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A.F.R.

Court No. - 16

Case :- CRIMINAL APPEAL No. - 95 of 1998

Appellant :- Smt. Madhu Tandon

Respondent :- State of U.P.

Counsel for Appellant :- R.B.Khare, Anil Kumar Rajvanshi, Ayodhya Prasad Mishra, H.S.Jain, Shesh Ram Verma

Counsel for Respondent :- Govt. Advocate, Bireswar Nath, Shiv P. Shukla

Hon'ble Shamim Ahmed, J.

1. List has been revised and the case was taken up in the revised call.
2. Heard learned Counsel for the appellant, Shri Shiv. P. Shukla, learned Counsel for C.B.I. and Shri Ashok Kumar Singh, learned A.G.A-I for the State-respondents.
3. The instant Criminal Appeal under Section 9 of the Criminal Law Amendment Act read with Section 374 Cr.P.C. has been filed on behalf of the appellant, namely, Smt. Madhu Tandon against the judgment and order dated 10.02.1998 passed by Special Judge (Anti Corruption), U.P (West) Lucknow, in Case No.1/81 arising out of R.C. No.19/1979, convicting the husband of the appellant under Section 409 I.P.C. and Section 5(2) readwith Section 5(1) (c) of the Prevention of Corruption Act, 1947 and sentencing him to undergo two years rigorous imprisonment and a fine of Rs.18,000/- on each count, the sentences of imprisonment directed to run concurrently and in default of payment of fine to undergo further imprisonment of six months.
4. The prosecution case in brief is that P.K. Tandon i.e. accused (now deceased), who was the husband of the appellant, was appointed as a Branch Managar at Koraw Branch Allahabad in the U.C.O Bank formerly known as United Commercial Bank and one-Shri T.N. Bhalla served as the chief

accountant in the same branch. On October 10, 1979, at 11:45 AM, a case was registered against P.K. Tandon and T.S. Bhalla as R.C. No. 19/79 under sections 120B , 419, 420, 409, 467 I.P.C. and under Section 5(2) read with Section 5(1)(c) of the Prevention of Corruption Act, 1947. During the period 1976-77, the accused obtained a blank cheque book of Shri Kamala Shankar Pandey, the proprietor of M/s Agro Service Center situated in Allahabad (now Prayagaraj) under false pretext. The chequebook, numbered 775830 to 775850, was subsequently used by the accused to forge the signature of the P.W.-5 on eight cheques between September 9, 1996, and February 17, 1997, the accused had fraudulently withdrawn a total sum of Rs.43,000/- using these forged cheques.

Additionally, it was alleged that the complainant had entrusted the accused with a sum of money to be deposited into a savings account. The accused, identified as P.K. Tandon, provided pay-in-slips with his signature acknowledging receipt of the money on various dates: November 29, 1976 (Rs.19,000/-), December 9, 1976 (Rs.7,000/-), January 13, 1977 (Rs.5,000/-), and January 21, 1977 (Rs.5,000/-), totaling Rs.36,000/-. However, the accused did not deposit the said amount into the bank account of the complainant, resulting in a loss to the bank.

Upon investigation, the case was handed over to C.B.I Inspector Shri K.P. Singh, who collected evidence indicating the guilt of the only accused, P.K. Tandon-accused, husband of the appellant for misappropriating the aforementioned sum of Rs.36,000/- and failing to deposit it into the bank account as instructed. Consequently, a charge-sheet was filed against the accused under Section 409 of the Indian Penal Code (IPC) and under Section 5(2) read with Section 5(1)(c) of the Prevention of Corruption Act, 1947.

5. Charges were framed by the trial court under Sections 409 I.P.C. and under Section 5(2) r/w 5(1)(c) of Prevention of Corruption Act, 1947. The accused persons denied charges and sought trial.

