

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 12 OF 2014

AND

CRIMINAL APPEAL NO.13 OF 2014

CRIMINAL APPEAL NO. 12 OF 2014

Shri Vilas Vasudev Kunkolienkar
S/o. Shri Vasudev Kunkolienkar,
Age: 60 years,
Residing at H.No.2238,
Bhalipet, Bicholim, Goa.

... Appellant.

Versus

Central Bureau of Investigation,
Anti Corruption Unit,
Altinho, Panaji, Goa.

.... Respondent.

AND

CRIMINAL APPEAL NO. 13 OF 2014

Smt. Vijayshree Vilas Kunkolienkar
W/o. Shri Vilas Kunkolienkar,
Age: 60 years,
Residing at H.No.2238,
Bhalipet, Bicholim, Goa.

... Appellant.

Versus

Central Bureau of Investigation,
Anti Corruption Unit,
Altinho, Panaji, Goa.

.... Respondent.

Mr. S. D. Lotlikar, Senior Advocate with Mr. Jayant Karn, Advocate for the Appellants.

Mr. Mahesh Amonkar, Additional Public Prosecutor for the Respondent.

Coram : M. S. SONAK, J.

Reserved on: 1st October, 2020.

Pronounced on: 7th October, 2020

COMMON JUDGMENT:

Heard Mr. S.D. Lotlikar, the learned Senior Advocate with Mr. Jayant Karn for the appellants in both these appeals. Mr. Mahesh Amonkar, the learned Additional Public Prosecutor appears for the Central Bureau Of Investigation (Respondent) in both these matters.

2. The learned Counsel for the parties agree that both these appeals can be disposed of by a common judgment and order, since the challenge in both these appeals is to the common judgment and order dated 28.01.2014 made by the learned Special Judge, CBI Court for Goa, Mapusa in Special Case No.5/2013/D (New) which was earlier numbered as Special Case No.2/2007(Old).

3. The Special Case No.5/2013/D was instituted by the CBI against Shri Vilas Vasudev Kunkolienkar (A1), Shri Peter Vincent Pereira(A2), Smt. Vijayshree Vilas Kunkolienkar (A3) and Shri Krishnanath Gopal Matodkar (A4). The name of Shri Romeo J. Pereira also appears in the cause title of the impugned judgment and order, but, it is indicated that he has expired. The record bears out that Romeo Pereira had expired even before the chargesheet was filed before the Special Court.

4. The learned Counsel for the parties pointed out that by the impugned judgment and order Shri Krishnanath Gopal Matodkar (A4), came to be acquitted and such acquittal was not questioned by the CBI. Further, it was pointed out that Peter Vincent Pereira(A2) who was convicted along with A1 and A3 had not preferred any appeal to challenge his conviction and, A2, has also, since expired by now.

5. Criminal Appeal No.12 of 2014 has been instituted by Shri Vilas Vasudev Kunkolienkar (A1) and Criminal Appeal No.13 of 2014 has been instituted by his wife Smt. Vijayshree Vilas Kunkolienkar (A3) questioning their conviction and the sentences imposed upon them by the impugned judgment and order.

6. The Special Court, by the impugned judgment and order has convicted A1 for the offence punishable under Section 13(2) r/w. 13(1)(d) of the Prevention of Corruption Act, 1988 and sentenced to undergo imprisonment for a period of two years and to pay fine of ₹10,00,000/- and in default to undergo imprisonment for six months. In addition, A1 is also convicted for offence punishable under Section 120-B, 420 and 477-A of IPC and sentenced for 6 months, 2 years and 1 year respectively. A1, has also been directed to pay fine of ₹1,000/-, ₹10,000/- and ₹1,000/- respectively and to undergo in default simple imprisonment for 3 months in respect of each of the offences under the IPC. The substantive sentences have been ordered to run concurrently.

7. The accused no. 3 is convicted for offence punishable under Section 420 IPC and sentenced to undergo imprisonment of 3 months and to pay fine of ₹1000/- and in default to undergo simple imprisonment for one month. The accused no. 3 is also convicted under Section 109 IPC r/w. Section 13(2) r/w Section 13(1)(d) of the Prevention of Corruption Act, 1988 and is sentenced to imprisonment of one year and to pay fine of ₹1,00,000/- and in default to undergo simple imprisonment for 3 months. The accused no. 3 is also convicted of offence punishable under Section 120-B of IPC and is sentenced to undergo imprisonment for a period of six months and to pay fine of ₹1000/- and in default to undergo simple

imprisonment for 3 months. The substantive sentences against A3 have been directed to run concurrently.

