AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 59 of 1999

Judgment reserved on 23.01.2023
Judgment delivered on 07.07.2023

Shatrugan Lal Verma S/o. Ghanaram Verma, aged 50 years, S.D.O. Phones, Bhopal, resident of 55/4-B, Saket Nagar, Bhopal Permanent resident of Talapara, Bilaspur (MP).

---------Appellant

VERSUS

State of Madhya Pradesh, Through CBI Jabalpur

------Respondent

For the Appellant : Mr. Somnath Verma, Advocate.

For the CBI : Mr. Himanshu Pandey, Advocate

Hon'ble Shri Justice Narendra Kumar Vyas

CAV Judgment

1. This criminal appeal preferred by the appellant under Section 374 (2) of Cr.P.C. is directed against the impugned judgment of conviction and order of sentence dated 17.12.1998 passed by Special Judge, CBI, Jabalpur in Special Criminal Case No. 31/1997 whereby the appellant stands convicted and sentenced as mentioned below:-

Conviction	Sentence	In Default
U/s. 7 of the Prevention of Corruption Act	RI for 2 years and fine of Rs. 2000/-	RI for six months
U/s. 13(1)(d) r/w 13(2) of the Prevention of Corruption Act.	RI for 2 years and fine of Rs. 2000/-	RI for six months

2. Facts of the case in brief, are that at the relevant time the appellant was working as SDO Phones at Bilaspur. Complainant Uday Kumar Sinha

(PW-1) working as Development Officer in LIC had given telephone connection from the department as the instrument was provided him was not properly working so he contacted the appellant for change of instrument. It is alleged that appellant demanded Rs. 200/- as bribe for change of instrument, as the complainant did not want to give him bribe, so he made a written complaint (Ex.P-1) to CBI Inspector and on the basis of written complaint, Vinay Kumar lodged the unnumbered FIR (Ex. P-10) in SECL guest house before the independent witnesses Anil Kumar (PW-1) and K.K. Mishra (PW-6). Both the witnesses enquired about the complaint with the complainant. Complainant has submitted tainted notes before the member of trap team and reaction of sodium carbonate was demonstrated to the complainant thereafter memorandum (Ex.P-2) was prepared. After completing all the formalities, the trap team proceeded to telephone exchange office for trap. Complainant with Anil Kumar (PW-1) entered in the chamber of appellant and on demand the complainant had given Rs. 200/- to the appellant then the appellant passed an order (Ex.P-3) to Ram Bharose (PW-2) for change of instrument. Subsequently, Ram Bharose brought the instrument with him and handed over the same to the complainant. After coming out from the office, the complainant gave a signal to member of trap team/CBI, who entered in the chamber of the appellant and cought hold the accused and prepared solution of sodium carbonate in which the left hand of the appellant was washed which turned into pink and solution was kept in the sealed bottle and marked Article C. Other hands of the appellant were washed with the solution which also turned into pink and the solution was sealed in bottle and marked Article B. The prosecution has washed the right hand of the Ram Bharose (PW-2) with sodium carbonate solution which also turned into pink and kept in sealed bottle and marked Article D. Hands of complainant Uday Sinha were washed with the solution which was kept in sealed bottle and

marked as Article E. Shirt of Ram Bharose (PW-2) was washed with solution which also turned pink and marked as Article G on it, thereafter memorandum (Ex.P-4) was prepared and signatures of the witnesses were obtained. Stock issue register was also seized. Statements of the witnesses were recorded and after completion of all the proceedings the matter was submitted before Superintendent of Police, CBI Jabalpur. S.R. Jaiswal, Superintendent of Police, CBI registered the numbered FIR (Ex.P-12) vide R.C. No. 31A/94 on 29.09.1994. All the bottles were sent to FSL, Delhi for examination and a receipt thereof was received vide Ex.P-13. After completion of investigation, charges under Sections U/s. 7 and 13(1)(d) r/w 13(2) of the Prevention of Corruption Act were levelled against the appellant and sanction for prosecution under (Ex.P-14) was received against the appellant thereafter charge sheet was filed before the Special Court.

3. In order to bring home the guilt of appellant, the prosecution has examined as many as 6 witnesses Anil Kumar (PW-1), Ram Bharose Yadav (PW-2), complainant Uday Kumar Sinha (PW-3), Vinay Kumar (PW-4), K. Nagrajan (PW-5), K. K. Mishra (PW-6). To substantiate the charges leveled against the appellant, the prosecution has exhibited the documents written complaint (Ex.P-1), memorandum (Ex.P-2), application dated 28.09.94 (Ex.P-3), Covering memo (Ex.P-4), Seizure Memo (Ex.P/5 to Ex.P/6), Stock register (Ex.P-7), list (Ex.P-8), examination of Ram Bharose (Ex.P-9), FIR (Ex.P-10), Supurdnama dated 28.09.94 (Ex.P-11), FIR (Ex.P-12), FSL Reort (Ex.P-13), Sanction for proseuction (Ex.P-14), list (Ex.P-15A), sheet for prosecution (Ex.P-15). The prosecution has exhibited Articles A-2 to A-2 I,J, and K. In question No. 13, this witness has replied and has reiterated the same stand in his defence and also exhibited statement of Ram Bharose (Ex.D-1), application dated 01.10.1994, postal receipt Ex.P-2, telegram Ex.P-3 and receipt Ex.D-1 to Ex.D-4.

