
(2021) 03 KL CK 0060

High Court Of Kerala

Case No: Criminal Revision Petition No. 8635 Of 2018, 55, 56, 57, 58, 59, 370 Of 2019, 674, 675 Of 2020

Savitha Dutt And Ors

APPELLANT

Vs

State Of Kerala And
Ors

RESPONDENT

Date of Decision: March 5, 2021

Acts Referred:

- Code Of Criminal Procedure, 1973 - Section 227, 245(1), 239, 397, 401, 482
- Prevention Of Corruption Act, 1988 - Section 13(1)(c), 13(1)(d), 13(2)
- Indian Penal Code, 1860 - Section 120(A), 120(B), 218, 407, 468, 471, 477(A)

Citation: (2021) 03 KL CK 0060

Hon'ble Judges: R. Narayana Pisharadi, J

Bench: Single Bench

Advocate: K Gopalakrishna Kurup, Anuroopa Jayadevan, A Rajesh, T.G. Rajendran, T.R. Tarin, E. Rafeek, Gokul Das V.V.H, Nishil.P.S, S. Rajeev, K.K. Dheerendrakrishnan, V. Vinay, D. Feroze, K. Anand

Final Decision: Allowed

Judgement

1. The orders passed by the Enquiry Commissioner and Special Judge, Kottayam in the applications for discharge filed by the accused in the case

C.C.No.5/2014 are under challenge in these revision petitions filed under Section 397 read with 401 of the Code of Criminal Procedure, 1973 (for

short 'the Code') and the Criminal Miscellaneous Case filed under Section 482 of the Code.

2. There are altogether eleven accused in the case. Accused No.1 was the Executive Engineer, Public Works Department (PWD), Roads Division,

Alappuzha during the period from 02.12.2002 to 31.05.2003. Accused No.2 was the contractor engaged by the PWD for conveyance of packed

bitumen from the Kochin Refineries Limited (KRL). Accused No.3 was the Assistant Engineer of the PWD Section, Alappuzha during the period

from November 1999 to October 2004. Accused No.4 was the Assistant Engineer of the PWD Section, Cherthala during the period from 03.06.2002

to 31.01.2005. Accused No.5 was the Executive Engineer, PWD Roads Division, Alappuzha during the period from 27.06.2003 to 31.08.2005.

Accused No.6 was the authorised agent of Accused No.2. Accused No.7 was the Divisional Accountant, PWD Roads Division, Alappuzha during the

period from 24.09.2001 to 31.05.2005. Accused No.8 was the Assistant Executive Engineer (Technical Assistant), PWD Roads Division, Alappuzha

during the period from 14.07.2003 to 30.09.2006. Accused No.9 was the Assistant Engineer (Works), PWD Roads Division, Alappuzha during the

period from 17.04.2000 to 27.07.2006. Accused No.10 was the Junior Superintendent, PWD Roads Division, Alappuzha during the period from

03.07.2003 to 18.01.2007. Accused No. 11 was the Clerk in the Office of the PWD Roads Division, Alappuzha during the period from 02.06.2003 to

10.09.2009.

3. The summary of the allegations against the accused, as stated in the charge-sheet filed by the Vigilance and Anti-Corruption Bureau (VACB) in

the trial court, reads as follows:

“The accused A1 while working as Executive Engineer, Public Works Department, Roads Division, Alappuzha during the period from

02.12.2002 to 31.05.2003 and as such being public servant, abused his official position and entered into criminal conspiracy with A2 and

A6, the conveyance contractor of packed bitumen and his authorized agent respectively for the period 2003-04 and in furtherance of the

criminal conspiracy, five loads of packed bitumen vide invoice no.303057 dated 12.05.2003, 304050 dated 23.05.2003, 304228 dated

26.05.2003, 304674 dated 30.05.2003 and 306783 dated 26.06.2003 taken delivery from KRL, on behalf of Executive Engineer, Public

Works Department Division, Alappuzha was dishonestly and fraudulently misappropriated wholly causing a loss of Rs.6,27,265.30/- to the

Government and corresponding gain to the accused by illegal and corrupt means without any public interest. A5 who succeeded A1 as the

EE, PWD Division, Alappuzha during the period 27.06.2003 to 31.08.2005 later on with malafide intention of obtaining pecuniary

advantage to the said accused A2 and A6 conspired with A3 and A4 who worked as AE of the PWD Section, Alappuzha during the period

11/99 to 10/04 and AE, PWD Section, Cherthala during the period 03.06.2002 to 31.05.2005 respectively and also with A7 who worked as

Divisional Accountant, Public Works Department, Roads Division, Alappuzha during the period from 24.09.01 to 31.05.05, A8 who worked

as Assistant Executive Engineer (Technical Assistant), Public Works Department Roads Division, Alappuzha during 14.07.2003 to

30.09.2006, A9 who worked as Assistant Engineer (works), Public Works Department Roads Division, Alappuzha during the period from

17.04.2000 to 27.07.2006, A10 who worked as the Junior Superintendent, Public Works Department Roads Division, Alappuzha during the

period from 03.07.2003 to 18.01.2007 and A11 who worked as the Clerk in the PWD Roads Division, Alappuzha during 02.06.2003 to

10.09.2009 and in furtherance of the said conspiracy hushed up the matter by delivering two loads of packed bitumen each to Pattanakkad

and Cherthala PWD Sections vide USR dated 03.11.2003. Thereafter the said A3 and A4 forged and falsified the documents such as the

stock register, invoices etc. and used them as genuine so as to make it appear that the bitumen loads with invoices mentioned were delivered

directly to the concerned sections and A7 to A11 and A5 admitted all the invoices in respect of the above mentioned misappropriated loads

of packed bitumen including the falsified duplicate for transporter in respect of invoice no. 303057 dated 12.05.2013 and as such the said