8. The prosecution version in this matter is that the Accused No.1 was the Branch Manager of Dena Bank, Arpora Branch, Goa, during the period from August, 2002 to February, 2004, accused nos. 2, 4 and 5 were the customers of the said Branch. Accused no.3 is the wife of accused no.1. It is alleged that accused no.1 abused his official position as a public servant and entered into criminal conspiracy with accused nos.2 to 5. Accused no.1 abusing his official position fraudulently and dishonestly sanctioned and disbursed six demand loans amounting to ₹86,12,054/- in favour of accused no.2 and 5. He also sanctioned and disbursed a loan amounting to ₹2.99lakhs in favour of accused no.3. It is then alleged that accused nos.2 and 5 in furtherance of said conspiracy along with accused no.4 siphoned of and did not repay an amount of ₹95,72,340/- thereby cheating the Bank. Accused no.4 is a Peon working in the Department of Agriculture, Government of Goa. It is alleged that he had acted as a mediator for purchase of house by accused no.1 in the names of accused no.3. According to the prosecution, accused no.1 advanced demand loans in different amounts in favour of accused nos.2, 3 and 5 purportedly on security of some fixed deposits which did not exist. Accused no.1 also allowed, sanctioned and disbursed these loans in excess of the

amounts that he would have sanctioned under the norms of the Bank. It is also alleged that accused no.1 himself had withdrawn certain amounts on demand loans from the accounts of accused nos. 2 and 5 by using their withdrawal slips.

9. After the charges were framed and explained to the accused persons they pleaded 'not guilty' and claimed to be tried for the offences levelled against them. The prosecution, in all, examined about 18 witnesses and produced on record voluminous documentary evidence in support of the charges. Thereafter, the accused persons, were questioned under Section 313 CrPC. The accused persons, despite opportunity, chose not to lead any defence evidence. The arguments were heard by the learned Special Judge and by the impugned judgment and order A1, A2 and A3 were convicted and sentenced as aforesaid. However, A4, was acquitted. Hence, the present appeals by A1 and his wife, A3.

10. Mr. Lotlikar, the learned Senior Advocate for the appellants, to begin with, made submissions in Criminal Appeal No.13 of 2014 instituted by Smt. Vijayshree Vilas Kunkolienkar (A3), as according to him, there is absolutely no evidence on record to sustain the conviction of A3, who is a housewife aged about 62 years by now.

11. Mr. Lotlikar submitted that A3 has been simply roped into this matter merely because she was the wife of the Branch Manager-A1. He submits that apart from the testimony of one Mahableshwar Sawant (PW10), that he had received by a demand draft an amount of ₹2.99lakhs towards sale of immovable property and in pursuance of the same, he has executed a sale deed for the sale of such property in favour of A3, there is no other evidence on record. Mr. Lotlikar submits that the testimony of PW10 was not even put to A3 during her questioning under 313 of CrPC. In any case, he submits that since there is no evidence whatsoever that A3 ever signed any application seeking loan from the Bank of which her husband, A1, was the Branch Manager, or in the absence of any material suggesting that the amount of ₹2.99lakhs was actually paid to A3 either by deposit in her bank account or otherwise, the prosecution, cannot be said to have established the ingredients of the offences for which A3 has been convicted and sentenced.

12. Mr. Lotlikar submits that even if the two circumstances, namely, that A3 is the wife of the Branch Manager-A1, and the circumstance that PW-10 executed the sale deed in favour of A3 are held to be true by the prosecution, such circumstances, do not conclusively prove any conspiracy between A1 and A3 or any abetment by A3 to A1 for commission of offence under Prevention of

Corruption Act, 1988. Mr. Lotlikar submits that such evidence is also not at all sufficient to convict A3 under Section 420 of the IPC.

13. Mr. Lotlikar points out that there is evidence on record that A3 was a mere housewife. There is no evidence brought on record by the prosecution that A3 was even aware of what was happening, much less, about her involvement in any conspiracy to siphon off the bank funds. Mr. Lotlikar submits that in such circumstances, conviction of A3 warrants interference.

14. Mr. Lotlikar points out that A3, at a later point of time, had addressed a letter to the bank offering to resell the property and pay back the alleged loan amount to the bank. He points out that PW-10, Vendor, had also deposed that he was willing to repurchase the immovable property and return the amount to A3. Mr. Lotlikar submits that this offer was only to indicate the bonafides of A3 and this offer ought not to have been looked into by the learned Special Judge for convicting A3 in this matter.

15. For all the aforesaid reasons, Mr. Lotlikar submits that the conviction against A3 is liable to be set aside.

16. Mr. Mahesh Amonkar, the learned Additional Public Prosecutor defends the conviction of A3 on the basis of the reasoning

reflected in the impugned judgment and order. He points out that there are documents on record, i.e., withdrawal slips which suggest that it is A3 who had applied for issue of demand drafts and it is on the basis of these documents that these demand drafts were actually issued. Mr. Amonkar points out that A3 is the wife of A1, the Branch Manager of the Bank and, therefore, it is too much to expect that she was not aware of the clandestine and corrupt manner in which her husband-A1, was siphoning off the public funds. Mr. Amonkar appoints out that since the sale deed with PW-10 was signed by A3, it is apparent that A3 is the beneficiary of these siphoned amounts. Mr. Amonkar submits that all these circumstances which have been proved by the prosecution beyond reasonable doubt are sufficient to sustain the conviction of A3 in this matter.

17. Upon consideration of the rival contentions in Criminal Appeal No. 13 of 2014, and, upon the evaluation of the evidence on record, a case has been made out for at least grant of benefit of reasonable doubt insofar as A3 is concerned.

