

IN THE HIGH COURT OF ODISHA, CUTTACK

CRLA No. 695 of 2016

An appeal under section 374(2) of the Code of Criminal Procedure from the judgment and order dated 13.12.2016 passed by the Special Judge (Vigilance), Phulbani, Kandhamal in G.R. Case No.08 of 2013(v) (T.R. No. 08 of 2013)/G.R. Case No.30 of 2005(v) BAM (T.R. No. 39 of 2009).

Sudarsan Sahani Appellant

-Versus-

State of Odisha (Vig.) Respondent

For Appellant: - Mr. Asok Mohanty
Senior Advocate

For Respondent: - Mr. Srimanta Das
Senior Standing Counsel (Vig.)

CRLA No. 687 of 2016

Prasanta Kumar Patra Appellant

-Versus-

State of Odisha (Vig.) Respondent

For Appellant : - Mr. Pradipta Kumar Mohanty
Senior Advocate

For Respondent: - Mr. Srimanta Das
Senior Standing Counsel (Vig.)

CRLA No. 694 of 2016

Saroj Kumar Misra Appellant

-Versus-

State of Odisha (Vig.) Respondent

For Appellant : - Mr. Asok Mohanty
Senior Advocate

For Respondent: - Mr. Srimanta Das
Senior Standing Counsel (Vig.)

GCRLA No. 25 of 2019

An appeal under section 378 of the Code of Criminal Procedure from the judgment and order dated 13.12.2016 passed by the Special Judge (Vigilance), Phulbani, Kandhamal in G.R. Case No.08 of 2013(v) (T.R. No. 08 of 2013)/G.R. Case No.30 of 2005(v) BAM (T.R. No. 39 of 2009).

State of Odisha (Vig.) Appellant

-Versus-

1. Saroj Kumar Mishra
2. Sudarsan Sahani
3. Prasanta Ku. Patra
4. Abakash Padhy

Respondents

For Appellant : - Mr. P.K. Pani
Standing Counsel (Vig.)

For Respondents: - Mr. Pradipta Kumar Mohanty
Senior Advocate

CORAM:

THE HONOURABLE MR. JUSTICE S.K. SAHOO

.....
Date of Hearing: 25.03.2022

Date of Judgment: 18.04.2022
.....

S.K. SAHOO, J. Since all the appeals arise out of one case, with the consent of the learned counsel for the parties, those were heard analogously and disposed of by this common judgment.

The appellant Sudarsan Sahani in CRLA No. 695 of 2016, appellant Prasanta Kumar Patra in CRLA No. 687 of 2016, appellant Saroj Kumar Misra in CRLA No. 694 of 2016 and respondent no.4 Abakash Padhy in GCRLA No. 25 of 2019 faced trial in the Court of learned Special Judge (Vigilance), Phulbani in G.R. Case No.08 of 2013(v) (T.R. No. 08 of 2013)/G.R. Case No.30 of 2005(v) BAM (T.R. No. 39 of 2009) for the offences punishable under section 13(2) read with section 13(1)(d) of the Prevention of Corruption Act, 1988 (hereafter '1988 Act') along with offences punishable under sections 420, 468, 201 and section 120-B of the Indian Penal Code on the accusation of misappropriating government money to the tune of Rs.1,50,000/- (rupees one lakh fifty thousand) in connivance with each other by corrupt or illegal means or by otherwise abusing their position showing false execution of pothole repair work, committing forgery of certain documents/records such as, pothole repair

estimate and causing disappearance of evidence, such as MB No.1311 to screen themselves from legal punishment.

The learned trial Court vide impugned judgment and order dated 13.12.2016 though acquitted the respondent no.4 Abakash Padhy of GCRLA No. 25 of 2019 of all the charges so also the appellants Sudarsan Sahani, Prasanta Kumar Patra and Saroj Kumar Misra in the three criminal appeals of the charges under sections 420, 468, 201 and section 120-B of the Indian Penal Code, but found the appellants guilty of the offence under section 13(2) read with section 13(1)(d) of 1988 Act and sentenced each of the appellants to undergo rigorous imprisonment for two years each and to pay a fine of Rs.2,000/- (rupees two thousand) each, in default, to undergo further R.I. for one month each.

The appellants have challenged the impugned judgment and order dated 13.12.2016 passed by the learned trial Court by filing the aforesaid three criminal appeals whereas the State of Odisha has filed GCRLA No. 25 of 2019 challenging order of acquittal of the appellants of the charges under sections 420, 468, 201 and 120-B of the Indian Penal Code so also of the respondent no.4 Abakash Padhy of all the charges.

2. The prosecution case, as per the First information report (Ext.28) lodged by P.K. Dwivedy (P.W.12), Inspector of

Police, Vigilance, Berhampur, in short, is that pursuant to receipt of reliable information of misappropriation of government money to the tune of Rs.1,50,000/- (rupees one lakh fifty thousand) by showing false execution of pothole repair work in N.H. 217 from 147 K.M. to 171 K.M. in September 2004, an enquiry was taken up, in course of which it was ascertained that during the period from 2002 to 2004, the appellant Sudarsan Sahani was the S.D.O. of N.H. Sub-division, Balliguda, appellant Saroj Kumar Misra was the Executive Engineer, N.H. Division, Berhampur and appellant Prasanta Kumar Patra was the Junior Engineer of N.H. Section, Balliguda. During the said period, an estimate was made relating to the periodical renewal of N.H. 217 and the same was sanctioned and agreement was executed on 19.02.2004 with contractor Sri Arun Kumar Choudhury relating to PR Coat of N.H. 217 from 148 K.M. to 154 K.M. for an amount of Rs.36,98,199/- with the date of commencement and completion from 19.02.2004 to 18.06.2004 and further extension of time was given upto 30.01.2005. The enquiry further revealed that while the said agreement was subsisting, another agreement was executed for the same portion of work with co-accused Abakash Padhy (respondent no.4 of GCRLA No. 25 of 2019) overlapping the earlier agreement with an estimate of Rs.4,64,881/- with the date of commencement and completion from 10.09.2004 to

09.03.2005. After execution of agreement with co-accused Abakash Padhy, the appellant Prasanta Kumar Patra made necessary entries relating to pothole repair work in the measurement book and an amount of Rs.1,50,000/- was paid to co-accused Abakash Padhy on 14.10.2004. It further came to light that pothole repair works from 147 K.M. to 171 K.M. was not actually executed and false bills were prepared and payment of Rs.1,50,000/- was shown. The Superintending Engineer, N.H. Circle (South), Bhubaneswar conducted an inspection and came to the conclusion that the agreement drawn by the Executive Engineer, N.H. Division, Berhampur was unauthorized as PR agreement over the same patch was already in force and it was further found that inflated rates were given in the sanction and estimate agreement with an intention to give undue financial benefit to the agency executing pothole repair work and that the measurement books were not produced before him for his scrutiny and it was reported to be missing. Considering the inspection report, the payment of Rs.1,50,000/- made to the contractor Abakash Padhy was treated as unauthorized, unwanted and loss to the Government.

Consequent to the enquiry, P.W.12 P.K. Dwivedy, Inspector of Police, Vigilance, Berhampur drew up the plain paper F.I.R. against the three appellants so also respondent no.4

Abakash Padhy and submitted the same to Superintendent of Police, Vigilance, Berhampur Division, Berhampur for registration of the case and accordingly, Berhampur Vigilance P.S. Case No. 30 dated 28.12.2005 was registered section 13(2) read with section 13(1)(d) of 1988 Act along with offences punishable under sections 420, 201 and section 120-B of the Indian Penal Code.

During investigation, P.W.12 examined the witnesses, seized relevant documents, obtained sanction for prosecution in respect of the public servants and on completion of investigation, since prima facie case was found against all the three appellants and the respondent no. 4 of GCRLA, charge sheet was placed under section 13(2) read with section 13(1)(d) of 1988 Act along with offences punishable under sections 420, 468, 201 and section 120-B of the Indian Penal Code.