A9 recorded all the invoices in the M book and prepared bill of Rs.1.39.925.25/- in respect of the conveyance of packed bitumen, the said

A8 checked the recorded quantity and the said A11. A10 and A7 audited the bill and the said A5 approved the bill and thereafter cheques

for Rs.1,02,293/- & Rs.33,379/- respectively were dishonestly and fraudulently released to the said A2 and the security deposit of

Rs.17,500/- was also dishonestly and fraudulently released to the said A2 and thereby caused the above said loss to the Government by

illegal and corrupt means without any public interest and thus committed offences punishable u/s 13(2) r/w 13(1)(c) & (d) of the PC Act,

1988 and Sec.218, 407,468,471,477(A) and 120(B) of IPC.

4. Accused Nos.1,2,5 and 6 to 11 filed applications for discharge before the trial court under Section 239 of the Code. The trial court allowed the

applications filed by Accused Nos. 1 and 5 and discharged them and dismissed the applications filed by the other accused.

5. The revision petition, Crl.R.P.No.55/2019 is filed by Accused No.7, Crl.R.P.No.56/2019 by Accused No.9, Crl.R.P.No. 57/2019 by Accused

No.10, Crl.R.P No.58/2019 by Accused No.11, Crl.R.P.No.59/2019 by Accused No.8 and Crl.R.P.No.370/2019 by Accused No.6, challenging the

orders passed by the trial court dismissing the application for discharge filed by them. The revision petitions, Crl.R.P. Nos. 674/2020 and 675/2020 are

filed by the State challenging the orders passed by the trial court allowing the applications for discharge filed by Accused 1 and 5. Crl.M.C

No.8635/2018 is filed by Accused No.2 challenging the order passed by the trial court dismissing the application for discharge filed by him.

6. Heard the learned counsel for the accused who have filed the petitions and also the learned Public Prosecutor.

7. The principles with regard to framing of charge and discharge are well settled. At the stage of considering an application for discharge, the court

must proceed on the assumption that the material which has been brought on record by the prosecution is true and evaluate the material in order to

determine whether the facts emerging from the material, taken on their face value, disclose the existence of the ingredients necessary to constitute the

offences alleged against the accused (See State v. Hiremath : AIR 2019 SC 2377). The court has the power to sift and weigh the evidence for the

limited purpose of finding out whether or not a prima facie case against the accused has been made out. At the same time, the court shall not conduct

a roving enquiry into the pros and cons of the matter and weigh the materials as if it is conducting a trial. The probative value of the materials

produced by the prosecution cannot be gone into at this stage. If two views are possible and one of them gives rise to suspicion only, as distinguished

from grave suspicion, the court is empowered to discharge the accused (See State v. S.Selvi : AIR 2018 SC 81).

8. One thing more needs mention here. Under Section 227 of the Code, the Court is required to discharge the accused if it “considers that there is

not sufficient ground for proceeding against the accused”. However, discharge under Section 239 of the Code can be ordered when “the

Magistrate considers the charge against the accused to be groundless”. The power to discharge under Section 245(1) of the Code can be exercised

when, “the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted would

warrant his conviction”. Notwithstanding the difference in the language employed in these provisions, whichever provision is applicable, the court is

required at this stage to see that there is a prima facie case for proceeding against the accused (See Tarun Jit Tejpal v. State of Goa : 2019 SCC

OnLine SC 1053).

9. The offences alleged against the accused in this case are punishable under Sections 13(1)(c) and 13(1)(d) read with 13(2) of the Prevention of

Corruption Act, 1988 (for short 'the PC Act') and also under Sections 218, 407, 468, 471, 477A and 120B I.P.C.

10. Section 13(1)(c) of the PC Act (as unamended) provides that, a public servant is said to commit the offence of misconduct, if he dishonestly or

fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any

other person to do so. Entrustment of property or control over a property is a necessary ingredient of the offence under Section 13(1)(c) of the PC

Act.

11. Section 13(1)(d) of the PC Act (as unamended) provides that, a public servant is said to commit the offence of criminal misconduct, if he,-- (i) by

corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or (ii) by abusing his position as a

public servant, obtains for himself or 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.

12. Insofar as Section 13(1)(d) of the PC Act is concerned, its essential ingredients are: (i) that the accused should have been a public servant; (ii) that

he should have used corrupt or illegal means or otherwise abused his position as such public servant and (iii) that he should have obtained a valuable

thing or pecuniary advantage for himself or for any other person.

13. The essential ingredients of the offence of criminal conspiracy, which is defined under Section 120A IPC and made punishable under Section

120B IPC, 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 which is done by illegal means. It is, therefore, plain that 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 sine qua non of criminal conspiracy. It is extremely difficult to adduce direct

evidence to prove conspiracy. Existence of conspiracy and its objective can be inferred from the surrounding circumstances and the conduct of the

accused. In some cases, indulgence in the illegal act or legal act by illegal means may be inferred from the knowledge itself.

14. As regards the other offences alleged against the accused under the I.P.C, reference shall be made at the appropriate stage.

15. Before considering the merits of the cases, it would be advantageous to refer to the procedure regarding the supply of bitumen in the PWD.

