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THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment reserved on: 13.05.2011
Judgment delivered on: 02.06.2011

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CRL. A. No. 689/2002

D.B. SAMUEL

..... APPELLANT

Vs

CENTRAL BUREAU OF INVESTIGATION (CBI)

..... RESPONDENT

Advocates who appeared in this case:

For the Appellant: Mr. Tarkeshwar Nath & Mr Saurabh Kr. Tuteja, Advocates.
For the Respondent: Ms Sonia Mathur & Mr Sushil Kr. Dubey, Advocates.

CORAM :-

HON'BLE MR JUSTICE RAJIV SHAKDHER

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment ? | Yes |
| 2. | To be referred to Reporters or not ? | Yes |
| 3. | Whether the judgment should be reported in the Digest ? | Yes |

RAJIV SHAKDHER, J

1. The captioned appeal has been preferred under Section 374 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Code') against the judgment dated 23.08.2002 and sentence dated 24.08.2002 passed by Sh. R.K. Gauba, Spl. Judge, CBI, Delhi. The appellant, who is the accused has been found guilty and convicted in respect of offences attributed to him under Sections 409, 466, 471, 477-A of the Indian Penal Code, 1860 (hereinafter referred to as 'IPC') and Section 5(2) read with Sections 5(1)(c) and (d) of the Prevention of Corruption Act, 1947 (hereinafter referred to as 'P.C. Act'). The accused has been sentenced to rigorous imprisonment (RI) for a period of four years and the fine of Rs 2000 on each count. The sentences

are to run concurrently. In the event of default in payment of fine on any of the counts the accused is required to undergo a further RI of three months.

2. The brief facts in the background of which the present appeal arises are as follows: The accused was working as cashier at the relevant point in time in the Horticulture Department of the Public Works Department (in short 'PWD') under the Delhi Administration. As part of his duties the accused was required to receive earnest money deposits (EMD) from contractors who intended to bid against tenders floated by PWD. In the course of his duties EMDs were received by him and thereafter remitted to the Reserve Bank of India (in short the 'RBI').

2.1 In the instant case the accused received on 22.06.1983 EMDs from four contractors. The sums in issue were Rs. 2239/-, Rs 223/-, Rs 1385/- and Rs. 1385/-. Against these deposits four receipts were issued being: receipt Nos. 63 (Ex. PW1/A), 64 (Ex. PW1/B), 65 (Ex. PW1/C) & 66 (Ex. PW1/D). The first deposit against receipt No. 63 (Ex. PW1/A) was made by Krishan Chand Wadhwa, deposits against receipt nos. 64 & 65 (Exs. PW1/B & PW 1/C) were made by M/s Jagjit Singh & Co., while the last deposit against receipt no. 66 was made by M/s Wadhwa Construction.

2.2 The said sum, which totaled to an amount of Rs 7248/-, was received by the accused. The said amount, however, was never remitted to RBI. The cash book was, however, tampered with in a manner that it reflected the deposit of the sum involved, i.e., Rs 7248/- with the RBI on 28.06.1983. Evidently this falsification of the cash book was done by tampering with the carbon copy of the receipt scroll bearing no. 43, dated 25.06.1983, issued by the RBI in relation to deposit of a sum of Rs 300. The tampering of the cash book was carried out by insertion of an entry in the amount column, of a figure equivalent to Rs 7248/- (which is the amount misappropriated in the instant case), and by changing the date from 25.06.1982 to 28.06.1983.

2.3 It appears that the matter attained urgency when one Mr R.L. Chopra (PW9), who at the relevant time was working as an executive engineer with Division-III of the Central Public Works Department (in short 'CPWD') wrote a letter dated 10.04.1986 to the Manager of RBI as well as to the Pay & Accounts Office (in short 'PAO') seeking a confirmation of remittance of Rs 7248/-. In response Sh. Ramesh Chander, Personnel Manager in the RBI intimated that the amount in issue, i.e., Rs 7248/- was never deposited with RBI, on 28.06.1983. A similar reply was received from the PAO of the RBI.

2.4 A FIR was filed on 12.05.1987, alleging criminal conspiracy between accused, Sh. N.N. Gupta (PW11), who at the relevant time was the Junior Accounts Officer and Sh. H.K. Gupta (PW12), Dy. Director, Horticulture Division.

2.5 The FIR was registered under Section 120B read with Section 409, 466, 471 & 477A of the IPC. Pursuant thereto investigation commenced. On the culmination of the investigation, a chargesheet was filed on 17.02.1988 by the Anti-Corruption Branch (in short 'ACB') of Central Bureau of Investigation (in short 'CBI').

2.6 In the chargesheet the accused was referred to in column one (1) while H.K. Gupta (PW12) and N.N. Gupta (PW11) were referred to in column two (2). The chargesheet adverted to the fact that investigations had revealed that the accused had prima facie committed offences under Section 409, 466, 477 and 477A of the IPC and under Sections 5(1)(c) and (d) of the PC Act. The trial court by an order dated 11.02.1994, directed framing of charge against the accused under the aforementioned Sections based on the fact that a prima facie case had been made out against the accused, having regard to the material placed on record.

