(2018) 10 GAU CK 0013

In the Gauhati High Court

Case No : Criminal Appeal No.53, 79 Of 2014

Navendra Kumar And Anr @APPELLANT@Hash Central Bureau Of Investigan Cbi

Date of Decision : 04-10-2018

Acts Referred:

Prevention of Corruption Act, 1988 — Section 7, 13(2), 13(1)(d), 13(1)(d)(i)(ii), 20
Indian Penal Code, 1860 — Section 120B, 420, 415, 468, 471, 477A
Code of Criminal Procedure, 1973 — Section 313

Citation : (2018) 10 GAU CK 0013

Hon'ble Judges : Rumi Kumari Phukan, J

Bench : Single Bench

Advocate : B. M. Choudhury, S. C. Keyal, L. S. Choudhury

Final Decision : Allowed

Judgement

1. As all the appeals arose from the same judgment in special case 17/2006 they are taken up together and being disposed with this common judgment.

Heard Mr. B. M. Choudhury, learned counsel for the appellant in Crl. Appeal 79/2014 and Mr. L. S. Choudhury, learned counsel for the appellants in

Crl. Appeal 53/2014. Also heard Mr. S. C. Keyal, learned standing counsel, CBI.

2. During 1995-96 the Department of Telecommunications, here-in-after called DoT, Government of India, decided to provide Optical Fibre Cable

(OFC) Communication link on Imphalâ?"Moreh route in the state of Manipur. A survey of the route was conducted; a Project Estimate was prepared

& sanctioned. The total route length of the section is 108 kms which was divided into 27 sub-sections of 4 kms length each. The tenders were invited

and the work was executed through contractors separately for each sub-section. The terms, conditions & specifications of work are mentioned in the

tender document. The agreement was executed with the successful contractors. The over-all in-charge of the work was Divisional Engineer (DE) and the Government is represented by him. The Sub-Divisional Engineer represents the Government at the site of work. The JTO supervised the day to

day work at site. The measurements were recorded by JTO in MB and bills were prepared by him. The cent percent work was checked by the Site

Engineer (SDE). The bills were pre-checked by JAO, passed by the DE; counter signed by the Director and paid by the concerned Accounts Officer.

3. The depth and protection of the cable was verified as per route index diagram three times immediate after execution of the work. The cable was

handed over to maintenance unit, coming to an end the responsibility of the OFC officials. After completion of trenching and laying of HDPE pipes in

the year 1998, the route was given for acceptance testing in the year 1999. The route was found to be satisfactory.

4. As per the survey report, as the entire sub-section fell in the hilly and rocky area it is not possible to lay the cable at the standard department and

hence the RCC protection had to be given over the cable. Hence acceptance testing of the OFC route had to be done by the T&D Circle. After

successful completion of acceptance testing, the route was handed over to the Eastern Telecom Region for maintenance purposes.

5. An FIR was lodged by the Inspector of Police of the CBI, Silchar on 26.10.2002 to the effect that they got a reliable information that the accused

public servants and different contractors while laying optic fibre cable which was awarded by the Divisional Engineer (OFC) to different contractors

during 1995-96 for execution in different subsections of the Imphal-Moreh route by paying excess amount to those contractors against approved rates

and the tendered quantities of the work. The excess payments were made on account of deviations and in quantity of works and increase in the

quantity of the works including unauthorized payment against some items which were not tendered.

6. It is alleged that appellants while working in their respective capacities by abusing their official position and in connivance with the other officials

and contractors (Contractor M. S. Deol was awarded the contract to execute the OFC laying in respect of SS 19, 21, 24, 26 & 27 of Imphal-Moreh

route) thereby caused undue loss to the exchequer by committing the following omissions and commissions.

(1) Approval of tenders at exorbitant rates much higher than the estimated rates.

(2) Deviations in the quantity of hard and rocky soil by increasing the same much more than the quantities indicated in the tenders, certifying the

execution of increased quantities and causing payments accordingly by passing the questioned bills, apparently because the rates for these items were

much higher than the estimated rates.

(3) Deviations in the execution of quantities of works for soft soil by decreasing the same apparently to favour the contractors because the rates of

these items were lower than the estimated rates.

(4) Deviations in the concreting works by showing executions of increased quantities of concreting works against the tendered quantities.

(5) Falsely certifying the unwarranted concreting works and RCC/GI pipes laying and causing payments by passing the bills of the contractors for

these items.

(6) Falsely certifying higher depth than the actual depths and excess payments against these items.

(7) Payments in excess of expenditure sanctioned in violation of rules.

7. Further it is alleged that the accused public servants and the contractors conspired among themselves and in pursuance of the said conspiracy,

excess quantity of some items in the works was shown to have been executed unauthorizedly without ex-post-facto approval from the competent

authority and payments were made at the tendered approved rate instead of departmental rates caused wrongful pecuniary loss to the department and

the Govt. with corresponding wrongful gains to the accused persons in the tune of Rs. 19,40,497/-. At the time of random technical checking

conducted by the CBI during preliminary inquiry reveals that the appellants with collusion with the contractor have cheated the department by way of

excess payment to the contractor towards execution of excess quantity of work without approval from the competent authority and that too at the

approved rate instead of departmental rate and by making false entries in the MBs showing execution of various works which are not actually

executed as recorded in the MB.

8. During investigation, the IO visited the spot, recorded statement of the witnesses, seized a number of documents and after obtaining necessary

sanction against the public servants submitted charge-sheet against all the persons u/s 120B/420/477A of the IPC read with Sections 13(2) and 13(1)

(d) of the Prevention of Corruption Act, 1988.

9. The learned Trial Court accordingly took cognizance of the offence against appellants and framed the charges u/s 120B/420/477A of the IPC read

with Sections 13(2) and 13(1)(d) of the Prevention of Corruption Act, 1988 against the appellants to which they pleaded not guilty.

10. Prosecution examined as many as 26 witnesses and defence examined none. The plea of defence is of total denial. Statement of accused persons

recorded u/s 313 Cr.P.C., wherein they have denied all the allegations.

11. The learned Trial Court on conclusion of trial convicted and sentenced appellant Pijush Kanti bagchi to r/i for 1 year with fine of Rs. 5,000 u/s

120B of the IPC and r/i for 2 years u/s 477A/420 of the IPC and u/s 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 with

fine of Rs. 5,000/- and in default to s/i for 3 months.

12. Appellant Navendra Kumar and D. Sundaramurthy are sentenced to r/i for 1 year with fine of Rs. 5,000/- u/s 120B of the IPC and r/i for 2 years

u/s 420 of the IPC and u/s 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 with fine of rs. 5,000/- and in default to s/i for 3

months to be run concurrently.

13. Aggrieved by the aforesaid order and judgment of the conviction present appeals are preferred.

14. Appellants in criminal appeal 79/2014 and the appellant 2 in criminal appeal 53/2014 were working as SDE(OFC) while appellant 1 as DE(OFC).

15. I have heard the argument of learned counsels for both the parties at length and there is deliberation from both the sides on the evidence on record

and the appreciation thereof. It has been vehemently contended by the learned counsel for the appellants that without proper appreciation of entire

evidence on record, the learned Trial Court has come to a conclusion on the basis of surmises and conjecture, which is not sustainable in law. Per

contra, according to the learned standing counsel, CBI, in view of apparent findings of excess payment by the appellants to the contractors for the

work in question, as per the joint inspection report, against the estimated amount in the tender document, the appellants are rightly held guilty by the

Trial Court which calls for no interference.

Contention raised by appellants (officials):

16. At the very outset, it is submitted that the learned Trial Court has not appreciated vital evidence on record and has ignored material evidence on

record which needs consideration. The learned counsel for the appellant has led this Court towards the various aspects of the witnesses which they

divulged during the cross examination which is totally inconsistent with the allegation raised in the charge-sheet.