4. Statement of accused/appellant has been recorded under Section 313 Cr.P.C., in which he denied the allegation leveled against him and pleaded innocence and false implication. He has stated that he has never demanded money from the complainant to change the instrument and the complainant has deliberately intented to give money and when he refused to accept the same for change of instrument then the complainant gave the money on his hand which he has thrown on the floor which subsequently was kept by Ram Bharose in his pocket. He submits that earlier Ram Bharose was made an accused thereafter he was discharged and was made witness to the case. He has reiterated that he has never demanded any money from the complainant.

5. Learned trial Court has recorded its finding that the complainant has given money to the accused/ appellant which subsequently was kept by Ram Bharose. The trial court has also recorded its finding that the money given by the complainant to the accused was not given to discharge of his duty but the money has been given for changing the telephone instrument as the appellant was working as public servant and has demanded illegal gratification of Rs. 200/- thereby the appellant committed criminal misconduct by adopting illegal means. Learned trial Court after appreciating the evidence, material on record has convicted the appellant vide judgment of conviction and order of sentence dated 17.12.1998 as mentioned above. Being aggrieved and dissatisfied with the aforesaid judgment of conviction & order of sentence, instant criminal appeal has been preferred by the appellant.

6. Counsel for the appellant would submit that the trial Court has failed to consider that sanction granted to prosecute the appellant is not valid sanction. The document and evidence on record goes to show that the sanction has not been granted by the application of mind, as such it is not a valid sanction and on the strength of invalid sanction the appellant cannot be prosecuted. He would submit that the examination of

appellant under Section 313 CrPC has not been conducted by the Court but the questions were put to accused by the reader and answers are given in his writing which is direct violation of the provisions of CrPC. He would further submit that the evidence of the prosecution witnesses do not establish that the appellant had demanded any bribe which is paramount consideration for establishing the case under Prevention of Corruption Act. He would submit that since the amount has not been seized from the appellant and was seized from Ram Bharose, therefore, the appellant should not have been convicted under Prevention of Corruption Act. He would submit that none of the prosecution witnesses who participated in the trap were independent witnesses and they were interested witnesses and would pray for quashing of judgment of conviction and order of sentence. Learned counsel for the appellant to substantiate his submission has relied upon the judgments in the cases of **Madhusudan Prasad Gutpa vs. State of MP 1981 CRILJ 571, State v Kashinath 2010 (1) AIR 706, Bhagwan Mahadeo vs. State 2011 AIR Bom R 479, Sejeppa vs. State AIR 2016 SC 2045, Mohd. Iqbal Ahmed vs. State of AP AIR 1979 SC 677, State of Maharashtra vs. Kashinath 2010 CRILJ (Noc) 544, State of Karnataka vs. Ameer Jan, AIR 2008 SC 108, Ayyasamy vs. State 1996 CRILJ 119, D. Venkatasan vs. State 1997 CRILJ 1287, Periasamy vs Inspector, Vigilance and Anti Corruption Department Tiruchirapalli 1994 CRILJ 753, Arun Prahlad Kale vs. State of Maharashtra 1992 CRILJ 1142, Jagannath Maruti Tekade vs. State of Maharashtra 1991 (1) MHLJ 976, Shivchalappa Gurumortyappa Loni vs. State of Maharashtra 1994(2) Bom CR 268, N. M. Rajendra vs State 1995 CRILJ 4195, G.V. Nanjundiah vs State (Delhi Admn.) AIR 1987 SC 2402, State of MP vs. J.B. Singh, AIR 2000 SC 3562, Ram Samukh Birju Ram Mourya vs. State of MP 2002 (2) MPLJ 85, Jagan Seshadri v. State of T.N. 2003 SCC (Cr) 1494, Mukhtiar Ahmed Ansar v. State AIR 2005 SC 2804, Ashwani Kumar vs. State of**

