(2016) 02 GAU CK 0047

In the Gauhati High Court

Case No : Crl. A. No. 125 of 2013

Amiyo Kumar Borah — APPELLANT

Vs

Central Bureau of Investigation — RESPONDENT

Date of Decision : 26-02-2016

Acts Referred:

Penal Code, 1860 (IPC) — Section 420, 468, 511

Citation : (2016) 4 GauLJ 77 : (2016) 4 GauLR 241 : (2016) 2 GauLT 687 : (2016) 3 NEJ 398

Hon'ble Judges : C.R. Sarma, J.

Bench : Single Bench

Advocate : D.K. Mishra, Sr. Advocate, B.M. Choudhury, U. Choudhury, M.S. Sundi and D.K. Kalita, Advocates, for the Appellant; P.N. Choudhury, Sr. Retainer Advocate, CBI, for the Respondent

Final Decision : Allowed

Judgement

C.R. Sarma, J. - The challenge made by the appellant in this appeal is against the judgment and order dated 30.3.2013, passed by the learned Special Judge, CBI, Assam, Addl. CBI Court No. II, Chandmari, Guwahati in Special Case No. 166/2004.

2. By the impugned judgment and order, the learned Special Judge convicted and sentenced the appellant to suffer simple imprisonment of 3 (three) years and pay fine of Rs. 1,000.00 for his conviction under Section 468 of the Indian Penal Code (hereinafter referred to as the IPC), simple imprisonment for 1 (one) year and pay fine of Rs. 1,000.00 for his conviction under Sections 420/ 511 IPC and in default suffer simple imprisonment for 1 (one) month, on each count. The appellant has also been sentenced to suffer simple imprisonment for 1 (one) year and pay fine of Rs. 1,000.00 for his conviction under Section 13(2) read with Section 13(I)(d) of the Prevention of Corruption Act, 1998 (herein after referred called the P.C. Act). It has also been directed that all the sentences shall run concurrently.

3. The prosecution case, as may be necessary for the purpose of disposal of this appeal, may, in brief, be stated as follows:

The appellant, namely, Sri Amiya Kumar Bora, while functioning as the Chairman of the Railway Recruitment Board, NF Railway (for short, RRB), Guwahati, during the period 1997-98, entered into a criminal conspiracy with some candidates and released a list of 165 candidates declaring the said candidates to have qualified in the written test and eligible for appearing in Typing Test against the employment notice No. 1/1996 for the category of "Junior Accounts Assistant". According to the prosecution, the appellant after receipt of the computerised list from the evaluator i.e. the computer farm, while decoding the merit list, instead of entering the roll numbers of the qualified candidates against the respective code numbers, fraudulently entered the roll numbers of unsuccessful candidates and thus, published a provisional merit list of candidates qualified in the written examination, thereby showing some unsuccessful candidates as qualified candidates and not including the roll numbers of some successful candidates in the said merit list.

4. In the said process the appellant, for showing undue favour to the said candidates omitted the names of 48 successful candidates and included, in the merit list, the names of 46 unsuccessful candidates by abusing his official position.

5. The matter was referred to the CBI for investigation. Accordingly, the CBI registered a case, being R.C. 24(A)/2002 under Section 420/511 IPC and Section 13 read with Section 13(1)(d) of the PC Act and launched investigation into the matter.

6. During investigation, the Investigating Officer (I.O.) recorded the statement of the witnesses, collected relevant documents from the office of the RRB and at the close of the investigation submitted charge sheet against the appellant for the offences, under Sections 420/511 IPC and Section 13(2) read with Section 13(1)(d) of the PC Act.

7. On receipt of the charge sheet, the learned Special Judge, CBI, Guwahati, after hearing the learned counsel for both the parties, framed charges under Sections 420/468 IPC and Section 13(2) read with Section 13(1)(d) of the PC Act. The charge was read over and explained to the accused person, to which he pleaded not guilty and claimed to be tried.

8. In order to prove its case, the prosecution examined as many as 19 witnesses and exhibited various documents in support of the prosecution case. The defence cross-examined the prosecution witnesses. The defence plea was a denial one.

