(2006) 12 GAU CK 0035

Gauhati High Court

Case No: None

State/CBI (SPE)		APPELLANT
	Vs	
Subrate Bhattacharjee and Another		RESPONDENT

Date of Decision: Dec. 22, 2006

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Penal Code, 1860 (IPC) - Section 120B, 420, 465, 468, 471
- Prevention of Corruption Act, 1988 - Section 13

Citation: (2007) 2 GLR 479

Hon'ble Judges: I.A. Ansari, J

Bench: Single Bench

Judgement

I.A. Ansari, J.

By the impugned judgment and order, dated 20.4.1999, passed in Spl. Case No. 18(C)/95, the two accused-respondents, namely, Subrata Bhattacharjee (''A1'') and Milan Kumar Chakraborty (''A2'') have been acquitted of the charges, framed against them, under Sections 120B, 420, 468, 465 and 471 IPC. By this impugned judgment and order, Al was also acquitted of the charge framed against him u/s 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act. Aggrieved by the acquittal of the two accused-respondents, the State has preferred the present appeal.

2. I have heard Mr. D.K. Das, learned Standing counsel for the Central Bureau of Investigation (''the C.B.I.''). I have also heard Mr. J.M. Choudhury, learned senior counsel, appearing on behalf of the accused-respondent No. 1, and Mr. K. Agarwal, learned Counsel for the accused-respondent No. 2.

3. The case of the prosecution, as unfolded at the trial, may, in brief, be described, thus : On 19,4-1991, Baba Chan Singh, an employee of M/s. Metal and Alloys Industries, Tinsukia, submitted two applications to the office of the Regional

Provident Fund Commissioner (''the RPFC''), Guwahati, seeking to withdraw his provident fund and family pension with request to make the payment thereof in his Savings Bank Account No. 17/411, maintained at the State Bank of India, A.T. Road branch, Tinsukia, his postal address being B.C. Singh, son of Kala Babu Sing, Quarter No. 41, Industrial Colony, Porbotia, Tinsukia. On 8.5.1991, the said two withdrawal applications, submitted by Baba Chan Singh aforementioned, were entrusted to A1 by Head Assistant of the office of the RPFC, when the accused was working as an Upper Division Assistant, in the Recovery Cell, at the said office. However, Al kept the said two applications pending and did not process the same. A Savings Bank Account No. C/13/1994 was opened at the State Bank of India, A.T, Road Branch, Guwahati, in the name of Bimal Chand Singh, Kahilipara, Guwahati, on 5.2.1992. At the time of the opening of the said bank account, the account holder was introduced by A2. The Bank Account No. C/13/1994 aforementioned was opened as a result of conspiracy entered into between Al and A2 and the account, having been so opened in the name of a fictitious person, Al erased the original account number and postal address given by Baba Chan Singh in the said two applications and, inserted therein, Account No. C/13/1994 (in place of Account No. 17/411) with the postal address of the account holder being shown Kahilipara, Guwahati. Promptly upon opening of the said bank account on 5.2.1992, as indicated hereinabove, the said two withdrawal applications were processed by Al on 6.2.1992. The two applications were passed by the office of the RPFC, on 23.4.1992, for Rs. 3,593 under the Family Pension Scheme and for Rs. 59,754 in respect of provident fund and two cheques accordingly were issued from the office of the RPFC and directly sent to the State Bank of India, AT Road, Guwahati, for being credited to the Savings Bank Account No. C/13/1944, which was opened on 5.2.1992. The amounts, so deposited, were withdrawn from the bank in two installments, these withdrawals being on 20.5.1992 and 9.6.1992, The Savings Bank Account No. C/13/1994 was, thus, opened consequent to the conspiracy entered into by the two accused and the money was also withdrawn from the bank in consequence of the conspiracy hatched by the two accused. As Baba Chan Singh aforementioned did not receive his dues under the Family Pension scheme and the Provident Fund, he lodged a complaint, in this regard, with the office of the RPFC, whereupon the Regional Provident Fund Commissioner lodged a complaint so made with the C.B.I., Shillong, on 30.3.1994. Following the complaint and treating the same as First Information Report, the C.B.I, registered a case under Sections 120 B/420/468/471 IPC and u/s 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act. During the course of investigation, "the C.B.I, seized a number of documents and got many of these documents examined by handwriting experts. On completion of investigation, charge-sheet was laid by the C.B.I, against both the accused under Sections 120B/109/420/468/471 IPC and u/s 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act.