18. Insofar as the offence of conspiracy as provided under Section 120-B of IPC is concerned, it is true that direct evidence is quite rare to come by and therefore, such cases, mostly, involve circumstantial evidence. Reasonable inferences are required to be

drawn from out of the circumstances which, the prosecution, is required to prove beyond reasonable doubt. Insofar as A3 is concerned, the prosecution, can be said to have proved the following circumstances beyond reasonable doubt:-

- (i) That A3, was the wife of A1, who, in turn was the Branch Manager of the Dena Bank at the time of the commission of the offence;
- (ii) that by demand drafts issued from the Dena Bank, an amount of ₹2.99lakhs was paid to one Mahableshwar Sawant-PW-10 towards consideration for purchase of immovable property at Chorao;
- (iii) Mr Mahableshwar Sawant-PW-10, executed a sale deed dated 16.05.2003 in favour of A3, conveying immovable property at Chorao. A3, has also signed the sale deed.

19. Apart from the aforesaid circumstances, it cannot be said that the prosecution has proved any other circumstances beyond reasonable doubt as against A3. Mr. Amonkar, the learned Additional Public Prosecutor did make reference to a set of about 8 withdrawal slips to be found at pages 461 to 468 of the paperbook, which bear the name of A3 as applicant. However, on perusal of the said withdrawal slips, although, it is true that the name of A3 is indicated against the column where the applicant's name and address is to be stated, there is no evidence that the signature is of A3. The

prosecution did not lead any evidence to establish that the initials on these withdrawal slips are indeed the initials of A3. Therefore, only on the basis that the name of A3 appears on these withdrawal slips, it cannot be said that it is A3 who had signed on these withdrawal slips or applied for issue of demand drafts.

20. No doubt, as pointed out by Mr Amonkar, it is possible to hold that A3 is not totally innocent in this matter, particularly because, she has executed the sale deed dated 16.05.2003 alongwith PW-10-Mahableshwar Sawant. However, on the basis of proved circumstances, i.e., A3 being the wife of A1 and A3 having signed the sale deed dated 16.05.2003, it cannot be said that the prosecution has proved beyond reasonable doubt the conscious involvement of A3 in the conspiracy. Again, based upon this evidence, it is not possible to say, beyond reasonable doubt that the offence of cheating or abetment have been made out. Even though, it is possible to say that A3 was, to a certain extent, beneficiary of the acts of A1, that by itself, is really not sufficient to hold that the offence of cheating, abetment or conspiracy has been proved beyond reasonable doubt.

21. In the case of *State of Kerala V/s. P. Sugathan And Another*¹, the Hon'ble Apex Court has held that it is true that direct independent evidence of criminal conspiracy is generally not available and its existence is a matter of inference. The inferences are normally

1 (2008) SCC 203

deduced from acts of parties in pursuance of a purpose in common between the conspirators. The Hon'ble Apex Court then quoted its earlier decision in *V. C. Shukla v/s. State (Delhi Admn.)*,² 1980 (2) SCC 665, in which it is held that to prove criminal conspiracy there must be evidence direct or circumstantial to show that there was an agreement between two or more persons to commit an offence. There must be a meeting of minds resulting in ultimate decision taken by the conspirators regarding the commission of an offence and where the factum of conspiracy is sought to be inferred from circumstances, the prosecution has to show that the circumstances give rise to a conclusive or irresistible inference of an agreement between two or more persons to commit an offence. As in all other criminal offences, the prosecution has to discharge its onus of proving the case against the accused beyond reasonable doubt. The circumstances in a case, when taken together on their face value, should indicate the meeting of the minds between the conspirators for the intended object of committing an illegal act or an act which is not illegal, by illegal means. A few bits here and a few bits there on which the prosecution relies cannot be held to be adequate for connecting the accused with the commission of the crime of criminal conspiracy. It has to be shown that all means adopted and illegal acts done were in furtherance of the object of conspiracy hatched. The circumstances relied for the purposes of drawing an inference should

2 (1980) 2 SCC 665

be prior in time than the actual commission of the offence in furtherance of the alleged conspiracy.

22. Applying the aforesaid principles in evaluation of the evidence on record, it is difficult to say that the prosecution has proved beyond reasonable doubt the involvement of A3 in the conspiracy. It is possible that A3 might have been involved in such conspiracy. However, such possibility is not sufficient to sustain a conviction. In order to sustain a conviction, there has to be proof beyond reasonable doubt, which is lacking in the present case insofar as the involvement of A3 is concerned.

23. The circumstance that at a much later point of time, A3 offered to resell the property to PW-10 and return the money to the bank cannot be held as incriminating circumstance per se. In the first place, such circumstance has allegedly arisen much after the commission of the crime. In *P. Sugathan* (supra), the Apex Court has observed that the circumstances relied for the purposes of drawing an inference should be prior in time than the actual commission of the offence in furtherance of the alleged conspiracy. Secondly, it is possible that A1 may have made the offer so as to escape the prosecution against her as well as her husband-A1. Therefore, this subsequent offer cannot be regarded as some relevant circumstance for inferring the involvement of A3 in the conspiracy.