9. At the close of the examination of the prosecution witnesses, the accused person was examined under Section 313 Cr.P.C. He denied the allegations, brought against him and declined to adduce defence evidence.

10. The learned trial Judge framed the following points for determination:-

(1) Whether during the period between 1997-98, the accused Sri Amiyo Kumar Baora while working as Chairman, Railway Recruitment Board, N.F. Railway, Guwahati cheated N.F Railway and thereby dishonestly inducing it to prepare a false list of candidates, containing names of unsuccessful candidates, which is capable of being converted to a valuable security and thereby committed an offence punishable under Section 420 IPC?

(2) Whether during the above time and place, Sri Amiyo Kumar Bora while working as stated above, forged certain documents, to wit, list of unsuccessful candidates who said to have been passed in the written test examination, held for selection of Jr. Accounts assistant in N.F. Railway, intending that those, shall be used for the purpose of cheating and thereby he committed an offence punishable under Section 468 IPC?

(3) Whether during the above time and place, Sri Amiyo Kumar Bora while posted and functioning as above, he, by abusing his official position as public servant omitted the names of successful candidates and included the names of unsuccessful candidates in the list of successful candidates to show undue favour to some unsuccessful candidates with some ulterior motives and thereby committed an offence punishable under Section 13(2) read with Section 13(I)(d) of the PC Act?

11. Answering the said points for determination against the appellant, the learned trial Judge found him guilty of the charges, framed against him and accordingly, convicted and sentenced him as indicated above.

12. Being aggrieved by the said conviction and sentence, the appellant has come up with this appeal.

13. I have heard Mr. D.K. Mishra, learned senior counsel, assisted by Mr. B.M. Choudhury and Mr. U. Choudhury, learned counsel, appearing for the appellant. I have also heard Mr. P.N. Choudhury, learned senior retainer counsel, appearing for the CBI, respondent. I have perused the case record.

14. Mr. D.K. Mishra, learned senior counsel, appearing for the appellant, referring to the evidence, on record, has submitted that the basic allegations brought against the appellant are that the appellant, while working as Chairman of the RRB had committed forgery in respect of preparation of the merit list of the candidates qualified in the written test by including the names of unsuccessful candidates and deleting the names of successful candidates from the merit list and that by dishonestly preparing a forged merit list i.e. Ext. No. 2, he had made an attempt to cheat the NF Railway Recruitment Board.

In view of the said allegations, brought against the appellant, the learned senior counsel has submitted that there is no substantial evidence, on record to show that the appellant had made attempt to fraudulently and dishonestly induce the NF Railway to do or omit to do anything which act was likely to cause any damage or harm to NF Railway in its body or mind, reputation or property.

15. It is also argued, on behalf of the appellant, that the appellant did not commit any forgery as defined by Sections 463 and 468 IPC and that there is not an iota of evidence to show that the appellant had committed the offence as defined by Section 13(2) read with Section 13(I)(d) of the PC Act, inasmuch as there is nothing substantive to show that the appellant had accepted or obtained or agreed to or attempted to obtain for himself or for any other person any valuable thing or pecuniary advantage from any person or gratification.

It is submitted that no ingredient of the offence under Section 13(i)(d)/ (i), (ii) and (iii) has been established and as such the conviction for the offence under Section 13(2), read with Section 13(i)(d) of the PC Act is not maintainable.

16. The learned senior counsel, for the appellant, has also submitted that the appellant, while conducting the recruitment process for selection of candidates for the various posts was required to undertake a huge exercise and, as it was humanly impossible to do the said job single handedly, had to take assistance of his office staff including confidential assistants and stenographers etc. It is submitted that, in the absence of any substantive and cogent evidence, it cannot be concluded that the appellant had himself with any dishonest and fraudulent intention had inserted the roll numbers of the unsuccessful candidates by deleting the roll numbers of successful candidates from the merit list, prepared by the concerned evaluator.

