Ashok Kumar Vs. C.B.I./Acb

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Court : Delhi

Decided On : Nov-19-2014

Judge : S. Muralidhar

Appellant : Ashok Kumar

Respondent : C.B.I./Acb

Advocate for Pet/Ap. : Mr. R.M. Tufail, Mr. Anwar A. Khan, Mr. Farooq Choudhary, Mr. Narender Mann, Mr. Manoj Pant, Ms. Uttkarsha Kohli, Ms. Anupama Sharma, Mr. Niraj Kumar Jha, Mr. Farooq

Judgement :

IN THE HIGH COURT OF DELHI AT NEW DELHI CRL.A. 138 of 2010 Reserved on:10th November 2014 Decision on:

19. h November 2014 SHABBAN Through: ..... Appellant Mr. R.M. Tufail, Mr. Anwar A. Khan and Mr. Farooq Choudhary, Advocates. Versus C.B.I./ACB Through: ..... Respondent Mr. Narender Mann, Spl. PP for CBI with Mr. Manoj Pant and Ms. Uttkarsha Kohli, Advocates. WITH CRL.A. 139 of 2010 JHARKHANDI RAI Through: ..... Appellant Ms. Anupama Sharma and Mr. Niraj Kumar Jha, Advocates. versus C.B.I./ACB Through: ..... Respondent Mr. Narender Mann, Spl. PP for CBI with Mr. Manoj Pant and Ms. Uttkarsha Kohli, Advocates. WITH CRL.A. 140 of 2010 MAHMOOD Through: Crl. A. No.138/2010 & connected matters ..... Appellant Mr. R.M. Tufail, Mr. Anwar A. Khan and Mr. Farooq versus

C.B.I./ACB Through: ..... Respondent Mr. Narender Mann, Spl. PP for CBI with Mr. Manoj Pant and Ms. Uttkarsha Kohli, Advocates. WITH CRL.A. 141 of 2010 ASHOK KUMAR Through: ..... Appellant Mr. R.M. Tufail, Mr. Anwar A. Khan and Mr. Farooq Choudhary, Advocates versus C.B.I./ACB Through: ..... Respondent Mr. Narender Mann, Spl. PP for CBI with Mr. Manoj Pant and Ms. Uttkarsha Kohli, Advocates WITH CRL.A. 142 of 2010 FAHEEM AHMAD Through: ..... Appellant Mr. R.M. Tufail, Mr. Anwar A. Khan and Mr. Farooq Choudhary, Advocates versus C.B.I./ACB ..... Respondent Through: Mr. Narender Mann, Spl. PP for CBI with Mr. Manoj Pant and Ms. Uttkarsha Kohli, Advocates CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

1911.2014 Introduction 1.These appeals are directed against the judgment dated 30th January 2010 passed by the learned Special Judge in Corruption Case No.78 of 1998, convicting the accused/Appellants for the offence under Sections 120B of the Indian Penal Code,1860 (IPC) read with Section 420 IPC and Section 13 (2) read with Section 13 (1) (d) of the Prevention of Corruption Act, 1988 (PC Act) and Section 25/27 of the Indian Telegraph Act, 1955 (IT Act). Additionally, Fahim Ahmed Abbassi (A-1) [the Appellant in Criminal Appeal No.(Crl.A) 142 of 2010]., Ashok Kumar (A-2) [the Appellant in Crl. A. No.141 of 2010]. and Mehmood Ahmed (A-3) [the Appellant in Crl.A. No.140 of 2010]. were convicted for substantive offence under Section 420 IPC and Jharkhandi Rai (A-5) [the Appellant in Crl.A.No.139 of 2010].was convicted for substantive offence under Section 13(2) read with Section 13(1) (d) of the PC Act and Section 25/27 of the IT Act.

2. These appeals are also directed against the order on sentence dated 8th February 2010 whereby all the Appellants were awarded one years rigorous imprisonment (RI) along with a fine of Rs.10,000each and in default to undergo simple imprisonment (SI) for two months for the offence under Section 120 B IPC read with Section 420 IPC and 13(2) read with Section 13(1) (d) of the PC Act and an identical sentence for the offence under Section 25/27 of the IT Act. Fahim Ahmed Abbassi, Ashok Kumar and Mehmood Ahmad were awarded two years RI with a fine of Rs.40,000 each and in default to undergo SI for two months for the

offence under Section 420 IPC. Jharkhandi Rai was awarded two years RI along with a fine of Rs.20,000 and in default to undergo SI for two months for the offence under Section 13(2) r/w Section 13 (1) (d) of the PC Act. All the sentences were directed to run concurrently.

