IN THE GAUHATI HIGH COURT

(*THE HIGH COURT OF ASSAM, NAGALAND,MEGHALAYA, MANIPUR, TRIPURA, MIZORAM AND ARUNACHAL PRADESH***)**

SHILLONG BENCH

1.Crl. Appeal No. 2(SH) of 2009.

Shri. Jatin Dutta,
S/o (L) M. Dutta
R/o Motinagar, Shillong,
Meghalaya. **Appellant**

- versus -

The Central Bureau of Investigation,
Having Office at Oakland, Shillong,
East Khasi Hills District, Meghalaya

Respondent

2.Crl. Appeal No. 6(SH) of 2009.

Sri, Takap Ringu,
S/o Late Marke Ringu,
Resident of 'C' Sector,
Itanagar in Arunachal Pradesh.

Appellant

- versus -

The Central Bureau of Investigation,
Having Office at Oakland, Shillong,
East Khasi Hills District, Meghalaya

Respondent

BEFORE
THE HON'BLE MR JUSTICE T VAIPHEI

Advocate for the Appellants : Mr. D. Das, Sr. Adv
: Mr. S.P. Mahanta
: Mr. H. Abraham
: Ms. R.M. Kharsyntiew,

Advocate for the Respondent : Mr. V.K. Jindal, Sr. Advocate
: Mr. S. Jindal
: Mr. S. Dey

Date of Hearing :4.12.12

Date of Judgment and Order :30.01.2013

JUDGMENT AND ORDER

This two criminal appeals are directed against the judgment and order dated 11-5-2009 passed by the learned Special Judge, CBI, Shillong in Special Case No. 3 of 2002 convicting both the appellants under Section 120-B IPC and Section 13(2) of the Prevention of Corruption Act, 1988 ("the Act" for short) and sentencing them to undergo imprisonment for six months each for commission of the offence punishable under Section 120-B IPC and two years of imprisonment for a period of two years with a fine of Rs. 30,000/- and in default thereof to suffer another six months of imprisonment.

2. The materials fact leading to the filing of these appeals may be noted at the outset. The case of the prosecution is that Shri Takap Ringu, who was serving as Secretary to NEC at the relevant time ("A-1" for short), the appellant in Criminal Appeal No. 6(SH) of 2009 and Mr. Jatin Dutta, who was the Under Secretary to NEC at the sametime ("A-2" for short), the appellant in Criminal Appeal No. 2(SH) of 2009, Mr. N.D. Varma, the then Director of Indian Council of Agricultural Research (who died before framing of the charge and shall hereafter be referred to as "the deceased Director" for short) and Mr. Tanka Sangkhum, the then Chairman of the Barak Valley Hills Tribe Development Council, the non-appellant ("NA" for short) had entered into a criminal conspiracy to defraud the Government of India, which

resulted in causing huge loss to the Government and wrongful gain to themselves by sanctioning and disbursing a huge amount of financial assistance for plantation of Agar. In the course of investigation carried out by the CBI, it was revealed that NA in furtherance of the said conspiracy had forwarded several proposals from individuals for NEC grants-in-aid including applications seeking financial assistance for Rs. 54,000/- for plantation of Rs. 5,000 Agar plants in ten bighas of land without entering such applications or without giving receipt numbers in the NEC. According to the CBI, Mr. J.S. Syiem, the then Planning Advisor to NEC, the deceased Director, Mr. Promode Kant, Advisor (Forest) to NEC, Mr. K.N. Hazarika, Advisor (Industries) to NEC and Mr. Gautam Sen, Financial Advisor to NEC had decided in a meeting that due to problem of theft and requirement of protection, plantation in one-half hectare would be sufficient for each farmer. Though the aforesaid decision was seen by A-1 on 13-10-1997, he did not approve it due to criminal conspiracy and decided for plantation of Agar in a land measuring a minimum of 2 hectares per family and two hectare per member in the case of registered societies or NGOs. It was also found by CBI during investigation that the Advisor (Forest) had calculated the cost of plantation for Agar @ Rs. 7,250/- per hectare and intimated the same to the Planning Advisor vide his letter dated 31-10-1997, but the deceased Director against this calculation fixed the cost @ Rs. 1,02,375/- per hectare with a minimum of 2.52 hectares, which could be viable for economic return for Agar plantation which was done in conspiracy with A-1, A-2 with NA by selecting very few applicants among many applicants. The fact that there was mala fide intention on the part of the appellants and the

deceased Director in sanctioning the grants at a much higher rate than the one recommended by the Advisor (Forest) came to light from the subsequent act of A-2 in refusing to make over the concerned and the applications available to the said Advisor who had called for the same vide his note dated 13-9-1998.