17. The learned senior counsel has also submitted that, though, the concerned roll numbers were entered by hand in Ext. No. 2 i.e. provisional merit list of the candidates qualified in written test, the prosecution failed to prove, by adducing evidence of handwriting expert, that the said roll numbers were inserted by none other than the appellant. In view of the above, learned senior counsel, for the appellant, has submitted that there is no substantive and cogent evidence to show that the appellant had dishonestly and fraudulently included the names of the unsuccessful candidates and deleted the names of some successful candidates, with a view to cheat the N.F. Railway and that, in doing so, he had either obtained any valuable thing, or pecuniary or other advantage from and on behalf of the proposed beneficiary. It is also submitted that there is no evidence to show that the appellant had any nexus with the candidates who were included in the Ext. Nos. 2and 1.

18. It is also submitted that the Ext. 1, which is alleged to be published by the appellant was only a provisional merit list of the candidates, who had qualified in the written test for appearing in the type writing and stenography test and that the final merit list was required to be prepared after holding type writing and stenography test.

Therefore, it is noticed that the said list i.e. Ext. No. 1, not being the final select list, the publication of the said merit list cannot lead to the conclusion that there was any attempt to cheat the N.F. Railway or such other authority.

In view of the above, the learned senior counsel has submitted that the prosecution failed to prove the charges, beyond all reasonable doubt, and as such the impugned conviction and sentences are liable to be set aside.

19. A written submission has also been tendered, on behalf of the appellant. The learned senior counsel, in support of his argument has relied on the following decisions:

1. A. Subair v. State of Kerala, reported in (2009) 6 SCC 587.

2. C.K. Damodaran Nair v. Govt. of India, reported in (1997) 9 SCC 477.

20. Refuting the said argument, advanced on behalf of the appellant, Mr. P.N. Choudhury, learned senior retainer counsel, appearing for the CBI, has submitted that there are sufficient evidence, more particularly, the evidence of PW Nos. 1 to 6, PW Nos. 11, 12, 13, 16 and 17 to show that it was the sole duty and responsibility of the appellant, in his capacity as the Chairman of the RRB, to prepare the merit list by doing the coding and un-coding process in preparing the merit list. Therefore, it is submitted that the appellant had intentionally included the roll numbers of some unsuccessful candidates for the purpose of unduly favouring the said unsuccessful candidates and that, by doing so, he made an attempt to cheat the NF Railway by committing forgery and criminal misconduct as a public servant.

21. The learned senior retainer counsel, CBI has also submitted that there is sufficient evidence, on record, to show that the roll numbers of unsuccessful candidates in Ext. No. 2, were inserted by the appellant and that the Ext. No. 1 was prepared by forging the Ext. No. 2. In view of the above, the learned senior retainer counsel CBI has submitted that the learned trial Judge committed no error or illegality by recording the conviction and sentence and such the impugned conviction and sentence do not warrant any interference by this court.

22. Having heard the learned counsel, appearing for both the parties and perusing the record, more particularly, the Ext. No. 2, it is found that the entry, inserting the roll numbers in the Ext. No. 2 i.e. computerised merit list prepared by the evaluator of the written test was made by hand by decoding the code numbers mentioned in the Ext. No. 2 and thus, the provisional merit list i.e. Ext No. 1 was prepared and sent for news paper publication. Hence, the basic allegation is that the appellant by doing forgery for the purpose of favouring some undeserving candidates had inserted, by hand, the roll numbers of unsuccessful candidates in place of successful candidates and thus, prepared an incorrect merit list.

23. The learned trial Judge, while convicting the appellant came to the findings, on the basis of the evidence rendered by PW Nos. 1 to 6, PW Nos. 11, 12, 13, 16and 17, that the appellant had forged the document i.e. merit list (Ext. No. 2) in his capacity as the Chairman of the RRB, by abusing his official position for obtaining appointment in favour of his desired unsuccessful candidates and thereby caused huge loss to the actual candidates in respect of money spent by

them in appearing in the examination.

24. The learned trial Judge also came to the findings, on the basis of the evidence given by PW 6 that in Ext No. 2, that the roll numbers in Ext. No. 2 i.e. Ext. 2 (1) to 2(19) were written by the appellant.

