

Supreme Court of India

S. P. Bhatnagar Etc vs State Of Maharashtra on 4 January, 1979

Equivalent citations: 1979 AIR 826, 1979 SCR (2) 875

Author: J Singh

Bench: Singh, Jaswant

PETITIONER:

S. P. BHATNAGAR ETC.

Vs.

RESPONDENT:

STATE OF MAHARASHTRA

DATE OF JUDGMENT 04/01/1979

BENCH:

SINGH, JASWANT

BENCH:

SINGH, JASWANT

REDDY, O. CHINNAPPA (J)

CITATION:

1979 AIR 826

1979 SCR (2) 875

1979 SCC (2) 535

ACT:

Prevention of Corruption Act, 1947 s. 5(1) (d) & s. 5(2)-Scope of-Proof of guilt based on circumstantial evidence-Tests for deciding.

HEADNOTE:

Both the appellants were officers of Indian Oil Corporation. The Corporation invited tenders from experienced contractors for rock cutting, filling and levelling of certain land acquired by it. On the notified date it opened the tenders received from eleven contractors. But in the meantime since it made a change in the specification of work to be done it asked the tenderers to submit revised tender. The direction to submit fresh tenders was restricted only to the original 11 tenderers. Even so it was alleged that a tender form was issued by the appellants to A-4, who was not one of the 11 tenderers. there was again a change in the specification of the work to be done at the suggestion of foreign collaborators. The appellants were alleged to have asked the concerned officers of the Corporation to make a fresh survey along with A-4, keeping in view the suggestion of the foreign collaborators. Eventually the contract was given to A-4. The prosecution alleged that (1) the conduct of the appellants showed their

keenness to have the contract entrusted to A-4. (2) the issue of work order was inflated with figures relating to rock cutting and filling; and (3) the appellants removed certain original documents from the departmental files and substituted in their place fabricated material.

The appellants who were charged with offences under s. 120B and s. 109 IPC and s. 5(2) read with s. 5(1)(d) of the Prevention of Corruption Act, 1947 were convicted and sentenced to undergo imprisonment.

On the question whether the appellants had been rightly convicted under s. 5(1)(d) of the Prevention of Corruption Act.

Allowing the appeals,

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HELD: 1. An analysis of the circumstantial evidence adduced by the prosecution did not lead to the unerring certainty that the appellants acted with any dishonest or corrupt motive or abused their position. [904 F]

2. (a) It is well settled that abuse of position, in order to come within the mischief of s. 5(1)(d) of the Act, must necessarily be dishonest so that it may be proved that the accused caused deliberate loss to the department. Further it is for the prosecution to prove affirmatively that the accused, by corrupt or illegal means or by abusing his position, obtained any pecuniary advantage for some other person. [892 G; 893 A].

(b) Again, the fundamental rule relating to the proof of guilt based on circumstantial evidence is that there is always danger that conjecture or suspicion might take the place of legal proof. In such cases the mind is apt to take a pleasure in adapting circumstances to one another and even in straining them a

876

little, if need be to force them to form parts of one connected whole and the more ingenious the mind of the individual the more likely it is, in considering such matters, to over-reach and mislead itself to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete. [893 B-D].

(c) In cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and should be such as to exclude every hypothesis but the one proposed to be proved. In other words there must be a chain of evidence so far complete as not to give any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused. [893 D-F].

M. Narayanana Nambiar v. State of Kerala , [1963] Supp. 2 SCR 724; Major S. K. Kale v. State of Maharashtra, AIR 1977 SC 822; Hanumant Govind Nergundkar v. State of M.P., [1952] SCR 1091, AIR 1952 SC 343; Palvinder Kaur v. State of Punjab, [1953] SCR 94; AIR 1952 SC 354; Charan Singh v. State of U.P., AIR 1967 SC 529; referred to.

(d) The principle that inculpatory fact must be inconsistent with the innocence of the accused and incapable of explanation on any other hypothesis than that of guilt does not mean that any extravagant hypothesis would be sufficient to sustain the principle, but that the hypothesis suggested must be reasonable. [893 G].

Govinda Reddy v. State of Mysore , AIR 1960 SC 29; referred to.

In the instant case the conduct of the appellants in preferring A-4 to any new contractor did not savour of dishonest intentions on their part. Although the notice was sent by registered post to the 11 original tenderers there is nothing in that notice or elsewhere on the record to indicate that other contractors were precluded from submitting their tenders or that the corrigendum extending the date for submission of the tenders was neither intended to be published nor was it actually published. The High Court had missed this fact. The High Court was also wrong in thinking that out of the nine contractors who submitted their revised tenders eight were from the original nine tenderers and the ninth was A-4. In fact five of the contractors that submitted the fresh tenders were fresh tenderers. Moreover none of the officers of the Finance and Engineering Department of the Corporation who handled the file relating to the grant of contract ever raised any objection regarding the improper reception or entertainment of A-4's tender. This showed that there was nothing wrong about the issue of tender Form to A-4 or its entertainment by the appellants. The contract in question was not a specialised job requiring any extra ordinary skill. A-4 was the Corporation's old and tried contractor who had previously executed a number of works including rock cutting.

(2) Though it cannot be gainsaid that the second appellant had been extremely negligent in not scrutinising the papers, he affixed his signature in a routine manner to the work order prepared by his subordinates without realising

877

the importance of his act, placing implicit faith in the integrity of the latter. [900 E-F]

(3) There is no clear, cogent and convincing evidence to show that the appellants had a hand in the removal of the level plans from the departmental file relating to the contract and substitution of the faked plans. [900 G].

JUDGMENT :

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal Nos. 346 and 387 of 1975.

Appeals by Special Leave from the Judgment and Order dated 6-8-75 of the Bombay High Court in Criminal Appeal No. 1005 and 1006 of 1973.

Lalit Chari, P. R. Guna, A. K. Srivastava and Vineet Kumar for the Appellant in Crl. A. No. 387/75.

R. L. Kohli, P. P. Rao, R. C. Kohli and R. Nagarathnam for the Appellant in Crl. A. No. 346/75.

V. S. Desai, H. R. Khanna and M. N. Shroff for the Respondent in both the appeals.

The Judgment of the Court was delivered by JASWANT SINGH, J.-The above noted two criminal appeals which are directed against the common judgment and order dated August 6, 1975 of the High Court of Judicature at Bombay affirming on appeal the judgment and order dated August 6, 1973 of the Special Judge, Greater Bombay, convicting S. P. Bhatnagar, appellant in the aforesaid first appeal, (hereinafter described as A-1) under s. 120B read with sections 409 and 109 of the Indian Penal Code and s. 5(2) of the Prevention of Corruption Act, 1947, and sentencing him to six months simple imprisonment on each of the said two counts as well as convicting A. S. Krishnaswamy, appellant in the aforesaid second appeal (hereinafter described as A-2) under the aforesaid two counts but reducing his sentence from nine months' imprisonment to six months simple imprisonment on each one of those counts, shall be disposed of by this judgment.

