

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CRL.A. 1455/2012 & CrI.M.B. 2246/2012, CrI.M.A. 442/2013

% Reserved on: 21st March, 2013
Decided on: 28th May, 2013

ANIL MAHESHWARI Appellant

Through Mr. B. Badrinath, Adv.

versus

CBI Respondent

Through Ms. Rajdipa Behura, Spl. PP with Ms.
Nidhi Sharma, Ms. Nitya Bansal, Mr.
Saket Mishra, Advs. with SI Chandra
Bhan.

+ CRL.A. 60/2013 & CrI.M.B. 91/2013

RAJESH KUMAR KOHLI Appellant

Through Mr. K.R. Pamei, Adv. with Appellant
in custody

versus

CENTRAL BUREAU OF INVESTIGATION Respondent

Through Ms. Rajdipa Behura, Spl. PP with Ms.
Nidhi Sharma, Ms. Nitya Bansal, Mr.
Saket Mishra, Advs. with SI Chandra
Bhan.

+ CRL.A. 99/2013 & CrI.M.B. 138/2013

ARVIND KUMAR SHARMA Appellant

Through Mr. B.S. Randhawa, Mr. Dinesh
Kothari, Advs.

	versus	
CBI		 Respondent
	Through	Ms. Rajdipa Behura, Spl. PP with Ms. Nidhi Sharma, Ms. Nitya Bansal, Mr. Saket Mishra, Advs. with SI Chandra Bhan.
+ CRL.A. 100/2013 & CrI.M.B. 139/2013		
KUNWAR VIJAY JUNEJA		 Appellant
	Through	Mr. K.R. Pamei, Adv.
	versus	
CBI		 Respondent
	Through	Ms. Rajdipa Behura, Spl. PP with Ms. Nidhi Sharma, Ms. Nitya Bansal, Mr. Saket Mishra, Advs. with SI Chandra Bhan.
+ CRL.A. 145/2013 & CrI.M.B. 213/2013		
VINOD KUMAR BHUTANI		 Appellant
	Through	Mr. Anil Soni, Mr. Neeraj Arora, Mr. Aekansh Shukla, Advs.
	versus	
STATE THR. CBI		 Respondent
	Through	Ms. Rajdipa Behura, Spl. PP with Ms. Nidhi Sharma, Ms. Nitya Bansal, Mr. Saket Mishra, Advs. with SI Chandra Bhan.

Coram:
HON'BLE MS. JUSTICE MUKTA GUPTA

Crl.M.A. 442/2013 in Crl.A. 1455/2011

By this application the applicant seeks leave of this Court to adduce additional evidence. The contention of learned counsel for the Applicant is

that at the time of leading defence evidence, counsel for the Appellant only examined three witnesses including the Appellant. Though the Appellant provided all the documents to the learned counsel for leading defence evidence regarding proof of existence of M/s. Supreme Trading Corporation at 3499, Chawri Bazar, Delhi-06, however the Appellant was advised by Shri Rajesh Kohli that the said documents were not required to be adduced since the same would not affect the outcome of the trial. Further, the Appellant was made to believe that the prosecution evidence was insufficient and that adducing evidence to prove existence of the firm would be a futile exercise. The Appellant following the advice proceeded accordingly and did not lead further defence evidence to prove that the firm M/s. Supreme Trading Corporation was not a non-existent and fictitious firm. By the impugned judgment the learned Trial Court has invoked Section 106 Evidence Act. Since the learned Trial Court has invoked Section 106 Evidence Act, the Appellant has been prejudiced and thus this Court should permit adducing of additional evidence so as to vindicate the innocence of the Appellant. Reliance is placed on *Zahira Habuballa Sheikh Vs. State of Gujarat* (2004) 4 SCC 158 and *Ashok Tshering Bhutia Vs. State of Sikkim* (2011) 4 SCC 402. The Appellant has annexed documents in support of the application which he seeks to adduce as additional evidence.

Learned counsel for the CBI submits that the documents now sought to be adduced in the additional evidence are of year 2001 onwards whereas the enquiry started in the year 1999. The Appellant even now has not been able to produce any document in the name of Supreme Trading Corporation

at the given address except one which is on page 52 of the application dated 20th December, 2002 which is a self-generated document.

I have heard learned counsel for the parties. Section 391 Cr.P.C. permits leading of additional evidence at the Appellate stage in case non-adducing thereof results in failure of justice. However said power has to be used sparingly and only in exceptional suitable cases, where the Court is satisfied that directing additional evidence would serve the interest of justice. Further the additional evidence cannot be permitted to be adduced at the stage of appeal to fill in the lacunae in the prosecution case or the defence case. The averment of the applicant is not that despite due diligence he was not in possession of the documents. The applicant was in possession of the documents, however on the advice of Rajesh Kumar Kohli the co-accused he did not exhibit these documents. Whether the documents were required to be produced in defence or not ought to have been the decision of the Appellant and his counsel and there is no averment in the application on affidavit that the Appellant was advised by his counsel not to lead/ exhibit the relevant documents in defence, especially when the applicant entered as a defence witness in the witness box. Further the documents i.e. the bills of the telephones at 2nd Floor, 3499 Chawri Bazar are in the name of Shri S.P. Maheshwari and other documents are not of the period in question but subsequent thereto and would have been thus of no relevance even if permitted to be adduced. The legal position for adducing additional evidence before the Appellate Court under Section 391 Cr.P.C. has been summarized by the Hon'ble Supreme Court in *Ashok Tshering Bhutia Vs. State of Sikkim* (2011) 4 SCC 402.

“28. Additional evidence at the appellate stage is permissible, in case of a failure of justice. However, such power must be exercised sparingly and only in exceptional suitable cases where the court is satisfied that directing additional evidence would serve the interests of justice. It would depend upon the facts and circumstances of an individual case as to whether such permission should be granted having due regard to the concepts of fair play, justice and the well-being of society. Such an application for taking additional evidence must be decided objectively, just to cure the irregularity.

29. The primary object of the provisions of Section 391 CrPC is the prevention of a guilty man's escape through some careless or ignorant action on part of the prosecution before the court or for vindication of an innocent person wrongfully accused, where the court omitted to record the circumstances essential to elucidation of truth. Generally, it should be invoked when formal proof for the prosecution is necessary. [Vide *Rajeswar Prasad Misra v. State of W.B.* [AIR 1965 SC 1887 : (1965) 2 Cri LJ 817] , *Ratilal Bhanji Mithani v. State of Maharashtra* [(1971) 1 SCC 523 : 1971 SCC (Cri) 231 : AIR 1971 SC 1630] , *Rambhau v. State of Maharashtra* [(2001) 4 SCC 759 : 2001 SCC (Cri) 812 : AIR 2001 SC 2120] , *Anil Sharma v. State of Jharkhand* [(2004) 5 SCC 679 : 2004 SCC (Cri) 1706 : AIR 2004 SC 2294] , *Zahira Habibulla H. Sheikh v. State of Gujarat* [(2004) 4 SCC 158 : 2004 SCC (Cri) 999] and *Manu Sharma v. State (NCT of Delhi)* [(2010) 6 SCC 1 : (2010) 2 SCC (Cri) 1385 : AIR 2010 SC 2352] .]

30. This Court in *State of Gujarat v. Mohanlal Jitamalji Porwal* [(1987) 2 SCC 364 : 1987 SCC (Cri) 364 : AIR 1987 SC 1321] dealing with the issue held as under: (SCC pp. 370-71, para 5)

“5. ... To deny the opportunity to remove the formal defect was to abort a case against an alleged economic offender. Ends of justice are not satisfied only when the accused in a criminal case is acquitted. The community acting through the State and the Public Prosecutor is also entitled to justice. The cause of the community deserves equal treatment at the hands of the court in the discharge of its judicial functions. The community or the

State is not a persona non grata whose cause may be treated with disdain. The entire community is aggrieved if the economic offenders who ruin the economy of the State are not brought to book. A murder may be committed in the heat of the moment upon passions being aroused. An economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the community. A disregard for the interest of the community can be manifested only at the cost of forfeiting the trust and faith of the community in the system to administer justice in an even-handed manner without fear of criticism from the quarters which view white-collar crimes with a permissive eye unmindful of the damage done to the national economy and national interest.”

31. In *Rambhau* [(2001) 4 SCC 759 : 2001 SCC (Cri) 812 : AIR 2001 SC 2120] , a larger Bench of this Court held as under: (SCC p. 762, para 4)

“4. Incidentally, Section 391 forms an exception to the general rule that an appeal must be decided on the evidence which was before the trial court and the *powers being an exception shall always have to be exercised with caution and circumspection so as to meet the ends of justice*. Be it noted further that the doctrine of finality of judicial proceedings does not stand annulled or affected in any way by reason of exercise of power under Section 391 *since the same avoids a de novo trial. It is not to fill up the lacuna but to subserve the ends of justice*. Needless to record that on an analysis of the Civil Procedure Code, Section 391 is thus *akin to Order 41 Rule 27 of the Civil Procedure Code*.”

(emphasis added)

32. In view of the above, the law on the point can be summarised to the effect that additional evidence can be taken at the appellate stage in exceptional circumstances, to remove an irregularity, where the circumstances so warrant in public interest. Generally, such power is exercised to have formal proof of the documents, etc. just to meet the ends of justice.

However, the provisions of Section 391 CrPC cannot be pressed into service in order to fill up lacunae in the prosecution case.”

I find no merit in the application. The same is dismissed.

CRL.A. 1455/2012 & CrI.M.B. 2246/2012

CRL.A. 60/2013 & CrI.M.B. 91/2013

CRL.A. 99/2013 & CrI.M.B. 138/2013

CRL.A. 100/2013 & CrI.M.B. 139/2013

CRL.A. 145/2013 & CrI.M.B. 213/2013

1. The present appeals arise out of a common impugned judgment dated 20th November, 2012 whereby the Appellants have been convicted for offences punishable under Section 120B read with Sections 420/467/468/471 IPC and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 (in short the PC Act). In addition to the above-mentioned provisions, Appellants Rajesh Kumar Kohli and Vinod Kumar Bhutani have been convicted for substantive offence under Section 13(2) read with Section 13(1)(d) of the PC Act, Appellants Arvind Kumar Sharma and Kunwar Vijay Juneja for offence punishable under Section 468 IPC and Appellant Anil Maheshwari for offences punishable under Section 420 and 471 IPC. Vide the impugned order on sentence dated 7th December, 2012 the Appellants have been awarded three years rigorous imprisonment and fine of Rs. 5000/- and in default of payment of fine, one month simple imprisonment each for offence punishable under Section 120B IPC. Appellant Anil Maheshwari has in addition been awarded rigorous imprisonment of four years and a fine of Rs. 5 lakh and in default of payment of fine one year simple imprisonment for offence punishable under

Section 420 IPC and rigorous imprisonment for three years, six months and a fine of Rs. 10,000/- and in default of payment of payment of fine two months simple imprisonment for offence punishable under Section 471 IPC. Appellants Arvind Kumar Sharma and Kunwar Vijay Juneja have been in addition awarded rigorous imprisonment for three years and six months and a fine of Rs. 10,000/- each and in default to undergo two months simple imprisonment for offence punishable under Section 468 IPC. Appellants Rajesh Kumar Kohli and Vinod Kumar Bhutani have been sentenced to undergo four years rigorous imprisonment and a fine of Rs. 25,000/- and in default to undergo three months simple imprisonment each for offence punishable under Section 13(2) read with Section 13(1)(d) of the PC Act. Out of the fine amount fine imposed upon Appellant Anil Maheshwari, if realized, a sum of Rs. 5 lakhs is directed to be paid to the National Insurance Company Ltd., the complainant as compensation.

2. Learned counsel for the Appellant Anil Maheshwari submits that the presumption under Section 20 of the PC Act is not available to the prosecution as the Appellant and the co-accused have been convicted for a conspiracy for offence under Section 13(1)(d) read with Section 13(2) PC Act. Further the learned Trial Court erroneously invoked Section 106 Evidence Act. Section 106 Evidence Act is an exception to the general rule of evidence under Section 101 Evidence Act. The duty to prove the facts lies on the party who alleges. The evidence of two prosecution witnesses examined by the prosecution does not prove beyond reasonable doubt that the shop of the Appellant does not exist at 3499 Chawri Bazar. 1716 Gali Piou Wali, Dariba is the residential address of the Appellant and is

mentioned in the bank account as the Appellant's firm is a proprietorship firm. Merely because the address of the firm was not given, the firm does not become non-existent. No efforts were made by the investigating agency to check from the telephone number on the letter heads of the firm to verify the existence of the shop at 3499, Chawri Bazar which would have been an authentic proof. Merely two witnesses in the neighbourhood have been examined which does not rule out the presence of the shop of the Appellant. PW2 Lalit Chawla in his cross-examination has admitted that 3499 is a building and there are number of other shops in the said building. He does not know who are the other persons running different shops in the said building. Further PW3 Sushant Rastogi says that he has no knowledge about the shop. He is not even running a shop in the said building and is running a shop in a distant building. In view of the number of shops in each small building in Chawri Bazar it cannot be expected of any businessmen to know all the occupants of a building, what to say of those running business from a different buildings. The prosecution having not proved the non-existence of the firm M/s. Supreme Trading Corporation beyond reasonable doubt, the learned Trial Court erred in shifting the onus on the Appellant under Section 106 Evidence Act. Further it is not the case of the prosecution that the goods were not dispatched by the Appellant from Delhi. PW10 Trilok Nath Bhatia In-charge, railway booking proved that goods were dispatched through railway receipts to Rajan Enterprises, Ernakulam. The learned Trial Court failed to deal with this issue. As a matter of fact the learned Trial Court has not dealt with any of the issues and without giving the reasons, findings have been arrived at. Once the tracer found the goods to have lost at Erode Station, he was not required to go to Ernakulam and thus no fault can be

found in the tracer's report. The finding of the learned Trial Court that there was a fake consignee and the tracer's report was false is based on no evidence. Though the Appellant is not the author of the tracer's report, still the Appellant is convicted substantively for offence under Section 420 IPC. An essential ingredient of Section 468 IPC is an element of impersonation i.e. the document is signed by the wrong person which is not the case herein. Hence the provisions invoked are not attracted. Reliance is placed on *Mohd. Ibrahim Vs. State of Bihar (2009) 8 SCC 751*. PW15 K.V.P. Namboothiri does not prove that the consignee was a non-existent firm. He merely states that he could not locate the address. Once there is loss of goods, there could be no cheating in Insurance crediting money to the Appellant's account. There is no evidence of meeting of minds and thus the Appellant cannot be convicted for offence of conspiracy.