3. At the time of admission of these appeals, the sentences awarded to the Appellants were directed to remain suspended. The case of the prosecution 4. The case of the prosecution was that a written complaint was filed by Mr. S.K. Peshin, Deputy Superintendent of Police (DSP), Central Bureau of Investigation (CBI), Anti Corruption Branch (ACB)(PW21) on 10th January 1995 stating that a surprise check was conducted at F18/8, Batla House, Jamia Nagar, New Delhi, in the presence of certain officials of the Mahanagar Telephone Nigam Limited (MTNL) and two independent witnesses to verify allegations regarding an ISD/STD racket being operated by some private persons in connivance with some officials of the MTNL, Okhla Telephone Exchange (OTE). During the course of the surprise check, two telephone numbers 6822682 and 6822683 were found installed in the said premises. The availability of ISD/STD facility on the said telephones was verified by the MTNL vigilance staff in the presence of the independent witnesses. It was revealed that two telephones were sanctioned in the name of Mr. Ayub Ali, resident of 337, B-1, Batla House and Mr. Mohd. Irfan, resident of D-40, Batla House respectively. Both the telephones were said to have been clandestinely shifted to18/8,Batla House in active connivance with Faheem Ahmed (A1), Jharkhandi Rai (A-5)who was a regular mazdoor with MTNL, OTE and some other unknown employees of MTNL. At the time of checking, Ashok Kumar (A-2) Mehmood Ahmed (A-3) were found providing STD/ISD facility to various parties at cheap rates causing substantial loss to the MTNL. They were doing this on the directions of A-1.

5. According to the prosecution, on further investigations and on perusing the official records of the MTNL, it was revealed that aforementioned two telephone connections were sanctioned on the deposit of Rs.30,000 on each telephone in the Tatkal category. A-1 and A-2 had got prepared on 9th September 1994 two bank drafts of Rs.30,000 from the Central Bank of India, Jamia Milia Branch in favour of MTNL. Two draft applications were submitted in the fictitious names of

Ayub Ali and Mohd. Irfan after OBs were issued to both the telephones. A-5 was deputed to install the telephone lines at the addresses given in OBs. A-5 installed both the telephones at F-18/8, Batla House, on 21st September 1994. The ISD facility on both the telephones was obtained by A-2 and A-3 with the assistance of Shabban (A-4) [the Appellant in Crl.A. No.138 of 2010]. who obtained forged attestations on the applications. The ISD facility was activated in both the telephones with effect from 27th September 1994. The non-payment of bills raised by the MTNL in respect of aforementioned telephone numbers for the period from 21st September 1994 to 10th January 1995 was to the tune of Rs.41,66,176 (for telephone number 6822683) and Rs.37,66,622 (for telephone number 6822682) respectively. Since A-5 was a public servant and the other accused were alleged to be in conspiracy with him, charges were framed against the accused for the aforementioned offences on 30th July 2002.

6. As many as twenty eight witnesses were examined by the prosecution. In their statements under Section 313 of the Code of Criminal Procedure (Cr PC), the accused denied the evidence and claimed to be falsely implicated. The judgment of the trial Court 7. In the impugned judgment, the trial Court, on an analysis of the evidence came to the following conclusions: (i) There were two independent witnesses namely Raj Kumar (PW4) and PW-6 both from Delhi Development Authority (DDA), who were part of the raiding party. They had described what transpired at the time of the raid. The failure to associate any other public witness from the spot could not lead to any adverse inference being drawn. (ii) The testimony of the officers of the CBI could not be rejected only because they belonged to the police force. (iii) A-2 and A-3 had voluntarily given their specimen signatures in the office of the CBI on 12th January 1995 in the presence of independent witnesses. From the evidence of PW-5, it transpired that A-1 also given his specimen hand writing voluntarily on 26th January 1995. PW-20 also supported the case of the prosecution in this regard. (iv) The questioned hand writings in the note book Ex. P-1 (D-39) and in another note book Ex. P-2 (D-38) were compared by the hand writing expert PW-23 and were found to match the specimen writings of A-2. It also contained the writings of A-1 and A-3. The writings on the application for telephone No.6822682 (Ex.PW-23/C) and the application in respect of the telephone No.6822682 were proved by PW-23 to be

