(2009) 02 BOM CK 0040

In the Bombay High Court

Case No : Criminal Appeal No. 438 of 2007

Shri Hemant Thakre — APPELLANT

Vs

The State of Maharashtra — RESPONDENT

Date of Decision : 03-02-2009

Acts Referred:
- Criminal Procedure Code, 1973 (CrPC) — Section 313
- Penal Code, 1860 (IPC) — Section 109, 120A, 120B, 34, 405
- Prevention of Corruption Act, 1988 — Section 5(1)

Citation : (2009) 02 BOM CK 0040

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

Bench : Single Bench

Advocate : S.P. Dharmadhikari and Sangeeta Gaikee-Jachak, in Criminal Appeal No. 438 of 2007, S.S. Vaditel, in Cri. Appeal No. 439 of 2007 and S.P. Gadling, in Cri. Appeal No. 454 of 2007, for the Appellant; S.S. Doifode, Additional Public Prosecutor, for the Respondent

Judgement

R.C. Chavan, J.—These appeals are directed against appellants'' conviction for various offences and sentences imposed upon them for those offences by the learned 2nd Additional Chief Judicial Magistrate, Nagpur, in Criminal Case No. 375 of 2002.

2. In the year 1999, a scandal of bogus degrees, mark-sheets and unwarranted increase of marks in revaluation at various examinations conducted by the Nagpur University surfaced. The University authorities reported the matter to police, whereupon Crime No. 346 of 1999 was registered on 22nd June, 1999 on the complaint of Shri Prakash Mistry. Two other crimes were also reported. In course of investigation of these crimes, some more matters surfaced. On 21-6-1999, on a report by Shri Prakash Mistry, Crime No. 346 of 1999 was registered against some students of the University. Eventually, in Crime No. 348 of 1999, Shri Prakash Mistry was himself arrested by the police. Investigation into the crimes was conducted by PI Sayyad and after him by PSI Anil Lokhande. Originally one chargesheet was filed bearing Regular Criminal Case No. 387 of

1999 and after separate trials were ordered, separate supplementary charge sheets for various offences came to be filed against various offenders.

3. Facts, which led to prosecution and conviction of the appellants are as under:

Appellant Anil Gupta in Criminal Appeal No. 439 of 2007, who was accused No. 1 before the Court, was a student, who had appeared at Part III of BE Examination in Summer- 1998. He failed in some of the subjects at the said examination. The Nagpur University permitted revaluation of answer books in terms of Ordinance No. 159 at the instance of such failed candidates. Therefore, accused No. 1 Anil Gupta applied for revaluation of his papers of Theory of Structures(TOS)-1 and Limit State Design (LSD), by paying requisite fees.

4. Procedure for conduct of examinations is prescribed in Ordinance No. 9 issued by the Nagpur University. It provides, among other things, from Clause 57 onwards, for appointing tabulators, scrutineers, etc., and their respective roles. This ordinance did not provide for revaluation, which facility was introduced by Ordinance No. 159. Ordinance No. 159 providing for revaluation merely gives sketchy procedure about revaluation. It does not lay down the procedure to be followed internally by the University administration. Therefore, it may be taken that the provisions of Ordinance No. 9 would apply mutatis mutandis to revaluation as well.

5. The practice, which was followed by the University officials for such revaluation has been deposed to by PW 3 Narayan Ghatole, an employee of the University in the Revaluation Section, and PW 1 Gangaram Meshram, the Assistant Registrar (Revaluation) of the University. According to them, after a candidate applied for revaluation after paying the prescribed fee, an entry used to be taken in the Revaluation Tabulation Register (hereinafter referred to as the RTR. for the sake or brevity). The RTR contains the following columns:

I) Sr. No. VIII) Original Marks

II) Roll No. IX) Marks of 1st examiner in revaluation

III) Date and amount X) Marks of 2nd examiner in revaluation

IV) Name of candidates XI) Average marks in both

V) Case No. /Code No. XII) Result/change or no change

VI) Subject paper XIII) % increase or decrease

VII) Maximum marks XIV) Signature of scrutineer

XV) Remarks

The Clerks in the Revaluation Section used to fill up column Nos.(I) to (IV) and (VI) to (VIII) on the basis of the material which they already had. Requisition for relevant answer books used to be sent to the godown. After the answer books were received, the portion of the answer book containing roll number of the candidate and marks obtained by him in the original valuation used to be masked. A code number used to be printed on the answer book by using a numbering machine.

6. According to Shri Ghatole, earlier the University used to maintain a register, where roll number of the candidate and the code number allotted to his answer books used to be recorded. However, since it was found that students could trace out the place where papers were sent for revaluation from this register, this practice was discontinued.