In view of the above, the basic question involved in this case is as to whether the appellant had himself inserted the roll numbers of the unqualified candidates in Ext. No. 2 i.e. Ext. 2(1) to 2(19) and if he had prepared the said provisional merit list i.e. Ext. No. 1 with fraudulent and dishonest intention to favour some unsuccessful candidates by obtaining any benefit or advantage from such candidates and thus attempted to cheat the RRB.

25. In order to examine the correctness of the impugned judgment and order and to appreciate the evidence on record, I feel it necessary to, briefly, scrutinise the evidence, given by the prosecution witnesses.

26. Admittedly, there is no scientific evidence more particularly, the evidence of any handwriting expert to substantiate that the said Ext. No. 2(1) to 2(19) i.e. the disputed roll numbers were written by the appellant. To substantiate the said charge, the prosecution has relied on the oral evidence given by PW Nos. 1, to 6, PW Nos. 11, 12, 13, 16 and 17.

27. Sri PG Thomson, Who deposed as PW 1 was the confidential Stenographer to the Chairman. He has exhibited the certified photo copy of the list of successful candidates, as Ext. 1. However, he stated that he did not know who certified the Ext. No. 1. He further stated that Ext. No. 1 seemed to have contained the signatures of Sri Amiyo Kumar Bora vide Ext. No. 1 (1) to 1(4). He also admitted that some of the Chairmen used to assign him with some work to type the confidential record. He also exhibited the computerised merit list, in original, as Ext. No. 2 and stated that Ext. Nos. 2(1) to 2(19) were the hand writings of the Chairman i.e. the appellant.

In his cross-examination, made on behalf of the defence, this witness stated that the assistant Secretary and other subordinate staff of the RRB used to receive the containers, containing the answer scripts and that keys of the containers were kept with the chairman. He denied the suggestion that the code numbers were given by him or his subordinate staff.

Controverting his said evidence, given in-chief, regarding the handwriting in Ext. 2(1) to 2 (19), this witness stated that he was not in a position to say in whose hand, the roll numbers i.e. Ext. 2(1) to 2 (19) were written and thus he negated his earlier statement that Ext. Nos. 2(1) to 2(19) were the hand writings of the appellant. This evidence given by PW 1 does not inspire confidence to believe that the Ext Nos. 2(1) to 2 (19) were written by the appellant. Hence, the findings given by the learned trial Judge, that Ext. No. 2 (1) to 2 (19) were written by the appellant, is not correct.

In my considered opinion, the learned trial Judge failed to properly appreciate the evidence given by PW No. 1 and took an erroneous view.

28. PW 2 was a Traffic Costing Officer of NF Railway. He stated about the normal procedure adopted at the time of holding the written examination in various centers and the process in which the answer scripts are collected and handed over in the office of the RRB.

In his cross-examination, he stated that the trunk containing answer scripts were received in the office of the RRB. This witness has not stated anything incriminating against the appellant.

29. PW 3, who workrd as a Personal Inspector also stated about the procedure adopted in holding the examination. He also stated that the boxes, containing answer scripts, were delivered in the office of the RRB.

In his cross examination, this witness stated that he could not remember any irregularity in conducting the examination. He clearly stated that they were not required to handover the boxes to the Chairman directly. The evidence given by this witness also speaks nothing against the appellant.

30. PW 4, who was the Director of M/s. Swastik Computer Pvt. Ltd, Guwahati stated that he was entrusted with the job of evaluation of the answer scripts and that, since 1995 he was doing the said job. He stated that he used to personally hand over the answer scripts and the merit list either to the P.S. or the Chairman himself. However, in the present case, this witness failed to recollect as to whom he had given list. This witness was declared hostile by the prosecution.

From his cross examination, made by the prosecution, nothing could be elicited against the appellant.

In view of the above, from the evidence of PW 4, it appears that the Chairman did not receive the merit list from the Evaluator. Hence, it cannot be held, from the evidence of PW 4 that the appellant had directly received the merit list from PW 4.