3. The learned Trial Court erroneously held that it was the duty of the Appellant to prove consignee's existence. Relying on *Shambu Nath Mehra Vs. State of Ajmer (1956) SCR 1999* it is contended that Section 106 casts the onus to prove the facts especially in the knowledge of the accused. The prosecution cannot investigate half-heartedly, not prove the facts which it could have proved and then shift the onus under Section 106 Evidence Act on the accused. Further even if the onus is on the accused, the accused has to prove not beyond reasonable doubt but by the preponderance of probability and the same can be done even by cross-examining the prosecution witnesses. PW1 in his testimony admits that he located M/s. Supreme Trading Corporation at 1716 Gali Piou Wali, Dariba and thus the finding that it was a non-existent firm is incorrect. The evidence of PW18

Inspector B.S. Bhist CBI that he went and could not locate the address is inconclusive. Telephone number appears on the invoice and all communications. Since the bank account was operational, the firm cannot be said to be non-existent. At best it could be said to be a case of incorrect address. Further PW11 Rajesh Bali, the officer from the bank has stated that the account in question was opened on 17.08.1990 and closed on 17th July, 1999. The account in question being in operation for more than 9 years, no adverse inference of conduct of closing of the account after receiving the insurance amount could be drawn by the prosecution. The three addresses were not put to the Appellant under Section 313 Cr.P.C. and thus the same cannot be used against him. Further the non-delivery certificate was also not put under Section 313 Cr.P.C. to the Appellant [*Kuldeep Singh Vs. State of Delhi (2003) 12 SCC 528*]. There is no specific finding as to which communication of Rajan Enterprises is forged. The railway receipt is not proved to be a forged document. There is no evidence on record as to what was the fate of parcels sent from Delhi. Since there is no evidence that the goods were duly delivered at Ernakulam, the finding of the false claim is incorrect. As regards Rajan Enterprises, the only evidence is of PW15 which is also a hearsay evidence. No postal officer has been examined. PW22 did not go personally over there. The initial letter requesting for verification was not placed on record, so what verification was sought is not known.

4. Learned counsel for the Appellant Rajesh Kumar Kohli submits that though the learned Trial Court held that procedural manual was violated, however no reasoning is given as to how and in which manner the manual has been violated. PW14 Deepak Chaudhary, Assistant Administrative

Officer in his evidence has clearly stated that the prescribed procedure was followed in passing the claim. PW5 K. Mahapatra, Chief Vigilance Officer admits that no departmental enquiry was conducted against any public servant in this case. There is no evidence on record to show that there was any pecuniary advantage to the Appellant or to anyone else with whom he shared. Further there is no evidence of conspiracy between the Appellant and co-convict Anil Maheshwari. There is no trail of money from Anil Maheshwari to the Appellant. There is no evidence of criminal intent at the inception and the chain of circumstances proved is incomplete with most vital links missing, coupled with the fact that there is no procedural lapse. Thus, the Appellant could not have been convicted. M/s. Pooja International was an approved agent of the National Insurance Company (NIC) and thus no illegality much less any irregularity can be attributed in appointing the said agency for preparing the tracer's report. The evidence of non-existence of M/s. Supreme Trading Corporation and M/s. Rajan Enterprises is very sketchy. Further PW1 A.K. Seth the Vigilance Officer and the star witness of the prosecution himself admitted in his cross-examination that he had not passed or processed any claim so he was not technically equipped to comment as to how a marine insurance claim was to be passed. PW1 further admitted that he had no knowledge or practice of marine insurance or underwriting of claim. Thus, PW1 is not an expert in the field and his testimony is irrelevant. Even PW4 Anil Kumar Tiwari, Divisional Manager, NIC admits that he had no history of working in claims relating to marine etc. Besides PW1 and PW4, the third member of the Vigilance team was Shri A.L. Gambhir, who has not been examined. The matter was technical in nature and the prosecution failed to examine the technical expert in this regard.

Even PW5 K. Mahapatra, Chief Vigilance Officer had no specific qualification in insurance claims. The job of the Appellant was to pass insurance claims. All the procedural requirements were duly followed and on the said basis, the claim was passed. In case the Appellant would not have passed the claim, he would have been proceeded against departmentally for dereliction of duty.

5. It has not been proved beyond reasonable doubt that the firm Supreme Trading Corporation was a non-existent firm. The search of the Appellant's diary was conducted in which 1600 address/ names were found, however the name of Anil Maheshwari nowhere figured. As regards the non-existence of Rajan Enterprises is concerned, the report of PW15 KVP Namboothiri is that since no specific door number or municipality number was given, the address could not be traced. An incomplete address of Rajan Enterprises does not prove that it does not exist. Further the complete address of Rajan Enterprises was 68/4 Main Bazar, Opposite Post Office Ernakulam, however no efforts were made to trace the same. Shri M. Shahjahan, the Inspector CBI, who conducted the enquiry at Kochi was not examined as a witness. In case Ex.PW20/2 was undelivered, it ought to have come back undelivered, however no such docket or register was produced. Thus, neither the start point nor the end point has been proved to be bogus. PW13 Hem Lata Ahuja, who was the member of the Committee approving the claim, has not been made an accused. She states that note was dictated to her, however the claim note is a formatted note purely mathematical in nature and she could not indicate which part of the note was dictated to her. PW13 was not even examined by the Vigilance Department. PW13 Hem Lata signed the note

not as a stenographer but as a part of the Committee, however no action has been taken against her. The reliance of the learned Trial Court on the testimony of PW6 Vishveshwar Nath is wholly misconceived. Vishveshwar Nath was an agent of the company and thus not an independent witness. Further the testimony of Vishveshwar Nath is general in nature and has no relevance to the facts of the present case. PW20 Jyoti Kumar admits that vide seizure memo Ex.PW9/A, 28 documents were seized however there were 26 documents on the file. Thus, the documents have been misplaced by the investigating agency. No effort was made by the investigating officer to check the authenticity of the bank statement of Appellant Anil Maheshwari. The learned Trial Court returned a finding that the present case has not been very effectively and professionally investigated by the investigating officers, however it still proceeds to convict the Appellants. There was no material on record to prove that any document was forged. The letter dated 12th March, 1998 to M/s. Supreme Trading Corporation by co-convict Vinod Kumar Bhutani erroneously sought for letter of authority from the consignee in his favour duly attested by the railway authority at item No.3. The same was not required as the same did not form part of procedural manual part 4, Ex.DW1/A. Non-delivery certificate and railway receipts were on record and thereafter no other document was required to be called. The requirement of the procedural manual was satisfied by these documents.

6. The case of the prosecution that A.K. Gambhir was a non-entity is incorrect. After the Appellant left the NIC on 30th September, 1998, he went out of India for another job and when he was called back for the enquiry he

found that the files were handed over in such a manner that their fidelity could not be maintained. No list of documents in the file have been prepared and several documents which ought to have been there like the forwarding letter of non-delivery certificate are not present. PW1 A.K. Seth admitted that he did not prepare the seizure memo while collecting the documents. In Ex.DW-3/2 there is no column to note down the address and the name of the other side besides the party which is claiming the insurance. Hence it was beyond the scope of the Appellant to have conducted the enquiry in this regard. Ex.DW-3/2 does not require that the address of the other side i.e. consigner or consignee is to be verified. Further PW1 A.K. Seth did not conduct any enquiry at Ernakulam. The memo in response to which reply was sent by Kochi office of NIC is not on record. So it cannot be proved whether the correct address was sent for verification. Relying upon *Murlidhar and Ors. Vs. State of Rajasthan 2005 11 SCC 133*, it is contended that facts especially within the knowledge of the accused, which the prosecution cannot by any means discover, are to be proved by the accused and the prosecution in the garb of Section 106 Evidence Act cannot shift its onus to the accused. Section 38 of the General Insurance Act provides protection to an officer if the action is taken in good faith. Reliance is placed on *GOC Vs. CBI and Anr. AIR 2012 SC 1890*. Further criminal conspiracy cannot be assumed and is required to be proved as held in *State of Tamilnadu Vs. Nalini and Ors. (1999) 5 SCC 253*. Neither actus-reas nor mensrea has been proved and thus the Appellant be acquitted.

7. Learned counsel for the Appellant Vinod Kumar Bhutani submits that the vigilance report Ex.PW1/A does not name the Appellant. The Appellant

is also not named in the FIR Ex. PW17/A. The official witnesses of NIC i.e. PW1, PW4, PW5, PW7 and PW18 have stated that the Appellant followed the due procedure with due diligence. The Appellant had no role in appointing the tracer and thus even if the tracer's report is false, the Appellant cannot be said to be a conspirator in the said act. There is no pecuniary benefit attributed to the Appellant. Further the claim of the prosecution that the original non-delivery certificate was not part of the claim file is incorrect as Ex.PW7/13, the claim note itself indicates that non-delivery certificate in original is part of the record. The vigilance report Ex.PW1/A states that non-delivery certificate was verified. PW1 has also stated that non-delivery certificate was sent to Kochi Regional Office for verification and the same was part of the claim file. There is no evidence on record that the non-delivery certificate was a forged document. The decision to pass the claim was of the Committee collectively of its three members i.e. the Appellant, co-convict Rajesh Kohli and G.C. Vij. However, G.C. Vij has neither been made an accused nor a witness. Role of the Appellant is at par with G.C. Vij. There is no evidence on record that the Appellant conspired with the co-accused. Rather all the material witnesses have deposed in favour of the Appellant. From the evidence on record no criminal culpability can be attributed. There is no application of mind by the sanctioning authority. On confronting PW19 with particular documents, he admitted that the same were missing from file. The Appellant raised this issue at the earliest opportunity in the cross-examination and thus the trial against the Appellant is vitiated on this count itself. As a matter of fact, in the judgment, paras 1 to 135 are narration of prosecution case, Paras 136 to 174 are versions of the defence and in one para i.e. para no. 175 the defence

version is discredited without any reasoning being adverted. Without discussing the evidence on record, findings have been recorded in para 191 of the impugned judgment. Thus, the Appellant be acquitted of the charges framed.

8. Learned counsel for the Appellant Arvind Kumar Sharma submits that the Appellant has been falsely implicated with the aid of Section 120B IPC. Section 468 IPC contemplates a forged report and not a bogus report. Reliance is placed on *Mohd. Ibrahim Vs. State of Bihar (2009) 8 SCC 751*. The Appellant's firm M/s. Pooja International is an empanelled tracer duly appointed to do this job. The tracer's report was duly placed on the claim file Ex.PW1/C. Appellant's employees went to the railway station at Delhi, Nagpur, Vijaywada, Salem and Erode. Since at Erode the consignment was not transferred, there was no purpose for proceeding further to Ernakulam. Further there was a statutory non-delivery certificate regarding the non-receipt of consignment at Ernakulam and the tracer's report was only in addition. The tracer's report was prepared on the information given by the railways. The Appellant's employees have no mechanism to ensure the exact information and they can only rely upon the information given verbally by the railway officers. The Appellant does not disown the report, however the report was given on the basis of what was told to the employees of the Appellant by the railway officials. There is no unreasonable claim of expenses by the Appellant and thus it cannot be said that undue pecuniary benefit was derived by the Appellant.

