafter, he reported the matter at Khatiguda Police Station and the investigating officer sent him to Project Hospital, Khatiguda for his medical examination and treatment. It is further stated that the appellant being the Medical Officer of the said hospital admitted him in the hospital and demanded bribe of Rs.500/- for his complete treatment and when he expressed his inability to pay such a huge amount, the appellant took Rs.100/- from him and asked him to make payment of the balance amount of Rs.400/- within four to five days. The informant was discharged from the hospital on 04.09.1998 and the appellant demanded the rest amount. It is further stated that the appellant threatened the informant that he would not issue a favourable medical certificate and shall abstain from making further treatment unless the balance amount of Rs.400/- is paid to him. It is also stated in the written report that the appellant asked the informant to pay Rs.300/- by 14.09.1998 and finding no other option, the informant arranged Rs.300/- and reported



the matter before the Deputy Superintendent of Vigilance, Jeypore.

On the basis of such written report, Berhampur Vigilance P.S. Case No. 38 of 1998 was registered under section 7 and section 13(2) read with section 13(1)(d) of the 1988 Act and D.S.P. (Vigilance) directed P.W.6 Bijoy Kumar Jena, Inspector, Vigilance, Nawarangpur to detect the case by laying a trap and to investigate the case.

On 14.09.1998 a preparation for the trap was held at the Vigilance Squad Office, Nawarangpur. Requisitions were sent to two Government independent witnesses and P.W.5 was asked to reach the Vigilance Squad Office, Nawarangpur. In presence of all the witnesses and Vigilance Officers, P.W.5 was introduced to the trap party members and he narrated the F.I.R. story before the witnesses and also produced six nos. of fifty rupee G.C. notes to be used in the trap. The numbers of the G.C. notes were noted down by the official witnesses. A demonstration relating to the reaction of phenolphthalein powder with sodium carbonate solution was made and the sample chemical liquid was collected in empty bottle and it was sealed. The G.C. notes were smeared with phenolphthalein powder and it was handed over to P.W.5 with instruction to give it to the appellant only on

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demand. A preparation report (Ext.2) was made and the trap party members signed thereon. P.W.3 K. Prasad Rao was asked by the trap laying officer (P.W.6) to accompany P.W.5 to act as over hearing witness, to see the receipt of tainted notes by the appellant from P.W.5 and then to relay signal to the trap party members.

After preparation of the trap, except P.W.4, the other members of the trap party proceeded towards the Project Hospital, Khatiguda in a Government Jeep. On 11.09.1998 at about 11.10 a.m. they arrived at Khatiguda and the jeep was parked at the back side of the said hospital and P.W.5, the accompanying witness P.W.3 and Tumbeswar Nayak, the brother of P.W.5, who were waiting there, were instructed to proceed ahead to the hospital by walking and accordingly, they proceeded towards the premises of the Project Hospital. Some members of the trap party entered into the premises of the hospital and keeping positions, waited for the signal. Some members of the trap party remained outside the hospital. At about 12.10 p.m. getting the pre-arranged signal of the accompanying witness P.W.3, the trap party members, who were inside the premises of the hospital, rushed to the spot and the other members of the trap party immediately followed them. The

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appellant was found sitting on his chair whereas the informant (P.W.5) and his brother were found near the entrance door of the office of the appellant. P.W.6 challenged the appellant, after disclosing his identity and the identities of other members of the trap party, to have demanded and accepted Rs.300/- from P.W.5. The appellant denied to have demanded and accepted any bribe from P.W.5. A.S.I. A. Mohanty (not examined) was asked to prepare solution of sodium carbonate in two separate glasses of water. The appellant was asked to dip his fingers of both the hands in the solution, but no change of colour of solution was visible to the naked eyes. P.W.6 preserved the samples of the hand wash and when the appellant denied to have received bribe from P.W.5, P.W.6 interrogated P.W.5 and the accompanying witnesses. P.W.5 stated before them that he along with his brother waited for about one hour as per the direction of the appellant and met him in the office room when all the patients were disposed of. The appellant thereafter demanded money and asked him to keep the same on his table and on receipt of which the appellant prepared the injury report and handed over to him. P.W.6 thereafter searched the places as per the version of P.W.5 and his brother and found the tainted G.C. notes under the table calendar lying on the office table of

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the appellant. The official witnesses verified the numbers and compared their initials, which tallied. P.W.6 seized the tainted G.C. notes along with the calendar frame from the office table of the appellant, the calendar frame was taken and the same was tested with the solution of sodium carbonate which turned to rose pink. The sample was preserved for chemical examination. P.W.6 seized the injury certificate given by the appellant to P.W.5, on production by him, in presence of the official witnesses. P.W.6 interrogated the witnesses, seized the bribe money, the injury report of P.W.5 and other connected documents under different seizure lists and prepared the detection report (Ext.6). On completion of investigation, P.W.7 submitted charge sheet on 09.03.2000 against the appellant under sections 7 and 13(2) read with 13(1)(d) of the 1988 Act.