Briefly put the case as set up by the prosecution was: In 1964, the Indian Oil Corporation (hereinafter referred to as 'the Corporation') which is a Government owned company, decided to purchase 13 acres and odd of a hilly tract of land situate in village Mahul in Trombay (Bombay) from the Tatas for the purpose of erecting black furnace oil storage tanks and construction of administrative buildings. After the area was taken over by the Corporation Varandani (P. W. 20), Junior Engineer of the Corporation surveyed the land in October, 1964, under the directions of A-1 and A-2, the Engineering Manager and Senior Engineer respectively of the Engi-

neering Department of the Marketing Division of the Corporation with a view to find out the extent of rock cutting and filling which might be required to be done for levelling the area of 7 acres out of the said tract of land. The kacha level plan (Exh. 125) and worksheets prepared by Varandani on October 13, 1964 and November 3, 1964 respectively during the course of his aforesaid survey (which were signed by A-1 and A-2, showed that 16,80,000 cft. of rock cutting work and 8,00,000 cft. of filling work would have to be done to suit the purpose for which the land was acquired. Estimate (Exh. 27) prepared by Varandani indicated that expenditure at the rate of Rs. 30/- per 100 cft. for rock cutting and Rs. 10/- per 100 cft. for filling would have to be incurred. Pucca tracing (Exh. 34) of level plan (Exh. 125) and copies thereof signed by A-1 and A-2, and contour plan prepared by Varandani and approved by Engineering Manager were kept on the record. On the basis of the survey and the estimate of expenditure made by Varandani, notice (Exh. 28) inviting tenders

from experienced civil contractors for rock cutting, filling and levelling of the land in question was prepared by A-2 on February 2, 1965, and was forwarded (under his signatures) by A-1 to the Finance Department for approval on February 5, 1965. After the approval of the Finance Department, the Public Relations Officer of the Corporation by his letter (Exh. 29) dated February 11, 1965 requested Times of India, Indian Express and Free Press to publish the tender notice (Exh. 28) wherein it was stated that the tenders which should reach the Corporation by 2.30 P.M. on March 2, 1965 would be opened at 3.00 P.M. on that date. In response to this notice eleven firms of contractors including Ram & Co. submitted their tenders. N. N. Desai (hereinafter described as A-4) however abstained from submitting his tender. In the meanwhile, it was decided that instead of having stack measurement as provided in Exhibit 28, it would be desirable to have the measurements on the basis of differences between the existing and finished levels. Accordingly, on March 5, 1965, the aforesaid eleven tenderers were asked to submit revised tenders on the basis of the amended tender notice by March 15, 1965.

Although fresh tenders were restricted to the original eleven tenderers, a tender form was issued to A-4 in response to the application made by him on March 8, 1965. On opening the tenders on March 15, 1965, it was found that five out of the eleven original tenderers and four new ones including A-4 had submitted their tenders, that the tender of Ram & Co. whereby it had quoted Rs. 28/- per 100 cft. for cutting work and 'nil amount for filling was the lowest and that the second lowest tender was of A-4 who had quoted Rs. 26/- per 100 cft. for cutting and Rs. 6/- per 100 cft. for filling work. Thus, the actual amount as per quotation of Ram & Co. was Rs. 4,70,400/- and that of A-4 was Rs. 4,84,800/- for 16,80,000 cft. of cutting work and 8,00,000 cft. of filling work. On discovering that the tender of his firm was the lowest, Roshan Lal, a partner of Ram & Co. addressed communication dated March 20, 1965 to the Managing Director of the Corporation requesting him that the aforesaid job of rock cutting and filling be entrusted to his firm in view of its working experience detailed therein but handed over the same to A-1. At or about this time, Messrs Labitos Oil Fields Limited, a British firm whom the Corporation was trying to collaborate in its project advised the Corporation that instead of three levels (steppings) which had been planned as per cantour map (Exh.

34) there should be a single level and instead of the survey being on the basis of 100 ft. spacing as done earlier by Varadani, it should be on the basis of 10 ft. spacing. Accordingly A-1 and A-2 told Varadani (P.W. 20) and S. D. Vaidya, another Assistant Engineer (hereinafter described as A-3) to make a fresh survey alongwith A-4 according to the advice of Messrs Labitos Oil Fields Limited as it had been almost decided to entrust the aforesaid work to A-4. Pursuant to the instructions of A-1 and A-2, B. N. Desai, a representative of A-4 was associated with the revised survey which was carried from March 21 to March 26, 1965. As a result of the joint survey, kacha level plan (Exh. 22) and work-sheet (Exh. 23) were prepared by A-3 under the directions of Varadani. As a result of this survey, it was found that rock cutting and filling would have to be done to the extent of 23,30,454 cft. and 31,500 cft. respectively as against 16,80,000 cft. and 8,00,000 cft. respectively as found as a result of the earlier survey. Notwithstanding the large variations in the cutting and filling work which required to be done as a result of the revised joint survey, the Engineering Department did not invite fresh tenders but instead prepared another comparative statement on the basis of the rates quoted by Ram & Co. and A-4 in their tenders opened on March 15, 1965 and showed therein that the tender of A-4 had turned out to be the lowest and that of Ram & Co. to be the second lowest.

On April 7, 1965, A-2 drew up tender committee proceedings (Exh. 16) as reproduced below and got them signed by A-1 in the hope that the recommendations made therein would be accepted by Srivastava, (P.W. 5) the Financial Controller and Patel, the Operation Manager of the Corporation, who were the other members of the Tender Committee, in addition to A-1 and finally by Gopal Krishan, the then Chairman of the Company :-

"Ref. No. ENG/ASK/Q 250 April 7, 1965.

Subject : Tender Committee proceedings for the finalisation of rock cutting, levelling of plot, taken over from M/s. Tata at Bombay.

(1) We had taken over 13.5 acres of land from M/s. Tata Power House at Trombay. It was intended to level this plot of land and recover about 7 acres of land by cutting and levelling in order to put up our Black Storage tanks and other allied facilities. Due to the uneven terrain, it was decided to have two steppings so that the storage tanks may be installed at a higher level and the remaining administrative blocks, were house stores etc., at a lower level. Accordingly, Public Tenders were invited for rock cutting and filling this area on 100 cft. basis.

(2) Subsequently, M/s. Lobitos Oil Fields Ltd. Ellesmere Port, Wirral, Cheshire, had negotiations with us for putting up a Transformer Oil Blending Plant at this site. The representatives of the above firm during their discussions with C. & S. M. and M. E. (accused No. 1) stated, that they would like to have only plain piece of land instead of steppings as was decided by us previously. This will entail additional cutting and minimise the quantity of filling.

(3) Our estimated quantity previously was 16,80,000 cft. of cutting and 8,00,000 cft. of filling. As per the revision in the levels to be maintained at this site that the total quantity of cutting comes to 23,30,456 cft. The quantity of filling comes to 31,500 cft. The total estimated cost for the original work was Rs. 6,13,200/-.

A comparative statement has been drawn as per the tendered rates quoted by the various parties and the position of the first three is as follows :-

S. Name of Contractor Qty. Rate Amount Total No. %Cft.

1 N.N. Desai
Cutting 23,30,450 26/- Sd. 605917 607807 Filing 31500 Cft. 1890 6/-

2	Ram & Co.	Cutting	2330450	652526	652526
			28/- Cft.		
		Filing	31500	-	
			Cft. free		
3	Library Construction	Cutting	2330450	652526	
			28/- Cft.		655676
		Filing	31500 Cft.	3150	

M/s. N. N.

Desai, Contractor are the lowest. The Tender Committee therefore recommends that this work may be allotted to M/s. N. N. Desai, Contractor at their quoted rate of Rs. 6,07,807/- being the lowest tenderer.

Sd/-

(S. P. Bhatnagar) M. E.

(A. K. Srivastava) F.O.

(H. B. Patel) O.M.

Approved (P. A. Gopalakrishnan) Chairman."

