

C.K. DAMODARAN NAIR

A

v.
GOVT. OF INDIA

JANUARY 8, 1997

[M.K. MUKHERJEE AND S.P. KURDUKAR, JJ.]

B

Criminal Law :

Penal Code, 1860—Section 161—Offence under—Ingredients of—Presumption under S.4 of—Prevention of corruption—Act—Raising of—Held: Offence under S.161 IPC could be established by proof of either "acceptance" or "obtainment" of illegal gratification—Proof of prior demand not essential—"Acceptance" implied consenting mind which could be proved by circumstances surrounding transaction without proof of prior agreement—Prevention of Corruption Act, 1947, Ss. 4(1) and 5(1)(d).

C

Section 161- accused obtained money pursuant to demand made by him earlier—Accused took the plea that complainant forcibly thrust money into his pocket—Held: accused obtained money by abusing his official position—Plea of accused not acceptable—Therefore, his conviction upheld.

D

Prevention of Corruption Act, 1947: Section 5(1)(d)—Offence under—Requisites of—Held: demand or request from public servant concerned was a primary requisite—Mere proof of obtainment not sufficient—Hence conviction of accused under S.5 (2) was well merited.

E

Words and Phrases: "Acceptance"—Meaning of—In the context of S.161 of the Indian Penal Code 1860.

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"Obtain"—Meaning of—In the context of S.5(1)(d) of the Prevention of Corruption Act, 1947.

The appellant was acquitted by the Special Judge for offences under Section 161 of the Indian Penal Code, 1860 and Section 5(2) read with Section 5(1)(d) of the Prevention of Corruption Act, 1947. But the High Court set aside the acquittal of the appellant and convicted him for the above offences. Hence this appeal.

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According to the prosecution, the appellant visited the Hospital and

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A demanded from the Assistant Manager, PW-9, a sum of money for exempting the Hospital in question from its liability to pay statutory provident fund contributions. For making such illegal demand, PW-1 complained against the appellant to the Central Bureau of Investigation (CBI). The CBI then decided to arrange a trap to nab the appellant red-handed.

B Marked currency notes were handed over by the complainant to the accused in the presence of two independent witnesses. The appellant accepted the currency notes and after counting kept them in the right pocket of his trousers.

C On behalf of the appellant it was contended that the prosecution had failed to prove that the appellant had demanded illegal gratification which is an essential ingredient of the offence in question and, therefore, recovery of the currency notes from the appellant by itself could not have been a ground for drawing the statutory presumption under Section 4(1) of the Act; and that the complainant had forcibly thrust the currency notes in the trouser's pocket of the appellant.

D Dismissing the appeal, this Court

E HELD: 1.1. In the instant case to sustain the charge under Section 161 of the Indian Penal Code, 1860 against the appellant the prosecution was required to prove that

- (i) the appellant was a public servant at the material time;
- (ii) the appellant accepted or obtained from PW-9 a gratification other than legal remuneration; and
- F (iii) the gratification was for exempting the Hospital in question from its liability to pay statutory provident fund contributions. [114-D-E]

G 1.2. From a combined reading of Section 161 of the IPC and Section 4(1) of the Prevention of Corruption Act, 1947 it is evident that if the prosecution has succeeded in proving that the appellant was a public servant at the material time and that he had 'accepted' or 'obtained' the money as gratification not only the first two ingredients of the former would stand proved but also the third, in view of the presumption under the latter which the Court is bound to draw unless, of course, the appellant, in his turn, has succeeded in rebutting that presumption. 'Accept' means

H to take or receive with a 'consenting mind'. Obviously such a 'consent' can

be established not only by leading evidence of prior agreement but also from the circumstances surrounding the transaction itself without proof of such prior agreement. If an acquaintance of a public servant in expectation and with the hope that in future, if need be, he would be able to get some official favour from him, voluntarily offers any gratification and if the public servant willingly takes or receives such gratification it would certainly amount to 'acceptance' within the meaning of Section 161 IPC. It cannot be said, therefore, as an abstract proposition of law, that without a prior demand there cannot be 'acceptance'. [115-D-F]

