(2018) 10 GAU CK 0014

In the Gauhati High Court

Case No : Criminal Appeal No.283 Of 2013

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

Citation : (2018) 10 GAU CK 0014

Hon'ble Judges : Rumi Kumari Phukan, J

Bench : Single Bench

Advocate : D. K. Das, 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 19/2006 they are taken up together and being disposed with this common judgment.

Heard Mr. D. K. Das, learned counsel for the appellant in Crl. Appeal 306/2013; Mr. B. M. Choudhury, learned counsel for the appellant in Crl.

Appeal 329/2013 and Mr. D. S. Choudhury, learned counsel for the appellant in Crl. Appeal 283/2013. 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. A joint inspection was conducted by the CBI after 7 years of execution of the work. The depth and protection of the cable was verified as per

route indeed 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.

4. Appellants in Criminal Appeal 306/2013 was a contractor. Appellant in Criminal Appeal 329/2013 was working as SDE(OFC) while the appellants

in Criminal Appeal 283/2013 as DE(OFC) and the Director (P) (OFC) respectively.

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 the contractors/the appellants in criminal appeal 306/2013 (the appellant Sh. Tarun Das was awarded the contract to execute the OFC laying in

respect of SS 15 & 16 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 causing wrongful pecuniary loss to the department and

the Govt. with corresponding wrongful gains to the accused persons in the tune of Rs. 12,99,811/-. 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 appellants.

9. The learned Trial Court accordingly took cognizance of the offence against appellants and charges framed under Section 13 (1) (d) (2) of the P.C.

Act read with Section 477 (A) IPC against the all officials and charges u/s 120 (B)/420 IPC against the officials as well as the contractors and all

accused appellants pleaded not guilty to the charge leveled against them.

10. Prosecution examined as many as 25 witnesses and defence examined none. The plea of defence is of total denial. Statement of accused persons

recorded under Section 313 Cr.P.C.

11. The learned Trial Court on conclusion of trial convicted and sentenced appellant Tarun Das to r/i for 2 years u/s 120B of the IPC with fine of Rs.

10,000/- and r/i for 2 years u/s 420 of the IPC with fine of Rs. 10,000/- and in default to s/i for 3 months.

12. Appellant P. K. Bagchi is convicted and sentenced to r/i for 1 year u/s 120b of the IPC with fine of Rs. 10,000/- and r/i for 2 years u/s 420 of the

IPC with fine of Rs. 10,000/- and r/i for 2 years u/s 477A of the IPC with fine of Rs. 10,000/- and r/i for 1 year with fine of Rs. 10,000/- and in default

to s/i for 3 months u/s 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act.

13. Appellant Ram Prasad and M. N. Khan are convicted and sentenced to r/I for 2 years u/s 13(1) (d) read with Section 13(2) of the Prevention of

Corruption Act with fine of Rs. 20,000/- each and in default to s/i for 3 months.

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

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:

16. At the very outset, the learned counsel for the appellants has submitted that none of the appellant/officials was associated in the execution of the

work relating to digging of trenches and laying of OF Cable. Since they did not execute any work, there is no question of their causing any loss to the

department or gain to the contractor. It is pointed out that the Director OFC has no field duties;

but, in accordance with the provisions contained in Clause 132 of the tender document, he can inspect the work during its progress. The same is

reproduced here-in 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 has been given toÂ the contractor himself.Â The work during its

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

17. It is submitted that in accordance with the aforesaid provision, the Director, Shri M.N. Khan proceeded to the inspection site in Manipur. His Head

Quarter was at Guwahati. He had taken Sh. Ram Prashad, DE (Survey) and Sh. A.S. Deb, SDE (Survey) to check the quality of work by conducting

sample check on Imphal-Moreh and Imphal-Churachandpur route. All the three proceeded to Imphal on 09.12.1996 and returned on 13.12.1996. They

remained in Imphal for 3 days and conducted sample check. Neither Ram Prashad nor A.S. Deb was posted in the OFC project as executing officer.

They were never associated in the executing work. Their duty was only to conduct survey. Sh. S.K. Sikidhar (PW-22), in his cross-examination has

stated that Sh. Ram Prashad, DE was posted in Survey unit and not in OFC (P). Also, he was not a member of TEC. The relevant part is reproduced

here-in below:-

â??Ram Prasad was not the member of TEC. But I was the member of TEC. Mr.

M.N. Khan was not posted as director OF(P) Guwahati when the

tender processing was completed and the work order was issued. Mr. Ram Prasad was posted as DE of Survey when the tender processing was

completed. Sri Ram Prasad was not posted as DE OFC(P) during the period I was posted as DE OFC. During tendering process and approval of

rates Sri Ram Prasad who was DE Survey at that time and Sri M.N. Khan who was later posted as Director OF(P) had no role in the process.â??

Even, the IO, Insp. M.T. Mang (PW-25) has admitted the aforesaid fact. The relevant part is reproduced herein below:-

â??It is correct that Ram Prashad was posted as DE (Survey) and not as an executing officer of the OFC. It is correct that Sri Ram Prashad along

with Director M.N. Khan and SDE, A.S. Deb had conducted sample test check of the OFC work executed by OFC stuff.â??

18. It is, therefore, submitted that Sh. Ram Prashad was not the executing officer. He did not supervise the work of digging of trenches and laying of

cable. As per orders of the Director Sh. M.N. Khan, he had conducted sample test check of the work that was already executed by the executing

staff. Whatever he noticed during sample test checking, he submitted his report to the Director. It contends that the officer who never executed any

work; but, conducted merely sample test check, has been dragged in the present case. The Director has no field duty. The DE is the highest executing

officer; but, the director can inspect the work during its progress as per clause 132 as mentioned above. Thus, the appellant is not at all blameworthy

for any kind of discrepancy in the work executed by the executing staff.

19. Attention has been drawn to the evidence of Sh. S.N. Malakar (PW-21), DETP-II, Jorhat, who was specially deputed for repairing of the work

after due execution of the work and in his cross-examination, he has stated as follows:-

Â â?? â?¦ OFC cables on both the routes were damaged due to bad pulling of cable, road widening by PWD, landslide etc. During fault repairing of

OFC, I noted at many points that OFC cables was damaged due to operation of JCB machine by the PWD staff. â?¦ After repairing, the OFC was

offered to AT. The AT team found that the depth and protection of OFC cable were intact in the route index diagram but the depth of the cable was

not standard depth i.e. 165 cms in ordinary soil and 90 cm in rocky soil. The AT raised objection that depth of the cable was less than the standard

depth of 165 cms. The AT team directed me to seek relaxation of depth from CGM NETF. After obtaining relaxation from CGM, I again offered the

OFC cable to AT teams. The AT team cleared the OFC cable as it was found within their parameters. AT team is not under the administrative

control of the CGM NETF. It is under the control of T&D circle Jabalpur. After AT clearance, I offered the cable on Imphal Moreh and Imphal

Churachandpur routes to maintenance organization. A joint inspection was conducted by OFC staff and also maintenance staff. During joint inspection

depth and protection of cable were again checked as per route index diagram. The depth and protection of the cable was f ound correct as per route

index diagram only thereafter maintenance staff took over the route. Maintenance staff consisted of Sri Ashok Kumar, DE, TP NETF, Guwahati, E.

Swer, DE (MTCE), ETR, Imphal, S.N. Malakar, DE, (TP), NETF, Guwahati, S. Mariapragasam, SDE (OFC), NETF, I mphal, W. Inaopi, JTO

(MTCE) ETR, Imphal. After inspection a joint inspection memo DE/OFC/GH/ G-11/99-2000 dated at Imphal 12/10/99 was prepared. This joint memo

was s igned by all the persons including me. After handing over the cable to maintenance staff, the responsibility of OFC executing staff came to end

and further responsibility is transferred to maintenance staff. The maintenance staff is not under the control of CGM, NETF, instead, the maintenance

unit is under administrative control of CGM, ETR, Kolkata. Not a single point in joint inspection memo (ext-51) co-relate with the route index diagram.

I cannot say if this joint inspect memo (ext-51) pertains to this SS since no point co-related. It is not possible after 7 years of the execution of the work

that the protection of the cable, depth of trenches and category of soil will remain same.â??

20. It has been pointed out that the IO (PW-25) M.T. Mang has also admitted all these facts in his cross-examination.

21. Accordingly, it has been submitted that from the testimony of Sh. S.N. Malakar and the admission of the same by IO (PW-25) 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.

22. Further it contends that as per 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??

Thus, it is submitted 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.

23. 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.

24. According to the geological survey, about 91% of the area of Manipur is hard rock. According to survey report conducted by PW-23 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. The IO has also admitted that according to Survey reports, the entire route is hilly and rocky.

25. The payment to the contractor has been made proportionately since the cable has not been laid at the standard depth of 1.65 metre.

26. The Head Quarter of the DE was at Guwahati whereas the work was executed in the State of Manipur. The execution of work is to be

supervised by the site engineer who represents the government at site of work as per clause 72.

