

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Before: Hon'ble Justice Sugato Majumdar

CRA 612 of 2012
Nand Kishore Rai & Anr.
Vs.
State (CBI)

For the Appellants	:	Mr. Anand Bhandari, Mr. Urgen Lama, Mr. Panthu Rai, Mr. Mayank Bhandari, Ms. Shalini Shah.
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For the CBI	:	Ms. Chandrayee Alam, Mr. Amajit De.
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Hearing concluded on	:	25.04.2023
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Judgment on	:	11.05.2023
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Sugato Majumdar, J.:-

The instant appeal is directed against Judgment dated 30.08.2012 and Order of conviction dated 31.08.2012 passed by the Judge Special (CBI) Court, Siliguri, Darjeeling in Special C.B.I Case No. 31 of 2012 whereby the Appellants were convicted under Section 420/468/120B of the Indian Penal Code and read with Section 13 (1) (d) and 13 (2) of Prevention of Corruption Act, 1988.

The Spices Board, Ministry of Commerce, Government of India, introduced a scheme in the State of Sikkim as well as in the district of Darjeeling, West Bengal for providing financial assistance for construction of cardamom curing house for individual cardamom growers (200 kgs capacity). According to this scheme planters who were willing to avail of subsidy under the scheme had to construct curing house in accordance with the standard approved by the Cardamom Board. The later was to provide financial assistance in the form of subsidy for construction of such curing house. Applications for subsidy were to be submitted to the concerned Assistant Director under whose jurisdiction the plantation was situated. The Assistant Director after conducting spot inspection, may forward the application to the Deputy Director with his own recommendations and remarks. The Deputy Director may also conduct spot inspections, if necessary and accord sanction in eligible cases with the concurrence of the Director.

The Appellant No. 1 was Extension Assistance in the office of the Assistant Director, Spices Board, Kalimpong. He was in charge of the said office from 19.06.1990 to 13.09.1990 and also from 10.12.1990 to 25.02.1991. At the relevant point of time the Appellant No. 2 was in the same office as Extension Assistant.

The genesis of this case is the written complaint dated 12.08.1993 lodged by N. Dasgupta being Inspector of Police, CBI/Siliguri Sub-Unit. It was alleged in the written complaint that the Appellants conspired together between 19.06.1990 to 13.09.1990 as well as from 10.12.1990 onwards and dishonestly cheated the department to the tune of Rs. 12,000/- which was property of the

department. The Appellants conspired together to show that the amount of Rs. 12,000/- was disbursed to one Gaw Prasad Rai, of Surak Basti, Todey, Kalimpong – III by cheque no. 814607 dated 16.10.1990 as subsidy for construction of curing house for cardamom plantation. In order to achieve this end, the Appellant No. 1 issued false certificate dated 12.09.1990 and the Appellant No. 2 issued false inspection report dated 12.09.1990. The signature of Gaw Prasad Rai was forged and the amount was misappropriated.

The written complaint was registered as R.C. Case No. 42 of 1993 – Calcutta dated 12.08.1993 against the Appellants. Mr. R. Debnath was entrusted with investigating into the case. In course of investigation, he examined witnesses and recorded their statements, seized relevant documents, obtained specimen signatures and handwriting, got the signatures and handwriting examined by Government examiner of questioned documents, obtained sanction order for prosecution and finally submitted charge sheet.

Charges were framed under Section 120B/420/468 of the Indian Penal Code and under Section 13 (1) (d) and 13 (2) of the Prevention of Corruption Act, 1988 charges were read over and explained to the Appellants to which they pleaded not guilty. Thereafter the trial followed.

The prosecution examined thirteen witnesses and produced various documents marked as Exhibit 1 to 27 respectively.

The defense of the Appellants as appears from the trend of cross-examination and from reply to the examination under Section 313 of the Code of Criminal Procedure is denial of allegations and plea of false implication.

The Trial Court in terms of the impugned Judgment convicted the Appellants and imposed sentence subsequently, as stated above.