1.3. The position will, however, be different so far as an offence under Section 5(1)(d) read with Section 5(2) of the Act is concerned, for such an offence prosecution has to prove that the accused 'obtained' the valuable thing or pecuniary advantage by corrupt or illegal means or by otherwise abusing his position as a public servant and that too without the aid of the statutory presumption under Section 4(1) of the Act as it is available only in respect of offences under Section 5(1)(a) and (b) - and not under Section 5(1)(c), (d) or (e) of the Act. 'Obtain' means to secure or gain (something) as the result of request or effort. In case of obtainment the initiative vests in the person who receives and in that context a demand or request from him will be a primary requisite for an offence under Section 161 IPC, which can be established by proof of either 'acceptance' - or 'obtainment'. [115-G-H, 116-A-B]

1.4. In the instant case, the unimpeachable evidence of these two independent witnesses conclusively proves that the transaction was consensual. That necessarily means that the appellant 'accepted' the money and the defence story that the complainant thrust the money is patently untrue. Consequent upon such proof, the presumption under Section 4(1) of the Act would operate and since the appellant did not rebut that presumption the conviction of the appellant under Section 161 IPC has got to be upheld. [116-F-G]

1.5. It is manifest that the appellant obtained the money pursuant to the demand as a public servant. The conviction of the appellant under Section 5(2) of the Act is also therefore well merited. [117-B]

Hazari Lal v. State (Delhi Admn.), AIR (1980) SC 873, referred to.

"*Shorter Oxford Dictionary*", referred to.

A **CRIMINAL APPELLATE JURISDICTION** : Criminal Appeal No. 687 of 1989.

From the Judgment and Order dated 29.6.89 of the Kerala High Court in CrI. A No. 325 of 1988.

B A.S. Nambiar and P.K. Manohar for the Appellant.

P.P. Malhotra and Y.P. Mahajan for the Respondent.

The Judgment of the Court was delivered by

C **M.K. MUKHERJEE, J.** Four Provident Fund Inspectors of Calicut including the appellant before us were tried by the Special Judge, Ernakulam for offences punishable under Section 161 IPC and Section 5(2) read with Section 5 (1) (d) of the Prevention of Corruption Act, 1947 ('Act' for short). The learned Judge acquitted all of them and aggrieved thereby
D the respondent preferred an appeal. The High Court disposed of the appeal by setting aside the acquittal of the appellant and convicting him for the above offences while maintaining the acquittal of the other three. Hence this appeal at the instance of the appellant.

E According to the prosecution case on **March 24, 1984** the appellant and two of the other three accused persons (who were arrayed as A3, A1 & A2 respectively at the trial and will hereinafter be so referred to) visited the Relief Hospital at Kondotty, of which Dr. Moideenkutty (P.W.1), K.K. Nair (P.W. 2) and Haneefa (P.W.9) were the Managing partner, Office Manager and Assistant Manager respectively. There they first met P.W. 2
F and then, along with him, went to meet P.W. 1. Before P.W.1 they disclosed their identities and told that they had come to inspect the records of the Hospital. Accordingly, under directions of P.W. 1, P.W. 2 handed over the attendance book and wages registers to them. The three accused persons then directed P.W. 2 to produce all other relevant records of the Hospital
G including the partnership deed in their office on March 29, 1984. As directed, P.W. 9 took the records to the office of the above three accused persons on the appointed day. Even though, A1 and A3 scrutinised the records on that day they asked P.W. 9 to produce the same again on the following day i.e. March 30, 1984. On the day so fixed when P.W. 9 and P.W. 2 alongwith the records, went to the office of the accused persons
H they found only A2 present there. A2 directed PWs 2 and 9 to go and meet

A1 and A3 who were waiting for them in room No. 17 of the nearby Alakapuri Guest House. P.W. 2 and P.W. 9 then went to Alakapuri Guest House and met A1 and A3. A3 told P.Ws. 2 and 9 that the Hospital would have to pay Rs. 7500 towards its provident fund contribution but if they were paid Rs. 3500 the Hospital could be exempted from such payment. When P.W. 9 expressed his inability to pay the amount demanded, A1 insisted on payment of at least Rs. 2000 and out of that amount Rs. 1000 on March 31, 1984 in their office. P.Ws 2 and 9 then returned to the Hospital and appraised P.W. 1 about the talks they had with the three accused persons. For making such illegal demand P.W. 1 decided to complain against the accused persons to the CBI and handed over a sum of Rs. 1000 to P.W. 9 for payment to them at the appropriate time. On March 31, 1984 P.W. 9 visited the office of the accused when A2 alone was present and he asked P.W. 9 whether he had brought the amount. P.W. 9 however told A2 that he could not bring the amount as he could not contact P.W. 1. A 2 thereupon instructed P.W. 9 to bring the money to their office on April 2, 1984 before 10.30 A.M.