It is pointed out that the Director OFC has no field duties; and as per provisions contained in Clause 132 of the tender document, he can inspect the

work during its progress as provided below:-

â??All work under or in course of execution or executed in pursuance of the contract shall at all times to open to the inspection and supervision of the

Engineer-in-Charge and his authorized subordinates, and the contractor shall at all times during the usual working hours, and at all other times at which

reasonable notice of the intention of the Engineer-in-charge or his subordinate, to visit the works, shall have been given to the contractor, either himself

be present to receive orders and instructions, or have a responsible agent duly authorized in writing present for that purpose. Orders given to the

contractorâ??s agent shall be considered to have the same force as if they have been given to the contractor himself. The work during its progress

can also be inspected by Director, Telecommunications and Chief General Manager Telecom.â??

17. Sh. S.N. Malakar (PW-17) was specially deputed for repairing work and in cross-examination has stated as follows:-

â??It is correct that I was posted as DE(TP-II) at Jorhat. I was called specially to repair OFC on Imphal Moreh and Imphal Churachandpur routes.

The OFC cables had been damaged as a result of clearing of debris accumulated from landslides by JCB and excavation of the drain by the side of

the hills by JCBs and also as a result of widening of road by PWD. I had repaired the damaged portions of the Imphal Moreh and Imphal

Churachandpur routes. After repairing, the cable was offered for A/T. The AT is directly under the control of CGM (T&D) with its head quarter at

Jabalpur. It is correct that A/T team verified the depth of the cable and protection over the cable from the Route Index Diagram. It is correct that the

OFC could not be commissioned unless it was accepted/approved by the AT team. AT had raised some objection at the first instance. After removing all those objections, I offered the OFC again for AT. AT had sought relaxation of depth of OFC trenches from the CGM NETF. It is correct that AT

had sought relaxation of depth of cable because the cable was not laid at the standard depth of 1.65 metres. The CGM accorded the relaxation of

depth the OFC. I had offered the cable, after approval of AT, to the maintenance organization. Thereafter, a joint team of 5 officers of executing and

maintenance organization consisting of Ashok Kumar, DETP/NETF, Guwahati, E. Swer, DE Maintenance, ETR, Imphal, S.N. Malakar,

DETP/NETF, Guwahati, Maria Pragasam, SDE, OFC, NETF, Imphal and W. Inaopi, JTO Maintenance ETR, Imphal, was constituted.

It is correct that the joint inspection team again verified the depth of the cable and protection. It is correct that a memo was prepared with regard to

the sample test check of OFC with regard to the depth of the cable and protection over the OFC. It is correct that during joint inspection, the random

test check was conducted in each sub-section of the entire route. The depth and protection was found correct as per Route Index Diagram. I was

present during joint inspection and I had signed the memo. It is also correct that a joint inspection was again conducted at the Director level on both

the routes i.e. Imphal Moreh and Imphal Churachandpur. Sri Sailendra Agarwal, Area Director, NETF, Guwahati and myself were present from OFC

side and Director (Maintenance) ETR, Shillong was also present there. I had signed that memo. The depth and protection noted by A/T was checked

at the Director level during joint inspection. After full satisfaction with regard to the depth and protection over the OFC as per Route Index Diagram,

the maintenance organization took over the charge of the OFC and I had handed over the charge of the cable to the maintenance. This exercise was

done both at Imphal Moreh route and Imphal Churachandpur route. I had signed the joint inspection memo prepared by maintenance organization and

executing staff. The responsibility of the executing staff with regard to depth and protection of the OFC came to an end and thereafter it became the

responsibility of the maintenance organization. â?¦â??

The IO (PW-26) M. T. Mang has admitted all these facts in his cross-examination in the following terms:-

â??It is correct that the A/T was conducted by the office T&D (Technical & Development) circle. The controlling officer of the AT is the CGM, T&D Circle Jabalpur. It is correct that CGM NETF has no control over them. It is correct that the officers of AT verified the depth and protection of

the cable as per Route Index Diagram. It is correct that the officers of AT team commissioned the cable only when they found it correct. It is correct

that I had seized AT report. It is correct that after AT, a joint inspection was conducted by the officers of OFC and ETR (maintenance). It is correct

that they also verified the depth and protection of the cable as per Route Index Diagram. It is correct that I had seized the joint inspection report. It is

correct that a depth check report was also prepared at the Director level in presence of the Additional Director and Director (Maintenance), Shillong.

It is correct that I had seized this report also. Since I did not feel that these documents i.e. A/T report, joint inspection report, I did not enlist them in

the list of documents enclosed with the charge sheet.â??

18. It is submitted that from the testimony of Sh. S.N. Malakar (PW-17) and the admission of the same by IO (PW-26) that the work executed by the

OFC staff/the appellants was verified three times as per Route Index Diagram in respect of the depth of the cable and the protection applied to it.

Each time, it was found correct as recorded on Route Index Diagram and the Measurement Book. The IO had admittedly seized all those documents;

but, he deliberately did not place those documents on record, obviously because no cases made out against the appellant in view of the said reports.

The responsibility of the appellants, thereafter, came to an end and further responsibility shifted on the Maintenance organization to maintain the cable.

It is pointed out that the CBI did not associate any person from the Maintenance organization during investigation. On this ground alone, the impugned

judgment is liable to be set aside and the appellants are entitled to acquittal.

19. The Ld. Trial Court wrongly relied upon the joint inspection report of CBI. The witnesses to the joint inspection memo stated as follows:-

â??PW-6 Sh. B. Nag Choudhury has stated that he did not decide the category of soil. The report was prepared by CBI office. The IO got it signed

the same after 2 days in a Hotel at Imphal where he was staying. The figures of measurement have not been furnished to him which he had taken.

PW-9, W. Sunil Singh has stated that he signed the inspection memo merely because he was present. He did not see any document or route index

diagram. It was prepared at site.

PW-20 Sh. Y. Rajo Singh has stated that he was not aware of the contents. The IO had come to the office of DE where he signed the inspection

memo. He does not know who had prepared the same and where it was prepared. It was not prepared in his presence. CBI neither read out its

contents nor he was told about the figures of measurement. He had not seen any documents e.g. MB, RID, Tender Document etc. on the spot during

inspection. He further stated that the IO had a diary and not the diagram.

PW-21 Sh. Y. Ibomcha Singh has stated that the IO recorded the measurements in his presence; but, he does not know anything about measurement.

He had signed the inspection memo after 10 days at the instance of the IO. He does not know when and where this memo was prepared and who had

prepared the same. He categorically stated that this memo was not prepared in his presence.

PW-22 Balai Das has stated that he didnâ??t know anything about the contents of the report. He has signed the same in the DEâ??s office. About

2-3 persons had signed the memo in DEâ??s office. He signed the memo as he himself had dug the pit. He categorically stated that he had no

understanding of the contents of the report and he had signed the same without knowing anything about it.

PW-23 Prakash Kapur has stated that he had merely made a pit. He didnâ??t know what was done at the pit. He did not know anything about the

contents of the inspection report. He did not know who had prepared the same and where it was prepared. He signed the same after 1 or 2 days in

the office of DE. Four persons have signed the same in the office of DE. He signed the same at the instance of the IO as he had made the pit.

Neither he enquired nor he was told by anybody about the contents of the joint inspection memo. The IO had no document other than one diary and

one diagram. At the time when the IO had brought this memo for my signature, he had no other document. He did not know about the sub-section

where he had made a pit. He did not know the place where it was placed. He further stated that he could not tell anything about the contents of the

said document as he cannot read, write or understand English.

PW-24 Sh. S.M. Singh has stated that he had signed the memo merely because he was present. He had signed in the office of DE at the instance of

IO. The Inspection continued for about 1 month and on its completion, IO got it signed by him. He does not know if it was prepared at site; but, he did

not sign at site. He was earlier called by same about 3 years ago; but, he declined to make a false statement as desired by CBI. He does not know

anything about its contents.