Contrary to the expectations of A-1 and A-2, Srivastava (P.W. 5) refused to be a party to the Tender Committee recommendations. Ignoring not only the opposition of Srivastava and the suggestion of the Accounts Officer of the Finance Department and the Assistant Finance Controller of the Corporation made vide Exhibit 68 and Exhibit 31 respectively while processing the tender committee proceedings that in view of the fact that both the quantity and value of the work had increased substantially as a result of the revised survey, it would be fair and proper to ask all the contractors who had responded to the tender notice to re-submit their quotations but also the offer made by Ram & Co. (which possessed the requisite skill and equipment) to execute the contract at the lower rates of Rs. 20/- per 100 cft. for rock cutting and Rs. 15/- per 100 cft. for filling as well as the flat refusal to reduce his rates given by A-4 during the negotiations conducted at the suggestion of the Accounts Department of the Corporation on April 17, 1965 with the three contractors mentioned in Exhibit 16, A-2 carried on, in pursuance of the conspiracy entered into between himself and A-1 and A-4 fresh negotiations with A-4 on or about April 20, 1965 without associating any member of the Finance Department and persuaded him to accept the lowest revised rates offered by Ram & Co. although he did not possess the requisite experience in and equipment for rock cutting and filling and by passing the Financial Controller forwarded the papers to the Operation Manager who not being conversant with the proceedings supported A-2 for entrusting the contract to A-4 at the lowest rates offered by Ram & Co. On the Tender Committee recommendations reaching him in circulation. Srivastava put on record his bold and emphatic protest but eventually reluctantly gave his con-

currence to the recommendations made by A-1 and the Operation Manager as is evident from the concluding sentence of the Note:

"The case is recommended for acceptance of the Chairman only because the Engineering Manager has certified that he would not be able to accept any responsibility about the deadline if work is not given to Desai."

Although according to A-2's note (Exh. 33) dated April 19, 1965, the Coordinator and Sales Manager was keen to have the site developed as early as possible, the latter held up the matter for nearly three months in the vain expectation that the work would be done free of cost either by the Government of Maharashtra or the Bharat Sevak Samaj and it was not before July 15, 1967 that he gave his approval to A-1's proposal to award the contract to A-4 whereafter accepting the said proposal the Managing Director of the Marketing Division and Chairman of the Board of Directors of the Corporation accorded sanction to the entrustment of the work to A-4. On receipt of the sanction, A-1 forwarded the papers with his endorsement to the Financial Controller on July 29, 1965. On July 30, 1965, work order (Exh. 19) manifesting quantity of rock cutting work as 29,30,450 cft., filling work as 90,000 cft. and value of the work as Rs. 5,99,590/- as against the corresponding figures of 23,30,450 cft., 31,500 cft. and Rs. 4,70,000/- respectively as specified in the final sanction which was based on the aforesaid level statement (Exh. 22) and work sheet (Exh. 23) was prepared and handed over by A-2 to A-4. Copies of the work order were also endorsed by A-2 to the Bills Section of the Engineering Department and the Accounts Section of the Finance Department of the Corporation with the endorsement "the above has Chairman's approval on our note of even reference dated 7th April 1965. Please have the agreement executed. Earnest money of unsuccessful tenderers may also please be refunded early." On July 30, 1965, formal contract (Exh. 74) mentioning only the number and date of the work order in the blank columns of the printed form was prepared and signed by A-4 and a representative of the Company. The joint level statement Exhibit 22 and the work sheet Exhibit 23 in respect of the joint survey made between March 21 and 26, 1965 for ascertaining the extent of rock cutting and filling which formed the basis for invitation of tenders and the final sanction in favour of A-4 were not only left unsigned by the concerned but were actually removed from the file and were substituted by spurious level plan (Exh. 24) and its copy (Exh. 38) which were fabricated by A-3 to justify the inflated figures of rock cutting and filling work mentioned in the work order (Exh. 19) dated July 29/30, 1965. On August 19, 1965, fabricated level plans (Exhibits 24 and 38) prepared by A-3 were sent to A-4 as annexures to Exhibit 106 which ran as under:-

"We are enclosing herewith two prints of spot level of land area to be dressed and levelled at our Trombay plot.

The whole plot should be brought to a level of 102.00 as directed.

Please return to us a copy of the Blue Print showing spot levels duly signed as a token of acceptance of the same for payment." While A-4 retained one of the spurious plans viz.

Exhibit 38 with himself, he returned the other viz. Exhibit 24 after putting his initials thereon. Thereafter A-3 endorsed on the letter Exhibit 106 that 'the print signed by A-4 should be filed by Sukhtankar (P.W. 13) who is in charge of the filing section.' Accordingly, Sukhtankar filed Exhibit 106 alongwith Exhibit 24 in the Bill Section. The actual rock cutting operations commenced with effect from August 1, 1965 and on August 27, 1965, A-4 prepared and submitted the first running bill (Exhibit 51) indicating that 8,00,000 cft. of cutting work and 80,000 cft. of filling work had been completed. This bill was accompanied by the certificate of A-3 reading as under :-

"The measurements on which column No. 3 of this bill are based were taken by me on 24-8-65 and recorded at pages of MMC No. 7201. Certified that the quantities of work actually executed as shown in column No. 4 has actually been done and in no case less than the on account payments claimed."

The above certificate was countersigned by A-2 on August 26, 1965. A-2, A-3 and A-4 also signed measurement certificate (Exhibit 52) which read as follows:-

"We certify that the measurements given above are the actual works carried out in accordance with the drawings and specifications as indicated in the work order referred to above."

On the basis of these certificates, the first on account running bill was passed and paid for. Thereafter the second and third running bills and measurement certificates Exhibits 53 and 54 dated Septem-

ber 16, 1965 and November 17, 1965 respectively claiming that the additional cutting work of 5,00,000 cft. and 8,00,000 cft. had been done were likewise prepared by A-4 and signed by A-3 and counter-signed by A-2. The fourth running bill and measurement certificate (Exh. 55) dated February 22, 1966 claiming that additional work to the extent of 7,00,000 cft. had been done was prepared by A-4 and signed by A-3. This bill which was countersigned by K. S. Joshi, another Senior Engineer who was put incharge of the Project in the absence of A-2 who had been transferred to Delhi was also paid.

On November 8, 1966, one Gurunath Naik (P.W. 17) who was working as a Junior or Assistant Engineer for some time in Bombay and for the remaining period at Allahabad, Kanpur and Mugalsarai was called by A-1 and asked to see Ramrao, the then Junior Engineering Manager. Accordingly Naik met Ramrao who directed him to go to the spot and have the level drawings. Pursuant to this direction, Naik went to the site for spot verification and reported to Ramrao vide Exhibit 18 that excepting at one place where he got a level of 102-9 nowhere else did he get a level of 102. Naik also reported that as against an area of 7.4 acres which had to be levelled hardly an area of 4.8 acres was attempted to be levelled. On December 30, 1966, A-4 submitted his final bill (Exh. 56) claiming to have completed the work by August 11, 1966. This bill bore the certificate dated December 29, 1966 of A-3 to the effect that the measurements on which column No. 3 of the bill was based was taken by him on that date, and had been recorded in the measurements of the M.B.M.C. book. A-3 also recorded a further certificate to the effect that the work had been completed 100% according to the specifications and drawings. This certificate of A-3 was followed by another certificate of A-4 that he accepted the above certificate and certified that the amount of payment which he received on that bill would be in full and final settlement of all his claims in respect of the work excepting the refund of his security deposit. By this bill, A-4 claimed to have done 3,84,720 cft. of cutting work and 18,200 cft. of filling work in addition to the work covered by the four earlier running bills. Thus A-4 claimed to have done 31,84,720 cft. of rock cutting work and 98,200 cft. of filling work. On this bill, which bore the certificates of A-3 and A-4 was countersigned by Ramrao on December 30, 1961 and wherein it was falsely claimed by A-4 that the work was completed on

August 11, 1966-although that date was also much beyond the stipulated date-A-3 recorded the following note:-

"The final bill amounts to Rs. 6,51,674/- and is in excess of work order amount by Rs. 52,084. Since this excess is within 10% of the ordered amount, M.E. may kindly approve."