31. PW 5, who was functioning as Chief Vigilance Inspector, during 1995-2001 stated that the former Chairman of RRB, Sri R.P. Mishra, who was the successor of the appellant, detected certain anomaly regarding recruitment and he submitted a report relating to selection process of Junior Accounts assistant category No. 37. However this witness stated the he could not find the report at the time of giving evidence. He has also stated that he had no personal knowledge about the alleged anomaly.

The evidence given by PW 5 aforesaid relates to a report, given by the successor of the appellant. From the evidence of this witness, it cannot be held that the appellant had himself inserted the roll numbers in Ext. 2(1) to 2(19) with any dishonest intention.

32. Sri Prafulla Kumar Das, who was the Assistant Secretary, RRB, deposing as PW 6 stated that the Chairman used to keep the answer scripts in his personal

custody and that as per the procedure he was required to write in his own hand the roll numbers of the candidates in the answer sheet/ merit list for identifying the candidates. He stated that Ext. No. 2 (1) to 2(19) has been written by the appellant.

In his cross examination PW 6 stated that he was working as Assistant Secretary of RRB from July, 1988 to 1993 and that during the tenure of the appellant he did not work as the Assistant Secretary RRB. He also stated that he did not make any correspondence with the appellant. He further stated that Ext. 2(1) to 2(19) was not written in his presence. From the said evidence, given by PW 6, it is clearly found that this witness had no scope to know the handwriting of the appellant. That apart, Ext. 2(1) to 2(19) were not written in his presence. Of course, he stated that the Ext. 2(1) to 2(19) seemed to be similar to the handwriting of the appellant.

The term ''seemed to be similar'' and the term ''same'' have different meaning and implication. The meaning of words "similar" and ''same'' cannot be same. Hence, from the terms, "seemed to be similar" used by this witness, it cannot be safely concluded that Ext. 2(1) to 2 (19) were written by the appellant.

A close reading of the evidence of this witness indicates that, in fact, he had no knowledge as to who had written the Ext. 2(1) to 2(19). Hence, the finding, rendered by the learned trial, Judge that PW Nos. 1, 2 and 6 identified the handwriting of the appellant is not, based on correct appreciation of the evidence. The evidence of PW 6, failed to prove the prosecution version that Ext. 2(1) to 2(19) were written by the appellant.

33. PW 7, Sri Bipul Kumar Dutta, in his cross-examination stated that he had no knowledge about the allegations, levelled against the appellant and that he did not investigate into the case. He was a vigilance officer of the N.F. Railway.

34. PW 8, Sri Mihir Krishna Deb Barma, in his cross-examination, stated that he had no personal knowledge about the irregularity committed in recruitment of the employees by RRB Guwahati.

35. PW 9, Sri Jibon Jyoti Bora, who joined as the Chairman of the RRB on 28.4.2003 and remained in the said post till 12.12.2007, stated that codification was done by the Chairman, RRB personally. This witness stated about the procedure to be adopted in the process of codification. He further stated that the Secretary, Assistant Secretary and P.S.-cum-Stenographer also used to help the chairman in holding the examination work. This witness had no direct knowledge about the anomaly, alleged to be committed by the appellant.

36. Sri K.L. Ahuja (PW 10), who was a Joint Director, Vigilance, NF Railway, Guwahati stated nothing incriminating against the appellant.

37. PW 11 (Sri Subhash Ranjan Nandi), who was the Divisional Officer of NF railway also stated about the procedure to be adopted in respect of the recruitment process. He stated that, after completion of the written examination,

the Centre-in-Charge used to handover the answer scripts to the Chairman of the RRB.

In his cross examination PW 11 stated that the office staff of the Chairman received the examination materials and the answer scripts.

This witness also did not state anything incriminating against the appellant.

38. Sri Gauri Kanta Kakati, a retired personnel officer of NF Railway, deposing as PW 12, stated that the confidential files were kept in the custody of the Chairman and that, with the assistance of the Stenographer, the Chairman used to deal with the files. He stated that he could not identify the signature and handwriting of the appellant.