24. Therefore, taking into consideration the material on record, benefit of reasonable doubt is required to be extended to A3 and the conviction recorded by the learned Special Court against A3 is liable to be quashed and set aside.

25. The Criminal Appeal No.13 of 2014 has been instituted by Vilas Vasudev Kunkolienkar, the Branch Manager of the Dena Bank.

26. Mr. Lotlikar, the learned Senior Advocate for the appellant submits that the basis of the prosecution case is that, A1 breached rules, regulations and norms in the matter of grant of loans. He further, points out that such rules, regulations and norms were never produced on record by the prosecution. He points out that mere oral evidence in which the witnesses assert that there was a breach of rules, regulations and norms is never sufficient in the matter of this nature. He points out that A1, in his submission under Section 313 of CrPC, has clearly stated that he had followed all the necessary rules, regulations and norms while granting loans. He submits that in the absence of actual production of such rules, regulations and norms by the prosecution, A1 ought not to have been convicted in this matter.

27. Mr. Lotlikar then submits that in this case the material documents were never seized by the prosecution in accordance with law. He points out that the evidence on record establishes that such material documents were permitted to remain with the Senior Manager from Panaji and very belatedly, such documents, were seized. Even the seized documents, were never sealed or otherwise secured so as to rule out the possibility of tampering. He points out that even the relevance of the documents was decided by the witnesses, i.e. the bank officials, and not the investigating agency. He submits that A1, in his statement under Section 313 of CrPC, had clearly stated that the loans were advanced after completing the necessary documentation. He, therefore, submits that in this case, the prosecution has suppressed such documentation which would have established the innocence of A1. He submits that the prosecution has placed selective documents on record and on that basis attempted to secure the conviction of A1. He submits that for these reasons the conviction against A1 is also liable to be set aside.

28. Mr. Lotlikar then points out that the so called extrajudicial confession of A1 was clearly not voluntary but rather, the same was a product of coercion or in any case caused by inducement proceeding from superiors of A1. Mr. Lotlikar points out that the alleged extrajudicial confession is in two parts. The first part was in the absence of the Regional Manager and the second part,

in the presence of the Regional Manager. From the comparison of the two parts, it is quite evident that A1 was threatened and coerced to give the confession. Mr. Lotlikar relies upon the provisions of Section 24 of the Evidence Act and submits that such extrajudicial confession ought not to have been relied upon by the learned Special Judge.

29. Mr. Lotlikar submits that this is only a case where the loans granted by the bank of which A1 was the Branch Manager, have turned sour and therefore, A1 is sought to be made a scapegoat. He submits that merely because the loan amounts may not have been repaid by the borrowers, there is no question of any corruption involved on the part of A1. Mr. Lotlikar submits that the evidence on record does not establish commission of any offence under Section 13(1)(d) of the Prevention of Corruption Act, 1988.

30. Mr. Lotlikar submits that there is absolutely no evidence on record to sustain the conviction under Section 477-A or 420 of the IPC. He points out that it was the case of the prosecution itself that though some ledgers were alleged to have been removed, the same were ultimately restored to the bank. He points out that the ingredients of cheating as defined under Section 415 of IPC have clearly not been proved by the prosecution in the present case.

31. Mr. Lotlikar points out that there is no evidence to establish beyond reasonable doubt, the commission of offence under Section 120-B of the IPC. He submits that the circumstances on record are not at all sufficient to raise inference of conspiracy.

32. For all the aforesaid reasons, Mr. Lotlikar submits that the conviction of A1 is also liable to be set aside.

33. Mr. Mahesh Amonkar, the learned Additional Public Prosecution defends the impugned judgment and order on the basis of the reasonings reflected therein. He points out that there is overwhelming evidence on record which establishes beyond reasonable doubt that A1 hatched the conspiracy to siphon off almost ₹90lakhs from the Bank of which he was the Branch Manager and in pursuance of such conspiracy, actually siphoned out the said amounts.

34. Mr. Amonkar points out that the modus operandi adopted by A1 was to fraudulently indicate that such loans were being granted against Fixed Deposit Receipts (FDRs) or Samruddhi Deposit Receipts (SDRs). Mr. Amonkar points out that in fact, the borrowers, had neither such FDRs or SDRs to their credit against which, such huge loans could ever have been taken by them. Mr. Amonkar points out that there was hardly any documentation

prepared by A1 who was responsible for preparation of the same and there were absolutely no securities taken for repayment of such loans.

35. Mr. Amonkar points out that very clearly, the prosecution has established beyond reasonable doubt the involvement of A1 in the commission of offences under the Prevention of Corruption Act, 1988 as also under Section 120-B, 420 and 477-A of the IPC. Mr. Amonkar submits that taking into consideration that the amount of over ₹90 lakhs (without taking into account the interest component) has virtually been siphoned off by A1 from out of the public funds of the Dena Bank, even the sentence imposed by the learned Special Judge is totally lenient and the sentence, should have, in fact, been more severe.

36. For all the aforesaid reasons, Mr. Amonkar submits that Criminal Appeal No.12 of 2014 may be dismissed.

37. The rival contentions now fall for determination.

38. Insofar as the involvement of A1 in the offences for which he was charged is concerned, it is correct as submitted by Mr. Amonkar, that there is overwhelming evidence on record which establishes beyond reasonable doubt the involvement of A1 in the offences for which he was charged.

