Justice V. Ramkumar
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ANTI-CORRUPTION LAW SHOULD RECEIVE A PURPOSIVE INTERPRETATION AT THE HANDS OF THE CONSTITUTIONAL COURTS.

A. THE PROVOCATION

What has impelled me to pen this article is a verdict rendered on 15-12-2022 by a Constitution Bench of the Supreme Court of India in **Neeraj Dutta v. State (Govt. of NCT of Delhi) –** S. Abdul Nazeer, B. R. Gavai, A. S. Bopanna, V. Ramasubramanian, **B. V. Nagarathna** – JJ, **Crl. Appeal. No. 1669/2009** *and connected cases*.

B. REFERENCE TO THREE JUDGES'

2. The above case along with connected cases initially came up for hearing before a two Judges' Bench of Supreme Court. The question mooted before the two Judges' Bench was whether despite the absence of primary evidence of the complainant, the Supreme Court was justified in sustaining the conviction of the accused in certain cases by relying on other evidence and the statutory presumption in prosecutions under Sections 7 and 13 (1) (d) read with Section 13 (2) of the Prevention of Corruption Act, 1988 ("P. C. Act, 1988" for short) as existed prior to the Prevention of Corruption (Amendment) Act 16/2018 which came into effect

on 26-07-2018. Noticing the divergence in the treatment of the evidentiary requirement for proving the aforesaid offences, the two Judges' Bench framed the following question of law:-

> "whether in the absence of evidence of complainant/direct or primary evidence of **demand** of illegal gratification, is it not permissible to draw inferential deduction of culpability/guilt of a public servant under Section 7 and Section 13(1)(d) read with Section 13(2) of Prevention of Corruption Act, 1988 based on other evidence adduced by the prosecution".
>
> **(Emphasis supplied by me)**

The two Judges' Bench accordingly referred the above question to be decided by a larger Bench.

C. REFERENCE TO CONSTITUTION BENCH (CB)

3. Consequent on the above reference the batch of cases came up for consideration before a Bench of three Judges. That Bench also took the same view and referred the above question to be decided by a Bench of appropriate strength. That is how the cases came up for hearing before the 5 Judges' Constitution Bench.

D. THE APPROACH BY THE CB

4. The Constitution Bench in the course of the verdict in question, started its discussion as follows in paragraph 2 of the verdict:-

> "Thus, the moot question that arises for answering the reference is, in the absence of the complainant letting in direct evidence of **demand** owing to the non-availability of the complainant or owing to his death or other reason, whether the **demand** for illegal gratification could be established by other evidence. This is because in the absence of proof of **demand**, a legal presumption under Section 20 of the Prevention of Corruption Act, 1988 (for short 'the Act') would not arise. Thus, the proof of **demand** is a sine qua non for an offence to be established under Sections 7, 13(1)(d)(i) and (ii) of the Act and de hors the proof of **demand** the offence under the two sections cannot be brought home. Thus, mere acceptance of any amount allegedly by way of illegal gratification or recovery thereof in the absence of proof of **demand** would not be sufficient to bring home the charge under Sections 7, 13(1)(d)(i) and (ii) of the Act. Hence, the pertinent question is, as to how **demand** could be proved in the absence of any direct evidence being let in by the complainant owing to the complainant not supporting the complaint or turning "hostile" or the complainant not being available on account of his death or for any other reason. In this regard, it is necessary to discuss the relevant Sections of the Evidence Act before answering the question for reference".
>
> **(Emphasis supplied by me)**

E. QUESTION FORMULATED BY THE CB

5. Thereafter, the Constitution Bench framed the question for consideration as follows in paragraph 28:-

"**Question for consideration:**

28. On consideration of the aforesaid cases, the question framed for determination by the larger Bench is as under:

> "Whether, in the absence of evidence of complainant/direct or primary evidence of **demand** of illegal gratification, is it not 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 Prevention of Corruption Act, 1988 based on other evidence adduced by the prosecution?".
>
> **(Emphasis supplied by me)**

F. THE FAULTY BASIC APPROACH

6. What is important to notice in this context is that initially the two Judges' Bench and subsequently the three Judges' Bench and finally the Constitution Bench proceeded on the pre-supposition that "**demand**" of illegal gratification is a common requirement to be proved in a prosecution for the offences under Sections 7 and 13 (1) (d) read with Section 13 (2) of the P. C Act, 1988 as it existed prior to 26-07-2018. "**Demand**" is not a phraseology used by either Section 7 or by Section 13(1)(d). Hence, for making the reference and for answering the reference, it was unnecessary and

*un*warranted to use the expression "**demand**". Here, according to me, lies the fallacy of understanding the relevant penal provisions which will be adverted to later.

