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**(2013) 07 AHC CK 0228**

**Allahabad High Court**

**Case No:** Government Appeal No. 2226 of 2011

State of Uttar Pradesh

APPELLANT

Vs

Bheem Sen and Others

RESPONDENT

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**Date of Decision:** July 11, 2013

**Citation:** (2013) 6 ALJ 448 : (2013) 82 ALLCC 777 : (2014) 2 Crimes 79

**Hon'ble Judges:** Kalimullah Khan, J

**Bench:** Single Bench

**Advocate:** Anil Raghav, R.C. Saxena and Samit Gopal, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

Kalimullah Khan, J.

This Government appeal has been filed against accused-respondents, Bheem Sen, S/o. Sukhan Singh, R/o. village Khushhalpur, P.S. Majhola, district Moradabad, the then T.G.-2/Cashier Mansarovar Sub Station Majhola, Ajay Kumar Srivastava, S/o. Musailal, the then S.D.O. Sub Divisional Office-IV, U.P. Power Corporation Limited, Moradabad and Satya Prakash Saxena, S/o. Ganesh Prasad, the then Junior Engineer, Mansarovar Sub Station Majhola, Moradabad, R/o. 2, Gandhi Park, Civil Lines, Moradabad, who have been acquitted by Special Judge, Ante Corruption, Bareilly in Special Trial No. 13/2008 (State v. Bheem Sen and two others, u/s. 7 /13(1)(d) read with Section 13(2) Prevention of Corruption Act, 1988, P.S. Majhola, district Moradabad challenging the finding of acquittal on the ground that the impugned judgment and order besides being perverse, is illegal. The prosecution case as embedded in the complaint of the complainant, Smt. Shobha Sachdeva, W/o. Kashmirilal Sachdeva, R/o. 23 Millan Bihar, Delhi Road, P.S. Majhola, district Moradabad made to the Dy. S.P., Ante Corruption, Moradabad, on 27.2.2007 is that she was all alone in her house on 25.2.2007. The said house is in the name of her husband. At about 10.00 a.m., S.D.O., Shri Srivastava and J.E., Shri Saxena along with 3 to 4 staff members came at her house to check the electric meter and its load. She told them that she was all alone at the house and her husband had gone out of

station. Even then, all the afore-said persons entered into the house and checked the meter and its load. Thereafter, they told that the load should be 13.5 kilowatts instead of 7.5 kilowatts and demanded Rs. 10,000/- as bribe for not taking any legal action against her and when the demand could not be fulfilled, they disturbed the meter by screwdriver and threatened to charge Rs. 2,00,000/- as penalty. On the request of the complainant, the S.D.O. and others agreed to take Rs. 20,000/- as bribe and Rs. 50,000/- as penalty, however, it was lastly settled that the bribe money of Rs. 20,000/- shall be given on 27.2.2007 apart from two cheques valuing Rs. 28,000/- in total to deposit in the Government Exchequer.

2. She prayed in the complaint that she did not want to give bribe but wanted to get such corrupt officials trapped. She had all the aforesaid money Rs. 20,000/- plus two cheques amounting to Rs. 28,000/-. Out of which, Rs. 20,000/-, total 40 currency notes each of which were in the denomination of 500 and all were treated by Anti Corruption Department according to the procedure meant for the same. The aforesaid total rupees were handed over to the complainant, Smt. Shobha Sachdeva and she was asked to give it to accused Bheem Sen as per the direction given to her by Shri. Ajay Kumar Srivastava, S.D.O.

3. Dy. S.P., Anti Corruption Organization, Moradabad along with other members of the trap team went at the house of the aforesaid complainant on the same day and arrested accused Bheem Sen while taking bribe Rs. 20,000/- along with two cheques. Case was registered at Crime No. 366 of 2007, u/s. 7 /13(1)(d) Prevention of Corruption Act, against accused at P.S. Majhola, District Moradabad. On the basis of the charge-sheet (Ex. ka14), this special case was registered. Charges against accused were framed under the aforesaid sections of prevention of Corruption Act and they denied the charges and claimed their trial.