2.7 It is important to bear in mind that before the trial court, at the stage of framing the charge, an argument was raised that since the accused was a public servant on the CRL.A. 689/2002

date of alleged commission of offence, the sanction required to be taken under Section 197 of the Code and Section 6 of the PC Act having not been obtained, no charge could be framed against the accused. The trial court in the very same order, that is, order dated 11.02.1994 repelled this submission, broadly on the ground that the requirement of taking sanction is examined at the stage when the court is called upon to take cognizance of the offence. Since the accused on that date, was no longer a public servant, the bar contained in Section 197 of the Code and Section 6 of the PC Act did not apply. It is important to note that accused did not agitate this issue any further, specially at the stage of final arguments after the evidence in the matter stood concluded. There is, therefore, rightly no discussion with respect to this aspect of the matter in the impugned judgment of the trial court. In the appeal filed in this court, however, a ground has been raised in this regard. I shall be dealing with the same in the later part of my judgment.

3. Coming back to the narrative, post the institution of the chargesheet, parties were given opportunity to lead evidence in support of their case. The prosecution examined thirteen (13) witnesses in support of its case while the defence did not present any witness apart from the accused, who recorded his statement under Section 313 of the Code.

3.1 Mr Tarkeshwar Nath, Advocate assisted by Mr Saurabh Kr. Tuteja advanced submissions on behalf of the accused, while arguments were addressed on behalf of the State by Ms Sonia Mathur assisted by Mr Sushil Kr. Dubey. Mr Nath in support of the appeal briefly made the following submission:-

(i) the trial court had held the accused guilty based on conjecture and surmises. There was, according to the learned counsel, failure on the part of the trial court to appreciate

the evidence on record; since the evidence on record demonstrably shows that there were two views possible, the benefit of doubt ought to have been given to the accused;

(ii) the trial court failed to appreciate that the prosecution had failed to establish that the hand writing in the cash book (Ex. PW5/B) and that in the carbon copy of the scroll receipt (Ex. PW5A) were not that of the accused. The evidence having come on record that it was not the sole duty of the cashier, which was the role assigned to the accused at the relevant point in time, to deposit the cash received with RBI, the alleged tampering of the record, i.e., the cash book and the scroll sheet, could not be attributed to the accused. Furthermore, since it has come on record that the entries made in the remittance book were not made by the accused then surely the benefit of doubt should go to the accused;

(iii) the factum of the misappropriation of the amounts in issue, that is, Rs 7248/- was brought to light by the accused when he made a complaint to one Sh. G.S. Rao, Director General against N.M. Gupta (PW11) and H.K. Gupta (PW12). The copies of this complaint were sent to the Lt. Governor, Chief Engineer Vigilance (CPWD) R.L. Chopra (PW9);

(iv) despite the above facts obtaining neither N.M. Gupta (PW11) nor H.K. Gupta (PW12) were charged, though their names were included in the chargesheet, their cases were not sent up for trial. Furthermore, even the statements of N.M. Gupta (PW11) and H.K. Gupta (PW12) were not recorded by the investigating officer under Section 161 of the Code. It was only much later, that is, on 23.11.2000 that permission of the trial court was sought to include N.M. Gupta (PW11) and H.K. Gupta (PW12) as prosecution witness;

(v) the trial court in coming to the conclusion that the accused was guilty of the offences with which he was charged has presumed that the receipts scroll (Ex. PW5/A)

was forged by him; that the motive for effecting the forgery was to reflect the entry of Rs 7248/- in the receipts scroll (Ex. PW5/A); and that N.M. Gupta (PW11) had made the entry (Ex. PW12/DA1) in the remittance book (Ex. PW12/DA) to the effect: “acknowledgement for Rs 7248/- remitted on 28/6/83 in the receipt scroll” at the behest and on the representation of the accused;

(vi) there was no evidence of any witness or otherwise which could establish that the accused had made such a representation to N.M. Gupta (PW11) to make the aforementioned entry in the remittance book; and

(vii) lastly, as indicated above, that in view of the State having failed to obtain sanction, as mandated in law, all proceedings against the accused being without jurisdiction, ought to fail.

4. As against this, Ms Mathur, who appeared for the State, largely relied upon the trial court judgment in support of her submissions. It was contended by Ms Mathur that evidence on record would demonstrate that the accused had not disputed the fact that the sum in issue, i.e., Rs 7248/- was received by him on 22.06.1983. The evidence on record would also clearly establish that the said amount was not remitted to RBI and that the receipts scroll sheet (Ex. PW5/A) and the remittance book (Ex. PW12/DA) had been fabricated to reflect entry in the sum of Rs 7248/- only to cover up the misappropriation of funds by the accused. The fact that funds stood misappropriated is not in dispute. The circumstantial evidence on record clearly points to the guilt that the accused was entrusted with the job of receiving the cash and deposit the same with the RBI. The fact that this job function (which entailed deposit of cash) had been performed once in a while by a person other than a cashier could not lead to the conclusion that there was no misappropriation of funds by the accused. In the ordinary course the accused would have made the necessary inquiries immediately after

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22.06.1983 and not in January, 1986 after a period of nearly three years. Therefore, the involvement of the accused cannot be disregarded due to the perceived laxity in maintaining strict vigilance by other officers, that is, N.M. Gupta (PW11) and H.K. Gupta (PW12).