3. The defence plea of the appellants who are the public servants is that the PR agreement with contractor Arun Kumar Choudhury was a conditional one which was not completed till the departure of Executive Engineer and the said contractor Arun Kumar Choudhury had also not applied for extension of time for which the 1st contract came into end on 31.08.2004 and was not in force when the 2nd contract with the respondent Abakash Padhy was executed. It is further pleaded by the appellants that the Executive Engineer executed the 2nd agreement for repair of

potholes from 148 K.M. to 171 K.M. which includes the work of 6 K.M. of the 1st agreement and that MB No.1311 was submitted by the appellant Prasanta Kumar Patra relating to the work executed by respondent Abakash Padhy and the same was submitted by J.E. S. Acharya to the Divisional Office. The defence plea of respondent Abakash Padhy is that he had rightly executed the work as per agreement and has been falsely implicated. The payment of running bill of Rs.1.50 lakh was made with bonafide and final bill having not been paid, there was no loss to the Government. The 1st contractor Arun Kumar Choudhury started the work on the verbal instruction on the day of joining of P.W.9 without extension and it is only on 24.03.2005 that post-facto extension was granted after the final bill was paid.

4. In order to prove its case, the prosecution examined twelve witnesses.

P.W.1 Kamala Padhi and P.W.2 Jabaharlal Patra were working as the Senior Clerk and Junior Clerk respectively attached to the office of Executive Engineer, N.H. Division, Berhampur in whose presence some documents were seized by the Vigilance police on production by one Rama Chandra Sethi as per seizure list vide Ext.1.

P.W.3 Surya Narayan Padhy was working as Junior Clerk in the office of Executive Engineer, N.H. Division, Berhampur

in whose presence some documents were seized by the Vigilance as per the seizure lists vide Exts. 2, 3 and 4.

P.W.4 Rankanidhi Padhy was working as Junior Clerk in the office of Executive Engineer, N.H. Division, Berhampur and is a witness to the seizure as per the seizure list vide Ext. 3.

P.W.5 Rama Chandra Sethy was working as an Assistant Engineer in the office of Executive Engineer, N.H. Division, Berhampur. He stated that on the direction of the Executive Engineer, he produced certain documents before the Investigating Officer which were seized as per the seizure lists vide Ext. 1 and 2. He was declared hostile by the prosecution.

P.W.6 Mahesh Ch. Panda was the Junior Clerk in the office of the N.H. Division, Berhampur and he is a witness to the seizure of documents as per seizure list vide Ext.2.

P.W.7 Muralikrushna Pattnaik was the Junior Clerk in the office of the N.H. Division, Berhampur and he is a witness to the seizure of documents like MB movement register (Ext.5), correspondence file (Ext.6) as per seizure list Ext.3. He also stated about the seizure of MB issue register (Ext.7) as per seizure list Ext.4.

P.W.8 Sarada Prasad Das was the Asst. Engineer attached to the Vigilance Directorate, Odisha, Cuttack, who was directed by the Superintending Engineer, Vigilance Directorate to

submit a report on scrutiny of certain records relating to the work providing PR coat to N.H. 217 at 13 patches under N.H. Division, Berhampur for the year 2003-04 and he submitted the report as per Ext.8 which was forwarded to the I.O. of the case.

P.W.9 Pradip Ku. Sutar was the Executive Engineer of N.H. Division, Berhampur. He stated that though the agreement in respect of the work in question was executed during the tenure of his predecessor, but the work started after his joining. He proved the tender documents and bills for the work of the two contractors i.e., Arun Kumar Choudhury and respondent no.4 Abakash Padhi and also proved the measurement book in respect of the work executed by the 1st contractor Arun Kumar Choudhury. He further stated that M.B. No.1311 containing measurement for the 1st running bill passed for respondent no.4 for Rs.1,50,000/- was not available in the office.

P.W.10 Anil Kumar Choudhury executed the work in question being the power of attorney holder of his brother Arun Kumar Choudhury as the agreement for the work between the Executive Engineer and his brother. He stated that after execution of the agreement, the work was executed jointly by him and his brother Arun Kumar Choudhury and he was supervising the entire work, which was for an estimated cost of Rs.36,98,199/-. He further stated that though as per agreement, the date of

commencement of the work was 19.02.2004 and date of completion was 18.06.2004 but it was extended from time to time and completed in January 2005. He proved the documents like running bills, final bill and signatures of his brother Arun Kumar Choudhury on the measurement books.

P.W.11 Bharat Ch. Pradhan was in additional charge of the Superintending Engineer, National Highway, Berhampur and he had inspected the work in question and submitted a consolidated report as per Ext.27.

P.W.12 Prasanta Kumar Dwivedy was the Inspector of Police, Vigilance, Berhampur, who submitted the written report to the Superintendent of Police, Vigilance, Berhampur, which was treated as F.I.R. as per Ext.28. He is also the Investigating Officer of the case.

The prosecution exhibited thirty six documents. Exts.1 to 4 are the seizure lists, Ext.5 is the MB movement register, Ext.6 is the correspondence file, Ext.7 is the MB issue register, Ext.8 is the report of P.W.8, Ext.9 is the forwarding letter, Ext.10 is the F-2 agreement, Ext.11 is the 1st running bill, Ext.12 is the relevant entry in MB 1427, Ext.13 is the 2nd running bill, Ext.14 is the relevant page nos.1 to 9 of MB 1446, Ext.15 is the final bill, Ext.16 is the relevant page nos. 5 to 11 of MB 1427, Ext.17 is the Schedule of Quantities approved by Superintending Engineer, N.H.

Circle (South), Bhubaneswar, Ext.18 is the comparative statement, Ext.19 is the tender schedule, Ext.20 is the estimate, Ext.21 is the F-2 agreement, Ext.22 is the tender submitted by respondent no.4 Abakash Padhy, Ext.23 is the tender submitted by Debaraj Pradhan, Ext.24 is the 1st running bill, Ext.25 is the MB Book No.1447, Ext.26 is the MB Book No.1346, Ext.27 is the inspection note of the Superintending Engineer, Ext.28 is the F.I.R., Ext.29 is letter no. 154, Ext.30 is the relevant entry No.263, Ext.31 is the letter no. 279, Ext.32 is letter No.1474, Exts.33, 34 and 35 are the sanction orders for prosecution of the three appellants, Ext.36 is letter no. 2453 dated 05.08.2015 of the Executive Engineer, N.H. Division, Berhampur.

The defence has examined four witnesses in its support.

D.W.1 Sarat Chandra Rout was the Assistant Engineer, N.H. Division office, Berhampur, who was also holding the additional work of Public Information Officer of the concerned office and while working as such, he had furnished some documents/letters, which were marked as Exts.G, I, J, M and Q.

D.W.2 Sanatan Mohanty was working as Asst. Engineer, Estimate, N.H. Office, Berhampur and he produced the letters vide Ext.CC, Ext.T, Ext.U, Ext.V, Ext.W, Ext.H/1, Ext.X, Ext.Y, Ext.Z, Ext.AA and Ext.BB.

D.W.3 Basudev Sasmal was working as Asst. Engineer, R & B Division, Jeypore and he produced the documents vide Ext.O & Ext.S.

D.W.4 Saroj Kumar Misra is the appellant in CRLA No.694 of 2016 and he produced certain documents which are marked as Ext.K and Ext.L.

The defence exhibited twenty nine documents. Ext.A is letter no. 843 dated 16.02.2005, Ext.B is letter No. 37 dated 16.02.2005, Ext.C is letter No.711 dated 11.02.2005, Ext.D is letter no. 581 dated 04.02.2005, Ext.E is letter no. 21 dated 31.01.2005, Ext.F is letter No. 246 dated 17.01.2005, Ext.F is letter no. 246 dated 17.01.2005, Ext.G is letter no. 5277 dated 29.10.2004, Ext.H is letter no. 56 dated 24.04.2005, Ext.I is letter No. 38(cib) WE dated 31.10.2004, Ext.J is letter No.11342 dated 19.02.2004, Ext.K is letter no. 2816 dated 17.08.2004, Ext.L is letter dated 22.05.2003, Ext.M is memo no. 2682 dated 29.05.2004, Ext.N is letter No.1165(WE) dated 24.03.2005, Ext.O is payment details of 141F-2/03-04 of respondent no.4 Arun Kumar Choudhury, Ext.P is the rain fall data obtained from BDO, Daringbadi, Ext.Q is the letter no. 4775 dated 22.09.2004, Ext.R is the charge papers showing details of inspection, Ext.S is memo no. 2584-88 dated 20.04.2005, Ext.T is D.O. letter no. 16990 dated 23.12.2003, Ext.U is the inspection report of R.K. Rao

(CEMH), Ext.V is the tour diary of P.K. Sutar (EENH), Ext.W is the letter no. 2500 dated 23.04.2005, Ext.X is the hand receipts of Abakash Padhy, Ext.Y is the forwarding letter of PIO dated 07.05.2015, Ext.Z is the office order of the Executive Engineer, NH Division, Berhampur, Ext.AA is the FDR assessment report, Ext.BB is the bar chart of FDR and Ext.CC is the letter no. 63 dated 07.05.2015.