Immediately thereafter P.W. 9 contracted Inspector Thomas John (P.W. 10) of the C.B.I. Office, Cochin over phone from Calicut. On being told about the entire episode P.W. 10 reached Calicut the same evening accompanied by A.S.I. A.D. Nambiar and constable Sreekumar and met P.W. 9. P.W.9 gave a written complaint (Ext. P16) to P.W. 10 and the latter immediately forwarded the same to the Superintendent of Police, (S.P.) C.B.I. Cochin through a constable. The S.P. C.B.I. marked the complaint to Inspector S. Vijaykumar (P.W. 8) with a direction to register a case under Section 161 IPC and arrange a trap. In terms of the said direction P.W. 8 drew up an FIR (Ext. P.15) and immediately proceeded to Calicut along with inspector M.R. Kurup and two constables to lay a trap. On arrival at Calicut P.W. 8 ensured the presence of two local witnesses viz. Premarajan (P.W. 3), local Manager of the State Bank of India and K.V. Anandakrishnan (P.W. 4), an Accountant of Canara Bank. P.W. 10 then directed P.W. 9 to meet the Police party in room No. 204 of the Neelima Lodge on April 2, 1984 at 7.30 A.M. where P.W. 8 had directed P.Ws 3 and 4 to be present.

On April 2, 1984 P.Ws 3, 4 and 9 and the trap party consisting of P.Ws. 8 and 10 and Inspector M.R. Kurup, A.S.I. A.D. Nambiar and the constables assembled at Neelima Lodge around 7.30 A.M. P.W.10 intro-

A duced the persons present there and read out the complaint (Ext. P16) in their presence. After P.W. 9 had vouched for its genuineness P.W. 10 took 10 hundred rupee notes from P.W. 9 which were to be given to the accused as bribe and got their numbers noted by P.Ws. 3 and 4. Thereafter Sodium-phenolphthaline test was demonstrated to the witnesses and the resultant solution was preserved in a bottle which was sealed and attested by the witnesses. The notes were then smeared with phenolphthaline powder and entrusted to P.W. 9 with instructions to hand over the same to the accused preferably outside the office on their asking for the bribe. A sign (wiping of the face with a handkerchief), which P.W. 9 was to display if the accused received the bribe was also pre-arranged. An entrustment mahazar was then prepared by P.W.10 detailing the above procedure and the numbers of the notes. Thereafter P.W. 3 and P.W. 4 were instructed to follow P.W. 9 and witness the transaction between P.W. 9 and the accused.

D The party thereafter proceeded to the office of the accused at or about 10 A.M. P.W. 9 first went inside the office and met A3. Following him P.W. 3 also went inside the office introducing himself as a telephone employee. A3 asked P.W. 9 whether he had brought the money. Thereupon P.W. 9 gave a proposal that they would go to a nearby hotel to which A3 agreed. A3 also called A2 and the other accused (A4) who were present there. The party consisting of the above four persons then went to hotel Nilgiris followed by P.W. 3. The rest of the trap party who were waiting outside the office also followed P.W. 9. They went inside the family room of the hotel and took tea. P.W. 3 and other members of the party took positions in the nearby dining hall from where they could see the inside of the family room. After taking tea A3 asked P.W. 9 to hand over the amount.

F P.W. 9 then handed over the notes to A3 who kept them in the right pocket of his trousers after counting. They then came out of the family room followed by P.W. 9 and by the time they reached the counter they were apprehended by the C.B.I. officials. A3 immediately started weeping and admitted to have received the bribe. The palms of A3 and the right pocket of his trousers were then subjected to phenolphthaline test which gave positive results. Thereafter A3 took out the notes from the pocket of his trousers and the number of the notes were compared by P.Ws 3 and 4 with the numbers noted in the entrustment mahazer and they were found to tally. Thereafter the accused were taken to their office where the table used by A1 and A3 was searched and a draft enquiry report prepared by A3 in respect of the Hospital was recovered and seized. From personal search

of A2 a diary was also recovered. The investigation was subsequently taken over by Inspector V.A. Mohan (P.W.11) and on completion thereof he filed chargesheet against the four accused. A