PW-26 IO, Sh. M.T. Mang has admitted several discrepancies in his own joint inspection memo. The IO has stated that route index diagram available

on record is defective. It is very strange that he is comparing his own findings with those of a defective diagram. He has admitted that some mistakes

have been crept in in-advertently in writing the measurements as per route index diagram. He further stated that nobody had noted the discrepancies

occurred in the locations; but, he had noted the discrepancy before filing charge-sheet; but, did not record the same in the case diary. He admitted that

only 0.12% of the work was examined during joint inspection conducted by him that too after 7 years of its execution.â??

Thus, the Trial Court evidently committed an error in relying upon the erroneous joint inspection report of CBI.

20. It has been admitted by the IO (PW-26) that no sub-section wise detailed estimate was prepared and without detailed estimate for each sub-

section, the cost and quantities cannot be worked out. The PW-17 Sh. S.N. Malakar has stated that the estimated cost shown for each sub-section

could not be correctly evaluated since no detailed estimate was prepared sub-section wise. He has also stated that the figures/quantities mentioned in

the tender document are not according to survey report. The IO has also admitted that the figures and quantities as per tender document are not

according to survey report. It is, therefore, evident that the estimated figures mentioned in the tender document are fictitious. Consequently, they are

bound to change.

21. In accordance with clause 46 of the tender document, the figures/quantities mentioned in the tender document are not firm and final. They are

subject to change. The changed quantities will be deemed to have been included in the tender schedule. In accordance with the clause 47 of the

tender document, the payment to the contractor will be made according to the actually executed quantities at the approved tender rates. It has been

done in the present case. The said clauses are reproduced here-in-below for the ready reference of the Court:

â??46. The quantities/figures indicated in the tender schedule are approximate and are subject to change. Any change effected shall be binding on the

tenderer/contractor as though included in the original tender schedule and any such change will not make the agreement void and it is therefore

essential that the tenderers binding all the documents carefully and not commit any mistake in analyzing the rates quoted and remain binding

notwithstanding any changes as aforesaid. No revision of tendered rates shall be considered on any ground whatsoever.

47. The quantities indicated in tender schedule shall not be considered as representing firm/final quantities. All works shall be measured by Divisional

Engineer or his authorized representatives. Amount payable to contractor shall be on the basis of actual work done by him at the rate approved by

department.â??

It is, therefore, abundantly clear that no excess payment has been made to the contractor. The excess payment alleged to have been made to the

contractor is merely the difference between the estimated cost and the actually executed cost. The estimated cost can never remain same in any

case.

22. In accordance with the provisions contained in clause 220 of the tender document, the site in-charge is the competent authority to decide the

category of soil and the depth of the trench. He will also decide the protection to be used over the cable under the prevailing circumstances.

23. The DE will conduct test check as per provisions contained in clause 192 of the tender document which provides that the DE will test check only

if he considers necessary. It is not mandatory and this fact has also been admitted by the IO (PW-26). He has clearly stated that the test check to be

conducted by DE is not mandatory rather it is his own decision. The PW-7 (Sh. S.K. Sikidhar) and PW-17 (Sh. S.N. Malakar) have also stated the

same thing.

24. According to the geological survey, about 91% of the area of Manipur is hard rock. According to survey report conducted by PW-13 Sh. R.N.

Singh, the entire route is hilly and rocky. It will not be possible to lay cable at the standard depth of 1.65 metre. Hence, the protection of GI/RCC pipe

and RCC is to be provided over the cable. This fact has also been stated by PW-7 and PW-17. The IO has also admitted that according to Survey reports, the entire route is hilly and rocky.

25. It is, therefore, submitted that there is no irregularity in making payment to the contractor. The payment to the contractor has been made

proportionately since the cable has not been laid at the standard depth of 1.65 metre.

Evidence on record:

26. As the whole case revolve around the joint inspection report made by the IO in presence of other witnesses, so let us start with the IO PW-26/Sh.

M.T. Mang. Without narrating about the illegalities and irregularities that has been committed by each of the accused persons, he has stated seizure of

various documents in connection of the case from the officials of the department concerned which is large in number, he has stated about joint

inspection as below:-

â??During investigation, joint inspection was conducted on 06.06.2003 and 31.05.2003 in presence of independent witnesses namely B. Nag

Chaudhury, S. M. Singh, Bolai Das, W. Sunil Singh, Ibomcha Sinch, Y. Rajo Singh, Prakash Kapur and myself. A joint inspection memos were

prepared on the spot which was signed by all the team members as a token of acceptance of the contents of the memos. During inspection the trench

where the OFC laid was dug out, nature of soil and protection used were visually examined. Four locations each in respect of SS 21, SS 24, SS 26,

another six locations each were also inspected in SS 27 and SS 19 of Imphal Moreh route wherein the nature of soil, RCC protection shown and the

depth mentioned in the bill/diagram were found false.

During investigation it was found that the nature of soil and RCC protection shown to have been provided were found false but payment was made as

per the bill/MB accordingly. Thereby causing substantial wrongful loss to the corporation and corresponding wrongful gain to the

contractor/themselves. Considering all the above facts in toto, I find that prima facie case is made out against them and they were charged

accordingly.â??

Some relevant portion of his cross-examination is reproduced below:-

â??Myself and B. Nag Chaudhury had decided the locations where pits were to be dug. I had the route index diagram, bills, MB and tender document of SS 19, 21, 24, 26 and SS 27 with me. We made pits, measured the depth of the trench and nature of the trench. Category of soil was decided by B.

Nag Chaudhury, myself and other team members jointly. The category of soil was decided by visual inspection of the excavated soil and by seeing the

area.

As per survey report, area in this case, falls in hilly, land erosion, landslide prone area. As per tender document the figures and quantities mentioned

are not according to survey report. The cost of cable laying cannot be same for all the 27 subsections i.e. Rs. 3 lakhs, as mentioned in the tender

document. It is correct that the contractor is paid at the approved tendered rates. It is correct that the site engineer is the competent authority to

ascertain the depth, size of the trench and category of soil. It is correct that it is the discretion of the DE whether to conduct test check or not. It is not

mandatory.

It is correct that no subsection wise detailed estimate had been prepared. Without detailed estimate for each subsection, cost and quantities cannot be

worked out. It is correct that the A/T was conducted by the office T&D circle. The controlling officer of the AT is the CGM, T&D Circle Jabalpur. It

is correct that CGM NE Task force has no control over them. It is correct that the officers of AT verified the depth and protection of the cable as per

route index diagram. It is correct that the officers of AT team commissioned the cable only when they found it correct. It is correct that I had not

seized AT report. It is correct that after AT, a joint inspection was conducted by the officers of OFC and ETR (maintenance). It is correct that they

also verified the depth and protection of the cable as per route index diagram. It is correct that I had seized the joint inspection report. It is correct that

a depth check report was also prepared at the director level in presence of the additional Director and director Maintenance, Shillong. It is correct that

I had not seized this report also. Since I did not feel that these documents i.e. AT report, joint inspection report, I did not enlist them in the list of

documents enclosed with the charge-sheet.

Insurgency was there at the time of execution of the cable laying work on Imphal Chaurachandpur and Imphal Moreh route. It is correct that

revolutionary peopleâ??s front of Manipur is an underground group which operates in Manipur. I am not aware whether such groups demanded money from executing authority, both contractor and officers.