9. Learned counsel for the Appellant Kunwar Vijay Juneja submits that Appellant is only an employee of Pooja International. The report was signed

by the Appellant on the basis of inputs received from his colleagues. No personal enquiry was conducted by the Appellant and thus he cannot be held personally liable for giving the report. This explanation was duly rendered by the Appellant in his statement under Section 313 Cr.P.C., however the same has not been considered by the learned Trial Court. PW1 A.K. Seth of NIC admits that M/s. Pooja International is an empanelled tracer with the NIC. PW4 states that he never met Arvind Kumar Sharma, the employer of the Appellant during investigation. Thus, the vigilance officer made no enquiries from the Appellant's employer. PW20 Jyoti Kumar, the part I.O. admits that he never checked the authenticity of the contents of the tracer's report. PW22 R.P. Kaushal the other investigating officer states that with regard to verification of Rajan Enterprises a letter was received by PW20 Jyoti Kumar, however this fact has not been stated by PW20 Jyoti Kumar in his examination-in-chief. M. Shahjahan, the Inspector of CBI who conducted investigation at Ernakulam, has not been examined as a witness. PW1 A.K. Seth states that all the three vigilance officers i.e. A.K. Seth, A.L. Gambhir and A.K. Tiwari went together and it cannot be said that which part was investigated by whom. Thus, there is no direct evidence on record to prove any forgery or misconduct on behalf of the Appellant. PW10 and PW12 have clearly stated that the goods consigned were received in safe and sound condition. PW5 K. Mahapatra Chief Vigilance Officer admits that the contents of the report Ex.PW1/A were not based on his personal knowledge. PW20 Jyoti Kumar, part I.O., states that he does not know where searches were conducted and whether he examined the accused or not. PW22 R.P. Kaushal states that he acquainted himself with published manual, tariffs and guidelines of Insurance Company and without exhibiting these documents,

no finding of fake report could have been arrived at. The impugned judgment has been passed by the learned Trial Court without discussing the evidence on record. Conviction under Section 468 IPC is not maintainable as signatures on the report have not been disowned. Before the Trial Court there were two evidences, one in the form of tracer's report and the other in the form of testimony of PW10 and PW12. PW10 and PW12 were not the author of the document Ex.PW10/A which contained the dispatch details. In the absence of proper proof of Ex.PW10/A, the tracer's report cannot be said to be incorrect. Ex.PW10/A mentions only Ram Lakhan, loader, who noticed the consignment number and who has not been produced as a witness. The difference in the wagon number was not put to the Appellant under Section 313 Cr.P.C. and thus the same cannot be used against him.

10. Learned counsel for the CBI on the other hand states that A.L. Gambhir was rightly not examined as a witness as the vigilance report was not signed by A.L. Gambhir as he had been transferred from the said division. The report was prepared by PW1 A.K. Seth, who deposed that during vigilance enquiry he went to property No. 3499, Chawri Bazar which had 2/3 stories and could not find M/s. Supreme Trading Corporation at the given address. There was no board or person to show that any company in the name of M/s. Supreme Trading Corporation was operating. PW2 Lalit Chawla is a person who is conducting business of electrical goods at Shop No. 3499 Chawri Bazar for the last 20 years, i.e. in the same building and he stated that there was no firm in the name of M/s. Supreme Trading Corporation at Shop No. 3499 Chawri Bazar for the last 20 years. Though he admitted that 3499 is the municipal number of the building and there are several other shops,

however there was no such hoarding in the said premises. Similarly, PW3 Sushant Rastogi who is also running a firm in the neighbourhood stated that he did know about any firm in the name of M/s. Supreme Trading Corporation. PW18 is one of the investigating officers, who also visited the place and recorded the statement of Lalit Chawla and Sushant Rastogi and found that the firm did not exist at the given address. Further Appellant Anil Maheshwari has given three addresses in the claim file; with the National Insurance Corporation the address given is 3499 Chawri Bazar, on the railway receipt the address mentioned is 1784 1st Floor, Chawri Bazar and the bank account has been opened in the Corporation Bank at the address of 1716 Gali Piou Wali, Darbia Kala. Thus, the conduct of the Appellant itself shows that the Appellant gave fake addresses. PW11 Rajesh Bali has deposed that the Appellant closed the account on 19th July, 1999 after the claim amount was remitted to his account. The prosecution has also proved beyond reasonable doubt that the address of Rajan Enterprises was incorrect from the evidence of PW15 and PW22. PW15 Kochi Regional Officer of NIC proved that it was difficult to locate the address. Further the verification sought by PW22 R.P. Kaushal was also returned back with the endorsement that no such address existed in the beat. PW15 K.V.P. Namboothiri visited the parcel office at Ernakulam junction railway station and verified from the Chief Parcel Superintendent Shri Mohanan who stated that non-delivery certificate Ex.PW15/DA was not genuine. Thus, the claim was passed on the strength of forged documents.

11. Learned counsel for the CBI further states that the contention of the Appellants that all relevant documents were there while processing the claim

is incorrect. The copy of the railway receipt and non-delivery certificate were not there on the file as stated by PW7. PW13 Hem Lata Ahuja was only a stenographer and thus not involved in the offence. The file was processed by V.K. Bhutani who was a Class-I officer and sanctioned by R.K. Kohli. The matter was further put up to the Divisional Claims Committee (in short the DCC) which comprised of again V.K. Bhutani and Rajesh Kohli and the third person was G.C. Vij who only signed the same and did not process or sanction it. Admittedly Appellant V.K. Bhutani vide his letters dated 26th February, 1998 and 12th March, 1998 asked for a number of documents from M/s. Supreme Trading Corporation. In reply, by the letter dated 11th March, 1998 all the documents were not given. Thus, in the absence of two most important documents i.e. the non-delivery certificate by the railways and the railway receipt, the processing of the claim was palpably illegal and clearly showed the criminal intent of the Appellants. PW7 Shri Ami Kumar, Chief Manager NIC has clearly stated that in the eventuality of the consignment going missing, the non-delivery certificate is essentially required for passing the claim. The procedural manual Ex.DW1/A clearly shows that in case some documents are not submitted reasons have to be recorded. However, the claim file records no reason from exempting the claimant from submitting, either the non-delivery certificate or the railway receipts. As per the letter of 12th March, 1998 besides the railway receipt and non-delivery certificate, the document sought at item No.3 i.e. the letter of authority from the consignee in favour of M/s. Supreme Trading Corporation duly attested by railway authorities was also not submitted. Further even documents No. 4 & 5 in the said letter i.e. copy of the notice of claim served on the courier through registered AD and AD card

of the above notice are also not on record. Certainly non-submitting of these documents could not result in non-passing of the claim but while dispensing with these documents the Appellant Vinod Kumar Bhutani and Rajesh Kumar Kohli should have recorded reasons in detail. In reply to the contentions raised on behalf of V.K. Bhutani that the sanction granted by PW19 was without application of mind, reliance is placed on Section 19(1) and (3) of the PC Act and it is contended that no finding can be reversed on account of any irregularity in sanction. PW19 Shri R.K. Kaul the Assistant General Manager, who granted the sanction, was competent to remove V.K. Bhutani. There is no illegality in the sanction granted by the competent authority. Reliance on Section 38 of the General Insurance Business Nationalization Act, 1978 is misconceived. Only actions done in good faith are protected and not the actions committed pursuant to a criminal conspiracy to commit a criminal offence. Neither Mr. Vinod Kumar Bhutani nor Rajesh Kumar Kohli called the claimant as they had never met Anil Maheshwari. Parcel Supervisor confirmed that goods were loaded and sent in the wagon vide railway receipt No. 646451 for transportation to Madras. PW6 Vishveswar Nath, who was an Insurance agent, stated that the cheques which used to come in his name were deposited by him in the account and after withdrawing the money, the same was given to Rajesh Kumar Kohli. PW6 was Insurance agent of M/s. Supreme Trading Corporation. Thus the connivance between the Appellants is duly established. R.K. Kohli, the Appellant who entered the witness box and examined himself as DW3 admitted that PW6 Vishveswar Nath Tiwari was appointed as Insurance agent. It has been established beyond reasonable doubt that the tracer's report was a false document. In this regard, the testimonies of PW10 Trilok

Nath Bhatia in-charge railway city booking and PW12 Suraj Prakash are relevant who have stated that the goods from M/s. Supreme Trading Corporation were received on 24th December, 1997 and dispatched on 26th December, 1997 vide RR No. 646451 dated 13th December, 1997. According to PW12 these goods were dispatched by wagon No. SC 7070878. However, as per the tracer's report, the goods were sent from Delhi in Train No. 2626 SLR 45680. Thus, the tracer's report tracked an incorrect wagon number through which consignment was sent on 14th December, 1997. In view of the testimony of PW10 and PW12 it has been proved beyond reasonable doubt that the claim was passed on the strength of a false tracer's report. M/s. Rajan Enterprises was a non-existent firm and in this regard verification was conducted by KVP Namboothiri, officer of the NIC at Kochin. This witness has proved that non-delivery certificate was a forged document. Since the Appellant Vinod Kumar Bhutani and Rajesh Kumar Kohli appointed the tracer and passed the claim in the absence of essential documents, the learned Trial Court rightly shifted the burden on the accused under Section 106 of the Evidence Act. The offence of forgery is made out not only by the signatures being forged but also by signing a document which has false recitals therein. Reference is made to illustration 'd' to the explanation to Section 464 IPC. By the acts of the Appellants, criminal misconduct, as contemplated under Section 13(1)(d) of the PC Act, is proved beyond reasonable doubt. Reliance is placed on *Ashok Tshering Bhutia Vs. State of Sikkim* Crl.A. 945/2003 decided on 25th February, 2011; *Mamta Devi Vs. Vijaykumar Mamraj Agrawal* 2008 Crl.L.J. 970 Bombay High Court; *Collector of Customs, Madras Vs. D. Bhoorumal* AIR 1974 SC 859; *Padala Veera Reddy Vs. State of Andhra Pradesh & Ors.* AIR 1990 SC

79; *Firoizuddin Basheeruddin Vs. State of Kerala* (2001) 7 SCC 596; *State of Madhya Pradesh Vs. Sheetla Sahai* 2009 Crl.L.J. 4436 SC; *Indian Bank Vs. M/s Satyam Fibers (India) Pvt. Ltd.* decided on 09.08.1996 by Hon'ble Supreme Court; *H.N. Rishbud & Inder Singh Vs. State of Delhi* 1995 AIR 196; *State of M.P. Vs. Harishankar Bhagwan P.D. Tripathi* (2010) 8 SCC 655 and *State of Maharashtra & Ors. Vs. Ishwar Piraji Kalpatri* 1996 SCC (1) 542.

12. Heard learned counsel for the parties. A brief exposition of the facts are that an insurance policy was issued in the name of M/s. Supreme Trading Corporation 3499 Chawri Bazar, Delhi-06 by Division Office- X of NIC for dispatch of industrial hardware goods from Delhi to Ernakulam. The goods were sent to M/s. Rajan Enterprises 68/4 Main Bazar, Opp. Post office Ernakulam vide RR No. 646451 dated 13th December, 1997 of Northern Railways. Vide letter dated 19th January, 1998 M/s. Supreme Trading Corporation informed the Divisional Office NIC regarding loss of consignment. On the said letter Appellant Rajesh Kohli the then Divisional Manager appointed M/s. Pooja International, an authorized tracer on the panel of NIC, as a "tracer". As per the complaint of NIC which formed the basis of FIR, the vigilance team made enquiries and it was found that the consignee was not found at the given address and the consignor took a fraudulent claim from the company on the basis of fake damage certificate in connivance with Rajesh Kohli and Arvind Kumar Sharma of M/s Pooja International. Since the claim was passed by public servant Rajesh Kumar Kohli by abusing their official position, RC No. 1(e)/2001/EOW-1/New Delhi under Section 120B read with Sections 420/467/468/470 IPC and

13(2) read with 13(1)(d) of the PC Act was registered. During investigation a further report was sent vide Ex.PW22/B that the claim file did not contain Railway Receipt and non-delivery certificate and the claim was settled in the absence of non-delivery certificate. After the filing of the charge-sheet the evidence of the prosecution was recorded and the Appellants were examined under Section 313 Cr.P.C. Appellants Rajesh Kumar Kohli and Vinod Kumar Bhutani appeared as defence witnesses and examined themselves as DW3 and DW2 respectively. The learned Trial Court convicted the Appellants as above and returned the following findings in para 191 of the impugned judgment:

“191. From the material placed and proved on record, following strong and cogent evidence and circumstances appear on record to show that the accused persons are guilty of the offences alleged against them.

(i) Accused Anil Maheshwari is the claimant and proprietor of M/s Supreme Trading Corporation (a non-existent enterprises).

(ii) Accused Arvind Kumar Sharma, admittedly, was appointed as Tracer by accused Rajesh Kumar Kohli. He was the owner of M/s Pooja International.

(iii) Accused Kunwar Vijay Juneja of M/s Pooja International submitted the bogus tracing report on 24.2.1998 signed by him as Manager.

(iv) TA/DA bill vide invoice No. 630, dated 24.2.1998 of Pooja International signed by Kunwar Vijay Juneja was submitted in the NIC Ltd.

(v) The aforesaid bill recommended by accused Vinod Kumar Bhutani and was passed by accused Rajesh Kumar Kohli.

(vi) The said bill for an amount of Rs. 2,763/-, which has been proved as Ex.PW22/O and signed by accused Kunwar Vijay Juneja as Chief Executive, was paid to M/s Pooja International which was credited in the current

Account No. CA 279 on 30.6.1998 of Pooja International of accused Arvind Kumar Sharma in OBC, Paschim Vihar, New Delhi, which is proved vide statement of account, Ex.PW 16/A-3.

(vii) Rajan Enterprises (the consignee) was found non-existent at the given address, in Ernakulam.