Accordingly the papers were laid before A-1 who accorded the desired approval the moment the bill was laid before him and sent it for payment to the Accounts Officer ignoring the practice which required all such bills involving an excess of 10% over the sanctioned amount to be submitted to the Chairman for sanction. On the bill coming before the Accounts Department for scrutiny, it pointed out that since the actual work exceeded the sanctioned amount by Rs. 52,084/- for which originally the approval of the Chairman was taken, the excess needed to be regularised by obtaining his sanction. It was also pointed out that as the contractor had not completed the work within the stipulated time, the question of imposition of penalty also required to be considered. On the pay order being returned to the Engineering Department, Ramrao, the then Deputy Engineering Manager, submitted the following reply vide Exhibit 59 dated January 12, 1967:-

"The work is now completed as required. However to acquire the required level and gradient, the quantity of work has increased. The party has now submitted their final bill for this work amounting to Rs. 6,51,674/- which is in excess by Rs. 52,084/- than the original amount of work order.

The excess is within 10% of the original estimate, M.D. is therefore requested to kindly approve the excess work done and to pass the final bill for Rs. 6,51,674/-.

As per the work order, the work was to be completed within 4 months (120 working days). However, the Contractors could not complete this work including the disposal of the excavated stuff within this time limit due to the fact that there was no approach available to this plot. The party has completed the work expeditiously, after the approach was given to them by M/s. Tatas.

M. D. is therefore, requested to consider this aspect and approve the time limit extension upto 11-8- 1966, the date on which the party has completed the work."

On the matter coming back to the Finance Department, Shende (P.W. 16) pointed out that not only the quantities of rock cutting and filling work which were found as a result of the survey made between March 21 and 26, 1965 had been enormously inflated in the work order but the work claimed to have been done also exceeded the inflated figures mentioned in the work order. He, therefore, suggested that the Department might agree to the payment of extra amount to A-4 subject to A-1's obtaining the Board's ratification. Sometime before March 28, 1967, Krishnaswamy Rajam (P.W. 1), the Chief Internal Auditor, was summoned by the Managing Director and the General Manager and was asked to have a personal talk with A-3 in connection with the matter. On P.W. 1's questioning A-3 on March 28, 1967, the latter made confessional statement (Exh. 21) which is

reproduced below for facility of reference:-

"Regarding rock cutting and filling at Trombay site I wish to bring to your kind attention the following:

I was assigned to this job after the work was started at site by M/s N. N. Desai. The original estimates for cutting and filling were 16,80,000 cft. and 8,00,000 cft. respectively. It was later revised to 23,30,450 cft. and 31,500 cft. for cutting and filling. I have got the workings for this revision with me at Ahmedabad. (He refers to the genuine level statements and plans and worksheets Exs. 22 and 23 which were prepared by him under the directions of Varandani between 21st and 26th March, 1965). Later on I was advised by my superiors to give a still further upward revision giving the quantities as 29,30,450 cft. for cutting and 90,000 cft. for filling. The work sheets prepared by me and signed by contractor only (N. N. Desai) has no bearing to actual quantities involved. I had merely acted as asked by my superiors in preparing worksheets accordingly which has resulted in this upward revision. I have also given measurement certificates in this regard in line with the revised wrong quantities. I realise now this has resulted in making excess payments to the contractor. I beg to be excused for having done such a thing which was done solely at the instance of my superiors in Engineering Depart-

ment. E.M. (accused No. 1) and Dy. E.M. are aware of this."

Thereupon P.W. 1 put up the papers before the Managing Director and the General Manager who advised him to start investigation on particular lines. During the course of the inquiry, A-2 told P.W. 1 that the work order which as far as he remembered was prepared by A-3 was cursorily signed by him due to heavy rush of work and that while checking the running bills submitted for payment, he normally checked the percentage of progress of work certified by the Assistant Engineer. On further investigation made on April 1, 1967, A-3 produced the genuine level statement (Exh. 22) and the work sheet (Exh. 23) before P.W. 1 and told him that the substitution of the fabricated level statement and work sheet relating to rock cutting and filling at Trombay was done at the instance of Joshi, A-2 and A-1 and that they were aware of the same. To the further question as to what was the basis for the work order for the figure of 29,00,000 cft. of rock cutting and 90,000 cft. of filling, A-3 told P.W. 1 that there was no basis for the work order and the quantities were fixed to suit sanctioned amount. On a query being made by P.W. 1 from Ramrao regarding the final bill, he admitted that he had not personally checked the calculations and had counter-signed the bill relying on the accuracy of the measurements shown in the bill which was prepared by A-3. He further stated that he had not personally checked the calculations based on the final bill and initialled joint levels which according to him were normally done by the Assistant Engineer. During the course of this inquiry, Murthy (P.W. 18) was deputed by A-1 and Krishnaswamy (P.W. 1) to go to the spot and find out the work which had actually been done. Thereupon, Murthy (P.W.

18) submitted his interim report on April 6, 1967 pointing out that at only one place the level was 103.94 and elsewhere it remained much more. By his final report (Exh.

44) dated April 20, 1967, Murthy (P.W. 18) pointed out that actually on the spot only 9,73,000 cft. of rock cutting and 50,000 cft. of filling had been done. After recording the statements of A-2, A-3 and A-4, Krishnaswamy (P.W. 1) submitted a detailed report (Exh. 25) on April 8, 1967 to the Managing Director through the Financial Controller. In his report, P.W. 1 also pointed out that contour plan/levels statement which in case of this nature are jointly signed by the contractor and the representative of the Engineering Department were not available in the instant case for inspection and that A-3 had produced a level statement alleged to have been processed by him and Varandani which was not signed by any body including A-3's superiors. P.W. 1 also pointed out in the course of the report that the quantities of rock cutting and filling shown in the work order were 29,30,450 cft. and 90,000 cft. respectively and that there was an increase of 6,00,000 cft. of rock cutting straightaway. Krishnaswamy (P.W. 1) also mentioned in his report that according to A-3, the level statement giving the figure of 29,30,450 cft. for cutting and 90,000 cft. for filling had been signed by A-4.

On the report being put up before the then Financial Controller, he directed that before proceeding with the matter, it was necessary to call for the comments of A-1. Thereupon after calling for a report from Ramrao, A-1 gave his comments vide Exhibit 178 dated April 17, 1967 wherein after doubting the competence and qualification of P.W. 1 to hold the investigation, he offered to send one of the senior engineers from Western Branch to carry out an independent survey to find out the quantity of work done by A-4 and suggested that measurements might be made by reference to the kacha level statement (Exh. 125), the work sheet (Exh.

126) and the contour plan (Exh. 34) which were checked by A- 2 and approved by him and which must be with the department. On April 18, 1967, A-1 sent for A-3 and questioned him in regard to the matter. In the statement penned by A-3 himself, he stated that he changed the levels of drawing of Trombay plot regarding rock cutting and filling job at the instance of A-2 and KSJ (i.e. Joshi) but did not inform A-1.

On May 3, 1967, A-1 issued show cause notices to A-2 and A-3 with a view to hold departmental enquiry against them. By his reply dated May 20, 1967 to the show cause notice, A-3 stated that he had changed the original contour plan at the instance of A-2.

On getting information on July 15, 1967 that A-4 was having some rock cutting done on the site although he had in his final bill claimed that he had fully completed the work on August 11, 1966, A-1 and A-2 visited the site along with Lakshmanan, the Operations Manager and finding that the work of rock cutting was still going on and that the claim of A-4 as certified by A-3 and countersigned by Ramrao about the work having been completed on August 11, 1966 was apparently false had the measurements of rock cutting and filling work taken by Ganapathy. As the measurements taken by Ganapathy were on the basis of level plans prepared by Tatas in which the bench mark was 94.5 as against the bench mark of 100 for the survey in question, the Managing Director had the measurements taken by M/s R. L. Dalal & Co. The report of Dalal & Co. showed that the rock cutting work done was 9,60,000 cft. and filling work was 1,96,000 cft. only.