After taking over the OFC cable from OFC, the officers of ETR (maintenance) maintain the cables. I do not know the role of the officers of OFC

after handing over the cable to ETR (maintenance staff). I do not know if the OFC officers can interfere in the working of the maintenance staff. I

did not associate any employee/officer of ETR (maintenance) during investigation or during joint inspection conducted by CBI. During inspection cable

was in working condition and was under the control of ETR staff. The officer of OFC had no role to play in the maintenance of cable at that time I

had conducted the joint inspection and carried out the investigation. I did not seize any report from any agencies such as PWD, Electricity department,

local telephone, local cable maintenance telephone officers and from the officers of ETR maintenance about the damages caused to the cable due to

militancy, landslide, land erosion, heavy rains or widening or road etc. I did not include any of the staff of the ETR in the list of witnesses. The

investigation was carried out with regard to irregularities in the trenching and laying of the cables which is done by OFC project not by maintenance.

Myself and other team members correlated the points in the joint inspection memo with that of the corresponding point in route index diagram. Myself

and other team members collectively decided the type of soil. Locations of pits for joint inspection had been ascertained by myself and other team

members. It is correct that the payment to the contractor is made on the basis of the actually executed quantities at the approved tendered rates. It is

correct that the government is represented by site engineer at the site.

It is correct that as per survey report SS 19, 21, 24, 26, 27 fall along hilly and rocky area and protection had to be provided on hilly and landslide prone

area. RCC/GI pipe protection is to be provided over OFC as the standard depth cannot be achieved in these areas. It is correct that the quantities and

figures shown in the tender document are not in the survey report. It is correct that estimate quantities are not final. The cost of execution may

increase when there is an excess quantity of work. It is correct that the work in this case was examined at 24 points.â??

27. PW-6/Sh. B. Nag Chaudhury, PW-9/Sh. W. Sunil Singh, PW-20/ Sh. Y. Rajo Singh, PW-21/Sh. Y. Ibo Mucha Singh, PW-22/Sh. Bolai Das, PW-

23/ Sh. Prakash Kapur and PW-24/ Sh. Shoibam Momon Singh were witnesses to the joint inspection dated 31.05.2003 and 06.06.2003 and they have

stated that the joint inspection vide Ext. 94 & 95 were prepared by CBI Inspector Sh. M. T. Mang and they were present at the time of excavation of

the OFC laying trenches in the subsection 19, 20, 21, 24, 26, 27 on National Highway 39 and they have signed the joint inspection report as directed by

the I.O. Sh. M. T. Mang. Save and except signing of the said verification report they have not stated anything about the findings of joint inspection

report.

In his cross-examination, PW-6/Sh. B. Nag Chaudhury, has stated that depth was measured from the top of the cable protection provided over the

cable upto the ground level. There was no other measuring tape like odometer at the time of such measurement except of 3 meters tap. He has also

stated that no route index diagram, measurement book and other documents were shown to him for reference or consultation, so he cannot say about

the correctness of the figure indicated in the joint inspection memo. He has no knowledge about the category of soil and it was decided by the CBI

personnel. The CBI personnel did not consult with any other personnel for deciding the location of pit and category of soil. The joint inspection memo

was prepared in the office of CBI and his signature was obtained after two days in his hotel room.

He further stated that the area where the joint inspection was carried was hilly and rocky. The category of soil at the time of reopening the trench

could not be the same as that the soil that was used to fill up the trenches for OFC laying earlier. He has also admitted that depth of the cable and the

protection used is verified from the route index diagram by the AT and found the correctness of the depth, soil and type of protection used. After the

AT and commissioning of cable, the cable is handed over to the maintenance department after a joint inspection conducted by team of officers of

maintenance and execution. After taking of the OF cable maintenance of the said is the responsibility of the maintenance department. I.O. did not

asked him anything about the work.

28. Evidence of PW-9/Sh. W. Sunil Singh, PW-20/ Sh. Y. Rajo Singh, PW-22/Sh. Bolai Das and PW-23/Sh. Prakash Kapur is totally silent as about

the anomalies that have been found at the time of joint inspection and they simply signed the joint inspection prepared by the I.O. However, they have stated that they were not shown any document by the I.O. at the time of such inspection.

29. PW-21/ Sh. Y. Ibomcha Singh has stated that the measurements were recorded by M. T. Mang in his presence but, he does not know what

measurement has taken. He had not been told about the measurement taken. The locations where inspections were conducted were hilly and rocky.

The cable was laid along the highway between highway and the hill. There had been road widening work. He does not know if the cable was shifted

during road widening. Along the cable trench, there were drains also. He put his signature on the memo in CBI office 10 days later. He signed in the

presence of IO PW-26/ Sh. M. T. Mang and PW-9/ Sh. W. Sunil Singh but Sh. S. M. Singh and two RMs did not sign at Silchar. He does not know

where the memo was prepared and it was not prepared in his presence.

30. As is evident, none of the witnesses has supported the joint inspection report as prepared by the IO (PW-26) M. T. Mang and his evidence. He

himself played the role in carrying the inspection and he recorded all the findings without consulting the all necessary documents like MBs, route index

diagram, subsection file etc., so as to correlate his findings along with those documents to give accuracy to his findings. Most importantly, none of the

officials of the department concerned has supported such findings of the IO which goes to the root of the case. Regarding the findings of different

category of soils at the time of inspection after several years of execution of works is not doubtful. On the other hand, some deviation in the depth of

trench and RCC protection also appears to be inevitable if the findings of the survey report and the explanation given in the cross examination by the

witnesses themselves. As per the survey report the whole area was rocky and hilly and expected depth cannot be achieved due to the hard and rocky

nature of soil. The witnesses in their evidence has admitted that findings of different nature of soil, depth, RCC protection may be caused due to

passage of time, widening of road, hilly terrain etc.

31. So far as the other evidence concern, PW-1/Sh. S. K. Jain, PW-3/Sh. I. N. Y. Prashad, PW-5/ Sh. A. K. Girotra and PW-8/Sh. Mahindar Singh

are not relevant as it stated about the sanction order passed by the authority.

32. PW-2/ Sh. S. C. Paul, Chief Accounts Officer, PW-10/Sh. Jibotosh Biswas, Rtd. Chief Accounts Officer, PW-11/Sh. Debobrata Dey, Chief

Accounts Officer, all of them have exhibited several related documents relating to work order, payment made to the contractor, the different bills

prepared in respect of work in question, entries in the MBs, cash book and the calculation sheet prepared on the basis of the joint inspection report,

wherein difference between the payment actually made as per MB/RA bills and report of joint inspection team in respect of different SS of the Imphal

Moreh route. But save and except exhibiting those documents, they have not uttered a single word about the irregularities or illegalities crept into by in

any of the documents they referred to implicate any of the accused persons regarding criminal liability. Their simple assertion is that they verified the

bills which were duly checked by the official concerned, passed by the DE and counter signed by the Director and they passed the bills and issued the

cheques under their signature.

In his cross-examination, PW-2 has stated that the test check was conducted by DE as per clause 192 of the tender document and as per 192 DE has

discretion to conduct test check, whereas, it is not mandatory for DE (T) to conduct test check. Bills are prepared and payment is made on the basis

of the actual executed quantity at the approved rate. The estimated quantity always subject to change and they are not final. Any change in the

quantity and excess quantity of work deemed to have been included in the tendered quantity and payment is made accordingly at approved rate. He

ordered payment of bills only after satisfying himself that bills are pre-checked by Jr. A. O. passed by DE and counter signed by Director and then all

the bills used to come to the Accounts Officer, Office of the Microwave Project Task Force Guwahati within forwarding letter to effect the payment

and accordingly payment is made after arithmetical check with reference to the MB/RD. He further stated that he order payment of bills only after

ascertaining all formalities have been completed. As far as the evaluation work is concerned, he does only the arithmetical calculation and he was not

a party to the joint inspection team. He does not know anything about the correction of the figure supplied by the CBI. He does not know if type of

soil, depth of cable and protection over the cable are in respect of the same cable and the position of the cable was intact as it was laid at the time of

execution of work and he acted merely as calculator.