(viii) The address of the claimant company Supreme Trading Corporation, given in Railway Receipt, Ex.PW22/A is 1784, 1st Floor, Chawri Bazar, whereas in corporation Bank, it is given as 1716 Gali Piou Wali Dariba, Delhi-6 vide Ex. PW 22/K, where claim amount was deposited/ encashed and was soon withdrawn. This speaks of fraudulent mind of the accused/ claimant, Anil Maheshwari of the Supreme Trading Corporation, who has given different address in the insurance policy and other documents submitted to NIC. It is none of the case of the defence of accused Anil Maheshwari that Supreme Trading Corporation was having three addresses. Further, the burden to show that Supreme Trading Corporation existed at the given address, under Section 106 of Evidence Act, was on Supreme Trading Corporation as the accused was having special and specific knowledge of all valid documents, pertinent to Supreme Trading Corporation. But the defence has failed to do so.

(ix) Letter, Ex.PW1/E, dated 31.5.1999 shows non-existence (door No. given was false, there were number of post offices, vague address 'Opp Post Office' only was given without specifying which post Office) of M/s. Rajan Enterprises (the consignee) as per enquiries conducted and proved by PW15.

(x) As per Ex.PW1/D, No – 'non-delivery certificate' was issued from Ernakulam Railway Station. The 'non-delivery certificate' furnished in the claim file, Ex.PW1/C was, therefore, false, forged and fabricated.

(xi) Accused Arvind Sharma was connected to Pooja International and opened its account with Oriental bank

of Commerce. The account opening form has been proved as Ex.PW 16/A-2.

(xii) Ex.PW22/A, the expert's opinion on admitted and questioned document, regarding handwriting of the accused persons, goes unchallenged.

In the case law reported as *Murari Lal Vs. State of M.P.*, AIR 1980 SC 531, Hon'ble Supreme Court has held that:

“In cases where the reasons for the opinion are convicting and there is no reliable evidence through a doubt, the uncorroborated testimony of a handwriting expert may be accepted.”

(xiii) Ex.DW3/P-18 letter dated 05.11.1998, is only a photocopy of Rajan Enterprises (non-existent) informing M/s Supreme Trading Corporation about non reaching of consignment vide RR on 13.12.1997.

On the said document there is no date of receipt/ stamp of receipt of NIC/ DO-X. It is therefore, shocking as to how it reached NIC/DO-X. It is admitted by the defence, in their evidence, that documents received in NIC, DO-X, were duly stamped, in token of receipt.

(xiv) Letter dated 27.6.2002, Ex.PW22/B, from NIC to R.P. Kaushal, IO of this case, disclosed that regarding the claim in question i.e. 'Super Trading Corporation', the sum insured was Rs. 4,58,000/- and that in the absence of Damage/ shortage certificate and copy of railway receipt, the claim was settled. It was gross violation of the prescribed norms.

(xv) The claim file, Ex.PW1/C, contains the false and fabricated documents, which admittedly were produced by the insured, accused Anil Maheshwari of M/s Supreme Trading Corporation and the Tracer, M/s Pooja International. These documents were admittedly processed by the accused Rajesh Kumar Kohli and accused Vinod Kumar Bhutani, when the claim was

passed in this case by them. The norms listed out in the Manual, Ex.DW1/A were violently flouted, without any cogent reason.

(xvi) Ex. PW 3/D-1 is the note to Divisional Manager vide which the claim was recommended to be settled by the accused V.K. Bhutani. It was approved by accused Rajesh Kumar Kohli. A bare perusal of this note shows how the norms were deliberately flouted to benefit the insured.

(xvii) Vide letter, Ex.DW2/DX-5, which was available, admittedly, in the claim file, the insured, M/s Supreme Trading Corporation, was asked/ directed to submit the following original documents mentioned therein i.e.

- 1.Original RR duly enclosed by the Railway Authority
- 2.Disposal of RR and get the original non delivery certificate from Railway Authority.
- 3.Letter of Authority from your consignee in your favour duly attested by Railway Authority.
- 4.Copy of notice of claim served on the carrier through Regd. AD post claim monetary compensation for loss suffered.
- 5.AD Card of the above notice.
- 6.Original copy of invoice.
- 7.Copy of Railway Receipt
- 8.Your claim bill in duplicate.
- 9.Packing List (Item wise)
- 10.Enclosed claim form duly completed.

However, it is evidently clear that all the aforesaid requisitioned documents do not find mention in para 24 of the note, Ex. DW3/D1.

The following documents find mention in the said note, Ex.DW 3/D1, which were shown as received and verified:

- 1.Copy of invoice.

- 2.Claim form
- 3.Claim Bill on us
- 4.Copy of RR
- 5.Copy of letter addressed to transporter duly received by them.
- 6.Non delivery certificate
- 7.Survey report.
- 8.Original Policy of Insurance.

There is nothing on record to show that any of the documents was dispensed with either by the accused V.K. Bhutani or by the accused R.K. Kohli. There is no reason mentioned anywhere in the claim file that any of the document was dispensed with in this case. Thus, despite specific requisition of the necessary documents, and without compliance by the insured claimant i.e. supreme Trading Corporation of the letter dated 12.3.1998, the claim was very swiftly and hurriedly passed, in this case.

(xviii) Further, the claim form available in this file, filed by the Supreme Trading Corporation, bears the date of 10.3.1998 whereas the letter dated 12.3.1998, which is Ex.DW 2/DX-5, has enclosed the claim form to be completed by the insured. How it is then that the claim form was filed on 10.3.1998 i.e. prior to 12.3.1998, whereas the claim form was enclosed vide letter dated 12.3.1998 by NIC?

(xix) The claim file contains the invoice, raised by Pooja International, which bears the signatures of accused K.V. Juneja, admittedly, raising the bill of Rs. 2763. It is not disputed that this bill was raised on behalf of M/s Pooja International. The amount of Rs. 2763/- was admittedly paid to M/s Pooja International, which was duly deposited in their account owned and operated by the accused Arvind Sharma. The same has been established on record. M/s Pooja International, in this case, has filed 'Tracer's' fake and forged report.

(xx) According to claim note, the survey in this case was arranged on 6.2.1998, whereas the document Ex.DW

2/P-15, indicates that M/s Pooja International was deputed as Tracer on 4.2.1998 i.e. prior to the survey arranged which does not appeal to logic. In any case, the tracing report, on the face of it, does not inspire any confidence inasmuch as it appears to have been manipulated. The Tracer knew very well that the consignment was sent from Delhi to Ernakulam Station and his assignment was to trace the goods from Delhi to Ernakulam or the place where it got damaged/ misplaced. The Tracer, however, did not go up to Ernakulam station and arbitrarily terminated his journey at Erode Station only, without tracing the goods. Further, it is mentioned in the Survey Report, which is Ex.PW 1/DC, that their representative checked the record of M/s Supreme Trading Corporation and collected the photocopies of various documents like invoice/ bill, consignee letter, claim lodged on Railways. However, the same were not enclosed, admittedly, with the said Tracer Report. It is not indicated in the report that anything was enclosed with the report. Apart from this, the same was not available in the file also.

(xxi) Further, perusal of 'tracer's' report shows that the report is suspicious, on the face of it, as it recites that representative of M/s Pooja International met one Mr. Kesar, representatives of M/s Supreme Trading Corporation on behalf of the accused Anil Maheshwari, however, nowhere it is clarified as to who Mr. Keswar was or whether Mr. Kesar had anything to do with M/s Supreme Trading Corporation. The tracer report does not mention as to when the representative reached Nagpur Station. The names, indicated in the report, are not complete inasmuch as it mentions the names like – Ramachandran, Mr. Ansari, etc. The report, regarding Erode Station, also does not inspire confidence inasmuch as their representative checked some other six cases containing the names with which the consignment in question, allegedly sent by the consignor, had nothing to do. In any case, the tracer report nowhere provided at

what point the goods were lost. No authentic documentary evidence was collected from the Railway Authority. It is, therefore, clear that this forged report was filed, considered, accepted and claim was released in favour of accused Anil Maheshwari as a part of criminal conspiracy amongst the accused persons.

(xxii) The letter, Ex.DW2/DX-8, issued by the accused Rajesh Kumar Kohli is the letter, vide which M/s Pooja International was appointed as recovery agent also. The claim in this case was passed admittedly on 18.6.1998. It is not understood as to why then recovery agent was appointed prior to that date. Moreover, M/s Pooja International filed false, forged and vague Tracing Report.

It is not understood how the same M/s Pooja International was appointed as tracer as well as the recovery agent. Admittedly, there is nothing available on record to show that any attempt was made or any recovery was made from the Carrier i.e. the Railways, in this case. It appears that criminal intent of the accused persons was only to ensure passing of the bogus claim and cheat NIC.

(xxiii) Accused Anil Maheshwari was in the specific knowledge regarding existence of Rajan Enterprises, the consignee, in this case and about his own Supreme Trading Corporation. The burden of proof under Section 106 of the Evidence Act lay on him. In any case, later on, it shifted to him to show that both these establishments were existing. The material established on record by the prosecution clearly indicates that none of them was found existing at the given address. Accused Anil Maheshwari despite being in the power and possession of exclusive knowledge and other documentary evidence did not come forward to demonstrate that these establishments existed at the given address. This clearly established that what prosecution has shown is correct i.e. both consignor and consignee

did not exist at the given address and the claim was bogus.

In the case law reported as Krishna Kumar Vs. UOI, AIR 1959 SC 1390, and Indore Municipal Corporation Vs. Caltex (India) Ltd, AIR 1991 SC 454, Hon'ble Supreme Court has held that:

“If the facts are within the knowledge of the accused, it is enough to establish facts which give rise to a suspicion and then by reason of sec. 106 of the Evidence Act to throw the onus on him to prove his innocence.”

(xxiv) It is well settled that the witness may tell lie but the documents do not. The address of M/s Supreme Trading Corporation as is reflected in the copy of RR, which is Ex. PW22/A, is 1784, 1st Floor, Chawri Bazar. In the Corporation Bank, where accused Anil Maheshwari deposited the amount of claim, contains the address of Supreme Trading Corporation as 1716, Gali Piou Wali, Dariba, Delhi. Still further in the Insurance Policy, the address given by the insured, M/s Supreme Trading Corporation, as 3499 Chawri Bazar, Delhi. It is, therefore, clear from all these undisputed and duly proved documents that accused Anil Maheshwari had certain and definite intentions to commit cheating and fraud by projecting Supreme Trading Corporation falsely by giving different addresses to different agencies.

(xxv) The circumstances and documents proved by the prosecution and which are available on record squarely proves that there was a well knit criminal conspiracy hatched by all the accused persons. Subsequently, they all performed their respective roles to get the offences committed in a systematic, clandestine and organized manner.

(xxvi) Accused Vinod Kumar Bhutani and Accused Rajesh Kumar Kohli, as discussed above, processed and passed the fraudulent claim based on false, fabricated and non-existing facts in pursuance to the criminal

conspiracy. They abused their official position to benefit the claimant, accused Anil Maheshwari to the extent of claim amount. Accused Anil Maheshwari presented the bogus claim and pocketed the proceeds of the claim. Accused Arvind Kumar Sharma and K.V. Juneja presented bogus tracers report and illegally charged NIC the fees, thereof. The tracer report presented by them was also false and fabricated as it did not correspond to the truthful position.

13. There are four serious fundamental flaws in the case of the prosecution which have been erroneously held in favour of the prosecution and against the Appellants by the learned Trial Court. Firstly the case of the prosecution is that the important documents like the railway receipt and the non-delivery certificate were not available on record and the claim was passed in the absence of these material documents. On the other hand it is contended that the non-delivery certificate was a forged document. The two contrary contentions cannot co-exist. If the non-delivery certificate was not on record it could not have been held that a forged document was used.

Secondly the prosecution has failed to prove by legal evidence that the non-delivery certificate was a forged document.

Thirdly it is even the case of the prosecution that the Appellant M/s Supreme Trading Corporation had booked a consignment which was duly dispatched however, the prosecution has failed to prove that this consignment was either received by the Appellant Anil Maheshwari or somebody at his instance and thus the NIC was cheated by raising a false claim.

Fourthly it is the case of the prosecution witnesses itself that on the basis of documents available, the officer was required to pass the claim. If

that be the position then it cannot be said that the Appellants Vinod Kumar Bhutani and Rajesh Kohli committed criminal misconduct as defined under Section 13(1)(d) of the PC Act.

14. As noted above vide finding no. (xiv) in para 191 of the impugned judgment, the learned Trial Court held that the letter dated 27th July, 2002 Ex. PW22/B from NIC to R.P. Kaushal, the Investigating Officer disclosed that regarding the claim in question, that is, M/s Supreme Trading Corporation, the sum insured was Rs. 4.58 lakhs and that in the absence of damage/shortage certificate and copy of the railway receipt, the claim was settled. It was gross violation of the prescribed norms. Ex. PW22/B is a photocopy of the letter from the Assistant Manager, NIC to the Investigating Officer R.P. Kaushal wherein on examination of the six marine claim files he stated about the details of the documents available/non-available along with the discrepancy noticed in the claims. As per the said document the Assistant Manager stated that the documents i.e. damage/shortage certificate and copy of RR were not available in the file and the discrepancy noted was that the claim was settled in the absence of Damage/shortage certificate. Ex. PW1/A is the vigilance report which has been exhibited by PW1 and on the basis of which FIR has been registered. The finding of the vigilance inquiry conducted by the PW1 and two other officers reads as under:

“1. Claim No. 2145/97-98/66

A/c-M/s Supreme Trading Corpn.