7. The answer books of students in the Engineering faculty used to be taken by a special messenger to the examiners appointed for the purpose of revaluation. Normally, the answer book used to be taken to a College in another University, where the Principal or the Head of the Department in the College concerned, used to assign the task of revaluation to the examiners in the said College or University. They were not supposed to write the marks on the answer sheets itself. These examiners were provided with .revaluation sheets.. These revaluation sheets contained columns of code number and marks assigned to each answer, with a column of total at the end. The revaluation sheet also provided for recording the subject of the question paper and its date. The revaluation sheet was to be signed by the revaluator. One revaluation sheet ordinarily contained 9 to 10 rows so that information in respect of 9 to 10 answer sheets revalued would be filled in. Since the examiners, who revalued the papers, had no access to the roll number, they would mention the code number and then fill up the marks allotted by them for each answer. Since the revaluation of each answer book used to be done by two revaluators, there used to be two such revaluation sheets (for the sake of easy reference, they would be hereinafter referred to as R1 and R2 sheets corresponding to revaluation done by the first and the second revaluator). The messenger, who took the papers for revaluation, used to bring back the answer books along with revaluation sheets to the University.

8. After receipt of answer books and revaluation sheets in the Revaluation Section of the University, the University employees used to de-mask the roll number on the answer sheet and used to fill up column No. (V) in the RTR by recording the relevant code number against the name of the student, his roll number and subject of the paper sent for revaluation.

9. After this was done by the University employees, the RTR along with R1 and R2 sheets used to be handed over to scrutineers. The scrutineers were select Professors of affiliated Colleges, who were assigned the task of entering marks obtained upon revaluation. The scrutineers used to work in pairs. Two Professors would be working as a team for entering marks in respect of one or more students. Column Nos. (IX) and (X) for marks assigned by the two examiners used to be filled in by the scrutineers. They then calculated average marks and filled them up in column No. (XI). In column No. (XII), the scrutineers would mention whether there was a change or no change or an adverse change. In

column No. (XIII), they were supposed to mention the percentage of increase or decrease and were expected to sign the entry in column No. (XIV). If there was a change of 5% or more over the original marks, then the result of the candidate would change.

10. It is not in dispute that there is no authentic document to describe this procedure or to discern as to what was the standard procedure to be followed. However, according to Shri Ghatole, after the RTR was filled up, a notification was expected to be issued about change in the result upon revaluation. After this notification, necessary changes were made in the Final Tabulation Register (for short, hereinafter referred to as the FTR.). The FTR in respect of an examination conducted by the University used to be drawn up after evaluation of answer books at the examination was over and the result used to be declared on the basis of the FTR. The FTR is in the form of a computer printout since the record was computerised. Thereafter the students used to apply for revaluation. After revaluation, change, if any, in the marks used to be noted in hand in the FTR by the same set of scrutineers.

11. Accused No. 2 Suresh Manmode and accused No. 3 Shyamrao Shinde were the pairs of scrutineers, who were entrusted with the task of entering marks of accused No. 1 Anil Gupta in the RTR as well as the FTR. Both of them are now dead. Accused No. 4 Shyamrao Kalamkar was the Assistant Registrar in charge of Revaluation Section in the University. Accused No. 5 Hemant Thakre was a Professor in Yashwantrao Chavan College of Engineering and Dean of the Engineering Faculty.

12. In this case, Anil Gupta, accused No. 1, had initially secured 23 marks out of 80 in the subject of TOS-I and 19 out of 80 marks in LSD. He applied for revaluation. Code Nos. 4728 and 4482 were assigned to his answer books of TOS-I and LSD respectively. Examiner-I for the subject of TOS-I had assigned him 31 marks and Examiner-II had assigned 29 marks, thus average of marks came to 30. However, while noting the marks in the RTR, the marks assigned by Ist and IInd Examiners were entered by Scrutineer Shri Shinde as 41 and 37 and the average was shown as 39. However even these marks were scored out and 37, 29 and 34 marks were entered in columns of R1, R2 and average respectively. Change was shown to be 14%, by scrutineer Shri Manmode. Thus, by adding 8 marks of sessionals the accused would pass in TOS-I subject. In the subject of LSD, for which code No. 4482 was given accused No. 1 had initially scored only 23 marks. The two examiners gave 33 and 34 marks. Average thus came to 34 and after adding 4 sessional marks accused No. 1 would have failed. However, in the RTR scrutineer Shinde entered 34 and 38 marks as assigned by the two revaluators and drew up average of 36. Correction in respect of average was initiated by Scrutineer Shri Manmode. Originally change of 19% was shown which was altered to 22% by Manmode. In the FTR corresponding changes were made by Shri Manmode. In the FTR, the marks in theory were changed to 29, practical marks of 14 were added, and thus he was shown to have secured 43

marks, and got an exemption.