39. Section 13(1)(d) of the Prevention of Corruption Act, 1988, inter alia, provides that a public servant is said to commit the offence of criminal misconduct 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 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.

40. Section 13(2) of the Prevention of Corruption Act, 1988, provides that any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall be not be less than one year but which may extend to seven years and shall also be liable to fine. This was the punishment provided on the date when offence was committed.

41. In this, there is absolutely no dispute that A1 was a public servant. In fact, at the time of the commission of the offences, A1 was holding a responsible position of Branch Manager of Dena Bank at Arpora Branch. The evidence on record establishes beyond

any reasonable doubt that A1, by corrupt and illegal means had obtained for himself valuable thing or pecuniary advantage. The evidence also establishes beyond reasonable doubt that alongwith himself, A1, by corrupt and illegal means obtained for at least A2 and possibly even A5, valuable thing or pecuniary advantage. Since, A5 expired even before the chargesheet came to be filed, no reference is made to the involvement of A5. However, the evidence on record, establishes beyond reasonable doubt that A1, by corrupt and illegal means obtained not only for himself but for A2 and his wife A3, valuable thing or pecuniary advantage.

42. There is evidence on record which establishes beyond doubt that A1 by abusing his position as a public servant and by corrupt and alleged means also sanctioned and disbursed a loan to or at least in the name of his wife A3. Though, for want of clinching evidence, A3 is granted the benefit of doubt insofar as her involvement in this conspiracy is concerned, there is no doubt from the evidence on record as to the criminal and corrupt involvement of A1 in this transaction. A1 was fully conscious of what he was doing. A1 fully knew that such a loan could never have been sanctioned and disbursed by him in absence of any application, documentation, securities, etc. The same is the position with loans sanctioned and disbursed to A2 and A5. There is indeed overwhelming evidence on

record to establish beyond reasonable doubt the commission of offences for which A1 was charged in this matter.

43. There is also overwhelming evidence on record that establishes beyond reasonable doubt that A1 has totally misused his position as a public servant and obtained for himself as well as at least A2 valuable things and pecuniary advantage. The evidence on record in this case, establishes beyond reasonable doubt that several loans were granted in the name of A2, A3 and A5 without there being any proper application seeking these loans. The loans were purportedly granted against FDRs and SDRs allegedly maintained by A2 and A5 at the Bank. However, in reality, such FDRs and SDRs were not existing. No securities were taken for repayment of such loans.

44. The evidence on record establishes that it was never the intention of the accused persons right from the beginning to ever repay such loans. All this was possible simply because A1, abused his position as a public servant and thereby obtained not only for himself but also for at least A2 and A3, valuable thing and pecuniary advantage. The public funds to the extent of almost ₹90lakhs, without adverting to the interest component, were virtually siphoned off by A1, the Branch Manager, by totally abusing his position as public servant.

45. The evidence on record, establishes beyond reasonable doubt that A1, while holding his office as public servant, obtained for at least A2 and A3, valuable thing or pecuniary advantage without there being any public interest whatsoever. In this case, A1, was the custodian of the bank's interest. Completely disregarding such interest, A1, while holding office of public servant, granted loans without any documentation worth the name with full knowledge that such loans, would never be repaid, thereby, A1 compromised severely with public interest. The evidence on record establishes that these loans, were shared by at least A2 and A1 again, compromising public interest.

46. There is no merit in the contention that in this case the rules, regulations and norms were not produced by the prosecution and therefore, there is no evidence to establish that A1, sanctioned and disbursed such loans in disregard of rules, regulations and norms. Shri K. N. Chabaria (PW-2) who carried out the inspection at the Arpora Branch in the year 2004 testified in great detail the breaches in the matter of sanction and disbursement of the loans. He testified that during the period of A1 as Branch Manager, these loans were sanctioned and disbursed. In fact, there is no dispute whatsoever that A1 was the Branch Manager at the time when these loans were sanctioned. A1, in his statement under Section 313 CrPC has admitted this fact but his only defence was that all norms had been

properly followed by him. His defence was that Fixed Deposit receipts were marked and equitable mortgage was created as security for the repayment of loans by A1, A3 and A5.

47. PW-2 has deposed giving details of the several demand loans sanctioned by A1 purportedly against FDRs and SDRs. All details about such sanctions as well as consequent disbursements have been deposed to by PW-2 in great details. The PW-2 has produced several documents on record in support of his oral testimony. He has identified the signatures of A1, since, he was familiar with the signature of A1. All this evidence was not even contested in the course of the cross-examination. Besides, as noted earlier, A1, in his statement under Section 313 of CrPC has also admitted having sanctioned and disbursed all these loans.

48. PW-2, has categorically deposed that in case of all these loans, the following were the breaches that were noticed by him in the course of inspection and on which voluminous record was also prepared:-

- a) No application for demand loans were obtained from accused nos.2 to 5;
- b) No securities were taken whilst granting said demand loans;

- c) The ledger sheets/folios of these demand loans were not available in the ledger books and they were missing, that these folios can be removed;
- d) The amount of loan sanctioned exceeded the loan amount that could have been granted; and
- e) The procedure required to be followed in granting such loans was not followed.