3. The defence plea of the appellant was one of complete denial of the occurrence and it was pleaded that he was a member of the Committee relating to Rehabilitation, Resettlement and Age Determination and one Tumbeswar Nayak, the brother of P.W.5 appeared before the said Committee and the said Committee had overruled his claim relating to his age for which a trap case has been foisted against him.

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<u>**Witnesses & Exhibits**</u>:

4. In order to prove its case, the prosecution examined seven witnesses.

P.W.1 Pravakar Panda was working as a Senior Clerk in the office of the Chief Medical Officer, Upper Indravati Project Hospital, Khatiguda and he is a witness to the seizure of duplicate service book of the appellant as per seizure list vide Ext.1.

P.W.2 Dibakar Behera was working as Senior Clerk in the office of I.T.D.A., Nawarangpur and he was a member of the trap party and a witness to the preparation report vide Ext.2. He also stated about the recovery of the tainted G.C. notes on the table of the appellant under a table calendar. He is also a witness to the seizure of G.C. notes as per seizure list Ext.3, seizure of medical certificate of P.W.5 as per seizure list Ext.5 and detection report as per seizure list Ext.6.

P.W.3 K. Prasad Rao, who was working as Senior Clerk in the office of the Sub-Collector, Nawarangpur, stated about the preparation for the trap. He acted as an over hearing witness to the trap. He also stated about recovery of tainted G.C. notes beneath the calendar of the table of the appellant. He proved the preparation report (Ext.2), detection repot (Ext.6)

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and seizure of paper chit containing the numbers of the G.C. notes as per seizure list Ext.7.

P.W.4 Basanta Kumar Swain, who was attached as Constable in the office of Inspector of Vigilance, Nawarangpur, stated that as per the direction of the I.O., he prepared the pre-trap chemical solution and tested the G.C. notes in presence of independent witness.

P.W.5 Gajendra Nayak is the informant in the case, who stated about the demand of money by the appellant for issuance of medical certificate in his favour. He has proved the written report marked as Ext.8. He stated about putting the tainted G.C. notes on the table of the appellant as per the instruction of the trap members.

P.W.6 Bijaya Kumar Jena was the Inspector of Vigilance, Nawarangpur and the initial investigating officer of the case, who stated about the preparation for trap, receipt of signal from P.W.5, about recovery of tainted G.C. notes beneath the calendar on the table of the appellant. He has proved the seized G.C. notes as per seizure list Ext.3, the medical certificate issued in favour of P.W.5 as per seizure list Ext.4, the injury report and bed-head ticket as per seizure list Ext.5, the detection report (Ext.6) and the chemical examintion report vide Ext.11.

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P.W.7 Arjuna Bhoi, was the Inspector of Vigilance, Bhawanipatna, who took over the charge of investigation from P.W.6 and on completion of investigation, he submitted charge sheet on 09.03.2000.

The prosecution exhibited fifteen documents. Exts.1, 4, 5 and 7 are the seizure lists, Ext.1/2 is the zimanama, Ext.2 is the preparation report, Ext.6 is the detection report, Ext.8 is the written report, Ext.9 is the paper chit, Ext.10 is the injury report, Ext.11 is the chemical examination report, Ext.12 is the sanction order, Ext.13 is the bed head ticket, Ext.14 is the medical certificate and Ext.15 is the calendar.

The prosecution proved six material objects. M.O.I, M.O.II and M.O. IV are the sample bottles, M.O.III is the packet containing the G.C. notes and M.O.VI is the calendar.

One witness has been examined on behalf of the defence. D.W.1 Suresh Chandra Mohapatra who was working as Senior Clerk in the office of the Project Director, R & R, U.I.H.E.P., Khatiguda, produced the proceedings of the age determination committee of village Benakhamara and a list of persons entitled to get compensation as per the rehabilitation policy of the Government in the submerged area vide Ext.A.

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Findings of the Trial Court:

5. The learned trial Court, after assessing the evidence on record, came to hold that the evidence of the decoy that the appellant had been demanding bribe for issuance of a favourable medical certificate finds sufficient corroboration from the evidence of P.Ws.2, 3, 4, 5 and 6 and further held that the circumstance that a favourable injury report was essential for supporting the plea of assault to the decoy (P.W.5) gives further credence to the prosecution case that the appellant had been demanding bribe for issuance of such certificate to P.W.5. The learned trial Court further held that the appellant, after demanding and accepting the bribe, has issued the medical certificate in favour of P.W.5 to show official favour. With regard to validity of sanction, learned trial Court has held that the Government of Odisha has rightly accorded sanction for launching prosecution against the appellant being satisfied with regard to existence of prima facie case and further held that the prosecution has ably proved the case against the appellant beyond all reasonable doubts.