Punjab I (1994) CCR 395, Som Prakash vs. State of Punjab, AIR 1992 SC 665, Raghbir Singh Vs. State of Punjab AIR 19776 SC91, Subhash Parbat Sonvane v. State of Gujarat, AIR 2003 SC 2169,Jagan M. Sheshadri vs. State of T.N. 2003 SCC (Cri) 1994, Jagdish Chandra Makhija v. State of MP 1990 MPLJ 239, Banarsi Das vs. State 2010 AIR SCN 2282, State of MP vs. J.B. Singh AIR 2000 SC 3562, Banshi Lal Yadav v. State of Bihar AiR 1981 SC 1235, Smt. Meena Vs. State of Maharashtra AIR 2000 SC 3377, Man Singh v. Delhi Admn. AIR 1979 SC 1455, K. Narsimhachary vs. State, Inspector of Police, Anti Corruption Bureau 2003 CRILJ 3315, G.V. Nanjudiah vs. State of Delhi Administration AIR 1987 SC 2402, R.C. Mehta vs. State of Punjab 1971 CRILJ 1119, Subash Parbat Sonwane v. State of Gujrat AIR 2003 SC 2169 and Krishna Kumar v. State of Punjab 1978 CLR 58 (P& H) and Sukh Deo Singh vs. State 1974(II) CLR 66, D. Velayutham vs. State Rep. By inspector of Police, Salem Towan Chennai decided in Criminal Appeal No. 787 of 2011 decided on 10.02.2015, Sanatam Naskar and Anr. vs. State of West Bangal in Criminal Appeal No. 686 of 2008 decided on 8th July, 2010, P. Satyanarayana Murthy vs. Dist. Inspector of Police AIR 2015 SC 3549 and Kalicharan & Ors. vs. State of UP 2022 Live La (SC) 1027 and would pray for quashing of order of conviction.

7. On the other hand, learned counsel for the CBI opposes the submission made by counsel for the appellant and would submit that the prosecution has proved its case beyond reasonable doubt after recording the evidence of the witnesses. He would submit that the prosecution has successfully proved its case against the appellant and there is no reason to interfere with the impugned judgment. Learned counsel for the CBI to substantiate his submission has relied upon the judgments in the cases of Hazari Lal vs. State (Delhi Administration) 1980 (2) SCC 390, Ramesh Harijan vs. State of UP 2012(5) SCC 777, Prakash Singh Badal and Anr. vs. State of Punjab and Ors. (2007)1 SCC1, State of Karnataka

vs. Ameerjan (2007)11 SCC 273, Baliram S/o. Irrappa Kamble vs. State of Maharashtra (2008) 14 SCC 779, State of Maharashtra through Central Bureau of Investigation v. Mahesh G. Jain (2013) 8 SCC 119, C.K. Dasegowda and Ors. vs. State of Karnataka (2014) SCC 119, State of Bihar and Ors vs. Rajmangal Ram (2014) 11 SCC 388, L. Laxmikanta vs. State by Superintendent of Police Lokayukta (2015) 4 SCC 222, Nanjappa vs. State of Karnataka (2015) 14 SCC 186 and State of Mizoram vs. C. Sangnghina (2019) 13 SCC 335 and would pray for dismissal of appeal.

8. I have heard learned counsel for the appellant and perused the records.

9. From the above factual matrix of the case, the point to be determined by this Court is as follows:-

(I) Whether the prosecution without following procedure under Section 306 and 307 CrPC was justified in recording the evidence of accused Ram Bharose as approver if yes what will be its effect ?.

(II) Whether the prosecution has been able to prove the demand made by the appellant to attract provisions of Section 7 of the Prevention of Corruption Act beyond reasonable doubt?.

10. The prosecution to prove the guilt of the appellant has examined Anil Kumar (PW-1), in the cross-examination, this witness has stated that when the complainant asked to change the instrument then the appellant told to give application and after submitting the application by the complainant, the appellant had directed the peon, thereafter the appellant stated that whatever amount was told to give are you ready then the complainant replied yes.

11. Ram Bharose Yadav (PW-2), in examination-in-chief, stated that after bringing other set of instrument, he kept the same on the table of the accused and asked the complainant to wait when the complainant gave money to the accused thereafter the accused gave the money to him and the complainant told him that it is for tea and breakfast. The money

was given by the appellant which he was kept in his pocket.

12. Complainant Uday Kumar Sinha (PW-3) has stated in his examination-in-chief that the accused told him to give money to the peon then he took out the money from his pocket and gave to the accused which was given to the peon. This witnesses was extensively cross-examined and in paragraph-13, he has stated that the accused told him to give application then he ordered on the application and called new instrument and gave him at that time the accused had not demanded Rs. 200/-.

13. Assistant Director General Vigilance K Nagrajan (PW-5) has identified the signature and gave permission to prosecution the appellant wherein he has stated that he demanded original document and original statement of the accused thereafter he has submitted before member services P. S. Sharan and recorded note sheet who prima-facie satisfied with the evidence and document he has granted sanction Ex.P-15. This witness has stated on two occasions on 25.5.96 and 13.09.96, sanction orders were passed. In the cross-examination he has stated that the matter was examined thereafter the matter was send to competent authority and if he has some doubt it again send for remarks, if there is no remarks then the sanction is granted. He also stated that sanction is granted after seeing the record.

