

IN THE HIGH COURT OF UTTARAKHAND
AT NAINITAL

HON'BLE JUSTICE SRI RAKESH THAPLIYAL, J.

September 17, 2014

SPLA No. 154 of 2017
With
Government Appeal No. 74 of 2017
With
CLMA No. 2052 of 2017

State of Uttarakhand

.....Appellant.

Versus

Balwant Singh

.....Respondent.

Counsel for the Appellant

Mr. B.C. Joshi, learned A.G.A.

Counsel for the respondent:

Mr. B.S. Negi, learned counsel

(Upon hearing the learned counsel the Court made the following judgment)

1. There is delay of 56 days in filing this special leave to appeal application as well as government appeal. In view of the grounds narrated in the application, and there being no serious objection from the side of the respondent-accused, the delay in filing the special leave to appeal is hereby condoned. Delay condonation application stands allowed, accordingly.
2. Heard on the SPLA No. 154 of 2017.
3. The State has preferred this application seeking leave to file an appeal against the judgment and order dated 17.06.2017, passed by the learned Session Judge, Chamoli (Gopeshwar) in Criminal Appeal No. 33 of 2013, Balwant Singh vs. State of Uttarakhand whereby the said court has set aside the judgment and order passed by the court of Chief Judicial Magistrate, Chamoli in Criminal Case No. 411 of 2008, convicting the respondent-accused for the charge of offence punishable under Section 409 IPC.

4. Facts, in brief, are that a written report (Ex. A2) was lodged on 01.11.2007 by the Principal of Government Inter College, Naini, District Chamoli which was addressed to the Joint Magistrate/S.D.M. Karanprayag, District Chamoli with the averments that an amount of Rs. 2,70,000/- had been sanctioned in the year 2003-04 for construction of new class rooms under the 'Pradhan Mantri Gramoday Yojna" the first instalment whereof was released on 27.12.2004 and second instalment was released on 14.02.2005. The work of construction was assigned by the then Principal Sri Balwant Singh Khatri (respondent herein) to Mr. Kuldeep Kumar who along with Jaiveer Singh Rawat, Technical Assistant under "Education for All" made a payment of Rs. 1,95,000/-, i.e, 75% of the completion of work to Mr. Kuldeep Kumar, Tolinayak. The instalments were amounted to Rs. 90,000/-, Rs. 45,000/- and Rs. 60,000/-. However, the work was not completed by the due date and the District Education Officer, Chamoli after an inquiry in the matter instructed to lodge the report against the culprits. Before the Inquiry Committee Balwant Singh Khatri (respondent accused) stated to get work completed till October 2007 and had requested to keep the proceeding of said FIR in abeyance till then; it was also mentioned in the report that the process to initiate the work has not been done by the respondent. Accordingly, the application was moved on which the SDM, Karanprayag directed the Patwari to take action as per law, whereupon Patwari Bainoli, District Chamoli, registered Crime No. 02 of 2007 on 01.11.2007 against Balwant Singh Khatri, Jaiveer Singh Rawat and Kuldeep Kumar for the offences punishable under Section 406, 409, 420 read with Section 34 IPC.

5. Pursuant to the said investigation charge sheet was submitted against the accused persons for the aforesaid mentioned sections itself. The learned Chief Judicial Magistrate, Chamoli took cognizance on the charge sheet, summoned the accused/persons, provided them copies of

prosecution documents and thereafter proceeded to frame the charges against the accused under Section 409, 406, 420 read with Section 34 IPC as against Balwant Singh Khatri and Jaiveer Singh Rawat whereas as against Kuldeep Kumar charges under Section 406, 420 read with Section 34 IPC were framed. The accused persons denied the charges and claimed to be tried.

6. As many as 11 witnesses were produced by the prosecution in support of its case who are, namely, PW1 Diwan Lal Raj, PW2 Chandradutt Semwal, PW3 Devi Prasad Khali, PW4 Ramesh Chandra Kothiyal, PW5 Ambaram Arya, PW6 Girish Chandra Dimri, PW7 Chandra Prakash Dimri, PW8 Prem Lal Arya, PW9 Mahendra Kumar, PW10 Devi Prasad and PW11 Pushkar Singh. On completion of prosecution evidence, the accused persons were examined under Section 313 Cr.PC. in which the respondent accused stated that an amount of Rs. 2,70,000/- had been sanctioned for construction of new class rooms under the "Pradhan Mantri Gramodaya Yojna" where for a construction, Committee was constituted and on the basis of the certificate issued by the Construction Committee and as well as by the Technical Assistants, he had made payment to Tolinayak the receipt whereof was taken from him; on 25.08.2005 he had been promoted and was accordingly transferred. After two years of promotion, stating the work to be incomplete, the report had been lodged against him whereas he had asked the then Principal to get the work complete. He also stated that he had not committed any forgery.

7. The Trial Court, after examining the prosecution evidence, proceeded to acquit the respondent/accused from the charge of Section 420/34 IPC, however, respondent was held guilty for the offence punishable under Section 409 IPC. Similarly co-accused were also convicted and sentenced by the Trial Court.

8. I have heard the learned counsel for the parties at length and carefully perused the entire papers available in the file of the Court. It needs to mention that charge against the accused is of Section 409 IPC. For the offence punishable under section 420 IPC, he was acquitted by the Trial Court. In this matter, the prosecution gave proof that an amount of Rs. 2,70,000/- had been handed over to the respondent-accused, being the Principal of School for completing the construction, the payment whereof was to be released in 3 equal instalments, looking to the pace of construction, however, the respondent accused did not adopt proper precautions, due to which the payment was made to the Tolinayak more than the actual work. In this regard, the Appellate Court has rightly recorded the finding that the prosecution could not prove evidence which can prove that there was a criminal breach of trust on the part of the respondent-accused. The witnesses examined by the prosecution in this regard before the Trial Court, those were the members of the Committee constituted for the construction work. PW3, PW6, PW7 along with PW8 had also been the members of the construction committee. Their evidence raised the question mark on the evidence, reason being that if their evidence is considered, they too were equally responsible for payment of work which was to be made from the public fund. Meaning thereby they too did not discharge their duty properly and they also fall in the category of co-accused. The Appellate Court also recorded the finding of fact that no such evidence was adduced by the prosecution that as to why the accused has deliberately committed the offence. Thus, the offence punishable under Section 409 IPC cannot be said to have been made out against the respondent-accused. The Appellate Court also relied upon the authorities of Supreme Court in the case of *L. Chandrih vs. State of Andhra Pradesh and others*, 2004 CRILJ 365 wherein in order to prove the offence punishable under Section 409 IPC, the existence of mens rea is a sine qua non.

The word used in Section 409 IPC is 'dishonest' i.e. to say guilty mind.

9. On the basis of the aforesaid discussion, the Appellate Court found that the judgment passed by the Trial Court in convicting the respondent accused for the offence punishable under Section 409 IPC is bad in the eye of the law and set aside the judgment of the Trial Court and in the opinion of this Court, the Appellate Court was perfectly justified in recording the findings of acquittal of respondent-accused.

10. In the opinion of this Court there is admittedly no scope of interference. Accordingly, I am of the considered view that there is no ground to grant leave to the State against the impugned judgment. As a result application seeking leave to file an appeal is hereby dismissed.

11. Since, the Court has declined to grant leave to file an appeal to the appellant-State against the respondent accused, hence, the present appeal is also dismissed.

RAKESH THAPLIYAL, J.

Parul