4. In order to prove the charges against the accused, prosecution examined 12 witnesses, in all, which are as under:

1. Shri. Manmohan, P.W. 1,
2. Shri. Kaushal Kumar, P.W.2,
3. S.I., Rajendra Singh Vist, P.W.3,
4. Smt. Shobha Sen (complainant), P.W.4,
5. Shri. Mahendra Singh, P.W.5,
6. Constable/Clerk-212, Omveer Singh, P.W.6.
7. Shri. Udai Bhan Pande, Retd. Chief Engineer, P.W.7,
8. Shri. Avanish Avasthi, Secretary, Cultural and Tourism, Govt. of U.P., P.W.8,
9. Shri. Nand Kishor, Executive Engineer, P.W.9,

10. Inspector, C.B.C.LD, Harendrapal Singh, P.W. 10,

11. Constable Vikas Tyagi, P.W. 11,

12. Inspector (Retd.), C.S. Yadav, P.W.12.

5. No other witness has been examined for prosecution. All the three accused, Bheem Sen,. Ajay Kumar Srivastava and Satya Prakash Saxena were examined u/s. 313 Cr.P.C. They challenged the evidence adduced by the prosecution against them and stated that being public servants and entrusted to the work of checking the meters and power load, they had gone to the house of the complainant to check the same. The meter was found tampered, therefore, they sealed the said meter. The allegation of demand of bribe and its payment to Bheem Sen on 27.2.2007 by the complainant as per the direction by Ajay Kumar Srivastava, accused was vehemently challenged. They also challenged the case of the complainant that when Bheem Sen had gone to her house to collect the amount of bribe they had any contact with the complainant on mobile phone of accused Bheem Sen and lastly they stated that they did not act against the rules. Complainant had falsely implicated them. They desired to adduce evidence in their defence. Accused Bheem Sen has filed written statement u/s. 243(1) Cr.P.C. Accused persons examined Shri Prem Prakash D.W.1, Jitendra, D.W.2 and Vikram Singh, D.W.3 in their defence, according to them, Bheem Sen was arrested from his office in the presence of the aforesaid D.Ws. and he was falsely implicated in this case.

6. In his memorandum of argument, accused Bheem Sen narrated his defence case that Ashutosh Gautam and other Members of the Anti Corruption Department had falsely apprehended him from the seat when he was discharging his duties in his office. His mobile set was also snatched away by them. To know the location of S.D.O., Ajay Kumar Srivastava, they talked on the said mobile. He denied to have contacted the said S.D.O. Ajay Kumar Srivastava-accused and facilitated his talk with complainant. He claimed to have been taken by Anti Corruption Department to Majhola police station where false papers were prepared and all the formalities were completed.

7. Having heard learned counsel for the parties, learned trial court held that there is no evidence on record that either of the accused persons had ever made any demand of bribe and prosecution has failed to prove the charge against the accused persons beyond all reasonable doubts. Accordingly, a finding of acquittal was recorded by the trial court, which has been challenged by the State in this criminal appeal.

Heard learned counsel for the parties and perused the record.

8. The essential ingredients of Section 7 of the Prevention of Corruption Act, 1988 are:

(i) that the person accepting the gratification should be a public servant;

(ii) that he should accept the gratification for himself and the gratification should be as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official function, favour or disfavour to any person.

Insofar as Section 13(1)(d) of the Act is concerned, its essential ingredients are:

(i) that he should have been a public servant;

(ii) that he should have used corrupt or illegal means or otherwise abused his position as such public servant, and

(iii) that he should have obtained a valuable thing or pecuniary advantage for himself or for any other person.

The primary requisite of an offence u/s 13(1)(d) of the Act is proof of a demand or request of a valuable thing or pecuniary advantage from the public servant. In the absence of proof of demand or request from the public servant for a valuable thing or pecuniary advantage, the offence u/s 13(1)(d) cannot be held to be established.

9. In this case, the complainant Shri Ashutosh Gautam, CO., Anti Corruption Organization, Moradabad, has not been examined by the prosecution for the reason best known to it. Prosecution has not assigned any reason or any plausible explanation for his non-examination during trial. Courts cannot find out their own reason for non-tendering of evidence or non-examination of the complainant. In the absence of complainant, there is no substantive evidence to prove the factum of demand of bribe and for the said reason, Hon"ble Supreme Court has acquitted accused appellant in the case of [A. Subair Vs. State of Kerala](#).