33. The PW-7/S. K. Sikidar, retired DE has stated all about the OFC lying project

and has also stated about the comparative statement of SS 19, SS

21, SS 22, SS 24, SS 26. It has been stated that in some subsections, amount approved against the sanctioned work is more than 50%, 300% of the

estimated cost. Further, he stated that if the quoted rate is found more than 25% above the estimated cost, the Director of the company will take the

decision whether quoted amount could be approved by taking into account the cost of executing work and the remoteness of the worksite, if the

Director find the approved rate as exorbitant, he may not approved it and he may direct the DE to go for re-tendering and if he found the amount

being justified considering the remoteness of the location and escalation of cost of material, he may approved the same after negotiation. He has also

referred about the letter Ext. 101 written by the contractor to the DE, OFC requesting him to allow him to complete the work by doing RCC work as it

was not possible to dig the trenches upto the standard depth and also to grant him excess quantity RCC work in respect of SS 26, 27 along with detail

of soil condition and DE, OFC provisionally allowed the same. Thus, he has exhibited lot amount of documents like tender document in respect of each

of the subsection, report of the tender evaluation committee, communication between the contractor and the authority(DE) and the agreement entered

between the contractor and the DE regarding the execution of the work in question.

In cross-examination, he has stated that the work sites along Imphal Moreh OFC route is hilly and rocky, which is also depicted in the survey report.

During monsoon the OFC cable may get damaged due to water seepage, road widening work, landslide, repairing of trenches and culverts. The

department does not use anti termite treatment while providing protection of OF cable through concreting on the OFC route. In cases where anti

termite treatment was not administered the concreting protection may get damaged by termite attack and it is quite impossible to predict the longevity

of cable route. It may get damaged during the work carried out by other agencies or by natural calamities. The route may get damaged at any time

after completion of work. The quality of soil used for covering of the trenches during initial execution of work will not remain the same if the same

trenches were to be excavated after few years. As per clause 192 of tender document for Imphal Moreh route, DE before passing the bill for any subsection has to carry out test checks by reopening the trenches at intervals if necessary. He further stated that as per tender document, site in-

charge i.e. SDE is the authorized person to decide the category of soil of a particular subsection and the protection required where the standard depth

is not maintained. The payment of the bills are made on actual work carried out by the contractor on the approved rates. AT is carried out before

commissioning of the route and AT is conducted by officers of the T & D circle which is a separate wing of the department.

AT carries out test checks with regard to depth and protection of the OFC route to be commissioned as per route index diagram submitted to them.

After commissioning of a route by the AT wing, the route is handed over to telecom region for maintenance purpose. Telecom region is also a

separate wing for maintenance of all transmission routes. Before taking over the route from task force organization, the maintenance staffs are to

inspect the site and verify the condition of the route along with task force staff and after satisfaction with regard to depth and protection of the cable

as per route index diagram. CGM Task Force Guwahati has no administrative control over AT and maintenance organization. After handing over of

OFC route to maintenance organization, the responsibility of the executing authority ends. The Imphal Moreh route is insurgency prone area and there

was no security provided to the staff who were supervising the OFC work.

34. The evidence of PW 12/Sh. Tomy Kurian, Chief Managar, relates to the opening of account and statement of account in respect of contractor M.

S. Deol. PW-13/Sh. R. N. Singh, conducted the survey report on visual inspection and said that the soil in the Imphal Moreh route was hard and rocky

and that is why the excavation of cable trench to the depth of 1.65 meter was extremely difficult and RCC and GI pipes were required to be laid for

protection of the SDPE pipe/OF Cable vide Ext. 99 is the survey report.

35. PW-14/Sh. B. C. Bordoloi, PW-15/ Sh. Ashutosh Kumar Chanda and PW-16/ Sh. Kamala Kanta Das has stated about certain document executed

by the parties while awarding the contract, large in number and they have not uttered anything about the irregularity while awarding the contract or

about preparation of bills.

After giving long statement by the PW-15 all about those documents, peculiarly in cross-examination, he has stated that he had no role to play in the instant case and he has no personal knowledge about the case. He had given his statements to the IO on the basis of documents which was produced

before him at the relevant point of time. He does not remember the documents which had been shown to him during interrogation and he had never

dealt with the documents which have been shown to him that today in the Court. He further admitted that he had identified the signatures on the

documents that day, since their names had been typed below the signatures. He was not posted in OFC but in a different unit. The record of TEC

(Tender Evaluation Committee) has been shown to him in the Court during his examination and he find that the names of M. L. Sharma and N.

Kumar are not there in the TEC. He further stated that the Director is the sole authority to approve the rate of the tenders. So far his knowledge, 10%

of the check of the trenching work is to be done by DE and there is no reference of 10% check by DE in clause 192 of the tender document.

If necessary the DE will conduct the test check. The duties and responsibilities of DE are mentioned in the tender document. He further stated that

the AT (Acceptance Testing) units verifies the depth and protection of the cable as per route index diagram and AT declares commissioning of the

cable after a satisfaction as per route index diagram. He admitted that a joint inspection was conducted by officers of OFC project and maintenance

organization and during joint inspection, the depth and protection of OFC is again verified as per route index diagram. The maintenance unit accepts

the OFC only after their satisfaction about the depth and protection of the cable as per route index diagram. After handing over the cable to

maintenance unit, the responsibility of OFC officers comes to an end. It is also stated that he has worked in OFC for one year on Silchar-Hilakandi

and Silchar-Dharmanagar route and he never visited Impahl Moreh route. The above revealment by the said witness has destroyed the credibility of

his evidence given in chief as his statement was even not on personal knowledge but on the basis of documents shown to him by the IO.

36. Sh. S. N. Malakar (PW-17), Retd. DGM, BSNL and in the year 1998-2000 he was DE in the officer of Director, OFC and he was specially

deputed for the repairing work of the Imphal Moreh and Imphal Churachandpur routes. The repairing work was undertaken in Octoberâ?? 1999 to

Decemberâ?? 1999. In his evidence, he has stated that when he took over the charge DE/TP on Imphal Moreh route in June 1998 all the works had already been completed and payments had also been made except in few cases where the payment of SD money was withheld. At the relevant time

the process of handing over of the OFC route to maintenance division was going on. There was some pending cases for correction of the OFC route.

He had been entrusted to look after the work of repairing of the damaged cables and low depth of the trenches. In this regard, he had intimated the

contractors concerned with regard to discrepancies found in the execution of the work. The contractor had replaced the damaged cables in few

sections and in the remaining sections of the route was restored departmentally by deducting SD money of the contractors concerned since the

contractors of these subsections did not turn up. He has exhibited different documents pertaining to the work in question like tender documents, project

estimate etc. etc. He, however, stated that the amount quoted by the contractor was much higher than the estimated cost.

37. PW-19/Sh. S. R. Bali, Deputy Director General, TEC, prepared the project estimate in respect of OFC laying work in Imphal Moreh route in the

year 1995 after getting approval from CJM task force and thereafter he came to know about this case in the year 2003. He has exhibited documents

pertaining to the survey report, tender documents and estimated cost of said SS 21, 24, 26 & 27. In cross-examination, he has stated that the estimate

was made on the basis of survey report. Ram Prasad was DE Survey and Sh. R. N. Singh was working as DE (M/W) at Imphal and he was not

under his administrative control. He has not made subsection wise detailed estimate. He did not know whether detailed estimate based on the project

estimate sanction by the CGM was prepared for each subsection. He has stated that the estimated cost of each subsection cannot be ascertained

without preparing detailed estimate in subsection wise. He never stated before the IO that he directed B. R. Attri to float tenders and he does not

know whether any one among the accused persons was member of the TEC. It is also admitted that he was under suspension as he was involved in

the CBI case and was arrested by CBI in a trap case along with Sri R. K. Varun, DGM. He was not aware if the detail estimate was prepared for

each subsection and he was also not aware as to how the subsection wise estimate cost was calculated as it was not prepared in his tenure.