Contention raised on behalf of the appellant/contractorÂ

27. It has been contended that the contractor/the appellant can no way be attributed to the criminality as they have duly participated in the tender

process and selected and there appears no any illegality as regards their role while awarding the contract. They have duly submitted the bid

documents and after due evaluation, the TEC has selected them. The evidence reveals that bills were passed by the appropriate authority and they

have no role to play in passing the bill. The MB was verified by the concerned Engineer and the bill was verified by the Site Engineer. By drawing

attention to the evidence on record, it is submitted that the loss calculation sheet prepared in this case is based on the data provided by the CBI not

from the office itself and as has been found above, data shown in the joint inspection report is itself not authentic or proved. The witness who

prepared the loss calculation himself stated that they are not at all sure about the correctness of the loss calculation or they were also not aware if the

work was awarded to the contractor at the departmental approved rate by the Director or has no idea about the correctness of the bill submitted by

the contractor.

28. Further it has been submitted that the evidence on record, runs counter to the allegation made against the appellant which is not at all suggestive of

preparation of bill in excess manner. Most of the witnesses have stated that bill was paid on actual work done by the contractors which is at par with

the terms of the tender agreement and as such there cannot be an allegation of raising false bill on the part of the contractor. Tender documents itself

provide that final bill may vary subject to the actual work done by the contractor. Accordingly, it has been urged that in view of the evidence on record

about the work site and the hilly condition etc. and in terms of the tender document, the variation of bill amount itself is not suggestive of criminality on

the part of the contractor. It contends that there is absolutely lack of evidence suggestive of criminal conspiracy on the part of the contractor with the

public servants at the time of awarding contractor nor there is requisite evidence to reflect the dishonest intention on the part of the accused appellant

to cheat the government. But however, the learned Trial Court relying only on the evidence of IO and the joint inspection report that was made after 7

years has held the accused appellants guilty without proper appreciation of entire matters on record, hence, finding of guilt at the accused appellants is

not sustainable.

The evidence on record in detail:

29. PW-1, Sh. S.K. Jain, the retired Director, HRD, BSNL Board, New Delhi and PW-2, Sh. K. C. Gupta, the retired Executive Director, Corporate

Office, MTNL, New Delhi and PW 10, Mahinder Singh, the then Director, Vigilance and Training in the Deptt. of Telecommunication in the year

2004, have stated about prosecution sanction accorded by them against P.K. Bagchi, the then SDE, OFC; Ramprashad, DE, A/T and M. N. Khan.

30. PW-3 Sh. Debabrata Dey, who was posted as Accounts Officer in the Office of the DGM, Task Force, BSNL, Guwahati, in the year 2002. He

handed over some documents to CBI regarding first and second running bill to and which were seized by the CBI vide Ext. 4 5 and 6 are the bills

seized by the IO. Further payment voucher issued in favour of Tarun Das, the contractor was also seized from him through Ext. 7. In his cross-

examination he has stated that pre-checking of the bills and payments were not made by him. He never dealt with those documents seized by the IO

nor he know about the contents about the documents, he simply submitted the documents to CBI officials as directed.

31. PW-4, Sh. S. C. Paul, was posted as Accounts Officer in the Office of Director, Microwave Project, Panbazar, Guwahati in the year 1996. His

duty was to make payment of bills duly pre-checked and passed by the office of the Director, OFC Guwahati, which were sent to him from the office of the Director, OFC. Along with the bills, copy of measurement book was also sent to effect payment. He has stated all about the preparation of

project estimate, revised estimate after survey being made of the site for trenching and laying OFC. He narrated about the tender process, and report

of the tender committee and about selection of the contractors on the basis of comparative statement of sub section 16 Imphal-Moreh road and he

exhibited several documents from Ext. 9 to 30 to show the disbursement of work to the contractor Tarun Das and about the 1st and 2nd payment of

bill to him. And infact he has signed the Ext. 8 sanction order. It is stated CGM, Task Force, Guwahati is in overall charge of development of NE

region and their duties are to supervise the work of SDE/JTO/Site Engineers and also to verify the measurement book on day to day basis. In case of

any deviation proposal is required to be sent by the site Engineer to the DE for approval of excess quantity by the competent authority. He had given

on noting for excess quantity as on 20.08.1998. For sub section 16 estimated cost was 4.12 lakhs and approved amount was Rs. 12,90,600 as per the

approval letter No. DIR/OF/GH-T-1(Pt.6/96-97, dated 07.02.1996) vide Ext. 12 given by the Director OFC. In cross-examination the said witness has

stated that he never prepared any revised estimate but the IO had wrongly recorded the same. It is also stated that there may be variation in the

estimated cost and approved quantity. Bills are prepared only on the basis of the actual work done in the site. Payments to the contractor are being

made on the basis of the actual work being done and if deviation occurs there should be approval from the competent authority. Further, it is stated

that payment was made to the contractor after verification of the bills by the officer of the Director OFC. Payments were made on the basis of

forwarding letter of Director and when the bills are sent to the accounts section bills are duly checked by the JAO and passed by DET and counter

signed by the Director and accordingly payment was made by the accounts section.

32. The evidence of PW-5, Guna Gobinda Das being the Chief Manager of Assam Grahmin Vikash Bank confined to the bank related documents

regarding to the account of accused appellant, Tarun Das and that certain amount was deposited in his account, vide Ext. 24 to Ext. 28 and the CBI

officials seized those documents. PW-6, Sh. Jibotosh Biswas, who was working as Sr. Accounts Officer in the Office of CGM, Task Force, Guwahati, Uzan Bazar and he is the only seizure witness to certain documents that was seized by the IO through Exhibits 28, 31 and 32.

33. PW-7, Sh. Kamala Kanta Das, was working as Telecom Office Asstt. in the Office of the DE, OFC, Chenikuthi, Guwahtai during the year 1995-

96. He stated about floating of tender documents vide Ext. 9 bearing No. DE/ OFC/GH/T-6/95-96/2 dated 16.11.1995 and about related documents

pertaining to the tender evaluation committee and about selection of Tarun Das as L-1. While narrating all details since floating of tender till payment

he has not uttered a single word about any sort of irregularity committed by any of the persons in the process.

34. The testimony of PW-8, Sh. Siv Raj Bali, who was a Director, OFC, DOT, Guwahati under Chief General Manager (CGM) Task Force, NE

Circle, Guwahati from June, 1993 to September 1995, is similar to the evidence of PW-7. Except narrating about the matter of OFC laying with the

aforesaid route after conducting prior survey, his evidence is silent about any illegality conducted by the officer as well as the contractor. During

investigation he was examined by the CBI about the procedure of laying of OFC. He was shown certain documents related to estimate where he put

his signature. He stated that OFC were laid down in the ground by digging trenches which were again covered with earth unless concreting was

necessary in case of rocky soil. He stated about the procedure from floating tender of the project and approval and also about execution of the work.

He also conducted the survey report of the Imphal-Moreh route for laying of OFC. His cross-examination is produced below:

â??I have never visited Imphal Moreh route. As per survey report the Imphal Moreh route is a hilly and rocky area. It is correct that the estimated

quantities are not firm and final, they are subject to change. The amounts paid to the contractor were on the basis of actual works done in the

particular route. Any change in the quantities will be deemed to have been included in the tender. It is the site Engineer who is competent authority to

decide the type of soil and depth of the cable. When work is executed by the executing staff, acceptance/testing (A/T) is done by team of another

wing of DOT known as technical and Development Circle (T & D). A/T is conducted two times. Once after laying of HDPE pipe in the trenches.

AT team verified the depth of the cable and also the protection provided on the cable. I am not aware about the report of A/T as I was posted out o unit at that time.â??

35. The testimony of PW- 9, Sh. Jayanta Kar, who was working as Sr. Asstt. in SBI, Chenikuthi as well the evidence of PW-11, Dharmeswar Das,

the retired Divisional Engineer (A), BSNL, are also similar to the earlier witnesses. Except stating about the all detail of the aforesaid work of

trenching and laying OFC, preparation of estimate etc, etc., their evidence no way supported the charges leveled against the accused persons.

36. On the next PW-12 Sh. Gobinda Kalita who was posted as Cashier in the Office of the Director, Microwave Project, Guwahati in the year 1991

to 2000 and his duty was to make payment to the staff and others bill including the contractorâ??s bill also, by maintaining cash book. He stated that

bills were prepared in the office of Director, OFC and the same was passed checked and verified in Director, OFC office. He stated that that the 1st

and 2nd running bills of the contractor Tarun Das vide Ext. 48 dated 10.09.1996, Ext. 49 dated 02.08.1996 was duly checked by JAO, OFC, passed by

DE, OFC (P) and he knows their signature. He further testified that after checking the bills which bears all necessary signature of concerned persons

same was passed and they issued cheques on the basis of pay order in the bill.

37. His evidence is also totally silent as about the irregularity in preparation of bill by the concerned officials and which was withdrawn by the

contractor through cheque under his signature.