5. The learned trial Court in its impugned judgment has been pleased to hold that the appellants were the public servants at the relevant point of time within the meaning of public servant as defined under section 2 of 1988 Act. It was further held that the respondent no.4 had executed the patch work on the N.H. way and at the time of entering into the contract with the respondent no.4, the earlier contract was not in force, as such, no illegality has been done. It was further held that by the time Arun Kumar Choudhury, the contractor commenced the disputed work on 01.12.2004 till its completion on 30.01.2005, there was no extension of time and extension of time was sought for by P.W.9 only on 21.03.2005 which was sanctioned by the Superintending Engineer on 24.03.2005. It was further held that till 22.09.2004, the earlier contract with the 1st Contractor Arun Kumar Choudhury was not rescinded and was very much in force in view of Clause-2 (b)(I) of the conditions of contract. The appellant Saroj Kumar

Misra entered into an agreement with the respondent no.4 on 10.09.2004 for the self-same work with commencement and completion date as 10.09.2004 and 09.03.2005 and as such the subsequent contract was illegal. It was further held that in view of the contradictory evidence adduced by the prosecution witnesses, it can affirmatively be concluded that the trial run of the machineries by the 1st contractor Arun Kumar Choudhury was doubtful. It was further held that the prosecution has not substantiated the essential ingredients of sections 420 and 468 of the Indian Penal Code.

The learned trial Court further held that on careful scrutiny of the materials on record, there appears nothing to the fact that the appellants conspired with the respondent no.4 to grab the government funds allotted for construction of potholes and therefore, the prosecution has failed to bring home the charge under section 120-B of the Indian Penal Code against the accused persons.

The learned trial Court further held that the disappearance of MB No.1311 against the appellants was not founded and accordingly, the prosecution has failed to substantiate the charge under section 201 of the Indian Penal Code against them. It was further held that the respondent no.4

is not guilty under any of the offences charged and accordingly, he was acquitted of all the charges.

However, the learned trial Court held that the prosecution has successfully established the charge under section 13(2) read with section 13(1)(d) of the 1988 Act against the appellants and accordingly found them guilty.

6. Mr. Asok Mohanty, learned Senior Advocate appearing for the appellants Sudarsan Sahani and Saroj Kumar Misra argued that the finding of the learned trial Court that the 2nd agreement which was executed by the appellant Saroj Kumar Misra with the respondent no.4 Abhisekh Padhi while the 1st agreement was in force is illegal, is contrary to the evidence on record and suffers from non-application of mind. It is further submitted that the 2nd agreement was a valid one for the following reasons:

- (i) Both the agreements were for different work and therefore, did not overlap at all. Moreover, the nature and scope of work in the two agreements operate in two different spheres. The 1st agreement was for periodical renewal and the 2nd agreement was for pothole repairs;
- (ii) The 1st agreement was for periodical renewal from 148 K.M. to 154 K.M. and the 2nd agreement was for pothole repair from 147 K.M. to 171 K.M. The value of

the 1st agreement was Rs.36,98,199/- for six kilometers, whereas the 2nd agreement value was for Rs.4,70,170/- for 24 Kms.;

(iii) At the time of execution of 2nd agreement dated 10.09.2004, the 1st agreement/contract was not in force;

(iv) In the 1st agreement, it is clearly mentioned that time was the essence of contract, which would be evident from a bare reading of clause 2(a) of the agreement (Ext.10) and since time was the essence of contract, the 1st contractor Arun Kumar Choudhury was obliged to finish the work within time or during the period of extension granted as per procedure laid down in the O.P.W.D. Code. The 1st contractor signed the agreement (Ext.10) on 19.02.2004 wherein the date of completion of the work was mentioned as 18.06.2004. On account of the Code of Conduct for General Election, extension was granted from 01.05.2004 to 31.08.2004, but before or after 31.08.2004, no extension was sought for or granted by the prescribed authority. Therefore, there was no agreement in force as on 10.09.2004 when the disputed agreement under Ext.21 was executed

between the appellant Saroj Kumar Misra, the Executive Engineer and the respondent no.4 Abakash Padhi. Reliance was placed on two letters i.e. Ext.Q and Ext.G.

Mr. Asok Mohanty, learned Senior Advocate further argued that the learned trial Court rightly acquitted all the appellants including the respondent no.4 of the charges under sections 420, 468, 120-B and 201 of the Indian Penal Code but most peculiarly without assigning any reason whatsoever, convicted the appellants under section 13(2) read with section 13(1)(d) of 1988 Act. Such an order of conviction is perverse and suffers from non-application of mind and therefore, cannot be sustained in the eye of law.

Mr. Pradipta Kumar Mohanty, learned Senior Advocate appearing for the appellant Prasant Kumar Patra in CRLA No.687 of 2016 so also for all the respondents in GCRLA No.25 of 2019 not only adopted the argument advanced by Mr. Asok Mohanty, Senior Advocate but added that the impugned judgment and order of acquittal of respondent no.4 of all the charges and the appellants of some of the charges passed by the learned trial cannot be said to be perverse, palpably wrong, manifestly erroneous or demonstrably unsustainable and since this Court while dealing with an appeal against acquittal ought to be cautious

because the presumption of innocence in favour of the accused is not certainly weakened by the fact that he has been acquitted at the trial, therefore, there is no compelling reasons to interfere with the same in the GCRLA.

Mr. Srimanta Das, learned Senior Standing Counsel for the Vigilance Department on the other hand contended that the appellant Saroj Kumar Misra being the Executive Engineer executed the agreement vide Ext.10 with the 1st contractor Arun Kumar Choudhury with date of commencement as 19.02.2004 and date of completion as 18.06.2004 and extension of time was granted upto 30.01.2005 which was sanctioned by Superintendent Engineer, N.H. Circle vide letter dated 24.03.2005. However, the said appellant executed the fresh agreement vide Ext.21 within the extended period of the 1st contractor with the respondent no.4 Abakash Padhi, i.e. the 2nd contractor on 10.09.2004 for repair of potholes from 147 K.M. to 171 K.M. for the year 2004-05 with date of commencement 10.09.2004 with the stipulated date of completion as 09.03.2005 thereby overlapping the existing agreement vide Ext.10 and the learned trial Court has rightly given the finding that the 2nd agreement was entered into between the appellant Saroj Kumar Misra and the respondent no.4 Abakash Padhy while the 1st agreement was not rescinded and was very much in force. He further argued that P.W.9 has

stated that although he joined as Executive Engineer on 08.10.2004, but he was not given charge of the office by his predecessor (appellant Saroj Kumar Misra) and that during that period, the office of the Executive Engineer was kept under lock and key by the said appellant and that he (P.W.9) took charge from the appellant on 01.12.2004 which was after nearly two months and during the said period, he (P.W.9) made an inspection of the site in question and found that no work appeared to have been done there. It is argued that P.W.9 was deliberately kept out of the office in order to cover up the irregularities committed by the appellants with regard to so-called work of the respondent no.4 which was in fact non-existent but the payment of bill was made thereon. He further emphasized that the respondent no.4 in his accused statement has clearly stated that he had no knowledge regarding entrustment of work to him in pursuance to the 2nd tender call notice for the year 2004-05, which substantiates that the accused persons prepared false bills and vouchers to misappropriate Government money making the respondent no.4 as a dummy contractor only on paper. While concluding his argument, Mr. Das contended that the respondent no.4 should have to execute the work entrusted utilizing machines as per specification in the tender, but he claimed the amount for such work, which he had allegedly executed manually and there is

no iota of doubt that had the work been done manually, the expenses would have been more and the respondent no.4 could not have claimed the lesser amount as if it was executed through machines and this is another factor, which improbably the execution of any work by the respondent no.4 under the 2nd contract and rather it strengthens the prosecution case that fabricated documents were created by the accused persons to claim charges for pothole repair works, which was in fact not been done and whatever work has been done, that was done only by the 1st contractor Arun Kumar Choudhury, who was paid for the work and therefore, the learned trial Court has rightly convicted the appellants under section 13(2) read with section 13(1)(d) of 1988 Act.