On July 28, 1967, the Managing Director issued a charge sheet to A-1, A-2, A-3 and Ramrao. In his reply (Exh.64) dated August 4, 1967 to the charge sheet, A-3 submitted that whatever he did was under the orders of A-1 and the Deputy Engineering Manager. This time he did not mention A-2 to be responsible for anything done by him. On the same day i.e. August 4, 1967, A-1 sent for A-3 in his cabin and questioned him in the presence of three other officers viz. Roy Chowdhary (P.W.2), who was the Deputy Financial Controller, Shriyan (P.W.23), the Assistant Engineer, and Vora, the Senior Engineer. On this Occasion, A-3 allegedly made statement (Exh.43) absolving A-1 and throwing the entire responsibility on A-2. While the three other officers and A-1 signed the statement (Exh.48) made by A-3, A-3 declined to sign it and fled away from the chamber on some excuse and rushed to the chamber of Krishnaswamy, Chief Internal Auditor whereupon Roy Chowdhary (P.W.2) also followed A-3 to the chamber of Krishnaswamy. In the chamber of Krishnaswamy, A-3 resiled from the statement. Having regard to the position adopted by A-3 in resiling from his earlier statement of that very day before A-1, Roy Chowdhary reminded him that in the morning in his presence, he had stated that it was A-2 who was responsible for asking him to change the drawing and increase the quantities. To this question of Roy Chowdhary in the chamber of Krishnaswamy, A-3 replied in the negative and stated that A-1 called him and Joshi into his room and instructed him personally to increase the quantity. When questioned by Roy Chowdhary as to why he did not come out with that truth in the room of A-1 in the presence of Roy Chowdhary, A-3 replied that he did not do so out of fear or A-1.

In his reply to the charge sheet, Ramrao inter alia stated that he signed the bill (Exh.56) relying on the certificate of A-3 who had been assigned to the job and added that according to the practice prevailing in the Corporation, Senior Engineers were not expected to verify the measurements. Elaborating his explanation, he stated that just as Senior Engineer, Doraiswamy could not proceed to a BPI nor Senior Engineer Vora nor Senior Engineer Chari could proceed to an installation just to verify the billed quantities in view of the fact that there were a number of bills on each work order and so many work orders for each location. Similarly in the Branches, Senior Engineers who were controlling the work for so many depots and installations were not expected to verify the quantities in each bill; that however, if there was a dispute with the contractor or there was some other reason to doubt the correctness of the Assistant Engineer's certificate, the Senior Engineer might either take measurements himself or get them taken by another Assistant Engineer; that subsequent to the counter signature by the Senior Engineer, the bill was passed on to the Engineering Bills Section where the bills were checked by the Accountant against sanctions, work order, rates and amounts, deductions for cement A.C. sheets or other materials supplied and security; deposit etc; that the Accountant prepared the pay order giving all these details for signature by a Senior Engineer as far as possible other than the countersigning Senior Engineer; that the bill then went to the Accounts Department where it was subjected to further detailed scrutiny before payment; that on December 30, 1966 Vaidya brought the bill for Rs.79, 674/- dated December 30, 1966 to him for counter signature; that it would have normally been put up to K. S. Joshi but was brought to him as he was not available; that Vaidya was the Assistant Engineer who had handled that contract from the time of placing the work order; that the bill was for the work carried out by the Contractor subsequent to the previous 'on account bill' 21-2-66 (nearly 10 months earlier) i.e. about 3.18 lakhs cft. at Rs. 20/- per 100 cft. of cutting and 18,200 cft. of filling at Rs. 15/- per 100 cft; that he had visited Trombay number of times in connection with other works during the period commencing from August, 1966

and was aware that the Contractor had carried out approximately that much work during 1966; that the extra quantity required sanction of competent authority; that the previous bills passed showed that the major portion of the work was carried out during the period August to December, 1965 and about 7 lakhs CFT of cutting during December, 1965 to February, 1966; that A. S. Krishnaswamy who placed the work order had countersigned bills upto 21 lakhs cft. of cutting and 80,000 cft. of filling as early as November 17, 1965 and subsequently K. S. Joshi had countersigned a bill for an additional 7 lakhs cft. of cutting and the contractor had already been paid Rs. 5.72 lakhs less security deposit; that he, therefore countersigned the bill dated December 30, 1966 and passed it on to M.E. for approval of the extra quantity of cutting; that M.E. approved on the same date and the bills was sent to Engineering Bills for scrutiny by the Accountant in respect of sanctions, work order terms etc; that he also particularly instructed that the bill should be shown to K. S. Joshi before the pay order was issued since normally the bill should have gone to him for counter signature; that the Accountant carried out his instructions; that the counter signature did not denote final passing of a bill but only that it might be proceeded further and subjected to all the necessary administrative and financial checks before payment; that all the bills for the work had been certified by the Assistant Engineer incharge who was fully familiar with work and the previous bills had been counter-

signed by colleagues of status equal to him; that he had no reasons to suspect any malpractice or mistakes and also there was no dispute with contractor; that he had exercise the normal technical checks which were the functions denoted by counter signature as per the prevailing practice and that countersignature did not imply correctness of the quantities certified by the Assistant Engineer (who alone was responsible for the correctness) in either the current or previous bills.

When the matter was thus pending, a confidential information reached Rege, the Deputy Superintendent of Police, C.B.I. (P.W. 27) who registered the case on December 27, 1967. During the course of investigation, he visited the office of the Corporation, took charge of all the concerned documents, had the site measured by Shivashankar, Technical Examiner, Central Intelligence Service, (P.W.4) according to whom the cutting and filling work done by the contractor was to the extent of 9,61,000 cft. and 1,50,000 cft. respectively and after securing the requisite sanction, prosecuted A-1, A-2 and A-3 and also submitted the charge sheet against A-4 with the result that all the four accused were convicted.

In these appeals, we have had the advantage of hearing full dressed arguments of counsel on both sides who diligently prepared the case and put across their respective contentions with great ability.

We must point out at the outset that although the trial court had clearly acquitted A-1 of the charge under section 409 read with section 120-B and section 109 of the Indian Penal Code it unfortunately forgot to keep that fact in mind with the result that while concluding its judgment it held him guilty on that charge as well. In the circumstances, it was not open to the High Court in the appeal by A-1 to go into that charge and reverse the findings arrived at by the trial court. We will accordingly be concerned with the question of validity of A-1's conviction under section 5(2) read with section 5(1)(d) of the Prevention of Corruption Act only but so far as A-2 is concerned, we will have to examine the validity of his conviction under all the charges. Before examining the sufficiency or otherwise of the material bearing, on the charges against both the appellants, we consider it

necessary to have a clear concept of the meaning and ambit of the phraseology "by corrupt or illegal means or by otherwise abusing his position as public servant" used in section 5(1)(d) of the Prevention of Corruption Act, 1947 (hereinafter referred to as 'the Act') for the contravention of which the appellants have been convicted. It will be advantageous in this connection to refer to two decisions rendered by this Court in *M. Narayanana Nambiar v. State of Kerala*(1) and *Major S. K. Kale v. State of Maharashtra*.(2) In the first case, Subba Rao, J. (as he then was) while construing clause

(d) of sub-section (1) of section 5 of the Act observed:-

"The phraseology 'by otherwise abusing his position as public servant' covers acts done otherwise than by corrupt or illegal means by an officer abusing his position. The gist of the offence under this clause is that a public officer abusing his position as a public servant obtains for himself or for any other person any valuable thing or pecuniary advantage. "Abuse" means misuse i.e. using his position for something for which it is not intended. That abuse may be by corrupt or illegal means or otherwise than those means. The word 'otherwise' has wide connotation and if no limitation is placed on it the words 'corrupt', 'illegal' and 'otherwise' mentioned in the clause become surplusage, for on that construction every abuse of position is gathered by the clause. So some limitation will have to be put on that word and that limitation is that it takes colour from the preceding words along with which it appears in the clause, that is to say something savouring of dishonest act on his part. The contention of the learned counsel that if the clause is widely construed even a recommendation made by a public servant for securing a job for another may come within the clause and that could not have been the intention of the Legislature. But in our view such innocuous acts will not be covered by the said clause. The juxtaposition of the word 'otherwise' with the words "corrupt or illegal means" and the dishonesty implicit in the word "abuse" indicate the necessity for a dishonest intention on his part to bring him within the meaning of the clause. Whether he abused his position or not depends upon the facts of each case."