38. The testimony of PW-13 Sh. Ashotosh Kr. Chanda, who was working as the DE, OFC in the office of Director Task Force, Microwave Guwahati

is general in nature who has narrated all about the procedure of tender and disbursement or work of OFC and he goes on exhibiting all the relevant

documents pertaining to the entire process but has not stated anything about the illegal part of any officials or the contractor and his evidence is like

opinion in nature. Some portion of his statement in cross-examination is relevant while he said that he was not associated with the execution of OFC

neither visited the site where the work was executed. It is stated that head office of Director, DE was at Guwahati and the work was executed in

Manipur in Imphal Moreh route of which he had no idea. However, as regards the documents he has stated that estimated quantities are not firm and

final, their subject to change. The payment to the contractor was made on the basis of actual work done at the rate approved by the Department. It is for the accounts section to verify whether any excess payment was made to the contractor.

39. Further he has stated that the cable is shifted to the safer side at the time of road widening or other natural calamities such a land slide erosion

heavy rain etc. The Depth of cable may or may not be changed due to the aforesaid natural calamities. After execution of the work, AT Section has

made through inspection regarding the depth of the cable protection provided to the cable and soil conditions as per route index diagram. The OFC

was commissioned after the acceptance by the AT team which was found within permissible limit with all aspect.

40. It is also stated that there is no Rule or any departmental instruction which provide that the DE will carry out test checks at every 100m or 10% of

total work. However, test check will be done as considered necessary by the DE. The then Director A.C. De is the over-all in-charge and responsible

of tendering and conducting everything before passing the bill.

41. In the instant case basically the prosecution relied upon the joint inspection report that was carried out in the year 2003 by the IO along with other

officials of the Department on the basis of which certain illegalities in the work in question has been alleged on the part of the officials and the

contractors as has been charged. Infact the whole prosecution case started from the joint inspection report Ext. 51, dated 02.06.2003.

42. The said joint inspection was prepared by the IO and PW-14 Sh. B. Nag. Choudhury who was posted as S.D.E at T & D Circle Silchar in the

year 2003, Sh. W. Sunil Singh/ PW-16, who was post as Head constable CBI Silchar on 02.06.2003, Sh. L. Nishikanto Singh/PW-18, who was posted

as RM at the office of DET/TP, BSNL on 02.06.2003, and Sh. Shoibam Momon Singh/PW- 19 who was posted as technician with Microwave

Project BSNL, Task Force on 02.06.2003, are the witnesses to the said joint inspection prepared by the IO Sh. M. T. Mang/PW-25.

43. Let us examine the evidence of the IO/PW 25, who infact prepared the said inspection report. In his evidence it is stated that he conducted the

joint inspection of OFC trenching routes in association with the Departmental Officers and the said inspection Memo was prepared in presence of

witnesses. During inspection of SS 16 of Imphal-Moreh route, they found depth nature of soil protection claimed to have been provided found to be false and at that time Ramprashad had gone for inspection of sub sections and has recorded that there was no rocky soil over the entire sub sections

and hence, the amount which was deducted from the bill was not found to commensurate with the findings which indicates accused persons were in

criminal conspiracy with each other to cause loss to the Government of India. In course of investigation he seized various documents from the

department pertaining to the work in question and thereafter he filed a charge-sheet, after obtaining prosecution sanction.

The IO was cross-examined at length wherein he had stated that he along with B. Nath. Choudhury decided the locations where pits were to be dug.

He had route index diagram, bills, MB, and tender documents of SS 16 at the time of inspection. At the time of measuring, the depth category of soil

was decided by him and the team members. The category of soil was decided by visual inspection. According to him the said inspection Memo was

prepared on the spot and took the signature of witnesses on the spot.

He has denied the suggestion of the defence side that without any reference of KMP in the route index diagram none of the points of inspection can

be co-related with the original route index diagram. He has admitted that as per Ext. 30 (18) the amount spent on rectification on cable falls was set

off, from the security deposit of the contractors. Accused Ram Prasad was posted as DE, Survey and not an executing officer of OFC and he along

with the Director M.N. Khan and SDE conducted sample test check of OFC work executed by the staff. He has also admitted that at the time of

execution of work accused person were of DoT and not of MTNL and BSNL and he is not aware whether at the time of alleged offence the officers

of BSNL, MTNL have been empowered to accord sanction for prosecution of accused persons. They have forwarded SP report to the concerned

prosecution sanctioning authority including draft prosecution sanction order.

Regarding the Survey report he has stated that quantities and figures mentioned in the tender were as per survey report and SS 16 falls in hilly, land

erosion, land slide prone area. The cost of OFC laying cannot be same for all the 24 sub sections. He has admitted that the contractor is paid at the

approved tender rates and the site engineer is the competent authority to ascertain the depth size of trench, and category of soil and he have no

technical knowledge regarding category of soil or the execution of OFC cables and it is the discretion of the DE to test check but not mandatory.

In further cross-examination, he has stated that some part of Imphal-Moreh and Imphal-Churachandur route are hilly areas and he has examined Sh.

S.N. Malakar who was engaged by BSNL to repair the damaged cables on both these routes and he has not seized the route index diagram, MBs

prepared by S.N. Malakar regarding repairing work of damaged OFC. The cables were laid in the year 1996-97 and he inspected the site in the year

2003. He has seized the report of AT that was conducted after the damage repairing work was completed by S.N. Malakar but the said report is

before the Court. He did not associate any person from ETR Kolkata while conducting the joint inspection. He has stated further that SDE is the

person who prepares the MB route index diagram and the bills and these are rectified by DE and these MB has been countersigned by Director, OFC

(P) and duly pre-checked by the JAO, OFC and finally passed by the Accounts Officer, Microwave but he did not seize any inspection report by DE

and the Director, OFC.Â

44. In their evidence, PW-14 and PW-16, who accompanied the investigating officer of CBI to Imphal to assist the CBI team has stated that Pits had

been dug on Imphal Moreh OFC route for checking the depth of the trenches where OFC cables were being laid to ascertain whether any anomalies

had been committed with regard to depth of the trenches, the type of soil and concrete protection work on the said OFC route in respect of SS15 and

16. Depths of trenches were measuredin their presence by the inspector CBI and measurement had been recorded in the joint inspection report dated

02.06.2003 and they put their signatures.

In cross examination, PW-14 had stated that the laying of optical fiber cable (OFC) was already commissioned when the inspection was conducted.

The acceptance/ testing were must before commissioning of the OFC. OFC was commissioned when depth and protection was found as per

departmental standard or within the current permissible units approved by the department. At the time of conducting the AT everything was in order

otherwise the case would not have been commissioned. He further stated that he was not aware as to who had decided the location of the pits, CBI

inspector might have decided. He was not aware and he had not seen as to who had decided the type of soil. He had no knowledge or training with regard to classification of soil. There was no soil specialist or expert present at the time of test verification. The CBI had prepared the report and he

had put his signature at the Hotel.

All the reports had been signed on the same day though the verification was done earlier. He was not aware whether CBI had any documents. He

was a witness during the spot verification but he had no role to play in the joint testing of the OFC. It was difficult to ascertain whether the position of

the cable was same at the time of joint inspection as it was at the time of initial execution of work. No diagrams were prepared by CBI in respect of

the pits where test check was conducted. The site engineer was the sole authority to decide the type of soil and dept of the trench, the protection

work at the time of execution of work at the prevailing situation. Generally in case of heavy rainfall and land slide the protection and sometimes cables

also get fully damaged. The anti termite treatment was not used anywhere in his department for the protection of the cement concreting work. He

cannot say if the cement concreting turned into ordinary soil after Â¾ years of the execution work in absence of anti-termite treatment copy of the

joint memo was not given to him despite his request. He had signed the memo as per instruction of the CBI inspector.

PW-14 was declared hostile at that stage and he stated that he had not been interrogated by the CBI nor his statement was recorded during

investigation.

45. In the cross examination, PW-16 has stated that he was not aware whether any soil testing scientist was engaged for testing the soil. The I.O had

decided on the location of pits to be dug. No diagram was prepared on the spot. All documents of the case were in the possession of the I.O and he

did not know what documents were available with the I.O. He did not see any documents with the regard to the depth, type of soil and protection of

the trenches where OFC were laid. There was no rocky soil in the entire section. Hard soil was found in one, two or three pits. He had worked on the

direction of the I.O. None of the person present had referred to any documents during inspection.

He stated further that he had not been shown any documents during inspection nor he was consulted about any document during inspection. He had

seen the route index diagram in the hand of the IO but he did not know anything about the diagram. He had not seen RA-1 and RA-2 and the route

index diagram. None of the person present had referred to any document during the inspection.

46. In his evidence PW 18 has stated that he accompanied the CBI team for joint inspection of OFC trenching on Imphal Moreh road in respect of SS

16 and he signed the joint inspection report that was prepared in the office of CBI. The measurements were noted in a piece of paper on the spot and

the joint inspection was not prepared on the spot.