Mr. P.K. Pani, learned Standing Counsel (Vigilance) appearing in the Government Appeal contended that not only the acquittal of respondent no.4 of all the charges, but also the appellants of the charges under sections 420, 468, 201 and section 120-B of the Indian Penal Code is faulty and it should be set aside and all the appellants and respondent no.4 should be held guilty for all the offences they were charged. According to Mr. Pani, pursuant to the F-2 agreement executed with the 1st contractor Arun Kumar Choudhury, the work was carried out and completed within the extended time as allowed by the

Department and after due measurement, the final bill was passed and payment was made thereon. During the continuance of the work under the 1st agreement which was in force, another agreement was illegally entered into with the respondent no.4 for a small part of the work covered under the 1st agreement and not only that, the bill for the work under 2nd agreement for an amount of Rs.1,50,000/- was also released in favour of the respondent no.4 within four days of the agreement. He further argued that the pothole repair works as per the 2nd agreement was also covered under the original agreement, which was not permissible, inasmuch as in case of exigencies for any small additional work within the original work in progress, the same has to be executed by the original contractor as per clause 10 of the F2 agreement of the 1st contractor as well as clause 3.5.31 of O.P.W.D. Code. Mr. Pani further submitted that that is the reason why the purported work under the 2nd tender was stopped because of irregularity and no work appeared to have been done in the site under the 2nd tender. He emphasized about the conspiracy between the accused persons in preparing false paper work like tender and agreement by showing simultaneous execution of sham work with the original work and for such purpose, a dummy contractor like respondent no.4 was set up. The measurement book for the work done under the 2nd agreement, which was M.B. No. 1311 was found missing.

According to Mr. Pani, since the learned trial Court has ignored the material evidence brought on record by the prosecution to substantiate various charges against the accused persons, the view taken for acquittal is clearly unsustainable and therefore, it should be set aside.

7. The first and core point for determination is whether the 1st agreement executed with the contractor Arun Kumar Choudhury was in force when the 2nd agreement was executed with the respondent no.4 Abakash Padhy.

The second point for determination is whether there was at all any necessity for entering into the 2nd agreement for execution of pothole repair work and whether the respondent no.4 executed any work at all or false bill was claimed.

The third point for determination is whether there was any criminal conspiracy between the accused persons and undue official favour was shown to the respondent no.4 for making payment of Rs.1,50,000/- (rupees one lakh fifty thousand) to him by showing false execution of pothole repair work.

The fourth point for determination is whether there was any forgery in respect of documents/records like pothole repair estimate of Rs.4,91,800/-, agreement entered into with the respondent no.4 and M.B. No. 1311 and whether there was any

dishonest cheating to the Government by showing undue official favour to the respondent no.4.

The fifth and last point for determination is whether the accused persons have caused disappearance of M.B. No.1311 with an intention to screen themselves from legal punishment.

First Point:

Whether the 1st agreement was in force when the 2nd agreement was executed:

8. Ext.10 is the F2 agreement executed between 1st contractor Arun Kumar Choudhury and the appellant Saroj Kumar Misra as Executive Engineer, N.H. Division, Berhampur on 19.02.2004 for the work "Periodical renewal work of N.H. 217 from KM 148/0 to 158/0". This document was proved by P.W.9, the Executive Engineer, N.H. Division, Berhampur. The stipulated date for commencement and completion of the work as per Ext.10 were 19.02.2004 and 18.06.2004.

Clause 2(a) of Ext.10 reads as follows:-

"The time allowed for carrying out the work as entered in the tender shall be strictly observed by the contractor and shall be reckoned from the date on which the written order to commence work is given to the contractor. The work shall throughout the stipulated period of the contract be carried on with all due diligence (*time being deemed to be of the essence of the contract on the part of the*

contractor) and the contractor shall pay as compensation an amount equal to ½% on the amount of the estimated cost if the whole work as shown by the tender for every day that the work remains uncommenced or unfinished after the proper dates (the work should not be considered finished until such date as the Executive Engineer shall certify as the date on which the work is finished after necessary rectification of defects as pointed out by the Executive Engineer, or his authorized Agents, are fully complied with by the contractor to the Executive Engineer's satisfaction) And further to ensure good progress during execution of the work, the contractor shall be bound in all cases in which the time allowed for any work exceeds one month, to complete one-fourth of the whole of the work before one fourth of the whole time allowed under the contract has elapsed, one half of the work, before one half of such time has elapsed and three-fourth of the work before three-fourth of such time has elapsed. In the events of contractor failing to comply with the condition, he shall be liable to pay as compensation an amount equal to one third percent on the said estimated cost of the whole work for every day that the due quantity of work remains incomplete provided always that the entire amount of compensation to be paid under the provisions of this clause shall not exceed 10% on the estimated cost of the work as shown in the tender."

Clause 4 of Ext.10 which provides for extension of time is quoted below:-

"If the contractor shall desire on extension of the time for completion of the work, on the ground of his having been unavoidably hindrances in its execution or any other ground, he shall apply in writing to the Executive Engineer within 30 days of the date of the hindrance on account of which he desires such extension as aforesaid and the Executive Engineer shall, if in his opinion (which shall be final) reasonable be shown therefore, authorize such extension of time, if any, as may in his opinion, be necessary or proper. The Executive Engineer shall at the same time inform the contractor whether he claims compensation for delay."

Para 3.5.30 of the O.P.W.D. Code, Vol.I provides for extension of time, which reads as follows:-

"3.5.30. Application for extension of time for the completion of a work on the grounds of unavoidable hindrance or any other grounds shall be submitted by the contractor within 30 days of such hindrance and the Divisional Officer shall authorize or recommend such extension of time as deemed necessary or proper within fifteen days of the receipt of such an application. In cases where the sanction of the higher authority to the grant of extension of time is necessary, the Divisional Officer should send his recommendation as

expeditiously as possible. The higher authority should communicate his decision within sixty days from the date of receipt on recommendation in his office. If the orders of the competent authority are not received in time, the Divisional Officer may grant extension of time under intimation to the concerned authorities so that the contract might remain in force, but while communicating this extension of time, he must inform the contractor that extension is granted without prejudice to Government's right to levy compensation under relevant clause of the contracts.

Notes:- (I) The power to grant extension of time vests with the authority who accepted the tender but the period of extension that can be granted by such an authority is limited to the period equivalent to the time originally stipulated in the agreement for completion of the work. Beyond this, approval of next higher authority should be obtained before extension of time is granted.

(II) The application for extension of time and sanction thereto should be made in the prescribed form."

Mr. Asok Mohanty, learned Senior Advocate placed reliance on Ext.Q, which is the letter no.4775 dated 22.09.2004 addressed to the 1st contractor Arun Kumar Choudhury by the appellant Saroj Kumar Misra in his official capacity. In the said letter, it is mentioned as follows:-

“You have not executed any work till now. You have also not applied for grant of extension of time as per clause of F2 agreement in prescribed form.”

Mr. Ashok Mohanty, learned Senior Advocate further placed reliance on Ext.G i.e. the letter no.5777 dated 29.10.2004 addressed to Superintending Engineer, N.H. Circle (South) by the appellant Saroj Kumar Misra which was a submission of rescission proposal of the 1st agreement i.e. the work assigned to the contractor Arun Kumar Choudhury. In the said letter, it is mentioned that the work that was awarded to Shri Arun Kumar Choudhury was with the date of commencement and stipulated date of completion was 19.02.2004 (shifted to 01.05.2004) and 18.06.2004 (shifted to 31.08.2004) respectively, but the contractor had neither executed any work during the period of contract nor has he applied to grant of extension of time in proper format as required under clause 4 of the F2 agreement. It is further mentioned therein that the said contractor as per letter dated 22.09.2004 (Ext.Q) was asked to file show cause within seven days as to why his contract should not be rescinded. It is further mentioned therein that the contractor had not started the work till 19.10.2004 and his revised work programme was already returned in original and that the delay in starting the work was therefore appeared to be intentional.

From these two letters i.e. Ext.Q and Ext.G, it becomes prima facie evident that the 1st contractor Arun Kumar Choudhury had not applied for extension of time either prior 31.08.2004 or after that particularly till the 2nd contract with respondent no.4 vide Ext.21 was executed on 10.09.2004.

During course of hearing on 10.02.2022, Mr. Asok Mohanty placed the letter dated 21.03.2005 written by P.W.9, the Executive Engineer to the Superintending Engineer, N.H. Circle (South), Bhubaneswar which is a part and parcel of Ext.N proved by the defence through D.W.3 wherein it was mentioned that subsequently on consideration of representation of the 1st contractor, the date of commencement and stipulated date of completion were shifted to 01.06.2004 and 30.09.2004 respectively and below the letter in the enclosure portion, copy of the representation of the 1st contractor Arun Kumar Choudhury has been mentioned. It was argued that no such representation was in existence and no such order has been passed on any such representation of the 1st contractor as was mentioned in the letter dated 21.03.2005 regarding shifting of date of commencement and date of completion of work to 01.06.2004 and 30.09.2004 respectively. To meet the contention of Mr. Asok Mohanty, learned Senior Advocate, time was sought for by Mr. Srimanta Das, learned Senior Standing Counsel of Vigilance Department to

obtain instruction as to whether any such representation of the 1st contractor and any such order regarding shifting of the date of commencement and the date of completion of the work is available or not.