Contentions of the Parties:

6. Mr. Satya Smruti Mohanty, learned counsel appearing for the appellant urged that there are number of

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discrepancies in the story narrated in the F.I.R. and the evidence adduced by the informant (P.W.5) in the Court. The learned counsel pointed out that though the informant has stated in the F.I.R. that he was treated for eleven days in the hospital and was discharged on 04.09.1998, but during the examination-in-chief, he stated that he was in the hospital for only nine days. However, the bed head ticket (Ext.13) shows the date of discharge to be 28.08.1998. Further, he argued that though the amount of demand in the F.I.R. was stated to be Rs. 400/-, but in the examination in-chief, the informant stated that the appellant demanded Rs.300/-. With regard to pre-trial preparation, the informant has stated in the deposition that three days after lodging the F.I.R., he visited the Vigilance office where he met the witnesses for preparation of the trap. However, the record reveals that F.I.R. was reported on 13.09.1998, registered on 14.09.1998 and the trap was conducted on the very same day i.e., 14.08.1998. Again, he highlighted, with regard to the demand, the F.I.R. story indicates that on 04.09.1998, the appellant demanded the balance amount of Rs.400/- and threatened to the informant that unless the same is paid, he would not issue a favourable injury report and will not continue with the treatment of the informant.

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However, during the cross-examination, the informant has categorically stated that the appellant-doctor did not charge any money for his treatment and he did not pay any money. Mr. Mohanty, the learned counsel for the appellant further argued that the informant (P.W.5) in the examination-in-chief has not uttered a single word on the issue of chemical test or regarding any demonstration or sealing and preservation of the hand wash solution and he has been declared hostile by the prosecution and P.W.3, the overhearing witness has also not stated anything about the chemical test, the sealing and preservation of the solution, although the said witness is a vital one for the prosecution and has signed on various other seizure lists containing the tainted notes and other documents. Further, he brought to the notice of the Court that P.W.2, though has stated that the hand wash of the appellant did not change colour, but he has not stated anything about the manner in which the said solution was preserved and sealed. The counsel further submitted that P.W.6, the T.L.O. has stated about preparation of chemical solution and asking the appellant to dip his hands in the said solution and that the solution in both the glasses did not change colour, but he has not narrated the method and the procedure followed for sealing and preservation of these

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solutions. Also, he stated that the forwarding report of the Chemical Examiner reveals that the specimen seal used in sealing bottles marked as Exhibits I to V in presence of Sri Balaram Patra, O.A.S., O.I.C., Election Section, Collectorate, Nabarangpur, in whose custody the seal has been kept, however, Sri Patra was neither a member of the trap laying party nor was he present at the time of taking of the hand wash of the appellant and also, he was not examined by the prosecution during trial. Therefore, there is no cogent material that the solution bottles were sealed at the time of trap rather it appears that the same was done subsequently at the office of the Vigilance Department and as such tampering of the exhibits cannot be ruled out.

Mr. M.S. Rizvi, learned Standing Counsel appearing for the Vigilance Department, on the other hand, contended that there is no infirmity or illegality in the impugned judgment of the learned trial Court and the prosecution has proved all the three aspects i.e. demand, acceptance and recovery of bribe money and the explanation of the appellant that a false trap case has been foisted upon him since he was a member of the Rehabilitation, Resettlement & Age Determination Committee, in which the brother of the informant was not found suitable for

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getting compensation, is not acceptable. The learned counsel for the Vigilance Department relied upon the decisions of the Hon'ble Supreme Court in the cases of **Vinod Kumar -Vrs.- State of Punjab reported in (2015) 3 Supreme Court Cases 220** and **Neeraj Dutta -Vrs.- State (Govt. of N.C.T. of Delhi) reported in (2013) 4 Supreme Court Cases 731** and contended that the appeal should be dismissed.

<u>Analysis of the Evidence</u>:

7. **<u>Occasion for demand of bribe</u>**:

Adverting to the contentions raised by the learned counsel for both the parties and on careful perusal of the depositions of witnesses and the documents proved by both the sides, it is apposite to weigh the circumstances and the evidence available on record. It is mentioned in the F.I.R. that the appellant had demanded bribe from the informant (P.W.5) on 04.09.1998 for issuance of favourable injury report to the police and for completing the treatment of the informant. However, the bed head ticket of P.W.5 shows that he was treated and discharged from Project Hospital, Khatiguda on 28.08.1998 i.e. almost a week before the alleged demand and thus, there was no occasion for the appellant to raise a demand of bribe on 04.09.1998 for completing the treatment of P.W.5.