4.1 As regards sanction Ms Mathur submitted that this issue was set at rest at the stage of framing of charge. The accused had not raised this issue at the final stage before the trial court and, therefore, could not be permitted to raise the same at this stage. In support of this submission the learned counsel cited the judgment of a Single Judge of this court in the case of *Satish Kumar vs CBI 2009 (108) DRJ 682*.

5. Having heard the learned counsel for the parties as well as on perusal of the evidence on record in order to form a view as to whether the trial court has arrived at a correct conclusion, it would be important to first look at the evidence from the point of view of following; though while in looking at the evidence it will have to be borne in mind that the testimony of witnesses does spill over and overlap with other areas as well.

- (i) the procedure for collection and deposit of cash;
- (ii) the responsibility of persons who collected the cash, vis-à-vis its remittance for deposit to RBI; and
- (iii) lastly, the reasons which propelled an inquiry into the misappropriation.

6. As regards the procedure in particular and other related aspects the evidence of following witnesses would be important: Brij Pal Singh (PW7) who was working as the Asstt. Director of Horticulture Department (PWD); N.M. Gupta (PW11) who was engaged as Junior Accounts Officer in the division; H.K. Gupta (PW12) who was working as the Dy. Director in the said division and Jagat Ram (PW6) who worked as the counter clerk with the RBI.

6.1 Brij Raj Singh (PW7) in his evidence deposed that the EMD, which was received from the contractors, was deposited with the cashier. On receipt of the amount an entry was made in the cash book; which was maintained in the divisional office. The Dy. Director of the divisional office would append his signatures to the entry made in the cash book by cross-referencing the same with the cash voucher generated in regard to the transaction on the deposit of amount with the cashier. The witness further deposed that in the event the contractor, who had deposited the money, failed to win the tender he could apply for refund of the EMD. Upon his application being allowed by the Dy. Director, the cashier would generate a receipt for refund of the amount which was counter-signed by the Dy. Director. After completion of these formalities the EMD was refunded in cash or by way of cheque to the contractor.

6.2 It is important to note at this juncture, while dealing with the evidence of PW7, that even though he identified the accused as an employee working in the divisional office of the Horticulture Department, he was unable to remember the post he held and was not able to identify either the hand writing or the signatures of the accused or those of H.K. Gupta (PW12) who was the Dy. Director in the department at the relevant point in time.

6.3 In his cross-examination he reiterated the fact that the Dy. Director would not sign an entry made in the cash book till it was cross-referenced with the entry made in the cash voucher. He also went on to depose that even though he had not signed the remittance book (Ex. PW12/DA) for the period 18.04.1983 till June, 1983, the duty to make entries in the remittance book was that of the cashier and the accountant.

6.4 N.M. Gupta (PW11), who was working during the relevant period as the Junior Accounts Officer in the divisional office deposed in his examination-in-chief that it was the duty of the accused to write the cash book and obtain signatures of the Dy.

Director. He went on to say that at the close of each day as and when the cash book was handed over to him, he would check the same when put up before him for verification, and thereafter, affix his initials on the cash book. Specifically with regard to the cash book (Ex. PW5/B), PW11 testified that the cash book had been written by the accused, and that entries at pages 32 and 33 of the cash book (Ex. PW5/B) dated 22.06.1983 were in the hand writing of the accused and bore his signatures. More specifically the entries at pages 32 (Ex. PW11/A, 11/B & 11/C) were made by the accused and that the signatures against the said entries at point 'A' were those of H.K. Gupta (PW12).

6.5 PW11 while admitting that it was his duty to sign the cash book repelled the suggestion that his duty also included an obligation to tally the cash with the vouchers, prior to his signing the cash book. He also repelled the suggestion that after he had signed the cash book, the Dy. Director was also once again required to verify the entry and then sign the cash book. As regards the suggestion made to PW11 as to whether it was his duty to sign the remittance book, the witness responded by saying that it was very much part of his duty to sign the remittance book. The witness, however, conceded that even though there were several entries in the remittance book his signatures appeared against only two of them at point encircled 'X' and 'Y'.

6.6 PW11, however, denied the suggestion made to him that he had appended his signatures at point 'Y' in the remittance book (Ex. PW12/DA) at the instance of Dy. Director, H.K. Gupta (PW12) to inveigle the accused in a trap. He, however, in the cross-examination alluded to the fact that he could not remember the duties of the Dy. Director in relation to cash book and the remittance book on account of lapse of time. It is pertinent to note that the examination-in-chief of PW11 took place on 31.05.2001 and his cross-examination was conducted on 02.07.2002.

6.7 The witness also displayed lack of knowledge as regards the obligation, if any, of the Dy. Director to tally the vouchers with the amounts mentioned in the cash book before appending his signatures on the same.