4. During trial, charges were framed against the two accused under Sections 120B, 420, 468,465 and 471 IPC. As far as Al was concerned, an additional charge, u/s 13(2) read with 13(1)(d) of the Prevention of Corruption Act, was framed against him. Both the accused pleaded not guilty to the charges so framed against them. Prosecution adduced evidence by pxamining as many as 11 witnesses to substantiate the charges framed against the accused. This was followed by recording of statements of the two accused u/s 313 CrPC. In their examination aforementioned, while both the accused denied that the they had committed the offences alleged to have been committed by them, the case of A2 was that Bimal Chand Singh was known to him as a customer and on the request of the said Bimal Chand Sihgh, he had bonafide introduced the said Bimal Chand Singh to the said bank. The defence, however, did not adduce any evidence. Having found the two accused not guilty of the charges framed against them, as indicated hereinbefore, the learned trial court acquitted them accordingly. Hence, the present appeal by the C.B.I.

5. While considering the present appeal, what needs to be noted is that an appellate court does not, ordinarily, interfere with an order of acquittal passed by trial court. It is, now, well settled that under the Criminal Procedure Code, there is no difference in the appellate court''s power to deal with an appeal from a conviction and an appeal against an order of acquittal except that an appeal against a conviction is as of right and lies to courts of different jurisdictions depending on the nature of sentence and kind of trial and the court in which the trial was held, whereas an appeal against an order of acquittal can be made only to the High Court. The procedure for dealing with two kinds of appeals is identical and the powers of the appellate court in disposing of the appeals are, in essence, the same. The High Court, therefore, has full powers, while hearing an appeal against an order of acquittal, to reappreciate the evidence and to come to a conclusion as to whether the order of acquiital passed by the trial court is per se bad or not. If, however, on the evidence, two views are reasonably possible, one supporting acquittal, and the other, indicating conviction, then, the High Court cannot substitite its views in place of that of the trial court. While reversing an order of acquittal, the appellate court must apply its mind to the reasons given by the trial court and find out whether such reasons are at all sustainable or not. But on examining the reasons advanced by the trial court as well as on reappreciating the evidence on record if the High Court is satisfied that the reasons given by the trial court for acquittal are totally unsustainable and the appreciation of evidence made by the trial court is per se bad, then, there would be no limitation, on the power of the High Court, to set aside the order of acquittal, see Banwari Ram and Others Vs. State of U.P., .

6. Moreover, when the High Court comes to the conclusion that the entire approach of the trial court in dealing with the evidence was patently illegal or that the conclusions arrived at by it by the trial court wholly untenable, the acquittal can be set aside. While sitting in judgment over an acquittal, the appellate court is, first, required to seek an answer to the question as to whether the findings of the trial

court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers these questions in the negative, the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities, it can, then, reappraise the evidence to arrive at its own conclusions. See Ramesh Babulal Doshi Vs. State of Gujarat, . See also Sambasivan and Others Vs. State of Kerala, .

7. Bearing in mind the position of law governing interference by the High Court with an order of acquittal passed by a trial court, when I turn to the present appeal, what attracts the eyes, most prominently, is that though in the case at hand, though the prosecution''s case has been that the bank account, in question, had been opened as a result of a criminal conspiracy entered into by the two accused and that the money had been withdrawn from the said account in consequence of this conspiracy, the learned trial court''s entire approach has been to consider the case of each of the two accused-respondents separately and independent of each other by keeping excluded from the purview of its consideration all such incriminating pieces of evidence, which concerned the other accused. Broadly speaking, in the present case, the incriminating pieces of evidence, which transpire from the evidence on record, are, thus:

(i) Baba Chan Singh (PW9), admittedly, submitted two applications to the office of Regional Provident Fund Commissioner, seeking withdrawal of his dues under the Provident Fund and Pension Fund Scheme;

(ii) Baba Chan Singh (PW9) gave his postal address on the said two withdrawal applications as a resident of Tinsukia.

