IN THE HIGH COURT OF ORISSA, CUTTACK

Criminal Appeal No. 331 Of 1989

From the judgment and order dated 26.10.1989 passed by the Special Judge (Vigilance), Sambalpur, in T.R. Case No. 12 of 1985.

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1. Sridhar Swain

2. Maheswar Behera ..... Appellants

-Versus-

State of Odisha ..... Respondent

For Appellants: - Mr. Jugal Kishore Panda

For State of Odisha (Vig.) - Mr. Sanjay Kumar Dash (Senior Standing Counsel)

P R E S E N T:

THE HONOURABLE MR. JUSTICE S.K. SAHOO

Date of Judgment: 04.01.2021

S. K. SAHOO, J. This case has proceeded at a snail's pace since the first information report was registered on 05.01.1983 and on completion of investigation charge sheet was submitted on 31.12.1984. The learned trial Court framed the charges on 07.07.1986, delivered the impugned judgment on 26.10.1989 whereafter this criminal appeal was presented on 10.11.1989

and admitted on 17.11.1989 and the appellants were directed to be released on bail. More than thirty one years after the presentation of the appeal, the judgment is being delivered today. When such type of year old criminal appeal comes for adjudication, few questions strike to mind, "Why so much of delay was caused to adjudicate the appeal? How it happened? Who is responsible for the delay?" The answers are not very difficult to find. The order sheet indicates that after the admission of the appeal, it was listed before various Benches for hearing but in spite of filing of paper books, the learned counsel for the appellants showed no interest to argue the appeal, for which the bail order granted to the appellants at the time of admission of the appeal was recalled on 06.02.2008. However, on the application filed by the appellants, they were directed to be released on bail on surrender before the learned trial Court as per order dated 12.05.2008. Again the same thing continued and when the matter was taken up on 13.03.2013 for hearing, none appeared for the appellants to argue the case for which the bail order dated 12.05.2008 was recalled and the appellant no.2 Maheswar Behera was arrested on 10.04.2013 and he was directed to be released on bail by this Court on 18.04.2013 and on the same day, an order was passed to recall the order dated

13.03.2013 so far as appellant no.1 Sridhar Swain is concerned. Another co-accused namely M.K. Raghaban who along with the appellants faced trial and convicted by virtue of the impugned judgment, preferred a separate appeal in Criminal Appeal No.332 of 1989 and was on bail, expired on 26.08.2000 for which the said appeal stood abetted as per order dated 17.04.2013. Finally, this appeal was listed before me on 06.08.2020 and again on that day, none appeared for the appellants and on the request of learned Senior Standing Counsel for the Vigilance Department, the matter was adjourned awaiting the report of Superintendent of Police, Vigilance, Sambalpur Division, Sambalpur for giving intimation to the appellants for taking up the matter for hearing. In spite of due intimation, Mr. Jugal Kishore Panda, Advocate though filed vakalatnama for appellant no.2 Maheswar Behera but since none appeared on behalf of the appellant no.1 Sridhar Swain, the learned counsel Mr. Jugal Kishore Panda was appointed as Amicus Curiae to place the case of appellant no.1 also and time was granted to him to prepare the case. The matter was ultimately taken up every week on Thursday which was fixed for hearing of criminal appeal starting from 05.11.2020 and after the hearing was concluded, the judgment was reserved and the learned counsel for the

appellants took time to file written note of submissions, which he filed on 24.11.2020.

It is said that slow and steady wins the race, but when the world is changing very fast, if one does not take pace then the fast would beat the slow. This case is a glaring example to show as to how the true import of the legal maxim 'justice delayed is justice denied' has yet not been appreciated properly. Delayed justice is the deadliest form of denial of justice. Discipline, commitment, thorough preparation, active cooperation from the learned members of the Bar and their able assistance can save a lot of valuable time of the Court and will pave way for early disposal of the old criminal appeals which are hanging over the head of judiciary like the sword of Damocles, otherwise all the planning, mechanism and infrastructure development would fail to yield the desired result in docket management. All concerned must realise that 'Rome was not built in a day' and for that continuous effort for doing something good and important is necessary though it may take time.

2. The appellant no.1 Sridhar Swain along with co-accused M.K. Raghaban faced trial in the Court of learned Special Judge (Vigilance), Sambalpur in T.R. Case No. 12 of 1985 for offences punishable under section 5(2) read with section 5(1)(d)

of the Prevention of Corruption Act, 1947 (hereafter '1947 Act') read with section 34 of the Indian Penal Code and sections 465, 471 read with section 34 of the Indian Penal Code. The appellant no.2 Maheswar Behera faced trial along with them but for the offences punishable under section 5(2) read with section 5(1)(d) of the 1947 Act read with section 109 of the Indian Penal Code and sections 465, 471 read with section 109 of the Indian Penal Code.