G. GREAT RELIEF IN THE FINAL ANSWER BY THE CB

7. In paragraph 70 of the verdict in question the Constitution Bench answered the above reference as follows:-

> "70. 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"**.

Thank God, while answering the reference the Constitution Bench steered clear of the word "**demand**".

H. END JUSTIFIED

8. Nobody can obviously have any objection to the above answer given by the Constitution Bench on the question referred to it regarding the feasibility of falling back upon **other evidence** in cases where "direct" or "primary evidence" of the complainant cannot be adduced by the prosecution either due to the death of the complainant or due to the complainant not supporting the prosecution or for any other reason. In fact, the matter stood covered by the three Judges' Bench speaking through Justice K. T. Thomas in **M. Narasinga Rao v. State of A.P AIR 2001 SC 318 –** *3 Judges* – **K. T. Thomas,** U. C. Banerjee, R. P. Sethi – JJ. That was a trap case in which the decoy himself had made a volte face during trial and had turned disloyal to the prosecution. The Supreme Court held that in such cases the fact that the accused "accepted" or "agreed to accept" the illegal gratification could be proved by "other evidence" if direct evidence was not available. The said ruling was binding on co-ordinate Benches of the Supreme Court warranting no reference to a larger Bench. The Constitution Bench has also, in the verdict in question approved **M. Narasinga Rao** (Supra – AIR 2001 SC 318). But, what is significant to note is that, after referring to the penal provisions and the case-law, the Constitution Bench

summarized the law in paragraph 68 of the verdict. The said "summary" contains contradictory and legally unsustainable conclusions which will be adverted to later.

I. THE RELEVANT SECTIONS ANALYSED

9. Let us now independently examine Sections 7 and 13(1)(d) as they stood at the relevant time.

Section 7

"7. **Public servant taking gratification other than legal remuneration in respect of an official act**.— Whoever, being, or expecting to be a public servant, "**accepts**" or "**obtains**" or "**agrees to accept**" or "**attempts to obtain**" from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, 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 functions, favour or disfavour to any person or for rendering or attempting to render any service or disservice to any person, with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company referred to in clause (c) of section 2, or with any public servant, whether named or otherwise, shall be punishable with imprisonment which shall be not less

than six months but which may extend to seven years and shall also be liable to fine.

(Emphasis supplied by me)

Explanations —(a) "Expecting to be a public servant". If a person not expecting to be in office obtains a gratification by deceiving others into a belief that he is about to be in office, and that he will then serve them, he may be guilty of cheating, but he is not guilty of the offence defined in this section.

(b) "Gratification". The word "gratification" is not restricted to pecuniary gratifications or to gratifications estimable in money.

(c) "Legal remuneration". The words "legal remuneration" are not restricted to remuneration which a public servant can lawfully demand, but include all remuneration which he is permitted by the Government or the organisation, which he serves, to accept.

(d) "A motive or reward for doing". A person who receives a gratification as a motive or reward for doing what he does not intend or is not in a position to do, or has not done, comes within this expression.

(e) Where a public servant induces a person erroneously to believe that his influence with the Government has obtained a title for that person and thus induces that person to give the public servant, money or any other gratification as a

reward for this service, the public servant has committed an offence under this section.

Section 13 (1) (d)

Section 13 - Criminal misconduct by a public servant. -

"(**1**) A public servant is said to commit the offence of criminal misconduct, -

a) Omitted for the present discussion.

b) -do- -do-

c) -do- -do-

(**d**) if he,—

(i) by corrupt or illegal means, "**obtains**" for himself or for any other person any valuable thing or pecuniary advantage; or

(ii) by abusing his position as a public servant, "**obtains**" for himself or for any other person any valuable thing or pecuniary advantage; or

(iii) while holding office as a public servant, "**obtains**" for any person any valuable thing or pecuniary advantage without any public interest;

(Emphasis supplied by me)

Explanation- For the purposes of this section, "known sources of income" means income received from any lawful source and such receipt has been intimated in accordance with the provisions of any law, rules or orders for the time being applicable to a public servant."