The evidence given by PW 12 also does not help to substantiate the allegations, brought against the appellant. However, this witness in his further cross-examination-in-chief, stated that, though decoding in respect of the answer script was done by the Chairman himself with the help of his office staff, the responsibility was with the Chairman. He also dis-closed the roll numbers in respect of which the alleged anomaly was committed. This witness clearly stated that it was the responsibility of the Chairman to write code numbers and roll numbers in the merit list and that the same was done by the Chairman himself or under his supervision. The said evidence given by this witness does not rule out the involvement of other persons in the process of preparation of merit list.

From the evidence of this witness, it cannot be concluded that, none other than, the appellant had written the said roll numbers falsely, with dishonest intention. However, from the evidence of this witness, it appears that the roll numbers of candidates, who could not succeed in the written test examination, were shown in the list of successful candidate.

In his cross examination, this witness stated that the statement, given in the examination-in chief, that the answer scripts were detached by the Chairman himself with the help of his office staff and that the detailed coding slip were kept by him was not correct, inasmuch as he was not involved with the examination system.

He further stated that he had no personal knowledge that the decoding was done by the Chairman himself. He further stated that the corresponding roll numbers in the merit list were supposed to be prepared by the Chairman. He also stated that the writing of code numbers could not be done by a single person as the roll numbers contained 8 (eight) digits and that Ext. No. 2 did not contain signature of any officer of RRB.

In view of the above evidence, given by PW 12, does not conclusively lead to hold that the appellant had written the roll numbers of unsuccessful candidates in the merit list with any dishonest intention.

39. Sri Rajendra Prasad Mishra, the successor of the appellant, deposing as PW

13, stated that coding and decoding was the responsibility of the Chairman and that he received complaint about the irregularity in the selection process. He also stated that some candidates, who did not find place in the merit list, were declared to be successful in the panel list of written examination.

There is no dispute that the roll numbers of unsuccessful candidates appeared in the merit list. But the question is whether the appellant had inserted the roll numbers with any fraudulent or dishonest intention for favouring the unqualified candidates.

This witness did not work with the appellant and his evidence does not indicate that the said roll numbers were inserted by the appellant himself.

40. PW 14, Sri B.K. Agarwal also stated about the procedure to be adopted in preparation of the merit list. He denied the suggestion that allegations were brought against the appellant for the purpose of removing from the post of chairmanship. This witness did not exhibit the controversial entries i.e. Ext No. 2(1) to 2(19). In fact, he did not have any personal knowledge as to who had written the said exhibits. Hence, from the evidence of PW 14, no inference can be drawn against the appellant.

41. Sri Vijay Kumar Mudgal, a retired Joint Director of the NF Railway, deposing as PW 15 stated that the concerned examination was cancelled due to certain anomalies. The evidence, given by this witness also speaks nothing against the appellant.

42. PW 16, Sri Biren Chandra Sarma, Head Clerk of NF Railway stated that, after evaluation and decoding of the answer scripts and preparation of the result, the merit list was handed over to him by the Assistant Secretary of the RRB for publication in newspapers. He has exhibited the certified photo copy of the forwarding letter, dated 29.11.1997 Ext. No. 1, by which the merit list was sent for paper publication. The Ext. No. 1, i.e. the forwarding letter was signed by him for the Chairman. He exhibited his signature in the photo copy as Ext. 1(1). He stated that Ext. 1 was a copy, certified by the Assistant Secretary of the RRB, Guwahati. He further stated that by the said letter, the list of candidates under the signature of Sri Amiyo Kumar Borah was forwarded to the newspaper for publication. He has exhibited the signature of Sri Amiyo Kumar Borah, as Ext. 1(4).

In his cross-examination, this witness stated that the confidential stenographer/ Assistant Secretary were the custodians of the keys of the strong room, where the documents were kept. He also admitted the suggestion that due to employment of local person, a conspiracy was hatched by a lobby from outside Assam to remove Shri Amiyo Kumar Borah from the post of Chairman of RRB.

This evidence, given by PW 16, who was an employee of the NF Railway, remained un-controverted. Hence, the involvement of the appellant in preparation of false merit list is not free from doubt.

Ext. 1 is not the original merit list. It is a copy certified by the Assistant Secretary of the RRB. The said person, who certified the said document, has not been examined by the prosecution.