Policy No. 21451842 was issued by DO X to M/s Supreme Trading Corpn. for dispatch of Industrial hardware goods from Delhi to Ernakulam.

The Insured vide their letter dt. 19-01-98 intimated the loss to Divisional Office. This letter was received by Shri Rajesh Kohli, D.M., and he deputed M/s Pooja International for trading. Shri Kohli wrote a letter dt. 4.02-98 to M/s Pooja International informing about their appointment as tracer in the case. As per our investigation we could not find M/s Supreme Trading Corpn. at the address given in the file. However, after lot of efforts we were able to trace them to the address of M/s Supreme Indl. Corpn at 1716, Gali Piou Dariba, Delhi. Our investigation has also further revealed that Shri Anil Maheshwari is the account holder of M/s Supreme Trading Corpn, with Corporation Bank, Chandni Chowk where the proceeds of the above claim have been credited.

Our Kochi Vigilance Officer has informed us that M/s Rajan Enterprises the consignee is not existing at Ernakulam. The consignment was sent through railway and we have written to Railways. We have contacted Chief Parcel Supervisor at Delhi Main Station and he has confirmed that receipt no. 645451 was issued and the goods were loaded on the wagon for transportation to Madras. However as regards non-delivery certificate issued by Southern Railway, Ernakulam is concerned we are trying to get it verify through out Kochi Vigilance Officer. Inspite of our repeated visits to the address of the Insured Shri Anil Maheshwari did not meet us. However, we could meet his younger brother Manish Maheshwari and he told us that they had never raised any invoice of Rs. 4,56,400/-. The claim note was signed by Shri V.K. Bhutani, AAO & Shri Rajesh Kohli, D.M. Since the loss was within the financial authority of D.C.C. this was passed by them comprising of V.K. Bhutani AAO, G.C. Vij, AO and Shri Rajesh Kohli, D.M.

Though the railways have confirmed the receipt and loading of the consignment but in view of the fact that the consignee was not found at Ernakulam we have doubt that the said claim is genuine one. Mere sending goods by railway in packed wooden cases does not confirm that the cases indeed contained the consignment of electrical goods as mentioned in the invoice

issued by Supreme Trading Corpn. The whole affair seems to be shrouded with doubts.

Hence we have strong doubt that the above claim could be fabricated.”

15. This report does not say that the claim was passed in the absence of these two important documents, that is, the railway receipt and the non-delivery certificate. As a matter of fact as regards the railway receipt number is mentioned and it is stated that it has been confirmed from the Chief Parcel Supervisor at Delhi, Main Station that goods were loaded on the wagon for transportation to Madras vide Receipt No. 645451. As regards the non-delivery certificate, it clearly mentions that efforts are being made to verify the same through the Kochi Vigilance Officer. Further PW1 in his deposition before the Court has not stated that when he conducted the vigilance inquiry, these two documents were not on the record. As a matter of fact, PW1 who was the Vigilance Officer of NIC from January, 1992 to March, 2003, is silent on this aspect in his examination in chief and in cross-examination he admitted that one of the documents received and verified in the claim note was the railway receipt. He further agreed that the railway receipt or the copy of the railway receipt was presently not exhibited in file Ex. PW1/C containing pages 1-26. He could not say as to why the copy of the railway receipt was missing from the file. He further clarified that he did not remember if railway receipt was there when he seized the file from the division. It is thus apparent that there is no material on record to show that the railway receipt was not available on the claim file when the claim was passed. As regards the non-delivery certificate, PW1 in his cross-examination admitted that in his report he stated that the non-delivery

certificate was got verified through Kochi Regional Office. Thus, the said non-delivery certificate was part of the file. Therefore, the very basis of the prosecution case that the claim was passed in the absence of two most material documents as stated in their report Ex.PW22/B to the Investigating Officer as upheld by the learned Trial Court is wholly incorrect. Further Ex. PW22/B was only a report to the Investigating Officer by the Assistant Manager Mr. Suresh Roy and was thus not substantive evidence. Mr. Suresh Roy has not been examined as a witness. This document has been exhibited by I.O. PW22 R.P. Kaushal, who is not the author of this document. PW9 P.K. Aggarwal from vigilance department NIC handed over the claim file to the IO vide seizure memo Ex.PW9/A dated 8.2.2001. He admitted that the claim file of Supreme Trading Corporation Ex.PW1/C contained 28 documents. He admitted that he could not say if any seizure memo was prepared while seizing these documents from DOX by the vigilance department. Further PW20 Inspector Jyoti Kumar the I.O. in his cross-examination admitted that vide document Ex.PW9/A, the claim file with 28 documents were seized whereas before the Court, the file contained only 26 documents. It is thus evident that sanctity of preserving the documents in the claim file was not maintained at any stage. Even PW1 A.K. Seth stated that there was no procedure for seizure of documents. He did not know who seized the claim file from DOX. Thus, the learned Trial Court erroneously returned the finding on the basis of the documents Ex. PW22/B as if by reporting that the railway receipt and non-delivery certificate were not available on the record; the prosecution has proved beyond reasonable doubt that these documents were not available on the claim file and the claim was passed in the absence of these documents.

16. The second most important finding No. (x) of the learned Trial Court is that as per the Ex. PW1/D, no non-delivery certificate was issued from Ernakulum Railway Station. The non-delivery certificate furnished in the claim file Ex. PW1/C was therefore, false, forged and fabricated. This finding of the learned Trial Court is based on no legal evidence and is wholly erroneous. Ex. PW1/D is a letter from PW15 K.V.P. Namboodri, Assistant Manager/Vigilance Officer, Cochin Branch of NIC to PW1 A.K. Seth, Vigilance Officer, Delhi NIC wherein he stated that he visited the Parcel Office of Ernakulum Junction Railway Station on 27th September, 1999 and discussed the matter with Mr. Mohanan, Chief Parcel Superintendent and Mr. Surender Nath, office staff. They verified their records thoroughly and confirmed that no such non-delivery certificate was issued from their office. They further stated the signatures and the rubber stamp of Chief Parcel seen in the certificate were not genuine and nobody signs as seen in it. Neither Mr. Mohanan, Chief Parcel Superintendent nor Mr. Surender Nath, office staff have been produced in the witness box who could on the basis of original record or on identifying the signatures not to be of the officer concerned could prove that the non-delivery certificate in the claim file Ex. PW1/C was a forged document. Since neither this document has been proved to be forged by the person in whose handwriting it is purported to be, nor by the expert opinion that the signatures on the documents were not of the person concerned, it could not have been held that the non-delivery certificate was proved to be forged document. The learned Trial Court defied the fundamental legal principles of proving a document to be forged before the Court and returned a finding that the non-delivery certificate was a forged and fabricated document without there being any evidence on

record. The letter of Mr. K.V. P. Namboodri, PW15, who was the Vigilance Officer, is just like the statement of an Investigating Officer, who states that the document is a forged document without proving the same from the purported author of the document or person acquainted with his handwriting or after exhibiting and proving the original documents that the same does not relate to the pertaining entries. The photocopy of the non-delivery certificate purported to be a forged document was exhibited as Ex. PW15/DA while confronting PW15. The prosecution even failed to prove the original alleged forged non-delivery certificate on record. Further this inquiry of PW15 was merely on oral request and nothing was given by Mr. Mohanan, Chief Parcel Superintendent in writing to PW15 in respect of the alleged fake certificate Ex. PW15/DA. The investigating agency had cited Mr. E.A. Sathyanasen as a witness to prove the forgery of non-delivery certificate. Once summons were served to Mr. Sathyanasen to appear as witness however he did not appear. As per the status report filed by SP CBI before this Court, it is apparent that no further serious efforts were made to examine this witness and the learned SPP gave up this witness. There is total violation of Sections 45 to 47 of the Evidence Act while returning this finding in sub-para (viii) of Para 191 of the impugned judgment. Thus the prosecution has failed to prove that the non-delivery certificate on record was a forged document. The Hon'ble Supreme Court in *S. Gopal Reddy Vs. State of Andhra Pradesh AIR 1996 SC 2184* held:

“28. We are unable to agree, in the established facts and circumstances of this case, with the view expressed by the courts below that PW1 is a competent witness to speak about the handwriting of the appellant and that the opinion of PW3 has received corroboration from the evidence of PW1. PW 1

admittedly did not receive any of those letters. He had no occasion to be familiar with the handwriting of the appellant. He is not a handwriting expert. The bald assertion of PW 1 that he was "familiar" with the handwriting of the appellant and fully "acquainted" with the contents of the letters, admittedly not addressed to him, without disclosing how he was familiar with the handwriting of the appellant, is difficult to accept. Section 67 of the Evidence Act enjoins that before a document can be looked into, it has to be proved. Section 67, of course, does not prescribe any particular mode of proof. Section 47 of the Evidence Act which occurs in the chapter relating to 'relevancy of facts' provides that the opinion of a person who is acquainted with the handwriting of a particular person is a relevant fact. Similarly opinion of a handwriting expert is also a relevant fact for identifying any handwriting. The ordinary method of proving a document is by calling as a witness the person who had executed the document or saw it being executed or signed or is otherwise qualified and competent to express his opinion as to the handwriting. There are some other modes of proof of documents also as by comparison of the handwriting as envisaged under Section 73 of the Evidence Act or through the evidence of a handwriting expert under Section 45 of the Act, besides by the admission of the person against whom the document is intended to be used. The receiver of the document, on establishing his acquaintance with the handwriting of the person and competence to identify the writing with which he is familiar, may also prove a document. These modes are legitimate methods of proving documents but before they can be accepted they must bear sufficient strength to carry conviction. Keeping in view the in-conclusive and indefinite nature of the evidence of the handwriting expert PW 3 and the lack of competence on the part of PW1 to be familiar with the handwriting of the appellant, the approach adopted by the courts below to arrive at the conclusion that the disputed letters were written by the appellant to Ms. Vani on the basis of the evidence of PW 1 and PW 3 was not proper. The doubtful evidence of PW 1 could neither offer any corroboration to the inconclusive and indefinite opinion of the handwriting expert

PW3 nor could it receive any corroboration from the opinion of PW3. We are not satisfied, in the established facts and circumstances of this case, that the prosecution has established either the genuineness or the authorship of the disputed letters allegedly written by the appellant from the evidence of PW1 or PW3. The courts below appear to have taken a rather superficial view of the matter while relying upon the evidence of PW1 and PW3 to hold the appellant guilty. We find it unsafe to base the conviction of the appellant on the basis of the evidence of PW1 or PW3 in the absence of substantial independent corroboration, internally or externally, of their evidence, which in this case is totally wanting.”

17. The Prosecution has sought to prove the evidence of non-delivery certificate being a forged document by hearsay evidence which is not permissible in law. In *Kalyan Kumar Gogoi Vs. Ashutosh Agnihotri and Anr. (2011) 2 SCC 532* it was held:

“34. The idea of best evidence is implicit in the Evidence Act. Evidence under the Act, consists of statements made by a witness or contained in a document. If it is a case of oral evidence, the Act requires that only that person who has actually perceived something by that sense, by which it is capable of perception, should make the statement about it and no one else. If it is documentary evidence, the Evidence Act requires that ordinarily the original should be produced, because a copy may contain omissions or mistakes of a deliberate or accidental nature. These principles are expressed in Sections 60 and 64 of the Evidence Act.

35. The term “hearsay” is used with reference to what is done or written as well as to what is spoken and in its legal sense, it denotes that kind of evidence which does not derive its value solely from the credit given to the witness himself, but which rests also, in part, on the veracity and competence of some other person. The word “hearsay” is used in various senses. Sometimes it means whatever a person is heard to say.

Sometimes it means whatever a person declares on information given by someone else and sometimes it is treated as nearly synonymous with irrelevant. The sayings and doings of the third person are, as a rule, irrelevant, so that no proof of them can be admitted. Every act done or spoken which is relevant on any ground must be proved by someone who saw it with his own eyes and heard it with his own ears.

36. The argument that the rule of appreciation of hearsay evidence would not apply to determination of the question whether change of venue of polling station has materially affected the result of the election of the returned candidate, cannot be accepted for the simple reason that, this question has to be determined in a properly constituted election petition to be tried by a High Court in view of the provisions contained in Part VI of the Representation of the People Act, 1951 and Section 87(2) of the 1951 Act, which specifically provides that the provisions of the Evidence Act, 1872, shall subject to the provisions of the Act, be deemed to apply in all respects to the trial of an election petition. The learned counsel for the appellant could not point out any provision of the 1951 Act, which excludes the application of rule of appreciation of hearsay evidence to the determination of question posed for consideration of this Court in the instant appeal.