The learned trial Court vide impugned judgment and order dated 26.10.1989, found the appellant no.1 along with co-accused M.K. Raghaban guilty of the offences under section 5(2) of the 1947 Act read with section 34 of the Indian Penal Code and sections 465 and 471 read with section 34 of the Indian Penal Code and the appellant no.2 was found guilty of the offences under section 5(2) of the 1947 Act, sections 465 and 471 read with section 109 of the Indian Penal Code and all the three were sentenced to undergo rigorous imprisonment for three months on each count with a further direction that the sentences are to run concurrently.

3. The prosecution case as per the F.I.R. (Ext.27), in short, is that Subas Chandra Patnaik (P.W.7), Deputy Superintendent of Police, Vigilance, Rourkela in course of enquiry

found that the appellant no.1 was working as Municipal Engineer in N.A.C.(C.T.), Rourkela during the period from 30.07.1979 to 01.07.1982 and the co-accused M.K. Raghaban was working as Sub-Assistant Engineer in N.A.C.(C.T.), Rourkela from 07.08.1980 till the lodging of the first information report and they committed criminal misconduct in respect of Municipal fund in execution of the work relating to **(a)** special repair to 40 feet wide road in Madhusudan market; **(b)** special repair to Taxi and Tempo stand at Madhusudan market area and **(c)** special repair to private and transport bus stand at Madhusudan market area. The appellant no.1 prepared the estimate for the above three work and after getting necessary approval from the Executive Officer and Chairman N.A.C.(C.T.), Rourkela, quotations were invited as per tender notice vide no.5238 dated 31.12.1981. The appellant no.2 along with others submitted tender for the above three work in pursuance of such notice and the tender papers were opened on 23.01.1982 in presence of the appellant no.1 and the Executive Officer Rajendranath Jena (P.W.5) who made endorsement in the quotations of appellant no.2 to the effect that there was only one cutting and no over writing and it referred to other items of work and not to the cost of MAXphalt. The appellant no.2 quoted the cost of MAXphalt at Rs.2,021/-

per metric ton. Entries were also made in the tender register showing the rate of MAXphalt at the rate of Rs.2,021/- in respect of quotation of the appellant no.2. Subsequently, the price of MAXphalt was changed from Rs.2,021/- to Rs.2,621/- by interpolation and overwriting both in figures and words in the quotation of the appellant no.2 and also in the tender register and as per the prosecution case, it was the co-accused M.K. Raghaban who made such interpolation in respect of the price of MAXphalt. It appears from the note sheet of the relevant files relating to the above work that the figures mentioned therein differs from the figures indicated on the body of comparative statements of all the three work. The said co-accused though correctly prepared the comparative statements at the first instance showing the price of MAXphalt at the rate of Rs.2,021/-, yet he subsequently changed those to a higher rate and prepared comparative statement showing the price of MAXphalt at Rs.2,621/- per metric ton and thereby helping the appellant no.2 to take excess amount of Rs.600/- per metric ton of MAXphalt after getting the approval of the Executive Officer and Chairman through the appellant no.1 who did not point out the discrepancies in the note sheet and comparative statement regarding the price of MAXphalt when the matter was placed

before the Executive Officer and Chairman for approval. After completion of the work, the co-accused M.K. Raghaban noted the measurement of the work in the measurement book showing price of MAXphalt at Rs.2,621/- per metric ton and got the bill passed for payment as per voucher no.39 dated 23.04.1982 giving the benefit of Rs.1,289.60 to the appellant no.2. It is the further prosecution case as per the F.I.R. that the appellant no.1 and the co-accused M.K. Raghaban quoted false measurement in the measurement book in respect of grouting item of all the three works and thereby gave pecuniary benefit to the appellant no.2.

4. The Superintendent of Police, Vigilance, Northern Division, Sambalpur on receipt of the first information report, directed for registration of the case on 05.01.1983 and accordingly, Sambalpur Vigilance P.S. Case No.01 of 1983 was registered under section 5(2) read with section 5(1)(d) of 1947 Act and section 471 of the Indian Penal Code and the informant (P.W.7) was directed to investigate the matter.

During course of investigation, P.W.7 examined the witnesses and recorded their statements, seized the relevant documents from the Executive Officer, N.A.C. (C.T.), Rourkela, moved the Executive Engineer (Vigilance) for inspection of the

work in question, got the report of the Executive Engineer (Vigilance) and on completion of investigation, he submitted the consolidated report of investigation through his higher authorities before the sanctioning authority, who after perusal of the documents, accorded sanction for prosecution of the appellant no.1 as well as the co-accused M.K. Raghaban. After receiving the sanction orders, P.W.7 submitted charge sheet on 31.12.1984 against the appellant no.1 and co-accused M.K. Raghaban for the offences under section 5(2) read with section 5(1)(d) of the 1947 Act and section 471 of the Indian Penal Code and against the appellant no.2 for the offences 5(2) read with section 5(1)(d) of the 1947 Act and section 471 read with section 109 of the Indian Penal Code.