16. The statements of the witnesses Vamadevan (CW3), Rajitha (CW4) and Shukkoor (CW5), who were working as Accountant, Divisional

Accountant and Executive Engineer in the PWD at the time of the investigation of the case, reveal that the following procedure was in existence in

the PWD Roads Division, Alappuzha regarding purchase, conveyance and supply of bitumen. The quantity of bitumen to be purchased in a year would

be decided and intimated by the Chief Engineer. Thereafter, the bitumen would be purchased from the Kerala Refineries Limited (KRL). The

Executive Engineer would give the indents for purchase of bitumen to the KRL, either directly or through the conveyance contractor. The indents so

given would contain the signature of the contractor which would be attested by the Executive Engineer. The bitumen would be collected from the

KRL by the conveyance contractor engaged by the PWD as per the indents and he would deliver it at the Division Store at Alappuzha, which is under

the control of the Assistant Engineer of PWD Roads Section, Alappuzha. When the bitumen is supplied, the KRL would give invoice in triplicate. The

original of the invoice is for the buyer. One copy of the invoice is for the transporter. The original and the third copy of the invoice would be given at

the Division Office along with the bitumen by the conveyance contractor. When the bitumen reaches the Division Store, it would be received by the

Assistant Engineer after verifying the quantity as per the original invoice and necessary entries would be made in the stock (account) register there.

The copy of the invoice for the transporter would be acknowledged by the Assistant Engineer and given to the transporter. The Assistant Engineer

should certify with date on the back of the original invoice regarding the quantity of bitumen received. The original invoices would be submitted by the

Assistant Engineer to the Division Office each month along with the bitumen account. The bitumen account received from the KRL and the Division

Store would be cross-checked and verified in the Division Office. When the funds are available, as per the demand made by the conveyance

contractor, the Assistant Engineer (Works) would verify the invoices produced by the contractor and the invoices received from the store and prepare

the bill for payment for conveyance. The Assistant Executive Engineer (Technical Assistant) of the Division would then check measure and the audit

clerk would verify the bill and with the audit report, the bill would be submitted to the Junior Superintendent who would verify it and submit it to the

Divisional Accountant. Thereafter, the bill shall be placed before the Executive Engineer with the recommendation of the Divisional Accountant and

the Executive Engineer would pass the bill and payment would be effected to the conveyance contractor.

17. Now, the case against each of the accused, who is before this Court as petitioner or respondent, shall be examined separately.

Accused D.Jayaprakash (A1), Executive Engineer.

18. Accused No.1 was the Executive Engineer of the PWD Roads Division, Alappuzha for the period from 02.12.2002 to 31.05.2003.

19. The application for discharge filed by Accused No.1 was allowed by the trial court as per the order dated 03.08.2018 and the State has challenged that order.

20. In the aforesaid order discharging Accused No.1, the trial court has stated as follows:

“Admittedly, the petitioner had worked as Executive Engineer, PWD Roads Division, Alappuzha for a total period of six months i.e., from

02.12.2002 to 31.05.2003 and he had issued indent to the 6th accused, the authorized agent of the conveyance contractor (accused No.2).

Prosecution states that on the basis of the said indent the 2nd accused had taken delivery of five loads of packed bitumen vide invoice

Nos.303057 dated 12.05.2003, 304050 dated 23.05.2003, 304228 dated 26.05.2003, 304674 dated 30.05.2003 and 306783 dated

30.06.2003 from Kochin Refineries Limited and they were misappropriated in pursuant to a criminal conspiracy of the 1st accused, 2nd

accused and 6th accused. It is true that these five loads of bitumen had not been brought to the Departmental store at Alappuzha as per the

agreement executed between the petitioner and the 2nd accused. Admittedly, the petitioner had retired from service on 30.05.2003 i.e.,

immediately after the issuance of indents to the 6th accused for collecting five loads of bitumen. The prosecution records do not show that

the petitioner had knowledge regarding the fact that these five loads of bitumen had not been brought to the PWD store at Alappuzha.

These being the facts, the petitioner cannot be made liable for the offences alleged against him unless materials are produced or

circumstances are brought out to show that there was a criminal conspiracy between the petitioner and the other accused for

misappropriating the bitumen worth of Rs.6,27,265.30/-. There is no material or circumstances to show that the persons who maintain the

records in the PWD store at Alappuzha, had informed the petitioner regarding the above aspect before his retirement or thereafter. These

being the facts and circumstances, the mere statements that there was criminal conspiracy the petitioner and others misappropriated five

loads of bitumen worth of Rs.6,27,265.30/- cannot be accepted. It is brought out from the prosecution records that the other accused

viz. accused Nos.3 to 11 hushed up the matter by delivering two loads of bitumen each to Pattanakkad and Cherthala stores on 03.11.2003

and made forged records to show that all the five loads of bitumen as per the aforesaid invoices had been delivered and thereafter bills for

the conveyance charge was prepared and paid to the 2nd accused. The above said transactions are seen made long after the retirement of

the petitioner. All the above said facts and circumstances would show that there are no materials connecting the petitioner with the

aforesaid offences including criminal conspiracy. Apart from statements that there was criminal conspiracy between the petitioner and other

accused no materials are produced or circumstances are brought out to substantiate the same.

21. In the light of the aforesaid reasons given by the trial court for discharging Accused No.1, learned Public Prosecutor was called upon by this Court

to point out the materials relied upon by the prosecution to prove the offences alleged against Accused No.1.