Following the decision in *M. Narayanan Nambiar v. State of Kerala* (supra), it was held by this Court in *Major S. K. Kale v. State of Maharashtra* (supra) that the abuse of a position in order to come within the mischief of the section must necessarily be dishonest so that it may be proved that the accused caused deliberate loss to the department. It was further held in this case that it is for the prosecution to prove affirmatively that the accused by corrupt or illegal means or by abusing his position obtained any pecuniary advantage for some other person. It would, therefore, be necessary to find out in this case as to whether the accused abused their position and acted dishonestly or with a corrupt or oblique motive in having the contract in question entrusted to A-4. As the courts below have rested their judgments on a constellation of circumstances, it would be well to bear in mind the fundamental rule relating to the proof of guilt based on circumstantial evidence which has been settled by a long line of decisions of this Court. The rule is to the effect that in cases depending on circumstantial evidence, there is always the danger that conjecture or suspicion may take the place of legal proof. In such cases the mind is apt to take a pleasure in adapting circumstances to one

another, and even in straining them a little, if need be, to force them to form parts of one connected whole; and the more ingenious the mind of the individual, the more likely it is, considering such matters to cover reach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete.

In cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable grounds for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused. (See *Hanumant Govind Nargundkar v. State of M.P.*,⁽¹⁾ *Palvinder Kaur v. State of Punjab*⁽²⁾ and *Charan Singh v. State of U.P.*⁽³⁾).

The principle that inculpatory fact must be inconsistent with the innocence of the accused and incapable of explanation on any other hypothesis than that of guilt does not mean that any extravagant hypothesis would be sufficient to sustain the principle, but that the hypothesis suggested must be reasonable. (See *Govinda Reddy v. State of Mysore*⁽⁴⁾).

Keeping in view the aforesaid construction placed on section 5(1)(d) of the Act and the principles with regard to proof of guilt based on circumstantial evidence, let us now turn to the various circumstances which have been relied upon by the High Court in holding the appellants guilty and see whether they factually exist and if so whether they are of such a character as to be wholly incompatible with the innocence of the appellants and consistent only with their guilt. In so doing, we purpose to divide the aforesaid circumstances under the following broad heads and deal with them seriatim:-

1. The conduct of the appellants evidencing their keenness to have the contract entrusted to A-4.
2. Issue of work order (Exh. 19) with inflated figures relating to rock cutting and filling.
3. Removal of statement of level plan (Exh. 22) and work sheet (Exh. 23) from the departmental file and fabrication and substitution in their place of the fabricated ones by A-3.
4. Despatch on August 19, 1965 of spurious level plan (Exh. 24) and its copy (Exh. 38) by A-2 to A-4 as annexures to Exhibit 106.
5. Counter-signing of the on running bills by A-

2.

6. The initialling of the final bill by A-1.

The first circumstance relied upon by the High Court in this behalf is that though the revised tender notice was limited to the eleven contractors who had originally submitted their tenders in response to the Tender Notice (Exh. 28), the appellants improperly got a tender form issued to A-4 and entertained by the Tender Committee. It is true that the copies of Exhibit 15 on which the prosecution has sought to rely were sent by registered post to the eleven original tenderers by the Engineering Department of the Corporation but it cannot be overlooked that there is nothing in Exhibit 15 or elsewhere on the record to indicate that other contractors were precluded from submitting their tenders or that the corrigendum extending the date for submission of the tenders was neither intended to be published nor was it actually published. It seems that the attention of the High Court was not drawn to the communication (Exh. 29) dated March 9, 1965 addressed by Ranganath, Public Relations Officer, to the Advertisement Manager, Times of India and others and the corrigendum forming annexure thereto which ran as under:-

" INDIAN OIL CORPORATION LIMITED (MARKETING DIVISION) Clarke Road, Mahalaxmi, Bombay-34, WB, India IN REPLY PLEASE REFER TO PR 31 317 9th March, 1965 To The Advertisement Manager, The Times of India, (Bombay) The Indian Express, (Bombay) Free Press Journal, (Bombay) Dear Sir, Subject: Tender No. 249/65 Corrigendum Attached is text of an advertisement for IMMEDIATE Publication utilising the minimum possible space under Public Notice/Tenders or in its appropriate place.

We would appreciate your treating this request as URGENT. Thanking you.

Yours faithfully, Sd/-

(B. V. Ranganath) Public Relations Officer Encl: One.

c.c. Engineering Manager, H.O. with reference to their inter-office memo No- Eng/ASK dated 9-3-1965. We are trying to get it published on March

10. INDIAN OIL CORPORATION LTD. (MARKETING DIVISION) Corrigendum to Public Tender No. 249/65 The last date for receiving this Tender has been extended to 15th March, 1965 at 2-30 P.M. and will be opened the same day at 3-00 P.M."

The attention of the High Court also does not seem to have been invited to the above noted endorsement at the foot of Exhibit 29.

The High Court also seems to be wrong in thinking that out of the nine contractors who submitted their tenders in response to the revised tender notice, eight were from the original nine tenders and the ninth was A-4. A comparison of the two lists viz. the one of the original tenders and the other of those contractors who submitted their tenders in response to the revised tender notice would make it clear that five contractors appearing in the second list were fresh tenderers.

The Financial Controller's note (Exh. 17) dated April 2, 1965 which appears to be the outcome of some personal pique itself shows that it was only on April 15, 1965 that it was agreed between the members of the Tender Committee that the grant of the contract would be confined to one the of the three lowest tenderers, one of whom was A-4.

The fact that none of the eleven officers of the Finance and the Engineering Department of the Corporation who handled the file relating to the grant of the contract in question ever raised any objection regarding the improper reception or entertainment of A-4's tender by the Engineering Department is a proof positive of the fact that there was nothing wrong about the issue of tender form to A- 4 or its entertainment by the appellants.

Thus it is clear that the first circumstance relied upon by the High Court had no factual existence and could not be pressed into service against the appellants.

The next finding of the High Court that while Ram & Co. was best fitted for entrustment of the contract in question in view of the vast experience and equipment possessed by it, A-4 did not have any such merit. It is a matter of common knowledge that rock cutting is not a specialised job and no extra-ordinary skill or experience is required for the same and that every civil construction involves some sort of rock cutting. It is also in evidence that A-4 who was the Corporation's old and tried contractor had previously executed 98 works including the one on the An-top Hill in Bombay for the Corporation to its entire satisfaction, and out of the aforesaid works many related to installations which were more complicated than rock cutting and filling. It would also be noticed that in the notes put up by them neither Srivastava (P.W. 5) nor Shivananda, Superintendent, nor Khurana, Assistant Financial Controller of the Finance Department, nor the Operation Manager ever pointed out that A14 lacked the requisite experience or competence which disentitled him to the grant of the contract. In fact Shivananda and Khurana had suggested as an alternative to inviting fresh tenders that A-4 should be asked to reduce his rates in view of the revised figures on account of which the value of the contract had gone up considerably.

It would also be noticed that the High Court while rightly holding that Exhibit 122 was not delivered to A-1 by Roshan Lal (P.W. 19) tell into an error in observing that A- 1 had a hand in suppressing it. It seems to have escaped its notice that at the negotiations conducted on April 17, 1965 with the three lowest tenderers viz. Ram and Co., Liberty and Co., and A-4 by the Tender Committee, of which P.W. 5 was a prominent member, Roshan Lal was present and while pressing his firm's claim to the grant of the contract he did draw the attention of the members of the Committee to the contents of Ext. 122 sent earlier by his firm to the Corporation. This is evident from Roshan Lal's own admission that he informed the corporation in writing as to his experience in the line and whatever he had written he had also told the concerned officers who were two or there in number. If A-1 would have had a hand in suppressing Ext. 122 he would not have allowed it is to remain on the file. That apart a bare perusal of report Ext. 33 which is fairly detailed is enough to show that neither A-1 nor A-2 was interested in suppressing or distorting any material fact. There was, therefore, hardly any justification for the observation in question.