49. In particular, what is serious is that there were no applications for demand loans obtained from accused Nos.2 to 5. From the tenor of the cross-examination on behalf of accused number no.2, at least it is the case of the said accused that he never applied for such loans. The cross-examination seems to suggest that the disbursed amounts were deposited in the joint bank accounts of A2 and the late A5 without their knowledge or consent. Even though, this version is not really believable, the fact remains that there is ample evidence on record which establishes that there were not even applications made by these parties for grant of loans. Even A3, who is the wife of A1, has taken the defence that she too had neither applied for any loan nor signed any papers in relation to such loan.

50. There is also evidence on record that no securities were taken while grant of such loans. The loans were purportedly sanctioned and disbursed against FDRs and SDRs. However, such

FDRs and SDRs were not available in the bank records and it is too much to suggest that FDRs and SDRs were in fact available, but have been suppressed by the prosecution. There is no document evidencing any equitable mortgage as was sought to be suggested on behalf of A1.

51. The normal and minimum banking norms are that the Branch Manager has to verify about the existence of FDRs and SDRs before extending any demand loans on the basis of the same. The normal and minimum norms are that there has to be proper application seeking such loans. The normal and the minimum norm is that the loan is disbursed only after the agreements are signed and the documentation is complete. In this case, it is obvious that A1, in abuse of his position as the Branch Manager, has flouted all such norms and therefore there is no merit in the contention that such norms would have been produced on record and only thereafter it could be said that A1 has breached such norms.

52. PW-1, Shri T. Ramesh Babu, is the Chief Vigilance Officer of the Dena Bank. He has also testified that the loans granted against fixed deposits should be sanctioned against a proposal, security has to be taken. After sanction of the loan but before disbursing, the original fixed deposit receipt has to be deposited in the Bank duly discharged in favour of the Bank. The margin to the extent of 10% of the amount of fixed deposit has to be maintained.

In case of housing loan, valuation of the immovable property has to be done by an expert, clear marketable title should be shown and further, only 75% of the value of the immovable property can be sanctioned as loan.

53. Both, the oral as well as the documentary evidence on record establishes beyond reasonable doubt that nothing of this sort was done by A1, but it appears that A1 was bent upon siphoning off the public funds to the detriment of public interest. The PW-2 has very categorically deposed that in the course of inspection, when despite repeated queries, A1 was unable to produce the FDRs and SDRs on the basis of which such huge loan amounts were sanctioned and disbursed, A1, took him in a corner and told him that there are no deposit receipts for which advances were made and further no securities for the demand loans were also obtained.

54. Except for suggestions, the evidence of both PW1 and PW2 has not been contended. In fact, PW-2, in the course of cross examination confirmed that he tried to verify time and again whether any fixed deposits were available but he could not find the same. These witnesses have categorically deposed that no demand loans can be sanctioned or disbursed without such securities.

55. Shri Suresh, Deputy General Manager of Dena Bank, PW3, has deposed that the inspecting team brought to his notice

serious irregularities which they noticed in the matter of loans and advances sanctioned and disbursed by A1 and therefore he immediately rushed to the Arpora Branch at Goa. He has deposed that even he found that FDRs were not traceable and, most importantly, fixed deposits of the stated numbers were not even part of the Bank records at Arpora Branch. He also deposed that A1 was unable to give any explanation for the disbursement and, thereafter, A1 admitted that he has no record of the FDRs or the loans made against the FDRs. In his cross examination PW3 has clearly deposed that on verifying the system available in the Bank, no details corresponding to the FDRs were available in the records. Again, there is absolutely no good reason not to accept the testimony of such a senior officer, particularly when no dent of whatsoever is made in the course of the cross examination.

56. Shri Lingu, the Assistant General Manager of Dena Bank, PW6, has testified to the procedure for obtaining demand loans or other loans. He has deposed that applications have to be made in the prescribed format, the fixed deposit receipts are required to be discharged by all the signatories and the duly discharged receipt has to be pledged as security with the bank. Further, the deposit holder has to execute demand promissory note and letter of set off and that an amount of 85% of the face value of the term deposit and interest accrued till date, is the maximum loan that is sanctioned as

advance. He has also deposed that when loan is sought on term deposit of third party, the third party has to be present in person, sign the documents, namely letter of set off and deposit receipt and further the third party term deposit must be of the Branch granting the loan.

57. Even PW6 has categorically deposed that upon inspection, no such FDRs were traced. No documents of security, letters of set off were also traced. Again, no dent has been made to the testimony of PW-6 in the course of cross examination.

58. There is again no merit in the contention that all the documents in this case were kept in the custody of the bank officials themselves and there was no proper sealing of these documents. In this case, there is not even a whisper about manipulation of any documents. These are documents maintained by the bank in the usual course of its banking transactions. The witnesses have deposed to A1 admitting to them that there were no FDRs and there were no security documents ever obtained in respect of these loans. Therefore, on the basis of a completely bald statement in response to question posed under Section 313 of CrPC that all norms and procedures were followed and that the FDRs were indeed in existence, it cannot be said that A1 has established his so called defence even going by the test of preponderance of probability.