22. Learned Public Prosecutor made the following submissions in this regard. The contract for collection and supply of bitumen from KRL to the

PWD was awarded to Accused No.2. Then, as per letter dated 12.05.2003, Accused No.2 had given intimation to the Executive Engineer that he had

authorized Accused No.6, his representative, to collect the indents on his behalf. Thereafter, Accused No.1 sent a letter dated 12.05.2003 to the KRL

stating that, supply of packed bitumen may be made through Accused No.6, who is the authorized agent of Accused No.2, with effect from

13.05.2003. Learned Public Prosecutor would submit that Accused No.2 had authorized Accused No.6 only to collect the indents from the Executive

Engineer. Accused No.2 had not authorized Accused No.6 to take delivery of bitumen from KRL and to supply it to the PWD. But, Accused No.1

informed KRL that Accused No.6 was authorized by Accused No.2 to supply the bitumen and it indicates that Accused No.1 had conspired with

Accused 2 and 6, enabling them to misappropriate the bitumen. This is the only material pointed out by the learned Public Prosecutor to show that

Accused No.1 was a party to the conspiracy alleged.

23. The specific allegation against Accused No.1 is that he had entered into a conspiracy with Accused 2 and 6 and pursuant to such conspiracy,

Accused 2 and 6 later misappropriated five loads of packed bitumen.

24. Accused No.1 retired from service on 31.05.2003. Admittedly, Accused No.2 was the contractor engaged by the PWD to take delivery of

bitumen from KRL and to supply it to PWD. As stated earlier, the only material pointed out by the learned Public Prosecutor to show the involvement

of Accused No.1 in the conspiracy alleged is that, as per the letter dated 12.05.2003 sent by Accused No.1 to KRL, he had intimated KRL that

Accused No.6 was authorized by Accused No.2 to take delivery of bitumen from KRL. The contention of the prosecution is that, Accused No.2 had

authorized Accused No.6 only to collect the indents from the PWD and he had not authorized Accused No.6 to take delivery of the bitumen from

KRL and supply it to the PWD.

25. The submission made by the learned Public Prosecutor that, Accused No.2 had authorized Accused No.6 only to collect the indents and not to

take delivery of bitumen from KRL, appears to be factually incorrect. What is stated in the letter dated 12.05.2003 given by Accused No.2 to the

Executive Engineer (A1) is extracted below:

“With reference to the above mentioned work, I am the contractor and I hereby authorise to Mr.R.Baiju Alappuzha as my representative

to collect the indents (taking bitumen from KRL) in my absence and whose specimen signature is attested below.

26. A bare perusal of the aforesaid letter would show that Accused No.2 had authorized Accused No.6 not only to collect the indents but also to take

bitumen from KRL in his absence. The words written in brackets in the above letter dated 12.05.2003, “taking bitumen from KRL”, cannot be

ignored. It cannot be found that those words only described the nature of the indents to be collected by Accused No.6.

27. At any rate, in view of the words written in brackets in the above letter, Accused No.1 could have understood it to mean that Accused No.2 had

also authorized Accused No.6 to take bitumen from KRL.

28. Moreover, only on the basis of the indent given by the Executive Engineer, the bitumen would be supplied from KRL. The indent shall contain the

signature of the person authorised to collect the bitumen from KRL which shall be attested by the Executive Engineer. If that be so, it eludes

comprehension how the person who collects the indents from the Executive Engineer and the person who takes delivery of bitumen from KRL could

be two different persons.

29. Though it is contended by the prosecution that indents for taking delivery of bitumen had been given even before the retirement of Accused No.1,

there is no material produced by the prosecution to show that Accused No.1 had any knowledge regarding the shortage in supply of bitumen. The

shortage in supply came to the notice of the department only after his retirement.

30. Conspiracy cannot be assumed from a set of unconnected facts or from a set of conduct at different places and times, without a reasonable link

(See Mohan v. State of M.P: (2020) 10 SCC 531).

31. If two views are equally possible and the Judge is satisfied that the evidence produced before him would give rise to form suspicion, but not grave

suspicion against the accused, he will be fully within his right to discharge the accused (See Union of India v. Prafulla Kumar Samal: AIR 1979 SC

366). Applying this principle also, there is no sufficient ground to interfere with the order passed by the trial court discharging Accused No.1.

Accused Devadas (A2), Conveyance Contractor

32. There is no dispute with regard to the fact that Accused No.2 was the person engaged by the PWD as contractor for collecting bitumen from

KRL and delivering it to the PWD.

33. The application filed by Accused No.2 for discharge was dismissed by the trial court. In the order dated 07.11.2018 passed by the trial court,

dismissing the application for discharge filed by Accused No.2 and the other accused persons, it is stated as follows:

“Admittedly, on the basis of the indents issued by the 1st accused, the petitioner in CrI.M.P.No.670/2018 (the 6th accused) who is

authorized agent of the petitioner in Crl.M.P.578/2018 (2nd accused) had taken delivery of five loads of packed bitumen vide invoice

Nos.303057 dated 12-5-2003, 304053 dated 25-5-2003, 304228 dated 26-5-2003, 304674 dated 30-5-2003 and 306783 dated 26-6-2003

from Kochin Refineries Limited. It is revealed from the statements of witnesses especially statements of witness Nos.2 to 4 that the aforesaid

five loads of bitumen had not been reached at the Divisional Stores, Alappuzha, but false entries regarding the same were entered in the

bitumen stock account book showing that they have reached there after 4/12/2003.

34. Admittedly, Accused No.2, either by himself or through Accused No.6, had taken delivery of five loads of packed bitumen from KRL on the basis

of the indents given by the Executive Engineer and as per the invoices dated 12.05.2003, 25.05.2003, 26.05.2003, 30.05.2003 and 26.06.2003 issued

from the KRL.