5. The learned trial Court framed the charges as aforesaid on 07.07.1986 and the appellants refuted the charges and pleaded not guilty and claimed to be tried.

6. The defence plea of the appellant no.1 was that in the tender paper, though the rate of MAXphalt per metric ton was mentioned in figure as Rs.2021/- but in words, it was mentioned as Rs.2621/- and as per P.W.D. Code, the rate mentioned in words was valid and accordingly, he instructed the

co-accused M.K. Raghaban to prepare the comparative statement.

The defence plea of the appellant no.2 was that he had quoted the rate of MAXphalt at Rs.2621/- per metric ton in his tender paper and that he was not aware of any interpolation or correction in his tender papers submitted for the three work. The appellants denied about the inflated measurement of the work.

7. In order to prove its case, the prosecution examined eight witnesses.

P.W.1 Chandramani Narayan Swamy was the Special Secretary in G.A. Department, Government of Orissa who issued the sanction order (Ext.1) dated 20.06.1984 for prosecution of appellant no.1 Sridhar Swain as per the order of the Chief Minister. She stated that the investigation report of the Vigilance D.S.P. marked as Ext.2 along with legal opinion were placed before the Chief Minister who after going through the same passed the order marked as Ext.3/2 and on the basis of the said order, she issued the sanction order (Ext.1).

P.W.2 Baman Charan Behera was the Accountant in N.A.C. (C.T.) Office, Rourkela who stated that he checked the bill (Ext.4) which relates to the work executed by the appellant no.2

Maheswar Behera with reference to the M.B. Book and the rate as mentioned in the agreement. He further stated that after he checked the bill, it was placed before the Executive Officer for sanction and after necessary sanction, the bill amount of Rs.37,560/- was paid to the appellant no.2.

P.W.3 B.K. Dash was the Executive Engineer attached to Vigilance Directorate who received requisition from the Deputy Superintendent of Police, Vigilance, Rourkela through the Superintendent of Police, Vigilance, Sambalpur to offer technical opinion regarding the extent of work in question executed in this case and he stated to have inspected the work in presence of the appellant no.1 Sridhar Swain and co-accused M.K. Raghaban and prepared his report (Ext.12) and calculation sheet (Ext.13). He observed that there was an inflation of measurement to the extent of 698.56 sq. meter.

P.W.4 Shyam Sundar Beuria was working as Junior Engineer attached to N.A.C. (C.T.), Rourkela, who proved the estimates prepared by co-accused M.K. Raghaban relating to the three work in question, floating of tenders for such work. He proved three tender papers for the three work submitted by appellant no.2 Maheswar Behera vide Exts.15, 16 and 17. He stated that the rates quoted by the appellant no.2 was

Rs.2,021/- which was mentioned both in letters as well as in words but the same has been changed to Rs.2,621/-. He further stated that co-accused M.K. Raghaban took his pen which was used by him in writing the tender register. He further stated that the tender register and the tender papers were tampered with subsequently.

P.W.5 Rajendranath Jena was working as Executive Officer, N.A.C. (C.T.), Rourkela and also one of the members of the tender committee. He stated that all the tenders for the three work were opened in his presence and in all the tenders, the appellant no.2 had quoted the price of MAXphalt at Rs.2,021/- for each metric ton. He further stated that in the tender papers submitted by the appellant no.2, there has been subsequent interpolation to the rate of MAXphalt and Rs.2,021/- has been changed to Rs.2,621/- in all the three work. He further stated that co-accused M.K. Raghaban prepared the notes in the corresponding file to be placed before the Chairman for approval and appellant no.1 Sridhar Swain whose duty is to verify the comparative statements and note of the co-accused before placing the note for his approval did not point out the discrepancy in the price of MAXphalt in the tender of the appellant no.2 and accordingly, the tender committee on good

faith approved the note. He further stated that the interpolation of the rate of MAXphalt and excess drawal by appellant no.2 were brought to his notice subsequently.

P.W.6 Bijay Kumar Sahu was working as U.D. Clerk in the N.A.C. (C.T.), Rourkela and he was the custodian of the tender register and tender files. He proved the tender call notice issued by the appellant no.1 Sridhar Swain on behalf of the Executive Officer in respect of all the three work in question. He further stated that co-accused M.K. Raghaban prepared the comparative statements of the tender papers and further stated about the procedure relating to the approval of the tender and issuance of work order in favour of the person whose tender is accepted. He further stated about the payment of subsequent bills of appellant no.2 with the cost of MAXphalt at the rate of Rs.2,021/- as per the entry in the measurement book.