Admittedly, Ext. 1, not being the original document, secondary evidence of the merit list can be adduced/ given, subject to the provision of Section 65 of the Indian Evidence Act. No explanation has been made as to why the original copy could not be exhibited.

From the evidence, on record, it appears that no case has been made out for adducing secondary evidence in respect of the said merit list. Therefore, the said merit list i.e. Ext. No. 1 cannot be accepted as evidence.

As the first, 2nd and 3rd pages of the said merit list do not bear the signature of the appellant, the allegation, that hand-written roll numbers, appearing in Ext. No. 2 were inserted by the appellant is not free from doubt. Also there is no substantive evidence to show that the Ext. No. 1 (merit list) was prepared by the appellant.

43. PW 17, Sri Jagadish Mandal, who was the Ex-Law Officer of the NF Railway also stated about the maintenance of the record in the office of the RRB. He was not acquainted with the appellant and his handwriting. Hence, his evidence is of no help.

44. PW 18 was the I.O., who conducted the investigation and submitted the charge sheet. In his cross-examination he stated that, during the investigation, he obtained specimen signature of Sri Amiyo Kumar Borah, Smti Bandana Rekha Dutta Bora (wife of the appellant, Sri Amiyo Kumar Borah), Mr. P.G. Jhonson, Mr. Girin Das and Mr. Raju Centuary. He also stated that, during investigation, he could not collect all the answer scripts and coding slips of the candidates, who appeared in the examination. He denied the suggestion that investigation was not done in proper manner.

From the evidence of the I.O. it appears that, though the I.O. had taken specimen signatures and the hand-writings of the appellant and others, no report with regard to examination by the handwriting expert has been produced and exhibited. Hence, there is no scientific evidence to show that the handwritten roll numbers, appearing in Ext. 2 i.e. Ext. No. 2(1) to Ext. 2(19), were written by the appellant.

45. PW 19, who was the Inspector of CBI Special Wing. He also participated in the investigation. In his cross-examination, he stated that though he had taken specimen signature of Sri Amiyo Kumar Borah, he had not taken specimen signature of the other officers including the officers of the RRB. He also stated that he did not know whether the specimen signature of the accused was sent to GEOD for opinion. He stated that Ext. 2 i.e. the merit list did not contain the signature of any officer of the RRB.

Therefore, the evidence given by this witness also does not substantiate the allegation made against the appellant.

46. That apart, failure to get the entries by hand examined by a handwriting expert or to produce examination report, if any, raises serious doubt about the veracity of the prosecution version.

47. From the above discussed evidence, it is clearly found that the prosecution failed to establish, by adducing substantive and cogent evidence, that none-other than the appellant had inserted the handwritten roll numbers in the Ext. No. 2 and that the Ext. No. 1 i.e. merit list was prepared by the appellant.

Hence, the findings, rendered by the learned trial Judge, that the appellant had inserted the roll numbers of unsuccessful candidate in the merit list are not based on evidence on record.

In a criminal proceeding of this nature, no conviction can be based merely on suspicion or presumption.

48. This being a case of forgery relating to preparation of false document with a view to cheat other, the prosecution ought to have adduced evidence to show that the hand-writings in Ext. 2(1) to 2(19) were the handwriting of the appellant. Though the prosecution appears to have taken specimen signature of the appellant, for reasons best known to it, the prosecution choose not to adduce any scientific evidence in this regard. This laps also creates doubt about the prosecution story, making it unsafe to hold the appellant guilty of forgery.

Hence, it is clearly found that there is no substantive evidence indicating involvement of the appellant in preparation of the said merit list.

Be that as it may, even if we presume, for the sake of argument, that the appellant had inserted the said roll numbers, by showing the names of unsuccessful candidates in the merit list, unless dishonest and fraudulent intention in doing so is established by adducing reliable and cogent evidence, the appellant cannot be held guilty of committing the offences, under Section 468 IPC or attempting to commit cheating by forgery. In order to hold a person guilty of offence under Section 420 IPC, the elements of cheating i.e. the existence of fraudulent or dishonest intention at the initial stage of transaction of the act, is required to be shown by adducing cogent evidence.