In his cross-examination, he stated that he cannot recollect how many pits have been excavated on the first day of OFC laying route and CBI had

decided the locations. The depths of trenches were measured taking the base as the top of the protection of the cable. The CBI team had been

accompanied by soil experts who had ascertained the types of soil in the trenches. There were around five persons present at the time of joint

inspection. One Sh. M.T. Mang, inspector CBI one Sh. Sunil were present and others he could not recognize. No soil samples were collected for

sending the same for examination. The type of soil was ascertained by looking at it. He did not notice any documents in the custody of the CBI team

except for a diagram of the location and the said diagram was not shown to him.

47. Similarly, PW-19 has also stated that he accompanied the CBI team while carrying joint inspection about OFC laying trenches in SS 16 on

02.06.2003 and he signed the joint inspection report that was prepared by the I.O.

In his cross examination, he stated that he had no role to play in this case and he signed the memorandum of inspection as a token of his presence in

CBI office on being asked by CBI officer. He was called earlier by the CBI for recording his statement, it was about three years back but he had

returned without making any statement as he did not agree to make a false statement as instructed by CBI officer.

48. The evidence of PW 20, Ch. Toiba, who was working as SDE, in the Office of the Microwave Division during the year 1996-97 and PW 21,

Sailendra Malakar, who was sent on deputation to Imphal as DE, OFC from Microwave Project where he was officiating DE during the year 1999 to

2000, simply stated about the seizure of documents by the IO as well as the procedure of the OFC laying work and exhibited the documents which was seized by the IO without any whisper about the irregularities found in the joint inspection report. PW 21 although has stated about the approval of

excess amount against the estimated cost without re-tendering but it is stated that Director A.C.De was responsible for the anomalies for awarding

the tender to the contractor but said Director was not an accused in this case.

The cross-examination of the PW-21 is relevant where he stated that without detailed estimate the estimated cost cannot be ascertained for the

concerned subsection. No detailed estimate was prepared for any of the subsections on Imphal Moreh and Imphal Churachandpur OFC route. The

estimated cost shown in the tender document was patently wrong, which resulted due to fault of the administration. So far SS 16 was concerned after

eight KMP from Imphal the entire Imphal Moreh route was hilly and rocky area. The tendered quantity was not based on survey report and also are

not according to the terrain of the route. The actual cost of execution of work is bound to increase.

The tender rates were approved by Director only and DoT has nothing to do with the approval of tendered rate. DE T was responsible for execution

of work as per specification of the tender. Estimated quantity and cost were not firm and final, they were subject to change due to obstruction of the

road, diversion, change of category of soil at the time of execution of the work the length of the trench increases. The changed quantity was deemed

to have been included in the original tendered schedule.

Further he stated that the payment to the contractor was made on basis of approved tendered rate and not at the departmental rates on the actual

executed work. The head quarter of the DE is located in Guwahati and work was executed in Imphal. It was the discretion of the DE T to conduct

test check and he would conduct the test check only if he considered it necessary. The site engineer was the competent authority to decide the size

and depth of the trench and category of soil. He had been specially deputed to commission the OFC cable on Imphal Moreh and Imphal

Churachandpur route. He had no personal knowledge of any activity or document pertaining to survey report, project estimate, tenders, MBs, bills,

route index diagram etc. OFC cables on both the routes were damaged due to bad pulling of cable, road widening by PWD, landslide etc. During fault

repairing of OFC, he noted at many points that OFC cables were damaged due to operation of JCB machine by the PWD staff. He did not prepare

any route index diagram when he took up repairing work and after repairing, the OFC was offered to AT. The AT team found that the dept and

protection of OFC cable were intact in the route index diagram but the depth of cable was not standard depth i.e 165cms in ordinary soil and 90cm in

rocky soil. The AT raised objection that depth of the cable was less than the standard depth of 165cms. The AT team directed him to seek relaxation

of depth from CGM NETF. After obtaining relaxation from CGM, he again offered the OFC cable to AT teams.

The AT team cleared the OFC cable as it was found within their parameters. AT team was not under the administrative control of the CGM NETF, it

was under the control of T&D circle Jabalpur. After AT clearance, he offered the cable on Imphal Moreh and Imphal Churachandpur routes to

maintenance organization. A joint inspection was conducted by OFC staff and also maintenance Staff during which depth and protection of cable was

again checked as per route index diagram. The depth and protection of the cable was found correct as per route index diagram only thereafter

maintenance staff consisting of Sri Ashok Kumar, DE, TP NETF, Guwahati. E. Swer DE, (MTCE), ETR, Imphal, S.N. Malakar DE, (TP), NETF,

Guwahati, S. Mariapragasam, SDE (OFC), NETF, Imphal, W. Inaobi, JTO (MTCE), ETR, Imphal took over the route. After inspection a joint

inspection memo DE/OFC/GH/G-11/99-2000 dated at Imphal 12.10.1999 was prepared and was signed by all the persons including him. After handing

over the cable to maintenance staff, the responsibility of OFC executing staff came to end and further responsibility was transferred to maintenance

staff. The maintenance staff was not under the control of CGM, NETF, instead, the maintenance unit was under administrative control of CGM, ETR,

Kolkata. Not a single point in joint inspection memo (Ext. 51) co-related with the route index diagram. He could not say if the join inspection pertained

to the SS since no point co-related. It was not possible after 7 years of the execution of the work that the protection of the cable, depth of trenches

and category of soil would remain same.

49. The evidence of PW 22, S. K. Sikidar is of formal in nature who was a member of tender committee and was not involve with the execution of

the work. He has narrated all about the project and about the allotment of work to the contractor by due procedure and exhibited certain documents

pertaining to the contract. His entire evidence is silent about any sort of illegality or irregularity while carrying out the aforesaid work. In his cross-

examination, he has stated that Ram Prashad was not the member of TEC and M. N. Khan was also not posted as Director, OF(P) when the tender

process was completed. Both the said persons have no role in the whole tendering process or approval of rates. As per the survey report from

Tegnopal to Moreh, the whole section is rocky whereas the same findings are not reflected in the tender schedule of SS 16 of Imphal-Moreh route.

If the quantity of items vary or enhanced in item number 10.2, 10.3, 10.7, the bill amount of particular sub-section will increase proportionately. On his

examination, the route index diagram and joint inspection report it is found that none of the four points where CBI had conducted joint inspection had

figured in the route index diagram. The AT team verified the depth and protection of the route as per route index diagram and after being satisfied that

the standard is maintained for laying the cable, the route is commissioned. After commissioning of the route, a joint inspection is carried out with the

maintenance organization for handing over the route to the maintenance. At that time of joint inspection, the depth and protections were verified by the

maintenance organization with the route index diagram. During rainy season there are possibility of damages being caused to the OFC route resulting

from landslides and sometimes cables are being washed away because of heavy rain fall. Cable also caused damaged during the road widening work

carried out by PWD and also during expansion of drain etc. After digging the trenches it was refilled by sand and soft soil as per instruction and

original soil category may not be available if such trenches dugs after some period.

50. PW-23/Shri Ragunath Singh was the Divisional Engineer, Microwave Project at the time of installation of microwave and he carried out survey

work of Imphal- Moreh route OFC in the month of Marchâ?? 1995 as per direction of the Director and submitted the survey report Ext. 37 in

respect of said route. As per the said survey report, the soil on the Imphal-Moreh was mostly hard and rocky soil and that is why the excavation of

cable trench to the depth of 1.65 metre was extremely difficult, therefore, RCC/ GI pipes are required to be laid for the protection of SDPE pipe/OFC cable. In his cross-examination, it is stated that the entire route falls in hilly and rocky area and it is prone to landslides and soil erosion as well as

sinking zone. He has mentioned in his report that it is extremely difficult to make the trench upto the standard depth of 1.65 cm. In fact it was not

possible to dig more than 50 cm deep into the rock.

51. Thus, his evidence indicates that digging of trench upto the standard depth 1.65 metre is not possible and his evidence goes counter to the

allegation of the prosecution itself that the contractor illegally did not carry out the work in question as per the specification in the contract about the

depth of 1.65 cm. His report also reveals that the entire work area was rocky and hilly whereas the contract work of some areas, soft soil is shown.

52. The evidence of PW 24, one of the Investigating Officer, Shri S. Lama is confined only to the seizure of certain documents and he was not the

part of investigation that was carried out by the PW 25.

53. A careful scrutiny of evidence on record, it go to show that the different officials from the DoT and other officials simply has stated all about the

procedure for awarding the contract in question and their evidence has not specifically spell out about any illegality that was carried out by the officials

concerned while carrying out the tender process nor it would reflect that contractor concern obtained the contract by any unfair means so as to

suggest any conspiracy among the officials and the contractors.

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

54. 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 in working condition 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 in some places. Most of the witnesses have merely exhibited the documents without knowing the content of the documents and

their evidence are general in nature and not at all specific to the charges.

55. 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.

56. 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.

57. 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.

58. 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.

59. 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.

60. 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.

61. 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.

62. 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.

63. 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.Â

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??

64. 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 portion of evidence including the cross-examination of the

witnesses. Except exhibiting the documents to the work in question, their evidence is not at all 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.

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

MBs and the joint inspection 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.

66. 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.

