NAFR

HIGH COURT of CHHATTISGARH, BILASPUR

Criminal Appeal No.2064 of 1996

1. R.S. Dubey, S/o Shri Ramcharan Lal Dubey, aged 59 years, R/o B/537-A, Janakpuri, New Delhi.
2. A. Rajgopalan, S/o T.Vankatacharya, aged 60 years R/o 10 Ishwar Koli Street, Mount Alandur, Madras (Tamil Nadu).

---- Appellants

Versus

State of Madhya Pradesh (Now Chhattisgarh) through Central Bureau of Investigation of India, Madan Mahal Chowk, Jabalpur (MP).

---- Respondent

For Appellant	:	Shri PKC Tiwari, Sr. Advocate along with Shri Shashi Bhushan and Shri Kripesh Kela, Advocates.
For respondent	:	Shri Kishore Bhaduri and Shri Pawan Kesharwani, Advocates.

SB: Hon'ble Shri Justice P. Sam Koshy

Judgment

Delivered on 22/09/2017.

1. The appellants stand convicted for the offence punishable under Section 409 read with Section 120-B IPC and have been sentenced to undergo RI for three years with fine of Rs.5000/- for each offence vide judgment dated 19.11.1996 passed by the Special Judge, Jabalpur, in Special Case No.17/1984. In addition, the appellants also stand convicted for the offence under Section 5(1)(c) read with Section 5(2) of the Prevention of Corruption Act, 1947 (old Act) (in short, PC Act) and for which they have been sentenced to undergo RI for two years and fine of Rs.35,000/- each. Thus, total fine amount payable was Rs.40,000/- each.

2. The brief facts of the case is that M/s Ganga Engineering Works, a construction Contractor, the proprietor of which was one S.C. Malik and his son Harish Malik, PW-5, received a contract from Bharat Heavy Electrical Limited (BHEL) for construction of Boiler and for its testing and maintenance. The said Contractor M/s Ganga Engineering used to submit their running bills in accordance with the progress of work that they execute and these bills used to be processed and the amount which were given to M/s Ganga Engineering as advance were adjusted and thereafter the bills were accordingly settled. As per contract, payment to the contractor was to be made purely by way of cheque.

3. The case of the prosecution is that the responsibility of the processing of the bills and its enquries were all works under the control of A. Rajgopal, Senior Accountant i.e. appellant No.2. After the bills were processed by the Accountant, it was placed for certification and signature of the Project Manager i.e. appellant No.1-R.S. Dubey and after the attestation of Project Manager, the bills were again placed before the Accounts Department where the Senior Accountant A. Rajgopal, appellant No.2 used to prepare documents pertaining to payments to be made to the Contractor. However, after the documents were prepared for the release of the payment, 10 cheques were prepared in the name of contractor S.C. Malik in addition to adjustment that was made and which were released in between 27.01.1982 to 04.10.1982 amounting to Rs.96,618.61. However, as a part of the conspiracy, the cheques were withdrawn by

the appellants and by playing fraud it was shown as if the payments were being released to M/s Ganga Engineering Works when infact the amount was withdrawn by the appellants themselves. When Shri S.C. Malik made a written application to the higher authorities of BHEL in this regard, an enquiry was conducted by a team of officials and in the process of inquiry it was revealed that the payment appear to have been withdrawn by the appellants and in the documents it was shown as if this amount have been paid to the contractor.

4. Immediately on the inquiry when it was detected that the appellants had defalcated the huge amount of money which otherwise was payable to M/s Ganga Engineering Works, a complaint was made to the Central Bureau of Investigation (CBI), who in turn, registered the case and later on charge sheet was filed before the concerned court where the case was registered as Special Case No.17/1984 before the 5th Additional Sessions and Special Judge (CBI), Jabalpur (Madhya Pradesh) prosecuting the two appellants for the offence under Section 409/120-B IPC and Section 5(1)(c) read with Section 5(2) of the PC Act.

5. Assailing the judgment of conviction, counsel for the appellants submits that the case of the prosecution has not been established beyond reasonable doubts with which the appellants could have been convicted. He submits that the nature of allegations itself reveal that no ingredients of criminal offence is made out against the appellants as documents pertaining to illegal transaction of amount would show

that there has been proper and regular entries made so far as the amount payable and the payments made and that the ingredients necessary for making out an offence under Section 409 IPC as also under Section 5 of the PC Act is clearly missing from the prosecution case. According to appellants, it is a case where the appellants have paid the entire money to the contractor and the only charge which could be levelled against the appellants is of not making the payments by cheque to the contractor and thus payment being released directly to the contractor and not through the cheque by itself may not constitute offence under Section 409/120-B IPC nor can it be termed to be an offence under Section 5 of the PC Act.