14. K.K. Mishra (PW-6) member of trap party has stated that he did not see what happened in the room as he was standing at ground floor. He has also admitted that shirt of complainant was not washed by the CBI. He has also admitted that if any body refused and powder is applied to the palm, then it can turn pink.

15. The accused was examined under Section 313 CrPC wherein in reply to the question, he has stated that he has been falsely implicated in the case and he has never demanded any money from the complainant. The complainant made forceful attempt to give money then the appellant refused to accept the same and when he tried to give forcefully, he

removed it from his hand and fell the notes under the table then Ram Bharose had kept the money in his pocket but he did not make accused in the case and he never demanded any money from the complainant. In question No. 13, this witness has replied and has reiterated the same stand in his defences and also exhibited statement of Ram Bharose (Ex.D-1).

16. Finding and analysis on Point No.1:-

Learned counsel for the appellant would submit that learned trial Court would rely upon the statement of Ram Bharose, who was accused and without following the procedure under Section 306 CrPC his statement has been recorded and on the basis of his statement only the appellant has been convicted, thus the trial on account of non-compliance of Section 306 CrPC vitiated and accused is deserves to be acquitted. To substantiate his submission Mr. Verma has relied upon the judgment of Hon'ble Supreme Court in the case of **Bharat Gurjar vs. State of Rajasthan reported in AIR 2018 SC (Supp) 480.**

17. On the other hand, learned counsel for the CBI would submit that the prosecution has proved the case not only on the basis of Ram Bharose statement but other accused also and he would submit that merely not following the procedure under Section 306 CrPC before the trial cannot be vitiated. He would further submit that there is corroborative evidence to prove guilt of the appellant has been produced by the prosecution and the prosecution has proved its case beyond reasonable doubt and would pray for dismissal of the appeal.

18. For better understanding, it is expedient for this Court to extract Section 306 CrPC which reads as under:-

Section 306 CrPC - Tender of pardon to accomplice.

> (1) With a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or

privy to an offence to which this section applies, the Chief Judicial Magistrate or a Metropolitan Magistrate at any stage of the investigation or inquiry into, or the trial of, the offence, and the Magistrate of the first class inquiring into or trying the offence, at any stage of the inquiry or trial, may tender a pardon to such person on condition of his making a full and true dis- closure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof.

(2) This section applies to-

(a) any offence triable exclusively by the Court of Session or by the Court of a Special Judge appointed under the Criminal Law Amendment Act, 1952 (46 of 1952);

(b) any offence punishable with imprisonment which may extend to seven years or with a more severe sentence.

(3) Every Magistrate who tenders a pardon under sub-section (1) shall record-

(a) his reasons for so doing

(b) whether the tender was or was not accepted by the person to whom it was made, and shall, on application made by the accused, furnish him with a copy of such record free of cost.

(4) Every person accepting a tender of pardon made under sub- section (1)

(a) shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any;

(b) shall, unless he is already on bail, be detained in custody until the termination of the trial.

(5) Where a person has, accepted a tender of pardon made under sub- section (1) and has been examined under sub-section (4), the Magistrate taking cognizance of the offence shall, without making any further inquiry in the case,-

(a) commit it for trial-

(I) to the Court of Session if the, offence is triable exclusively by that Court or if the Magistrate taking cognizance is the Chief Judicial Magistrate;

(ii) to a Court of Special Judge appointed under the Criminal

Law Amendment Act, 1952 (46 of 1952), if the offence is triable exclusively by that Court

(b) in any other case, make over the case to the Chief Judicial Magistrate who shall try the case himself.

Section 307 CrPC;- Power to direct tender of pardon. At any time after commitment of a case but before judgment is passed, the Court to which the commitment is made may, with a view to obtaining at the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender a pardon on the same condition to such person.

19. For determining point No.1, this Court has perused the order sheet, from perusal of order sheet, it is quite vivid that no such application under Section 306 CrPC was moved by the prosecution to examine Ram Bharose (PW-2) as prosecution witness who was also earlier made accused and in the charge sheet submitted by the CBI, in the column of name and address of the accused who was not send for trial, whether he be arrested or not including the absconders name of Ram Bharose has been mentioned but relying upon his statement under Section 164 CrPC recorded that he was no way concerned with the demand and acceptance of bribe and he was simply applying the order of SDO Phone Shri S.L.Verma and Ram Bharose was not made accused in the case earlier he was included in the list of accused but on his statement recorded under Section 164 CrPC (Ex. D-1) Ram Bharose was cited as prosecution witness and thus he was made as approver.