6. In order to substantiate their case, the prosecution examined witnesses Rajeshwar Amolak Ramshani, Assistant General manager UCO Bank, D.R Kapoor, Director of UCO Bank, N.P Khare, Officer UCO Bank, T.N Bhalla

Chief accountant UCO Bank, Kamala shankar pandey i.e. P.W.5 proprietor M/s Agro Service Center, Koraw, Amar singh Deputy G.E.Q.D, State Handwriting examiner, K.P Singh Inspector C.B.I Supervising officer.

7. Learned Counsel for the appellant submitted that the prosecution banked upon three types of evidences to substantiate the charges leveled against the accused. The first evidence consists of direct testimony of witness who has entrusted the amount to the accused, who had issued pay-in-slip related to deposit of money. The second type of evidence consists of those witnesses working in the same department who acknowledged the signature and writing of the accused. The last type of evidence is the evidence of Expert who compared the handwriting of accused inasmuch as he was provided with the specimen signatures and handwriting of the accused as well as signatures in disputed pay-in-slip, and who had given his opinion that the signatures in the disputed pay-in-slip were of accused.

8. P.W-1 Rajeshwar Amolak Ramshani, who was an Assistant General Manager at UCO Bank in 1981 stated that he had granted permission to run a case against the accused after obtaining the necessary authorization from the Board of Directors of UCO Bank. Furthermore, he mentioned that the accused was served with a joining letter bearing signature of B.D Desai, the Deputy General Manager of UCO Bank. He further stated that the accused was an employee of UCO Bank at the Koraw branch, but did not made any allegation regarding embezzlement of money from the bank by the accused, thus, statement of P.W.-1 also did not support the prosecution case so far it relates to the allegation that the accused is involved in embezzlement of fund.

9. P.W. 2 stated that he has given Power of Attorney to PW 1 to proceed the case against the accused. Thus, it is clear from his statement that he had not mentioned anything in favour of the prosecution case and he just gave his permission to proceed for prosecution of the accused in accordance with law.

10. P.W-3 N.P. Khare testified that they took charge of the Koraw branch from the accused P.K Tandon and claimed familiarity with the writing and signatures of the accused because he had seen the accused writing and putting signatures on relevant papers and further stated that one current account was

opened in the name of the P.W-5 on 13.02.976 and signature of the accused were put on the account opening form, and also stated that on the name of the P.W-5 accepted Term loan of Rs.91800/- and Cash Credit of Rs.62,750/- on 14.06.1976. He further stated that he was familiar with the writing and signatures of the accused and had seen the writing style of the accused. Statement of PW-3 seems ambiguous because he had seen the accused handwriting and putting signatures while he was taking the charge from the accused. The claim of P.W-3 being familiar with the handwriting of the accused is dubious as he testified this fact after 10 years. It might be the case that P.W-3 has given statement against the accused under influence of the bank. The trial courts while examining witness to verify handwriting the trial court must adopt due care and caution. No common man could identify signature and handwriting of any person which had been signed or written 10 years ago. Therefore, the statements of PW-3 are not wholly reliable as he appears to be an interested witness. It is further observed that the accused in her statement before the trial court clearly stated that he had not worked with P.W.-3 but he was only present when the accused was joining in the U.C.O. Bank, thus, it is highly improbable that a person who has seen the accused writing or putting signature once that too ten years back could remember the writing style of the accused.

11. P.W.-4, namely-T.N. Bhalla, who was the Chief Accountant in the U.C.O Bank stated that on the date of issue of alleged pay-in-slips he was on leave, thus, he stated that he was not present on the date of issue of alleged pay-in-slips, which clearly shows that the P.W.-4 has not fully supported the prosecution and has only stated that he was well aware with the handwriting and signature of the accused, which is the subject matter of verification before coming to a conclusion that the signatures which are in dispute were put by the accused. So far as the statements of P.W-4 are concerned, it is pertinent to note here that initially P.W.-4 was also accused in the present case and later on under the influence of the Bank and its Officials turned into a prosecution witness only with the intention to save himself from the case and falsely implicate the accused in the present case, thus, it appears that P.W.-4 is also not a reliable witness.