6.8 He repelled the suggestion that he had conspired with H.K. Gupta (PW12) in embezzling the amount in issue. He also repelled the suggestion that it was in his knowledge or in his presence that on 28.06.1983, H.K. Gupta (PW12) took the amount from the accused along with bank challans to deposit the amount with the RBI.

6.9 He further repelled the suggestion that false token numbers were given to the accused for making an entry in the cash book on the pretext that the challan would be given to him later in point of time.

7. PW11 also repelled the suggestion that the accused had refused to make entries in the remittance book and that he had made the entries in the remittance book despite the presence of the accused in the office on that day.

7.1 H.K. Gupta (PW12), who was working as Dy. Director at the relevant point in time, testified to the following effect in his examination-in-chief. The accused, who was the cashier at the relevant point in time, maintained the cash book (Ex. PW5/B) which remained in the custody of the accused. The entries (Ex. PW11/A) in the cash book (Ex. PW5/B) at page 32 bore his signatures at points 'A', 'B' and 'C'. The entry (Ex. PW11/B) made in the cash book (Ex. PW5/B) at page 33 bore his signatures at points 'B' and 'C' and that of the accused at point 'A'. Similarly, entry (Ex. PW11/C) at page 34 of the cash book bore his signatures at point 'B', 'C', 'D' and 'E' while the signatures of the accused were appended at point 'A1' to 'A4'. PW12 admitted that he would append his signatures in the cash book after entries had been recorded by the cashier and signed by him.

7.2 In his cross-examination PW12 deposed that both the divisional accountant and the cashier worked under him at the relevant point in time when, he was the Dy. Director in the department. He went on to say that the cash which was collected during the day was put in the locker only after it had been counted and tallied by him with the cash vouchers. According to him the locker had two keys, one of which remained with him while the other was with the accused. He volunteered and said that locker could be opened only if both the keys were used.

7.3 He further adverted to the effect that before cash was brought to him it was first checked by the divisional accountant and then by him.

7.4 As regards deposit of the cash with the RBI, the witness stated that whoever went to deposit the cash would normally obtain an endorsement on the challan evidencing deposit of cash with the RBI and in addition would seek stamping of the remittance book. In the case of their department it was not compulsory to carry the remittance book to the RBI. The deposit of cash, according to the witness, was normally made by the cashier. To a suggestion made to PW12 that the remittance book was not carried at the time of deposit and instead a copy of challan bearing the acknowledgement of RBI was pasted in the remittance book; the witness replied in the negative. The witness, however, accepted that the challans would always require his signatures for the purposes of deposit.

7.5 The witness, however, repelled the suggestion that it was mandatory that the entries in the cash book were based on the challans, which were checked by the divisional accountant and counter checked by him, whereafter they were mandatorily entered in the remittance book under his signatures.

7.6 He failed to recall as to whether at the time of deposit of cash a token number is issued by the RBI and the number of the said token is reflected in the cash book. He

also failed to recall whether he would check the token number before putting his signatures in the cash book though he accepted the fact that correct token numbers were reflected against entry number (Ex. PW11/C) reflected at page 34 of the cash book. It is important to note that this entry is the entry in the sum of Rs 7248/-, which has been allegedly inserted by the accused, by tampering with the cash book.

7.7 PW12, however, denied the suggestion that he had embezzled the amount in collusion with N.M. Gupta and trapped the accused.

7.8 To a specific suggestion that on 28.06.1983 he had taken the amount in issue, from the accused by representing to him that he would deposit the same with the RBI; the witness answered in the negative. PW12, also answered in the negative, to a suggestion made that the accused had handed over to him the sum in issue, along with a bank challan in good faith and that he had given him fictitious token numbers which were entered by the accused in the cash book. PW12 also denied the suggestion made to him that the accused did not make the entries in the remittance book because he had failed to hand over the copies of the challan to the accused. He failed to recall that there was any rule that the remittance book could be signed only, either by the cashier or by the Dy. Director.

7.9 On the other hand Jagat Ram (PW6), who was posted as staff officer in the receipt section of RBI at the relevant point in time, deposed as follows: The witness stated that it was the duty of his section to receive payments. After the payments were received by the counter clerk, it was his duty to certify the actual amount received as per the challan and enter the same in the receipt scroll. As per the procedure in vogue four (4) copies of the receipts were prepared. The original receipt scroll was kept with RBI. The first carbon copy of the scroll was delivered to the cashier depositing the

amount, though; the cashier would collect his copy only on the succeeding day, the second and third carbon copy of the receipt scroll was sent to the PAO Officer.

8. It is thus evident that there was one original and three carbon copies of the receipts scroll which was generated.

8.1 PW6 went on to advert that on 25.06.1983 as per the receipt scroll available with the PAO only a sum of Rs 300/- was deposited by the cashier of the horticulture department, and that in the carbon copy of the receipt scroll an entry in the sum of Rs 7248/- has been made by committing a forgery in the carbon copy (Ex. PW5/A). The forgery, according to PW6, is not only with regard to the insertion of the amount but also in the date being changed from 25.06.1983 to 28.06.1983. He went on to say that as per the receipt scroll maintained in RBI, the entry made on 26.05.1983 did not tally with that which was displayed on Ex. PW5/A.