10. Smt. Shobha Sachdeva, P.W.4, has deposed that on 25.2.2007, at about 11.00 a.m., Srivastava Ji, S.D.O., Saxena Ji, J.E. and many other persons had come to her house to check meter and power load. They checked and sealed the electric meter. Thereafter, they left her house. After sometime, some persons, whom she did not identify/recognize reached at her house and asked for Rs. 20,000/- cash and two cheques amounting to Rs. 20,000/- and 8,000/-, respectively. At the time of said demand, none of the accused were present there. She clearly and categorically deposed that accused Ajay Kumar Srivastava, S.P. Saxena and Bheem Sen present in the court did not make any demand of money or the cheque. They had not come at her house on 27.2.2007 nor they demanded money. She has further deposed that on 27.2.2007 nobody had come to her house to ask for bribe or to collect the cheque. She denied to know accused Bheem Sen, who was present in the court. Again, she stated that accused Bheem Sen had not come to her house on 27.2.2007, at 12.00 noon to collect Rs. 20,000/-, amount of bribe and cheque. She has gone to the extent of saying that on the said date at 12.08 hours, no person named Bheem Sen was arrested nor Rs. 20,000/- was recovered from him. She has not supported the trap story set up by the prosecution. She expressed her ignorance as to whether

or not she has signed her complaint.

In this way, another important witness, complainant Smt. Shobha Sachdeva RW.4 did not support the prosecution story as such she was declared hostile but nothing could be fetched out from her mouth in support of prosecution case during her cross-examination made by prosecution.

11. Shri. Manmohan Singh, P.W.1, who, according to the prosecution case, had accompanied Smt. Shobha Sachdeva up to the office of Anti Corruption Organization, Moradabad turned hostile. He deposed that he knows complainant, Smt. Shoba Sachdeva, W/o. Kashmirilal of his colony. On 27.2.2007, at about 8.00 a.m., he had not gone to the office of Anti Corruption Organization, Moradabad. He did not see Ashutosh Gautam, Dy. S.P. and other officials. He denied the alleged fact that Smt. Sachdeva has given any complaint in his presence to Ashutosh Gautam. He stated that no conversation had taken place in between Smt. Sachdeva and the officials of the Anti Corruption Department in his presence. He denied the alleged fact that Smt. Sachdeva asked Ashok Gautam and other officials to arrest accused read handed. She had not carried Rs. 20,000/- the amount of bribe to hand it over to Ashutosh Gautam for the purpose of trap. He stated that Kashmirilal, husband of Smt. Sachdeva, had got his signatures on the plain paper on the road. He denied that the contents of the memo were written in his presence. He denied to be acquainted with accused Bheem Sen, Ajay Kumar Srivastava and S.P. Saxena. He admitted that he is the real nephew of Kashmirilal.

12. Prosecution witness, Rajendra Singh Vist, S.I.M/Steno (P.W.3), is a witness of recovery memo, who had supported the prosecution story in his examination-in-chief and has deposed that on 27.2.2007, he was an employee of Anti Corruption Organization, Moradabad. At about 8.00 a.m., Smt. Shobha Sachdeva and Manmohan Singh came to his Office and handed over a written complaint to Dy. S.P. against J.E., Sri. Saxena, S.D.O., Srivastava accusing them that they demanded Rs. 20,000/- as bribe. She desired to get them caught red handed while taking bribe. After making complaint to Ashutosh Gautam, she gave Rs. 20,000/- to him. The said notes were in the denomination of 500 each. Dy. S.P. has put his initial on the said notes and thereafter the said notes were treated with phenolphthalein powder but in cross-examination, he stated that he had not heard the conversation made in between Smt. Sachdeva and CO. Gautam. He admitted that the timing of his office was 10.00 a.m. to 5.30 p.m. but on 27.2.2007, he had reached his office at 7.45 a.m. On being specifically questioned, he could not answer as to why he had reached in the office at 7.45 a.m. on that day. He also admitted that no talk had taken place in between him and Smt. Shobha Sachdeva. He also admitted that Smt. Shobha Sachdeva had named only Srivastava Ji, S.D.O. and J.E., Saxena Ji. Their full names were not disclosed by her. He went to the extent of saying that complainant Smt. Sachdeva had not made her complaint to CO. Ashutosh Gautam in his presence. Therefore, it is not safe to rely the testimony of

this witness to fasten the guilt on the head of the accused.