13. It is the case of the prosecution that accused No. 1 Anil Gupta approached accused Nos. 2 to 5 in order to get his marks changed and accused Nos. 2 to 5 changed the marks in order to favour accused No. 1, either actively indulging in making such changes or conniving at such changes or contriving to bring about changes by abetment, by engaging in conspiracy. It was, therefore, alleged that accused No. 1 had committed offence punishable u/s 420 of the Penal Code; accused Nos. 2 to 5 had committed offences punishable under Sections 468 and 471 read with Section 34 of the Penal Code, and all the accused persons had committed offences punishable under Sections 420, 468 and 471 read with Section 109 of the Penal Code.

14. In course of investigation, the Investigating Officer secured the necessary record from the University, recorded statements of witnesses, had the disputed and admitted handwriting of all dramtis personae sent to the Examiner of Questioned Documents, State CID, Pune, and after getting an opinion from the Experts, and finding that the accused persons were involved in the aforementioned offences, charge sheeted them.

15. The learned Chief Judicial Magistrate, Nagpur, charged all the appellant Anil Gupta of offences punishable under Sections 420 read with Section 34 of the Indian Penal Code and the other appellants of offences punishable under Sections 468 and 471 read with Sections 109 and 34 of the Penal Code. The appellants Shyamrao Kalamkar and Hemant Thakare were later also charged of offence punishable u/s 409 read with Section 34 of the Penal Code. Accused Nos. 2 and 3, scrutineers Suresh and Shyamrao died before charge could be framed. The accused pleaded not guilty to the said charge and hence were put on trial, at which the prosecution examined in all 11 witnesses in its attempt to bring home the guilt of the accused. They are : PW 1 Gangaram Meshram, who was serving as Assistant Registrar (Revaluation), PW 2 Bhaiyyalal Barbate, who was Assistant Registrar Professional Examinations, PW 3 Narayan Ghatole, who was serving as Senior Clerk in Revaluation Section, PW 4 Vishwas Rajangaonkar, Examiner of Questioned Documents in the State C.I.D., PW 5 Jageshwar Sahariya, who was acting as Vice Chancellor of the University, PW 6 Shriniwas Patwardhan, Chief Administrative Officer, Yashwantrao Chavan College of Engineering, PW 7 Laxman Khobragade, API, who registered the F.I.R., PW 8 Udaykumar Pandya, Reader Govt. Engineering College, Jabalpur, PW 9 Dharmesh Parate, Deputy Registrar Academic, VNIT, Nagpur, P.W. 10 Dr. Vijendra Kumar, Valuer-II, PW 11 Investigating Officer PSI Anil Lokhande.

16. After considering the evidence tendered before him, the learned 2nd Additional Chief Judicial Magistrate, Nagpur, held that the charges against accused Nos. 1, 3 and 5 were proved. He also convicted the accused of offence punishable u/s 120-B of the Penal Code. The convictions and sentence recorded by the learned Magistrate are as under:

(a) For offence punishable u/s 420 read with Section 34 & 109 of the Penal Code accused No. 1 Anil Gupta, accused No. 4 Shyamrao Kalamkar and accused No. 5 Hemant Thakare were sentenced to rigorous imprisonment for four years and fine of Rs. 20,000/- each, or in default RI for two months.

(b) For offence punishable u/s 468 read with Sections 34 & 109 of the Penal Code accused No. 1 Anil Gupta, accused No. 4 Shyamrao Kalamkar and accused No. 5 Hemant Thakare were sentenced to rigorous imprisonment for three years and fine of Rs. 15,000/- each, or in default RI for one month.

(c) For offence punishable u/s 471 read with Sections 34 & 109 of Penal Code, accused No. 1 Anil Gupta, accused No. 4 Shyamrao Kalamkar and accused No. 5 Hemant Thakare were sentenced to rigorous imprisonment for one year and fine of Rs. 15,000/- each, or in default RI for one month.

(d) For offence punishable u/s 120-B of the Penal Code, accused No. 1 Anil Gupta, accused No. 4 Shyamrao Kalamkar and accused No. 5 Hemant Thakare were sentenced to rigorous imprisonment for six months and fine of Rs. 2,000/- each, or in default RI for fifteen days.

(e) For offence punishable u/s 409 read with Section 34 of Penal Code, accused No. 4 Shyamrao Kalamkar and accused No. 5 Hemant Thakare were sentenced to rigorous imprisonment for four years and fine of Rs. 20,000/- each, or in default RI for two months.

17. The learned Magistrate directed that all the sentences imposed upon the appellants were to run consecutively and not concurrently. Aggrieved thereby, the appellants have preferred these appeals. He also ordered confiscation of mark list as well as degree of B. E. (Civil) of appellant Anil Gupta.

18. I have heard the learned Counsel appearing for the respective appellants and the learned APP for the State. With the help of all the learned Counsel, I have gone through the evidence tendered.