On being aggrieved and dissatisfied the instant is preferred.

On behalf of the Appellants, it is argued by Mr. Anand Bhandari that evidence-on-record indicates that Appellant No. 2 produced an Inspection Report and Appellant No. 1 relied on the Inspection Report to issue certificate. There is no evidence on record to indicate or establish that the Appellant No. 1 had nurtured any wrongful intention as alleged. There is no evidence of conspiracy against Appellant No. 1. Even if all the evidences against Appellant No. 1 are assumed to be proved, as submitted by Mr. Bhandari, at best the same may constitute a dereliction of duty but not an offence. In nutshell, alleged offences are not proved against the Appellants for which they should be acquitted.

Secondly, it is argued by Mr. Bhandari that no *iota* of evidence indicates that the Appellant No. 1 in any way received or misappropriated government money, as alleged. Evidences against the Appellant No. 2 are ambiguous and inadmissible. The Appellant No. 1 is in no way connected with encashment of cheque as alleged. Therefore, charges are not proved against the Appellant No. 1 for which he should be acquitted.

Thirdly, it is argued that one Gaw Prasad Rai is stated to be a beneficiary of the scheme whose name surfaced during investigation. But he is not made a charge sheeted witnesses although he is a star and crucial witness in this case. In absence of his evidence, it cannot be concluded that he had not made any application, that he had not received any subsidy and that he had not

constructed any curing house. According to Mr. Bhandari the prosecution failed to adduce best evidence for which benefit of doubt should go in favour of the Appellants.

Fourthly, according to Mr. Bhandari the prosecution evidence is rife with contradictions and discrepancies. The Trial Court committed an error in relying on such contradictory and discrepant evidences in convicting and sentencing the Appellants.

Fifthly, it is further submitted that the Trial Court failed to apply the correct law in the given facts and circumstances of the case. According to Mr. Bhandari the impugned judgment and the order of sentence should be set aside and the Appellants should be acquitted.

Sixthly, another submission made by Mr. Bhandari is that in course of investigation rules of the Spices Board was not seized by the Investigating Officer. This vitiated the whole investigation.

Per contra, Ms. Alam appearing for the C.B.I argued that there can hardly be any direct evidence of conspiracy. In most of the cases the factum of conspiracy is proved by attenuating circumstances. In this case, the Inspection Report was prepared by the Appellant No. 2 on 12.09.1990. The certificate was issued by the Appellant No. 1 on the very same day without any inspection as he was required under the existing rules. His explanation, which he stated in course of examination under Section 313, is that he could not remember whether he issued the certificate. This failure to explain itself is a sufficient proof of conspiracy and presence of *mens rea*. It is very unlikely that an innocent person

shall have no explanation for an act and deed when he is indicted with criminal charges for such deed and act. So far as the Appellant No. 2 is concerned, according to Ms. Alam, substantial and overwhelming evidence clearly and unequivocally bring home the charges against the Appellant No. 2. When confronted with incriminating evidences in course of examination under Section 313 of the Code of Criminal Procedure, the Appellant No. 2 failed to explain any such act. Therefore, the Trial Court committed no error, according to Ms. Alam, in convicting the Appellants for the charges levelled.

I have heard rival submissions.

One part of the allegation is under 120B of the Indian Penal Code read with Section 13(1) (d) and 13 (2) of the Prevention of Corruption Act 1988, as was existing at the material point of time. The other part of allegation is under Section 420/468/120B of the Indian Penal Code. Section 13(1) (d) was substituted by Act 16 of 2018. Before substitution the section stood as follow:

“(d) 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 for 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; or..”*

Section 463 of the Indian Penal Code defines forgery as:

“463. Forgery.— Whoever makes any false documents or false electronic record or part of a document or electronic record, with intent to cause damage or injury], to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery.”