P.W.7 Subas Chandra Patnaik was the Deputy Superintendent of Police (Vigilance), Rourkela who lodged the F.I.R. (Ext.27) and took up investigation of the case and ultimately submitted charge sheet against the accused persons.

P.W.8 Gourahari Pradhan was working as Head Clerk in Jharsuguda Municipality who proved the original sanction order (Ext.30) issued by Shri B.C. Pandey, Chairman of

Jharsuguda Municipality against co-accused M.K. Raghaban for his prosecution.

The prosecution exhibited thirty three documents. Ext.1 is the sanction order for the prosecution of appellant no.1, Ext.2 is the investigation report of Vigilance D.S.P., Ext.3 is the notes of scrutiny made by P.W.1, Ext.4 is the bill relating to special repair of road, Ext.5 is the agreement, Ext.6 is the measurement book, Ext.7 is the notes of P.W.2, Ext.8 is the requisition issued by Vigilance D.S.P. for technical opinion, Ext.9 is the measurement book, Ext.10 is the file relating to Special repair of 40 feet wide road, Ext.11 is the details of measurement, Ext.12 is the report of P.W.3, Ext.13 is the calculation sheet, Ext.14 is the tender register, Ext.15 is the tender paper of the appellant no.2 relating to S.R. to 40 ft. road, Ext.16 is the tender paper of the appellant no.2 relating to repair of private bus stand, Ext.17 is the tender paper of the appellant no.2 relating to repair of taxi and tempo stand, Exts.18, 20, 22 are the comparative statements of tender papers, Ext.19 is the note sheet in the file Ext.10/1, Ext.21 is the note sheet in the file Ext.10/2, Exts.23, 24 and 25 are the tender committee resolutions, Exts.26 to 26/2 are the draft work order for approval, Ext.27 is the F.I.R., Ext.28 is the seizure list, Ext.29 is

the note sheet of sanction order, Ext.30 is the sanction order, Ext.31 is the letter of Director of Municipal Administration, Ext.32 is the letter of S.P., Vigilance and Ext.33 is the endorsement and signature of Inspector of Vigilance.

The defence has examined one witness. D.W.1 Abhay Kumar Nanda was the Junior Assistant in Rourkela N.A.C. who proved the personal file of co-accused M.K. Raghaban. The defence exhibited five documents. Ext.A is the C.L. application of co-accused M.K. Raghaban, Ext.B is the telegram of co-accused M.K. Raghaban for extension of leave, Ext.C is the order passed by Additional Executive Officer sanctioning leave, Ext.D is the note sheet of dealing Assistant regarding leave and Ext.E is the joining report of co-accused M.K. Raghaban.

8. The learned trial Court after assessing the oral as well as the documentary evidence has been pleased to hold that the spot verification report of P.W.3 is unsatisfactory and unreliable and that the prosecution has failed to prove the charge of misconduct in respect of cash of Rs.9402.29 paisa by way of inflated measurement. About the interpolations made in tender papers submitted by the appellant no.2 vide Exts.15, 16 and 17 as well as tender register (Ext.14), the learned trial Court held that the price of MAXphalt was subsequently changed to

Rs.2621/- although it was originally Rs.2021/- in the tender paper of the appellant no.2. It was further held that the price of MAXphalt was originally Rs.2021/- at the time of submission of tender and it was forged and enhanced from Rs.2021/- to Rs.2621/- in the tender paper as well as in the tender register subsequently. The learned trial Court further held that nothing has been brought out in the cross-examination of P.W.5 to discredit his testimony regarding the interpolation, overwriting and subsequent correction in the price of MAXphalt to Rs.2621/- from its original price of Rs.2021/-. Similarly, the learned trial Court found the evidence of P.W.6 has not been discredited in the cross-examination. It was further held that there was commission of forgery by way of overwriting, cutting and interpolation in the price of MAXphalt in the tender paper and tender register increasing the original amount of Rs.2021/- to Rs.2621/- per metric ton subsequently even though there is no evidence as to who committed the forgery but fact remains that the appellant no.2 derived pecuniary benefits due to commission of forgery. The learned trial Court held that the defence plea taken by the appellant no.2 was false for which adverse inference is to be drawn against him. The appellant no.1 and co-accused M.K. Raghaban knowingly used the forged documents as

genuine regarding the price of MAXphalt and helped the appellant no.2 for which he derived pecuniary advantage out of it though temporarily. The learned trial Court also did not accept the plea taken by the appellant no.1 and co-accused M.K. Raghaban and further held that the sanction for prosecution of the appellant no.2 is not imperative even though he is a public servant as per the provisions of Orissa Municipal Act. The learned trial Court ultimately came to the conclusion that the appellant no.1 and the co-accused M.K. Raghaban being public servants committed criminal misconduct and by corrupt and illegal means, they obtained pecuniary advantage for the appellant no.2 by enhancing the price of MAXhalt from Rs.2,021/- to Rs.2,621/- by way of overwriting and interpolation in the tender papers and tender register and used the same as genuine knowing those to be forged documents with the help of appellant no.2 in furtherance of their common intention and accordingly convicted the appellants as well as the co-accused M.K. Raghaban as already indicated.