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Similarly, the reverse of the medical requisition, which has been marked as Ext.10, contains the injury report which is signed by the appellant on 24.08.1998 and duly sent to the police station. There is no evidence that the preparation and dispatch of the injury report was deliberately delayed by the appellant. Hence, it is apparent that there was no occasion for the appellant to demand the bribe amount for a favourable injury report on 04.09.1998. It is but natural that if someone has demanded a bribe for doing certain official work for someone and expecting the bribe to be fulfilled, he would delay the completion of such work till he receives the same.

7.1. **Demand and acceptance:**

Now, coming to the demand and acceptance of bribe money of Rs.300/- from P.W.5 by the appellant, this Court in the cases of **Shri Satyananda Pani -Vrs.- State of Orissa (Vig) reported in (2018) 125 CLT 339** and **Rajeev Ranjan -Vrs.- Republic of India reported in (2023) 1 CLT (CRI) (Supp) 410** considering the observations made in **Suraj Mal -Vrs.- The State (Delhi Administration) reported in 1979 Criminal Law Journal 1087**, has been pleased to hold as follows:

> "The principle of law that emerges from the views expressed by different Courts including the Hon'ble Supreme Court in the above decisions

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placed by both the parties is that mere receipt of the amount by the accused is not sufficient to fasten guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification. In order to constitute an offence under section 7 of 1988 Act, proof of demand is a sine qua non.

xx xx xx

It is only when this initial burden regarding demand and acceptance of illegal gratification is successfully discharged by the prosecution, then burden of proving the defence shifts upon the accused and a presumption would arise under section 20 of the 1988 Act. The proof of demand of illegal gratification is the gravamen of the offence under sections 7 and 13(1)(d)(i) and (ii) of 1988 Act and in absence thereof, unmistakably the charge therefore, would fail. Mere acceptance of any amount allegedly by way of illegal gratification or recovery thereof, de hors the proof of demand, ipso facto, would thus not be sufficient to bring home the charge under these two sections of the Act. As a corollary, failure of the prosecution to prove the demand for illegal gratification would be fatal and mere recovery of the amount from the person accused of the offence under sections 7 or 13 of the Act would not entail his conviction thereunder."

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P.W.5, the informant in his examination in-chief has stated that he kept the money as per the instruction of the appellant-doctor on his table. However, in the cross-examination, P.W.5 has firmly denied about the factum of any demand of money made by the appellant for his treatment and stated that he did not pay anything for the treatment given to him and the appellant discharged him from the hospital after his treatment was over. Apart from the sole evidence of P.W.5 in his examination-in-chief that he kept the tainted notes as per the instruction of the appellant, which has been retracted in the cross-examination, no other evidence has been adduced by the prosecution to prove or corroborate the demand and acceptance of the illegal gratification by the appellant.

P.W.3 K. Prasad Rao was directed by the T.L.O. (P.W.6) to accompany and overhear the conversation between the appellant and the informant (P.W.5) and to give signal by combing his hair by means of his hand in the event of receipt of bribe money by the appellant from P.W.5, but P.W.3 has stated that he did not hear the appellant demanding any money and has also not seen him accepting the tainted G.C. notes. He has simply stated that after reaching Khatiguda hospital, he found the appellant-doctor sitting in his chamber and upon seeing the

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appellant, P.W.5 kept the tainted notes on the table of the appellant and came and told him that he kept the money on the table of the appellant and at this, P.W.3 gave pre-arranged signal and upon getting his signal, other witnesses and vigilance officials rushed to the spot. P.W.3 has not been declared hostile by the prosecution. In the cross-examination, he has stated that P.W.5 along with his brother entered inside the room of the appellant and he remained outside the room and that he could not say anything in what manner the money transaction relating to the tainted G.C. notes happened in the room of the appellant as he was present outside the room. Therefore, P.W.3 only saw the informant keeping the money on the table of the appellant without there being any demand or acceptance of the same by the appellant. It is not understood as to why in spite of specific instruction being given to him to accompany P.W.5, to overhear the conversation and after acceptance of the bribe money by the appellant, to relay the signal to the trap party members, he remained outside the room. The brother of P.W.5, namely, Tumbeswar Nayak who according to P.W.3 also entered into the room of the appellant on the date of occurrence with P.W.5 has not been examined by the prosecution even though he is the charge sheet witness no.2 in the case. His evidence would have

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lent corroboration to the evidence of P.W.5 as he was closer to the appellant at the relevant point of time when P.W.5 allegedly kept the tainted notes on the table of the appellant on the instruction of the appellant. P.W.3 has not stated that when P.W.5 came out of the room of the appellant and told him that he kept the money on the table of the appellant, the appellant also told him that the same was done as per the instruction of the appellant. Therefore, there is no acceptable evidence that as per the instruction of the appellant, the tainted money was kept by P.W.5 on the table of the appellant below the table calendar.