38. PW-18/Sh. Govinda Kalita has stated all detail about the execution of the work till preparation of the bill and cheque etc. and he has not stated

anything about the irregularities crept into while awarding the contract except exhibiting bunch of documents. His cross-examination even declined by

the defence.

39. Initial part of the investigation was carried out by the PW-25/Sh. S. Lama, who has stated about seizure of certain documents at the instruction of

the another IO/ M. T. Mang from the officials of the Central Bank of India, Pan Market, some measurement book from the Accounts Officer, Task

Force Guwahati.

FROM THE DEPOSITIONS OF THE AFORESAID VITAL PROSECUTION WITNESSES, IT REVEALS THAT â?

Ã? Before inviting the tender, no sub-section wise survey, project estimate was prepared. After completion of tender process and after issuing the

work order to the contractor, physical survey was conducted by the authority and on the basis of such survey report, project estimates were prepared.

Ã? The estimated quantities are not firm and final, that are subjected to change during the time of execution of the work as per clause 46 & 47 of the

tender documents. It may be increased or it may be decreased. Any excess quantity required at the execution of the work would be deemed to have

been included in the tender quantity and the payment to the contractor is made on the basis of the actual work done, it may be less, it may be more.

Ã? The entire Imphal Moreh route is hilly, rocky, landslide, soil erosion and sinking zone. It was extremely difficult to make the trench upto the

standard depth of 165 cm. It was therefore essential to provide RCC/GI pipes and RCC protection of OF cable over the entire route.

Ã? The AT team had sought relaxation of depth of OFC trenches from the CGM, NEFT because the cable was not laid at the standard depth of 1.65

meter. The CGM accorded the relaxation of depth the OFC. Such facts have been stated none other than the prosecution witnesses. As the entire

route is hilly and rocky area, therefore the project cost increases and therefore, a revised estimate was prepared and the same was duly approved by

the CGM, Task force.

Ã? The work was executed in the year 1996. After completion of the work, the cable was offered to the AT team for inspection and as the AT team

detected some defect at the first instance in the year 1999, therefore, the contractor was asked to rectify the same. After rectification of the defects, the cable was again offered to the AT team and the AT approved the same. Thereafter the cable was handed over to the maintenance organization.

After handing over the cable to the maintenance organization, a team of 5 officers from the AT and the Maintenance organization was constituted and

accordingly, they carried out the joint inspection as per the Route Index Diagram and after inspection, as everything was in order, the said team

approved the same.

Ã? Thereafter, another inspection was carried out at the directorate level and the said team also inspected the cable as per the Route Index Diagram

and after inspection, they accepted the cable and accordingly, the cable was formally handed over to the maintenance organization.

Ã? Thereafter, the SDE prepared the MB on the basis of the route index diagram and the bills and the same were rectified by the DE. The MBs had

been countersigned by the Director OFC (P) and duly pre checked by the JAO, OFC (P) and finally the Accounts officer, Microwave project passed

the bills and accordingly payment was made to the contractor.

Ã? The CBI conducted the investigation in the year 2003 till that time more than 7 years have elapsed. During this period of seven years, the condition

of the cable has been changed due to land slide, soil erosion, damaged caused by the PWD etc, which has been corroborated by several prosecution

witnesses, but the CBI has neither collected any report from such organization nor exhibited the same.

Ã? That CBI has made the joint inspection without the route index diagram inasmuch as the same has not been exhibited in the case. The CBI has

also not exhibited the AT report, Joint inspection report prepared by the officers of the AT and the maintenance organization and the joint inspection

report prepared at the Directorate level. The sub-section file which contained about the deviation statement and the approval from the authority

although seized by the IO but not produced. Due to such serious lapse on the part of the IO, the authenticity of the joint inspection report is itself at

shake.

Ã? The CBI had not made the JAO, the ETR personal, CGM, Task Force NER, as witness and/or accused in the case, under whose supervision, the

work was executed and who had verified and/or inspected the work.

Ã? The CBI had prepared the joint inspection memo at their office and the signatures of the witnesses were taken at their office as well as in the hotel

after two days that too without allowing them to verify the figure recorded at the time of the inspection. The witnesses to the joint inspection has not

supported the content of the said report save and except their signature in the report.

Ã? At the time of carrying such joint inspection by the IO, no soil testing expert was with him nor any comparative chart was prepared having regard

to the route index diagram to show the actual amount tendered and about the deviation as regard the nature of soil, depth of trench etc. The only

verbal evidence of the IO which was not supported by documentary evidence and not corroborated by his own witness is not enough to prove such

serious charges against the appellants.

Ã? The official witnesses so far examined by prosecution except exhibiting the documents has not brought anything on record to reflect that the

officials entered into conspiracy with the contractor while awarding the contract, rather evidence reveals that the contract was awarded in due

manner after evaluation by tender evaluation committee. No any witness has stated about the irregularities in the tender process.

FINDINGS

40. In view of all what have been discussed above, the deviation that has been found by the IO at the time of his inspection after 7 years of execution

of the work will not itself indicate the criminal liability of the officials as well as the private contractors. Evidence indicates prior approval was taken

for such deviation of work by the site engineer which is in the sub-section file that the said important file was withdrawn from producing before the

Court. The tender document says that estimated amount is not final, survey report says that the standard depth cannot be acquired, witnesses said that

due to natural calamity like heavy rain fall, soil erosion as well as broadening of road many a times disrupted the places of cables. The cables were

found working at the time of joint inspection at their places and certainly the change of nature of soil and damage to the protection etc. is natural due

to the above reasons. It reflects that the MBs have been countersigned by the Director, OFC, duly pre-checked by JAO, OFC (P) and finally passed

by Account Officer, Microwave Project and thereafter payment was made to the contractor on the basis of actually executed quantities and at the approved tender risk. The prosecution witnesses as discussed above that the work in question was completed as per tender document and under the

supervision of the authority and none of the witnesses speak about any illegality except some deviation of amount in respect of soil and depth of the

trench.

41. The notable aspect of the case is that the case was registered on source information by CBI but source is not disclosed. The higher authority of

the department has not come forward with allegation and the case was independently investigated by the CBI officials and has conducted the joint

inspection by the IO in presence of the police officials and the officials from the BSNL but none of the witnesses have supported the evidence of the

IO on material aspect, rather they show ignorance about the findings made by the IO, whereas, the whole case revolves around the joint inspection

made by the IO. No implicit reliance can be made upon such joint inspection report, the authenticity of which is itself clouded by shadow of doubts.

More so, the witnesses reveals that the loss calculation has been made on the basis of such report, the content of which is not at all proved. Similarly,

the depth of the trench and deviation of soil have also been calculated having regard to the findings of the joint inspection report and comparison of the

findings with the original status of the project obviously cannot be the same. The findings of the survey report indicates that the projected area was

hilly and rocky and prone to the landslide, couple with the oral evidence (particularly in cross-examination) reveals stoutly that condition of soil and

depth of trench cannot remain same for variety of reasons as has been discussed above.

42. The department concerned was reluctant to accord sanction to prosecution as has been stated by own witnesses of the department and they

mechanically accord the sanction for the third time on the basis of the CBI report (draft prosecution sanction was prepared by CBI as stated by one

of the witness) as the CBI approach to CVC. It reveals that while awarding sanction, there was no application of mind to the relevant documents as

well the status of the officials, whether they can be removed by the person who has accorded the sanction.