35. The records produced by the prosecution show that, when the shortage in supply of the bitumen came to the notice of the PWD, a letter dated

21.08.2003 was sent to Accused No.2 to explain the same. In the letter dated 15.09.2003 sent by Accused No.2 to the Executive Engineer (A5), his

explanation was that he had authorised Accused No.6 only to collect the indents and not to do conveyance or any other work on his behalf and that he

is not responsible for the illegalities committed by Accused No.6. This plea of Accused No.2 cannot be accepted. As already noticed, Accused No.2

had authorised Accused No.6 not only to collect the indents from the Executive Engineer but also to take bitumen from KRL.

36. Learned counsel appearing for Accused No.2 would contend that the bitumen had been supplied at work sites as per the directions given by the

Executive Engineer and the other officers of the PWD. Even assuming that bitumen had been supplied at the work sites, such supply was as against

the norms and conditions. As per the agreement executed by Accused No.2, his responsibility was to collect the bitumen from KRL and to deliver it at

the Division Store at Alappuzha and not at work sites.

37. Learned counsel for Accused No.2 has contended that, since Accused No.1 has already been discharged by the trial court, there is no basis for

the allegation of conspiracy between Accused No.1 and Accused No.2. This submission ignores the fact that there is allegation that there was

conspiracy among Accused 2,3,4,5 and 6 and it was pursuant to such conspiracy, false entries were made in the stock register etc by Accused 3 and 4

to cover up the alleged misappropriation of bitumen.

38. The stock register of packed bitumen kept in the PWD Division Office contains entries to the effect that the five loads of bitumen, which were

taken delivery by Accused No.2 as per the invoices of the above dates, were received in the store on 04.12.2003. These entries relating to invoices

covering the period from 12.05.2003 to 26.06.2003 are seen made in the stock register only after the entries made with regard to the invoices dated

01.12.2003 to 04.12.2003 and they are shown as receipt during the month of December, 2003.

39. The prosecution has got a case that the above entries in the stock register are not correct. Even assuming that the entries in the stock register are

correct, it would show that receipt of the five loads of packed bitumen as per the invoices dated 12.05.2003, 25.05.2003, 26.05.2003, 30.05.2003 and

26.06.2003 at the Division Store was only on 04.12.2003.

40. The case relates to five loads of bitumen taken delivery by Accused No.2 from KRL as per the invoices 303057 dated 12.5.2003, 304050 dated

23.5.2003, 304228 dated 26.5.2003, 304674 dated 30.05.2003 and 306783 dated 26.6.2003. The invoice file produced by the prosecution contains the

original of all the above invoices, except invoice No.303057. Regarding the invoice No.303057, the file only contains the copy intended for the

transporter.

41. Invoice No.303057 (transporter's copy) contains an endorsement on the front page by the Assistant Engineer that packed bitumen of 9.360 MT

was received vide unstamped receipt dated 03.11.2003. This invoice contains endorsement on the back by the Assistant Engineer concerned, without

any date, that the bitumen was received.

42. Invoice No.304050 also bears endorsement by the Assistant Engineer concerned, without any date, regarding receipt of bitumen in good condition.

Further, it also contains an endorsement of receipt by the Assistant Engineer, Roads Section, Cherthala with the date 03.11.2003.

43. Invoice No.304228 also contains the endorsement with regard to receipt of bitumen by the Assistant Engineer concerned, without any date.

Further, it also bears an endorsement by the Assistant Engineer, Roads Section, Cherthala that 9.360 MT bitumen was received but the date of receipt

of bitumen is not mentioned.

44. Invoice No.304674 bears the endorsement, without date, of the Assistant Engineer concerned that the bitumen was received in good condition. It

bears no other endorsement.

45. Invoice No.306783 only bears the signature of the Assistant Engineer without any date and without any endorsement regarding receipt of bitumen.

46. The invoices referred to above and the endorsements thereon by the Assistant Engineers concerned would show that Accused No.2 had supplied

the five loads of bitumen to the PWD which were taken delivery by him from KRL. The endorsements on two invoices would show that supply of

bitumen was made by him not at the Division Store at Alappuzha but at Cherthala. Since the invoices bear the endorsement of the Assistant Engineer

concerned regarding receipt of bitumen, it cannot be found that Accused No.2 did not supply the five loads. If the endorsements made by the

Assistant Engineers concerned are false, they are the persons who are answerable for it. It does not necessarily mean involvement of Accused No.2

in the conspiracy. The entries and the endorsements regarding receipt of bitumen would have been made by the Assistant Engineers to cover up their

own malpractices.

47. However, the records would reveal that Accused No.2 supplied the bitumen only in November or December 2003. The fact that the monthly

statements from KRL and the Division Store did not earlier tally with each other would indicate this. Further, the bitumen might have been supplied by

Accused No.2 not at the Division Store but at the Road Section Offices at Cherthala and Pattanakkad or at the work sites and such supply was

against the terms of the contract which he had entered into with the PWD. On the basis of such supply, if the Assistant Engineer concerned had made

entries in the stock register kept in the Division Store, it was also irregular.

48. The questions whether the supply of the five loads of bitumen only after a long time by Accused No.2 would amount to misappropriation of

bitumen by him and whether it constitutes an offence of criminal breach of trust or not and whether he was a party to any conspiracy have to be

considered afresh by the trial court. For that purpose, the application for discharge filed by him has to be remitted for fresh consideration by the trial

court.

Accused Chandrababu (A5), Executive Engineer

49. Accused No.5 was the Executive Engineer of the PWD Roads Division, Alappuzha for the period from 27.06.2003 to 31.08.2005.