3. It is the further case of the CBI that when the file was placed before the said Planning Advisor, he raised objection vide his noting dated 27-10-1997 by remarking that all the proposals for intensive cultivations were to be examined at the same time not piecemeal after the scheme was framed; that the scheme concerning medicinal and aromatic plants had to be considered separately; and that the Advisor (Forest) should also examine the proposals. Ignoring those advice, A-2 processed the file on 1-12-97 and reiterated his earlier recommendations for sanctioning Agar plantation in 4.5 hectares of land for societies and 2.5 acres for five members of the Barak Valley Hills Tribe Development Council ("the Society" for short) for cultivation of Agar at an estimated cost of Rs. 35,83,250/- and submitted the file directly to A-1. Further investigation revealed that A-2 had noted in the file that A-1 agreed to for NEC support for five members of the Society, among others, and put up the draft A/A order for sanctioning Rs. 11,51,719/- for the five members of the Society vide the sanction order dated 26-12-97 and released a sum of Rs. 5,75,859/- by way of first instalment, which facilitated the passing of bill No. 431/EEMAP, dated 30-12-1997 for the said amount in favour of the Society by Bank Draft No. MTL/E 185526 dated 7-1-1999, which was deposited with SBI/Silchar Bazar on 24-1-1998,

which was opened only on 23-1-1998 in the Account No. CA/8/852, (New Account No. 01000/050026). NA thereafter withdrew the said amount and misappropriated the same without executing the project for which it had been sanctioned. It was further revealed that one of the members of the Society, namely, Mr. Ngurlunthang was not even aware of this financial grant. It is the case of the CBI that as per the sanction order, the Chairman of the Society was required to submit the quarterly report on the progress of the scheme, but neither the appellants enquired about the progress of the scheme nor did the Society submitted its report, which resulted in the loss of Rs. 5,75,859/- to the Government and in causing wrongful gain to the appellants and the Society. They were accordingly charge-sheeted under Section 120-B/420/409 IPC read with Section 13(2) of the Act. After hearing the appellants and the non-appellant, the learned Special Judge framed the charges against them U/s 120-B/420 IPC and Section 13(3) of the Act, to which they pleaded not guilty to the charges and claimed to be tried. In the course of trial, the prosecution examined as many as 22 witnesses and exhibited some 21 documents and two paper marks, while the defence exhibited 2 exhibits in the course of examination of the prosecution witnesses. After examination of the witnesses, the appellants and the non-appellant were examined under Section 313 CrPC whereafter the impugned judgment was passed by the trial court. The legality of the impugned judgment is now called into question in this batch of appeals.

4. The trial court recorded the findings that as many as 31 applications were received for Agar plantation as reflected in the file

relating to NEC/PLANTATION/1-40/97 at page 153 vide Ext. 12; that as per Ext. 11, A-2 had proposed for consideration of only five applications and the applications of five members of the Society; that the Planning Advisor (J.S. Syiem), who was examined as PW 4 had advised in his note Ext. 10 that all proposals for intensive cultivation were to be examined at the same time after framing of the scheme, while the scheme for medicinal and aromatic plants should be examined separately and such applications should not be considered piecemeal. It is further observed by the trial court that there was no note made by A-2 justifying him for selecting the five members of the Society and that instead of following the advice of PW 4, A-2 proceeded to process the file of the Society on 1-12-1997 and put it up directly to A-1 by recommending the financial support sought for by the Society. According to the trial court, the manner in which the application of the Society was selected and the file processed by A-2 and promptly acted upon the recommendation by A-1 led one to the inevitable conclusion that they were interested to abuse their official positions to help the members of the Society obtained pecuniary benefits. The learned Special Judge also found that PW 16, Advisor (Forest), vide his note dated 19-3-1998 had called for the file relating to Texus Bacatta and Agar, but the same was never put up before him on the pretext that the file was dealt with the deceased Director and that A-1 wanted the present system to continue. This is corroborated by the evidence of PW 16. The trial court also found that as per Paper Mark 2, a meeting was convened by PW 4 wherein the all Sectoral Heads, such as Advisor (Forest), Advisor (Industries) and Financial Advisor had agreed that the problem with Agar plantation was that it