(iii) Baba Chan Singh (PW9) mentioned, in his said applications, S.B. Account No. 17/411 as the account maintained by him at the State Bank of India, A.T. Road, Tinsukia branch.

(iv) Baba Chan Singh submitted his said two applications on 9.4.1991. These two applications were, admittedly, handed over to A1 on 14.5.1991, but no action was taken by Al on these two applications and, as a result thereof, these two applications were not attended to and remained without being processed by Al until 5.2.1992.

(v) On 5.2.1992, bank account No. C/13/1994 was opened in the name of one Bimal Chand Singh, at State Bank of India, A.T. Road branch, Guwahati.

(vi) The person, who so opened the account, at the State Bank of India, AT Road, Guwahati, had been introduced to the bank by A2. The person, who opened the bank Account No. C/13/1994 as Bimal Chand Singh, gave his address to the bank as Bimal Chand Singh, Kahilipara, Guwahati.

(vii) That a person, in the name of Bimal Chand Singh, Kahilipara, Guwahati, existed, remained unproved and, according to the prosecution, it was a fictitious name.

(viii) Following the opening of the account No. C/13/1994 on 5.2.1992, Al promptly attended to the two applications on 6.2.1992. The two applications were accordingly passed and two cheques were issued by the office of the RPFC on 23.4.1992.

(ix) The Account No. 17/411, as had been originally mentioned by the applicant, namely, Baba Chan Sing, was erased and substituted by Account C/13/1994 aforementioned.

(x) The two cheques, prepared on 23.4.1992, were forwarded by the office of the RPFC to the State Bank of India, AT Road Branch, Guwahati, by registered post, the amounts mentioned in the cheques were credited to the Account No. C/13/1994 and, on two different dates, namely, 20.5.1992 and 9.6.1992, the amounts credited to the Account No. C/13/1994 were withdrawn.

(xi) Account No. C/13/1994 could not have been put on the said two application forms, when the same were submitted by the applicant on 19.4.1991 and that the said bank account number must have been mentioned on the said two writ applications on or after 5.2.1992, when the account in the name of Bimal was opened at the State Bank of India, AT Road Branch, Guwahati.

8. It is on the basis of the incriminating circumstances, as indicated hereinabove, that the learned trial court ought to have considered as to whether the prosecution had succeeded in substantiating, beyond reasonable doubt, the guilt of the two accused or of any of them. The learned trial court has not, as already pointed out, considered all the incriminating circumstances indicated hereinabove nor has it considered the cumulative effect thereof, while determining the guilt or otherwise of the two accused-respondents.

9. As a result of the process of bifurcating the incriminating circumstances appearing from the evidence on record, the learned trial court, as already indicated hereinabove, denied to itself the benefit of consideration of all the pieces of such circumstances/which appear to be incriminating in nature. This apart, even if the charge of conspiracy u/s 120B IPC had failed, it was still the duty of the learned trial court to determine if any of the two accused had committed offences under Sections 420, 465 and/or 471 of the IPC and/or whether A1 I had committed offence u/s 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act. No such exercise, as the impugned judgment reveals, was undertaken by the learned trial court.

10. It is also worth pointing out that on noticing that the prosecution had not been able to prove that Al had erased the original bank account number and address of Baba Chan Singh (PW9) from the said two withdrawal applications aforementioned, the learned trial court held that merely from the fact that Al had processed the two applications, it cannot be presumed that Al had erased the bank account number and address and/or that Al had written the new account number and address on the said two applications. What, however, escaped the attention of the learned trial court is that in order to establish the charge under Sections 420 IPC, it was not at all