13. Shri. Manmohan Singh, P.W.5, has also not supported the prosecution case. He has stated that on 27.2.2007, at about 11.00 a.m., neither he had gone to Milan Vihar Colony nor met S.P. Ashutosh Gautam and other officials. They had not informed him that somebody was to be arrested while accepting bribe. He denied to know and identify accused Bheem Sen and deposed that none had arrested Bheem Sen in his presence. Rs. 20,000/- and cheques valued Rs. 20,000/- and 8,000/- had not been recovered from accused Bheem Sen in his presence. Nothing was reduced to writing in his presence.

14. Constable Vikash Tyagi, P.W.11, has supported the prosecution story in his examination-in-chief but in his cross-examination, he could not explain as to why after all he had reached at his office at 7.30 a.m. on 27.2.2007 when there was no prior notice to him about the complaint of Smt. Sachdeva. Therefore, his presence at the time of trap is not reliable and there appears substance in the contention of learned counsel for the accused that being the employee of the Anti Corruption Organization, Moradabad, he is interested in the conviction of the accused persons and therefore the possibility of his telling a lie cannot be ruled out especially when all the important witnesses of fact turned hostile and did not support the prosecution case at all.

15. Rest of the prosecution witnesses are formal witnesses. When charges framed against the accused persons are not proved by the substantive evidence, the evidence of formal witnesses of prosecution and defence witnesses need not be discussed.

16. Undisputedly, accused Ajay Kumar Srivastava and Satya Prakash Saxena were not at spot at the time of the trap of the accused Bheem Sen. Only Bheem Sen has been arrested by the trapping party at the house of the complainant but it is not the case of the prosecution that Bheem Sen ever made a demand of bribe, therefore, the demand of bribe by Bheem Sen is not there in the present case. The crucial question is whether the appellant had demanded any amount as gratification to show any official favour to the complainant. Its answer is negative, therefore, trial court does not appear to have committed any illegality in giving the finding that there is no evidence on record on the point of demand of bribe by the accused persons. Therefore, conviction under the charged sections cannot be recorded against them.

17. In [C.M. Girish Babu Vs. CBI, Cochin, High Court of Kerala](#), the Division Bench of the Court held that mere recovery of tainted money divorced from the circumstances under which it is paid is not sufficient to convict the accused when the substantive evidence in the case is not reliable. The mere recovery by itself cannot prove the charge of the prosecution against the accused, in the absence of any evidence to prove demand of bribe or to show that the accused voluntarily

accepted the money knowing it to be bribe.

18. Hon"ble Supreme Court in the case of [State of Madhya Pradesh Vs. J.B. Singh](#), has observed that if there is no evidence of demand of bribe, prosecution cannot be said to have established the fact that the accused made any demand of bribe. Mere allegations in the complaint or in the case of prosecution does not tantamount to proof of the allegations so made.

19. In [Suraj Mal Vs. State \(Delhi Administration\)](#), it was held that mere recovery by itself cannot prove the charge of the prosecution against the accused in the absence of any evidence to prove payment of bribe or to show that the appellant voluntarily accepted the money.

20. In the case in hand, there is no evidence on record to establish that accused Ajay Kumar Srivastava ever contacted Bheem Sen accused to go to the complainant and accept the amount of bribe viz. Rs. 20,000/-, therefore, the mere recovery from the possession of co-accused Bheem Sen is not enough to hold him guilty.

21. In case law of [Govindaraju @ Govinda Vs. State by Sriramapuram P.S. and Another](#), it was held that interference with finding of acquittal in appeal is justified only when there is element of perversity, which should be traceable in the findings recorded by the trial court, either of law or of appreciation of evidence. Mere possibility of another view is no ground for interference.

22. In [Rohtash Vs. State of Haryana](#), almost the same view was reported and it was observed that the law of interfering with the judgment of acquittal is well settled, it is to the effect that only in exceptional cases where there are compelling circumstances and the judgment in appeal is found to be perverse, appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and after that the trial court's acquittal bolster presumption of innocence. Interference in a routine manner where the other view is possible should be avoided unless there are good reasons for interference. From the foregoing discussions of evidence on record and legal position, it is crystal clear that learned trial court had made appraisal of evidence available on record according to the settled principles of appreciations of evidence and has rightly recorded the findings of acquittal of all the three accused respondents. There is nothing to interfere with the findings of acquittal recorded by learned trial court.

In the result, Government appeal stands dismissed and the judgment and order impugned is upheld.