50. The application for discharge filed by Accused No.5 was allowed by the trial court by order dated 22.10.2018. In that order, the trial court has

taken notice of the fact that Accused No.5 had taken charge as successor of Accused No.1 only on 27.06.2003 and that the alleged misappropriation

of bitumen had taken place before he took charge. The trial court further noted that, when Accused No.5 came to know about the non-delivery of five

loads of packed bitumen, he issued show cause notice to Accused 2 and 6. The trial court has, thereafter, stated in the impugned order as follows:

“Thereafter, it was reported to the petitioner by the Assistant Engineer who is in-charge of the Divisional Store, that the 6th accused had

produced invoices and no loss has been caused to the Government. It is further seen from the statements of aforesaid two witnesses that the

petitioner has exempted the 6th accused from the recovery proceedings on the basis of the recommendation of the other officers. It was on

the basis of the aforesaid facts and reason, the petitioner effected payment of Rs.1,02,293/- as conveyance charge. If the petitioner had

involved in the conspiracy alleged in this case he would not have taken aforesaid steps. On the other hand it is revealed from the available

materials that he was not at that station as Executive Engineer at the material time of incidents alleged in this case and that he had taken

steps against the concerned persons after getting information regarding the non-delivery of bitumen as per the aforesaid invoices. All the

above said facts and circumstances would show that there are no materials connecting the petitioner with the aforesaid offences including

criminal conspiracy.

51. Called upon to explain the grounds on which the aforesaid order is challenged, learned Public Prosecutor would submit that Accused No.5 had

conspired with Accused 3 and 4 and pursuant to such conspiracy, Accused 3 and 4 had forged and fabricated the stock register in the Divisional Store

to cover up the misappropriation of bitumen committed by Accused 2 and 6. Learned Public Prosecutor submitted that it was the decision of Accused

No.5, even after he came to know about the misappropriation committed by Accused 2 and 6, not to take any action against them. Learned Public

Prosecutor would submit that it indicates that Accused No.5 was a party to the conspiracy alleged.

52. Learned counsel for Accused No.5 would submit that there was really no shortage in the supply of packed bitumen and when the non-delivery of

bitumen by Accused 2 and 6 came to his notice, Accused No.5 had taken prompt action against them and subsequently, the supply of the missing five

loads was effected and there was no loss caused to the Government. Learned counsel would submit that, it was on the basis of the instructions given

by his superior officers that Accused No.5 decided not to take any further action against Accused 2 and 6.

53. The plea of Accused No.5, that he did not take any action against Accused 2 and 6 because his superior officers had given instructions to him in

that regard, cannot be accepted at this stage of the case. It is a plea to be raised by him during the trial of the case. The materials produced by the

prosecution would not show that Accused No.5 had submitted the relevant file to any superior officer or that he had informed the matter to his

superior officers or the Government and thereafter, obtained any order or decision from his superior officers or the Government in the matter.

Accused No.5 has got no plea also that he did take any such step.

54. I have perused the statements of the witnesses Rajitha (CW4) and Shukkoor (CW5). Their statements, especially the statements of the witness

Shukkoor (CW5), would reveal that Accused 3 to 5 had tried to cover up the irregularities and malpractices committed in the supply of bitumen.

55. Learned counsel for Accused No.5 would submit that the stock register would show that all the missing five loads of packed bitumen had been

received and entry to that effect had been made in the stock register on 04.12.2003. The entries in the stock register and the endorsements on the five

invoices referred to earlier would, of course, show that Accused 2 or 6 had supplied the bitumen either in November or December, 2003. However,

the prosecution has got a case that such entries were falsely made by Accused 3 and 4 pursuant to the conspiracy in which Accused No.5 was a

party and that the false and fabricated entries were made to cover up the malpractices committed by them.

56. There are also circumstances to indicate that the entries made in the stock register relating to supply of bitumen as per the five invoices are not

genuine. Out of the missing five loads of packed bitumen, two each had been supplied at Cherthala and Pattanakkad Sections long after they were

taken delivery from KRL. If that be so, the Assistant Engineer who was in control of the Division Store could not have verified the quantity of the

bitumen as per the invoice and made entries in the stock register of the Division Store at Alappuzha. Moreover, as noticed earlier, the entries with

regard to invoices covering the period from 12.05.2003 to 26.06.2003 are seen made in the stock register after making the entries with regard to

invoices dated 01.12.2003 to 04.12.2003.

57. The trial court has found that the alleged misappropriation had taken place before Accused No.5 took charge as Executive Engineer at Alappuzha.

This finding is not fully correct. Moreover, the crucial question is why he did not take any action against Accused 2 and 6 even after the malpractices

had come to his notice.

58. Not only dishonest and intentional action but also dishonest and intentional omission would amount to criminal misconduct.

59. In the aforesaid circumstances, the order passed by the trial court, allowing the application for discharge filed by Accused No.5, cannot be

sustained. The trial court has to reconsider the application for discharge filed by Accused No.5 and take a fresh decision in that application on the

basis of the materials produced by the prosecution.

Accused Baiju (A6), Authorized Agent of Accused No.2

60. Accused No.6 was the authorized agent of Accused No.2. Whatever materials produced by the prosecution as against Accused No.2 would be

available as against Accused No.6 also.

61. Additionally, in the letter dated 22.10.2003 sent by Accused No.6 to the Executive Engineer (A5), he had admitted non-delivery of bitumen at the

Division Store and non-delivery of invoices containing the acknowledgment of the Assistant Engineer concerned.