20. From perusal of section 306 CrPC, it is quite vivid that Judicial Magistrate First Class or a Metropolitan Magistrate at any stage of the investigation or inquiry into, or the trial of, the offence, and the Magistrate of the first class inquiring into or trying the offence, at any stage of the inquiry or trial of the offence, may tender a pardon to such person on condition of his making a full and true dis- closure of the whole of the circumstances within his knowledge relative to the offence

and to every other person concerned, whether as principal or abettor, in the commission thereof Magistrate who tenders a pardon under sub-section shall record his reasons for so doing; whether the tender was or was not accepted by the person to whom it was made, and shall, on application made by the accused, furnish him with a copy of such record free of cost.

21. The issue whether the trial will be vitiated without moving any application under Section 306 CrPC before the Magistrate for tendering pardon has come up for consideration before the Hon'ble the Supreme Court in case of **Bharat Gurjar Vs. State of Rajasthan AIR 2018 SC (supp) 480** wherein Hon'ble Supreme Court has held at paragraph 9 and 10 as under:-

> 9. The third witness of material fact is PW 5 Shyam Verma, who is stated to have accompanied the deceased with accused Lalit (A-1). We fail to understand as to how after investigation though role of the two was similar but Lalit was made accused and Shyam Verma was made prosecution witness From the record, it does not appear that any application was moved under Section 306 of Code of Criminal Procedure, 1973 (Cr.PC) before the Magistrate for tendering pardon to Shyam Verma before getting examined him as prosecution witness.
>
> 10. Shri K.T.S. Tulsi, Senior Advocate, appearing on behalf of the appellants referring the case of Adambhai Sulemanbhai Ajmeri and Others vs. State of Gujarat (2014) 7 SCC 716 (paragraph 143) submitted that an approver is a most unworthy friend, if at all, and he, having bargained for his immunity, must prove his worthiness for credibility in court. Illustration (b) of Section 114 of Indian Evidence Act, 1872 provides that the court may presume that an accomplice is unworthy of credit unless his evidence is corroborated in material particulars. There appears little corroboration of his testimony. After scrutinizing the evidence, we find that

the courts below have erred in law in relying the testimony of PW 5, the person whose role is akin to that of one of the accused. The other two witnesses of fact namely PW 2 Jitendra Singh and PW 3 Ram Laxman have not supported the prosecution case.

22. Again the Hon'ble Supreme Court in the case of **A. Srinivasulu vs The State Rep. by the Inspector of Police in Criminal Appeal No. 2417 of 2010 on 15th june 2023 2023 Live Law (SC) 485** has held in paragraph 70 to 71 which is as under:-

70. To come to the above conclusion, this Court relied upon its previous decision in Suresh Chandra Bahri vs. State of Bihar 1995 Supp.(1) SCC 80, wherein it was held as follows:-

"30. A bare reading of clause (a) of sub-section (4) of Section 306 of the Code will go to show that every person accepting the tender of pardon made under sub-section (1) has to be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any. Sub-section (5) further provides that the Magistrate taking cognizance of the offence shall, without making any further enquiry in the case commit it for trial to any one of the courts mentioned in clauses (i) or (ii) of clause (a) of sub-section (5), as the case may be. Section 209 of the Code deals with the commitment of cases to the Court of Session when offence is tried exclusively by that court. The examination of accomplice or an approver after accepting the tender of pardon as a witness in the Court of the Magistrate taking cognizance of the offence is thus a mandatory provision and cannot be dispensed with and if this mandatory provision is not complied with it vitiates the trial. As envisaged in sub-section (1) of

Section 306, the tender of pardon is made on the condition that an approver shall make a full and true disclosure of the whole of the circumstances within his knowledge relating to the offence. Consequently, the failure to examine the approver as a witness before the committing Magistrate would not only amount to breach of the mandatory provisions contained in clause (a) of sub-section (4) of Section 306 but it would also be inconsistent with and in violation of the duty to make a full and frank disclosure of the case at all stages. The breach of the provisions contained in clause (a) of sub-section (4) of Section 306 is of a mandatory nature and not merely directory and, therefore, non-compliance of the same would render committal order illegal. The object and purpose in enacting this mandatory provision is obviously intended to provide a safeguard to the accused inasmuch as the approver has to make a statement disclosing his evidence at the preliminary stage before the committal order is made and the accused not only becomes aware of the evidence against him but he is also afforded an opportunity to meet with the evidence of an approver before the committing court itself at the very threshold so that he may take steps to show that the approver's evidence at the trial was untrustworthy in case there are any contradictions or improvements made by him during his evidence at the trial. It is for this reason that the 16 1995 Supp (1) SCC 80 examination of the approver at two stages has been provided for and if the said mandatory provision is not complied with, the accused would be

deprived of the said benefit. This may cause serious prejudice to him resulting in failure of justice as he will lose the opportunity of showing the approver's evidence as unreliable. Further clause (b) of sub-section (4) of Section 306 of the Code will also go to show that it mandates that a person who has accepted a tender of pardon shall, unless he is already on bail be detained in custody until the termination of the trial. We have, therefore, also to see whether in the instant case these two mandatory provisions were complied with or not and if the same were not complied with, what is the effect of such a non-compliance on the trial?"