J. THE SEMANTIC DISTINCTION BETWEEN "ACCEPT" AND "OBTAIN".

10. The old law corresponding to Section 7 of P. C Act, 1988 was Section 161 of IPC. Similarly, the old law, by and large corresponding to Section 13(1)(d) of P. C Act, 1988 was Section 5(1)(d) of P. C Act, 1947. While Section 5(1)(d) of P. C Act, 1947 and Section 13(1)(d) of P. C Act, 1988 use the expression "**obtains**" only, Section 161 of IPC and the corresponding Section 7 of P. C Act, 1988 not only use the expression "**obtains**", but also use the expressions "**accepts**", "**agrees to accept**", "**attempts to obtain**". It was noticing the above semantic distinction between the words "**accepts**" and "**obtains**" that a four Judges' Bench of the Supreme Court of India in **Ram Kishan v. State of Delhi AIR 1956 SC 476 -** *Vivian Bose, B. P. Sinha, S. J. Imam,* ***N. Chandrasekhara Aiyar*** *– JJ,* observed in paragraphs 14 and 15 as follows:-

"We have primarily to look at the language employed and give effect to it. One class of cases might arise where corrupt or illegal means are adopted or pursued by the public servant to gain for himself a pecuniary advantage. **The word 'obtains', on which much stress was laid does not eliminate the idea of**

acceptance of what is given or offered to be given, thought it connotes also an element of effort on the part of the receiver.

15. One may accept money that is offered or solicit payment of a bribe, or extort the bribe by threat or coercion; in each case, he **obtains** a pecuniary advantage by abusing his position as a public servant. The word 'obtains' is used in S.161 and 165, Penal Code. The other words "corrupt or illegal means" find place in S.162. Apart from "corrupt and illegal means" we have also the words "or by otherwise abusing his position as a public servant".

(Emphasis supplied by me)

Again in paragraphs 11 and 12 of **C. K. Damodaran Nair v. Government of India AIR 1997 SC 551 -** ***M. K. Mukherjee****, S. P. Kurdukar - JJ*, Justice M. K. Mukherjee speaking for the Bench observed as follows:-

"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 S.161 IPC**. **It cannot be said, therefore, as an abstract proposition of law, that without a prior demand there cannot be 'acceptance'**.

12. The position will, however, be different so far as an offence under S.5(1)(d) read with S.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 S.4(1) of the Act as it is available only in respect of offences under S.5(1)(a) and (b) - and not under S.5(1)(c), (d) or (e) of the Act. **'Obtain' means to secure 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 S.5(1)(d) of the Act unlike an offence under S.161 IPC**, which as noticed above, can be established by proof of either 'acceptance' or -'obtainment'".

(Emphasis supplied by me)

The above classic observations have not been dissented to or overruled so far and continue to be valid propositions of law.

11. Section 7 when dissected in the light of the above judicial pronouncements, reads as follows:-

A public servant or an expectant public servant-

i) **accepts**(merely **receives** without any effort on his part. Here the effort by way of offer is on the part of the bribe-giver) ; or

ii) **agrees to accept** (here the public servant gives his nod to the offer); or

Here prior **demand** is **not necessary**

iii) **obtains** (by a conscious effort on the part of the public servant); or

- *Both **demand** & **acceptance** are necessary*

iv) **attempts to obtain** (here again there is a conscious effort on the part of the public servant).

- *Mere **demand** is sufficient (Vide para 7 of **State of M. P v. Mubarak Ali AIR 1959 SC 707***

for himself or for any other person, any **gratification** other than legal remuneration.