12. P.W-5 Kamala Shankar Pandey, was not treated as a reliable witness because he had made false and frivolous complaint against the accused for forging signature on several cheques which were obtained from him under false pretext and used those cheques to misappropriate money from his bank account but this complaint appears to be false and fabricated as there is high probability that P.W.-5 has given false statements against accused for settlement of his Bank loan. Further, this allegation leveled by the P.W.5 against the accused regarding misappropriation of cheques which were obtained by the accused on false pretext and later they were misused by him, was dropped by the Investigating Officer at the initial stage of his investigation.

13. Learned Counsel for the appellant further submitted that in respect of allegation regarding pay-in-slips, the P.W.-5 further stated that he used to visit the bank to deposit money of which he used to keep record in his personal diary but at the time of investigation he could not produce his personal diary and further stated that he did not remember the exact dates on which the pay-in-slips were issued to him and regarding veracity of those pay-in-slips he stated that the pay-in-slips which were issued against the money which was allegedly deposited by him in the bank were undated, the only thing which goes against the accused is that the pay-in-slips bear the signature of the accused even though, the signatures which were put on the pay-in-slips are in dispute, thus, the P.W.-5 himself has failed to establish his case beyond reasonable doubt and the whole prosecution story is based on surmises and conjectures.

14. P.W.-6 -Amar singh Deputy G.E.Q.D, State Handwriting Examiner has stated that the signatures of the accused which were produced before him for examination do tally to some extent but so far as the science of examination of handwriting is concerned he stated that the science is not perfect to give its full proof finding that both the signatures are same, thus, he stated that there might be some shortcomings in his finding regarding veracity of his report given in respect of signature examination. Thus, it is evident from his statements that the finding given by the expert examiner is not full proof. The

value of the expert evidence depends largely on the cogency of the reasons on which it is based. In general it cannot be a basis for conviction unless it is corroborated by other evidence. The hazard of accepting the opinion of any expert, handwriting expert or any other kind of expert, is not because experts, in general, are unreliable witness, the quality of credibility or incredibility being one which an expert shares with all other witnesses, but because all human judgment is fallible and an expert may go wrong because of some defect of observation, some error of premises or honest mistake of conclusion. The more developed and the more perfect a science, the less chance of an incorrect opinion and the converse if the science is less developed and imperfect the science of identification of finger print has a ten year perfection and the risk of an incorrect opinion is practically non-existent. On the other hand, the science of identification of handwriting is not merely so perfect and the risk is, therefore, higher. An expert deposes not decides, his duty to furnish the court with the necessary scientific criteria for testing the accuracy of his conclusion, so as to enable the court to form its own independent judgment by the application of these criteria to the facts proved in evidence, thus, the statement given by the P.W.-6 is also not wholly reliable to prosecute the accused in the present case.

15. P.W-7 -Ram Chandra Pandey is an independent witness, who was also the guarantor of P.W.-5 in the bank loan amount and he used to visit the bank regularly with P.W.5 and they both know each other well, thus, it is clear that P.W.-7 is an interested witness, who gave his statements under the influence of the complainant only with the intention to help the complainant to establish its case against the accused and also help him to get some liberty in respect of loan amount, which was taken by the complainant from the said Bank. Further, there is nothing on record to demonstrate this fact that P.W.-7 used to visit the bank regularly with P.W.-5, which also create doubt in the mind of this Court.

16. P.W.-8 K.P. Singh, Inspector C.B.I. Supervising Officer, stated that after due consideration of the material available on record and after thorough investigation, he has submitted the chargesheet against the accused. He

further stated that in respect of the allegations made by P.W.-5 on which the Bank initiated prosecution against the accused, P.W.-5 did not make any complaint to concerned authorities and he further stated that the alleged pay-in-slips were undated. Thus, his findings are also based on imaginary and concocted evidence which came up during the course of investigation.