On 24.02.2022, Mr. Srimanta Das, learned Senior Standing Counsel for the Vigilance Department filed an application under section 391 of Cr.P.C. for marking certain documents as additional evidence and the application was registered as I.A. No.254 of 2022.

An affidavit was filed by the holding Investigating Officer on 10.03.2022 in which it was clearly mentioned that the two documents i.e. the representation of the 1st contractor Arun Kumar Choudhury for extension of time for completion of work or the order passed on such representation regarding shifting of the date of commencement or date of completion of work were not available either in the office of Executive Engineer, N.H. Division, Berhampur or in the office of Chief Construction Engineer, N.H. Circle, Berhampur.

The application filed by the learned Senior Standing Counsel for the Vigilance Department under section 391 Cr.P.C. was heard and rejected as per order dated 10.03.2022.

Thus, neither before the learned trial Court nor before this Court, the prosecution was able to produce any

representation of the 1st contractor nor any order passed on such representation shifting the date of commencement and date of completion of the work to 01.06.2004 and 30.09.2004 respectively. P.W.9 admits that there is a provision under O.P.W.D. Code giving scope to the executant to apply for extension of time one month prior to the proposed date of completion if the extension is required due to unavoidable hindrance. However, P.W.9 stated that he could not say if the extension was prayed within the time stipulated unless he referred to the record. He further stated that he could not say if Arun Kumar Choudhury had applied for extension of time one month prior to the end day of the stipulated time. P.W.9 further stated that he could not say whether the Technical team had inspected the work entrusted to the 1st contractor Arun Kumar Choudhury and reported on 29.07.2004 that the contractor had no equipments in order to execute the proposed work which was submitted to the Superintending Engineer, N.H. South Circle, Berhampur who in turn intimated the Executive Engineer, N.H. Division, Berhampur vide letter dated 17.08.2004. P.W.9 further stated that he could not say whether the Executive Engineer had called on Arun Kumar Choudhury to submit his show cause within seven days and whether the Executive Engineer vide letter dated 29.10.2004 intimated Superintending Engineer about the closure

proposal of the work of Arun Kumar Choudhury. P.W.9 further stated that when a contractor fails to execute the work under the conditions stipulated in the agreement and for his default, he is served with a show cause notice, he cannot be directed to take up the said work afresh after the time stipulation of the agreement.

In view of such state of affairs, the submission of Mr. Asok Mohanty, learned Senior Advocate has got substantial force that the prosecution has failed to produce any document regarding submission of any application by the 1st contractor for extension of time to complete the work or any order passed thereon and thus it would be deemed that after 31.08.2004, there was no extension to the work in question under 1st agreement Ext.10.

The above aspect is further strengthened on perusal of the check list which is a part and parcel of Ext.N that goes to show at column no.4 that the application for extension of time was submitted on 10.03.2005 after the work is said to have been completed on 30.01.2005. This check list was signed by P.W.9 wherein the date of submission of application for extension of time by the 1st contractor Arun Kumar Choudhury has been mentioned as 10.03.2005.

P.W.9 has clearly stated in his evidence that he joined as Executive Engineer, N.H. Division, Berhampur on 08.10.2004

and took charge from his predecessor (appellant Saroj Kumar Misra) on 01.12.2004 and that the agreement Ext.10 was executed during the tenure of his predecessor but the work started after his joining and in the cross-examination, he has clarified that the 1st contractor Arun Kumar Choudhury started execution of work on 01.12.2004 on which date he took charge of the office from his predecessor. The learned trial Court has also observed (para-16 of the impugned judgment) that by the time the 1st contractor Arun Kumar Choudhury commenced the disputed work on 01.12.2004 till its completion on 30.01.2005, there was no extension of time and extension of time was sought for by P.W.9 only on 21.03.2005 and the same was sanctioned by the Superintending Engineer on 24.03.2005. This finding of the learned trial Court is quite justified in the facts and circumstances of the case.

Mr. Asok Mohanty, learned Senior Advocate contended that 'contract remains in force' after the earlier stipulated date only when the application for extension of time for the completion of a work is submitted by the contractor within the period stipulated indicating the grounds of unavoidable hindrance or any other grounds in the work in question. The same also finds place in clause 4 of the conditions of the contract in Ext.10. According to him, as per Para 3.5.30 of O.P.W.D. Code, Vol.I, the term

'contract remains in force' and 'rescission of contract' as per clause 2(b)(i) of the conditions of the contract as per Ext.10 are two different things. To rescind the contract, the rescission notice in writing is to be given to the contractor under the hand of Executive Engineer which would be the conclusive evidence and the security deposit of the contractor shall stand forfeited and will be absolutely at the disposal of the Government. The finding of the learned trial Court in para-17 of the impugned judgment that in view of the notice dated 22.09.2004 vide Ext.Q issued to the 1st contractor, till that date the earlier contract was very much in force, is not correct. I agree with the submission made by the learned Senior Advocate Mr. Asok Mohanty that 'contract to remain in force' as per the provisions of the O.P.W.D. Code and 'rescission of contract' which includes forfeiture of the security deposit of the contractor are quite different and distinguishable and the learned trial Court erred in holding these two aspects to be one and the same.

Security for the due fulfillment of a contract is invariably taken in view of clause 3.5.19 of the O.P.W.D. Code. The security may be taken in shape of N.S.C./Post Office Savings Bank Account/ Post Office Time Deposit Account/ Kissan Vikash Patra only towards E.M.D./initial security deposit/ any other security deposit from the contractor or supplier. In Ext.10, as per

tender call notice 1/2003-2004 issued by the Office of the Superintending Engineer, N.H. Circle (South), Bhubaneswar under the heading of eligibility criteria as per clause 8, it is mentioned that the contractor shall be required to give a trial run of the equipments for establishing their capacity to achieve the laid down specification and tolerances to the satisfaction of the Engineering-in-charge within fifteen days from signing of agreement failing which the securities of the contractor shall be forfeited. Basing on the inspection of Drum Mix Plant made by the Technical Committee on 28.07.2007 as per Ext.K, it was found to be not to the satisfaction of the Executive Engineer which is mentioned under the heading of general remarks. The learned trial Court also came to conclusion in the impugned judgment that the trial run of machinery by the 1st contractor Arun Kumar Choudhury as per clause 8 of Ext.10 is doubtful. However, the learned trial Court gave an erroneous finding that failing to give a trial run of the equipments for establishing the capacity by the contractor will only result in forfeiture of his 'security deposit' and not 'rescission of contract'. Once there would be forfeiture of security for not giving the trial run of the equipments, it would result in a situation of tender being submitted without security and agreement will also be without security and as such the agreement will lapse in view of clause 3.5.19.

In view of the foregoing discussions and the relevant provision of Para 3.5.30 of O.P.W.D. Code, Vol.I and clause 4 of the conditions of contract (Ext.10), since there was no application for extension of time submitted by the 1st contractor either prior to 31.08.2004 or after that, it is to be held that the contract as per 1st agreement executed with the contractor Arun Kumar Choudhury was not in force when the 2nd agreement was executed on 10.09.2004 vide Ext.21 with the respondent no.4 Abakash Padhi for potholes repair works. Thus, the first point is answered accordingly.