Even in cases where the case of the prosecution was that the accused "demanded and accepted" bribe and what has been proved is mere receipt of the "marked currency notes" without any proof of "demand", can the Court remain content by saying that mere recovery of tainted money from the accused does not make out the offence? Apart from pressing into service the presumption under Section 20 of the P. C Act, 1988, the Court will be justified in invoking the doctrine of res ipsa loquitur (the thing speaks for itself) which was boldly employed by Justice V. R. Krishna Iyer in para 11 of **Reghubir Singh v. State of Haryana AIR 1974 SC 1516 = (1974) 4 SCC 560** – 3 Judges - *H. R. Khanna,* ***V. R. Krishna Iyer****, P. K. Goswami – JJ*. Once the prosecution establishes that gratification was paid and accepted by the public servant, the presumption under Section 4(1) of P. C Act, 1947 (corresponding to Section 20 of the P. C Act, 1988) is attracted and the Court can presume that the gratification was paid and accepted as a motive or reward to do or to forbear from doing any official act. (Vide **Madhukar Bhaskarrao Joshi v. State of Maharashtra AIR 2001 SC 147 = (2000) 8 SCC 571 -** *A. P. Mishra,* ***N. Santosh Hedge*** *- JJ***;** Para 24 of **C. M. Girish Babu v. CBI AIR 2009 SC 2022 = (2009) 3 SCC 779 -** *Lokeshwar Singh Panta,* ***B. Sudershan Reddy*** *- JJ*).

Where "**receipt**" of gratification is proved by the prosecution, the "Court is under a legal obligation" to presume under Section 20 (1) of P. C Act, 1988 that such gratification was accepted as a reward for doing the public duty. (Vide paras 24 and 25 of **M. Narasinga Rao** (Supra – AIR 2001 SC 318)**.**

The essential distinction between Section 7 and Section 13(1)(d) is that every **acceptance** of illegal gratification *by a public servant* whether preceded by a "**demand**" or not, would be covered by Section 7, whereas "acceptance" of illegal gratification in pursuance of a "**demand**" by a public servant would also fall under Section 13(1)(d). (Vide para 8 of **State v. Parthiban AIR 2007 SC 51 = (2006) 11 SC 473 -** ***Arijit Pasayat****, R. V. Raveendran - JJ***; Baliram v. State of Maharashtra (2008) 14 SCC 779 -** ***Dr. Arijit Pasayat****, Dr. Mukundakam Sharma - JJ***;** Para 25 (C) of **Ramdas M. P v. State of Kerala 2011 KHC 236 = ILR 2011 (2) Ker. 375 –** *V. Ramkumar - J*).

K. INVOLUNTARY REACTION EXPECTED OF AN UPRIGHT PUBLIC SERVANT

12. Will an upright public servant either actively or passively accept bribe offered to him by a crooked person seeking a favour from him ? Never. Far from accepting the bribe meekly, his natural and involuntary reaction would be a loud protest followed by a thunderous rebuke at the person

who tried to bribe him. (Vide **A. Sasidharan v. State of Kerala 2007 (4) KHC 774** – *V. Ramkumar - J*; **Joseph James @ Jose v. State of Kerala 2010 KHC 323** – *V. Ramkumar – J* and para 25 (N) of **Ramadas N. P. v. State of Kerala 2011 KHC 236 –** *V. Ramkumar - J*). He may even fling the bribe on the face of the intruder who will be thrown out or asked to get out. Such a public servant will also shout his remonstrance at the person who tried to bribe him and may even call his official superior or the police. This will be the natural instinct of a reasonable and prudent public servant *and this, the Court can definitely presume under Section 114 of the Evidence Act*.

L. MEANS DO NOT JUSTIFY THE END

13. Now let us examine the **summary** of the discussion given by the Constitution Bench in paragraph 68 of the verdict in question. The said summary reads as follows:-

> "68. What 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 the nature 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 and receives the illegal gratification, it is a case of acceptance as per Section 7 of the Act. In such a case, there need not be a prior demand by the public servant.

(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, the offer by the bribe giver and the demand by the public servant respectively have to be proved by the prosecution as a fact in issue. In other words, mere acceptance or receipt of an illegal gratification without anything more would not make it an offence under Section 7 or 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 in turn 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 an 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".