37. Here comes the rule of appreciation of hearsay evidence. Hearsay evidence is excluded on the ground that it is always desirable, in the interest of justice, to get the person, whose statement is relied upon, into court for his examination in the regular way, in order that many possible sources of inaccuracy and untrustworthiness can be brought to light and exposed, if they exist, by the test of cross-examination. The phrase "hearsay evidence" is not used in the Evidence Act because it is inaccurate and vague. It is a fundamental rule of evidence under the Indian law that hearsay evidence is inadmissible. A statement, oral or written, made otherwise than by a witness in giving evidence and a statement contained or recorded in any book, document or record whatsoever, proof of which is not

admitted on other grounds, are deemed to be irrelevant for the purpose of proving the truth of the matter stated. An assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact asserted. That this species of evidence cannot be tested by cross-examination and that, in many cases, it supposes some better testimony which ought to be offered in a particular case, are not the sole grounds for its exclusion. Its tendency to protract legal investigations to an embarrassing and dangerous length, its intrinsic weakness, its incompetence to satisfy the mind of a judge about the existence of a fact, and the fraud which may be practised with impunity, under its cover, combine to support the rule that hearsay evidence is inadmissible.

38. The reasons why hearsay evidence is not received as relevant evidence are:

(a) the person giving such evidence does not feel any responsibility. The law requires all evidence to be given under personal responsibility i.e. every witness must give his testimony, under such circumstance, as expose him to all the penalties of falsehood. If the person giving hearsay evidence is cornered, he has a line of escape by saying “I do not know, but so and so told me”,

(b) truth is diluted and diminished with each repetition, and

(c) if permitted, gives ample scope for playing fraud by saying “someone told me that...”. It would be attaching importance to false rumour flying from one foul lip to another. Thus statements of witnesses based on information received from others is inadmissible.

18. The learned Trial Court committed a serious error in returning two contradictory findings. It could not have held at the same time that the claim was passed in the absence of non-delivery certificate and that the claim was passed on the basis of a forged non-delivery certificate. The non-delivery certificate was either there on record or not. Both the facts cannot co-exist.

The prosecution case is self contradictory and the learned Special Judge not only failed to notice the same but also accepted the two contrary contentions.

19. Thirdly, it is the case of the prosecution itself that the firm of Appellant Anil Maheshwari, M/s Supreme Trading Corporation sent the consignment to Ernakulum vide Railway Receipt No. 645451 dated 13th December, 1997 as per the testimony of PW10 Trilok Nath Bhatia, in-charge of Railway City Booking Agency, Northern Railway, Barafkhana Sabzi Mandi, Delhi. PW10 stated that he was posted as in charge from 1986 and was working for Shri Mohan Lal Jaggi and sons who was running an agency authorized for booking parcel, goods and ticket booking on behalf of the Northern Railway. The entire details of the booking etc. used to be sent to the railway. Four copies of the railway receipts used to be prepared. One used to be sent to the consignor, one to the accounts office, one to guard operation for affixing and one for record. He stated that he had seen copy of the railway receipt No. 645451 dated 13th December, 1997 and as per the railway receipt four packets of hardware goods were booked by M/s Supreme Trading Corporation, Chawri Bazar, Delhi. The goods were booked after the receipt of forwarding note and the railway receipt was issued. The goods were then sent to the parcel office of the Northern Railway under Summary No. 8915 dated 23rd December, 1997 along with lot of 138 packets. He identified the signatures of Shri Dogra on the Summary No. 8915 as he had worked under him. The goods sent by the Summary No. 8915 Ex. PW10/A had been loaded and so acknowledged by Chief Parcel Supervisor, Northern Railway. He further stated that though they do not check the goods while booking the same however, checked the outward condition of the packets and book the goods by measurement, weight,

volume and on the basis of the declaration of the supplier. He further reiterated that on seeing the railway receipt he could say that the goods were sent to M/s Rajan Enterprises, Opposite Post Office, Ernakulum. PW12 Suraj Prakash working as Head Parcel in Delhi Main Railway Station, Old Delhi was also examined. On seeing RR No. 645451 dated 13th December, 1997 and summary of RR Ex.PW10/A dated 23rd December, 1997 he stated that four packets of hardware goods were booked to Ernakulam destination by their parcel office on 26th December, 1997 in wagon No. SE 80878. They got no intimation whether goods were delivered or not at the given destination. It is thus the case of the prosecution itself that the goods were dispatched by M/s Supreme Trading Corporation vide Railway Receipt No. 645451 dated 13th December, 1997. To return a finding that a false claim was passed, the prosecution was thereafter required to prove that the goods were delivered at the address given or were intercepted by the Appellant Anil Maheshwari by himself or through someone else and despite the same a claim was taken. The prosecution has placed no material to prove that after dispatch of the goods from Delhi where the goods have gone. Though a doubt is raised in the vigilance enquiry as to what goods were sent however it is not even the case of prosecution that other articles or no goods were sent and a claim was raised. In the light of this material, the finding of the learned Trial Court that a false claim was approved by Rajesh Kohli and Vinod Kumar Bhutani and on the basis of a false claim, Anil Maheshwari committed the offence of cheating is wholly erroneous and perverse.

20. Fourthly, the case of the prosecution as per the statement of PW1 A.K. Seth, Vigilance Officer itself is that by merely looking at the document, that is, non-delivery certificate it cannot be ascertained whether it was a fake

document or not. He admitted that the Divisional Officer does not have any device and no cause can straightaway be made out whether the document is original or fake. He further admitted that it was correct that there was no regulation or rule in the company that every non-delivery certificate should first be verified and only then the claim paid. He also admitted that by signing of the claim note, Mr. Vinod Kumar Bhutani and Rajesh Kohli committed no breach of any rule of the company and in passing of the claim by DCC, there was no breach of any rule. Besides PW1 Anil Seth, the prosecution also examined PW4 Anil Kumar Tiwari, who assisted A.K. Seth and A.L. Gambhir in the vigilance enquiry of the NIC and signed the report. A.L. Gambhir was never examined as a prosecution witness. PW4 A.K. Tiwari also admitted that no rule of the company was breached in issuance of policy no. 21451842. He also stated that the verification of address of Supreme Trading Corporation at 1716 Gali Piao Wali or at the bank were not done personally by him. He admitted that the conclusions were not based on investigations done by him personally. This witness admitted that non-delivery certificate was sent to Kochi R.O. for verification, since by merely looking at it, it was not possible to determine whether it was a true or false certificate. He admitted that no rule of the company required Divisional Manager to first have the non-delivery certificate checked up from Kochi Regional Office and then pay the claim. He admitted that there was nothing wrong in Mr. V.K. Bhutani and Mr. G.C. Vij signing the claim in the claim file vide Ex.PW1/C. He further admitted that no rule of the company required the Divisional Manager to check about the existence of consignee and then only to under-write the insurance or pay the claim. He also admitted that during the process of settlement of claim, the officers

concerned do not have any documents beyond the documents available in the file and there is no such test to know whether the documents are genuine or forged at the time of processing the claim. Though learned counsel for the Appellant states that an adverse inference needs to be drawn for non-examination of A.L. Gambhir, the third member of the vigilance team, however even in the absence of statement of A.L. Gambhir, PW1 A.K. Seth and PW4 A.K. Tiwari have not been able to point out any negligence much less a misconduct or a criminal misconduct qua the Appellants V.K. Bhutani and Rajesh Kumar Kohli. Thus it is apparent that the Appellants Rakesh Kohli and Vinod Kumar Bhutani neither committed breach of any rule of the company in issuing the policy or passing the claim nor from merely looking at the non-delivery certificate it was possible to determine whether the same was true or false. Thus the Appellants were not even negligent in their conduct what to say about misconducting themselves. The word 'misconduct' in criminal jurisprudence finds mention only in Section 13 (1) (d) of the PC Act though used very often and primarily in service jurisprudence. In *State of Punjab & Anr. Vs. Ram Singh Ex. Constable* (1992) 4 SCC 54 their Lordship considered 'misconduct' and held:

“5. Misconduct has been defined in *Black's Law Dictionary*, Sixth Edition at page 999 thus:

“A transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behavior, wilful in character, improper or wrong behavior, its synonyms are misdemeanor, misdeed, misbehavior, delinquency, impropriety, mismanagement, offense, but not negligence or carelessness.”

Misconduct in office has been defined as:

“Any unlawful behavior by a public officer in relation to the duties of his office, wilful in character. Term embraces acts which the office holder had no right to perform, acts performed improperly, and failure to act in the face of an affirmative duty to act.”

P. Ramanatha Aiyar's *Law Lexicon*, Reprint Edition 1987 at page 821 defines ‘misconduct’ thus:

“The term misconduct implies a wrongful intention, and not a mere error of judgment. Misconduct is not necessarily the same thing as conduct involving moral turpitude. The word misconduct is a relative term, and has to be construed with reference to the subject matter and the context wherein the term occurs, having regard to the scope of the Act or statute which is being construed. Misconduct literally means wrong conduct or improper conduct. In usual parlance, misconduct means a transgression of some established and definite rule of action, where no discretion is left, except what necessity may demand and carelessness, negligence and unskilfulness are transgressions of some established, but indefinite, rule of action, where some discretion is necessarily left to the actor. Misconduct is a violation of definite law; carelessness or abuse of discretion under an indefinite law. Misconduct is a forbidden act; carelessness, a forbidden quality of an act, and is necessarily indefinite. Misconduct in office may be defined as unlawful behaviour or neglect by a public officer, by which the rights of a party have been affected.”

6. Thus it could be seen that the word ‘misconduct’ though not capable of precise definition, on reflection receives its connotation from the context, the delinquency in its performance and its effect on the discipline and the nature of the duty. It may involve moral turpitude, it must be improper or wrong behaviour; unlawful behaviour, wilful in character; forbidden act, a transgression of established and definite rule of action or code of conduct but not mere error of judgment, carelessness or negligence in performance of the duty; the act complained of bears forbidden quality or character. Its ambit has to be construed with reference to the subject matter and the

context wherein the term occurs, regard being had to the scope of the statute and the public purpose it seeks to serve. The police service is a disciplined service and it requires to maintain strict discipline. Laxity in this behalf erodes discipline in the service causing serious effect in the maintenance of law and order.”

21. For an offence defined under Section 13(1)(d) PC Act, the prosecution is required to prove the criminality in the misconduct. Thus, the misconduct should be accompanied by culpability i.e. the requisite knowledge that the misconduct is so gross so as to constitute an offence. While dealing with criminal misconduct constituting an offence under Section 13(1)(d) of the PC Act, the Hon’ble Supreme Court in *R. Sai Bharathi Vs. J. Jayalalitha & Ors.* (2004) 2 SCC 9 held:

“32. Section 13(1)(d) of the Act states as follows:

“13. (1) A public servant is said to commit the offence of criminal misconduct,

(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;”

33. To attract provisions of Section 13(1)(d) of the Prevention of Corruption Act, public servant should obtain for himself or any other person any valuable thing or pecuniary advantage

(i) by corrupt or illegal means, or

(ii) by abusing his position as a public servant, or

(iii) without any public interest.

34. The circumstances under which the properties were purchased by M/s Jaya Publications and M/s Sasi Enterprises cannot be treated as one obtained in the circumstances arising in Section 13(1)(d). The facts established in the case point out that the properties are not purchased by corrupt or illegal means or by abusing the official position as public servant to obtain pecuniary advantage discarding public interest. The purchase was effected through open sales held by TANSI. The right to sell the properties in question was available with the Corporation which chose to do so in favour of M/s Jaya Publications and M/s Sasi Enterprises. It is not established that A-1 or any other person obtained for herself any valuable thing or pecuniary advantage by abusing her position as a public servant. On the other hand, as stated earlier, the properties in question were sought to be sold from time to time and pursuant to such steps taken the properties had been sold to the two firms in question. The sale has been held pursuant to various resolutions of the Government since 1985 and that the putting up of the properties in question for sale itself was not against any public interest. When the two firms of which A-1 is a partner offered appropriate price the same having been accepted, it cannot be said that it has resulted in obtaining any pecuniary advantage or valuable thing by abuse of the official position. If the properties in question were sold by TANSI in public interest, the obtaining of the same through purchase in such a transaction for valuable consideration which does not fall below the market value does not come within the scope of Section 13(1)(d). Thus, the charge under Section 13(1)(d) is not established and we concur with the findings recorded by the High Court in this regard.

22. The definition of offence of criminal misconduct under Section 13(1)(d) of the PC Act shows that the pecuniary advantage or advantage of any valuable thing to himself or to the other person should be coupled by

either corrupt or illegal means or abusing the position as a public servant or without any public interest. It may be noted that it is the duty of a public servant to pass orders like award of tender, claim etc. Thus, merely causing pecuniary advantage to someone will not hold the public servant liable for criminal misconduct under Section 13(1)(d) of the PC Act, as by awarding a tender or claim the pecuniary advantage is bound to follow. The prosecution is bound to prove that the pecuniary advantage or the valuable thing to that person was obtained either by corrupt or illegal means or by abusing the position or without any public interest. It may be further noted that the presumption under Section 20 PC Act is not available for an offence of criminal misconduct under Section 13(1)(d) PC Act. In absence of proof by the prosecution of corrupt or illegal means, abuse of position or without any public interest, the prosecution cannot be said to have proved the offence under Section 13(1)(d) PC Act punishable under Section 13(2) PC Act. In the present case the prosecution has failed to either prove that corrupt or illegal means were used by Appellants Vinod Kumar Bhutani or Rajesh Kohli or they abused their position or that the claim was passed without any public interest. Hence neither substantive offence under Section 13(1)(d) read with 13(2) PC Act nor the conspiracy thereof can be said to have been proved against the Appellants.