Section 464 of the Indian Penal Code clarifies, among others, that a person is said to make a false document who dishonestly or fraudulently makes, signs, seals or executes a document or part of a document. In ***Mohd. Ibrahim v. State of Bihar***, [(2009) 8 SCC 751], explaining the scope of Section 464, the Supreme Court of India observed:

“14. An analysis of Section 464 of the Penal Code shows that it divides false documents into three categories:

1. The first is where a person dishonestly or fraudulently makes or executes a document with the intention of causing it to be believed that such document was made or executed by some other person, or by the authority of some other person, by whom or by whose authority he knows it was not made or executed.
2. The second is where a person dishonestly or fraudulently, by cancellation or otherwise, alters a document in any material part, without lawful authority, after it has been made or executed by either himself or any other person.

3. The third is where a person dishonestly or fraudulently causes any person to sign, execute or alter a document knowing that such person could not by reason of (a) unsoundness of mind; or (b) intoxication; or (c) deception practised upon him, know the contents of the document or the nature of the alteration.

In short, a person is said to have made a “false document”, if (i) he made or executed a document claiming to be someone else or authorised by someone else; or (ii) he altered or tampered a document; or (iii) he obtained a document by practising deception, or from a person not in control of his senses.”

The allegations are the Appellants conspired together, in abuse of their position and authority, to induce the authority to part with government money for their pecuniary advantage. In order to achieve this end, they conspired to make false application in name of one intended beneficiary of the scheme of the Spices Board, submitted inspection report containing false statement, issued certificate on the basis of such false inspection report and thus induced the government authority to hand over bearer cheque to the Appellant No.2. The later forged signature on that cheque, encashed the amount and misappropriated. All such alleged deeds come within ambits of the offences charged, according to the prosecution.

Evidence of handwriting expert, specimen signature of Gaw Prasad Rai established clearly that the application does not bear the signature of Gaw Prasad Rai. It is also in allegation that there was no construction of such curing house by Gaw Prasad Rai since subsidy did not reach him and was misappropriated by the Appellants. P.W. 1 stated in evidence that after issuing

of cheque he went to visit the spot to verify whether any construction was made or not. He submitted his report to the Joint Director. P.W. 10, Umesh Kumar stated in evidence that he along with Mr. Acharya (P.W.2), the Appellant No.2, Mr. Shekharappa (P.W.1) and others went to the residence of Gaw Prasad Rai at Kalimpong on 12.09.1990 to verify whether curing house was constructed or not by him. A half constructed curing house with mud and stone wall was found. But Gaw Prasad Rai could not produce any plan. This is corroborated by P.W.13 Rajeev Debnath who also accompanied him. Cross-examination could not contradict their statements.

It is argued by Mr. Bhandari that the prosecution should adduce evidence of Gaw Prasad Rai absence of whose evidence is fatal to the prosecution case. I cannot agree with this argument. In their unshaken testimony, the prosecution witnesses stated that on visit they found half constructed curing house in the residency of Gaw Prasad Rai with mud and stone. But plan could not be produced. Therefore, it is not proved that even if any construction was made, the same was done in terms of the scheme for which subsidy could have been sanctioned. When prosecution adduced evidence of witnesses who deposed on the basis of their personal knowledge it is duty of the defense to disprove such established fact. They should call Gaw Prasad Rai as defense witness so that truth might come to the knowledge of the Court for rebuttal of the prosecution case. But no such attempts were made. So, it is established that there was no curing house constructed by Gaw Prasad Rai pursuant to and under the scheme. When confronted with the question that P.W.1, P.W.2, P.W.10 along with both the Appellants visited the residence of Gaw Prasad Rai and a half-constructed

house was found, his answer was that he was not present. Corroborated testimony of witnesses establish otherwise. In fact he failed to explain that. Interestingly, not a single word was uttered by the Appellant No.2 stating that he did not issue false certificate or that there was construction of house in terms of the scheme by the said Gaw Prasad Rai.