59. The evidence of the witnesses, most of whom are senior bank officials, inspires confidence and there is absolutely no case made out to reject their evidence on the basis of some suggestions thrown up about manipulation in the absence of sealing of such documents. Taking into account both, the oral testimony as well as the voluminous documentary evidence on record, it is not possible to accept Mr. Lotlikar's contention that the prosecution in this case may have suppressed any documents favourable to A1. It is obvious, that neither most of the FDRs or SDRs were at all in existence, nor is there any cross reference to these FDRs and SDRs in the system maintained at the Branch office. In this case the prosecution has clearly established the case against A1 beyond reasonable doubt.

60. The learned Special Judge has marshalled the evidence on record, particularly, against A1 and A2 and dealt with the so called defence raised on behalf of the accused persons. The learned Special Judge has analysed the evidence in great detail and has quite correctly concluded that there is overwhelming oral as well as documentary evidence on record establishing not only the offences under Section 120-B and 420 of the IPC, but, also the offence under Section 13(1) (d) of the Prevention of Corruption Act, 1988.

61. Insofar as the offence under Section 477-A of the IPC is concerned, Mr. Lotlikar contends that it was the case of the prosecution itself that some pages of the bank ledger were taken out,

but thereafter, they were provided by A1 to the investigating agencies. That may be the position as regards the ledgers. However, even the taking out of the ledger pages, in a given case, may attract the provisions of Section 477-A of the I.P.C. and the mere restoration thereof in the course of investigation, may at the highest, be a mitigating factor in the matter of sentencing. That apart, we were concerned not merely with the ledger extracts, but that A1 has sanctioned and disbursed loans on the basis of non-existent FDRs and SDRs and thereby falsified books of account. A1, as a Branch Manager, has created documents as if to suggest that such demand loans were sanctioned and disbursed against existing FDRs and SDRs. For this purpose, A1, has falsified accounts and made false entries. All this was obviously with an intention to defraud and cheat the Bank. Therefore, A1, was quite correctly convicted also under Section 477-A of the IPC.

62. In this case, there is clear and cogent evidence of conspiracy between at least A1 and A2 and even possibly, A5. However, it is not necessary to make any observations with regard to the role of A5, since, he had expired even before any charge could be framed against him. Suffice to hold that there is more than sufficient evidence to establish conspiracy as between A1 and A2 in the least. There is evidence that withdrawal slips bearing signatures of A2 and A5 were found with A1. There is evidence in any case that by

utilizing these withdrawal slips, on the directions of A1, amounts were withdrawn from the joint account of A1 and A5, which is the precise joint account in which the loan amounts were disbursed and deposited. From the manner in which these loans were sanctioned and disbursed, right from the inception, it is very obvious and stands proved beyond reasonable doubt that A1 and A2 were out to cheat the Bank.

63. Section 415 of IPC provides that whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to delivery any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to 'cheat'.

64. According to me, the ingredients of this offence have been established by the prosecution beyond reasonable doubt. Here, A1 who was the Branch Manager, has deceived the Bank whose interest he was, in fact, enjoined to protect and by so deceiving the Bank, has fraudulently and dishonestly induced the Bank to grant loans to the tune of almost ₹90 lakhs, with full knowledge that there were no securities against which such loans could have been sanctioned and disbursed and knowing fully well that there were no

other securities for recoveries of such loans and also knowing fully well that A2, A3 and A5 were in no position and had no intention to repay such loans to the Bank.

65. Though, there is no clinching evidence to involve A3, the wife of A1, in the conspiracy for reasons discussed earlier, there is clinching evidence to establish conspiracy between A1 and A2. The circumstances proved beyond reasonable doubt by the prosecution are sufficient to infer conspiracy and consequently, there is no good ground to interfere with the conviction under Section 120-B of the IPC in this case.

66. The fact that A1 and at least A2 conspired with each other to cheat the Bank and falsify its accounts and the fact that A1 and A2 conspired to enable A1 to commit offences under the Prevention of Corruption Act, 1988, it is quite evident from the circumstances, that both A1 and A2 were clearly aware that there were no FDRs and SDRs against which they were seeking to sanction and avail loans to the extent of almost ₹90 lakhs. Inference of conspiracy can be reasonably drawn from the manner in which both these accused persons acted in pursuance of their agreement to commit these offences. The learned Special Judge, has considered this aspect in great detail and there is really no case made out to warrant any interference.

67. As if, all these oral and documentary evidence on record was not sufficient to sustain the conviction against A1 in this case, there is, on record, extrajudicial confession of A1 which is quite clear and cogent. It is only at the stage of record of statement under Section 313 of CrPC, almost ten years after the date of such extrajudicial confession, that, A1 suggested that there was coercion, and thereafter relied under the provisions of Section 24 of the Evidence Act, this confession was irrelevant and should not have been taken into consideration. As noted earlier, even without going into the extrajudicial confession, there is overwhelming oral as well as documentary evidence on record which establishes beyond reasonable doubt, the charges levelled against A1. In any case, there is absolutely no case made out that the clear and cogent extrajudicial confession of A1 was caused by any inducement, threat or promise.