9. Mr. Jugal Kishore Panda, learned counsel for the appellant no.2 and engaged as Amicus Curiae for the appellant no.1 contended that the learned trial Court has not appreciated the evidence on record in its proper perspective and the findings

are mainly based on surmises. He argued that the appellant no.2 is a public servant as per the provisions of Orissa Municipal Act, 1950 but no sanction has been obtained for prosecuting him which is illegal. It is further argued that there is no clinching evidence adduced from the side of the prosecution as to who made the endorsement or correction in the tender papers or tender register and the signatures appearing thereon were also not sent to the handwriting expert for opinion to prove the interpolation in the tender papers and tender register. It is further argued that in absence of any evidence as to who forged the documents or that the appellants used the forged document as genuine and more particularly when the files were not in the custody of the appellants, the conviction of the appellants under sections 465 and 471 of the Indian Penal Code are not sustainable in the eye of law. While concluding his argument, Mr. Panda submitted that both the appellants are now more than seventy five years of age and about thirty seven years have passed since the date of registration of the case and the appellants have suffered sufficient mental agony and depression and at this stage, it would not be proper to send them to judicial custody again.

Mr. Sanjay Kumar Das, learned Senior Standing Counsel for the Vigilance Department on the other hand supported the impugned judgment and contended that in view of the oral and documentary evidence available on record, it cannot be said that any illegality has been committed by the learned trial Court in convicting the appellants for the offences charged and therefore, the appeal should be dismissed.

10. Now, let me deal with the first point raised by the learned counsel for the appellants regarding absence of sanction for prosecuting the appellant no.2 Maheswar Behera.

Section 378 of the Orissa Municipal Act, 1950 (hereafter '1950 Act') states, inter alia, that any person with whom the Councillor or its Executive Officer, has entered into a contract on behalf of the council in the performance of their duty or of anything which they are empowered or required to do by virtue or in consequence of the 1950 Act, or of any bye-law, rule, regulation or order made under it, shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code. From a plain reading of the aforesaid provision, it is evident that by the aforesaid section, the legislature has created a fiction that a contractor with whom the Councillor or its Executive Officer, has entered into a contract on behalf of the

council, shall be deemed to be a 'public servant' within the meaning of section 21 of the Indian Penal Code. It is well settled that the legislature is competent to create a legal fiction. A deeming provision is enacted for the purpose of assuming the existence of a fact which does not really exist. When the legislature creates a legal fiction, the Court has to ascertain for what purpose the fiction is created and after ascertaining this, to assume all those facts and consequences which are incidental or inevitable corollaries for giving effect to the fiction. Thus, the legislature, while enacting section 378 has created a legal fiction for the purpose of assuming that the contractor, otherwise, may not be public servant within the meaning of section 21 of the Indian Penal Code but shall be assumed to be so in view of the legal fiction so created. However, section 376 of the 1950 Act states that when the Chairman, Vice-Chairman or any councillor of a municipal council or any officer of Government whose service are lent to the council is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction of the State Government. Section 376 of the 1950 Act does not include a contractor. Therefore, a conjoint reading of section 378

and section 376 of the 1950 Act shows that if anyone commits an offence voluntarily against a contractor to deter him from discharging his lawful duty which was entrusted to him by virtue of a contract executed under the 1950 Act, shall be prosecuted as if he has committed an offence against a public servant. However, if a contractor is alleged to have committed any offence while acting or purporting to act in the discharge of his duty entrusted to him by virtue of a contract executed the under the 1950 Act, he can be prosecuted without any sanction of any authority. The purpose of obtaining sanction is to protect the public servant from harassment by frivolous or vexatious prosecution and not to shield the corrupt. Therefore, no sanction is necessary from any authority for prosecuting a contractor with whom the Councillor or its Executive Officer has entered into a contract on behalf of the council. In other words, a Court can take cognizance of offences and proceed against a contractor without any sanction order, if he is accused of any offence alleged to have been committed by him in the performance of his duty which was entrusted to him by virtue of a contract. Thus, I am of the humble view that though a contractor shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code by virtue of section 378 of the 1950 Act but

no sanction is necessary for his prosecution in view of section 376 of the 1950 Act and as such absence of sanction for prosecuting the appellant no.2 Maheswar Behera is not illegal.