On the issue of overhearing witness, this Court in the case of **Sushil Kumar Pati -Vrs.- State of Orissa, reported in (2018) 71 Orissa Criminal Reports 436** has observed as follows:

> "The overhearing witness (P.W.2) is completely silent regarding any demand stated to have been made by the appellant to P.W.3 even though he remained outside the room near the door of room no.34 which was open and there was a curtain on the entrance door of the room. P.W.3 has stated that no patient was present either inside the room or outside. In such a situation had there been any demand by the appellant, it would not have missed the ears of P.W.2 who had accompanied P.W.3 for a specific purpose. The silence of P.W.2

> on such a material aspect speaks volumes regarding the alleged demand made inside room no.34 on 12.11.2000.”

The Hon’ble Supreme Court in the case of **K. Shanthamma -Vrs.- State of Telangana, reported in (2022) 4 Supreme Court Cases 574** has observed as follows:

> “14…………. In the pre-trap mediator report, it has been recorded that LW8, Shri R.Hari Kishan, was to accompany P.W.1 - complainant at the time of offering the bribe. P.W.7 Shri P.V.S.S.P. Raju deposed that P.W.8 Shri U.V.S. Raju, the Deputy Superintendent of Police, ACB, had instructed LW8 to accompany P.W.1 - complainant inside the chamber of the appellant. P.W.8 has accepted this fact by stating in the examination-in-chief that LW8 was asked to accompany P.W.1 and observe what transpires between the appellant and P.W.1. P.W.8, in his evidence, accepted that only P.W.1 entered the chamber of the appellant and LW8 waited outside the chamber. Even P.W.7 admitted in the cross-examination that when P.W.1 entered the appellant’s chamber, LW8 remained outside in the corridor. Thus, LW8 was supposed to be an independent witness accompanying P.W.1. In breach of the directions issued to him by P.W.8, he did not accompany P.W.1 inside the chamber of the appellant, and he waited outside the chamber in the corridor. The

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> prosecution offered no explanation why LW8 did not accompany P.W.1 inside the chamber of the appellant at the time of the trap."

P.W.3 did not enter into the room of the appellant, did not hear any conversation between P.W.5 and the appellant, did not see the acceptance of the tainted notes by the appellant but only stated to have seen P.W.5 keeping the tainted G.C. notes on the table of the appellant and coming back. The prosecution being satisfied with his evidence has not declared him 'hostile' nor put him any questions with the permission of the Court invoking the provision under section 154 of the Evidence Act. The evidence of P.W.3 coupled with the evidence of P.W.5 makes the demand and acceptance of bribe money by the appellant a doubtful feature.

Law is well settled that mere recovery of the bribe amount from the accused is not sufficient to fasten guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification. In order to constitute an offence under section 7 of 1988 Act, proof of demand is a sine qua non. The burden rests on the accused to displace the statutory presumption raised under section 20 of the 1988 Act by bringing on record evidence, either direct or circumstantial, to

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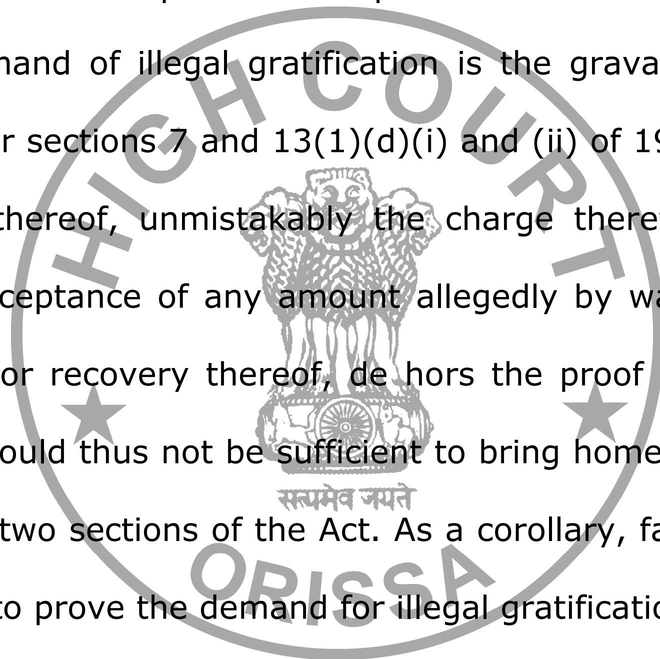
establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in section 7 of the 1988 Act. For arriving at the conclusion as to whether all the ingredients of the offence i.e. demand, acceptance and recovery of illegal gratification have been satisfied or not, the Court must take into consideration the facts and circumstances brought on the record in their entirety. The standard of burden of proof on the accused vis-à-vis the standard of burden of proof on the prosecution would differ. The proof of demand of illegal gratification is the gravamen of the offence under sections 7 and 13(1)(d)(i) and (ii) of 1988 Act and in absence thereof, unmistakably the charge therefore, would fail. Mere acceptance of any amount allegedly by way of illegal gratification or recovery thereof, de hors the proof of demand, ipso facto, would thus not be sufficient to bring home the charge under these two sections of the Act. As a corollary, failure of the prosecution to prove the demand for illegal gratification would be fatal and mere recovery of the amount from the person accused of the offence under sections 7 or 13 of the Act would not entail his conviction thereunder. The evidence of the informant should be corroborated in material particulars. Even if the trap witnesses turn hostile or are found not to be independent, if the