All the four accused pleaded not guilty to the charges levelled against them. When examined under Section 313 Cr. P.C. the appellant (A3) admitted that he alongwith A1 had visited the Hospital on March 24, 1984, that they had verified the registers (Exts. P1 and P2) and that they had handed over a list of documents to the Hospital authorities with a direction to produce them on March 27, 1984 in their office for inspection. He however denied to have met P.Ws. 1 or 9 on any day after March 24, 1984; and stated that on April 2, 1984 P.W. 9 did not come to their office. According to the appellant, he and A2 were on out-door duty on that day and while they were taking tea in the family room of Neelgiri Hotel, P.W. 9 approached him and forcibly put some notes in his trouser pockets. He immediately brought them out and insisted P.W. 9 to take them back but in the meantime the CBI Officers came and arrested him. B C D

On consideration of the evidence of the eleven witnesses examined on behalf of the prosecution (no witness was examined on behalf of the defence) and the other materials on record the trial Court observed that the prosecution succeeded in proving recovery of the ten hundred rupee notes, which were entrusted to P.W. 9 for handing over to the appellant, from him; but as, according to it, the prosecution failed to prove beyond reasonable doubt that the appellant demanded and accepted the said amount and the defence of the appellant that he was taken to the family room of Hotel Nilgiris where P.W. 9 thrust the notes into his trousers' pocket was a probable one, acquitted him. In setting aside his acquittal the High Court firstly held that the finding of the trial Court that the appellant neither demanded nor accepted the amount of Rs. 1,000 was perverse. Besides, the High Court held, relying upon the judgment of this Court in *Hazari Lal v. State (Delhi Admn.)* AIR (1980) SC 873 that the recovery of the above notes from the appellant coupled with the other attending circumstances on record entitled the Court to draw a presumption under Section 4(1) of the Act and since the appellant failed to rebut that presumption, he was liable for conviction for accepting illegal gratification. E F G

Mr. Nambiar, the learned counsel for the appellant contended that the judgment of the trial Court acquitting the appellant was based on a H

A proper appreciation of the evidence and hence the High Court was not at all justified in setting aside the same. Mr. Nambiar next contended that one of the essential ingredients of the offences for which the appellant was convicted is a demand for illegal gratification and as the trial Court recorded, after proper appraisal of the evidence, a categorical finding that the prosecution signally failed to prove such demand the recovery of the notes from the appellant by itself could not have been made a ground for drawing the statutory presumption under Section 4 (1) of the Act.

Before we proceed to consider whether the prosecution has, in fact, succeeded in proving that the appellant demanded bribe from the Hospital authorities it will be necessary to ascertain whether such demand is an essential ingredient of the offences in question. To sustain the charge under Section 161 IPC (since omitted from the IPC and incorporated in Section 7 of the Prevention of Corruption Act, 1988 ('1988 Act' for short) with certain modifications) against the appellant the prosecution was required to prove that

- (i) the appellant was a public servant at the material time;
- (ii) the appellant accepted or obtained from P.W. 9 a gratification other than legal remuneration; and
- (iii) the gratification was for exempting the Hospital in question from its liability to pay statutory provident fund contributions.

So far as the other offence is concerned, Section 5(1)(d) of the Act (now replaced by Section 13(1)(d) of the 1988 Act) lays down that if a public servant, by corrupt or illegal means or by otherwise abusing his position as a public servant obtained for himself or for any other person any valuable thing or pecuniary advantage he would be guilty of 'criminal misconduct' and Section 5 (2) thereof (which corresponds to Section 13(2) of the 1988 Act) speaks of the punishment for such misconduct. The other Section which requires reproduction is Section 4(1) of the Act (it corresponds to section 20(1) of the 1988 Act). It reads as under :

"Where in any trial of an offence punishable under Sec. 161 or Section 165 of the Indian Penal Code or of an offence referred in clause (a) or clause (b) of sub-section (1) of Section 5 of this Act punishable under sub-section (2) thereof it is proved that an ac-

cused person has accepted or obtained or has agreed to accept or attempt to obtain for himself, or for any other person any gratification (other than legal remuneration) or any valuable thing from any person, it shall be presumed unless the contrary is proved that he accepted or obtained or agreed to accept or attempted to obtain that gratification or that valuable thing as the case may be as a motive or reward such as is mentioned in the said Sec. 161 or as the case may be without consideration or for consideration which he knows to be inadequate."