M. MY COMMENTS ON THE ABOVE "SUMMARY" BY THE CB

14. The following are my response to the summary given by the Constitution Bench in paragraph 68 of the verdict in question:-

a) Proposition (a) in the summary can hold good only in the case of a prosecution under Section 13(1)(d) or in a case involving "*obtains*" or "*attempts to obtain*" of Section 7. The broad proposition that "*demand and acceptance*" is a *sine qua non* for a prosecution under Sections 7 and 13(1)(d), cannot be accepted.

b) What has been said regarding Proposition (a) above, equally holds good regarding Proposition (b) also, except regarding the mode of proof.

c) Proposition (c) can be applied in those cases where the charge is that the public servant "*obtained*" or "*attempted to obtain*" and not in cases where the

charge is that the public servant "*accepted"* or "*agreed to accept*". Section 7 takes in all the above situations and the "*demand factor*" is applicable only in the aforementioned two situations.

d) **Clause (i)** of Proposition (d) in fact, contradicts Propositions (a) to (c). What is stated in the said Clause of Proposition (d) will hold good only in cases where the public servant *"**accepts***" and "***agrees to accept***" occurring in Section 7. But, there is no duty on the prosecution to prove "*offer to pay the bribe*" by direct evidence. Such offer can even be inferred by the conduct of the public servant receiving the bribe without any protest.

Clause (ii) of Proposition (d) correctly lays down the requirements of Section 13(1)(d). But, it is not confined to Section 13 (1) (d) only. It also applies to the words *"obtains"* and *"attempts to obtain"* occurring in Section 7 as well.

Clause (iii) of Proposition (d) cannot hold good in the case of Section 7 in all situations. As already indicated in paragraph 10 above once the prosecution has proved that the bribe has been accepted by the public servant without any protest, then the dicta in **Madhukar Bhaskarrao Joshi** (*Supra - AIR 2001 SC*

147), **C. M. Girish Babu** (*Supra - AIR 2009 SC 2022)* and **M. Narasinga Rao** (*Supra – AIR 2001 SC 318)*, will squarely apply.

In **Clause (iii)** of Proposition (d) the Bench appears to be importing the doctrine of "*offer*" and "*acceptance*" known to the realm of contracts. As already mentioned, from the very fact of receiving the bribe without any protest, the Court can infer that there was an offer since it is axiomatic that there cannot be any acceptance without an offer which may be either express or implied. In this connection I am fortified by a recent article by Justice P. N. Prakash, Former Judge, High Court of Madras, published in **(2023) 3 MLJ (Crl)**, **Journal Page 6** under the caption "**Neeraj Datta v. State (NCT of Delhi) – A Comment**".

e) Proposition (e) will apply in those cases where both "*demand*" and "*acceptance*" of the bribe are relevant and not in all cases falling under Section 7.

f) Proposition (f) also will be applicable in those cases where "*demand*" of illegal gratification arises for adjudication. The mode of proof indicated there will be available to the prosecution even to prove the receipt of bribe by the public servant. The last sentence in Proposition (f) which reads "*the trial does*

not abate nor does it result in an order of acquittal of the accused public servant", does not, in my opinion, make any sense.

g) Proposition (g) correctly lays down the consequence of the presumption under Section 20 on a charge for an offence under Section 7. Hence the observations in Clause (iii) of Proposition (d) laid down by the CB that mere acceptance or receipt of illegal gratification will not make it an offence under Section 7 is not true if the case involves a situation where the public servant has "*accepted*" or "*agreed to accept*" illegal gratification. Such a case will undoubtedly fall under Section 7.

h) Proposition (h) seeks to clarify Proposition (e) with regard to a presumption of fact made mention of therein.

N. THE CONCLUSION

15. What is disappointing to note is that when proof of "demand" in a prosecution under Section 7 is irrelevant in cases where the allegation is that the accused either "accepted" or "agreed to accept" bribe, even the question referred to the Constitution Bench and framed by the Bench also, proceeds on the footing that "demand" is a necessary

ingredient in all prosecutions under Section 7. It is not known whether the Courts at different levels, while formulating the question were carried away by the arguments of some vested interests who want to perpetuate the erroneous interpretation of insisting on the "demand factor" in all prosecutions under Section 7.

When the common man is suffocating under rampant corruption at all levels and in almost all walks of life, the duty of Constitutional Courts is not to give such a hair splitting interpretation as to defeat the intendment of the law-maker.

Kochi
02-09-2023

Justice V. Ramkumar,
Former Judge,
High Court of Kerala.