evidence of the informant and the other circumstantial evidence on record are found to be consistent with the guilt of the accused and not consistent with his innocence, there should be no difficulty for the Court in upholding the prosecution case. The trial Court which has the occasion to see the demeanour of the witnesses is no doubt in a better position to appreciate it and the Appellate Court should not lightly brush aside the appreciation done by the trial Court except for cogent reasons. (**Ref:- B. Jayaraj -Vrs.- State of Andhra Pradesh reported in (2014) 13 Supreme Court Cases 55, Bhagirathi Pera -Vrs.- State of Orissa reported in (2014) 58 Orissa Criminal Reports 566, M.R. Purushotham -Vrs.- State of Karnataka reported in (2015) 3 Supreme Court Cases 247, State of Punjab -Vrs.- Madan Mohan Lal Verma reported in A.I.R. 2013 Supreme Court 3368, State of Maharashtra -Vrs.- Dnyaneshwar reported in (2009) 44 Orissa Criminal Reports 425, Punjabrao -Vrs.- State of Maharashtra reported in A.I.R. 2002 Supreme Court 486, V. Sejappa -Vrs.- State reported in A.I.R. 2016 S.C. 2045, Panalal Damodar Rathi -Vrs.- State of Maharashtra reported in A.I.R. 1979 S.C. 1191, Mukhitar Singh -Vrs.- State of**

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Punjab reported in (2016) 64 Orissa Criminal Reports (S.C.) 1016).

In case of **Krishan Chander -Vrs.- State of Delhi reported in (2016) 3 Supreme Court Cases 108**, it is held that the demand for the bribe money is sine qua non to convict the accused for the offences punishable under sections 7 and 13(1)(d) read with section 13(2) of the 1988 Act. In case of **P. Satyanarayana Murthy -Vrs.- District Inspector of Police reported in (2015) 10 Supreme Court Cases 152**, it is held that the proof of demand is an indispensable essentiality and of permeating mandate for an offence under sections 7 and 13 of the Act. Qua section 20 of the Act, which permits a presumption as envisaged therein, it has been held that while it is extendable only to an offence under section 7 and not to those under section 13(1)(d)(i) & (ii) of the Act, it is contingent as well on the proof of acceptance of illegal gratification for doing or forbearing to do any official act. Such proof of acceptance of illegal gratification, it was emphasized, could follow only if there was proof of demand. Axiomatically, it was held that in absence of proof of demand, such legal presumption under section 20 of the Act would also not arise.

In the case in hand, it is reflected from the bed-head ticket that the informant (P.W.5) was discharged from the hospital on 28.08.1998. In his F.I.R., P.W.5 has alleged that the appellant demanded illegal gratification on 04.09.1998. However, it is already discussed that the demand of bribe money by the appellant almost seven days after he discharged P.W.5 from the hospital is a doubtful feature, particularly when the injury report had also been prepared and there is no evidence of its delayed dispatch to police. In the face of such inherent improbability and in absence of any clinching evidence, the demand of bribe prior to the date of trap cannot be accepted. P.W.5 has stated that the appellant did not charge any money for his treatment and though he did not pay any money to the appellant, he treated him and discharged him from the hospital. The evidence of P.W.5 that as per the instruction of the appellant, he kept the tainted money on the table of the appellant is also not acceptable as has already been discussed. Therefore, not only the demand but also the acceptance of tainted money by the appellant is a doubtful feature in this case and merely because the tainted money was recovered below the table calendar of the appellant, it cannot be said that the appellant demanded and accepted the money and that keeping

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of the money by P.W.5 was within the knowledge of the appellant.