67. 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 â??may beâ?? and â??must beâ?? 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.

68. 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).

69. 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.Â

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??

70. 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??

71. 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.

72. 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.

73. 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.

As all the appeals arose from the same judgment in special case 19/2006 they are taken up together and being disposed with this common judgment.

Heard Mr. D. K. Das, learned counsel for the appellant in Crl. Appeal 306/2013; Mr. B. M. Choudhury, learned counsel for the appellant in Crl.

Appeal 329/2013 and Mr. D. S. Choudhury, learned counsel for the appellant in Crl. Appeal 283/2013. 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. A joint inspection was conducted by the CBI after 7 years of execution of the work. The depth and protection of the cable was verified as per

route indeed 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.

4. Appellants in Criminal Appeal 306/2013 was a contractor. Appellant in Criminal Appeal 329/2013 was working as SDE(OFC) while the appellants

in Criminal Appeal 283/2013 as DE(OFC) and the Director (P) (OFC) respectively.

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 the contractors/the appellants in criminal appeal 306/2013 (the appellant Sh. Tarun Das was awarded the contract to execute the OFC laying in

respect of SS 15 & 16 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 causing wrongful pecuniary loss to the department and

the Govt. with corresponding wrongful gains to the accused persons in the tune of Rs. 12,99,811/-. 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 appellants.

9. The learned Trial Court accordingly took cognizance of the offence against appellants and charges framed under Section 13 (1) (d) (2) of the P.C.

Act read with Section 477 (A) IPC against the all officials and charges u/s 120 (B)/420 IPC against the officials as well as the contractors and all

accused appellants pleaded not guilty to the charge leveled against them.

10. Prosecution examined as many as 25 witnesses and defence examined none. The plea of defence is of total denial. Statement of accused persons

recorded under Section 313 Cr.P.C.

11. The learned Trial Court on conclusion of trial convicted and sentenced appellant Tarun Das to r/i for 2 years u/s 120B of the IPC with fine of Rs.

10,000/- and r/i for 2 years u/s 420 of the IPC with fine of Rs. 10,000/- and in default to s/i for 3 months.

12. Appellant P. K. Bagchi is convicted and sentenced to r/i for 1 year u/s 120b of

the IPC with fine of Rs. 10,000/- and r/i for 2 years u/s 420 of the

IPC with fine of Rs. 10,000/- and r/i for 2 years u/s 477A of the IPC with fine of Rs. 10,000/- and r/i for 1 year with fine of Rs. 10,000/- and in default

to s/i for 3 months u/s 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act.

13. Appellant Ram Prasad and M. N. Khan are convicted and sentenced to r/I for 2 years u/s 13(1) (d) read with Section 13(2) of the Prevention of

Corruption Act with fine of Rs. 20,000/- each and in default to s/i for 3 months.

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

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:

16. At the very outset, the learned counsel for the appellants has submitted that none of the appellant/officials was associated in the execution of the

work relating to digging of trenches and laying of OF Cable. Since they did not execute any work, there is no question of their causing any loss to the

department or gain to the contractor. It is pointed out that the Director OFC has no field duties;

but, in accordance with the provisions contained in Clause 132 of the tender document, he can inspect the work during its progress. The same is

reproduced here-in 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 has been given toÂ the contractor himself.Â The work during its

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

17. It is submitted that in accordance with the aforesaid provision, the Director, Shri M.N. Khan proceeded to the inspection site in Manipur. His Head

Quarter was at Guwahati. He had taken Sh. Ram Prashad, DE (Survey) and Sh. A.S. Deb, SDE (Survey) to check the quality of work by conducting

sample check on Imphal-Moreh and Imphal-Churachandpur route. All the three proceeded to Imphal on 09.12.1996 and returned on 13.12.1996. They

remained in Imphal for 3 days and conducted sample check. Neither Ram Prashad nor A.S. Deb was posted in the OFC project as executing officer.

They were never associated in the executing work. Their duty was only to conduct survey. Sh. S.K. Sikidhar (PW-22), in his cross-examination has

stated that Sh. Ram Prashad, DE was posted in Survey unit and not in OFC (P). Also, he was not a member of TEC. The relevant part is reproduced

here-in below:-

â??Ram Prasad was not the member of TEC. But I was the member of TEC. Mr. M.N. Khan was not posted as director OF(P) Guwahati when the

tender processing was completed and the work order was issued. Mr. Ram Prasad was posted as DE of Survey when the tender processing was

completed. Sri Ram Prasad was not posted as DE OFC(P) during the period I was posted as DE OFC. During tendering process and approval of

rates Sri Ram Prasad who was DE Survey at that time and Sri M.N. Khan who was later posted as Director OF(P) had no role in the process.â??

Even, the IO, Insp. M.T. Mang (PW-25) has admitted the aforesaid fact. The relevant part is reproduced herein below:-

â??It is correct that Ram Prashad was posted as DE (Survey) and not as an executing officer of the OFC. It is correct that Sri Ram Prashad along

with Director M.N. Khan and SDE, A.S. Deb had conducted sample test check of the OFC work executed by OFC stuff.â??

18. It is, therefore, submitted that Sh. Ram Prashad was not the executing officer. He did not supervise the work of digging of trenches and laying of

cable. As per orders of the Director Sh. M.N. Khan, he had conducted sample test check of the work that was already executed by the executing

staff. Whatever he noticed during sample test checking, he submitted his report to the Director. It contends that the officer who never executed any

work; but, conducted merely sample test check, has been dragged in the present case. The Director has no field duty. The DE is the highest executing

officer; but, the director can inspect the work during its progress as per clause 132 as mentioned above. Thus, the appellant is not at all blameworthy

for any kind of discrepancy in the work executed by the executing staff.

19. Attention has been drawn to the evidence of Sh. S.N. Malakar (PW-21), DETP-II, Jorhat, who was specially deputed for repairing of the work

after due execution of the work and in his cross-examination, he has stated as follows:-

Â â?? â?¦ OFC cables on both the routes were damaged due to bad pulling of cable, road widening by PWD, landslide etc. During fault repairing of

OFC, I noted at many points that OFC cables was damaged due to operation of JCB machine by the PWD staff. â?¦ After repairing, the OFC was

offered to AT. The AT team found that the depth and protection of OFC cable were intact in the route index diagram but the depth of the cable was

not standard depth i.e. 165 cms in ordinary soil and 90 cm in rocky soil. The AT raised objection that depth of the cable was less than the standard

depth of 165 cms. The AT team directed me to seek relaxation of depth from CGM NETF. After obtaining relaxation from CGM, I again offered the

OFC cable to AT teams. The AT team cleared the OFC cable as it was found within their parameters. AT team is not under the administrative

control of the CGM NETF. It is under the control of T&D circle Jabalpur. After AT clearance, I offered the cable on Imphal Moreh and Imphal

Churachandpur routes to maintenance organization. A joint inspection was conducted by OFC staff and also maintenance staff. During joint inspection

depth and protection of cable were again checked as per route index diagram. The depth and protection of the cable was f ound correct as per route

index diagram only thereafter maintenance staff took over the route. Maintenance staff consisted of Sri Ashok Kumar, DE, TP NETF, Guwahati, E.

Swer, DE (MTCE), ETR, Imphal, S.N. Malakar, DE, (TP), NETF, Guwahati, S. Mariapragasam, SDE (OFC), NETF, I mphal, W. Inaopi, JTO

(MTCE) ETR, Imphal. After inspection a joint inspection memo DE/OFC/GH/ G-11/99-2000 dated at Imphal 12/10/99 was prepared. This joint memo

was s igned by all the persons including me. After handing over the cable to maintenance staff, the responsibility of OFC executing staff came to end

and further responsibility is transferred to maintenance staff. The maintenance staff is not under the control of CGM, NETF, instead, the maintenance

unit is under administrative control of CGM, ETR, Kolkata. Not a single point in joint inspection memo (ext-51) co-relate with the route index diagram.

I cannot say if this joint inspect memo (ext-51) pertains to this SS since no point co-related. It is not possible after 7 years of the execution of the work

that the protection of the cable, depth of trenches and category of soil will remain same.â??

20. It has been pointed out that the IO (PW-25) M.T. Mang has also admitted all these facts in his cross-examination.

21. Accordingly, it has been submitted that from the testimony of Sh. S.N. Malakar and the admission of the same by IO (PW-25) 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.

22. Further it contends that as per 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??

Thus, it is submitted 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.

23. 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.

24. According to the geological survey, about 91% of the area of Manipur is hard rock. According to survey report conducted by PW-23 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. The IO has also admitted that according to Survey reports, the entire route is hilly and rocky.

25. The payment to the contractor has been made proportionately since the cable has not been laid at the standard depth of 1.65 metre.

26. The Head Quarter of the DE was at Guwahati whereas the work was executed in the State of Manipur. The execution of work is to be

supervised by the site engineer who represents the government at site of work as per clause 72.