43. According to the learned Standing counsel for the respondent/CBI excess quantity of work was executed without taking prior approval of the

competent authority and payment was made for those excess quantity of work whereas according to the clause 78 of the tender document, contractor

shall not make any change of any work under the contract without written instruction from the site engineer, i.e. the DE. Refuting the said allegation,

the learned counsel for the appellant pointing towards the evidence of IO as well as other witnesses, it has been urged that the witnesses said that the

prior approval was taken for the excess work done for which excess payment has been made which aspect has entered in the subsection file and the

same is not produced before the Court, despite seizure being made by the IO.

44. It has also been argued from the side of the respondent that supervising authority, i.e., the DE has to conduct test check of the OFC trenches and

protection of cable which is not done contrary to the provision rendering them liable for such illegality. Referring to the clause 132 of the tender

document, the learned counsel for the appellant has submitted that the said submission is not true as the said provision is not mandatory but a

discretionary and for non-compliance of the same, it may amounts to irregularity but not an illegality and same cannot be attributed any criminal liability

on the part of the official concerned. It has been submitted that the Accounts Officer, who checked the bill, found the same correct and passed the bill

without any objection. Further contention raised by the learned counsel for the respondent that even after lapse of 7 (seven) years from the execution

of the work, the protection of the cable cannot be washed away and vanished neither the soil condition cannot turn into soft soil from hard/rocky soil

that was found at the time of joint inspection and the joint inspection report is proved by the witnesses. The same submission has also been refuted by

the learned counsel for the appellant that witnesses to the joint inspection itself reveals that the cable was found in the working condition and all the

protection work was not vanished but found damaged condition. It is vehemently contended by the learned counsel for the appellant that in view of the

evidence on record itself regarding the land condition and other various factors, the RCC protection as well as the soil condition cannot remain the

same as the area was prone to the landslide also.

45. Another piece of argument by the learned counsel for the respondent that the accused appellant has raised the bills for the excess quantity of work

which was never executed by them and there is violation of provision of different clauses 60 (F), 73 (D), 78, 192 , 220. In reply, the learned counsel

for the appellant has strenuously contended that such a piece of argument has no basis to rely as evidence on record never speak about violation of

such conditions and the witnesses have admitted in their cross-examinations that the work was executed as per tender document and payment was

made on the basis of the work actually executed by them.

46. On the case of the evidence on record, which has already been discussed, I found no force in the contention of the learned counsel for the

respondent rather the submission of the appellant got support in terms of the evidence on record. Moreover, the veracity of the joint inspection report

is itself at shake and not a proved document.

47. In view of the charge/allegations leveled, it was for the prosecution to prove affirmatively that the accused appellants by corrupt or illegal means

or over abusing their positions obtained pecuniary advantage by making conspiracy with each other. But in the instant case, upon scrutiny of the

evidence, it would go to show that save and except mechanically exhibiting the documents related to the work in question, the witnesses have not

divulged anything on the above aspect. The prosecution cannot prove its case by mere exhibiting documents but authenticity and correctness of said

documents also to be proved by the witnesses, which is absolutely lacking in this case.

49. Let us discuss the law pertaining to exhibiting of documents in evidence. In a landmark judgment, the law laid down by the Honâ??ble Supreme

Court in AIR 1971 SC 1865, Sait. T. Khimsand and Ors. Vs. Yelamarti Satyam & Ors, is â?" Mere marking of an exhibit does not dispense with the

proof of documents.

Further, in Sudhir Engineering Co. Vs. NEEPCO Roadways Ltd., Manu/ DE/0401/1995 (1995 (34) DRLJ 86), the entire law relating to the marking of

exhibits and tendering documents in evidence has been dealt with. It has been held that mere marking and exhibit on a document does not dispense

with the formal proof thereof. Relevant para is extracted below â?

â??Let me now look at the law. Any document filed by either party passes through three stages before it is held proved or disproved. These are :

First stage : when the documents are filed by either party in the Court; these documents though on file, do not become part of the judicial record;

Second stage: when the documents are tendered or produced evidence by a party and the Court admits the documents in evidence. A document

admitted in evidence becomes a part of the judicial record of the case and constitutes evidence. Third stage: the documents which are held â??proved,

not proved or disproveâ?? when the Court is called upon to apply its judicial mind by reference to Section 3 of the Evidence Act. Usually this stage

arrives the final hearing of the suit or proceeding.

I am of firmly opinion that mere admission of document in evidence does not amount to its proof. Admission of a document in evidence is not to be

confused with proof of a document. When the Court is called upon to examine the admissibility of a document it concentrates only on the document.

When called upon to form a judicial opinion whether a document has been proved, disproved or not proved the Court would look not at the document

alone or only at the statement of the witness standing in the box; it would take into consideration probabilities of the case as emerging from the whole

record. It could not have been intendment of any law, rule or practice direction to expect the Court applying its judicial mind to the entire record of the

case, each time a document was placed before it for being exhibited and form an opinion if it was proved before marking it as an exhibit.

The marking of a document as an exhibit, be it in any manner whatsoever either by use of alphabets or by use of numbers, is only for the purpose of

identification. While reading the record the parties and the Court should be able to know which was I he document before the winless when it was

deposing. Absence of putting an endorsement for the purpose of identification no sooner a document is placed before a witness would cause serious

confusion as one would be left simply guessing or wondering while was the document to which the witness was referring to which deposing.

Endorsement of an exhibit number on a document has no relation with its proof. Neither the marking of an exhibit number can be postponed till the

document has been held proved; nor the document can be held to have been proved merely because it has been marked as an exhibit. This makes the

position of law clear. Any practice contrary to the above said statement of law has no sanctity and cannot be permitted to prevail.â??

In 2010 4 SCC 491, LIC of India & Anr. Vs. Rampal Singh Bisen it has been held as below -

â??Mere admission of document in evidence does not amount to its proof. In other words, mere marking of exhibits on a document does not dispense

with its proof, which is required to be done in accordance with law. Under the law of evidence also it is necessary that content of documents are

required to be proved either by primary and secondary evidence. At the most admission of document may amounts to admission of content but not its

truth. Content of the documents cannot be proved by merely filing in the Court.â??

50. Although the learned counsel for the CBI in firm vehemence has contended that looking into the allegations leveled against the public servants and

the findings of the Trial Court needs to be confirmed, but looking into the manner in which the case was conducted by the IO and non-appreciation of

the relevant evidence by the Trial Court and discussion only one portion of evidence ignoring the entire evidence on record amounts to cause prejudice

to the case of the defence. Miserably, the learned Trial Court has not discussed the relevant cross-examination of the witnesses and we may say so

that even in their examination-in-chief, except exhibiting the documents to the work in question, their evidence is not specific to the allegations leveled.

It is the cardinal principles of the criminal jurisprudence that prosecution case is to proof the each and every charges leveled against the accused to

the heel and Court is to appreciate the entire evidence either oral or documentary in the touchstone of the authenticity. The Court is not expected to

pick and choose one portion of evidence to arrive its conclusion by ignoring the other aspect as to whether said portion of documents is proved or

substantiated as per law, which is found missing in this case. So far as the revealment by the witnesses, plausibility of involvement of accused persons

with the offence alleged is not forcefully made out, rather it indicates another view that the work in question was carried out without any illegality.

There may be some irregularity here and there for raising the cost of soil without having proper sanction at relevant time but in view of the evidence

surfaced, it also indicate on the basis of actual finding in the field the status of soil as well as depth of trench may differ which has resulted the

variation of cost against the estimate. As there is no clear picture depicted by the prosecution itself, the Court is not obliged to carry out own exercise

to arrive at a conclusion which is not otherwise proved.

51. Now, in the instant case, the impugned judgment reveals that the learned Trial Court counted the content of different exhibits regarding the bills,

MBs etc., whereas, the said documents were not proved by the witnesses themselves. Most of the witnesses in their cross-examination has stated

that they have no personal knowledge about those exhibited documents and they have marked the document in the Court as shown to them and this

was the evidence of the officials of the department concerned and in such pretext, it will be more vulnerable to decide the case on such unproved

documents.