The third finding of the High Court that the appellants told Vrindani (P.W. 20) and Vaidya (A-3) that it had already been decided to entrust the contract to A-4 and in order not to lose time, a joint survey should be made, is also erroneous. It is unbelievable that A-1 and A-2 who were pre-occupied with several projects would go and tell Vrindani who was three or four steps below them and was admittedly not a member of the conspiracy nor concerned with policy matters that it had been already decided to assign the contract to A-4. The aforesaid briefing attributed to the appellants also seems to be incredible in view of the fact that it was only on the basis of the level measurements taken by P.W. 20 and A-3 during the survey made by them between March 20 and 26, 1965 that A-4 turned out to be the lowest tenderer and at the time when the briefing is alleged to have been given the lowest tender was of Ram & Co.

The insinuation implicit in the fourth finding of the High Court that Exts. 16, 17, 30-33 and 123 led to the inference that A-1 was the author and architect of the proposal for acceptance of A-4's tender, is also unwarranted. There is nothing in these documents which can be interpreted to indicate that the appellant was actuated by any ulterior or corrupt motive or that he was guilty of any mis-demeanour, irregularity or impropriety. On the contrary the said documents particularly Exts. 16 and 33, which like an open book fairly set-out all the facts and circumstances bearing upon the allotment of the contract in question including the claim thereto of Ram & Co. not only manifest, that the procedure referred to by P.W. 1 in his deposition for inviting and finalizing the tenders was meticulously followed in the present case, but also establish A-1's bona fides. It has also to be borne in mind that the Tender Committee which comprised of the Operation Manager and the Financial Controller in addition to A-1 had only an advisory role to play and the decision to entrust the contract to a particular contractor lay with the Chairman of the Board of Directors in consultation with the coordinator and Sales Manager who was above the Tender Committee. That the appellant's proposal favouring A-4 was in the interest of the corporation both from the point of view of economy as well as speedy and satisfactory execution of work and was solely inspired by his concern to avoid the sad experience which the corporation had in respect of rock cutting work at An-top hill with the Kore Brothers which was a new party is evident from the following endorsement made on A-33 by H. B. Patel, Operation Manager:-

"In view of the urgency and our past experience with a new party at An-top hill, I agree to Senior Engineer's proposal that we give the job to M/s. N. N. Desai at the lowest tendered rates."

The fifth finding of the High Court that the appellants had negotiations on their own with A-4 with a sinister object is also against the weight of the material on the record. The act of the appellants in trying to ascertain from A-4 whether he was prepared to reduce his rates to the level of M/s. Ram & Co. which seems to have been taken in consultation and agreement with P.W. 5 was, in our opinion, guiltless. It would be well to remember in this connection that Shrivastava P.W. 5 himself admitted in the course of his deposition that there was practice in their corporation of asking the second lowest tenderer to match his rates with the lowest tender. The proposal about the allotment of work in favour of A-4 was, therefore, not only consistent with the practice but was also in the interest of the corporation.

In view of the foregoing we are inclined to think that the conduct of the appellants in preferring A-4 to any new contractor did not savour of dishonest intention.

Re. 2: Coming to the work order (Exh. 19) containing inflated figures which is the corner stone of the prosecution case, it may be pointed out that the prosecution has not been able to produce any evidence showing the circumstances under which it was prepared. The observation of the High Court that the work order must be the creation of not only A-2 but of A-1 as well seems to be based upon mere conjecture. It would be noticed that the work order does not bear the signatures of A-1 and there is nothing to show that in the normal course, the work order had to come to A-1 before being issued to A-4. We cannot also in this connection afford to lose sight of the observations made by the trial court at page 279 of the Paper Book that 'it is a common ground that accused No. 1 is not concerned with the making of the order and that it is also a common ground that a work order is issued by the Engineer Incharge'. In these circumstances, it is difficult to understand how the High Court came to the conclusion that the work order (Exh. 19) was the creation of not only A-2 but of A-1 as well. It seems that the finding of the High Court was influenced by its finding with regard to Exhibits 16 and 33. In view, however, of our finding with regard to Exhibits 16 and 33, the observation of the High Court that the work order was also the creation of A-1 cannot be sustained. We will, accordingly advert to the material on the record with a view only to see how far it reflects on the bonafides of A-2. The prosecution has not led any evidence to prove that A-2 dictated or prepared the work order. The proven facts show that according to the normal practice prevalent in the department it is not the Senior Engineer like appellant No. 2 who is incharge of the Project that prepared a work order but an assistant or Junior Engineer in charge of the work working under him. Although Varandani has in the course of his deposition tried to suggest that the work order was prepared by A-2, his suggestion cannot be relied upon in the face of Exhibit 67 wherein he told P.W. 1 that the work order was presumably prepared by Vaidya, A-3. It is highly improbable that on the very day of the grant of the sanction of the contract in question A-2 would take the extremely hazardous step of inflating the figures to obtain undue advantage for A-4 specially when he knew that the fraud would be at once discovered by reference to the sanction which had been transmitted to the Finance Department.

The prosecution theory that the work order giving inflated figures was not only signed but was also prepared by A-2 is also negated by the following endorsement on the copy of the work order sent to the Bills and Accounts Sections of the Engineering Department of the Corporation:

"The above has Chairman's approval on our note of even reference dated 7th April, 1965. Please have the agreement executed. Earnest money of unsuccessful tenderers may be refunded early."

The above quoted endorsement completely demolished the prosecution case. If A-2 had been the author of Exhibit 19, or had suspected that his subordinate would have dared to inflate the quantities of the work, it is inconceivable that he would have made the above quoted insertion giving the particulars of the above mentioned note meant for the Chairman's approval in the copy of the work order addressed to the Bills and Accounts Sections which would have furnished a valuable clue for the speedy detection of the fraud that is alleged to have been perpetrated.

Again if A-2 were really a conspirator who had falsely inflated the figures of rock cutting and filling in the work order he would have seen to it that the potential documentary evidence embodied in Exhibit 125 which showed the genuine levels on the spot was destroyed or done away with. The fact that he did not do anything of the kind raises a strong doubt about his culpability.

Thus though it cannot be gainsaid that A-2 has been extremely negligent in not scrutinising the papers, it seems to us that he affixed his signatures in a routine manner to the work order prepared by his subordinate engineer without realizing the importance of his act placing implicit faith in the integrity of the latter.

Re. 3: There is no clear, cogent and convincing evidence to show that A-1 or A-2 or both had a hand in the removal of the level plan (Exh. 22) or the work sheet (Exh.

23) from the departmental file relating to the contract in question and substitution in their place of the faked level plan (Exh. 24) and work sheet (Exh. 38) which were admittedly fabricated by A-3. The statements made from time to time by A-3 in this behalf being contradictory and discrepant as would be evident from the following table :

_____ S. Date
No.of Text of the statement No the Exhi-

bit _____ 1
28-3-1967 21 The Original estimates for cutting and filling were 16,80,000 cft. and 8,00,000 cft. respectively. It was later revised 23,30,450 cft. and 31,500 cft
_____ S. Date
No.of Text of the statement No the Exhi-

bit _____ for
cutting and filing.. Later on I was advised by my superior in Engg.

Dept., E and Dy. E.M. to give a still further upward revision giving the quantities as 29,30,450 cft. for cutting and 90,000 cft.

for filling.

2 1-4-1967 36 ASK, KSJ and SPB asked me to substi-

tute SHS relating to rock cutting & filling at Trombay which was resulted in larger quantities of cutting and filling and they are fully aware of it.