19. Anil Gupta had admitted in his statement u/s 313 of the Code of Criminal Procedure that he had appeared in BE Part III Examination in Summer-1998 and failed. He admitted that he had scored 23 and 19 marks respectively in TOS-I and LSD papers, in reply to question No. 1 and had applied for revaluation. He stated that he had failed in revaluation.

20. PW 1 Shri Gangaram Meshram was the Assistant Registrar, Revaluation, after the scandal came to light. Various documents were made available by him to the investigating machinery. He deposed about the entire process of revaluation. He stated that accused Anil Gupta had initially scored 23 and 19 marks in TOS-I & LSD papers respectively. Anil''s roll No. was 499. Anil applied for revaluation. His answer sheet of TOS-I was given code No. 4728 and answer sheet for LSD was given Code No. 4482. In the RTR against subject of TOS-I, 39 and 29 marks were entered in columns of two revaluations and average marks were noted as 34. Against subject of LSD 34 and 38 marks were noted as assigned by two

revaluators and average was shown as 36. Increase was shown as 14% in TOS-I and 22% in LSD. Accordingly in the FTR marks against TOS-I and LSD were shown as 34 and 36, respectively. R1, R2 sheets on the basis of which these marks were entered were identified by him at Exh. 22 to 25. Evidence of P.W. 2 Bhaiyyalal Barbate, who was Assistant Registrar, Professional Examinations is to the same effect. 21. Revaluator Prof. Pandya was examined as PW 8. He stated having received the answer papers of BE Part III Theory of Structures (TOS)-I and Limit State Design (LSD) bearing Code Nos. 4728 and 4489 on R1 sheet from the Nagpur University. After assessment of the papers, he allotted 29 marks against Code No. 4728 on R2 sheet and 33 marks against Code No. 4482 on R1 sheet. He proved R1 & R2 sheets to be in his handwriting, which are at Exhibits 23 and 25.

22. PW 10 Prof. Jain stated that he had examined TOS-I paper of BE Part III Examination and identified revaluation sheet Exh. 22 dated 30.09.1998 to be in his hand and bearing his signature. Against Code No. 4728, he claims to have given 31 marks.

23. PW 3 Narayan Ghatole had also stated about the change in marks. He identified R1 and R2 sheets at Exhibit 22 and 23. He stated that the student had initially scored 23 marks in TOS-I. After adding 8 marks of sessional examination, the total marks were 31 and thus the student had failed. The Revaluators had awarded 31 and 29 marks respectively against Code No. 4728. They were wrongly entered as 39 and 29 with average drawn as 34, when it ought to have been 30. He stated that initially in the RTR against the subject TOS-I, 41, 37 and 39 marks were entered. According to Narayan, these entries are in the handwriting of deceased scrutineer Shinde. They were changed to 37(39?) and 29 and 34 in the handwriting of deceased scrutineer Manmode. Adding 8 sessional marks Anil Gupta had thus scored total of 42 marks and had passed. According to P.W. 3 Narayan Ghatole, in the subject of LSD, Anil Gupta had initially scored 19 in theory and 4 marks in sessional. His answer sheet with code No. 4482 was sent for revaluation. In revaluation he was awarded 33 and 34 marks respectively and thus the average came to 34. Even with the addition of 4 sessional marks, the candidate failed. However, in the RTR marks entered were 34 and 38 and average was shown as 36, with overwriting in average. Original figure 33 was changed to 38. Adding 4 marks scored in sessionals, Anil Gupta, thus passed even in LSD. He stated that these entries against the subject of TOS-I were in the handwriting of accused No. 2 Madhukar Smarth.

24. PW 3 Narayan Ghatole had stated that since he was working in Revaluation Section, he had the occasion to see their handwritings and signatures frequently and, therefore, could identify the signatures and handwritings of all the six Scrutineers.

25. PW 11 PSI Lokhande had conducted investigation in the matter. He stated in para 6 of his deposition about change of marks in the case of Anil Gupta. In para 9 of this deposition, he stated that he had caused specimen handwriting of Dean

Hemant Thakre to be obtained, and sent the samples along with the questioned writing to the Examiner of Questioned Documents. He had also caused handwriting of other persons involved in the scandal to be collected and sent to the Examiner of Questioned Documents.

26. PW 4 Vishwas Ranjangaonkar is the State Examiner of Questioned Documents, who stated about examination of documents referred to him. Since appellant Hemant Thakre admitted that chit in question was in his handwriting and since the scrutineers who allegedly entered wrong marks are dead, it may not be necessary to delve on the evidence of P.W. 8 at length.