6. It was further contended by the appellants that the case of the prosecution stands not proved as well as not established since the original complainant itself could not be examined before the court inasmuch as the proprietor of M/s Ganga Engineering Works had died before he could be examined before the court and that the only evidence which have been led on the part of the complainant is that of son of S.C. Malik i.e. Harish Malik whose evidence may not fall within the purview of direct evidence.

7. It was also argued that there was a huge delay on the part of the complainant as the first complaint was made after many months of the actual transaction having occurred.

8. According to the counsel for the appellant the amount of defalcation committed by the appellants vary from authorities to authorities like at

one stage before one authority the amount of defalcation is shown as Rs.96618.61 and the report of the committee which had inquired into the defalcation the amount is reflected as Rs.72118.66. Further before the trial Court the amount of defalcation gets further reduced to Rs.68618.61, thus this difference in the amount of defalcation at different stages itself would create doubt on the prosecution story and the benefit of which should be given to the accused persons. According to the counsel for the appellant the act on the part of the appellants even if it is accepted on its face value may not be one which may be called as a criminal offence, but could be only an act of irregularity or negligence of the Government rules for which at best there could be a disciplinary action initiated and for this reason also the Court should not have convicted the appellants.

9. According to the appellant it is only a procedural default which might have occurred at the hands of the appellants and that there has been no malafide intention on the part of the appellants for the said procedural default and in fact there has been no defalcation whatsoever the entire money had been paid to the contractor, the only irregularity which could be alleged against the appellants is that the appellants not issuing an account payee cheque in the name of the contractor rather releasing the money by issuance of bearer cheque, as the entries made in the account book reflects of payments to have been made towards the contractor.

10. Per contra, the counsel appearing for the CBI opposing the appeal

submits that it is a case where the prosecution has proved its case beyond all reasonable doubts and the appeal being devoid of substance deserves to be rejected.

11. Shri Bhaduri, the learned counsel for the CBI submitted that the prosecution in the instant case has examined 6 witnesses and all the witnesses including the officers of the department, the bank officials, etc. who have specifically proved the charges leveled against the appellants. The witnesses examined have all proved the respective documents like the seizure of the documents which were produced in the course of trial. Further the identification of the signature of the accused persons in the seized documents and the cheques etc. Further the Branch Manager of the Bank from where the cheques were seized. All these facts leaves no room for holding that the prosecution case suffers any lapses or illegality warranting interference with the findings of the trial Court.

12. So far as the discrepancies in respect to the defalcated amount, which is reflected before the different authorities is concerned, the counsel for the CBI submits that even if the figures do not tally what clearly reflects is the misdeed on the part of the appellants and which has been proved and established by cogent evidence.

13. The counsel for the CBI referred to the report of the committee which had inquired into the matter. According to Shri Bhaduri there were documents sufficient enough to show that the counter foil of the cheques issued reflected the payments to be made by account payee

only, whereas actually it was the bearer cheque, which were issued and encashed by the appellants themselves.

14. Referring to the statement of witnesses examined on behalf of the prosecution he submitted that the statement of the prosecution witnesses have all ingredients necessary to prove entrustment, so as to attract the provisions of Section 409 of IPC. Counsel for the appellant drew the attention of the Court to the statement of M. Radhakrishnan, PW-3, who was the member of the committee which had investigated the alleged misdeeds committed by the appellants and there was not much which could be extracted from the cross-examination of this witness so as to disprove the findings of the committee. Thus on the basis of this counsel for the CBI prayed for rejection of the appeal.

15. Having heard the contentions put forth on either side and on perusal of the record certain undisputed facts which culls out is that the appellant No.1 was working as a Project Manager at the Project Division site at Bhilai at the office of BHEL, likewise the appellant No.2 also was working as a Senior Accounts Officer during the period between January, 1982 to October, 1982 at the same office under the appellant No.1. A contract was awarded by BHEL to one M/s. Ganga Engineering Works for erection, commissioning of boilers, turbines, generators, etc. at the project division of BHEL.