those of A2. The writings on the reverse of the drafts were also proved to be that of A-2. It was proved beyond reasonable doubt that A-2 was involved in this deal. (v) It was proved in the evidence of Majid Ali (PW-16) and Mohd. Islam (PW-11) that A-4 had taken the two applications for attestations on which rubber stamps of Mrs. Mohini Anjum(PW1) were affixed. Those attestations on the applications were proved to be false and fictitious. (vi) The evidence of S.K. Peshin (PW-21) and Jai Raj (PW-22) showed that at the relevant time, A-5 along with PW-22 had visited the Batla House for installation of the two telephone connections and that it was A-5 who had verified the address of the premises where the phones were to be installed. (vii) Although PW-22 turned hostile, he supported the case of the prosecution regarding A-5 having verified the address of the premises where the phones were to be installed. (viii) The conspiracy could be inferred from the circumstances. In the present case the evidence led to the inference that a conspiracy was hatched by the accused with A-5 to have two telephones in the name of non-existent persons installed at F-18/8, Batla House for illegally running a PCO Booth and providing ISD/STD facility. (viii) PW-24 Shakti Saruphad proved the telephone bills in respect of the two telephone numbers and that they were unpaid in respect of both the telephones for the period21st September 1994 to10thJanuary 1995. The connections were disconnected on 10th January 1995 due to non-payment of the bills even as on 21stMay 1998.

8. The trial court convicted the Appellants for the offence aforementioned and sentenced them in the manner noted hereinabove.

9. This Court has heard the submissions of Mr. R.M. Tufail, learned counsel for the Appellants in Crl.A.Nos.138,140,141and 142 of 2010, Ms. Anupama Sharma, learned counsel for the Appellant in Crl. A. No.139 of 2010 and Mr. Narender Mann, learned Special Public Prosecutor (SPP). The role of A-5, the public servant
10. One of the central issues that had to be addressed by the trial court was whether the offence under Section 13(1)(d) read with Section 13(2) of the PC Act was made out against A-5, who was the only public servant amongst all the accused, being a regular mazdoor of MTNL. This assumed significance as a perusal of the charges framed against the accused shows that the first charge is that of conspiracy under Section 120B read with Section 420 IPC and 13(2) read

with Section 13(1) (d) of the PC Act and Section 27 of the IT Act. The second charge is against A1, A-2 and A-3 for dishonestly providing the STD/ISD facility and causing consequential financial loss to the MTNL, thus committing the offence punishable under Section 420 IPC. The third charge specific to A5 is for installing the two telephones illegally at an address other than those mentioned in the OBs, thus, committing the offence punishable under Sections 25/27 of the IT Act. The fourth charge is again specific to A-5 for abusing his official position and diverting the two telephones to an address used by A-1, A-2 and A-3unauthorisedly, thus committing the offence under Section 13(1) (d) read with Section 13(2) (d) of the PC Act.

11. The role that A-5 played in getting the two telephones installed at F18/8, Batla House requires to be examined first. A-5 was admittedly a regular mazdoor with the MTNL. Mr. M.L. Kochhar (PW-2), Divisional Engineer with the MTNL who was part of the team that had conducted the surprise check at F-18/8, Batla House on 10th January 1995, explained in his cross-examination the procedure involved in processing the applications for telephone connections. He stated that those days OB number used to be issued which was given to the Inspector for verification of the spot. Any field officer like JTO/TTA/ or Phone Inspector used to furnish the report after installation of the telephone connection to subscriber certifying the place of installation.

12. Mr. S.C. Duggal, Assistant General Manager (Law) MTNL (PW-7), was part of the raiding team. He stated in his cross-examination that he was not a technical person and only a Divisional Engineer could explain whether the exchange to which two telephones were connected was an electronic exchange or a cross bar exchange. Mr. K.K. Nayyar, Assistant Vigilance Officer, MTNL (PW-8), was also part of the raiding team. He stated that the two telephone numbers were found installed at F-18/8, Batla House which was a house under construction. They found A-2 and A-3 present at the spot. After confirming the two telephone numbers, they questioned A-2 and A-3, who purportedly told them that they were working for A-1. In their presence the equipments were seized. The STD/ISD facility from the numbers was confirmed by making calls to Jammu and United States of America. The printout of the calls were obtained from the OTE and

handed over to the CBI.

13. PW-8, in his cross-examination, explained the procedure involved in processing applications for telephone connections. He stated that the concerned area Inspector/JTO verifies the address where the telephones are to be installed. In the present case, he did not know who was the concerned JTO or Inspector. He did not check any record before proceeding on the raid. PW-8 further stated that apparatus for installation could be issued either to lineman or a regular mazdoor or inspector. In the present case, he did not know which of them had been given the apparatus for installation. He further confirmed that the JTO and the phone Inspector were the competent authority who after verification of the address of the subscribers issued the OBs.

14. When P.D. Singhal (PW-10) was asked about who had issued acknowledgment in respect of telephone Nos.6822282 and 6822283 (Ex. PW-10/C-1), he denied doing so and stated that it was some clerk in his office. He pointed out that the OBs were issued by the Commercial Officer (Registration).