The learned counsel for the appellants has not advanced any argument regarding any illegality in the sanction order (Ext.1) issued by P.W.1 for prosecution of the appellant no.1.

11. The defence plea of the appellant no.2 that he had quoted the rate of MAXphalt at Rs.2,621/- per each metric ton in his tender papers cannot be accepted inasmuch as had he quoted such price, he would not have been declared as the lowest bidder to get the work orders rather one M.C. Agarwal who had quoted the rate of MAXphalt at Rs.2,400/- per each metric ton would have been the successful bidder. P.W.5, the Executive Officer stated that he himself and the appellant no.1 were the members of tender committee and all the tenders of the three projects were opened in their presence and in all the tenders, the appellant no.2 had quoted the price of MAXphalt at Rs.2,021/- per each metric ton. Nothing has been brought out in the cross-examination to disbelieve the evidence of P.W.5 in that respect. Therefore, the defence plea taken by the appellant no.2

regarding his quoted rate of MAXphalt to be Rs.2,621/- per each metric ton cannot be accepted.

The learned trial Court held that an adverse inference is to be drawn against the appellant no.2 for deliberately taking a false plea. Law is well settled that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. It is not the law that where there is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a Court. Therefore, even though the appellant no.2 has taken a false plea regarding quotation of rate of MAXphalt in his tender papers but all the same, it is to be seen how far the prosecution has established the charges against the appellants.

12. Now, let me discuss about the interpolation, cutting and overwriting in the price of MAXphalt in the tender papers of the appellant no.2 and also in the tender register.

P.W.5, the Executive Officer has stated that in all the tenders, the appellant no.2 had quoted the price of MAXphalt at Rs.2021/- for each metric ton. About the tender paper (Ext.15) of the appellant no.2 relating to special repair to 40 feet wide road in Madhusudan market, he stated that he himself and the appellant no.1 made endorsement (Ext.15/1) that there was only

one cutting but no overwriting and the cutting (Ext.15/2) was initialed by the appellants. He further stated that the interpolation, cutting and overwriting in the price of MAXphalt in Ext.15 were made long after opening of the tender which were not in existence at the time of opening of the tender. The quotation price of Rs.2,021/- in the tender paper in item no.7 in Ext.15 was subsequently changed to Rs.2,621/- and the cutting and interpolation in the changed price in Ext.15 were not initialed either by him or by the appellant no.1 and those were made in different ink from the other writings of Ext.15. He then stated about the similar interpolation made in the tender register (Ext.14) maintained by the Sub-Asst. Engineer Behuria in the price of MAXphalt in the special repair to 40 feet wide road. He further stated that a comparative statement (Ext.18) was prepared in the hands of co-accused M.K. Raghaban relating to this work in which he had recorded the tender amount of the appellant no.2 to be Rs.40,808.35 paisa which was 11.33% below the scheduled rate though in the note for this work vide Ext.10/3, he mentioned the tender amount of the appellant no.2 was Rs.35,204.35 paisa which was 23.51% below the scheduled rate. He further stated that Ext.18 was prepared after the

interpolation in the tender paper (Ext.15) and tender register (Ext.14).

About the tender paper (Ext.16) of the appellant no.2 relating to special repair of private and transport bus stand in Madhusudan Market, P.W.15 stated that there was only one cutting and no overwriting which was endorsed by him and the appellant no.1 as per Ext.16/1. He further stated that the appellants have initialed the cutting as per Ext.16/2 and the MAXphalt price which was quoted @ Rs.2,021/- per metric ton was subsequently changed by way of interpolation and overwriting in a different ink to Rs.2,621/- which was not initialed either by him or by the appellant no.1 or by the appellant no.2. In the tender register (Ext.14), the price of MAXphalt so far as this work is concerned was converted by way of interpolation from Rs.2,021/- to Rx.2,621/-. He further stated that in the comparative statement (Ext.22), the co-accused M.K. Raghaban recorded the tender amount of the appellant no.2 to be Rs.33,338.77 paisa which was 11.59% below the scheduled rate though in the note (Ext.21) prepared by the said co-accused in respect of that work, the tender amount of the appellant no.2 was mentioned as Rs.29,859.65 paisa and in that note, 19.92%

has been scored through and in its place, 10.59% has been noted.

About the tender paper (Ext.17) which relates to special repair of taxi and tempo stand of Madhusudan market, P.W.5 stated that the price of MAXphalt per metric ton was quoted at Rs.2,021/- but subsequently it was converted by way of interpolation to Rs.2,621/- and though the co-accused M.K. Raghaban placed the note (Ext.19) in respect of this work that the tender amount of the appellant no.2 was Rs.26,087.10 paisa which was 19.44% below the scheduled rate but in the comparative statement (Ext.20), it was mentioned by him to be Rs.30,047.10 paisa which was 9.87% below the scheduled rate and the increase in the tender amount was due to subsequent interpolation in the quoted price of MAXphalt in the tender paper (Ext.17) and tender register (Ext.14).