Contention raised on behalf of the appellant/contractor

27. It has been contended that the contractor/the appellant can no way be

attributed to the criminality as they have duly participated in the tender

process and selected and there appears no any illegality as regards their role while awarding the contract. They have duly submitted the bid

documents and after due evaluation, the TEC has selected them. The evidence reveals that bills were passed by the appropriate authority and they

have no role to play in passing the bill. The MB was verified by the concerned Engineer and the bill was verified by the Site Engineer. By drawing

attention to the evidence on record, it is submitted that the loss calculation sheet prepared in this case is based on the data provided by the CBI not

from the office itself and as has been found above, data shown in the joint inspection report is itself not authentic or proved. The witness who

prepared the loss calculation himself stated that they are not at all sure about the correctness of the loss calculation or they were also not aware if the

work was awarded to the contractor at the departmental approved rate by the Director or has no idea about the correctness of the bill submitted by

the contractor.

28. Further it has been submitted that the evidence on record, runs counter to the allegation made against the appellant which is not at all suggestive of

preparation of bill in excess manner. Most of the witnesses have stated that bill was paid on actual work done by the contractors which is at par with

the terms of the tender agreement and as such there cannot be an allegation of raising false bill on the part of the contractor. Tender documents itself

provide that final bill may vary subject to the actual work done by the contractor. Accordingly, it has been urged that in view of the evidence on record

about the work site and the hilly condition etc. and in terms of the tender document, the variation of bill amount itself is not suggestive of criminality on

the part of the contractor. It contends that there is absolutely lack of evidence suggestive of criminal conspiracy on the part of the contractor with the

public servants at the time of awarding contractor nor there is requisite evidence to reflect the dishonest intention on the part of the accused appellant

to cheat the government. But however, the learned Trial Court relying only on the evidence of IO and the joint inspection report that was made after 7

years has held the accused appellants guilty without proper appreciation of entire matters on record, hence, finding of guilt at the accused appellants is

not sustainable.

The evidence on record in detail:

29. PW-1, Sh. S.K. Jain, the retired Director, HRD, BSNL Board, New Delhi and PW-2, Sh. K. C. Gupta, the retired Executive Director, Corporate

Office, MTNL, New Delhi and PW 10, Mahinder Singh, the then Director, Vigilance and Training in the Deptt. of Telecommunication in the year

2004, have stated about prosecution sanction accorded by them against P.K. Bagchi, the then SDE, OFC; Ramprashad, DE, A/T and M. N. Khan.

30. PW-3 Sh. Debabrata Dey, who was posted as Accounts Officer in the Office of the DGM, Task Force, BSNL, Guwahati, in the year 2002. He

handed over some documents to CBI regarding first and second running bill to and which were seized by the CBI vide Ext. 4 5 and 6 are the bills

seized by the IO. Further payment voucher issued in favour of Tarun Das, the contractor was also seized from him through Ext. 7. In his cross-

examination he has stated that pre-checking of the bills and payments were not made by him. He never dealt with those documents seized by the IO

nor he know about the contents about the documents, he simply submitted the documents to CBI officials as directed.

31. PW-4, Sh. S. C. Paul, was posted as Accounts Officer in the Office of Director, Microwave Project, Panbazar, Guwahati in the year 1996. His

duty was to make payment of bills duly pre-checked and passed by the office of the Director, OFC Guwahati, which were sent to him from the office

of the Director, OFC. Along with the bills, copy of measurement book was also sent to effect payment. He has stated all about the preparation of

project estimate, revised estimate after survey being made of the site for trenching and laying OFC. He narrated about the tender process, and report

of the tender committee and about selection of the contractors on the basis of comparative statement of sub section 16 Imphal-Moreh road and he

exhibited several documents from Ext. 9 to 30 to show the disbursement of work to the contractor Tarun Das and about the 1st and 2nd payment of

bill to him. And infact he has signed the Ext. 8 sanction order. It is stated CGM, Task Force, Guwahati is in overall charge of development of NE

region and their duties are to supervise the work of SDE/JTO/Site Engineers and also to verify the measurement book on day to day basis. In case of

any deviation proposal is required to be sent by the site Engineer to the DE for approval of excess quantity by the competent authority. He had given on noting for excess quantity as on 20.08.1998. For sub section 16 estimated cost was 4.12 lakhs and approved amount was Rs. 12,90,600 as per the

approval letter No. DIR/OF/GH-T-1(Pt.6/96-97, dated 07.02.1996) vide Ext. 12 given by the Director OFC. In cross-examination the said witness has

stated that he never prepared any revised estimate but the IO had wrongly recorded the same. It is also stated that there may be variation in the

estimated cost and approved quantity. Bills are prepared only on the basis of the actual work done in the site. Payments to the contractor are being

made on the basis of the actual work being done and if deviation occurs there should be approval from the competent authority. Further, it is stated

that payment was made to the contractor after verification of the bills by the officer of the Director OFC. Payments were made on the basis of

forwarding letter of Director and when the bills are sent to the accounts section bills are duly checked by the JAO and passed by DET and counter

signed by the Director and accordingly payment was made by the accounts section.

32. The evidence of PW-5, Guna Gobinda Das being the Chief Manager of Assam Grahmin Vikash Bank confined to the bank related documents

regarding to the account of accused appellant, Tarun Das and that certain amount was deposited in his account, vide Ext. 24 to Ext. 28 and the CBI

officials seized those documents. PW-6, Sh. Jibotosh Biswas, who was working as Sr. Accounts Officer in the Office of CGM, Task Force,

Guwahati, Uzan Bazar and he is the only seizure witness to certain documents that was seized by the IO through Exhibits 28, 31 and 32.

33. PW-7, Sh. Kamala Kanta Das, was working as Telecom Office Asstt. in the Office of the DE, OFC, Chenikuthi, Guwahtai during the year 1995-

96. He stated about floating of tender documents vide Ext. 9 bearing No. DE/OFC/GH/T-6/95-96/2 dated 16.11.1995 and about related documents

pertaining to the tender evaluation committee and about selection of Tarun Das as L-1. While narrating all details since floating of tender till payment

he has not uttered a single word about any sort of irregularity committed by any of the persons in the process.

34. The testimony of PW-8, Sh. Siv Raj Bali, who was a Director, OFC, DOT, Guwahati under Chief General Manager (CGM) Task Force, NE

Circle, Guwahati from June, 1993 to September 1995, is similar to the evidence of PW-7. Except narrating about the matter of OFC laying with the aforesaid route after conducting prior survey, his evidence is silent about any illegality conducted by the officer as well as the contractor. During

investigation he was examined by the CBI about the procedure of laying of OFC. He was shown certain documents related to estimate where he put

his signature. He stated that OFC were laid down in the ground by digging trenches which were again covered with earth unless concreting was

necessary in case of rocky soil. He stated about the procedure from floating tender of the project and approval and also about execution of the work.

He also conducted the survey report of the Imphal-Moreh route for laying of OFC. His cross-examination is produced below:

â??I have never visited Imphal Moreh route. As per survey report the Imphal Moreh route is a hilly and rocky area. It is correct that the estimated

quantities are not firm and final, they are subject to change. The amounts paid to the contractor were on the basis of actual works done in the

particular route. Any change in the quantities will be deemed to have been included in the tender. It is the site Engineer who is competent authority to

decide the type of soil and depth of the cable. When work is executed by the executing staff, acceptance/testing (A/T) is done by team of another

wing of DOT known as technical and Development Circle (T & D). A/T is conducted two times. Once after laying of HDPE pipe in the trenches.

AT team verified the depth of the cable and also the protection provided on the cable. I am not aware about the report of A/T as I was posted out o

unit at that time.â??

35. The testimony of PW- 9, Sh. Jayanta Kar, who was working as Sr. Asstt. in SBI, Chenikuthi as well the evidence of PW-11, Dharmeswar Das,

the retired Divisional Engineer (A), BSNL, are also similar to the earlier witnesses. Except stating about the all detail of the aforesaid work of

trenching and laying OFC, preparation of estimate etc, etc., their evidence no way supported the charges leveled against the accused persons.

36. On the next PW-12 Sh. Gobinda Kalita who was posted as Cashier in the Office of the Director, Microwave Project, Guwahati in the year 1991

to 2000 and his duty was to make payment to the staff and others bill including the contractorâ??s bill also, by maintaining cash book. He stated that

bills were prepared in the office of Director, OFC and the same was passed checked and verified in Director, OFC office. He stated that that the 1st and 2nd running bills of the contractor Tarun Das vide Ext. 48 dated 10.09.1996, Ext. 49 dated 02.08.1996 was duly checked by JAO, OFC, passed by

DE, OFC (P) and he knows their signature. He further testified that after checking the bills which bears all necessary signature of concerned persons

same was passed and they issued cheques on the basis of pay order in the bill.

37. His evidence is also totally silent as about the irregularity in preparation of bill by the concerned officials and which was withdrawn by the

contractor through cheque under his signature.