15. The other mazdoor, who is supposed to have gone along with A-5 for installation of the two telephones, was Jairaj (PW-22) who was a regular mazdoor at the OTE. He, however, did not support the case of the prosecution. When confronted with his previous statement (Ex. PW22/A), he claimed that the CBI did not record his statement.

16. If one goes by the evidence of PW-8, it is plain that no mazdoor, on his own, can simply go ahead and install a telephone. An application has to be verified by the JTO or the Phone Inspector. Whether this part of the case was at all investigated by the CBI is not clear.

17. Surindeep Singh (PW-18) explained that the OB issued by the Commercial Officer, is directly received by the JTO and then the work is allotted to the concerned lineman for installation. PW-18 further stated:

The lineman or the regular mazdoor then checks the bonafide of the subscriber. Then, he gets filled the performa prescribed by the department which is called annexure-A. This annexure A, inter alia, contains that he is a bonafide consumer of the telephone. Both the copies of the performa annexure A is returned to the JTO. The JTO issued jumper letter for allotment of the telephone number and opening of the said number to the record section. The record section again verifies the bonafide of the subscriber on a clip test position of the exchange after installation of the telephone. After this verification by the record section, another number letter is issued to the switch room for opening of the telephone number. One copy of the jumper letter is issued to the switch room for opening of the telephone number. One copy of the jumper letter is sent to main distribution frame staff for jumpering of the telephone number of the cable pair allotted to the subscriber. Record section after verifying the number opened from the subscriber through telephone send the initial meter reading and the done copy of the account officer for processing the billing against the telephone. Baljore Singh was the record supervisor in the instant case in the year 1994. I can identify signatures of Baljore Singh on seizure memo Ex. PW18/A which is signed by Baljore Singh at point A. I can identify his signatures as I have seen him writing and signing. Through this memo, the documents were handed over to the CBI.

18. It is known in the present case as to who carried out all the above steps. In his cross-examination, PW-18 stated that he was not concerned with the verification of annexure-A at any stage as far as the case is concerned. With the prosecution having failed to prove the above aspects of the case, the entire chain of circumstances for proving the conspiracy is not complete.

19. The learned trial Court has relied on the answers given by PW-22 in his cross-examination that it was A-1 who had verified the address and he had accompanied A-1 to Batla House for installation of telephones. That still somehow does not prove the conspiracy between A-1 and other accused. Further, in the entire hierarchy of the MTNL with decisions being taken at various levels as explained by the witnesses from the MTNL it is difficult to believe that A-1 could in his official capacity take decisions on his own to instal a telephone line without anyone else in the organization being involved.

20. The documents produced include a duplicate application (Ex.PW23/C) and accompanied by a regular application (Ex. PW-23/B) in the name of Mr. Ayub Ali and the tatkal order issued (D-36) in respect of telephone number 6822282. There is a similar set of documents (Ex.PW23/Q and Ex. PW-23/R) in respect of the other telephone number 6822283 in the name of Mohd. Irfan. Both were under the tatkal system. What these documents show is that the applications were processed in the office of the MTNL on the basis of which OB letters were apparently issued. Importantly, there are documents to show that a sum of Rs. 30,000 each was in by demand draft for both the tatkal connections. What, however, is not clear is who was actually involved in the verification of the addresses and issuance of the OB letters, which were then purportedly handed over to PW-1 and PW-23 for installation of the telephones. This is an important link in the entire case which is missing.

21. Although there need not be direct evidence about a conspiracy but the evidence on record must give rise to a conclusive or irresistible inference of an agreement between the two or more persons to commit an offence.

In Esher Singh v. State of Andhra Pradesh (2004) 11 SCC585he Supreme Court explained the requirement for establishing the offence of conspiracy as under:

The circumstances in a case, when taken together on their face value, should indicate the meeting of the minds between the conspirators for the intended object of committing an illegal act or an act which is not illegal, by illegal means. A few bits here and a few bits there on which the prosecution relies cannot be held to be adequate for connecting the accused with the commission of the crime of criminal conspiracy.

In the present case too there are bits and pieces of evidence in the which somehow do not add up to conclusively prove the guilt of A-5 for the offence under Section 13 (1) (d) read with Section 13 (2) PC Act or even to prove beyond reasonable doubt the conspiracy between the accused. The role of A-1, A-2 and A-3 22. It has been urged by Mr. Mann, the learned Special Public Prosecutor (SPP), that the fact that the handwritings on the application forms have been proved by the handwriting expert (PW-23) to belong to Ashok Kumar and the fact that Ashok Kumar was found present at the premises where the two telephones were installed and the notebook recovered from the spot contained writings of A-1, A-2 and A-3 were sufficient to prove the conspiracy between them and A-1to cause losses to the MTNL by installing two telephones in the names of fictitious persons, at fictitious addresses.