8.2 In his cross-examination, PW6 adverted to the effect that after the monies were deposited with the RBI and the person received a carbon copy of the receipt scroll, at times the signatures of the recipient were obtained but this was not a practice which was uniformly followed. In the instant case the signatures of the person, who deposited the cash, were the representative of the department who collected the carbon copy, the signatures on the receipts scroll were not obtained. PW6 was also unable to identify either the hand writing on the original receipt scroll or the person who had come to collect the carbon copy of the receipts scroll.

8.3 R.C. Khatri (PW1), who was working as the divisional clerk, at the relevant point in time in the department, also referred to the procedure adopted for collection of cash and making entries in the cash book and the remittance book. Crucially, while in his examination-in-chief he dithered in identifying the signatures of the accused (accordingly therefore, the witness had been declared hostile) in his cross-examination,

he accepted that the entries at point 'B' at page 32 and entries at point 'C' at point 33 of the cash book were in the hand writing of the accused who, according to his deposition, was working as cashier at the relevant point in time. This was once again reiterated by PW1 in the following words :

“.....It is correct that I have stated to the CBI that the entries at point B at page 32 and at point 'C' at page 33 of the cash book mark 'A' is in the hand writing of the accused. It is wrong to say that I have not identified the writing of the accused at point 'B' and 'C' at page 32 and 33 respectively of the cash book mark 'A' in order to favour the accused since he is my senior. The facts stated in my statement running into five pages are correct, this statement is u/s 161 Cr.P.C. dated 26.5.87 and 19.11.87, the witness has answer this question after going through the entire statement.....”

8.4 A.K. Sehgal (PW2) in his deposition proved the procedure to which he had adverted to in his statement made under Section 161 of Code to the CBI. The witness, however, testified that since he had joined the horticulture department only on 17.04.1985, he could not say whether the entries were those made by the accused though, in the ordinary course, they ought to have been made by the cashier. The witness went on to testify that in his statement u/s 161 of Cr.P.C. he had not identified the hand writing of the accused on the counter foil of the receipts bearing nos. 63 to 66 (Exs. PW1/A, 1/B, 1/C & 1/D).

Testimony of other witnesses

8.5 R.V. Verma (PW3), who worked as the accounts officer with the RBI proved the signatures of Mr Ramesh Chander at point 'A' on the letter dated 15.04.1986 (Ex. PW3/A).

8.6 A.S. Bomrah (PW4) proved the signatures on letter dated 18.04.1986 (Ex. PW4/A) sent under the signatures of one Mr M.C. Bansal, who was working as the

PAO Officer in the CPWD during the relevant period. PW4 testified that the money in the RBI was deposited by the divisional officer (horticulture) alongwith a challan. The witness went on to say that, the copy of the challan and the receipts of money, scroll are received thereafter in the PAO from the treasury of the RBI evidencing the deposit of money, as per the challan. At the end of the month, the divisional officer sends information contained in the Form 51 to the PAO (CPWD) showing the remittance made to the bank, i.e., RBI along with the acknowledgement of the bank. The remittance made is checked within 3 to 4 months. Importantly, the witness was not subjected to cross-examination by the accused.

8.7 Ramesh Kumar Menon (PW5), who was working as the lower division clerk in the horticulture department testified to the effect that the entries made at pages 31 and 32 as also those made at page 34 were in the hand writing of the accused. The witness, however, was unable to identify the hand writing made in the receipts scroll (Ex. PW5/A) against the entry in the sum of Rs 7248/- made on 28.06.1983. The witness was declared hostile and, on a suggestion being made to him that he had deliberately not identified the hand writing of the accused on Ex. PW5/A; the witness denied the same.

8.8 Madan Lal (PW8), who was working as a contractor under the name and style of Wadhwa Construction testified that he had deposited a sum of Rs 1385/- on 22.06.1983. He went on to say that he had applied for refund which had been paid to him. He failed to recollect whether a cheque in the sum of Rs 1385/- was given to him by the accused.

8.9 Jagjit Singh (PW10) testified that he worked, at the relevant point in time, as a contractor under the name and style of M/s Jagjit Singh & Co. He went on to depose that he had deposited a sum of Rs 2239/- and 1385/- as EMD along with the tender

filed by him. He specifically adverted to the effect that it was the accused with whom he had deposited the said amount. PW10 went on to state that since his tender was not accepted, the EMD was refunded to him by way of two cheques dated 07.07.1983 & 06.08.1983. PW10 proved the counter foil receipts of EMDs received being: Exs. PW1/B and PW1/C.

9. R.L. Chopra (PW9), who was working as an executive engineer in the CPWD, identified the accused. He testified that the accused was working as a cashier in the division at the relevant point in time. He also went on to say that he had investigated the accused regarding embezzlement of Rs 7248/-. PW9 went on to say that, in this connection, he had sent a letter dated 10.04.1986 (Ex. PW9/A) to the manager of RBI. He proved his signatures appended at point 'A' on the said letter. PW9 further proved the letter dated 10.04.1986 (Ex. PW9/B), written by him, to the PAO. He also identified his signatures at point 'A' on the said letter. The witness, went on to prove, the responses received to his letters dated 18.04.1986 and 15.04.1986 being Exs. PW4/A and PW3/A.