was highly liable to be theft, that the question of protection was very important and unless the tree was protected effectively, the farmer would not be able to harvest the crop and therefore recommended one-half hectare of land would be sufficient for each farmer. It was further recommended therein that it was only after the approval of the scheme and approval of the project that the applications would be scrutinized and selection for candidate would be done. The trial court held that in spite of the decisions taken at Paper Mark 2, A-1 and A-2 proceeded to sanction the financial assistance to members of the Society which clearly demonstrates that they not only abused their official positions but also committed criminal conspiracy to support the applications of five members of the Society. The trial court concluded as follows:

> **"In this instant case taking into consideration the evidence as discussed above, in its totality and act of accused Mr. Takap Ringu and Mr. Jatin Dutta from Ext. 10, 11, 13, 15 (in Special Case No. 4/2002) as well as Paper Mark 2 of Special Case No. 2/2001 shows that they have by-passed all other Sectoral Head; and without any reason and justification proposed and select 5(five) members of Barak Valley Hills Tribe Development Council and get approval and released an amount of `5,75,859/- (Rupees five lakhs seventy five thousand eight hundred fifty nine)only, from such act of accused persons inference can be drawn definitely that official accused persons had dishonest intention and conspired and got approved few applications though there were many applicants applied for.**
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> **Similarly, from the evidence as discussed above, it is clear and appears that Mr. Takap Ringu and Mr. Jatin Dutta had abused their official positions while working as Secretary NEC and Under Secretary (Planning) as such, I find them guilty of committing offence of abusing of their official position under section 13(1)(d)(ii) of P.A. Act 1988 and accordingly both the accused persons Mr. Takap Ringu and Jatin Dutta are also hereby convicted for criminal misconduct under section 13(2) of P.C. Act 1998."**

5. Unfolding his submissions, Mr. D. Das, the learned senior counsel for A-2, argues that the question of A-2 deviating from any rules of procedure does not arise on the facts of this case inasmuch as no guidelines or rules were formulated by the Government at the relevant time, and the finding of the trial court to that effect is, therefore, untenable and perverse; this alone is enough to set aside the impugned judgment of conviction. He further submits that the CBI has miserably failed to prove that A-1 obtained a valuable thing or pecuniary advantage to himself or to any other person for the simple reason that none of the prosecution witnesses have ever made any allegation to that effect; the question of A-1 abusing his position as a public servant or by means of corrupt or illegal means to obtain for himself or for any other person any valuable thing or pecuniary advantage cannot, on the facts found in this case, arise at all. He maintains that all the bills passed from NEC have financial concurrence followed by sanction order and that on the evidence of some of prosecution witnesses, it has been established that all the Sectoral Heads were involved in sanctioning the application of the Society and in releasing the first instalment amounting to Rs. 5,75,859/- to members of the Society, and the application was processed through proper channels; the findings to the contrary recorded by the trial court are, therefore, based on no evidence. The learned senior counsel, therefore, submits that the impugned judgment of conviction cannot be sustained in law and is liable to be set aside.