62. Learned counsel for Accused No.6 would contend that the contract was between the PWD and Accused No.2 and that Accused No.6 had no

role in the procurement of bitumen. This contention is belied by the letter dated 22.10.2003 which was sent by Accused No.6 to the PWD.

63. Since the roles of Accused 2 and 6 in the supply of bitumen to the PWD are almost similar or equal, as in the case of Accused No.2, the

application for discharge filed by Accused No.6 also needs reconsideration by the trial court.

64. Learned counsel for Accused No.6 cited the decision of the Supreme Court in State of Gujarat v. Jaswantlal Nathalal (AIR 1968 SC 700) and

contended that, for non-delivery of bitumen, Accused No.6 cannot be made liable for criminal breach of trust. Since this Court intends to remand the

application for discharge filed by Accused No.6 for fresh consideration by the trial court, the contention in this regard can be raised by him before the

trial court.

65. In the aforesaid circumstances, I find that the application for discharge filed by Accused No.6 has to be remanded to the trial court to take a fresh

decision in the matter.

Accused Savitha Dutt (A7), Divisional Accountant.

66. Accused No.7 was the Divisional Accountant of the PWD Roads Division, Alappuzha for the period from 24.09.2001 to 31.05.2005.

67. The allegation against Accused No.7 is that he was a party to the alleged conspiracy and pursuant to such conspiracy, he hushed up the

misappropriation of bitumen and admitted the invoice, which was intended for the transporter, instead of the original, for passing the bill for payment of

amount to Accused No.2.

68. The records produced by the prosecution show that, on 18.10.2003, Accused No.7 had put up an office note to the Executive Engineer (A5)

regarding the non-delivery of bitumen by Accused 2 and 6. In that office note, he had stated as follows:

“4 load packed bitumen costs about Rs.5 lakh is not traceable since 30.06.2003. This is a huge loss to the State exchequer. If it is not

traceable I would be forced to report the fact to the Finance department, Government of Kerala for further investigation and necessary

action.”

69. However, on this office note, the Executive Engineer (A5) passed only an order to address Accused No.6 directing him to submit the invoice

(receipt) within seven days and if not complied, to initiate action against Accused No.6 as per the agreement conditions.

70. The Executive Engineer (A5) was the authority to take a decision on the office note put up by Accused No.7. The Executive Engineer did not

order any enquiry or investigation in the matter. He also did not take any steps to inform the matter to the Government. In such circumstances, there is

no basis for the allegation against Accused No.7 that he hushed up the matter and that he was a party to the conspiracy.

71. Regarding the auditing of the bill for payment to Accused No.2, it is to be noted that the Assistant Engineer concerned had reported that the

bitumen found missing was delivered. In spite of the recommendation made by Accused No.7 to initiate enquiry in the matter, the Executive Engineer

(A5) did not take any decision in that regard. In such circumstances, if at all the bill for payment was recommended by Accused No.7 on the basis of

the copy of the invoice intended for the transporter, it was only an irregularity in the office procedure. The fact that, instead of the original invoice, the

copy intended for the transporter, was admitted cannot be taken as sufficient material to presume his involvement in the alleged conspiracy. The office

note produced by the prosecution shows that the Assistant Engineer concerned had approved all the missing invoices and furnished acknowledgment

of them.

72. In the order passed by the trial court, the specific role of Accused No.7 in the conspiracy or the specific act of criminal misconduct committed by

him, is not mentioned. There is only a general observation in the order passed by the trial court that Accused 7 to 11 had admitted the invoices without

verifying the fact that one of them was only a copy intended for the transporter and not the original.

73. In the aforesaid circumstances, I find that, prima facie, there is no material to proceed against Accused No.7 for the offences alleged against him

under the PC Act. The prosecution has no case that he has committed any of the offences under the Indian Penal Code other than the offence under

Section 120B IPC. As already noticed, the materials produced by the prosecution are not sufficient to show the involvement of Accused No.7 in the

alleged conspiracy. Rather, the office note referred to earlier, indicates that what he tried was to bring out the malpractices committed.

74. In the aforesaid circumstances, Accused No.7 is entitled to be discharged by allowing the application filed by him in that regard.

Accused M.V.Abraham (A8), Assistant Executive Engineer (Technical Assistant)

75. Accused No.8 was the Assistant Executive Engineer (Technical Assistant), PWD Roads Division, Alappuzha for the period from 14.07.2003 to

30.09.2006.

76. The office note made by Accused No.8 on 21.10.2003 reads as follows:

“Based on the letter received from Sri.Devadas, Contractor for the conveyance contract from 12.05.2003, it is obvious that there is

irregularities occurred in the conveyance of packed bitumen during the month of May and June, 2003. It may please be noted that the

custodian of the packed bitumen has not reported anything about the shortfall in the supply and receipt noted. In the above circumstances,

it may be better to have a detailed enquiry about the so called illegal authorisation issued from this office to Sri.R.Baiju and the

whereabouts of the missing bitumen, quantum of bitumen already missed etc. without any further delay to avoid nullification of evidence and

to avoid huge loss to the Government.”

77. In the light of the above office note made by Accused No.8, there is no basis for the allegation that he hushed up the matter.

78. Regarding the admitting of the invoices, including the invoice intended for the transporter, and the auditing of the bill for payment to Accused No.2,

for the very same reasons as stated in the case of Accused No.7, it cannot be found that there is, prima facie, sufficient material to proceed against

him.

79. In the aforesaid circumstances, Accused No.8 is entitled to be discharged by allowing the application filed by him in that regard.