3 18-4-1967 39 & 41 I told R. Krishnaswamy when he called me on 29-3-1967 that A.S.

Krishnaswamy and K.S. Joshi told me to change the levels of drawings of Trombay plot regarding rock cutting/filling job . In reply to the further query of R. Krishna-

swamy, I told him that I did not inform M.E. about this and that he might be knowing.

5 20-5-1967 69 In addition to the statement dated 18-4-1967, I have to submit that I was asked to change the original contour, place by A.S. Krishnaswamy, Senior Engineer.

6 4-8-1967 43 Sometime in September, 1965, A.S.

Krishnaswamy told me to increase the levels at random and bring the quality to about 30 lakhs cft. I did so accordingly.

7 4-8-1967 42 The Engineering Manager called me and Shri Joshi into his room one day and instructed me personally to increase the quantity.

_____ the prosecution ought to have made a serious attempt to produce K. S. Joshi whose testimony was essential to clear up the mystery in which the whole affair is shrouded. The non-production of K. S. Joshi who appears to have been one of the main actors in the drama has left a lacuna which is very difficult to bridge. In the present state of evidence, it is inconceivable that A-1 who admittedly had a meritorious record of service, had won commendation from the Board of Directors for designing a tank and saving considerable sums of money and who was the only Head of Department to be given three advance increments for his integrity and efficient work and who had no axe to grind would be a party to the unholy conspiracy for the removal of genuine level plan and work sheet and their substitution by spurious ones simply to obtain some pecuniary advantage for A-4 who was neither his friend nor relative. The position of A-2 is also not materially different as in his case also the prosecution has not been able to show that he derived any monetary gain out of the transaction.

Re. 4 :-A bare perusal of statement contained in Exhibit 43 which according to H.N. Roy Chowdhary (P.W. 2) and C. L. Shriyan (P.W. 23) was voluntarily and without any pressure made by A-3 is enough to show that it was in September, 1965 that A-3 increased the levels shown in the original drawings and brought up the quantity of rock cutting to 30 lakhs cft. This statement totally knocks the bottom out of the prosecution case that the spurious level plan and the work sheet were despatched to A-4 on August 19, 1965 as annexures to Exhibit 106. If the spurious plan and the work sheet came into existence in September, 1965, it is difficult to understand how they could be despatched to A-4 alongwith Exhibit 106 on August 19, 1965. The conclusion, therefore, is irresistible that when the communication (Exh.

106) was despatched to A-4, it was not accompanied by fabricated level plan (Exh. 24) and work sheet (Exh. 38) but by the genuine ones viz. Exhibits 22 and 23 and that it was later on that the genuine ones were removed and retained by A-3 who during the course of the enquiry by R. Krishnaswamy (P.W. 1) brought them from Ahmedabad and handed them over to P.W. 1. The omission on the part of Shriyan who claims to be certain that A-3 got the tracings Exhibits 24 and 38 prepared by him in April/May, 1965 to contradict A-3 when he made the aforesaid statement (Exh. 43) is also intriguing and lends assurance to the correctness of our conclusion.

Re. 5:-The first thing to be borne in mind with regard to the measurement certificates on the running bills is that it is the Assistant Engineer incharge of the work who is responsible for taking measurements of the actual quantities of the work executed by the contractor for entering the same in the measurement book and for recording a certificate that the measurements given in the bill are of the actual work carried out on spot in accordance with the Department's drawings and specifications. It has also to be remembered that A-1 had to look after the Corporation's projects and installations all over India and A-2 had to look after and supervise a large number of the Corporation's projects under the Western Branch which included installations at Sabarmati, Ahmedabad, Okha and Kandla in Gujarat and Sewri, Wadala and Trombay in Maharashtra and parts of Madhya Pradesh. It cannot also be ignored that according to Ganpati (D.W. 3) when a Senior Engineer visits the site, he determines the progress of the work by visual inspection determining visually the approximate quantity of the work done. All this apart, an examination of the running bills (Exhibits 51, 53, 54, 55 and 56) shows that all of them bear the certificates as referred to and reproduced at page 11 of this judgment. It would be noted that whereas first three of these bills bear the counter- signatures of A-2, Bill (Exh. 55) bears the countersignatures of K. S. Joshi, Senior Engineer and Bill (Exh. 56) bears the counter-signatures of Ramrao, another Senior Engineer, who was absolved in the departmental enquiry. Now the fact that A-2 countersigned the first three bills does not appear to be material in view of the following statement made by Ramrao vide Exhibit 107:-

"I had no reason to doubt Shri Vaidya's figures. Countersignature of a bill as per our prevailing practice is not indicative of verification but only indicates that there is no reason to doubt the correctness of the figures."

The fact that K. S. Joshi, Senior Engineer, also countersigned the bill (Exh. 55) which contains inflated figures and no action was taken against him also lends assurance to the inference that the counter-signatures were appended merely as a routine by the Senior Engineers who seem to have reposed blind and unflinching faith on the honesty of their subordinates.

Now if Ramrao who countersigned the bill (Exh. 56) showing the quantity of cutting work as 31 lakhs cft. was exonerated in the departmental enquiry and no action was taken against K. S. Joshi who made the wrong endorsement in respect of the measurement on Exhibit 55 or against Vora who had prepared the note (Exh. 58) showing that the work had been completed, it is difficult to understand how A-2 could be treated differently and criminal intention attributed to him. The finding of the High Court in respect of the third running bill (Exh. 54) that the very defence of A-2 would itself furnish the best evidence of the conspiracy involving A-1 is not correct for apart from other infirmities from which it suffers, it is well settled that the defence taken by one accused cannot in law be treated as evidence against his co-accused.

Re. 6 :-The finding of the High Court that A-1 signed the bill (Exh. 56) and sanctioned excess amount involved knowing full well that the bill was not true is also against weight of the evidence on the record. It cannot in the first instance be forgotten that it was on July 29, 1965 that A-1 could have had occasion to see the figures of the work for which sanction was granted by the Chairman of the Board of Directors and the bill (Exh. 56) was put up to him on December 30, 1967. In the

absence of the sanction from which the genuine figures could have been gleaned, it would not be reasonable to expect A-1 to remember the sanctioned figures after the lapse of 17 months specially when it is admitted on all hands that being the head of the Engineering Department, he had to tour extensively to supervise several projects spread all over the country and to discharge multifarious duties in connection therewith. The bill, it would be noted was prepared by A-3 and was countersigned by no less a functionary than the Deputy Engineering Manager, Ramrao, who was next below A-1 in the hierarchy of the Department. In the note prepared by him, it was not pointed out by A-3 that the bill had to go to the Managing Director. The evidence in the case also shows that A-1 was not expected to meticulously scrutinize the bill but was concerned only with the initialling of the note which although it had passed through several hands did not indicate that the competent authority to grant sanction for the excess amount was the Chairman of the Board of Directors.

It will also be wrong to hold A-1 responsible for simply initialling the note contained in Exhibit 56 without examining Ramrao who approved the bill including the note and also countersigned the measurement certificate before it came to A-1. In the circumstances, the mere initialling by A-1 of the bill alongside the note marked for him by A-2 is, therefore not a circumstance which can unmistakably be said to point to the guilt of the appellant.

An analysis of the circumstantial evidence adduced by the prosecution does not in our opinion lead to an unerring certainty that A-1 and A-2 acted with any dishonest or corrupt motive or abused their position.

In conclusion we cannot help observing that non- examination by the prosecution of Ramrao, Joshi, Vora and Patel who were material witnesses for the unfolding of its case has left some yawning gaps in the evidence which we have found very difficult to bridge. If these persons had been produce many of the points which have remained obscure and hidden up would have been cleared up.

For the foregoing reasons, we allow the appeals, set aside the convictions of the appellants and the sentences imposed upon them and acquit them of the offences with which they were charged.

P.B.R.

Appeals allowed.