68. It is true that the confession has been recorded in two parts. However, both the parts are inculpatory. Upon comparison of the two parts, it cannot be said that the second part is a result of any threat or coercion as was sought to be urged. The confession, when considered in its entirety is inculpatory and A1 has admitted the circumstances which prove beyond reasonable doubt that he has committed the offences which he was charged with. Merely because 4 or 5 senior officers were present at the time when such confession was made in writing by A1, is not at all sufficient to conclude that

such confession was made under threat or coercion. Similarly, this circumstance is by no means sufficient to hold that the confession was caused by any promise of inducement having reference to the charge against A1 and proceeding from a person in charge. No doubt there were senior officers present. It is quite natural that such senior officers would be present, when a fraud of this nature was discovered.

69. In the course of the inspection, it is, apparent that the inspecting team offered opportunity to A1 to produce the FDRs and SDRs or other documents on the basis of which such huge loan amounts were sanctioned and disbursed. Since, A1 was unable to produce the same, A1, ultimately, confessed to the members of the inspecting team, some of whom have deposed in this case, that there were no FDRs or SDRs or any other securities against which these loans were sanctioned and disbursed. In the presence of senior officers, A1, only admitted this position, which was even otherwise, difficult not to accept, in writing. In these circumstances, merely because some senior officers were present, it can hardly be said that this confession is to be regarded irrelevant in terms of Section 24 of the Evidence Act.

70. In ***K.I. Pavunny v/s. Assistant Collector (Head Quarter), Central Excise Collectorate***³ the Hon'ble Apex Court has held that the burden to prove that threat, coercion was used to obtain

3 1997 3 SCC 721

the confession is on the accused, though, it is not as high as on the prosecution to prove the guilt of the accused. In this case, A1, has not discharged this initial burden at all, even going by the test of preponderance of probability. Mere raising of such a plea in the statement under Section 313 of the CrPC is certainly not sufficient to discharge such burden. Besides, even the prosecution evidence, does not, in any manner, suggest any threat, coercion or inducement. The learned Special Judge, in such circumstances, was entitled to and has correctly relied upon the clear and cogent confession quite voluntarily rendered by the A1 in the matter.

71. The confessional statement of A1 has been duly proved by the prosecution. The prosecution has also proved such confession was given by A1 voluntarily. Though, it would not be the requirement of the law that an accused has to retract a confession, in order to take the plea that the same was not voluntary or was induced, the circumstance that for ten years until A1 was questioned under Section 313 CrPC, there was not a whisper that such confession was not voluntary, is not an entirely irrelevant circumstance in the facts of the present case. There is evidence on record that soon after this fraud was discovered, A1 was placed under suspension and even disciplinary proceedings were initiated against him. A1, possibly, having confessed to his involvement, did not even

bother to participate in the disciplinary proceedings. Ultimately, A1 was dismissed from service.

72. The aforesaid circumstance, permits the reasonable inference that there was no inducement offer to A1 about his retention in service or leniency in disciplinary proceedings. The above, also permits reasonable inference that A1 chose not to participate or defend himself in the disciplinary proceedings, because he had already voluntarily confessed to his involvement in the cheating, fraud and corruption. At least, at the stage when disciplinary proceedings were initiated against A1, A1 was not reeling under threat or coercion or inducement. At least at that stage, A1, was expected to participate in the disciplinary proceedings and take up the defence that the confession was not voluntary. Upon cumulative consideration of all these circumstances, there is really no case in the plea based upon Section 24 of the Evidence Act.

73. Therefore, upon cumulative consideration of the entire evidence on record, this is a case where the prosecution, has proved beyond reasonable doubt the offences against A1. Accordingly, there is no case made out to interfere with the conviction of A1 in this matter.

74. Insofar as the sentence is concerned, Mr. Lotlikar did point out that A1 is now an old person. Even upon taking into consideration this circumstance, there is really no case made out to reduce the sentence imposed upon A1. These are serious offences committed by A1 which have resulted in loss of over ₹90 lakhs to the Bank, even without taking into consideration the interest element. Mr. Amonkar, the learned Additional Public Prosecutor is quite right in his submission that the learned Special Judge, has been rather lenient on the aspect of sentencing.

75. Accordingly, the Criminal Appeal No.12 of 2014 is liable to be dismissed.

76. In the result, both the appeals are disposed off by making the following Order:

ORDER

A) The Criminal Appeal No.12 of 2014 is hereby dismissed. Shri Vilas Vasudev Kunkolienkar (A1) to surrender before the Jail Authorities within one month from today failing which, the respondent to take necessary steps to ensure that A1 serves the sentence as imposed by the learned Special Judge.

B). The Criminal Appeal No.13 of 2014 is allowed. Smt. Vijayshree Vilas Kunkolienkar (A3) is granted benefit of reasonable doubt and acquitted of the offences for which she was convicted by the learned Special Judge.

C). There shall be no order as to costs.

M. S. SONAK, J.

msr.