27. The learned Counsel for appellant Anil Gupta submitted that there is no evidence that Anil Gupta had ever approached other accused persons or that other accused persons changed the marks to the advantage of Anil Gupta at the instance of Anil Gupta. He submitted that it may be possible that the change was unintentional, that is, without any motivation to make such a change, or could also have been at the instance of someone else and not necessarily Anil Gupta. Therefore, according to the learned counsel, since the nexus is not established, it would be wrong to hold that the accused persons had engaged in any conspiracy or that Anil Gupta had abetted in forgery or falsification of record by Scrutineers or that Anil Gupta had indulged in cheating by using a genuine mark-list, which was false.

28. The learned APP submitted that it would be too far fetched to imagine that the Scrutineers would increase the marks of Anil Gupta for no apparent reason, or without being approached by Anil Gupta or merely because he took a fancy for the name. Since scrutineers are no more, it is not necessary to ascertain authorship of handwriting. Suffice it to say that marks of accused Anil Gupta were altered to his advantage.

29. The learned APP submitted that in course of investigation, accused No. 4 Shamrao Kalamkar had been arrested. He was interrogated by Investigating Officer PI Sayyad in presence of Advocate Dhananjay Dhondarkar, who was called as panch but was not examined in this case. P.W. 11 P.S.I. Lokhande claimed to have been present at the memorandum and stated that accused Shamrao Kalamkar stated that Dr. Prakash Mistry and accused No. 5 Hemant Thakre and some others used to send chits to him to have marks increased and that he had preserved those chits. He stated that the chits were kept at his house and that he would hand over the chits to the police. A memorandum was accordingly made in presence of panch Dhananjay Dhondarkar as well as other panch Sudhir Shivdekar. He proved the copy of memorandum from original, which was in record of another Regular Criminal Case. He stated that then all of them proceeded to the house of Kalamkar in a jeep. Kalamkar''s house was situated near Bouddha Vihar, Dhammapuri, Misal Layout, Jaripatka, Nagpur, which was shown by Kalamkar himself. Kalamkar called them inside the house and from the steel cupboard, took out some some chits. After sorting out the chits from the almirah, he handed over the chits to PI Sayyad, which included

chits written by accused Hemant Thakre. There was also an envelope, which had been taken out. A seizure panchanama was drawn up and the chits were seized. Copy of the panchanama was proved by the witness at Exhibit 127. The chits and envelope seized were proved at Exhibits 128, 129 and 130.

30. The learned Counsel for accused Anil Gupta submitted that the Investigating Officer had admitted in his crossexamination that Anil Gupta had applied for revaluation in nine subjects, out of which he passed in five subjects. No malpractice was found in respect of three subjects and so no case was filed in respect of those subjects. Case is in respect of change in only TOSI and LSD papers. He admitted that in the chit Exh.129 written by accused Hemant Thakre which is relevant, only the branch and roll nos are mentioned. Roll No. 499 of accused Anil Gupta is written against the subject of Civil Engineering. The learned counsel submitted that the theory of prosecution was that accused Anil Gupta approached accused Hemant Thakre, who through accused Shyamrao Kalamkar influenced the Scrutineers to change marks. If that was so, the learned Counsel wondered as to how Anil Gupta could have failed in four subjects even after revaluation. Therefore, according to the learned Counsel, if there is any mistake on the part of the University authorities to note down marks in TOS-I and LSD papers, it cannot lead to inference that it was done at the instance of accused Anil Gupta.

31. In V.C. Shukla and Others Vs. State (Delhi Administration), , while considering the case of conspiracy, the Court held that it was well settled that in order to prove a criminal conspiracy, there must be direct or circumstantial evidence to show that there was an agreement between two or more persons to commit an offence and that this clearly envisages that there must be a meeting of minds resulting in an ultimate decision taken by the conspirators regarding the commission of an offence. The Court observed that it was true that in most cases, it will be difficult to get direct evidence of an agreement to conspire but a conspiracy can be inferred even from circumstances giving rise to a conclusive or irresistible inference of an agreement between two or more persons to commit an offence.

32. On the question of elements of conspiracy the learned Additional Public Prosecutor placed reliance in K. Hashim Vs. State of Tamil Nadu, the Court was considering ''conspiracy'' in the context of circulating counterfeit currency. In this context the Court observed in paragraph 22 of the judgment as under:

22. It would be appropriate to deal with the question of conspiracy. Section 120-B IPC is the provision which provides for punishment for criminal conspiracy. Definition of ''criminal conspiracy. given in Section 120-A reads as follows:

120-A. When two or more persons agree to do, or cause to be done:

(1) an illegal act, or

(2) an act which is not illegal by illegal means, such an agreement is designated

a criminal conspiracy ;