23. In this regard, it should be noticed that the mere fact that the installation of telephones at a place different from the one indicated in the application forms might itself not complete the requirement for offence under Section 420 read with Section 120-B IPC. It requires many more personnel of the MTNL other than A-5 to process the application and install a telephone. However, for reasons best known to the CBI, they were not identified and proceeded against. While the handwriting experts opinion as regards the writings on the application forms being that of A-2 might be of corroborative value that cannot constitute substantive evidence for the offence of cheating or conspiracy between the different accused.

24. The prosecution has no doubt proved that a raid was conducted at the premises at F-8/18 Batla House in the presence of two independent witnesses, viz., PWs 4 and 6 and that they found the two telephones installed. They found A-2 and A-3 present there. Some documents and diaries were seized. This in turn led them to A-1. However, the above evidence by itself is hardly sufficient to prove that there was a conspiracy between the three accused to cause loss to the MTNL.

25. The principal charge was that A-1 was providing telephone services to customers based in Saudi Arabia and Gulf countries and the house where the instruments were installed belonged to his sister. However, no documents were recovered during investigation to connect A-1 with the premises in question.

26. The most important element of a loss being caused to MTNL as a result of the two telephones being installed has not been conclusively proved by producing records to show that the bills raised remained unpaid. In response to a question put to him in cross-examination, PW-8 stated as under:

Q. Is it correct that if a subscriber allows a person to use his phone free or takes some lesser amount from him no loss is caused to MTNL and no offence is made out?. A. It is correct. I cannot say if any offence is made out or not.

27. On the question of the bills raised, the prosecution examined Mr. Shakti Sarup (PW-24), who, at the relevant time was posted as accounts officer at the OTE and remained there up to March 1999. The bills in respect of two telephones - 6822682 and 6822683 were marked as Ex. PW-24/B1 to B8. What is significant in his cross-examination is that his statement was recorded on 21st May 1998 more than three years after the raid. A perusal of the bills shows that they are handwritten giving just the rent and total call charges. There is nothing to indicate that these bills were in fact raised and sent at the addresses given for the subscribers of the telephones, which were subsequently returned undelivered. The critical element of showing the loss to the MTNL was this important evidence, and if, indeed, the bill pertained to the calls made from these two telephones, the complete breakdown of the bills had to be shown with reference to how many calls were made on STD and ISD basis.

28. It was possible for the MTNL to produce such data as is evident from the call breakup details of 10th January 1995 which is document Ex.D-6. This gives the list of the calls made on 10th January 1995 and shows the details of the calls made between 9:44 am to 10:51 am in respect of telephone No.26822682 and for the other telephone between the same times. It is not understood why the details of the computer generated bill, which should have been available in the system, was not provided by the MTNL to the CBI. It is also not understood why the crucial details of the actual dispatch of the bill and it being returned undelivered, since the addresses were fictitious, was not proved by the prosecution.

29. It is significant that PW-24 states that his statement is not in his own handwriting. The other factor is that the statement was recorded more than three years later. Why this angle was not investigated for more than three years is again not known. The chargesheet was filed only on 5 th August 1998 and there was sufficient time for CBI to have gathered these details. The role of A-4 30. The involvement of A-4 is sought to be established through the evidence of Prof.

Mohini Anjum (PW-1), Mohd. Islam (PW-11) and Majid Ali (PW-16). What their evidence proves is that A-4 only brought the application forms for attestation to PW-16. It is not clear who forged the signature of PW-1 in those applications. This circumstance, by itself, is insufficient to hold in A-4 as being part of the conspiracy to cause financial loss to the MTNL for the installation of two telephones. Conclusion 31. Consequently, the Court is not persuaded to hold that the case against the accused has been proved by the prosecution beyond all reasonable doubt. It appears that there are huge gaps in the prosecution case, possibly on account of poor investigation. However, this cannot possibly be filled up by the Court.

32. For the aforementioned reasons, this Court sets aside the impugned judgment dated 30th January 2010 and the order on sentence dated 8th February 2010 of the learned trial Court.

33. The appeals are accordingly allowed. The bails bonds and the surety bonds of the Appellants shall continue for a period of three months in terms of Section 437-A Cr PC.

34. A certified copy of this order along with the trial Court record be sent back to the learned trial Court forthwith. S. MURALIDHAR, J.

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