material as to whether the act of forgery, on the two applications, had been committed by Al or not. If the acts of forgery, as indicated hereinbefore, were within the knowledge of Al, the learned trial court ought to have attempted to ascertain if Al could be held guilty of offences u/s 420 and 13(1)(d), read with Section 13(2) of the Prevention of Corruption Act, for, the fact that forgery was committed is an admitted fact and that the amounts have been fraudulently withdrawn is, again, an admitted fact and, hence, until the learned trial court could have completely ruled out that the said forgery had been committed without the knowledge of Al, Al could not have been let off if the forgery, on the said two withdrawal applications, were found to have been committed, while the same were in the custody of Al. Similarly, as far as A2 is concerned, he merely stated, in his statement recorded u/s 313 CrPC, that Bimal Chand. Singh was one of his customers and he had introduced Bimal Chand Singh to the bank on the strength of his relationship with the said Bimal Chand Singh as a customer. Did Bimal Chand Singh really exist ? This was the question the learned trial court ought to have determined. Since it was A2, who had introduced Bimal Chand Singh, it was within the special knowledge of A2 if Bimal Chand Singh had really existed or not. When a fact is within the special knowledge of an accused, the onus lies on him to prove such a fact, though the standard of proof may not be as high as in the case of the prosecution. A2 could have discharged his onus by even probablising that there did exist a man, whom A2 had known as Bimal Chand Singh, or that A2 dealt with a person, as his customer, who was known as Bimal Chand Singh. An accused can probablise his defence either by drawing support, for his plea, from the evidence adduced by the prosecution or by adducing evidence in defence. In the case at hand, the prosecution''s clear case was that Bimal Chand Singh was a fictitious personality and never existed. In such circumstances, the onus lied on A2 to probablise existence of Bimal Chand Singh. There is no evidence on record to show that anyone in the name of Bimal Chand Singh did exist. In such a situation, A2 could have adduced his own evidence in support of his plea of existence of Bimal Chand Singh, but nothing was done in this regard.

11. I could have endeavoured to determine the guilt or otherwise of the two accused on the basis of the evidence on record, but the reasons, which are indicated herein below, I refrain from doing so.

(i) While examining A1 u/s 313 CrPC, the learned trial court did not put to him any question as regards the fact that, according to evidence ''on record, though Al had received the said two applications, on 14.5.1991, for being processed, he had taken no action until the time an account in the name of Bimal Chand Singh was opened on 5.2.1992 inasmuch as he commenced processing of/ the two applications as late as 6.2.1992.

(ii) The learned trial court also did not put to Al that the evidence on record indicated that the account number and address on the two applications were erased and

subsequently substituted by fictitious ones. Irrespective of the fact as to whether Al was the man, who had erased and/or subsequently written the account number and address on the said two applications, the learned trial court ought to have drawn the attention of Al to the fact that the account number and address on the said two application forms were erased and substituted by the account number and address, which were subsequently prepared.

(iii) Similarly, the learned trial court has also not put to A2 any of the incriminating circumstances, such as, the fact that PW9 (Baba Chan Singh) had submitted two applications for withdrawal of the amounts, as mentioned above, with his own account number and address, at Tinsukia, and that promptly after opening of the account in the of Bimal Chand Singh, on 5.5.1992, those two applications were processed, cheques were prepared and the money credited to the accounts, which were opened on being introduced by A2, were withdrawn. In fact, no incriminating piece of evidence on record, which concerned the said two applications, was put to A2.

12. Without giving any effective opportunity to the two accused to have their say in respect of such incriminating circumstances, which transpire from the evidence on record, as a whole, it would be highly illegal and improper, on the part of this court, to ascertain the guilt or otherwise of the two accused, for, any such attempt would cause serious prejudice to the defence of the two accused inasmuch as they have not been afforded their right to have their say against the incriminating pieces of evidence, which have been broadly summarized hereinabove.

13. Situated thus, this court is of the view that the impugned judgment and order of acquittal cannot be sustained and the matter needs to be remanded to the learned trial court for further examining the two accused u/s 313(1)(b) CrPC in accordance with law and, then, dispose of the case.

14. In the result and for the reasons discussed above, this appeal partly succeeds. The impugned judgment and order shall accordingly stand set aside and the case is remanded to the learned trial court with direction to proceed from the stage of recording of the additional statement of the two accused-respondents u/s 313(1)(d) Cr.P.C. and, then, dispose of the case in accordance with law.

15. In order to enable the learned trial court to expeditiously dispose of the case, the accused-respondents are hereby directed to appear in the learned trial court, on 1.2.2007, for further necessary orders.

16. Before parting with this appeal, I must hasten to add that whatever have been indicated hereinabove is for the purpose of determining the merit of the appeal and, hence, the learned trial court shall remain free to come to its own judicious findings, in accordance with law, upon examination of the two accused-respondents as indicated hereinabove and upon consideration of such other materials, which may appear on the record.

17. Send back the LCR.

18. With the above observations and directions, this appeal shall stand disposed of.