It is interest to see that in Suresh Chandra Bahri, this court first held that the procedure prescribed in Section 306(4)(a) of the Code is mandatory and not directory and that its non-compliance will render the committal order illegal. After so holding, this court raised a question in the last line of para 30 extracted above, as to what is the effect of such non-compliance on the trial. While answering this question, this court found in Suresh Chandra Bahri, that the Court to which the case was committed, noticed this irregularity even at the threshold and hence remanded the matter back to the Magistrate for recording the evidence of the approver. Thus the defect got cured before trial and hence this court held in paragraph 31 of the decision that eventually no prejudice or disadvantage was shown to have been caused to the accused.

23. In the Prevention of Corruption Act, Special Court chooses to take cognizance, the question of the approver being examined as a witness

in the Court of the Magistrate as required by Section 306 (4)(a) does not arise as the Special Court is having power of Judicial Magistrate First Class as well as power of Session Judge also. From the record, it is quite vivid that no such application under Section 306 CrPC was moved by the prosecution to tender pardon Ram Bharose. In absence of such application or order from the Magistrate/ Sessions Judge itself, statement of co-accused Ram Bharose should have not been considered by the trial Court. Hon'ble Supreme Court in the case **Adambhai Sulemanbhai Ajmeri and others vs. State of Gujrat (2014) 7 SCC 716** has held in paragraph 143 to 145 which is as under:-

> 143. Before examining the evidence of the accomplices on merit, we need to satisfy ourselves that the evidence of the accomplices is acceptable. The twin test on this point has been laid down by this Court in the three judge bench decision of this Court in Ravinder Singh v. State of Haryana49 which was reiterated in the case of Mrinal Das & Ors. v. State of Tripura, wherein this Court in the Ravinder Singh case (supra) held as under:
>
> > "12. An approver is a most unworthy friend, if at all, and he, having bargained for his immunity, must prove his worthiness for credibility in court. This test is fulfilled, firstly, if the story he relates involves him in the crime and appears intrinsically to be a natural and probable catalogue of events that had taken place. The story if given, of minute details according with reality is likely to save it from being rejected brevi manu.Secondly, once that hurdle is crossed, the story given by an approver so far as the accused on trial is concerned, must implicate him in such a manner as to give rise to a conclusion of guilt beyond reasonable doubt. In (1975) 3 SCC 742 (2011) 9 SCC 479 a rare case taking into consideration all the factors, circumstances

> and situations governing a particular case, conviction based on the uncorroborated evidence of an approver confidently held to be true and reliable by the court may be permissible. Ordinarily, however, an approver's statement has to be corroborated in material particulars bridging closely the distance between the crime and the criminal. Certain clinching features of involvement disclosed by an approver appertaining directly to an accused, if reliable, by the touchstone of other independent credible evidence, would give the needed assurance for acceptance of his testimony on which a conviction may be based." (emphasis laid by this Court)

144. A perusal of the evidence of all the three accomplices in the present case shows that all of them intended to absolve themselves of the liability for the conspiracy with respect to the attack on Akshardham, going as far to mention that they were not involved in the incident and only the accused persons knew about the intricate details of the chain of events that ultimately led to the execution of their plan of 'carnage'. Even then, if, we were to presume that the accomplices have implicated themselves by mentioning that they were aware about some incident which was about to happen and thus, were part of the criminal conspiracy, the evidence of the accomplices fail the second test, in that it fails to prove the guilt of the accused persons beyond reasonable doubt. All the three accomplices mentioned about the plan of 'carnage' which the accused persons had planned together. However, no link can be established between the accused persons and the attack on Akshardham since the evidence of the accomplices is far too vague and they fail to provide any form of substantive evidence against the accused persons.

145. Therefore, we need to examine the statements of the accomplices in the light of the legal principle laid

down by this Court in the case of Mohd. Husain Umar Kochra Etc. v. K.S. Dalipsinghji & Anr. Etc.51 which held as under: (1969) 3 SCC 429.

> "21. On the merits, we find that the two courts have recorded concurrent findings of fact. Normally this Court does not re-appraise the evidence unless the findings are perverse or are vitiated by any error of law or there is a grave miscarriage of justice. The courts below accepted the testimony of the accomplice Yusuf Merchant. Section 133 of the Evidence Act says:
>
> > 133. "An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice." Illustration (b) to Section 114 says that the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. The combined effect of Section 133 and 114, Illustration (b) is that though a conviction based upon accomplice evidence is legal the Court will not accept such evidence unless it is corroborated in material particulars. The corroboration must connect the accused with the crime. It may be direct or circumstantial. It is not necessary that the corroboration should confirm all the circumstances of the crime. It is sufficient if the corroboration is in material particulars. The corroboration must be from an independent source. One accomplice cannot corroborate another, see Bhiva Doulu Patil v. State of Maharashtra and R. v. Baskerville. In this light we shall examine the case of each appellant separately."