P.W.5 further stated that before placing the note before him for his approval, it was the duty of the appellant no.1 as Municipal Engineer to verify the comparative statement and note prepared by the co-accused M.K. Raghaban and then to place the same for obtaining approval of the Chairman. However, the appellant no.1 did not point out the discrepancies in the price of MAXphalt in the tender of the appellant no.2. He further

stated that believing in good faith, the note of the appellant no.1 about the tender work in Exts.15, 16 and 17 was approved as per resolution in the committee vide Exts.23, 24 and 25 respectively. He further stated that subsequently it came to his notice regarding interpolation and excess drawal by appellant no.2 so far as the price of MAXphalt @ Rs.2,621/- per metric ton instead of Rs.2,021/- per metric ton.

In the cross-examination, P.W.5 has stated that the tender committee consisted of the Chairman, he himself and the appellant no.1. He further stated that the tender of the appellant no.2 in respect of all the three items of work were accepted which was also communicated to the appellant no.2. He further stated that the dealing assistant Bijay Kumar Sahu (P.W.6) was the custodian of the files relating to all the three work entrusted to the appellant no.2 and he placed the draft before the appellant no.1 to approve the same and then it was placed before him (P.W.5) for approval. He further stated that there was no discussion between him, the Chairman, the appellant no.1 as Municipal Engineer and the dealing assistant before acceptance of the tender paper. The members of the tender committee were to scrutinize the relevant documents before accepting the tender. He further stated that all the three tenders

submitted by the appellant no.2 were accepted as per the decisions (Exts.23, 24 and 25) taken by the members of the committee consisting of the appellant no.1 as Municipal Engineer, he himself as Executive Officer and the Chairman on 20.02.1982.

P.W.6 Bijay Kumar Sahu who was the U.D. Clerk in the NAC (C.T.), Rourkela also stated about the interpolation in the tender papers of the appellant no.2 and tender register and that he gave the notes that the overwriting were made by co-accused M.K. Raghaban in the tender papers and tender register relating to the appellant no.2. He further stated though he was the custodian of the tender register and tender files but co-accused M.K. Raghaban prepared comparative statements vide Exts.18, 20 and 22. He further stated that the files of tender papers used to be taken by co-accused M.K. Raghaban, the appellant no.1, P.W.5 and also by the Chairman whenever those were required. In the cross-examination, P.W.6 however stated that the manipulations were not in existence on and prior to 26.02.1982 and the interpolations were not made in his presence. He further stated that the manipulations were made during his leave period from 01.03.1982 to 08.03.1982 and that he entertained doubt and concluded that the manipulations were

made by co-accused M.K. Raghaban and accordingly, he made the endorsement in the note sheet vide Ext.21/3 and 19/3. He further stated the work orders were issued to the appellant no.2 on 05.03.1982 under the signature of the Executive Officer (P.W.5).

The conjoint reading of the evidence of P.W.5 and P.W.6 indicate that the appellant no.2 quoted the price of MAXphalt at Rs.2,021/- per metric ton for all the three work and he became the lowest bidder and got the work orders in his favour. It also appears that not only in the tender register but also in the tender papers of the appellant no.2, the rate of MAXphalt was interpolated and Rs.2,021/- was made Rs.2,621/- and in the running bill, the cost of MAXphalt was shown to be Rs.2,621/- per metric ton and in that process, excess payment was made to appellant no.2. The evidence of P.W.6 further indicates that he doubted that the interpolations were made by co-accused M.K. Raghaban. According to P.W.5, it was the duty of the appellant no.1 to verify the comparative statements and the notes prepared by the co-accused M.K. Raghaban but he did not point out the discrepancies in the price of MAXphalt in the tender work of appellant no.2 at the time of placing the notes before him. The note of the appellant no.1 for each item of work

is there below the note of co-accused M.K. Raghaban and it seems from the note of the appellant no.1 that on good faith, he has relied upon the note of the co-accused without verification of the comparative statement and passed the same for approval by Chairman like P.W.5 who on good faith passed the note of the appellant no.1. In my humble view, it may be a case of dereliction of duty on the part of the appellant no.1 but that would not ipso facto attract the ingredients of the offences against him.