That apart, as argued by the learned senior counsel for the appellant, the alleged merit list was a provisional list of candidates qualified for appearing in typewriting test and stenography test. The final select list would have been prepared taking into account the performance in the said tests. Hence, as no final list was prepared, it can''t be held that the appellant made any attempt to commit the offence under Section 420 IPC.

49. In the present case, there is nothing, on record, to find that the appellant had any nexus with any of the candidate, whose roll numbers were shown in the merit list or that he had obtained pecuniary or other benefit from such candidate.

Hence, there is no evidence to show that the appellant had included the names of the unsuccessful candidates with a fraudulent and dishonest intention to benefit them.

In view of the above, I have no hesitation in holding that the prosecution failed to prove that the appellant had committed the offence under Sections 420/ 511 and Section 468 IPC.

50. With regard to the conviction under Section 13(2) read with Section 13(1)(d) of the PC Act, in order to hold a person guilty of the offence under Section 13(2) read with Section 13 (1)(d), the prosecution has to prove the existence of the ingredients mentioned in Section 13(d)(i)(ii)(iii) of the PC Act. Section 13 of the PC Act reads as follows:

"13. Criminal misconduct by a public servant.-

(1) A public servant is said to commit the offence of criminal miscount,-

(a) if he habitually accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person any gratification other than legal remuneration as a motive or reward such as is mentioned in Section 7; or

(b) if he habitually accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person, any valuable thing without consideration or for a consideration which he knows to be inadequate from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by him, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned; or

(c) 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 so to do; or

(d) if he,-

(i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantages, 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

(e) if he or any person on his behalf, is in possession or has, at anytime during the period of his office, been in possession for which the public servant cannot satisfactorily account of pecuniary resources or property disproportionate to his known sources of income.

Explanation: For the purpose of this Section, "known sources of income" means income received from any lawful source and such receipt has been intimated in accordance with the provisions of any law, rules or orders for the time being applicable to a public servant.

(2) Any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall be not less than one year but which may extend to seven years and shall also be liable to fine."

51. In the case of C.K. Damodaran Nair (Supra), the Supreme Court held that for the offence under Section 5(1)(d), read with Section 5(2) [now Section 13(1)(d) and 13(2)] of the PC Act, the prosecution has to prove that the accused ''obtained'' the valuable thing or pecuniary advantage by corrupt or illegal means or by abusing his position as a public servant. A careful reading of Section 13(1)(d),(i)(ii) and (iii) leads to understand that to hold a person guilty of the said offence, it must be proved that he obtained any valuable thing or pecuniary advantages either by corrupt or illegal means or by abusing his official position. In the present case, there is no legal evidence to show that the appellant had either obtained any valuable thing or took any pecuniary advantage, illegally or by abusing his position.

In the case of A. Subair (Supra), the Supreme Court observed that the primary requisite for consisting an offence under Section 13(1)(d) of the PC Act, is proof of demand or request of a valuable thing or pecuniary advantage and in the absence of such proof, the offence under Section 13(1)(d) of the P.C. Act cannot be held to be established.

52. In view of what has been discussed above, I am inclined to hold that the prosecution failed to prove, beyond all reasonable doubt that the appellant, with fraudulent and dishonest intention with a view to cheat the NF Railway had inserted the handwritten roll numbers in Ext. 2 i.e. Ext. 2(1) to 2(19) and falsely prepared the Ext. 1. As provided by Section 20 of the PC Act, no presumption can be drawn in respect of the offence under Section 13(1)(d) of the PC Act. Therefore, even if there was any error or mistake in preparing the merit list (Ext. 1 and Ext. 2), no adverse presumption, binding the appellant with criminal liability, can be drawn. There is no substantive evidence to show that he had committed criminal misconduct, as provided by Section 13 of the P.C. Act.

53. In the light of the above, I find sufficient merit in this appeal. Accordingly, the appeal is allowed. Consequently, the impugned conviction and sentence are set aside and the appellant is acquitted and set at liberty. His bail bond shall stand discharged.

54. Return the LCR.