23. There are further flaws in the prosecution case besides those mentioned above. The finding of the learned Trial Court that M/s. Supreme Trading Corporation was a non-existent firm is also erroneous. The prosecution examined PW1 A.K. Seth, the Vigilance officer who stated that during the vigilance enquiry he went to property no. 3499 Chawri Bazar,

Delhi though he did not remember the date. The property as he remembered was two-three storied. He did not know in whose possession the ground, first or second floor were. He only knew that he could not find M/s. Supreme Trading Corporation at the given address. He further stated that there was no board or person to the effect that there was any company in the name of M/s. Supreme Trading Corporation, however he admitted there were many offices in the property no. 3499 Chawri Bazar, Delhi. He made enquiries from one or two persons but did not record their names. He further stated that he only visited the place which was mentioned in the file i.e. 3499 Chawri Bazar and the persons who met him stated that no firm of the name of Supreme Trading Corporation existed in the said premises. PW2 Lalit Chawla who was running a shop of electrical works at 3499 Chawri Bazar stated that there was no firm in the name of M/s. Supreme Trading Corporation at shop No. 3499 Chawri Bazar for the last 20 years. The statement of this witness was as if 3499 was the number of shop at Chawri Bazar and no other shop existed in the said premises. This witness in his cross-examination admitted that 3499 was the municipal number of a building and in the said building besides his shop, there were several other shops and offices. He further admitted that he did not know all the persons, who were doing business in the said building. He did not even know personally the firms which were working in the said building. He further admitted that if some firm does not put its hoarding, he would not be aware of the firm. Thus, this witness was not aware of all the occupants of the building and his testimony could not have proved beyond reasonable doubt that the firm of Appellant Anil Maheshwari did not exist at the given address. The evidence of PW3 Sushant Rastogi is worse than PW2. He was

running a business of electrical goods at shop number 3495. He stated that shop no. 3495 was his shop alone and there was no other shop or establishment at shop no. 3495. This witness did not know whether there was only one shop at 3499 or number of shops. He did not even know whether the municipal no. 3499 was given to a building which had many shops and offices. Thus, the testimony of PW3 is of no avail to the prosecution. The testimonies of PW1 and PW2 do not prove beyond reasonable doubt that M/s Supreme Trading Corporation did not exist at 3499, Chawri Bazar as the two did not know all the occupants of the buildings. The prosecution did not make any effort to find out the existence of shop from the telephone department which could have given an authentic and documentary verification. Further PW1 admitted that they could locate Supreme Trading Corporation at 1716, Gali Piao Wali, Dariba, Delhi which address was mentioned in the bank statement of Supreme Trading Corporation. In the light of this evidence, it cannot be said that the prosecution has proved beyond reasonable doubt that M/s Supreme Trading Corporation was a non-existent firm.

24. Learned Trial Court has drawn an inference of fraudulent mind of Appellant Anil Maheshwari on the basis that he had given different addresses in the insurance policy, railway receipt and the Corporation bank and the burden to show that Supreme Trading Corporation existed at the given address was on the Appellant Anil Maheshwari under Section 106 of the Evidence Act as the Appellant was having especial and specific knowledge of all valid documents pertaining to Supreme Trading Corporation but the defence has failed to do it. The three addresses

mentioned on the three documents i.e. in the insurance policy, corporation bank and railway receipt were all part of record of the insurance company as they formed part of the claim file. The insurance company was aware as to in which account of corporation bank the claim cheque of Rs. 4,58,000/- was deposited. It was also aware of the two addresses given in the railway receipt and the insurance policy. No effort was made by either the vigilance officers of the NIC or the investigating officer to verify these addresses from the various documents i.e. the bank account and the telephone numbers whether M/s Supreme Trading Corporation existed or not. The telephone number was mentioned on the letter heads used for correspondence. Thus ignoring all these documentary evidence which could have proved the existence of M/s. Supreme Trading Corporation, the prosecution choose to rely on two witnesses who were not fully aware of the persons running their firms and establishments in building no. 3499 Chawri Bazar. Since all the addresses, phone number and account number were available with the vigilance department of NIC and with the investigating officer also, the learned Trial Court erroneously shifted the burden on the accused under Section 106 Evidence Act holding that the same were in the especial and specific knowledge of the Appellant Anil Maheshwari and he has failed to prove the same. Section 101 Evidence Act is the fundamental principle of evidence that a party who asserts existence of certain facts must prove that those facts exists. It is only in a case where the party has no means to prove or to find out the facts that the burden shifts to the other party under Section 106 Evidence Act which is an exception to Section 101 Evidence Act. The learned Trial Court failed to even notice this fundamental principle of law. Further PW1 admitted that they were able to locate M/s. Supreme Trading

Corporation at Gali Piao Wali and thus the findings of the learned Trial Court that M/s. Supreme Trading Corporation was a non-existent firm, the Appellant had fraudulent intention as he gave different addresses and burden was on the Appellant Anil Maheshwari under Section 106 Evidence Act are wholly erroneous. In *Shambhu Nath Mehra Vs. State of Ajmer 1956 SCR 199* their Lordships while dealing with Section 106 Evidence Act held that the word 'especially' stresses the facts that are pre-eminently or exceptionally within the knowledge of the accused. It was held:

"Section 106 is an exception to section 101. Section 101 lays down the general rule about the burden of proof.

"Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist".

Illustration (a) says -

"A desires a Court to give judgment that B shall be punished for a crime which A says B has committed.

A must prove that B has committed the crime".

This lays down the general rule that in a criminal case the burden of proof is on the prosecution and section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word "especially" stresses that. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not. It is evident that that cannot be the intention and the Privy Council has twice

refused to construe this section, as reproduced in certain other Acts outside India, to mean that the burden lies on an accused person to show that he did not commit the crime for which he is tried. These cases are *Attygalle v. Emperor* A.I.R. 1936 P.C. 169 and *Seneviratne v. R.* [1936] 3 All E.R. 36, 49.

Illustration (b) to section 106 has obvious reference to a very special type of case, namely to offences under sections 112 and 113 of the Indian Railways Act for travelling or attempting to travel without a pass or ticket or with an insufficient pass, etc. Now if a passenger is seen in a railway carriage, or at the ticket barrier, and is unable to produce a ticket or explain his presence, it would obviously be impossible in most cases for the railway to prove, or even with due diligence to find out, where he came from and where he is going and whether or not he purchased a ticket. On the other hand, it would be comparatively simple for the passenger either to produce his pass or ticket or, in the case of loss or of some other valid explanation, to set it out; and so far as proof is concerned, it would be easier for him to prove the substance of his explanation than for the State to establish its falsity.

We recognise that an illustration does not exhaust the full content of the section which it illustrates but equally it can neither curtail nor expand its ambit; and if knowledge of certain facts is as much available to the prosecution, should it choose to exercise due diligence, as to the accused, the facts cannot be said to be "especially" within the knowledge of the accused. This is a section which must be considered in a commonsense way; and the balance of convenience and the disproportion of the labour that would be involved in finding out and proving certain facts balanced against the triviality of the issue at stake and the ease with which the accused could prove them, are all matters that must be taken into consideration. The section cannot be used to undermine the well established rule of law that, save in a very exceptional class of case, the burden is on the prosecution and never shifts."

25. Learned counsel for CBI relies on *Collector of Customs Madras & Ors. Vs. Bhoormul AIR 1974 SC 859* to contend that the prosecution is not required to prove its case with mathematical precision. There is no doubt about it. Proof beyond reasonable doubt does not mean absolute proof. All that is required is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. In the said case the Court was considering the standard of proof in an adjudication proceedings in a smuggling case. It was held that smuggling being clandestine conveying of goods to avoid legal duties, secrecy and stealth being its facts, it was impossible for the preventive Department to unravel every link of the process. The Hon'ble Supreme Court reiterated the legal position that facts especially in the knowledge of the accused are required to be proved by him. As noted above in the present case the prosecution case itself is that it was able to locate M/s. Supreme Trading Corporation at Gali Piou Wali and thus it could not be said to be a non-existent company.

26. In the finding in sub-para no. xvii of Para 191 the Learned Trial Court, noted that though vide letter Ex. DW2/DX5, 10 documents were asked for, however on the basis of 8 documents as mentioned in Ex. DW3/D1 the claim was passed and no reasons were mentioned as to why the other documents were dispensed with. Learned Trial Court does not specify which two documents were missing. The only inference that can be drawn from the other findings of the learned Trial court are that the two documents missing were the Railway Receipt and the non-delivery certificate. As discussed above, there is no material on record to prove that the claim was passed in

the absence of these two material documents. Rather it is clear from the evidence on record that the railway receipt and non-delivery certificate were duly submitted by Anil Maheshwari and considered by Appellants Rajesh Kohli and Vinod Kumar Bhutani before passing the claim. Faced with a situation that the non-existence of the Railway Receipt and the non-delivery certificate had not been proved, learned counsel for the CBI points out that besides the railway receipt and the non-delivery certificate, document no. 3 i.e. letter of authority from the consignee in favour of the claimant duly attested by railway authorities is missing from the record. However, this is not the case of the prosecution. In this regard, PW7 Amiya Kumar, Chief Manager, National Insurance Company appeared in the witness box. According to him in the eventuality of missing of entire consignment, non-delivery certificate is required and in case of theft copy of FIR is also required. Further railway receipt, lorry receipt and goods receipt in original in case of non-delivery is also required. Proof of having lodged monetary claim on the carrier is also required. After loss assessment, claimant submits the bill to the company which is known as claim bill. Prior to the settlement of the claim a special power of attorney and a letter of subrogation in favour of NIC is to be submitted by the complainant. In his cross-examination, this witness after going through the claim file of Supreme Trading Corporation Ex. PW1/C admitted that there was a letter of Supreme Trading Corporation showing that claimant had submitted original railway receipt along with other documents. As per the claim note Ex.PW3/D1 railway receipt number, date and non-delivery certificate were duly mentioned and these documents were ticked. In cross-examination this witness further stated that certificate of compliance of Section 64(5)(b) of Insurance Act was not on file though

the same was mentioned in the claim note at column no. 19 stating that Section 64(5)(b) had been complied with. It is thus evident that from the evidence of the witnesses all necessary formalities were complied with at the time when the claim was passed and for the relevant documents being subsequently not there on record, the liability cannot be fastened on the Appellants because the prosecution has failed to prove that after the Appellant Vinod Kumar Bhutani and Rajesh Kohli dealt with the file, the same was kept in sealed condition and not tampered with by other persons. PW1 A.K. Seth and PW4 A.K. Tiwari admitted that when the vigilance investigation of these claims were done, Appellant Rajesh Kohli was outside the country, the files were stored in the premises of division office – X and when files were seized, neither any receipt nor seizure memo was prepared. As a matter of fact, the claim file has changed number of hands and the documents were sent to number of places for verification which have been admitted by the prosecution witnesses. Further PW20 Inspector Jyoti Kumar the investigating officer admitted that vide Ex.PW9/A, claim file Ex.PW1/C of Supreme Trading Corporation was seized with 28 documents and in the Court there were only 26 documents in the file. Thus the relevant documents not being available on the claim file during investigation or during trial would not fasten the liability on the Appellants Rajesh Kohli and Vinod Kumar Bhutani and hold them guilty of misconduct of passing the claim in the absence of material documents.

27. Findings of the learned Trial Court in sub-para Nos. ii, iv, v, vi, xi and xix of Para 191 are not incriminating in nature, as the same relate to the appointment of M/s. Pooja International as the tracer, the bill of Rs. 2,763/-

raised for preparing the tracer's report and passed by Appellant Rajesh Kumar Kohli. Though finding in sub para nos. xx and xxi are inculpatory against the Appellants Arvind Kumar Sharma and Vijay Juneja, however the prosecution cannot be said to have proved its case beyond reasonable doubt on that basis. It is the case of the prosecution itself that M/s. Pooja International was an authorized tracer of the NIC. PW1 A.K. Seth admitted in his cross-examination that Rajesh Kohli committed no breach of any rule of the company in appointing M/s. Pooja International as tracer. Thus, once an authorized agent was appointed as a tracer and a tracer's report was filed, which Appellant Rajesh Kohli had no means to find out to be false, no illegality or misconduct can be attributed in clearing the bill for payment of Rs. 2763/- in favour of M/s. Pooja International for preparing the tracer's report.

28. The tracer's report Ex.PW/DC has been proved by the prosecution to be a false report. As per the report, the representatives of M/s. Pooja International visited the New Delhi Railway's parcels office/ record room and met Shri Shobraj who after going through the record regarding RR No. 645451 dated 13th December, 1997 told their representative that this consignment was sent through train no. 2626 SLR 45680 on 14.12.97 and the wagon had 287 cases for Nagpur, Vijaywada, Salem, Erode stations. Thus the employees of M/s. Pooja International tracked train no. 2626 SLR 45680 and they were informed that from the said train they unloaded 43 cases at Nagpur station, however consignment with RR No. 645451 was not unloaded at Nagpur station. At Vijaywada SLR No. 45680 reached the outer yard and the wagon was stranded for three days for repair, where after the

consignments therein were shifted to wagon no. SR 11079 in train no. 6318 on 28th February, 1997. Further enquiry at Salem station revealed that no consignment was unloaded at the said station with the said RR number. From Erode station it was revealed that no consignment relating to RR No. 645451 was received. Hence, in view thereof the tracer did not go to the Ernakulam station and opined that the carrier failed to deliver the full consignment at destination, the insured had suffered a loss and the claim of the insured seems to be genuine. The learned Trial Court held against the Appellants the fact that the tracer did not go to Ernakulum station and terminated his enquiry at Erode station. The finding is also erroneous. It was common sense on the part of the tracer not to go to Ernakulum station for enquiry as the goods had not reached even at Erode station. It was thus logical they could not have been sent to the next station.