Second Point:

Whether there was any necessity for entering into the 2nd agreement and whether the respondent no.4 executed any work at all or claimed false bill:

9. From a bare reading of the two F2 agreements i.e. Ext.10 and Ext.21, it is apparent that the agreements were for different work and operate in two different spheres. The 1st agreement (Ext.10) with Arun Kumar Choudhury was for periodical renewal from 148 K.M. to 154 K.M. and the 2nd agreement (Ext.21) with the respondent no.4 Abakash Padhy was for pothole repair from 147 K.M. to 171 K.M. The value of the 1st agreement was Rs.36,98,199/- for six kilometers, whereas the 2nd agreement value was for Rs.4,70,170/- for 24 Kms. Thus,

the nature and scope of work in two agreements are different. There is no dispute that the period of execution of the pothole repair work under Ext.21 would have been well within the time period of earlier agreement Ext.10 had the 1st contractor applied for extension of time and an order would have been passed in granting extension. It is also not in dispute that in case of exigencies for any small additional work within the original work in progress, the same has to be executed by the original contractor as per clause 10 of the F2 agreement of the 1st contractor as well as Para 3.5.31 of O.P.W.D. Code, but when the 1st contractor Arun Kumar Choudhury has not at all progressed with his work as per F2 agreement Ext.10 executed on 19.02.2004 and started execution of work only on 01.12.2004 as stated by P.W.9 and on account of rainy season, the potholes repair which was in the nature of flood damage repair work had to be undertaken immediately for maintaining the safety of road for movement, no fault can be found with entering into the contract vide Ext.21 with the respondent no.4 Abakash Padhy on the ground that those two work overlap each other. Had the 1st contractor Arun Kumar Choudhury started the periodical renewal work in time, there might not have been any necessity for entering into contract with the 2nd contractor respondent no.4 Abakash Padhy for pothole repair work. P.W.9 admits in his cross-examination that repairing

of potholes on N.H. is a routine work for maintenance. He further stated that the Executive Engineer is competent to take steps for repair of the potholes in an emergency situation by entering into new agreement with a contractor following the official procedure. He further stated that if the potholes on the road required to be repaired are small in size, the work can be executed manually. In my humble view, there were every necessity for entering into the 2nd agreement (Ext.21) as the 1st contractor had not progressed with his assigned work.

There are materials on record that the respondent no.4 executed the port hole repair work assigned to him under agreement Ext.21 and submitted the first running bill which was passed for Rs.1,50,000/-. Ext.C is the letter dated 11.02.2005 issued by P.W.9 to the Assistant Engineer, N.H. Sub-Division, Balliguda which clearly states that the final bill regarding execution of work under F2 Agreement No.1 of 2004-05 (Ext.21) has not been submitted. P.W.9 further mentioned in the letter that it would be construed that no further work had been executed against the above contract other than the items against which the bills were earlier submitted. Thus, P.W.9 himself indicates in the letter under Ext.C that the respondent no.4 had executed the work as per Ext.21 for which running bill was submitted. According to P.W.9, running bills are prepared taking

into consideration the progress of a particular work and that the payment on running bill is made during the execution of the work and it has nothing to do with the completion of the work. P.W.9 further submits that the first running bill (Ext.24) for the second work was prepared for Rs.2,53,418/- and passed on 14.09.2004 for Rs.1,50,000/- and in M.B. No.1311 at page No.89, the measurement for this work was recorded.

P.W.9 has stated that the Superintending Engineer (P.W.11) had inspected the works along with him on 05.05.2005 and submitted the inspection note Ext.27 which was received by him (P.W.9) on 31.05.2005. P.W.11 referring to his inspection note Ext.27 has stated that the pothole repair work from KM 147/0 to 171/0 of NH 217 was taken up and during his inspection, some patch work was found executed on the National Highway towards the repair. He (P.W.11) further stated that in his inspection report marked as Ext.27, he has observed that the potholes between KM 147/0 to 171/0 excluding the area between 148/0 to 154/0 were found repaired manually using over sized chips for surface dressing. In the cross-examination, P.W.11 has stated that if those 6 Kms. are excluded from 24 Kms., the pothole repair work was undertaken for 18 Kms. only. He further stated that a pothole can be repaired without using WBM and by surface dressing only if the nature of the pothole is small and due

to wear and tear of the BT. He further stated that the record reveals that the pothole repair from 147/0 Km. to 171/0 Km. on NH 217 was a flood damage repair. He further stated that for repairing pothole, machineries are required depending upon the size of damage and it can also be repaired manually. He has further stated that the part bill paid to contractor Abakash Padhi (respondent no.4) for the pothole repair was calculated on the basis of repair through machine though the work was actually executed manually. P.W.9 also admits that in the status report communicated to Asst. Engineer on 17.02.2005, he had instructed him to stop the work by respondent no.4 as on that day. As per Ext.A the respondent no.4 was intimated about the closure of contract. From this, it is apparent that the respondent no.4 continued with the work in respect of 154 Km. to 171 Km. till 17.02.2005. In view of the evidence available on record, I am of the humble view that after execution of the agreement under Ext.21, the respondent no.4 executed the pothole repair work and submitted the first running bill which was passed for Rs.1,50,000/- (one lakh fifty thousand) and it cannot be said that he raised any false bill merely because the pothole repaired work was done manually even though he could have utilized machine as per specification in the tender but since it was the running bill, it cannot be said that no pothole work had been done by the

respondent no.4 and that he was a dummy contractor only on paper and that it was a sham work and that the accused persons prepared false bills and vouchers to misappropriate the Government money. Thus, the second point is answered accordingly.

Third Point:

Whether there was any criminal conspiracy between the accused persons and undue official favour was shown to respondent no.4:

10. It has already been held while discussing the 1st point and 2nd point that the contract as per 1st agreement (Ext.N) executed with the contractor Arun Kumar Choudhury was not in force when the 2nd agreement (Ext.21) was executed with the respondent no.4 Abakash Padhi for pothole repair work and that the nature and scope of work in the two agreements (Ext.10 and Ext.21) are different and there was every necessity for entering into the 2nd agreement (Ext.21) as the 1st contractor had not progressed with his work and that there are materials on record that the respondent no.4 executed the pothole repair work and submitted his first running bill (Ext.24) which was passed for Rs.1,50,000/-.

The basic ingredients of the offence of 'criminal conspiracy' as defined under section 120-A I.P.C. are

- (i) An agreement between two or more persons;
- (ii) The agreement must relate to doing or causing to be done either (a) an illegal act; or (b) an act which is not illegal in itself but is done by illegal means.

The meeting of minds of two or more persons for doing or causing to be done an illegal act or an act by illegal means is the sine qua non of criminal conspiracy. The offence can be proved largely from the inferences drawn from the acts or illegal omission committed by the conspirators in pursuance of a common design in as much as the conspiracy is always hatched in secrecy and it is impossible to adduce direct evidence of the common intention of the conspirators. The entire agreement is to be viewed as a whole and it has to be ascertained as to what in fact the conspirators intended to do or the object they wanted to achieve. The essence of criminal conspiracy is the unlawful combination and ordinarily the offence is complete when the combination is framed. Encouragement and support which co-conspirators give to one another rendering enterprises possible which, if left to individual effort, would have been impossible, furnish the ground for visiting conspirators and abettors with condign punishment. **(Ref:-AIR 2008 SC 2991, Yogesh @ Sachin Jagdish Joshi -v- State of Maharashtra; (1980) 2**

SCC 465, Shivnarayan Laxminarayan Joshi -v- State of Maharashtra, 2013 (3) SCALE 565, Yakub Abdul Razaq Menon -v- State of Maharashtra; AIR 2005 SC 128, K. Hasim -v- State of Tamil Nadu).

Section 120-B of the Indian Penal Code prescribes punishment for criminal conspiracy which is defined under section 120-A of the Indian Penal Code.

In case of **Devender Pal Singh -Vrs.- State National Capital Territory of Delhi reported in (2002) 5 Supreme Court Cases 234**, it is held that the element of a criminal conspiracy consists of (a) an object to be accomplished, (b) a plan or scheme embodying means to accomplish that object, (c) an agreement or understanding between two or more of the accused persons whereby they become definitely committed to co-operate for the accomplishment of the object by the means embodied in the agreement, or by any effectual means, (d) in the jurisdiction where the statute required an overt act. The essence of a criminal conspiracy is the unlawful combination and ordinarily the offence is complete when the combination is framed. From this, it necessarily follows that unless the statute so requires, no overt act need be done in furtherance of the conspiracy, and that the object of the combination need not be accomplished, in order to constitute an indictable offence. Law making conspiracy a crime

is designed to curb immoderate power to do mischief which is gained by a combination of the means. The encouragement and support which co-conspirators give to one another rendering enterprise possible which, if left to individual effort, would have been impossible, furnish the ground for visiting conspirators and abettors with condign punishment. The conspiracy is held to be continued and renewed as to all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design. For an offence punishable under section 120-B of the Indian Penal Code, the prosecution need not necessarily prove that the perpetrators expressly agree to do or cause to be done illegal act; the agreement may be proved by necessary implication. Offence of criminal conspiracy has its foundation in an agreement to commit an offence. A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act by unlawful means.