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

The elements of a criminal conspiracy have been stated to be (a) an object to be accomplished, (b) a plan or scheme embodying means to accomplish the object, (c) an agreement or understanding between two or more of the accused persons whereby, they become definitely committed to cooperate for the accomplishment of the object by the means embodied in the agreement, or by any effectual means, and (d) in the jurisdiction where the statute required an overt act. The essence of a criminal conspiracy is the unlawful combination and ordinarily the offence is complete when the combination is framed. From this, it necessarily follows that unless the statute so requires, no overt act need be done in furtherance of the conspiracy, and that the object of the combination need not be accomplished in order to constitute an indictable offence. Encouragement and support which coconspirators give to one another rendering enterprises possible which, if left to individual effort, would have been impossible, furnish the ground for visiting conspirators and abettors with condign punishment. The conspiracy is held to be continued and renewed as to all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design. (See American Jurisprudence, Vol.II, Section 23, p.559). For an offence punishable u/s 120-B the prosecution need not necessarily prove that the perpetrators expressly agree to do or cause to be done illegal act; the agreement may be proved by necessary implication. Offence of criminal conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and an act of each of the parties, promise against promise, actus contra capable of being enforced, if lawful, punishable if for a criminal object or for use of criminal means.

33. In this judgment reliance is placed on earlier judgment of the Supreme Court in Ram Narain Poply, Pramod Kumar Manocha, Vinayak Narayan Deosthali and Harshad S. Mehta Vs. Central Bureau of Investigation and Others, , which too was made available for my perusal by the learned Additional Public Prosecutor. In that case a three Judge Bench of the Supreme Court was considering the ingredients of the criminal conspiracy amongst other things, though the Judges were divided on the complicity of some of the accused persons. According to the learned A.P.P., as far as ingredients of conspiracy comes, observations of minority judge Hon''ble Shri Justice Shah as well as majority judgment written by Hon''ble Shri Justice Pasayat and Hon''ble Shri Justice Agrawal would be helpful in bringing out as to what would constitute conspiracy as also concepts of making false documents defrauding dishonestly and fraudulently. I have carefully gone through the judgment. In that case the Court was considering the cases which

were not of conventional or traditional type. The case pertained to the famous security scam where the ultimate objective was to use public money in carefully planned manner for personal use with no right to it. The Court held that in the last few years the country has seen an alarming rise in white-collar crimes which has affected the fiber of the country''s economic structure. These cases are nothing but private gain at the cost of the public, and lead to economic disaster.

34. The learned A.P.P. submitted, relying on the observations of these cases that the duty cast on the scrutineers and University officers in respect of filling in the marks secured by the candidates was an entrustment which they had misappropriated by vending the marks to willing students by engaging in a conspiracy.

35. The contention in relation to entrustment and misappropriation is being dealt with separately. The foundation of conspiracy is involvement of accused No. 5 Hemant Thakre who was allegedly approached by the students for getting their marks changed and who inturn influenced the University officers to change the marks. It may, therefore, be useful to examine the explanation which accused No. 5 Hemant Thakare has to offer in this regard.

36. Accused No. 5 Hemant Thakre had admitted that in the chit, copy whereof was at Exhibit 129, roll No. 499 of Anil Gupta was in his handwriting in response to question No. 54. He submitted reply to questions No. 55 to 59 that he was the Dean of the Faculty of Engineering and Technology, and since revaluation results were not declared even after stipulated time he wanted to know as to why revaluation results were not declared, and so sent chits of roll numbers of concerned students with a request to enquire about delay in declaration of revaluation results.

37. The learned Senior Counsel for appellant Hemant Thakre submitted that revaluation results used to be declared in bits as and when revaluation in respect of some of the students was over. There used to be multiple notifications as and when results were ready. Therefore, according to him, there is nothing abnormal in the students approaching the Dean with a grievance that their results were not declared. Therefore, he sent chit Exhibit 129, to the Assistant Registrar (Revaluation). He submitted that it would be ridiculous to conclude that a person in the position of a Dean of a Faculty desirous of indulging in clandestine increase of marks would write a chit and send it. Had accused Hemant Thakre desired to secure increase in marks, he could have telephoned the officer giving the roll numbers or could have contacted the officer secretly. Therefore, according to him, sending the chits to the Assistant Registrar is consistent only with the innocence of the accused.

38. The learned Senior Counsel for appellant Hemant Thakre pointed out that the Investigating Officer had admitted in paragraph 26 that only on the basis of statement of accused Shyamrao Kalamkar Hemant Thakre has been involved in the case and also that except the chit there is no other document on record to

connect accused Hemant Thakre. The Investigating Officer had also admitted that it was the duty of the Board of Examinations to declare the result and the Dean was the member of the Board. In para 26 of the deposition, the Investigating Officer stated that the two chits Exhibits 128 and 129 contain roll numbers of 14 students. Out of them, cases have been filed only against seven students. The Investigating Officer volunteered that since no discrepancy was found in R1 and R2 sheets and RTR and FTR, cases were not filed against remaining seven students. He had admitted that even in respect of Anil Gupta no discrepancy was found in respect of three subjects.