7. Mr. SP Mahanta, the learned counsel for A-2 (Mr. Jatin Dutta), while supporting the contentions of learned senior counsel for A-2, also makes additional submissions. In the first place, he submits that the evidence of PW 5 (who was at the relevant time the Planning Adviser to NEC), who had called for the meeting on 8-9-1997 vide Paper Mark 2 would go to show that the minutes of the meeting dated 8-9-1997 (Paper Mark 2) was never approved by the Secretary, and the same was only a record of the discussion, a fact corroborated by the evidence of PW 19 and, as such, such the recommendation could not be binding upon any official. In any case, contends the learned counsel, Paper Mark 2 is merely a Xerox copy, and is not admissible in evidence and the trial court has acted illegally in relying on this inadmissible evidence to convict the appellants. It is submitted by the learned counsel that prior to the discussion held on 8-9-1997 vide Paper Mark 2, a decision had already been taken by A-2 and PW 5 on 17-7-1997 vide the Note Sheet of File No. NEC/Agri/1-97 regarding the modus operandi for intensive cultivation/plantation and these were printed in the media and was published in the *Sentinel, Apphira and Shillong Times* in their issues dated 29-7-1997. The trial court grossly erred in convicting A-1 without taking these facts in account. It is also the contention of the learned counsel that the NEC scheme for intensive cultivation was for societies and not for individuals and altogether five proposals of registered societies were received which included 29 individual applications of different members of M/s Barak Valley Hills Tribe Development Council and those 29 applications individual applications and all applications for *Agar* plantation were taken up and processed at the sametime, and the trial court is wrong

in holding that those applications were processed on piecemeal basis. Drawing my attention of the evidence of PW 6, PW 10 (Financial Advisor to NEC) and Exhibit B, financial concurrence was given for sanction of the grants, and no objection was ever raised by PW 10 before or after the sanction order, and this evidence was completely overlooked by the trial court while convicting A-1. It is pointed out by the learned counsel that the deceased Director had calculated all the components including cultivation, maintenance, fencing, growing period, etc. for propagation of *Agar* plant for a certain period of years keeping in view the local price index and the conditions prevalent in the area at that time, and the trial court has completely ignored these glaring facts while sanctioning the scheme and had recommended the cost for the plantation at Rs. 5,75,859/- and only the first instalment was released, and the question of sanctioning a higher rate than prescribed cannot arise.

8. Referring to the evidence of PW 8, the learned counsel submits that as *Agar* was included in the Agriculture Sector, there was no irregularity on the part of the deceased Director, who was the ex-officio Advisor to NEC (Agriculture & Allied) to deal with the file of *Agar*, in examining the proposal of the Society and no written order was issued by PW 8 or otherwise for putting up the file prior to the release of the first instalment of grant. According to the learned counsel, the prosecution witness have established that there was proper utilization of fund released to the Society by the NEC, which goes to show that the first instalment had been utilized to the maximum by the Society, and there is thus no evidence to hold that

the appellants have abused their official positions: A-2 is entitled to be acquitted, The learned counsel also submits that the conviction of A-1 under Section 120-B IPC cannot be sustained in law when the trial court acquitted NA-1 and NA-2. It is further contended by the learned counsel that when the trial court has already discharged all the co-accused in five cases based on the same complaint, it should not have convicted the appellant in the instant case: the conviction of the appellant by holding that he had misused his official position in this case and on the same breath holding the six co-accused demonstrably shows that the conviction of A-2 is illegal. It is also the contention of the learned counsel that there is no whisper of evidence to prove that A-2 misappropriated the released fund or that he had received pecuniary advantage by putting the Government to a loss; the conviction of A-2 is thus unsustainable in law. Finally, the learned counsel submits that the prosecution has miserably failed to prove that a criminal conspiracy was hatched by A-1 and A-2 together with NA-1 and NA-2 to defraud the Government and that A-2 abused his official position to help NA-1 and NA-2 obtained pecuniary advantage, and, as such, his conviction is liable to be set aside.