9.1 In his cross-examination, PW9 accepted the fact that the accused had informed him about the embezzlement of the amount in issue, and that an inquiry was conducted based on the information.

9.2 In respect of the last part, the witness stated that he was not sure about it, since the incident occurred at least 13 years ago. PW9 went on to say that the result of the inquiry was not communicated to the accused as he was not supposed to communicate the result to the accused.

9.3 The last witness R.N. Azad (PW13) was a formal witness who proved the seizure of certain memos dated 04.06.1987 (Ex. PW13/B) and 19.05.1987 (Ex. PW13/C). In his cross-examination the witness denied having seized a copy of the

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complaint dated 13.01.1986, evidently made by the accused, which was, purportedly addressed by the accused to G.S. Rao, Director General (Works), CPWD.

9.4 Crucially, during the cross-examination of PW13, the counsel for the accused was accepted the fact that the accused was dismissed from service on 31.12.1985. This statement was made by the counsel for the accused in relation to her submission with regard to sanction under Section 197 of the Cr.P.C.

10. It is important to note that in the statement made under Section 313 of the Code the accused accepted the fact that he was working as cashier during the period April, 1983 to April, 1984. He also accepted the fact that N.M. Gupta (PW11) and H.K. Gupta (PW12) were at that particular point in time working as the JAO (divisional accountant) and Dy. Director of Horticulture Department respectively. The accused went on to accept that it was his duty to receive the cash deposited by the contractors, who applied for tenders floated by the department as also to reflect the receipt of the money deposited in the cash book as well as in the counterfoils of receipts, which were prepared in his hand and under his signatures. The accused also accepted the fact that he was required to obtain the signatures of Dy. Director of the division and reflect the receipts in the cash book, after the cash received had been tallied and verified with the receipts and the vouchers, first from the divisional accountant and then from Dy. Director. The accused also accepted the fact that the cash collected was deposited in a cash chest maintained in the office, and that the cash chest had two keys, one of which was kept by him and the other with the Dy. Director (PW12). It is important to note the answers of the accused in respect of the following questions:

“Ques. 3 – It is in evidence against you that the cash used to be deposited by you s cashier with RBI against challans which would be presented in the receipt section of RBI under the signatures of the Deputy Director, and the counter clerk in the receipt section would mention the

counter number and the token number allocated to the said deposit while acknowledging the deposit by suitable endorsement on the challan, a copy of which would be handed over to you. What have you to say?

Ans: I would generally go to RBI but it was not necessary that only cashier would go to RBI.

Ques. 4 – It is in evidence against you that the receipt section of RBI would also authenticate the deposit by suitable mention in the scroll, a copy of which would be sent periodically to the concerned PAO, and such remittances would be checked on regular basis. What have you to say?

Ans: It is correct.

Ques. 5 – It is in evidence against you that you would also maintain a remittance book in which all such remittance to the bank would be reflected including with reference to the token number allocated at the time of deposit and the entries in the remittances book would also be duly checked and authenticated by the Deputy Director. What have you to say?

Ans: It is correct.

Ques 6. – It is in evidence against you that Ex. P.W.5/B (also Mark-A) was the cash book, Mark-B, including counterfoils of the receipts Ex. P.W.1/A to Ex. P.W. 1/D was the receipt book, and Ex. P.W.12/DA was the treasury remittance book maintained by you as cashier in the Horticulture Development Division – I of CPWD during the relevant period.

Ans: It is admitted except for questioned writings.

Ques. 7 – It is in evidence against you that you as cashier on 22.6.83 received Rs 2239/-, Rs. 2239/-, Rs 1385/- and Rs 1385/- against receipt nos. 63, 64, 65, 66 vide counterfoils Ex. PW1/A, Ex. PW1/B, Ex. PW1/C and Ex/ PW1/D respectively from contractors Krishan Chand Wadhwa, M/s Jagjit Singh & Company, M/s Jagjit Singh & Co., represented by PW10, and M/s Wadhwa Construction company, represented by PW8. What have you to say?

Ans: It is correct.

Ques. 8 – It is in evidence against you that you as cashier reflected the said deposits in the cash book Ex. PW5/B in your own hand vide entries

Ex. PW11/A on page 32 and Ex. PW11/B on page 33. What have you to say?

Ans: It is correct.

Ques. 9 – It is in evidence against you that in the Cash Book Ex. PW5/B on page 34 the aforementioned receipts of total value of Rs 7248/- was reflected, by you vide entry Ex. PW11/C, to have been deposited with RBI on 28.6.83 vide token no. 59/34204. What have you to say?

Ans: It is incorrect.

10.1. As regards the tampering in the receipts scroll (Ex. PW5/A), the accused stated that he had no knowledge of the additions made therein with regard to the amount, i.e., Rs 7248/- and the change in date.