52. In 1980 Criminal Law Journal 220, Abdullah Mohammad Pagarkar etc. Vs. State (Union Territory of Goa Daman Dieu), where a public servant

and contractor were prosecuted under prevention of corruption act and Section 420, 468, 471 IPC for defrauding the government by submitting false

bills of the work done, it has held that thought the work was got executed in flagrant disregard to the relevant rules and even ordinary norms of

procedural behavior of governmental official, contractor such disregard did not amount to say any of the offences alleged against them. The onus of

proof of existence of every ingredient of the charge always rest on prosecution and never shift. It was incumbent therefore on the State to bring out

beyond all reasonable doubt that the number of labourers actually employed in carrying out the work was less than that stated in the summaries

appended to the bills paid by the government, the accused could not be convicted relying on the mere impression of prosecution witnesses regarding

the number of labourers employed from time to time. No doubt there several irregularities giving rise to strong suspicion in regard to the bonafide of

accused in the matter of execution of the work but suspicion however strong, could not be substitute for proof. And it was not permissible to place the

burden of proof of innocence on the person accused of criminal charge.

53. It has been held in JT 2013 (8) SC 570, Sujit Bishwas VS. State of Assam, the suspicion however great it may be, cannot take place of proof and

there is a large difference between something that will be proved. In criminal trial suspicion no matter how strong cannot and must not be permitted to

take place of proof. This is for the reason that the mental distance may be and must be quite large and divides vague conjectures from sure

conclusions. In a criminal case, the Court has a duty to ensure that mere conjecture and suspicion do not take the place of legal proof. The large

distance between â??may beâ? true and â??must beâ? true, must be covered by way of clear, cogent and unimpeachable evidence produce by

prosecution before an accused is condemn as convict and the basic and golden rule must be applied. An adverse inference can be drawn against

accused only if the incriminating materials stands fully established and the accused is not able to furnish any explanation for the same.

54. The present case is required to be examined in the light of the aforesaid settled legal propositions. The work in question was completed in the year

1995-96 and the IO made a joint inspection in the year 2003 and come up with the allegation regarding deviation of soil in the work place, non finding

of RCC protection, non having of required depth of the trench in the work in question and while arriving such finding, the prosecution has failed to

brought all the necessary documentary as well as oral evidence for arriving such conclusions, so the said finding in the joint inspection is conjecture

and summarizes. The evidence that has been surfaced indicates the reasons for non achieving the required depth of the trench and also the change of

nature of soil and RCC protection as well. Already three level inspection was carried out after completion of said work at the time of delivery the

work in question to the maintenance department and as such the say of maintenance department on the subject was very much crucial but no such

person was associated at the time joint inspection carried by the IO. The difficult terrain where the OFC was laid couple by different factors that

arose at the time of the execution of work has made the authority to change the quantum of works, nature of soil on the basis of practical finding in

the field which has been indicated by the evidence itself. In the given circumstances raising of bill for excess amount cannot be solely attributed as

criminality while for such deviation, approval of the higher authority (the same was entered in the sub-section file, but not produced).

55. The official witness that has been examined by prosecution has not supported the allegation as leveled in the FIR and except mentioning about

some excess in the running bills, their evidence is silent while about the unfair means adopted by the officials or the contractor while awarding the

work and the execution. The bills were duly prepared and pre-checked by all the authorities having regard to the MBs and the Accounts Officer finally passed the bill without recording any sort of discrepancy on record. The learned Trial Court centered around his discussion only on the running

bills which shows some excess amount but has not at all discussed all the material evidence on record. The appreciation of all evidence on record is a

must prior to reaching a conclusion. As has been held in Sujit Biswas (supra), in criminal case charge has to be proved by clear, cogent and

unimpeachable evidence and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny based on the comprehensive

appreciation of all features of the case as well as the quality and credibility of the evidence brought on record. The Court must ensure that the

miscarriage of justice is avoided and in the facts and circumstances of the case so demand, that the benefit of doubt must be given to the accused,

keeping in mind that a reasonable doubt is not an imaginary, prevail or nearly a probable doubt but a fair doubt that is based upon reason and common

sense. Further it is held that in the circumstances proved in a case consistent either with the innocence of the accused or with his guilt, that the

accused is entitled to benefit of doubt.

The Section 415 of the IPC defines cheating as under :

â??Section 415 - Cheating - Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to

any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which

he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body,

mind, reputation or property, is said to â??cheatâ??.

An offence of cheating cannot be said to have been made out unless the following ingredients are satisfied :

i) deception of a person either by making a false or misleading representation or by other action or omission;

ii) fraudulently or dishonestly inducing any person to deliver any property; or

iii) To consent that any person shall retain any property and finally intentionally inducing that person to do or omit to do anything which he would not do

or omit.

For the purpose of constituting an offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. Even in a case where allegations are made in regard to failure on the part of the accused to keep his

promise, in absence of a culpable intention at the time of making initial promise being absent, no offence under Section 420 of the Indian Penal Code

can be said to have been made out.

One of the ingredients of cheating as defined in Section 415 of the Indian Penal Code is existence of an intention of making initial promise or existence

thereof from the very beginning of formation of contract.â??

56. None of the ingredient of cheating is proved in the instant case against any of the accused. The Section 13 (1) (d) and Section 13 (2) of Prevention

of Corruption Act read as follows â?

â??13. Criminal misconduct by a public servant - (1) A public servant is said to commit the offence of criminal misconduct, -

â?¦..

(d) if he, -

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

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

(iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest.

(2) Any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall be not less than (four years) but

which may extend to (ten years) and shall also liable to fine.â??

57. The learned counsel for the appellants strenuously argued that to convict an accused for an offence under Section 13 (1) (d) and 13 (2), the

prosecution must establish that by corrupt and legal means the accused has obtained for himself or for any other person any valuable things or

pecuniary advantage but in the present case there is no evidence on record the appellants/the public servants obtained any amount by corrupt or illegal

means and conviction of the public servants/the two appellants is not sustainable in absence of such requisite evidence. The decision of (2002) 5 SCC

86, Subash Parbat Sonvane Vs. State of Gujarat, is relied on the aspect.

58. In the aforesaid decision, para 6, it has been held that for convicting the

person under Section 13 (1) (d) that there must be evidence on record that

the accused obtained for himself or others any valuable things or pecuniary advantage either by corrupt or illegal means or by adducing his position as

a public servant without any public interest. In the present case, there is a lack of evidence on the above aspect.

59. On the next, the appellants have relied upon the decision rendered by the Honâ??ble Apex Court in 2013 (3) JCC 1552, B. Jayaraj Vs. State of

A.P., wherein it has been held that the presumption under Section 20 of the P.C. Act can be drawn only in respect of offence under Section 7 and not

the offences under Section 13 (1) (d) (i) (ii) of the Act. In any event it is only on the proof of acceptance of illegal gratification presumption can be

drawn under Section 20 of the Act that such gratification was received or doing or for bearing any official act. Applying the proposition laid by the

aforesaid decision, the statutory presumption also cannot be drawn against the public servant/the appellants herein.

The upshot of the forgoing discussions will be â?

1) The prosecution did not laid down any foundational facts to arrived at a finding of dishonest intention on the part of the appellants nor any such

findings have been arrived at by the Trial Court.

2) The prosecution evidence does not establish neither the conspiracy nor any criminal misconduct on the part of the accused appellants as per the

allegation.

3) None of the charges leveled is proved beyond all reasonable doubts. For the aforementioned reasons the impugned judgment and order being

unsustainable is set aside. The appeals are allowed and accused are acquitted from the charge. Appellants are on bail, their bail bonds stands

discharged.

Return the LCR.