Since in the factual scenario, the execution of 2nd agreement with the respondent no.4 cannot be said to be an illegal act but was a sheer necessity in the situation of flood damage and there is absence of any material that there was any agreement between the accused persons for doing the pothole repair work by illegal means or for doing an unlawful act by unlawful means rather the respondent no.4 has executed the

pothole repair work entrusted to him in a lawful manner and got a sum of Rs.1,50,000/- towards the first running bill and there is no material also on record that there was any inflated cost or any loss to the Government and specifically in view of the evidence of P.W.11 that the part bill paid to respondent no.4 was calculated on the basis of repair through machine though the work was actually executed manually, I am of the humble view that the learned trial Court has rightly held that the prosecution has failed to bring home the charge under section 120-B of the Indian Penal Code against the accused persons. Thus, the third point is answered accordingly.

Fourth Point:

Whether there was any forgery in respect of documents/records or there was any dishonest cheating to the Government by showing undue official favour to the respondent no.4:

11. The essential ingredients of the offence of "cheating" are that (i) deception of a person either by making a false or misleading representation or by dishonest concealment or by any other act or omission; (ii) fraudulent or dishonest inducement of that person to either deliver any property or to consent to the retention thereof by any person or to intentionally induce that person so deceived to do or omit to do anything which he would

not do or omit if he were not so deceived; and (iii) such act or omission causing or is likely to cause damage or harm to that person in body, mind, reputation or property. To constitute an offence under section 420 of the Indian Penal Code, there should not only be cheating, but as a consequence of such cheating, the accused should have dishonestly induced the person deceived (i) to deliver any property to any person, or (ii) to make, alter or destroy wholly or in part a valuable security (or anything signed or sealed and which is capable of being converted into a valuable security). (Ref:- **Md. Ibrahim -Vrs.- State of Bihar reported in (2009) 8 Supreme Court Cases 751**)

In case of **Inder Mohan Goswami -Vrs.- State of Uttaranchal reported in (2008) 39 Orissa Criminal Reports (SC) 188**, it is held that to hold a person guilty of 'cheating', it is necessary to show that he had a fraudulent or dishonest intention at the time of making the promise. From his mere failure to subsequently keep a promise, one cannot presume that he all along had a culpable intention to break the promise from the beginning.

In case of **Joseph Salvaraj A. -Vrs.- State of Gujarat reported in (2011) 49 Orissa Criminal Reports (SC) 924**, it is held that under section 420 of the Indian Penal Code, it is inbuilt that there has to be a dishonest intention from the very

beginning, which is sine qua non to hold the accused guilty for commission of the said offence.

In case of **Devendra -Vrs.- State of U.P. reported in (2009) 43 Orissa Criminal Reports (SC) 680**, it is held that a misrepresentation from the very beginning is a sine qua non for constitution of an offence of cheating, although in some cases, an intention to cheat may develop at a later stage of formation of the contract.

In case of **Alpic Finance Ltd. -Vrs.- P. Sadasivan reported in A.I.R. 2001 S.C. 1226**, it is held as follows:-

“10. The facts in the present case have to be appreciated in the light of the various decisions of this Court. When somebody suffers injury to his person, property or reputation, he may have remedies both under civil and criminal law.

The injury alleged may form basis of civil claim and may also constitute the ingredients of some crime punishable under criminal law. When there is dispute between the parties arising out of a transaction involving passing of valuable properties between them, the aggrieved person may have right to sue for damages or compensation and at the same time, law permits the victim to proceed against the wrongdoer for having committed an offence of criminal breach of trust or cheating. Here the main offence alleged by the appellant is that respondents committed

the offence under Section 420 I.P.C. and the case of the appellant is that respondents have cheated him and thereby dishonestly induced him to deliver property. To deceive is to induce a man to believe that a thing is true which is false and which the person practicing the deceit knows or believes to be false. It must also be shown that there existed a fraudulent and dishonest intention at the time of commission of the offence. There is no allegation that the respondents made any willful misrepresentation. Even according to the appellant, parties entered into a valid lease agreement and the grievance of the appellant is that the respondents failed to discharge their contractual obligations. In the complaint, there is no allegation that there was fraud or dishonest inducement on the part of the respondents and thereby the respondents parted with the property. It is trite law and common sense that an honest man entering into a contract is deemed to represent that he has the present intention of carrying it out but if, having accepted the pecuniary advantage involved in the transaction, he fails to pay his debt, he does not necessarily evade the debt by deception.

11. Moreover, the appellant has no case that the respondents obtained the article by any fraudulent inducement or by willful misrepresentation. We are told that respondents, though committed default in paying some

installments, have paid substantial amount towards the consideration.

12. Having regard to the facts and circumstances, it is difficult to discern an element of deception in the whole transaction, whereas it is palpably evident that the appellant had an oblique motive of causing harassment to the respondents by seizing the entire articles through magisterial proceedings. We are of the view that the learned judge was perfectly justified in quashing the proceedings and we are disinclined to interfere in such matters."

In case of **Hridaya Ranjan Pd. Verma -Vrs.- State of Bihar reported in A.I.R. 2000 S.C. 2341**, it is held as follows:-

"13. Cheating is defined in Section 415 of the Code as, "Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver 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".

Explanation - A dishonest concealment of facts is a deception within the meaning of this section.

The section requires - (1) Deception of any person.

(2) (a) Fraudulently or dishonestly inducing that person

(i) to deliver any property to any person; or

(ii) to consent that any person shall retain any property; or

(b) intentionally inducing that person 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.

14. On a reading of the section, it is manifest that in the definition there are set forth two separate classes of acts which the person deceived may be induced to do. In the first place he may be induced fraudulently or dishonestly to deliver any property to any person. The second class of acts set forth in the section is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases the inducing must be fraudulent or dishonest. In the second class of acts, the inducing must be intentional but not fraudulent or dishonest.

15. In determining the question, it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused

at the time to inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore it is the intention which is the gist of the offence. To hold a person guilty of cheating, it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise.

16. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed."

The basic ingredients of the offence under section 467 of the Indian Penal Code are that (i) the document in question is forged; (ii) the accused forged it and (iii) the document is one of the kinds enumerated in the said section. Section 468 of the Indian Penal Code applies to those cases where forgery has been committed for the purpose of cheating. If it is proved that the purpose of the offender in committing the 'forgery' is to obtain property dishonestly or if the guilty purpose comes within the definition of 'cheating' as defined under section 415 of the Indian Penal Code, then his act would be punishable under section 468 of

the Indian Penal Code. For both these offences, the very first thing which is required to be proved is that a 'forgery' as defined under sections 463 and 464 of the Indian Penal Code have been committed.

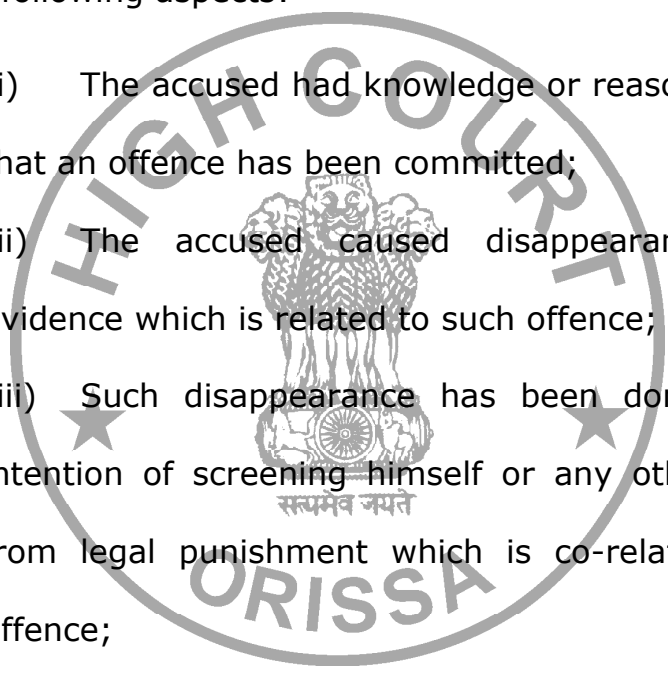
There is absolutely no material that any fraud has been perpetuated in making the document Ext.21. There is no dispute that final bill in respect of the work executed by respondent no.4 had not been prepared and the amount paid to him to the tune of Rs.1,50,000/- (rupees one lakh fifty thousand) was in the nature of first running bill. The evidence on record as already discussed clearly indicates that the pothole repair work was done manually but the bill of respondent no.4 has been calculated on the basis of repair through machine and thus the payment of the running bill cannot be said to be with an inflated rate or it cannot be said that there was any wrongful loss to the Government in making such payment. The prosecution had not adduced any satisfactory evidence that any of the documents like agreement entered into with the respondent no.4 or M.B. No.1311 or the pothole repair estimate are false documents and that the accused persons prepared such documents for the purpose of cheating and therefore, the learned trial Court is quite justified in holding that the prosecution has not substantiated the essential

ingredients of offences under sections 420 and 468 of the Indian Penal Code. Thus, the fourth point is answered accordingly.