9. Mr. V.K. Jindal, the learned senior counsel for the CBI, however, vehemently supports the findings of the trial court in respect of A-1 and A-2 and submits that the trial court has correctly appreciated the evidence on record. He contends that the evidence i.e. the documentary evidence exhibited by the CBI and fully corroborated by the evidence of official witness and other evidence on record clearly establish the commission of the white collar crimes and the manner in

which they were committed, for which the interference of this Court is not called for. According to the learned senior counsel, quoting from the decision of the Apex court, the expression "proof beyond reasonable doubt" is merely a guideline, not a fetish, and the prosecution is not required to meet any and every hypothesis put forward by the appellants. He further submits that a reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair doubt based on reason and common sense; man may lie but documentary evidence will never. The learned senior counsel also points out that as per the evidence of PW-24, who was the Registrar of Societies at the relevant time, the Society was registered only on 4-9-1997 while the evidence of PW 9 established that the application of the Society was signed by NA-1as late as 18-8-1997 and, therefore, submits that the application of the Society for the grant-in-aid was not even a registered society on 18-8-1997 when the application was submitted: PW 5 (who was the Principal Chief conservator of Forest at that time) revealed that the application of the Society was forwarded by him on 18-8-1997.

10. After hearing the learned counsel appearing for A-1 and A-2 and the learned counsel for the CBI at considerable length and on perusing the impugned judgment and other materials on record, the first question which falls for examination is as to whether the offence of Section 13(2) of the Prevention of Corruption Act, 1988 ("the Act" for short) has been committed by A-1 and A-2? Undoubtedly, these two appellants are public servants coming within the purview of Section 2(*c*) of the Act. Section 13(2) is the penal section for the

offence of criminal misconduct while Section 13(1)(*d*) explains the offence of criminal misconduct. Section 13(1)(d) is in the following terms:

> **"13. (1) A public servant is said to commit the offence of criminal misconduct**
>
> **(*d*) if he,—**
>
> **(*i*) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or**
>
> **(*ii*) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or**
>
> **(*iii*) while holding office as a public servant, obtains for any person any valuable thing or [pecuniary advantage without any public interest;"**

Thus, to attract the provisions of Section 13(1)(d) of the Prevention of Corruption Act, public servant should obtain for himself or any other person any valuable thing or pecuniary advantage

(i) by corrupt or illegal means, or

(ii) by abusing his position as a public servant, or

(iii) without any public interest.

The term "abuse" is explained by the Apex Court in ***M. Narayan Nambiar v. State of Kerala, AIR 1963 SC 1116,*** to mean "misuse i.e. using his position for something for which it is not intended". From the evidence of PW 4 (Planning Advisor), PW 5 (Financial Advisor), PW 7 (Deputy Secretary, Administration) and PW 8, the then Accountant in the NEC (who gave the same evidence in Special Case No. 4 of 2002 as PW 4) and other prosecution witnesses, I have no hesitation to hold that no set of guidelines governing/regulating the

manner in which financial grants to support intensive Agar cultivation were to be sanctioned by the NEC was made at the time when the Society (Barak Valley Hill Tribes Development Council) received the financial grant in question. The case of appellants is that in the absence of such guidelines, no irregularity was, or could have been committed, by the appellants in sanctioning the grant to the Society. There cannot also be any dispute by now that Paper Mark 2, which is the minutes of the meeting convened by PW 5 on 9-8-1997, is indisputably not admissible in evidence inasmuch as this document is merely a Xerox copy and not the original document. Moreover, the recommendations made by the high officials of NEC such as Planning Advisor, Financial Advisor, Environment and Forest Advisor and other Sectoral Heads recorded in the minutes of the said meeting were never approved by the Secretary, NEC (A-2) and, as such, they cannot be held to be binding upon the officials of the NEC. However, the moot point is whether, notwithstanding the absence of any set of guidelines, A-1 and A-2 had the unfettered power to pick and choose the beneficiary for the grant of financial assistance at their whims and caprice? In my opinion, they did not have: there is no longer such untrammelled or unguided power in a country governed by the rule of law. From the evidence of PW 4 (Planning Advisor), PW 5 (Financial Advisor), PW 7 (who was then the Deputy Secretary, Administration, NEC), PW 13 (Accountant in the Finance Wing of the NEC in 1997-98), PW 15 (the informant), and PW 16 (Environment & Forest Advisor to NEC), it has been proved that there was an established office practice and procedure requiring the examination of any application for financial support for intensive cultivation by all Sectoral

Heads/Advisors such as the Planning Advisor, Advisor Forest, etc., and then financial scrutiny of those proposals to be made by Financial Advisor and it was only after the examination that the matter was finally placed before the Secretary, NEC for final decision. Undoubtedly, these are normal official transactions in every public office, which are to be scrupulously followed by the officials of the establishment. True, the Secretary, NEC had the discretion to overrule the recommendation/assessment of the Sectoral Heads but with a cogent reason and not whimsically. This is obviously a salutary and wholesome practice prevailing in any Government establishment to ensure that the financial support so granted is received by deserving applicants for a genuine cases and that there was no arbitrariness in the decision-making process.