7.2. **<u>Preservation of hand wash of the appellant in safe custody</u>**:

Though some of the witnesses have stated that the hand wash of the appellant was taken in chemical solution and the colour of the solution did not change but no evidence was adduced by the prosecution as to the procedure of seizure and preservation of the hand wash solution. Further, there is no statement on record either of the I.O. or the decoy or the overhearing witnesses or other trap laying witnesses about the manner of sealing the bottles containing the hand wash solution and the use of brass seal in sealing the bottles and there is no oral evidence adduced as to in whose zima the brass seal was kept. If the hand wash solution is not properly sealed at the spot itself with paper seal containing signature of the witnesses and the same is retained in the vigilance office or at any other place without proper sealing, without evidence of its safe custody prior to its production before the Court, there would be chances of tampering with the same. Similarly, belated production of the seized sample bottles in Court raises question mark regarding the conduct of the prosecution. In such cases, even if the chemical examination report finding favours the prosecution case

and phenolphthalein is detected in the exhibits, still then the Court may doubt about the authenticity of such report and in appropriate cases, may not place implicit reliance on the findings of such report where tampering with the solution seized at the spot before its production in Court cannot be ruled out. It is a settled principle of law that apart from the factum of hand wash of the accused being taken properly following due procedure of law in presence of witnesses, it is also the duty of the prosecution to establish and cover the entire path right from the beginning by adducing cogent, reliable and unimpeachable evidence that the hand wash solution of the accused was properly sealed, preserved and there was no chance of tampering with the same during its retention by the investigating agency before being produced in Court for sending it to the chemical examiner.

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In the case in hand, when the prosecution has failed to prove that the seized solution was sealed at the spot rather it appears that it was sealed in the vigilance office in the presence of one Shri Balaram Patra, O.A.S. and there is no evidence as to whose seal was used in sealing the solution, where the seal was kept and in what manner the solution was preserved, it can be said that the prosecution has failed to cover the entire path right

from the hand wash being taken, its sealing, preservation of the solution, its production in Court and forwarding of the sample to the chemical examiner for analysis by clinching evidence to rule out tampering with the same and therefore, the chemical examination report which has been relied upon heavily by the learned trial Court cannot and should not form the basis for convicting the appellant. It is pertinent to note that the failure of the prosecution in examining Shri Balaram Patra, who stated to have taken the custody of the seal and had witnessed the procedure of sealing as per the forwarding report, raises doubts on the prosecution case. Even though the hand wash taken stated to have contained phenolphthalein as per the chemical examination report (Ext.11) but in view of the suspicious feature relating to sealing and preservation of the sample before its production in Court, no importance can be attached to such report.

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Relevance of the conduct of the appellant:

7.3. It is relevant to state here that P.W.2 in his evidence has stated that after arrival in the office of the appellant, Vigilance Inspector caught hold of both the hands of the appellant and challenged him to have accepted bribe, but the appellant refused to have received any bribe from the informant.

Similarly, P.W.3 in his cross-examination has stated that when the Vigilance Officer asked the appellant if he had received the money, the appellant told that neither he demanded any money from the informant nor the informant offered any money to him. P.W.6 also in his examination-in-chief has stated that when he asked the appellant if he had received the bribe from the informant, the appellant outrightly denied the demand or acceptance of the bribe at the time of the trap. Therefore, the appellant has categorically, vehemently and consistently denied to have demanded or accepted the bribe at the time of the trap.

This Court in the case of **Sushil Kumar Pati** (supra) as follows:

> "When the appellant on being confronted by the trap laying officer (P.W.6) about the acceptance of bribe money, without fumbling or getting panicked gave a spontaneous explanation right at the moment when the crime is allegedly committed and there was no opportunity to fabricate such explanation or concoct a story, the explanation becomes admissible as res gestae within the meaning of Section 6 of the Evidence Act."

Therefore, taking into account the conduct of the appellant in denying confidently and consistently to have

accepted any illegal gratification which has been proved by the evidence of a number of witnesses, it can be said that his acts and reactions following the trap are relevant and constitute a chain of evidence in his favour which is admissible under section 6 of the Evidence Act. It is a contemporaneous statement made by the appellant when challenged by the vigilance officials to have demanded and accepted bribe money from P.W.5. What a prosecution witness said at or about at the time of occurrence is a part of res gestae and that can be used as a corroborative evidence of his own testimony and that is relevant and admissible.