Documentary evidences adduced before the Trial Court were the application made by Gaw Prasad Rai dated 31.07.1992 addressed to the Assistant Director, Spices Board, Inspection Report dated 12.09.1990 signed by Appellant No. 2 (Ext.4) certificate dated 12.09.1990 issued by Appellant No. 1 (Ext.5), bearer cheque dated 16.10.1990 of Rs. 12,000/-, along with specimen signature and report on specimen signatures submitted by Government examiner of questioned documents. Oral testimony of P.W.7 (Government examiner of questioned document), Ext.18 and 19 (opinion of P.W.7 and reason) along with other exhibits which are specimen signatures and handwriting of Gaw Prasad Rai and Appellant No.2, the impugned cheque (Ext.6) which was encashed by P.W.11 Albert Singh, testimony of P.W.6, K.B. Soren, the passing officer at counter of the bank.

Evidence of handwriting expert (P.W.7) is that the application dated 31.08.1990 (Ext.7) does not bear the signature of Gaw Prasad Rai. On the basis of that application Inspection Report was prepared by the Appellant No.2, execution of which he denied, but execution was established by evidence and ultimately the Appellant No.2 misappropriated government money for his benefit. P.W.1 stated in his evidence that he handed over the cheque to P.W.11, Albert Singh. Albert Singh stated in his testimony that he encashed the cheque

and handed over the withdrawn amount of Rs. 12,000/- to Appellant No.2. This evidence was not shaken in cross examination. The Appellant No.2, in course of examination under Section 313 of the Code of Criminal Procedure failed to explain what he did with that amount. Rather he denied that statement when that incriminatory evidence was put before him in course of examination under Section 313 of the Code of Criminal Procedure.

Evidences, so adduced by the prosecution clearly, unequivocally and beyond reasonable doubt establish the allegations against the Appellant No.2. If prosecution had failed to call Gaw Prasad Rai as witness, the Appellants could call him as defense witness to disprove the allegations. He could have clarified whether the allegations are true or false. They failed to do that. Failure on the part of prosecution to examine Gaw Prasad Rai is not fatal for the prosecution case. I disagree with the submission of Mr. Bhandari. The Trial Court correctly came to a conclusion of proper appreciation of evidence that the Appellant No. 2 is the guilty of offence charged against him. Therefore, I am not inclined to interfere with finding of the Trial Court so far as the Appellant No. 2 is concerned.

Creation of a document based on falsely or non-existent facts and creation of a false document are different incidents. In order to constitute forgery, the alleged act must come within the ambit of Section 463 and 464 of the Indian Penal Code. Essential ingredients of the offences are discussed above. The alleged document should not only be a false document as defined in Section 464 of the Indian Penal Code, but must also come within ambit of Section 463 of the Code. The Appellant No.1 signed the certificate in his own name; it is not of a

kind as enumerated in Section 464 of the Code. It may be based on false premises. The facts on the basis of which the document was made may be false. But there is no proof that the certificate (Ext.5) was executed by any person other than the Appellant No.1 or that the same was executed in the name of some other or dead person, whatever wrong intention he might have. That may be relevant for consideration of other offence but itself does not attract the offences of Section 463 or Section 464 or Section 420 of the Code or conspiracy to commit such acts. Therefore, I am of the view that issue of the certificate by Appellant No.1 does not attract the offences of forgery or cheating. Therefore, conviction under Section 420/467/120B against the Appellant No.1 is liable to be set aside.

It is argued by Ms. Alam that there are strong evidences on record to establish that the Appellants conspired together to commit offences under Section 13(1) (d) and Section 13 (2) of the Prevention of Corruption Act. The Appellant No. 2 in this case managed to make an application in the name of Gaw Prasad Rai and filed an Inspection Report stating falsely therein that curing house was constructed by Gaw Prasad Rai with definite intention to obtain pecuniary gain for him which subsequent acts established. When the Appellant No.2 submitted the Inspection Report, dated 12.09.1990, the Appellant No. 1, issued certificate on the very same day. The conduct clearly indicates that Appellant No. 1 had no intention to verify the report visiting the spot. Otherwise on the self-same day he would not have issued such certificate.