11. PW 4, who was the Planning Advisor to NEC at NEC at the relevant time, has deposed that after the meeting held on 8-9-1997 vide his office note dated 27-10-1997, he had specifically advised that all the applications received in respect of Agar plantation should be considered at the same time. The said note dated 27-10-1997 is exhibited as Ext. 10. He had mentioned therein that such applications could not be considered piecemeal and the Advisor (Forest) should also examine the file. However, he further testified, he did not know what had happened thereafter as the same was never re-submitted. From Ext. 13, it is seen that the file was directly placed by A-2 before A-1 on 1-12-1997 and vide the note dated 23-12-1997, A-2 mentioned that A-1 had given his approval for a financial support of Rs. 5,75,859/-/-, in favour of the Society vide Ext. 10(3) apart from

some other societies with which were are concerned in this appeals. The statement of PW 4 is corroborated in full by the statement of PW 16, who also tendered the same evidence as PW 19 in Special Case No. 2 of 2001 and as PW 8 in Spl. Case No. 4/2002 and who testified in his cross-examination to the effect that PW 4 had advised in his note dated 23-10-97 that all such applications should be processed together after the guidelines had been evolved. In his examination-in-chief, he testified that A-2 had directly placed the six proposals including the proposal of the Society before A-1 against the advice of PW 4 and that the Advisor, Forest, should be consulted with regard to the applications for Agar plantation. He also deposed that A-2 did not mention any reason for selecting these six beneficiaries including the Society from amongst the 29 applications for Agar plantation so received. According to PW 8, A-2 in his note dated 1-12-1997 (Ext.13) indicated that he was submitting the note as directed by the A-1 and that A-2 signed the same on 12-12-1997 meaning thereby that he had given his approval for the proposal submitted by A-2. It is further deposed by PW 16 that the Ministry of Environment & Forest, Govt. of India had given an estimate of Rs. 10,215/- per hectare for plantation of non-timbers such as *Agar* plantation in the North Eastern Region and further allowed addition of up to 50% in activities like awareness creation, Joint Forest Management, Fencing, etc., yet the grant was sanctioned to the Society at the rate of Rs. 1,02,375/- per hectare, which was about 8 to 9 times higher than the amount estimated by the said Ministry. This witness further disclosed that when vide note dated 19-3-1998 (Ext. 15), he asked for file relating to plantation of Texus Bacatta and *Agar* from A-2, the same was not made available to

him by Shri V.K. Lyngdoh, ARO on the pretext that as the subject was being dealt with the deceased Director.

12. PW 11, who had tendered his evidence in Special Case No. 3 of 2002, also corroborated the statements of PW 4 and 5, and deposed that in this case, the normal channel of submission of file was not followed by A-2, who directly submitted the file to A-1 on 1-12-1997 and on the approval by A-1 on 12-12-1997, the draft sanction was prepared and put up by A-2 on 23-12-1997 before the Financial Advisor not for financial concurrence but to see whether the draft sanction order was in order and the same was simply marked to S.O. (Finance): financial occurrence was to be obtained prior to the examination for approval by the A-1. In this connection, the testimony of the Deputy Secretary, Administration (PW7) threw much light on this issue. The following the extract of his deposition:

> **"In this particular case, if we look ino the file No. NEC/Plantation/1-40/97 which is Ext. 12 in the instant case (Ext. 9 in Spl. Case No. 2/2001, Ext. 10 in Spl. Case No. 4/2002 this is not the route/procedure which is actually followed by which I mean the normal channel of submission of file is not followed. What has happened in this case is that the then Under Secretary Mr. Jatin Dutta has sumitted the file directly to the Secretary on 1/12/97 and the Secretary gave approval on 12/12/97.**
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> **Ext. 12/1 is the office note dt. 1/12/97 put up by the then Under Secretary to the Secretary and Ext. 12/2 is the signature of the Secretary dt. 12/12/97 at pahe 5 of the note side of Ext. 12.**
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> **On the tour note of the Financial Adviser the Secretary instructed hat I should look after the works of the Financial Advisor during the period when F.A. was on official tour. I do not recollect the date but it was around 20th or 21st December 1997. My understanding is that the Financial Adviser is not on**

leave but on official tour which meant he was on duty and since there cannot be two F.A. during the given period my duty only involve routine work works which did not involve substantive decision. Hence, I have not given any financial concurrence in respect of the case of Barak Hills Tribe Tribal Development Council.

What happened in this instant case was the file was submitted by the Under Secretary directly to the Secretary and the Secretary gave approval to the proposal submitted as in the note 1-12-97, on 12-12-97 and based on the approval of the Secretary a draft sanction order was prepared and put up by the Under Secretary on 23-12-97 to the Financial Adviser and Ext. 12/3 is the said note dt. 23-12-97 at page 5, 6 and 7 of the note sheet. Hence, the issue here is not financial concurrence but to see whether the draft sanction order was in order and the same was simply marked to S.O. Finance, as the proposal had already been approved by the Secretary. And there was definitely procedural lapses"

13. In the cross-examination of this witness by the defence, nothing tangible has been brought out to discredit his testimony. Therefore, vide the note dated 23-12-97 at Ext. 12(B) it was shown that financial concurrence was never given by the Financial Advisor as he was on official tour; financial concurrence could not have been given by the Deputy Secretary under such circumstances. The evidence of PW 17 is also to the same effect. The cross-examination of PW 7, 8, 11 and 17 did not elicit anything to falsify their testimonies. The fact that a sum of Rs. 5,75,859/- was received by the Society is not an issue here inasmuch there was no denial on this issue by any of the accused. According to PW 16, the Ministry of Environment & Forest, Govt. of India had given an estimate of `10,215/- per hectare for plantation of non-timbers such as *Agar* plantation in the North Eastern Region and further allowed addition of up to 50% in activities like awareness creation, Joint Forest Management, Fencing, etc., yet the grant was sanctioned to the Society at the rate of Rs. 1,02,375/-

per hectare, which was about 8 to 9 times higher than the amount estimated by the said Ministry. This evidence of PW 16 is not controverted by the defence. There is thus a difference between the estimate of the Ministry of Environment & Forest, Govt. of India and the estimate made by the deceased Director to the extent of Rs. 92,160/- (Rs. 1,02,375 –Rs. 10215). It is not a difference of one hundred rupees or one thousand rupees but in terms of tens of thousands for the plantation, which is hardly believable. In the absence of proper explanation from the appellants, the inference is inevitable that they were granting the financial assistance on the basis of highly inflated cost to hand out undue benefit to NA. This act of commission on the part of A-1 and A-2 is one of the circumstantial evidence to prove abuse of official position by them. Coming now to the question as to whether the Society actually utilised the first instalment to them, heavy reliance is placed by Mr. S.P. Mahanta, the learned counsel for A-2 to the evidence of PW 19, who partly investigated the case, wherein in the cross-examination, he had admitted that NA issued the utilization certificate on 4-2-1998 in respect of Rs. 5,75,859/-, to prove that the fund was properly utilized by the Society. This is in the light of the allegation made by the prosecution that the fund was not utilized for the purpose for which it had been sanctioned.