16. It was also duty of the appellant No.2 to maintain the accounts at the project division and for preparation of the bills. As per the system the

accused/appellant No.1 being the Project Manager it was his duty for verifying the work and its progress and the appropriate entries being made in the measurement book and obtain signatures of the contractor in the measurement books. After the finalization of the running bills by the appellant No.1, the same was sent to the appellant No.2 for cross verification and for preparation of the appropriate entries and for taking steps for releasing the payments. After the appellant No.2 makes the appropriate entries in the concerned registers maintained in the Accounts department and prepares a cheque and puts his signature, the same is again sent to the office of the appellant No.1, who in turn, also is required to sign the cheques and issue the same to the contractor after taking appropriate receipts by the contractor.

17. The evidence which have come on record establishes the fact that the appellants had in fact after making all necessary entries in the registers maintained in the accounts department had on the counter foil shown payments to have been made by the account payee cheque, but the main cheques were issued with endorsements “to self” i.e. bearer cheque was issued and payments were also received by the appellants. The proof of which also has been produced before the Court below and which has been dully considered by the Court.

18. From the aforesaid factual matrix which have come on record and considering the statement recorded by the prosecution witness particularly that of PW-3 M. Radhakrishnan, the member of the

investigation team and also the statement of PW-4 the Branch Manager of the Bank Shri Padmanabhan revealing that the cheques which were issued were self cheques and nor the account payee cheques. The charges leveled against the appellants has been fully proved and established and the judgment of conviction thus does not warrant any interference.

19. So far as the sentence part is concerned, if we take into consideration, the age of the appellants who at the time of filing of the appeal were aged around 59 years and 69 years respectively and accordingly today after a lapse of 20 years, both the appellants have reached the age of 80 years and 90 years respectively.

20. Considering the age of the appellants if we look into the aspect of appropriate sentence, section 409 read with 120 of IPC for which the appellants have been convicted and sentenced to undergo R.I. for 3 years with fine of Rs.5,000/-, the said section does not prescribe a minimum period of sentence. Likewise, if we look into the provisions of Sections 5(1)(c) & 5(2), it reveals that the minimum sentence prescribed for the offence under this Section is not less than 1 year, but each may extend to 7 years and shall also be liable to fine. However, the proviso to sub-section 2 of section 5 envisages that "**for any special reason record in writing the Court may imposed a sentence of imprisonment less than one year**". This proviso to sub-section 2 makes it amply clear that in a given factual back ground or circumstances, where there are special reasons available

the Court may impose the sentence less than the minimum sentenced awarded.

21. In these contexts, it would be trite at this juncture to refer to the judgment of the Hon'ble Supreme Court in case of "V.K. Verma v. C.B.I." 2014(3) SCC 485, which was also a case where the accused was prosecuted under the same provision of law as in the instant case i.e. P.C. Act, 1947 and in the said case, the Hon'ble Supreme Court in paragraphs No. 15 & 16 keeping in view the advance age of the appellants therein held as under:-

> ***15. The appellant is now aged 76. We are informed that he is otherwise not keeping in good health, having had also cardio vascular problems. The offence is of the year 1984. It is almost three decades now. The accused has already undergone physical incarceration for three months and mental incarceration for about thirty years. Whether at this age and stage, it would not be economically wasteful, and a liability to the State to keep the appellant in prison, is the question we have to address. Having given thoughtful consideration to all the aspects of the matters, we are of the view that the facts mentioned above would certainly be special reasons for reducing the substantive sentence but enhancing the fine, while maintaining the conviction.***
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> ***16. Accordingly, the appeal is partly allowed. The substantive sentence of imprisonment is reduced to the period already undergone. However, an amount of Rs.50,000/- is imposed as fine. The appellant shall deposit the fine within three months and, if not, he shall undergo imprisonment for a period of six months. On payment of fine, his bail bond will stand cancelled."***

22. Taking advantage of the said judgment referred by the Hon'ble

Supreme Court when applied to the facts of the present case, it reflects that in the instant case the age of the appellants are much more than the age of the appellant in the said case and therefore the provisions of law can be squarely applied and another aspect which cannot be brushed aside is the fact that at this advance age of their life, when they would definitely be also ailing from various age related ailment now sending the appellants to the jail at this stage for completion of the full sentence awarded would not be practical and feasible as well, both for the Government as also for the family. Thus, in the opinion of this Court ends of justice would meet if the conviction of the appellants are maintained, however the sentence be reduced to the period already undergone. However, the fine amount shall be enhanced and it is directed that the appellants shall pay an amount of Rs.10,000/- each for each of the offence for which they have been convicted, in addition to what has been awarded by the Court below.

23. The appeal thus with the modification in the sentence stands dismissed.

Sd/-
(P. Sam Koshy)
Judge

Ved