39. The Investigating Officer admitted that except chit Exhibit 129, there was no other document on record to connect accused Hemant Thakre to the crime. He admitted that accused No. 4 Shamrao Kalamkar told him that marks were increased at the instance of Hemant Thakre and, therefore, Hemant Thakre has been made an accused in the case, because the Investigating Officer believed the information given by Shamrao Kalamkar as true and correct.

40. The learned Senior Counsel for appellant Hemant Thakre submitted that it may be a mistake on the part of the Investigating Officer to rely on statement of co-accused and to chargesheet a person. But he wondered as to how the learned Trial Magistrate could forget that such a statement of an accused made to a Police Officer is inadmissible and a conviction could not be based on such a statement. The learned Senior Counsel submitted that the evidence of the Investigating Officer clearly shows that he had roped in accused Hemant Thakre only on what the Investigating Officer understood to have been communicated by Shamrao Kalamkar and on no other basis.

41. Further cross-examination of the Investigating Officer in para 27 is also interesting. According to the Investigating Officer, in the chit Exhibit 128, where five roll numbers are mentioned and out of which cases have been filed against two students, there were some figures in the chit, which, according to the Investigating Officer, showed as to how many marks were required to be given to the students so that they could pass. He stated that in the investigation, it was revealed that the cross marks and tik marks in Exhibit 128 were made by Shamrao Kalamkar. He admitted that such cross marks or tik marks are not in the copies supplied to the accused and he could not assign any reason for the same. Also numbers 15 and 33 in Exh.128 were also not found in copies supplied to accused. The learned Senior Counsel submitted that this would indicate that those cross marks and tik marks were in fact made subsequently after the copies meant for delivery to the accused were prepared and, therefore, would rule out Shamrao Kalamkar making tik marks or cross marks.

42. The entire cross-examination would show that there was absolutely no reason to rope in appellant Hemant Thakre except what Shamrao Kalamkar was allegedly told to the Investigating Officer, which cannot be a part of the evidence.

43. The learned Senior Counsel submitted that since the chits were in respect of

only Engineering student and since the appellant was the Dean of Engineering Faculty, it is reasonable to infer that the chit was sent because the student came with a grievance that the revaluation result was held up .He pointed out that the fact that there was no irregularity in respect of half of the roll numbers in the chits and even in more than half the number of papers (7 out of 9) in which accused Anil Gupta appeared, since the case is in respect of only two papers, would rule out the possibility that the chit was sent in order to secure increase in the marks or to influence the result. The learned Senior Counsel submitted that in a case resting on circumstantial evidence, unless it is shown that the circumstances are incompatible with the innocence of the accused, conviction could not be handed down.

44. Relying on a judgment of the Supreme Court in Sharad Birdhichand Sarda Vs. State of Maharashtra, . The learned Counsel submitted that in a case resting on circumstantial evidence, every circumstance has to be fully established and the circumstances so established must form a chain so complete as to leave no other conclusion but that of guilt of the accused. The observations drawn in Sharad''s case by the Hon''ble Supreme Court in para 152 of the judgment may be usefully reproduced as under:

152. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned ''must or should'' and not ''may be'' established. There is not only a grammatical but a legal distinction between ''may be proved'' and ''must be or should be proved'' as was held by this Court in Shivaji Sahabrao Bobade and Another Vs. State of Maharashtra, where the following observations were made:

certainly, it is a primary principle that the accused must be and not merely may be guilty before a Court can convict and the mental distance between ''may be'' and ''must be'' is long and divides vague conjectures from sure conclusions.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been

done by the accused.

45. In Orissa State Warehousing Corporation Vs. Commissioner of Income Tax, , on which the learned Counsel for the accused placed reliance, the Supreme Court had held that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established, those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused, and the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else, and it should also be incapable of explanation on any other hypothesis than that of the guilt of the accused.

46. In Abdulla Mohammed Pagarkar etc. v. State (Union Territory of Goa, Daman and Diu) reported at , the Court held that even strong suspicion created against the accused, and failure of the accused to repel the same, is not sufficient to convict the accused of offences punishable u/s 5(1)(d) of the Prevention of Corruption Act and Sections 420 and 471 of the Penal Code.

47. Viewed in this light, the only circumstance established in this case is that accused Anil Gupta had failed in nine subjects. The application for revaluation had been made. At the revaluation, he had secured 31 and 29 marks respectively, in subject of TOS-I which were changed to 39 and 29 by each of the Revaluators while noting the marks in the RTR. He had secured 33 and 34 marks at revaluation of LSD paper by the two examiners. They were changed to 34 and 38. Accused No. 5 Hemant Thakre did send chit containing roll No. 499 of accused Anil Gupta, without mentioning any subject. Anil Gupta is not shown to have been favoured in four out of nine subjects. There is no irregularity in remaining three subjects. Half of the students whose roll numbers are mentioned in the chits have not at all been benefited. Accused Hemant Thakre was the Dean of the Engineering Faculty. Results of revaluation was unduly delayed. Therefore, the chits may have indeed been sent for reasons given by appellant Hemant. Considering all this, it would be difficult to hold that complicity of appellants in a conspiracy to increase the marks of appellant Anil Gupta in the subject of TOS-I or LSD is not established.