Direct evidence of criminal conspiracy may not be available in all circumstances in most cases proof of conspiracy is largely in confidential though

the inference must be derived from the solid facts. Surrounding circumstances antecedents and subsequent conduct are some factors which were constituted material (**Noor Mohammad Mohd. Yusuf Momim v. State of Maharashtra**, AIR 1971 SC 855; (1970) 1 SCC 696; 1970 SCC (Cri) 274; 1971 CrLJ 793 and **V. C. Sukla V. State (Delhi Admn.)**, AIR 1980 SC 1382; (1980) 2 SCC 665; 1980 SCC (Cri) 561; 1980 CrLJ 965.

“A conspiracy from its very nature is generally hatched in secret. It is, therefore, extremely rare that direct evidence in proof of conspiracy can be forthcoming from wholly disinterested quarters or from utter strangers. But, like other offences, criminal conspiracy can be proved by circumstantial evidence. Indeed, in most cases proof of conspiracy is largely inferential though the inference must be founded on solid facts. Surrounding circumstances and antecedent and subsequent conduct, among other factors, constitute relevant material. In fact because of the difficulties in having direct evidence of criminal conspiracy, once reasonable ground is shown for believing that two or more persons have conspired to commit an offence then anything done by anyone of them in reference to their common intention after the same is entertained becomes, according to the law of evidence, relevant for proving both conspiracy and the offences committed pursuant thereto.” [**Noor Mohammad Mohd. Yusuf Momim v. State of Maharashtra**, AIR 1971 SC 855; (1970) 1 SCC 696]

The act of Appellant No. 1 to issue certificate on the same day with overactive promptness indicates that he had made no effort to verify the

Inspection Report. Interestingly he denied that he prepared the certificate (Ext.4) and denied execution although P.W.1 identified signature of Appellant No.1 on the certificate. Conduct of the Appellant No.1 does not indicate mere dereliction of duty but something more, a design to carry out an agreed plan to obtain pecuniary benefit by either himself or some other person, here the Appellant No.2. I disagree with the argument of Mr. Bhandari that it is mere dereliction of duty. It might be that Appellant No. 1 had no knowledge or did not conspire with Appellant No. 2 to commit the offence of forgery. No evidence is there that he shared the sum of money misappropriated by way of forgery by Appellant No. 2. But it can be concluded that there is a conspiracy between Appellant No. 1 and Appellant No. 2 to commit offences under Section 13 (1) (d) and 13 (2) of Prevention of Corruption Act, 1988. Although there is no evidence that the Appellant No.2 misappropriated or converted to his own use dishonestly or fraudulently the money obtained by encashing the cheque in questioned, he allowed the Appellant No. 2 to do the same. To this extent it is proved that he conspires with Appellant No. 2 to commit offence under Section 13 (1) (d) and 13 (2) of Prevention of Corruption Act, 1988.

In nutshell, the appeal is partly allowed to the extent that conviction and sentence under Section 420/468/120B of the Indian Penal Code stands set aside against the Appellant No.1. Judgment of conviction under Section 13(1) (d) and Section 13(2) of Prevention of Corruption Act, 1988 stands upheld against the Appellant No.1. Terms of imprisonment against the Appellant No. 1 is reduced to three years considering long pendency of this appeal and considering the punishment provided under Section 13(1) (d) and 13 (2) of Prevention of

Corruption Act, 1988 as it stood at the time of passing of the impugned judgment. Order of sentence so far as fine is concerned against the Appellant No. 1 stands unaltered.

The Judgment of conviction remains unaltered against the Appellant No. 2. Order of sentence, so far as terms of imprisonment is concerned, is modified and reduced to four years considering long pendency of the appeal.

The Appellants shall surrender before the trial court to serve the rest of the sentence, if unserved.

Accordingly, the instant appeal stands disposed of.

(Sugato Majumdar, J.)