17. Learned Counsel for the appellant after concluding his arguments on the factual and legal aspect finally submitted that the accused (now deceased) who was the husband of the appellant had been falsely implicated in the present case by the officials of the Bank and P.W.5, namely-Kamala Shankar Pandey in collusion with their other associates only with the intention to get some financial aid from the Bank as the P.W.-5 took some loan amount from the concerned Bank. The investigating agencies did not appreciate the factual aspect of the case and has conducted the investigation in a hasty manner and filed the chargesheet against the accused. He further submitted that the trial court also did not go through the legal aspect of the case and has passed the order of conviction in a cursory manner, thus, the present appeal may be allowed and the order of conviction passed by the trial court may be set aside and reversed.

18. Per contra, learned A.G.A-I and learned Counsel for C.B.I. have submitted that the charges have rightly been framed by the trial court against the accused i.e. the husband of the present appellant and no interference is called for by this Court as the prosecution has proved its case beyond reasonable doubt and the trial court has rightly convicted and sentenced the accused in aforesaid case, thus, this appeal being devoid of merit and substance is liable to be dismissed.

19. I have considered the submissions made by learned counsel for the parties and gone through the record.

20. The submission of the learned counsel for the appellant is that the conviction of the accused has been held on suspicion. The suspicion, however, grave cannot take place of proof and the prosecution cannot afford to rest its case in the realm of "may be" true but has to upgrade it in the domain of "must be" true in order to steer clear of any possible surmises or

conjectures. Thus, on the material on record when judged on the touch stone of legal principles adumbrated hereinabove, leave no manner of doubt that the prosecution, in the instant case, has failed to prove its case beyond reasonable doubt and the trial court also did not apply its judicial mind before passing the order of conviction and sentence, the accused, who made an error in issuing pay-in-slips without date for which he has no satisfactory explanation and to that extent he has committed grave irregularity. But, only on that point, it cannot be said that he committed the offences for which he was charged in the aforesaid case.

21. It is observed here that **Section 409 I.P.C.** deals with criminal breach of trust by public servant or by banker, merchant or agent. Section 405 defines criminal breach of trust. The offence like the offence of criminal misappropriation is characterized by an actual fraudulent appropriation of property. There is not originally wrongful taking or moving as in the case of theft but the offence consists in wrongful appropriation of property, consequent upon a possession which is lawful. The offence is distinguishable from criminal misappropriation because subject of it is not the property which by some casual act or otherwise, but without criminal means, comes into the offender's possession: but the property which is entrusted to the offender by the owner or by others lawful authority and which the offender holds subject to some duty or obligation to apply it according to the trust.

22. Further, Section 5(1)(c) and Section 5(2) of Prevention of Corruption Act, 1947 are quoted hereunder:-

"5. Criminal misconduct in discharge of official duty - (1)

A public servant is said to commit the offence of criminal misconduct: —

(c) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do, or

5. Criminal misconduct in discharge of official duty -

(2) Any public servant, who commits criminal misconduct shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to seven years and shall also be liable to fine."

So far as Section 5 of the Prevention of Corruption Act, 1947 is concerned, Hon'ble the Apex Court in the case of ***C.S.D. Swamy v. State [(1960) 1 SCR 461]*** has held that that sub-section (3) of Section 5 of the Prevention of Corruption Act, 1947, does not create a new offence but only lays down a rule of evidence which empowers the Court to presume the guilt of the accused in certain circumstances, contrary to the well known principle of Criminal law that the burden of proof is always on the prosecution and never shifts on to the accused person. In Swamy case, there were charges for the offence of criminal misconduct under two heads, clause (a) and clause (d). The trial court held the accused person in that case not guilty of the offence under clause (a) but guilty of the offence under clause (d) by invoking the Rule of presumption laid down in sub-section (3) of Section 5. The distinction between that case and the case under our consideration is this : in Swamy case, there were two charges either of which could be found on the rule of presumption laid down in sub-section (3); but in our case there is only one charge of criminal misconduct of which the appellant has been acquitted; therefore, there is no other charge which can be found on the rule of presumption referred to in sub-section (3). This is the difficulty with which the respondent is faced in the present case. It appears to us that the learned Special Judge and the High Court proceeded wrongly on the footing as though sub-section (2) or sub-section (3) of Section 5 of the Act creates an offence. The offence which is punished under sub-section (2) or can be founded on the rule of presumption laid down in sub-section (3) must be the offence of criminal misconduct of one or more of the categories mentioned in clauses (a) to (d) of sub-section (1). In the case before us the only category which was alleged against the appellant was that of category (c), namely, dishonest or fraudulent misappropriation, etc. That charge having failed, there was no other charge which could be founded on the rule of presumption laid down in sub-section (3).