Defence plea:

8. Now coming to the defence plea, the appellant has pleaded that as the case of the brother of P.W.5, namely, Tumbeswar Nayak was rejected by him as part of the committee which determined the age for rehabilitation and resettlement benefits for village Benakhamara, this case was falsely instituted for wreaking vengeance. D.W.1 has exhibited the original proceeding of the age determination committee dated 06.08.1994 of village Benakhamara which proves that the appellant was a member of the said Committee and the case of Tumbeswar Nayak, which stands at serial no.33, has been

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rejected. This evidence has not been dislodged by the prosecution even though in the cross-examination by the prosecution, it has been brought out that other applicants of the list were also disqualified. Law is well settled that there should not be any differentiation in evaluation of a witness's testimony depending on the party who calls him for examination. The witnesses both for the prosecution and the defence must be treated equally while evaluating their evidence. Defence can establish its case by preponderance of probabilities. Inference of preponderance of probabilities can be drawn not only from materials on record but also by reference to the circumstances upon which he relies. The learned trial Court has completely ignored and overlooked the defence plea and the evidence of D.W.1 and the documentary evidence proved by D.W.1 to show that there were chances of false implication of the appellant.

Evidentiary value of F.I.R.:

9. Even though the demand aspect has been mentioned in the F.I.R., but law is well settled as held in the case of **Madhusudan Singh -Vrs.- State of Bihar reported in A.I.R. 1995 Supreme Court 1437** that the F.I.R. does not constitute a substantive evidence, however it can be used as a previous statement for the purpose of corroboration/contradiction to the

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maker thereof. The allegation has to be proved at the trial. Conviction cannot be based only on the basis of the allegations made in the F.I.R. In case of **Utpal Das -Vrs.- State of West Bengal reported in (2010) 46 Orissa Criminal Reports (SC) 600**, it is held that the F.I.R. does not constitute substantive evidence. It can, however, only be used as a previous statement for the purposes of either corroborating its maker or for contradicting him and in such a case, the previous statement cannot be used unless the attention of witness has first been drawn to those parts by which it is proposed to contradict the witness.

Whether guilt can be presumed:

10. Learned counsel for the Vigilance Department placed reliance in the case of **Vinod Kumar** (supra), wherein it is held that if the informant turns hostile in a case of this nature, then the entire prosecution case cannot be discarded or rejected. Indeed, the above position of law is unquestionable; however, apart from the allegation made in the F.I.R., there is hardly anything for the prosecution to prove its case. In case of **Sita Ram -Vrs.- The State of Rajasthan reported in 1975 Criminal Law Journal 1224**, the evidence of the informant was rejected and it was held that there was no evidence to establish

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that the accused had received any gratification from any person. On that finding the presumption under section 4(1) of the Prevention of Corruption Act was not drawn. All that was taken as established was the recovery of certain money from the person of the accused and it was held that mere recovery of money was not enough to entitle the drawing of the presumption under section 4(1) of the Prevention of Corruption Act. In **Suraj Mal** (supra), it was held that mere recovery of money divorced from the circumstances under which it was paid was not sufficient when the substantive evidence in the case was not reliable to prove payment of bribe or to show that the accused voluntarily accepted the money.

Conclusion:

11. In the case of **Neeraj Dutta** (supra), the Hon'ble Supreme Court has been pleased to hold that the offer by the bribe giver and demand by the public servant have to be proved by the prosecution as a fact in issue. Mere acceptance or receipt of an illegal gratification without anything more would not make it an offence under section 7 or section 13(1)(d),(i) and (ii) respectively of the Act. The presumption of fact with regard to the demand and acceptance or obtainment of an illegal gratification may be made by a Court of law by way of an

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inference only when the foundational facts have been proved by relevant oral and documentary evidence and not in the absence thereof.

After careful consideration of the evidence on record, I am of the humble view that the prosecution case suffers from serious infirmities. The reasoning assigned by the learned trial Court is faulty and genuine material evidence available on record in favour of the appellant has been overlooked and it appears that the impugned judgment is one-sided in favour of the prosecution. There is no sufficient, cogent and reliable evidence available on record to establish the guilt of the appellant. In the absence of any clinching evidence relating to the demand and acceptance of the bribe money by the appellant, no guilt can be fastened upon him in a callous manner. In the circumstances, since the guilt of the appellant has not been established beyond all reasonable doubt, I am constrained to give benefit of doubt to the appellant.

In the result, the criminal appeal is allowed. The impugned judgment and order of conviction of the appellant under section 7 and section 13(2) read with section 13(1)(d) of the 1988 Act and the sentence passed thereunder is hereby set aside and the appellant is acquitted of all the charges.

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The appellant, who is on bail by order of the Court, is hereby discharged from liability of the bail bonds and the surety bonds shall also stand cancelled.

The trial Court records with a copy of this judgment be sent down to the concerned Court forthwith for information and necessary action.

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S.K.Sahoo,J.

Orissa High Court, Cuttack
The 21st August 2023/PKSahoo