On perusal of the relevant tender papers of the appellant no.2 and the tender register, it is apparent that there has been interpolations, cutting and overwriting in different ink and the original price of MAXphalt in the tender papers and tender register was increased from Rs.2,021/- to Rs.2,621/- per metric ton subsequently. Though the evidence of P.W.6 is that he entertained doubt that the manipulations were made by co-accused M.K. Raghaban and accordingly, he made the endorsement in the note sheet but law is well settled that supposition, surmise, speculation and subjective beliefs are no substitute for fact findings based on evidence. In absence of any clinching evidence as to who made the cuttings, overwriting and interpolations in the relevant documents and when and

particularly when the files containing tender papers and also the tender register were being handled by different persons as stated by P.W.6, the learned trial Court is quite justified in its observation that there is no specific evidence as to who committed the forgery.

The learned trial Court held that the appellant no.1 as well as co-accused M.K. Raghaban was the technical persons and dealing with the matter and instead of detecting the forgery, they acted on the basis of such forged documents and did not point out the same to the authority and in that process, the appellant no.2 derived pecuniary benefits. Even though it is evident that interpolation, overwriting and cutting in the figures and words of the price of MAXphalt were made in the tender papers at a subsequent stage which were not in existence at the time of its opening and so also in the tender register but there is no evidence that the appellants had any preconcert of mind with the co-accused M.K. Raghaban or they were hand in gloves or in furtherance of their common intention, forgery was committed in the tender papers of the appellant no.2 and also in the tender register. Though there is material that the appellant no.2 derived temporary pecuniary benefits by getting excess payment than which was legally admissible to him in the first running bill but

the same was subsequently deducted from his subsequent running bills as stated by P.W.6.

On the basis of the oral and documentary evidence adduced by the prosecution, even though it is held that false plea has been taken by the appellants but it cannot be said that there are enough materials to hold that the appellant no.1 abused his position as a public servant and obtained temporary pecuniary benefits in favour of the appellant no.2 particularly when there is no evidence as to who committed forgery of documents and when and there is also no evidence that the appellant no.1 has got any role in the interpolation in the tender papers of the appellant no.2 and the tender register maintained in the office of N.A.C., Civil Township, Rourkela and there is also lack of clinching evidence against him that he had knowledge or reason to believe those documents to be forged and in spite of that he used the forged documents as genuine. Therefore, the conviction of the appellant no.1 Sridhar Swain under section 5(2) of the 1947 Act read with section 34 of the Indian Penal Code and sections 465 and 471 read with section 34 of the Indian Penal Code is not sustainable in the eye of law.

13. Charges were framed against the appellant no.2 Maheswar Behera that he abetted the commission of the

offences by the appellant no.1 as well as co-accused M.K. Raghaban. Section 107 of the Indian Penal Code defines abetment of a thing to mean that a person abets the doing of a thing if he firstly, instigates any person to do that thing; or secondly, engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or thirdly, intentionally aids, by any act or illegal omission, the doing of that thing. So far as the first two clauses are concerned, it is not necessary that the offence instigated should have been committed. Under the third clause, when a person abets by aiding, the act so aided should have been committed in order to make such aiding an offence. In other words, unlike the first two clauses, the third clause applies to a case where the offence is committed. Therefore, abetment can be by instigation, conspiracy or intentional aid. In order to decide whether a person has abetted by instigation the commission of an offence or not, the act of abetment has to be judged in the conspectus of the entire evidence in the case. The act of abetment attributed to an accused is not to be viewed or tested in isolation.

On a careful analysis of the evidence on record, I find no evidence of abetment of commission of offence against the appellant no.2. After he submitted his tender papers and got the work orders, till he received the payment for the work executed, there is no evidence that he got access to any forged documents. Even if it is held that he got the temporary pecuniary benefits, but the said amount was subsequently deducted from his subsequent running bills. Taking of a false plea regarding quotation of rate of MAXphalt in his tender papers, by itself would not be sufficient to hold that he abetted commission of any offence. Therefore, the conviction of the appellant no.2 Maheswar Behera for the offences under section 5(2) of the 1947 Act, sections 465 and 471 read with section 109 of the Indian Penal Code is not sustainable in the eye of law and is hereby set aside.

14. In the result, the criminal appeal is allowed. The impugned judgment and order of conviction of the appellants passed by the learned trial Court and the sentence passed thereunder is hereby set aside. The appellants are acquitted of all the charges. The appellants are on bail by virtue of the order of this Court. They are discharged from liability of their bail

bonds. The personal bonds and the surety bonds stand cancelled.

Lower Court records with a copy of this judgment be sent down to the learned trial Court forthwith for information.

Before parting with the case, I would like to put on record my appreciation to Mr. Jugal Kishore Panda, engaged as learned Amicus Curiae for the appellant no.1 for rendering his valuable help and assistance in deciding this year old criminal appeal. The hearing fees is assessed to Rs.5,000/- (rupees five thousand) in toto which would be paid to the learned Amicus Curiae immediately.

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S.K. Sahoo, J.

Orissa High Court, Cuttack
The 4th January 2021/Pravakar/Sisir/RKM