24. Thus the trial Court while negating the defences raised by the appellant that when Ram Bharose was included in the list of accused, he can be included in the list of witness as merely mentioning his name in the list of

accused he cannot be called as accomplish as per Section 133 of the Evidence Act as he has worked under the direction of his superior authority and he can be cited as witnesses. Learned trial Court without examining the provisions of Section 306 CrPC and without considering the law on this subject has recorded its finding, as such it is incumbent upon the prosecution to first move an application under Section 306 CrPC to pardon the accused before Sessions Judge itself then only his statement should have been taken. In absence of any such proceeding the evidence of the Ram Bharose cannot be relied upon statement of accomplish Ram Bharose.

25. From the record of the trial Court it is crystal clear that Special Judge has not followed due procedure under Section 306(4)(a) CrPC, therefore, it is proceedings initiated by the Special Judge is bad in law. The trial Court has committed illegality in relying upon the statement of Ram Bharose. Thus, the this finding of learned trial Court is against the laid by the Hon'ble Supreme Court in the case of Bharat Gurjar, A. Srinivasulu and **Adambhai Sulemanbhai Ajmeri (supras)** coupled with the fact neither application was submitted by the CBI nor there was any order by the Special Judge, the conviction of the appellant on the statement of Ram Bharose is bad in law and deserves to be set aside on this count.

26. <u>Finding and analysis on Point No.2:</u>-

Now the point No. 2 and also examine whether CBI has proved the demand and acceptance by the appellant through cogent evidence, it is expedient for this court to evaluate the evidence of witness Ram Bharose (PW-2) who has stated that Uday Kumar Sinha has given money forcefully to the appellant and he had not accepted the money and money was seized from his pocket. He has also admitted that he was granted bail but no matter is pending in any court and would submit that he has not been made as approver witness. This witness has also

admitted that he has seen the incident from a gap of curtain.

27. Learned trial Court while relying the statements of U.K.Sinha and Anil Kumar that Ram Bharose has not demanded money from the complainant. Even if the explanation of the accused is to be taken into consideration and money was kept by Ram Bharose but there is no evidence that Ram Bharose has demanded money. In subsequent paragraph, he has stated that even for the sake of argument, Ram Bharose be treated accomplish still his evidence can be taken into consideration. But the learned trial Court has nowhere recorded its finding that accused has demanded the money and in paragraph 43 of its judgment has recorded the finding that money has given by the U.K. Sinha to the accused in lieu of change of telephone instrument, therefore, it is illegal gratification.

28. Learned trial Court while convicting the accused nowhere recorded its finding whether the accused has demanded money and thereafter the money was given to him. On the contrary, the appellant has categorically stated that the complainant tried to give forcefully money and he did not accept the same, therefore, basic ingredient to prove the offence under Prevention of Corruption Act has not been proved by the prosecution by any cogent evidence. In his defencse the accused has stated that the complainant has forcefully given money to him and he has not accepted and thrown the notes under the table which was kept by Ram Bharose in his pocket and has drawn unnecessary assumption and presumption that peon cannot dare to keep money in his pocket and has disbelieved the defence taken by the accused under Section 313 CrPC without any rhyme and reason which is perverse finding.

29. From perusal of above provisions of the Act, 1988, it is evident that the allegation of demand of gratification and acceptance made by a public servant has to be established beyond a reasonable doubt. Even the decision of the Constitution Bench in the case of **Neeraj Dutta vs Govt of**

NCT of Delhi reported in (2022) SCC Online 1724 does not dilute this elementary requirement of proof beyond a reasonable doubt. The Constitution Bench was dealing with the issue of the modes by which the demand can be proved. The Constitution Bench has laid down that the proof need not be only by direct oral or documentary evidence, but it can be by way of other evidence including circumstantial evidence. When reliance is placed on circumstantial evidence to prove the demand for gratification, the prosecution must establish each and every circumstance from which the prosecution wants the Court to draw a conclusion of guilt. The facts so established must be consistent with only one hypothesis that there was a demand made for gratification by the accused. Therefore, in this case, this Court has to examine whether there is any direct evidence of demand. If this Court has to reach to a conclusion that there is no direct evidence of demand, this Court will have to consider whether there is any circumstantial evidence to prove the demand. Hon'ble the Supreme Court in case report in **Neeraj (supra)** has held at paragraph 74 as under:-

> “74What emerges from the aforesaid discussion is summarised as under:-
>
> (a) Proof of demand and acceptance of illegal gratification by a public servant as a fact in issue by the prosecution is a sine qua non in order to establish the guilt of the accused public servant under Sections 7 and 13 (1)(d) (i) and(ii) of the Act.
>
> (b) In order to bring home the guilt of the accused, the prosecution has to first prove the demand of illegal gratification and the subsequent acceptance as a matter of fact. This fact in issue can be proved either by direct evidence which can be in thenature of oral evidence or documentary evidence.
>
> (c) Further, the fact in issue, namely, the proof of demand and acceptance of illegal gratification

can also be proved by circumstantial evidence in the absence of direct oral and documentary evidence.