10.2 To a question as to what he had to say apart from his response to the evidence put to him, the accused stated that: the amount in issue, was handed over by him to H.K. Gupta (PW12) on the assurance that he will deposit the same with RBI along with the bank challan forms; since token number and the copy of the challan was not given to him, he refused to make entries in the cash book and the remittance book; and that act of misappropriation by H.K. Gupta (PW12) in collusion with N.M. Rao (PW11) was reported by him to G.S. Rao, Director General (works) and Sh. R.N. Chander, Executive Engineer (CPWD). He went on to say that N.K. Gupta (PW11) and H.K. Gupta (PW2) had used their influence to foist a false case on him.

11. Having looked at the evidence on record including the statement of accused under Section 313 of the Code there is no denial by the accused in respect of the following: Firstly, that the four deposits made by various contractors vide receipt nos. 63 to 66 being Exs. PW1/A, PW1/B, PW1/C and PW1/D were received by him. Second the entries (Exs. PW11/A & 11/B) made at pages 32 and 33 of the cash book (Ex. PW5/B) were made by the accused.

11.1 It is important to note at this juncture that the deposits of at least two amounts have also been proved by Jagjit Singh (PW10), who is one of the contractors.

11.2 The accused has, however, denied having made the entry (Ex. PW11/C) at page 34 of the cash book (Ex. PW5/B). The said entry which has been inserted along with an entry in the sum of Rs 300/- is according to the prosecution a forgery, apart from the fact that the original date of 25.06.1983 has been changed to 28.06.1983.

11.3 Sh. Jagat Ram (PW6) has testified that on 25.06.1983 only an amount of Rs 300/- had been remitted to the RBI, and that the carbon copy of the receipts scroll (Ex. PW5/A) had been tampered with in as much as an entry in the sum of Rs 7248/- had been made inserted subsequently.

11.4 It has been argued on behalf of the accused by Sh. Nath that none of the witnesses having identified the hand writing of the accused with regard to entry (Ex. PW11/C) at page 34 of the cash book (Ex. PW5/B), for the trial court to come to a conclusion that the amount had been misappropriated by the accused by fabricating the said entry, is a conclusion arrived at without basis.

11.5 In my view this submission of Mr Nath would have to be rejected. The reason for the same is that it is the case set up by the accused that H.K. Gupta (PW12) in collusion with N.M. Gupta (PW11) had taken away the money in issue, i.e., Rs 7248/- along with the challan from the accused on the representation that the same will be deposited with the RBI. Since this was not done the accused refused to sign the remittance book. It does not, in my opinion, stand to reason that if the money in issue (i.e., Rs 7248/-) had been taken away by H.K. Gupta (PW12) along with the challan, from the accused, on the representation that he would do the needful then, why would the accused not have raised a hue and cry when, after a reasonable point in time, he did not receive back a copy of the challan with the endorsement of the RBI on it.

According to the case set up by the accused, and the suggestions made to PW11 and PW12 by the accused this was the precise reason why the accused had not signed the remittance book. Therefore, the defence of the accused that it was he who had brought, the misappropriation of funds, to the notice of his superiors by filing a complaint on 13.01.1986 appears to be a hollow. The fact that money had been received on 22.06.1983 is not in dispute. For the accused to make a complaint with respect to misappropriation of funds by H.K. Gupta (PW12) in January, 1986 does not stand to reason. The letter dated 13.1.1986 is not on record. The accused for reasons best known to him did not seek to summon the said complaint even though a suggestion was made to Sh. R.N. Azad (PW13) that the said complaint dated 13.01.1986 had been seized by him. The court did not have the benefit of perusing the contents of the letter dated 13.01.1986; though R.C. Chopra (PW9) in his testimony referred to a complaint being made by the accused in his deposition, he had not referred to the date of the complaint. Be that as it may, as indicated above, the conduct of the accused was not consistent with the stand taken by him.

11.6 Furthermore, a perusal of Ex. PW9/B, which is a letter dated 10.04.1986 addressed by PW9 to PAO reveals that the letter seeking confirmation of the remittance of Rs 7248/- was written in the background of certain investigations having commenced at the office. It is pertinent to note that in the said letter there was no reference to the complaint of the accused evidently made to G.S. Rao on 13.01.1986. It is quite possible that the accused had a whiff of the ensuing investigation and in order to pre-empt the situation, after nearly three years, directed the attention of his superiors to the misappropriation of the funds by alleging the involvement of N.M. Gupta (PW11) and H.K. Gupta (PW12).

11.7 Furthermore, the evidence reveals that it was ordinarily the duty of the cashier to deposit cash with RBI and write the cash book. The accused does not dispute the factum of receipt of cash from the contractors. These are facts which have been accepted by the accused in his own statement made under Section 313 of the Code. The factum of the funds having been misappropriated is not in doubt. The circumstantial evidence thus points to the fact that it is the accused who misappropriated the funds and thereafter inserted the entry (Pw11/C) at page 34 of the cash book (PW5/B) as well as in the carbon copy of the receipts scroll (Ex. PW5/A). Therefore, the argument made on behalf of the accused that none of witnesses identified his handwriting on the cash book, in my view pales into insignificance.