Accused Pushparajan (A9), Assistant Engineer (Works)

80. Accused No.9 was the Assistant Engineer (Works) for the period from 17.04.2000 to 27.07.2006.

81. As the Assistant Engineer (Works), it was the responsibility of Accused No.9 to make entries in the M book with regard to the invoices. When the

shortage of bitumen was brought to his notice, Accused No.9 had recorded in the file that a detailed enquiry (if required by an outside agency) may be

conducted in the matter. However, when the invoices were received with the endorsement and signatures of the Assistant Engineers concerned

regarding receipt of bitumen, Accused No.9, in the absence of any decision taken by the Executive Engineer to conduct an enquiry, could have done

nothing in the matter. In the light of the office note made by him, it cannot be found that Accused No.9 had hushed up the matter in any manner as

alleged by the prosecution. Merely on the ground that one of the invoices accepted, instead of the original, was a copy intended for the transporter,

Accused No.9 cannot be found to be a party to the conspiracy alleged. The reasons stated for discharging Accused 7 and 8, more or less apply to

Accused No.9 also.

82. In the aforesaid circumstances, I find that the application for discharge filed by Accused No.9 has to be allowed and he is entitled to be

discharged.

Accused K. K. Alexander (A10), Junior Superintendent

83. Accused No.10 was the Junior Superintendent of the PWD Roads Division, Alappuzha for the period from 03.07.2003 to 18.01.2007.

84. When the invoices were put up by the clerk concerned (A11) on 05.12.2003, Accused No.10 had recorded in the file as follows:

“As the account of the full quantity of bitumen transported to various sites by Sri.R.Baiju has been received and found correct, the liability burden

on Sri.R.Baiju in this respect may be eased.”

85. The aforesaid office note was made by Accused No.10, without verifying the fact that one of the invoices, instead of the original, was the invoice

intended for the transporter. It is true that Accused No. 11 (the clerk concerned) had not mentioned in the office note that one of the invoices was the

copy intended for the transporter. However, it was the duty of Accused No.10 to verify the invoices. If he had scrutinized the invoices put up by

Accused No.11 carefully, he could have easily found out that one of them was a copy intended for the transporter and not the original.

86. If there was only the above omission on the part of Accused No.10 to verify the invoices properly, no dishonest intention could have been

attributed to him. But such omission, with the added circumstance that he made a recommendation to exonerate Accused No.6 from liability, leads to

an inference of dishonest intention and it creates a strong suspicion as to his role in the alleged conspiracy.

87. In the aforesaid circumstances, I find no sufficient ground, in the exercise of the revisional jurisdiction of this Court, to interfere with the order of

the trial court dismissing the application for discharge filed by Accused No.10.

Accused Shaji (A11), Clerk

88. Accused No.11 was the Clerk in the PWD Roads Division, Alappuzha during the period from 02.06.2003 to 10.09.2009.

89. Accused No.11 had put up the office note regarding the invoices involved in this case. In the office note dated 05.12.2003 put up by him, he had

recommended as follows:

“The invoices are put up herewith. Request orders whether this may be admitted and Sri.R.Baiju, Fathima Manzil, P.H Road, Alappuzha

may be exonerated and exempted from recovery of cost of bitumen at penal rate.”

90. In the office note, Accused No.11 did not specifically mention that one of the invoices was not the original, but only a copy intended for the

transporter. That omission, by itself, is not sufficient to infer any dishonest intention on his part. But, the fact that he made a recommendation for

exonerating Accused No.6 from the liability indicates dishonest intention on his part. If he had only made a recommendation for admitting the invoices,

no such dishonest intention could have been inferred. But, the very fact that he also made a suggestion for exonerating

Accused No.6 from liability creates strong suspicion as to his involvement in the alleged conspiracy.

91. In the aforesaid circumstances, I find no sufficient ground, in the exercise of the revisional jurisdiction of this Court, to interfere with the order

passed by the trial court dismissing the application for discharge filed by Accused No.11.

92. In the light of the findings made above, Crl.R.P.Nos.57/2019, 58/2019 and Crl.R.P.No.674/2020 are liable to be dismissed and

Crl.R.P.Nos.55/2019, 56/2019, 59/2019, 370/2019 and 675/2020 and Crl.M.C.No.8635/2018 are liable to be allowed.

93. Consequently, the revision petitions, Crl.R.P.Nos. 57/2019, 58/2019 and 674/2020 are dismissed.

94. The revision petitions, Crl.R.P.Nos.55/2019, 56/2019 and 59/2019 are allowed. The orders passed by the trial court dismissing the applications for

discharge filed by Accused 7 to 9 are set aside. The applications for discharge filed by Accused 7 to 9 are allowed and they are discharged.

95. The revision petition Crl.R.P.No.370/2019 and the case Crl.M.C.No.8635/2018 are allowed as follows: The orders passed by the trial court,

dismissing the applications for discharge filed by Accused 2 and 6, are set aside. The applications for discharge filed by Accused 2 and 6 stand

restored to the file of the trial court. The trial court shall reconsider the applications for discharge filed by Accused 2 and 6 and dispose of them afresh

in accordance with law.

96. CrI.R.P.No.675/2020 is allowed as follows: The order passed by the trial court, allowing the application for discharge filed by Accused No.5, is set

aside. The application for discharge filed by Accused No.5 will stand restored to the file of the trial court. The trial court shall reconsider the

application for discharge filed by Accused No.5 and dispose of it afresh in accordance with law.

97. At the time of hearing the discharge applications filed by Accused 2, 5 and 6, the prosecution shall specifically point out before the trial court the

materials on record which would attract the offences alleged against Accused 2, 5 and 6.

All pending interlocutory applications in the cases are closed.