23. Further, the Hon'ble Apex Court in the case of ***Harishchandra Krishna Gadkar vs. State of Maharashtra*** reported in ***1994 SCC (L&S) 1055*** has been pleased to observe as under:-

"7.We are unable to agree with the learned counsel. Apart from the evidence of handwriting expert, there is evidence of PW 6 the Assistant Commissioner of Income Tax (Mr Deshmukh) who deposed that the alterations were made by A-3. According to him, the payment of Rs 20,000 has been made by cheque received from the Office of the Income Tax Commissioner and he refused to sign the receipt as it was in the name of B.P. & Co. Thereupon, accused 3 scored off the words "B.P. & Co." on the receipt and wrote the words "Assistant Commissioner of Income Tax" and thereby made the alterations. In order to substantiate this aspect, certain specimen signatures were also secured and those were sent to handwriting expert and the evidence establishes that handwriting tallies with that of accused 3.

8.But the next question is whether that alterations could, even otherwise, in any manner, establish the guilt of the appellant. The High Court having accepted the evidence of handwriting expert as well as the evidence of PW 6, reached the conclusion that the part played by accused 3 shows that he must have been a member of the conspiracy. Having given such a finding, again, the High Court categorically held thus:"It is impossible on this evidence to hold that accused 3 must have enriched himself with this amount or a large part thereof". Having made this observation the High Court also commented that police investigation came at a much later stage and if proper investigation had been done, the truth might have come out."

24. Further, the Hon'ble Apex Court in the case of ***Fakhruddin vs. The State of Madhya Pradesh*** reported in ***1966 SCC OnLine SC 55*** has been pleased to observe paragraph No.11, which is reproduced hereunder:-

"11. Both under S. 45 and 5. 47 the evidence is an opinion, in the former by a scientific comparison and in the latter on the basis of familiarity resulting from frequent observations and experience, In either case the Court must satisfy itself by such means as are open that the opinion may be acted upon. One such means open to the Court is to apply its own observation to the admitted or proved writings and to compare them with the disputed one, not to become an handwriting expert but to verify the premises of the expert in the one case and to appraise the value of the opinion in the other case. This comparison depends on an analysis of the characteristics in the admitted or proved writings and the finding of the same characteristics in large measure in the disputed writing. In this way the opinion of the deponent whether expert or other is subjected to scrutiny and although relevant to start with becomes probative. Where an expert's opinion is given, the Court must see for itself and with the assistance of the expert come to its own conclusion whether it can safely be held that the two writings are by the same person. This is not to say that the Court must play the role of an expert but to say that the Court may accept the fact proved only when it has satisfied itself on its own observation that it is safe to accept the, opinion whether of the expert or other witness."

25. Similarly in ***Paramjeet Singh v. State of Uttarakhand; AIR 2011 SC 200*** also Hon'ble Apex Court was pleased to observe as under:-

"When the witness was declared hostile at the instance of the public prosecutor and he was allowed to cross examine the witness furnishes no justification for rejecting en bloc the evidence of the witness. However, the court has to be very careful, as prima facie, a witness who makes different statements at different times, has no regard for the truth. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to it. The court should be slow to act on the testimony of such a

witness; normally, it should look for corroboration to his testimony”.