38. The testimony of PW-13 Sh. Ashotosh Kr. Chanda, who was working as the DE, OFC in the office of Director Task Force, Microwave Guwahati

is general in nature who has narrated all about the procedure of tender and disbursement or work of OFC and he goes on exhibiting all the relevant

documents pertaining to the entire process but has not stated anything about the illegal part of any officials or the contractor and his evidence is like

opinion in nature. Some portion of his statement in cross-examination is relevant while he said that he was not associated with the execution of OFC

neither visited the site where the work was executed. It is stated that head office of Director, DE was at Guwahati and the work was executed in

Manipur in Imphal Moreh route of which he had no idea. However, as regards the documents he has stated that estimated quantities are not firm and

final, their subject to change. The payment to the contractor was made on the basis of actual work done at the rate approved by the Department. It is

for the accounts section to verify whether any excess payment was made to the contractor.

39. Further he has stated that the cable is shifted to the safer side at the time of road widening or other natural calamities such a land slide erosion

heavy rain etc. The Depth of cable may or may not be changed due to the aforesaid natural calamities. After execution of the work, AT Section has

made through inspection regarding the depth of the cable protection provided to the cable and soil conditions as per route index diagram. The OFC

was commissioned after the acceptance by the AT team which was found within permissible limit with all aspect.

40. It is also stated that there is no Rule or any departmental instruction which provide that the DE will carry out test checks at every 100m or 10% of

total work. However, test check will be done as considered necessary by the DE.

The then Director A.C. De is the over-all in-charge and responsible

of tendering and conducting everything before passing the bill.

41. In the instant case basically the prosecution relied upon the joint inspection report that was carried out in the year 2003 by the IO along with other

officials of the Department on the basis of which certain illegalities in the work in question has been alleged on the part of the officials and the

contractors as has been charged. Infact the whole prosecution case started from the joint inspection report Ext. 51, dated 02.06.2003.

42. The said joint inspection was prepared by the IO and PW-14 Sh. B. Nag. Choudhury who was posted as S.D.E at T & D Circle Silchar in the

year 2003, Sh. W. Sunil Singh/ PW-16, who was post as Head constable CBI Silchar on 02.06.2003, Sh. L. Nishikanto Singh/PW-18, who was posted

as RM at the office of DET/TP, BSNL on 02.06.2003, and Sh. Shoibam Momon Singh/PW- 19 who was posted as technician with Microwave

Project BSNL, Task Force on 02.06.2003, are the witnesses to the said joint inspection prepared by the IO Sh. M. T. Mang/PW-25.

43. Let us examine the evidence of the IO/PW 25, who infact prepared the said inspection report. In his evidence it is stated that he conducted the

joint inspection of OFC trenching routes in association with the Departmental Officers and the said inspection Memo was prepared in presence of

witnesses. During inspection of SS 16 of Imphal-Moreh route, they found depth nature of soil protection claimed to have been provided found to be

false and at that time Ramprashad had gone for inspection of sub sections and has recorded that there was no rocky soil over the entire sub sections

and hence, the amount which was deducted from the bill was not found to commensurate with the findings which indicates accused persons were in

criminal conspiracy with each other to cause loss to the Government of India. In course of investigation he seized various documents from the

department pertaining to the work in question and thereafter he filed a charge-sheet, after obtaining prosecution sanction.

The IO was cross-examined at length wherein he had stated that he along with B. Nath. Choudhury decided the locations where pits were to be dug.

He had route index diagram, bills, MB, and tender documents of SS 16 at the time of inspection. At the time of measuring, the depth category of soil

was decided by him and the team members. The category of soil was decided by visual inspection. According to him the said inspection Memo was

prepared on the spot and took the signature of witnesses on the spot.

He has denied the suggestion of the defence side that without any reference of KMP in the route index diagram none of the points of inspection can

be co-related with the original route index diagram. He has admitted that as per Ext. 30 (18) the amount spent on rectification on cable falls was set

off, from the security deposit of the contractors. Accused Ram Prasad was posted as DE, Survey and not an executing officer of OFC and he along

with the Director M.N. Khan and SDE conducted sample test check of OFC work executed by the staff. He has also admitted that at the time of

execution of work accused person were of DoT and not of MTNL and BSNL and he is not aware whether at the time of alleged offence the officers

of BSNL, MTNL have been empowered to accord sanction for prosecution of accused persons. They have forwarded SP report to the concerned

prosecution sanctioning authority including draft prosecution sanction order.

Regarding the Survey report he has stated that quantities and figures mentioned in the tender were as per survey report and SS 16 falls in hilly, land

erosion, land slide prone area. The cost of OFC laying cannot be same for all the 24 sub sections. He has admitted that the contractor is paid at the

approved tender rates and the site engineer is the competent authority to ascertain the depth size of trench, and category of soil and he have no

technical knowledge regarding category of soil or the execution of OFC cables and it is the discretion of the DE to test check but not mandatory.

In further cross-examination, he has stated that some part of Imphal-Moreh and Imphal-Churachandur route are hilly areas and he has examined Sh.

S.N. Malakar who was engaged by BSNL to repair the damaged cables on both these routes and he has not seized the route index diagram, MBs

prepared by S.N. Malakar regarding repairing work of damaged OFC. The cables were laid in the year 1996-97 and he inspected the site in the year

2003. He has seized the report of AT that was conducted after the damage repairing work was completed by S.N. Malakar but the said report is

before the Court. He did not associate any person from ETR Kolkata while conducting the joint inspection. He has stated further that SDE is the

person who prepares the MB route index diagram and the bills and these are rectified by DE and these MB has been countersigned by Director, OFC

(P) and duly pre-checked by the JAO, OFC and finally passed by the Accounts Officer, Microwave but he did not seize any inspection report by DE

and the Director, OFC.Â

44. In their evidence, PW-14 and PW-16, who accompanied the investigating officer of CBI to Imphal to assist the CBI team has stated that Pits had

been dug on Imphal Moreh OFC route for checking the depth of the trenches where OFC cables were being laid to ascertain whether any anomalies

had been committed with regard to depth of the trenches, the type of soil and concrete protection work on the said OFC route in respect of SS15 and

16. Depths of trenches were measured in their presence by the inspector CBI and measurement had been recorded in the joint inspection report dated

02.06.2003 and they put their signatures.

In cross examination, PW-14 had stated that the laying of optical fiber cable (OFC) was already commissioned when the inspection was conducted.

The acceptance/ testing were must before commissioning of the OFC. OFC was commissioned when depth and protection was found as per

departmental standard or within the current permissible units approved by the department. At the time of conducting the AT everything was in order

otherwise the case would not have been commissioned. He further stated that he was not aware as to who had decided the location of the pits, CBI

inspector might have decided. He was not aware and he had not seen as to who had decided the type of soil. He had no knowledge or training with

regard to classification of soil. There was no soil specialist or expert present at the time of test verification. The CBI had prepared the report and he

had put his signature at the Hotel. All the reports had been signed on the same day though the verification was done earlier. He was not aware

whether CBI had any documents. He was a witness during the spot verification but he had no role to play in the joint testing of the OFC. It was

difficult to ascertain whether the position of the cable was same at the time of joint inspection as it was at the time of initial execution of work. No

diagrams were prepared by CBI in respect of the pits where test check was conducted. The site engineer was the sole authority to decide the type of

soil and dept of the trench, the protection work at the time of execution of work at the prevailing situation. Generally in case of heavy rainfall and land

slide the protection and sometimes cables also get fully damaged. The anti termite treatment was not used anywhere in his department for the

protection of the cement concreting work. He cannot say if the cement concreting turned into ordinary soil after Â¾ years of the execution work in

absence of anti-termite treatment copy of the joint memo was not given to him despite his request. He had signed the memo as per instruction of the

CBI inspector.

PW-14 was declared hostile at that stage and he stated that he had not been interrogated by the CBI nor his statement was recorded during

investigation.

45. In the cross examination, PW-16 has stated that he was not aware whether any soil testing scientist was engaged for testing the soil. The I.O had

decided on the location of pits to be dug. No diagram was prepared on the spot. All documents of the case were in the possession of the I.O and he

did not know what documents were available with the I.O. He did not see any documents with the regard to the depth, type of soil and protection of

the trenches where OFC were laid. There was no rocky soil in the entire section. Hard soil was found in one, two or three pits. He had worked on the

direction of the I.O. None of the person present had referred to any documents during inspection.

He stated further that he had not been shown any documents during inspection nor he was consulted about any document during inspection. He had

seen the route index diagram in the hand of the IO but he did not know anything about the diagram. He had not seen RA-1 and RA-2 and the route

index diagram. None of the person present had referred to any document during the inspection.

46. In his evidence PW 18 has stated that he accompanied the CBI team for joint inspection of OFC trenching on Imphal Moreh road in respect of SS

16 and he signed the joint inspection report that was prepared in the office of CBI. The measurements were noted in a piece of paper on the spot and

the joint inspection was not prepared on the spot.

In his cross-examination, he stated that he cannot recollect how many pits have been excavated on the first day of OFC laying route and CBI had

decided the locations. The depths of trenches were measured taking the base as the top of the protection of the cable. The CBI team had been

accompanied by soil experts who had ascertained the types of soil in the trenches. There were around five persons present at the time of joint inspection. One Sh. M.T. Mang, inspector CBI one Sh. Sunil were present and others he could not recognize. No soil samples were collected for sending the same for examination. The type of soil was ascertained by looking at it. He did not notice any documents in the custody of the CBI team except for a diagram of the location and the said diagram was not shown to him.