29. The prosecution has examined PW12 Shri Suraj Prakash working as Head Parcel in New Delhi Main Railway Station, Old Delhi. As per PW12 vide Railway Receipt No. 645451 dated 13th December, 1997 goods from City Booking Agency, Barafkhana Chowk, Delhi were booked as per summary of railway receipt Ex.PW10/A dated 23rd December, 1997. From these documents he could say that four packets of hardware goods booked for Ernakulam destination were received on 24th December, 1997 and were dispatched by their parcel office on 26th December, 1997 in wagon no. SE 80878 in the lot of 302 packets by the parcel clerk to the Parcel Office, Madras Railway Station. He further stated that they got no intimation whether the goods were delivered or not at the destination in the railway receipt and the said information can be received from their destination office

i.e. the Parcel Office of Madras Railway station. It is thus apparent that as per the tracer's report the goods were sent by train no. 2626 SLR 45680 on 14th December, 1997 whereas they were actually sent from Delhi on 26th December, 1997 vide wagon no. SE 80878.

30. Learned counsels for Arvind Kumar Sharma and Vijay Kumar Juneja the employer and employee of M/s. Pooja International have an explanation in this regard. Their case is that they do not have any statutory backing and when they go to these Government offices like the railway department to verify the facts, no documents are given and they have to rely upon what is told by the officer concerned. I find force in the argument of the learned counsel for the Appellant. The tracers are more or less like private detective agents who when go for verification are required to seek information not by statutory means but by making request to the railway officers concerned for whom this would be a least priority work. Further, the railway officers are under no legal obligation to check all the records and give correct information to the tracers. This is evident from the tracer's report Ex.PW/DC. The representative of M/s. Pooja International, who visited New Delhi Railway Station parcels office, met one Shri Shobraj who after going through the records, gave the information to the representative of Pooja International on the basis of which they further tracked the movement of the goods. Thus, if the information regarding the date of dispatch, the train number and the wagon number in which they were dispatched was incorrect, the same would lead to a total incorrect report as all subsequent details would also be incorrect. Further Vijay Kumar Juneja, who is an employee of Arvind Kumar Sharma, has been made an accused because he

has signed the report. He does not deny the signatures on the report but his case is that he did not personally visit these places and the enquiry was conducted by other colleagues working in M/s Pooja International who visited these places and on the basis of verification done by them, this final report was prepared. Vijay Kumar Juneja thus had no personal knowledge about the facts, as is even evident from the tracer's report itself. Similar is the situation of Arvind Kumar Sharma who is the employer, whose employees went and enquired into the matter. It is not the case of prosecution that Arvind Kumar Sharma or Vijay Kumar Juneja charged money which was disproportionate to their claim for preparing a tracer's report or they were not entitled to claim the TA/DA bills or the amount of Rs. 2763/- for preparing the report. Thus, I find no merit in the learned Trial Court drawing an adverse inference in its finding arrived at in this regard.

31. Further even by proving the tracer's report to be false, the prosecution has not been able to prove the charges beyond reasonable doubt against the Appellants. To prove an offence of forgery under Sections 464 and 468 IPC, it is essential to prove that the document was false to the knowledge of the accused. In the present case, the tracer's report was prepared on the basis of inputs by third party. It has not been proved by the prosecution that the Appellants Arvind Kumar Sharma and Vijay Juneja had the knowledge that the details given by their colleagues and mentioned in the report were false, so that the same could attribute a fraudulent intention to them. Section 464 IPC defines a false document. As per illustration (d) to Explanation 1 to Section 464 IPC a false recital in a document amounts to making a false document. Section 468 IPC punishes forgery for the purpose of cheating.

One of the essential ingredients of Section 468 IPC is intention. Thus the act of preparing a false document must be committed with an intention to cheat. Intention to cheat presupposes the knowledge to the accused that the document was false. In *A.S. Krishnan & Anr.. v. State of Kerala*, AIR 2004 SC 3229, the Hon'ble Supreme Court while discussing "knowledge" held that "knowledge" is an awareness on the part of the person concerned indicating his state of mind. A person can be supposed to know where there is a direct appeal to his senses and a person is presumed to have a reason to believe if he has sufficient cause to believe the same. In substance, what it means is that a person must have reason to believe if the circumstances are such that a reasonable man would, by probable reasoning conclude or infer regarding the nature of the thing concerned. Such circumstances need not necessarily be capable of absolute conviction or inference; but it is sufficient if the circumstances are such creating a cause to believe by chain of probable reasoning leading to the conclusion or inference about the nature of the thing. These two requirements i.e. "knowledge" and "reason to believe" have to be deduced from various circumstances in the case.

32. It is not the case of prosecution that the tracer was required to obtain documentary proof and supplement its report with the same, as per the manual prescribed. As noted above the tracer's report is like a report of private detective agent who has no statutory back to procure the document. This case calls for a serious introspection by the National Insurance Company to reconsider its guidelines in seeking tracer's report. There should be some inhouse mechanism for proper verification of facts.

33. Regarding findings in sub-para nos. vii, ix, xiii and xxiii of Para 191 that M/s. Rajan Enterprises was a non-existent firm, it may be noted that the only witness examined by the prosecution in this regard is PW15, who stated that in the year 1999, he was posted at Kochi Regional Office of the NIC as Assistant Manager and on 13th April, 1999 he received a letter from Delhi office for verification of address of M/s. Rajan Enterprises and he submitted his report already exhibited as Ex.PW1/E. As per this report, PW15 has stated that he made enquiries about the said firm at the relevant post office and with similar trade people from the market, however nobody could identify the above firm. The door number given is false. There was no such Bazaar in Ernakulam City. There were a number of post offices and the address given was only Opposite Post Office, no pin code and telephone number was furnished. Further this witness in his report and in his cross-examination admitted that it was very difficult to locate the address without the name of the street, door number, pin code number and telephone number. It is thus evident that he could not locate the address for want of complete address. Further Inspector M. Shahjahan, the investigating officer of Kochi region of CBI, who conducted the investigation at Kochi, has not been examined as a witness. The learned Trial Court has relied on Ex.PW22/R a notice under Section 160 Cr.P.C. sent to proprietor of M/s Rajan Enterprises through registered post. The said registered post as per the prosecution is stated to note 'no such firm in my beat'. A perusal of the envelop shows that Ernakulam has been scored off and it is written thereon 'Try Kochi-31'. No such effort has been made. It is not even the case of the prosecution that the goods which were dispatched from Delhi by M/s. Supreme Trading Corporation were received at Ernakulam and thus insurance on a false claim

was taken. Thus, even if assuming that the prosecution could not trace M/s. Rajan Enterprises, the same is immaterial because it is not the case of the prosecution that the goods had reached Ernakulam station.

34. Learned Trial Court has held in its finding in sub-para xv that the claim file Ex. PW1/C contains false and fabricated documents produced by the insured Anil Maheshwari and the tracer M/s. Pooja International. These documents were admittedly processed by accused Rajesh Kohli and Vinod Kumar Bhutani when the claim was passed by them flouting all norms listed in the manual Ex.DW1/A. Nothing has been noted by the learned Trial Court as to which norm enlisted in the manual Ex.DW1/A was flouted. As noted above, the railway receipt and the non-delivery certificates have neither been proved to be missing nor forged documents, rather railway receipt was found to be genuine and the goods were found to be dispatched. As regards tracer's report, the same was not obtained by Appellant Anil Maheshwari but was asked for by Appellant Rajesh Kohli in his official capacity as per the procedure prescribed. Further none of the prosecution witnesses have stated as to which portion of the manual Ex.DW1/A has been flouted. The witnesses have rather stated that no norm or rule of the company was breached while issuing the policy or passing the claim. The finding of the learned Trial Court is de-hors evidence, without reasoning and is thus perverse.

35. Learned Trial Court in its finding in sub-para xvi held that Ex. DW3/D1 was the note to Divisional manager vide which the claim was recommended to be settled by the accused V.K. Bhutani and approved by accused Rajesh Kohli. It held that a bare perusal of this note shows how the

norms were deliberately flouted to benefit the insured. This Court has perused the note to the Divisional Manager. From the perusal of the note it is not evident as to which norms have been deliberately flouted, neither are they spelt out in the impugned judgment.

36. Learned Trial Court in its finding in sub-para xviii held that the claim form available in the claim file, filed by the Supreme Trading Corporation, bears the date of 10th March, 1998 whereas the letter dated 12th March, 1998 which is Ex. DW 2/DX-5 has enclosed the claim form to be completed by the insured. According to the learned Trial Court it was not possible to have filed the claim form on 10th March, 1998 i.e. prior to the letter dated 12th March, 1998 by NIC. The learned Trial Court failed to notice that in the claim file Ex.PW1/C before the letter dated 12th March, 1998 was sent, a letter was sent by NIC to M/s. Supreme Trading Corporation on 26th February, 1998 asking it to give the information i.e. copy of invoice, copy of railway receipt, non-delivery certificate in original, claim form duly filled in by the claimant, claim form enclosed and claim bill to the NIC. This document was exhibited as Ex.DW2/DxX. In response to this letter M/s. Supreme Trading Corporation vide its letter on 11th March, 1998 Ex.DW 2/DX-7 sent the original RR claim bill, claim form, invoice, consignee letter, original letter etc. This letter along with the documents was received at NIC on 19th March, 1998 when in between another letter was sent by the NIC on 12th March, 1998. Thus, the finding that though the letter by NIC was sent on 12th March, 1998, however the letters of the Supreme Trading were dated 10th and 11th March, 1998 i.e. prior to the calling of the documents by NIC is wholly erroneous and arrived at by looking into incomplete documents.

Thus, no malafide intention can be attributed in sending the documents by Supreme Trading Corporation even prior to the letter dated 12th March, 1998 Ex. DW 2/DX-5.

37. For an offence punishable under Section 420 IPC there must be deception coupled with dishonest or fraudulent inducement to part with the property. Learned Trial Court failed to deal with the issue that admittedly even as per the prosecution case the consignment was sent from Delhi and there was no evidence on record that the same was received at Ernakulam or some other place by the Appellant Anil Maheshwari or someone on his behalf , thus it could not be stated that the claim of Appellant Anil Maheshwari was a false claim and the charge of Section 420 IPC has thus not been proved by the prosecution beyond reasonable doubt against him. The decisions relied upon by the learned Special Judge have no application to the facts of the present case. In *Kuldip Sharma and Anr. V. State*, 2000 CrLJ 1272 (Delhi) payments were taken from the Government of India on the strength of bogus railway receipts. In *Ram Prakash Singh v. State of Bihar*, AIR 1998 SC 296 there was a false and fake insurance proposal. In the present case, it is the case of prosecution itself that goods were dispatched vide RR 646451 thus neither the RR was forged nor the claim was false. Appellant Anil Maheshwari has also been convicted for using bogus, false and forged document for offence under Section 471 IPC. As discussed above, the RR and the non-delivery certificate were not proved to be forged documents. Hence offence under Section 471 IPC has not been proved against him.

38. No doubt conspiracy is seldom an open affair and mostly required to be proved by circumstantial evidence. Usually both existence of the conspiracy and its objects have to be inferred from the circumstances and the conduct of the accused. The well known rule governing circumstantial evidence is that each and every incriminating circumstance must be clearly established by reliable evidence. Thus, each incriminating circumstance has to be proved beyond reasonable doubt and thereafter the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. The Court should not allow suspicion to take the place of legal proof. [*State (NCT of Delhi) v. Navjot Sandhu*, 2005 (110 SCC 600)]. In the present case, it may be thus noted that incriminating circumstances have not been proved beyond reasonable doubt. The circumstances which have been proved do not form a chain of events which lead to the only irresistible conclusion that the Appellants are guilty of committing the offence of conspiracy. In *Firozuddin* (supra) relied by learned counsel for CBI, reliance was placed on *Regina Vs. Murphy* (173 Eng. Reports 508). J. Coleridge while summing up for the jury summed up the law of conspiracy but added a word of caution. It was laid down that to draw an inference of conspiracy, the relative acts or conduct of the parties must be conscientious and clear to mark their concurrence as to what should be done. The concurrence cannot be inferred by a group of irrelevant facts artfully arranged so as to give an appearance of coherence. The innocuous, innocent or inadvertent errors and incidents should not enter the judicial verdict.

39. On the basis of aforesaid discussion it is clearly evident that the prosecution has failed to prove the substantive charges and charges with the aid of Section 120B IPC against the Appellants. Hence they are acquitted of the charges framed. The Appellants, who are in custody, be released forthwith if not wanted in any other case. Appeals are disposed of accordingly. Consequently, the bail applications have become infructuous and are disposed of as such.

(MUKTA GUPTA)

MAY 28, 2013

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