48. In view of this, it would not be possible to sustain appellants'' conviction for engaging in conspiracy to forge tabulation registers and marksheets or to cheat the authorities by not only using as genuine the forged document.

49. The learned Additional Public Prosecutor submitted that appellant Shyamrao Kalamkar was the Assistant Registrar incharge of Revaluation Section and, therefore, was entrusted with the job of properly maintaining the relevant records. The fact that in two subjects marks of appellant Anil Gupta were wrongly entered in order to favour Anil Gupta would show that the appellant Shyamrao Kalamkar has not discharged trust which was reposed on him and therefore, was guilty for the offence punishable u/s 409 of the Penal Code.

50. In R.K. Dalmia Vs. Delhi Administration, on which the learned A.P.P. relied,

the Court had considered the meaning of the word ''property'' used in Sections 405 and 409 of the Penal Code. The Court observed that the word ''property'' is used in the Penal code in a much wider sense than the expression ''movable property''. The Court observed that there was no good reason to restrict the meaning of the ''property'' to movable property only. The Court held that whether the offence defined in a particular section of the Penal Code can be committed in respect of any particular kind of property will depend not on the interpretation of the word ''property'' but on the fact whether that particular kind of property can be subject to the acts covered by that section. The learned A.P.P. submitted that in view of this judgment, the marks earned by the appellant-student and the mark-sheet issued to him would be a sort of property and therefore, the offence punishable u/s 420 of the Penal Code as also 409 of the Penal Code would be attracted. It is not possible to accept this submission. In the case, which the Supreme Court was considering, the question was of entrustment that dominion over funds of Bharat Insurance Company and in that context the observations came. It cannot be held that the property for the purpose of Section 420 or 405 of the Penal Code would be non-corporeal property. It will have to be either movable or immovable property or the property which is transferable, consumable or capable of being spent and not one of the type of mark-sheet which is intangible, non-transferable or nonexpendable. 51. The learned Additional Public Prosecutor also placed reliance on the judgment of the Supreme Court in Anwar Chand Sab Nanadikar Vs. State of Karnataka, where a property clerk of the Court was prosecuted for misappropriating the properties belonging to the Court and selling them to other accused persons. It was contended that only entries in the books of accounts were made by the appellant and that there was nothing beyond to show that he was actually acting as a property clerk. Rejecting this contention the Court held that in order to sustain conviction u/s 409 of the Penal Code two ingredients to be proved are:

(1) the accused, a public servant, or a banker or agent was entrusted with property of which he is duty bound to account for ; and

(2) the accused has committed criminal breach of trust.

52. The Court further observed that the basic requirement to bring home the accusations u/s 405 of the Penal Code was to prove conjointly (1) entrustment, and (2) whether the accused, actuated by the dishonest intention or not, misappropriated it or converted it to his own use to the detriment of the persons who entrusted it. The Court further held that the question of intention is not a matter of direct proof. Applicability of this judgment is also doubtful, since there is no property which has been entrusted to the scrutineer. They had been charged with the duty in relation to the registers which they were supposed to fill up but that was certainly not the property of any kind.

53. The University would doubtless take appropriate action against Shyamrao Kalamkar for his failure to perform his duties diligently.

54. The learned Counsel for appellant Anil Gupta assailed the direction of the learned Additional Chief Judicial Magistrate ordering confiscation of marksheet as well as degree awarded to Anil Gupta. He submitted that such a direction was beyond the scope of powers of the learned 2nd Additional Chief Judicial Magistrate.

55. The learned A.P.P. relying on judgment of the Supreme Court in Ram Preeti Yadav Vs. U.P. Board of High School and Intermediate Education and Others, submitted that once fraud is proved, it will deprive the person of all the benefits and therefore, the certificate or degree awarded to the student will have to be cancelled. It was a case of mass copying and the Court observed that principles of natural justice need not be strictly complied. It may be seen that in that case, the Court was considering action taken by the Board after conducting an inquiry. The Court was not concerned with the powers of the criminal Court to cancel the certificate or degree awarded.

56. In view of this, even the order cancelling degree cannot be sustained.

57. As a result, the appeals are allowed. Conviction of the appellants for the offences punishable under Sections 420, 468, 471, 120-B, 409 read with Section 34, 109 of the Indian Penal Code and sentences imposed upon them for the said offences are set aside, instead they are acquitted of the offences charged.

The order cancelling degree awarded to appellant Anil Gupta is also set aside.