47. Similarly, PW-19 has also stated that he accompanied the CBI team while carrying joint inspection about OFC laying trenches in SS 16 on 02.06.2003 and he signed the joint inspection report that was prepared by the I.O. In his cross examination, he stated that he had no role to play in this case and he signed the memorandum of inspection as a token of his presence in CBI office on being asked by CBI officer. He was called earlier by the CBI for recording his statement, it was about three years back but he had returned without making any statement as he did not agree to make a false statement as instructed by CBI officer.

48. The evidence of PW 20, Ch. Toiba, who was working as SDE, in the Office of the Microwave Division during the year 1996-97 and PW 21, Sailendra Malakar, who was sent on deputation to Imphal as DE, OFC from Microwave Project where he was officiating DE during the year 1999 to 2000, simply stated about the seizure of documents by the IO as well as the procedure of the OFC laying work and exhibited the documents which was seized by the IO without any whisper about the irregularities found in the joint inspection report. PW 21 although has stated about the approval of excess amount against the estimated cost without re-tendering but it is stated that Director A.C.De was responsible for the anomalies for awarding the tender to the contractor but said Director was not an accused in this case. The cross-examination of the PW-21 is relevant where he stated that without detailed estimate the estimated cost cannot be ascertained for the concerned subsection. No detailed estimate was prepared for any of the subsections on Imphal Moreh and Imphal Churachandpur OFC route. The estimated cost shown in the tender document was patently wrong, which resulted due to fault of the administration. So far SS 16 was concerned after eight KMP from Imphal the entire Imphal Moreh route was hilly and rocky area. The tendered quantity was not based on survey report and also are not according to the terrain of the route. The actual cost of execution of work is

bound to increase.

The tender rates were approved by Director only and DoT has nothing to do with the approval of tendered rate. DE T was responsible for execution

of work as per specification of the tender. Estimated quantity and cost were not firm and final, they were subject to change due to obstruction of the

road, diversion, change of category of soil at the time of execution of the work the length of the trench increases. The changed quantity was deemed

to have been included in the original tendered schedule.

Further he stated that the payment to the contractor was made on basis of approved tendered rate and not at the departmental rates on the actual

executed work. The head quarter of the DE is located in Guwahati and work was executed in Imphal. It was the discretion of the DE T to conduct

test check and he would conduct the test check only if he considered it necessary. The site engineer was the competent authority to decide the size

and depth of the trench and category of soil. He had been specially deputed to commission the OFC cable on Imphal Moreh and Imphal

Churachandpur route. He had no personal knowledge of any activity or document pertaining to survey report, project estimate, tenders, MBs, bills,

route index diagram etc. OFC cables on both the routes were damaged due to bad pulling of cable, road widening by PWD, landslide etc. During fault

repairing of OFC, he noted at many points that OFC cables were damaged due to operation of JCB machine by the PWD staff. He did not prepare

any route index diagram when he took up repairing work and after repairing, the OFC was offered to AT.

The AT team found that the dept and protection of OFC cable were intact in the route index diagram but the depth of cable was not standard depth i.e

165cms in ordinary soil and 90cm in rocky soil. The AT raised objection that depth of the cable was less than the standard depth of 165cms. The AT

team directed him to seek relaxation of depth from CGM NETF. After obtaining relaxation from CGM, he again offered the OFC cable to AT teams.

The AT team cleared the OFC cable as it was found within their parameters. AT team was not under the administrative control of the CGM NETF, it

was under the control of T&D circle Jabalpur. After AT clearance, he offered the cable on Imphal Moreh and Imphal Churachandpur routes to

maintenance organization. A joint inspection was conducted by OFC staff and also maintenance Staff during which depth and protection of cable was

again checked as per route index diagram. The depth and protection of the cable was found correct as per route index diagram only thereafter

maintenance staff consisting of Sri Ashok Kumar, DE, TP NETF, Guwahati. E. Swer DE, (MTCE), ETR, Imphal, S.N. Malakar DE, (TP), NETF,

Guwahati, S. Mariapragasam, SDE (OFC), NETF, Imphal, W. Inaobi, JTO (MTCE), ETR, Imphal took over the route. After inspection a joint

inspection memo DE/OFC/GH/G-11/99-2000 dated at Imphal 12.10.1999 was prepared and was signed by all the persons including him. After handing

over the cable to maintenance staff, the responsibility of OFC executing staff came to end and further responsibility was transferred to maintenance

staff. The maintenance staff was not under the control of CGM, NETF, instead, the maintenance unit was under administrative control of CGM, ETR,

Kolkata. Not a single point in joint inspection memo (Ext. 51) co-related with the route index diagram. He could not say if the join inspection pertained

to the SS since no point co-related. It was not possible after 7 years of the execution of the work that the protection of the cable, depth of trenches

and category of soil would remain same.

49. The evidence of PW 22, S. K. Sikidar is of formal in nature who was a member of tender committee and was not involve with the execution of

the work. He has narrated all about the project and about the allotment of work to the contractor by due procedure and exhibited certain documents

pertaining to the contract. His entire evidence is silent about any sort of illegality or irregularity while carrying out the aforesaid work. In his cross-

examination, he has stated that Ram Prashad was not the member of TEC and M. N. Khan was also not posted as Director, OF(P) when the tender

process was completed. Both the said persons have no role in the whole tendering process or approval of rates. As per the survey report from

Tegnopal to Moreh, the whole section is rocky whereas the same findings are not reflected in the tender schedule of SS 16 of Imphal-Moreh route. If

the quantity of items vary or enhanced in item number 10.2, 10.3, 10.7, the bill amount of particular sub-section will increase proportionately. On his

examination, the route index diagram and joint inspection report it is found that none of the four points where CBI had conducted joint inspection had

figured in the route index diagram. The AT team verified the depth and protection of the route as per route index diagram and after being satisfied that

the standard is maintained for laying the cable, the route is commissioned. After commissioning of the route, a joint inspection is carried out with the

maintenance organization for handing over the route to the maintenance. At that time of joint inspection, the depth and protections were verified by the

maintenance organization with the route index diagram. During rainy season there are possibility of damages being caused to the OFC route resulting

from landslides and sometimes cables are being washed away because of heavy rain fall. Cable also caused damaged during the road widening work

carried out by PWD and also during expansion of drain etc. After digging the trenches it was refilled by sand and soft soil as per instruction and

original soil category may not be available if such trenches dugs after some period.

50. PW-23/Shri Ragunath Singh was the Divisional Engineer, Microwave Project at the time of installation of microwave and he carried out survey

work of Imphal- Moreh route OFC in the month of Marchâ?? 1995 as per direction of the Director and submitted the survey report Ext. 37 in

respect of said route. As per the said survey report, the soil on the Imphal-Moreh was mostly hard and rocky soil and that is why the excavation of

cable trench to the depth of 1.65 metre was extremely difficult, therefore, RCC/ GI pipes are required to be laid for the protection of SDPE pipe/OFC

cable. In his cross-examination, it is stated that the entire route falls in hilly and rocky area and it is prone to landslides and soil erosion as well as

sinking zone. He has mentioned in his report that it is extremely difficult to make the trench upto the standard depth of 1.65 cm. In fact it was not

possible to dig more than 50 cm deep into the rock.

51. Thus, his evidence indicates that digging of trench upto the standard depth 1.65 metre is not possible and his evidence goes counter to the

allegation of the prosecution itself that the contractor illegally did not carry out the work in question as per the specification in the contract about the

depth of 1.65 cm. His report also reveals that the entire work area was rocky and hilly whereas the contract work of some areas, soft soil is shown.

52. The evidence of PW 24, one of the Investigating Officer, Shri S. Lama is confined only to the seizure of certain documents and he was not the

part of investigation that was carried out by the PW 25.

53. A careful scrutiny of evidence on record, it go to show that the different officials from the DoT and other officials simply has stated all about the

procedure for awarding the contract in question and their evidence has not specifically spell out about any illegality that was carried out by the officials

concerned while carrying out the tender process nor it would reflect that contractor concern obtained the contract by any unfair means so as to

suggest any conspiracy among the officials and the contractors.

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

54. 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 in working condition 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 in some places. Most of the witnesses have merely exhibited the documents without knowing the content of the documents and their evidence are general in nature and not at all specific to the charges.

55. 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.

56. 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.

57. 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.

58. 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.

59. 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.

60. 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.

61. 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.

62. 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.

63. 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.Â Â

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??

64. 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 portion of evidence including the cross-examination of the

witnesses. Except exhibiting the documents to the work in question, their evidence is not at all 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.

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

MBs and the joint inspection 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.

66. 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.

67. 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 â??may beâ?? and â??must beâ?? 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.

68. 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).

69. 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.Â

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??

70. 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??

71. 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.

72. 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.

73. 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.