26. Further the Bombay High Court in the case of ***Pandurang s/o Ramji Khade vs. State of Maharashtra*** reported in ***1980 SCC OnLine Bom 201*** has observe paragraph No.24 and 25, which are reproduced hereunder:-

"24. From this angle, it would be advantageous to refer to the decision of the Supreme Court reported in (1976) 4 SCC 233: A.I.R. 1977 S.C. 1706 (Rabindra Kumar Dev v. State of Orissa). In the said case Fazal Ali, J., has laid down certain cardinal principles of criminal jurisprudence viz;

1) that the onus lies affirmatively on the prosecution to prove its case beyond reasonable doubt and I cannot derive any benifit from weakness or falsity of the defence version while proving its case;

2) that in a criminal trial the accused must be presumed to be innocent unless he is proved to be guilty; and

3) that the onus of the prosecution never shifts.

25. He further observed that;

“It is sufficient if the accused is able to prove his case by the standard of preponderance of probabilities as envisaged by section 5 of the Evidence Act as a result of which he succeeds not because he proves his case to the hilt but because probability of the version given by him throws doubt on the prosecution case and, therefore, the prosecution cannot be said to have established the charge beyond reasonable doubt. In other words, the mode of proof, by standard of benefit of doubt, is not applicable to the accused, where he is called upon to prove his case or to prove the exceptions of the Penal Code, 1860 on which he seeks to rely. It is sufficient for the defence to give a

version which competes in probability with the prosecution version, for that would be sufficient to throw suspicion on the prosecution case entailing its rejection by the Court."

27. It feels pain to observe that in our present system of trial despite having sufficient power to the judge to ask questions to the witnesses in order to find out truth, most of them do not ask questions to the witnesses to shift the grain from the chaff. Practice of leaving witnesses to the Advocates, when a witness becomes hostile or is an interested witness, is not un-common in the trial Courts. Time and again Hon'ble Apex Court has reminded that a Judge does not preside over a criminal trial merely to see that no innocent man is punished, but a Judge also presides to see that a guilty man does not escape. Both are public duties, which the Judge has to perform. Therefore, the trial Court must shed their inertia and must intervene in all those cases where intervention is necessary for the ends of justice.

28. The loose ends and the suspicion raised by the learned counsel for the appellants cannot be brushed aside lightly. On a comprehensive re-appreciation of the evidence and material placed on record, this Court is of the firm opinion that the testimony of the witnesses is wholly untrustworthy and unbelievable. In criminal prosecution the standard of proof required for conviction is proof beyond all reasonable doubts. The testimonies of other witnesses, even if taken on their face value, fall short of the requirement of proof of the charge beyond all reasonable doubt.

29. Consequently, contrary view taken by the trial Court is against the weight of the evidence on record and the exposition of law attested by the decisions of Hon'ble Supreme Court cited herein above. Thus, on perusal of material placed on record and discussions and observations made above, it appears that the prosecution has failed to establish its case beyond reasonable doubt and the learned trial court has also not applied its mind to appreciate and consider the prosecution witnesses placed by the prosecution in order to substantiate its case.

30. Thus, in view of the aforesaid discussions/observations and the judgments rendered by the Hon'ble Apex Court cited hereinabove, the appeal is ***allowed***. the judgment and order dated 10.02.1998 passed by Special Judge (Anti Corruption), U.P (West) Lucknow, in Case No.1/81 arising out of R.C. No.19/1979, convicting the accused (now deceased) under Section 409 I.P.C. and Section 5(2) readwith Section 5(1)(c) of the Prevention of Corruption Act, 1947 and sentencing him to undergo two years rigorous imprisonment and a fine of Rs.18,000/- on each count, the sentences of imprisonment directed to run concurrently and in default of payment of fine to undergo further imprisonment of six months is ***set aside*** and ***reversed***. The accused, namely, Late P.K. Tondon, who was the husband of the present appellant, is acquitted of charges under Section 409 I.P.C. and Section 5(2) readwith Section 5(1)(c) of the Prevention of Corruption Act, 1947 and sureties, if any, are also discharged.

31. Let record of trial Court be sent back to Court concerned along with copy of judgment and order for information.

(Shamim Ahmed, J.)

Order date :- 05.03.2024

Piyush/-