(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:

(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 andreceives 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.

(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 Section 13 (1)(d)(i) and (ii) of the Act.

(iii) In both cases of (i) and (ii) above, theoffer 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 7or Section 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 inturn there is a payment made which is received by the public servant, would be an offence of obtainment under Section 13 (1)(d) and (i) and (ii) of the Act.

(e) 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 inference only when the foundational facts have been proved by relevant oral and documentary evidence and not in the absence thereof. On the basis of the material on record, the Court has the discretion to raise a presumption of fact while considering whether the fact of demand has been proved by the prosecution or not. Of course, a presumption of fact is subject to rebuttal by the accused and in the absence of rebuttal presumption stands.

(f) In the event the 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 prosecution can prove the case by circumstantial evidence. The trial does not abate nor does it result in order of acquittal of the accused public servant.

(g) In so far as Section 7 of the Act is concerned, on the proof of the facts in issue, Section 20 mandates the court to raise a presumption that the illegal gratification was for the purpose of a motive or reward as mentioned in the said Section. The said presumption has to be raised by the court as a legal presumption or a presumption in law. Of course, the said presumption is also subject to rebuttal. Section

20 does not apply to Section 13 (1) (d) (i) and (ii) of the Act. (h) We clarify that the presumption in law under Section 20 of the Act is distinct from presumption of fact referred to above in point (e) as the former is a mandatory presumption while the latter is discretionary in nature.

69. In view of the aforesaid discussion and conclusions, we find that there is no conflict in the three judge Bench decisions of this Court in B. Jayaraj and P. Satyanarayana Murthy with the three judge Bench decision in M. Narasinga Rao, with regard to the nature and quality of proof necessary to sustain a conviction for offences under Sections 7 or 13(1)(d)(i) and (ii) of the Act, when the direct evidence of the complainant or "primary evidence" of the complainant is unavailable owing to his death or any other reason. The position of law when a complainant or prosecution witness turns "hostile" is also discussed and the observations made above would accordingly apply in light of Section 154 of the Evidence Act. In view of the aforesaid discussion, we hold that there is no conflict between the judgments in the aforesaid three cases. 76. Accordingly, the question referred for consideration of this Constitution Bench is answered as under: In the absence of evidence of the complainant (direct/primary, oral documentary evidence) it is permissible to draw an inferential deduction of culpability/guilt of a public servant under Section 7 and Section 13(1)(d) read with Section 13(2) of the Act based on other evidence adduced by the prosecution. Tender of pardon to accomplice and Section 307 power to direct tender of pardon. At any time after commitment of a case but before judgment is passed, the Court to which the commitment is made may, with a view to obtaining at the trial the evidence of any

person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender a pardon on the same condition to such person.

With a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence to which this section applies, the Chief Judicial Magistrate or a Metropolitan Magistrate at any stage of the investigation or inquiry into, or the trial of, the offence, and the Magistrate of the first class inquiring into or trying the offence, at any stage of the inquiry or trial, may tender a pardon to such person on condition of his making a full and true dis- closure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof.

30. Considering the entire facts and circumstance and the evidence of the witnesses on record, this Court finds that the prosecution had failed to prove its case beyond reasonable doubt. There is suspicion regarding the demand and acceptance of bribe amount for which the accused appellant was charge sheeted under Sections 7 and 13(1) (d) r/w 13(2) of the Prevention of Corruption Act. The trial Court while convicting the appellant has not considered the relevant aspects of the matter thereby committed illegality, Therefore, I am of the view that the accused deserves to be acquitted from the charges leveled against him.

31. Thus, the present appeal is allowed and the judgment and the order dated 17.12. 1998 passed by the learned Special Judge, CBI Jabalpur in Special Cr. Case No. 31/97 is hereby set aside. The appellant is acquitted of the charge for offence under Sections 7 and 13(1) (d) r/w 13(2) of the Prevention of Corruption Act. The appellant is reported to be on bail. His bail bonds shall stand discharged in view of section 437-A

CrPC and the fine amount deposed by the appellant shall be refunded within one month from the date of receipt of the copy of this order.

Sd/-

(Narendra Kumar Vyas)
Judge

Santosh