12. There is, however, one aspect of the matter which I wish to touch upon, which is, with regard to the the procedure which was followed in the collection and deposit of cash. It has come through on perusal of the evidence that once the cash was received it was entered in the cash book, on being tallied with the vouchers generated for the transaction. The cash book was signed by the divisional accountant as well as the Dy. Director after due verification. The amount collected at the end of the day was deposited in the cash chest maintained in the office till it was remitted to the RBI. The cash chest admittedly had two keys, one which was retained with the cashier and the other with H.K. Gupta, Dy. Director. It is obvious on an appreciation of evidence that till this stage there was no problem. The problem started after the cash had been taken out from the cash chest for being deposited with the RBI. The procedure which appears to have been evolved was that once the cash was deposited alongwith the challan, ordinarily an endorsement was made on the challan by the clerk who received the cash. A token number was also given on a deposit being made with the RBI along with the endorsement made on the challan. Besides this a receipt scroll was also

generated. According to PW6 the receipts scroll was generated in original along with three copies. One carbon copy of the receipt scroll was handed over to the person who had deposited the cash or his representative. The other two carbon copies of the receipts scroll were sent to the PAO Office. The original was kept with the RBI. In the instant case the entry in the remittance book on 23.06.1983 has been made by N.M. Gupta (PW11) and not the Dy. Director H.K. Gupta (PW12). Whether this was a lapse in the nature of a mere negligence in discharge of duties by H.K. Gupta (PW12) or had a criminality attached to it, is an aspect which ought to have been examined more carefully. A perusal of the remittance book would show that ordinarily it was Dy. Director H.K. Gupta who would sign the entries made in the remittance book along with the cashier, i.e., the accused. Therefore, in my opinion this matter needed a closer scrutiny. This was specially so in view of the fact that N.M. Gupta (PW11) and H.K. Gupta (PW12) had been named in the FIR in the first instance. They were, however, for reasons best known to the prosecution named in column (2) of the chargesheet and hence did not have their cases sent up for trial. This aspect was put to the learned counsel for the State. Ms Mathur was unable to supply me any satisfactory answer with respect to this aspect of the matter.

13. However, having said so, I am of the view that this by itself would not absolve the accused of his guilt in the matter. I have no doubt as regards the involvement of the accused in misappropriating the funds in issue, i.e., a sum of Rs 7248/- deposited with him by various contractors. Therefore, I have no difficulty in holding that the judgment of the trial court ought to be sustained.

14. The argument of Mr Nath with regard to the entire proceedings before the trial court being without jurisdiction since no sanction was obtained under section 197 of the Code, in my view, is a submission which is not available to the accused at this

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stage. This very issue had been raised by the accused at the stage of framing of the charge. The argument was repelled by the trial court vide its order dated 11.02.1994. The accused did not challenge the said order in a further proceedings in a superior forum, and as a matter of fact made no submissions in that regard even at the final stage in the trial court. In these circumstances, in my view, this ground is not available to the accused at this late stage. That apart Section 197 of the Code has been engrafted in the statute to protect public servants, Judges and Magistrates against vexatious and frivolous complaints, in respect of acts done or purported to be done in discharge of ones official duty and not those done in the garb of official duty. The act should have 'reasonable nexus' and not 'forceful' or 'pretended' connection with the official duty of the accused. Though this is an aspect which ordinarily the court examines at the stage of taking cognizance or immediately thereafter, there may be cases where the trial court may require the evidence to be led for it to come to a conclusion either way. It is obvious in this case that evidence having been led the accused did not choose to press this issue any further before the trial court. Having perused the evidence on record, I am of the firm opinion that misappropriation of funds could not be termed as an act done or purported to have been done by the accused in discharge of his official duty. There is, therefore, no merit in the submission made by learned counsel for the accused.

14.1 As far as provisions of Section 6 of the PC Act were concerned, since admittedly the appellant had been dismissed from service and hence, not a public servant on the date cognizance of the offence was taken, as correctly appreciated by the trial court, there was no impediment in proceeding with the prosecution of the accused.

15. This brings me to the quantum of sentence which has been imposed on the accused. Given the fact that the offence occurred in 1983, a chargesheet was filed against the accused in February, 1988 and the trial court delivered its judgment in August 2002 - at which point in time the accused was already (approximately) 57 years of age, I am of the view that the sentence ought to be reduced. I am persuaded to reduce the sentence given the fact that the accused is today nearly 65-66 years of age and is required to bear the burden of a wife, widowed sister and a deaf and dumb niece. Therefore, the sentence imposed by the trial court is varied to the extent that the accused will undergo RI for a period of three years with a fine of Rs 2000 on each count. The sentence shall run concurrently. In default of payment of fine the accused shall undergo a further RI of three months on each count as imposed by the trial court. Needless to say the period of incarceration already suffered by the accused shall suitably be adjusted against the sentence imposed on him. The appeal is thus partially allowed only to the extent of the sentence imposed by the trial court, as indicated above. The accused will thus be taken into custody forthwith. The bail bond will be cancelled. The surety shall stand discharged. The appeal is disposed of accordingly.

RAJIV SHAKDHER, J

JUNE 02, 2011

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