Fifth Point:

Whether the accused persons have caused disappearance of M.B. No.1311 with an intention to screen themselves from legal punishment:

12. In order to attract the ingredients of the offence under section 201 of the Indian Penal Code, the prosecution is required to prove the following aspects:-

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- (i) The accused had knowledge or reason to believe that an offence has been committed;
 - (ii) The accused caused disappearance of the evidence which is related to such offence;
 - (iii) Such disappearance has been done with the intention of screening himself or any other offender from legal punishment which is co-related to such offence;
 - (iv) After having knowledge or reason to believe regarding commission of offence, the accused intentionally gave any false information relating to such offence and thereby caused disappearance of evidence.

The Investigating Officer (P.W.12) has stated that during investigation, J.E. Sasikanta Acharya disclosed before him to have received and handed over M.B. No.1311 to the Head Clerk Prakash Chandra Panda but had not received a receipt for the same from Shri Panda. Neither the prosecution has examined J.E. Sasikanta Acharya nor Prakash Chandra Panda.

P.W.9 has stated that a letter was written to Assistant Engineer to ascertain about the M.B. No.1311 and in his letter dated 03.04.2006, the Assistant Engineer intimated that the M.B. was submitted along with the bill in the Office of the Executive Engineer's Head Clerk in-charge Shri P.C. Panda on 15.03.2005. He further stated that after receipt of the reply from the Assistant Engineer, a letter was issued to the Head Clerk in-charge Shri P.C. Panda. He further stated that M.B. No.1311 was in his office on 03.02.2005 and on that day, he was the Executive Engineer of N.H. Division, Berhampur and the M.B. movement registers remain under the custody of the dealing assistant. He further stated that a departmental proceeding was initiated against the Junior Engineer S.K. Acharya for the untraced M.B. and the bills and that J.E. S.K. Acharya was awarded with a punishment in that D.P.

In view of such materials, it cannot be said that merely because M.B. No.1311 was not found, the accused persons

caused its disappearance. The finding of the learned trial Court that disappearance of M.B. No.1311 against the accused persons is not found and the prosecution has failed to substantiate the charge under section 201 of the Indian Penal Code against the accused persons is quite justified and I also agree with the same. Thus, the fifth point is answered accordingly.

13. Coming to the charge under section 13(2) read with section 13(1)(d) of the 1988 Act for which the three appellants were found guilty by the learned trial Court after acquitting all the accused persons of the charges under sections 420, 468, 120-B and 201 of the Indian Penal Code without assigning any reason whatsoever is quite surprising, reflects non-application of mind to the ingredients required to substantiate such charge.

The charge was framed under section 13(2) read with section 13(1)(d) of the 1988 Act on the ground that that all the three appellants-public servants in connivance with each other and also with the respondent no.4 Abakash Padhi by corrupt and illegal means or by otherwise abusing their position as such public servant obtained for themselves pecuniary advantages to the extent of amount of Rs.1,50,000/- (rupees one lakh fifty thousand) by showing undue official favour to the respondent no.4 by showing false execution of pothole repair work.

Since I have already found that there has been execution of pothole repair work by the respondent no.4 for which he was paid Rs.1,50,000/- (rupees one lakh fifty thousand) towards his first running bill, the question of showing of undue official favour to anybody does not arise. Therefore, the conviction of the appellants under section 13(2) read with section 13(1)(d) of the 1988 Act is not sustainable in the eye of law and hereby set aside.

14. Coming to the appeal against acquittal filed by the State of Odisha, law is well settled as held in case of **Babu -Vrs.- State of Uttar Pradesh reported in A.I.R. 1983 Supreme Court 308** that in appeal against acquittal, if two views are possible, the appellate Court should not interfere with the conclusions arrived at by the trial Court unless the conclusions are not possible. If the finding reached by the trial Judge cannot be said to be unreasonable, the appellate Court should not disturb it even if it were possible to reach a different conclusion on the basis of the material on the record because the trial Judge has the advantage of seeing and hearing the witnesses and the initial presumption of innocence in favour of the accused is not weakened by his acquittal. The appellate Court, therefore, should be slow in disturbing the finding of fact of the trial Court and if two views are reasonably possible on the evidence on the record,

it is not expected to interfere simply because it feels that it would have taken a different view if the case had been tried by it.

Thus, an order of acquittal should not be disturbed in appeal under section 378 of Cr.P.C. unless it is perverse or unreasonable. There must exist very strong and compelling reasons in order to interfere with the same.

The right of appeal against acquittal vested in the State Government should be used sparingly and with circumspection and it is to be made only in case of public importance or where there has been a miscarriage of justice of a very grave nature.

In case of **Bannareddy -Vrs.- State of Karnataka reported in (2018) 5 Supreme Court Cases 790**, it is held as follows:-

"10....It is well-settled principle of law that the High Court should not interfere in the well-reasoned order of the trial court which has been arrived at after proper appreciation of the evidence. The High Court should give due regard to the findings and the conclusions reached by the trial court unless strong and compelling reasons exist in the evidence itself which can dislodge the findings itself".

In case of **Ghurey Lal -Vrs.- State of Uttar Pradesh reported in (2008) 10 Supreme Court Cases 450**, it is held as follows:-

75....The trial court has the advantage of watching the demeanour of the witnesses who have given evidence, therefore, the appellate court should be slow to interfere with the decisions of the trial court. An acquittal by the trial court should not be interfered with unless it is totally perverse or wholly unsustainable.”

Thus in a case of appeal against acquittal, although the powers of the High Court to reassess the evidence and reach its own conclusions are as extensive as in an appeal against an order of conviction, yet, as a rule of prudence, proper weight should be given to the views of the Trial Judge as to the credibility of the witnesses, the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at the trial, the right of an accused to the benefit of any doubt and the slowness of an appellate Court in disturbing a finding of fact arrived at by a Trial Judge who had the advantage of seeing the witnesses. Where two reasonable views are possible or two reasonable conclusions can be drawn on the evidence on record, the appellate Court, as a matter of judicial caution should not interfere with the conclusion arrived at by the learned trial Court unless the conclusions are not possible. Even if the appellate Court can review the trial Court’s conclusion both on facts as well as law, but if the grounds of acquittal cannot be entirely and effectively dislodged or demolished and unless there has been flagrant miscarriage of justice by pronouncing the order

of acquittal substantially and compelling reasons are there to interfere with the conclusions arrived at by the trial Court, the findings of acquittal should not be disturbed.

Keeping the ratio laid down by the Hon'ble Supreme Court and the settled position of law, on the basis of careful analysis of evidence on record as made above, I am of the humble view that the view taken for the acquittal of the respondent no.4 of all the charges so also the appellants of the charges under sections 420, 468, 201 and 120-B of the Indian Penal Code is reasonable and plausible and I find no compelling reason to interfere with the conclusions arrived at by the learned trial Court so far as the order of acquittal is concerned.

15. In view of the foregoing discussions, all the three criminal appeals i.e. CRLA No.695 of 2016 filed by appellant Sudarsan Sahani, CRLA No.687 of 2016 filed by appellant Prasanta Kumar Patra and CRLA No.694 of 2016 filed by appellant Saroj Kumar Misra are allowed. The impugned judgment and order of conviction of the three appellants under section 13(2) read with section 13(1)(d) of the 1988 Act and the sentence passed thereunder is hereby set aside and they are acquitted of such charge. The appellants are on bail by virtue of the orders of this Court. They are discharged from liability of their bail bonds. The personal bonds and the surety bonds stand cancelled.

GCRLA No.25 of 2019 filed by the State of Odisha also stands dismissed. The respondent no.4 Abakash Padhy who is on bail by virtue of the order dated 02.08.2019 is discharged from the liability of the bail bonds. The personal bond and the surety bonds stand cancelled.

The trial Court records with a copy of this judgment be sent down to the concerned Court forthwith for information.

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S.K. Sahoo, J.

Odisha High Court, Cuttack
The 18th April 2022/PKSahoo/Pravakar/RKMishra