(emphasis supplied)

From a combined reading of Section 161 IPC and Section 4 (1) of the Act it is evident that if, in the instant case, the prosecution has succeeded in proving that the appellant was a public servant at the material time and that he had 'accepted' or 'obtained' Rs. 1,000 from P.W. 9 as gratification not only the first two ingredients of the former would stand proved but also the third, in view of the presumption under the latter which the Court is bound to draw unless, of course, the appellant, in his turn, has succeeded in rebutting that presumption. According to Shorter Oxford Dictionary 'accept' means to take or receive with a 'consenting mind'. Obviously such a 'consent' can be established not only by leading evidence of prior, agreement but also from the circumstances surrounding the transaction itself without proof of such prior agreement. If an acquaintance of a public servant in expectation and with the hope that in future, if need be, he would be able to get some official favour from him, voluntarily offers any gratification and if the public servant willingly takes or receives such gratification it would certainly amount to 'acceptance' within the meaning of Section 161 IPC. It cannot be said, therefore, as an abstract proposition of law, that without a prior demand there cannot be 'acceptance'.

The position will, however, be different so far as an offence under Section 5 (1)(d) read with Section 5(2) of the Act is concerned. For such an offence prosecution has to prove that the accused 'obtained' the valuable thing or pecuniary advantage by corrupt or illegal means or by otherwise abusing his position as a public servant and that too without the aid of the statutory presumption under Section 4(1) of the Act as it is available only in respect of offences under Section 5(1)(a) and (b) - and not under Section 5(1)(c), (d) or (e) of The Act. 'Obtain' means to secure

A or gain (something) as the result of request or effort (shorter Oxford Dictionary). In case of obtainment the initiative vests in the person who receives and in that context a demand or request from him will be a primary requisite for an offence under Section 5(1) (d) of the Act unlike an offence under Section 161 IPC, which, as noticed above, can be, established by proof of either 'acceptance' - or 'obtainment'.

B

Keeping in view the above principles we may now consider the facts of the instant case to ascertain whether the High Court was justified in setting aside the order of acquittal recorded in favour of the appellant. As already noticed the appellant did not dispute the fact that the sum of Rs. 1,000 was recovered from his possession. While according to the prosecution the appellant 'accepted' that amount, the appellant contended that the same was thrust into his trouser pocket by P.W. 9. From the judgment of the trial Court we find that the principal reason which weighed with it for accepting the case of the defence in preference to that of the prosecution was that P.W. 9 was an interested witness and P.Ws. 3 and 4, the two independent witnesses, who were examined by the prosecution to prove the transaction did not speak about any demand made by the appellant. Having gone through the evidence of the above two witnesses, namely, P.Ws. 3 and 4 we are in complete agreement with the High Court that the finding recorded by the trial Court in this regard is patently perverse. Both these witnesses, who at the material time were holding responsible positions in State Bank of India and Canara Bank respectively, categorically stated that they saw P.W. 9 taking out the notes from his shirt's pocket and handing over the same to Damodaran (the appellant), and the appellant, after counting those notes, putting them in the right front pocket of his trousers. The unimpeachable evidence of these independent witnesses conclusively proves that the transaction was consensual. That necessarily means that the appellant 'accepted' the money and the defence story that P.W. 9 thrust the money is patently untrue. Consequent upon such proof, the presumption under Section 4(1) of the Act would operate and since the appellant did not rebut that presumption the conviction of the appellant under Section 161 IPC has got to be upheld.

That brings us to the question whether the conviction of the appellant for the other offence under Section 5(1) (d) read with Section 5(2) of the Act can be sustained or not. The prosecution led evidence through P.Ws. 2 and 9 that the appellant and the other accused persons had earlier

demanding bribe to exempt their Hospital from the operation of the Employees Provident Funds Act. Since there is no reason to disbelieve their evidence and since their evidence gets amply corroborated by the fact of acceptance of Rs. 1, 000 by the appellant subsequently on April 2, 1984, as testified by a number of witnesses including P.Ws. 3 and 4, it is manifest that the appellant obtained the money pursuant to the demand earlier made by him by abusing his position as a public servant. The conviction of the appellant under Section 5(2) of the Act is also therefore well merited.

On the conclusions as above we uphold the convictions recorded against the appellant. Since the sentence of rigorous imprisonment for six months and a fine of Rs. 2,000 imposed upon the appellant for each of the above convictions errs on the side of leniency, no interference in respect thereof is called for. The appeal is, therefore, dismissed. The appellant, who is on bail, shall now surrender to his bail bonds to serve out the sentence.

V.S.S.

Appeal dismissed.