13. The prosecution, in order to prove that the fund was improperly utilized by NA, tendered the evidence of one Ngurlunthang as PW 21, the Chairman of the Society after NA when the latter resigned in 1999, who testified that NA had to resign as there was

misutilization charges against him of the fund released by the NEC by members of the Council (the Society) and that in his letter dated 8-1-2000, he had written to the CBI that there was no record maintained in Society regarding the fund released by the NEC and that he could not say how much money was released by the NEC to him nor did he know for what purpose the same was released as there was no record in the Society and that he learnt that the money was received directly by NA from one K. Khamthant (now deceased), who was also a member of the Society. This is coming from no less a person than the Vice-Chairman of the Society when the fund was disbursed to and received by NA on behalf of the Society. In his cross-examination, he disclosed that during the tenure of NA, he was the Vice-Chairman with NA as the Chairman of the Society. The evidence of PW 19 has proved that the fund was not utilized for the purpose for which it had been sanctioned and that the same was misappropriated by NA. NA in his examination under Section 313 CrPC has admitted the receipt of the money; what he denied is that the amount was spent for militant camp. In my opinion, once he has admitted the receipt of the money and asserted that he utilized the same for cultivation and did not pay for any militant camp, in the light of the above evidence against him, the onus has naturally shifted to him to prove the manner in which the fund was utilized by him with evidence. After all, this is a fact especially within his knowledge; he must prove it with evidence. Having failed to adduce evidence to rebut the prima facie evidence against him, there is no difficulty in holding that NA did never utilize the sum of Rs. 5,75,859/- sanctioned and released to him for the Society by the NEC as alleged by the CBI.

14. The question to be determined now is whether, on the facts found above, the offence of Section 13(2) of the Prevention of Corruption Act, 1988 ("the Act" for short) has been committed by A-1,A-2 and A-3. Undoubtedly, these three appellants are public servants coming within the purview of Section 2(c) of the Act. Section 13(2) is the penal section for the offence of criminal misconduct while Section 13(1)(*d*) explains the offence of criminal misconduct. Section 13(1)(d) is in the following terms:

> **"13. (1) A public servant is said to commit the offence of criminal misconduct**
>
> **(*d*) if he,—**
>
> **(*i*) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or**
>
> **(*ii*) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or**
>
> **(*iii*) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest;**
>
> * * *
> *
>
> **(2) Any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to seven years and shall also be liable to fine.**

Thus, to attract the provisions of Section 13(1)(d)(ii) of the Prevention of Corruption Act, public servant should obtain for himself or any other person any valuable thing or pecuniary advantage by abusing his official position as a public servant. The term "abuse" is

explained by the Apex Court in ***M. Narayan Nambiar v. State of Kerala, AIR 1963 SC 1116,*** to mean "misuse i.e. using his position for something for which it is not intended". In my opinion, the acts of commission and omission committed by A-1 and A-2 referred to in the foregoing constitute an abuse of their official positions to enable NA, under the guise of supporting Agar plantation, obtained pecuniary advantage to the order of Rs. 5,75,859/-, which resulted in wrongful loss to the NEC and wrongful gain to NA. They are, therefore, punishable under Secion 13(2) of the PC Act.

15. The next question for determination is, whether there was criminal conspiracy among A-1, A-2 together with NA to cause wrongful loss to the Government to the order of Rs. 5,75,859/- under the guise of granting financial assistance for intensive plantation of Agar? The law relating to criminal conspiracy is no longer res integras: the difficulty lies in applying the law to the facts obtaining in a particular case. Be that as it may, I still deem it necessary to refer to the law of criminal conspiracy as lucidly explained by the Apex Court in ***Mohd. Khalid v. State of W.B., (2002) 7 SCC 334***:

> "*17. It would be appropriate to deal with the question conspiracy. Section 120-B IPC is the provision which provides for punishment for criminal conspiracy. Definition of "criminal conspiracy" given in Section 120-A reads as follows:*
>
> *"120-A. When two or more persons agree to do, or cause to be done,—*
> *(1) an illegal act, or*
> *(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:*

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

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

18. No doubt in the case of conspiracy there cannot be any direct evidence. The ingredients of the offence are that there should be an agreement between persons who are alleged to conspire and the said agreement should be for doing an illegal act or for doing by illegal means an act which itself may not be illegal. Therefore, the essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence

or by circumstantial evidence or by both and it is a matter of common experience that direct evidence to prove conspiracy is rarely available. Therefore, the circumstances proved ***before***, ***during*** *and* ***after the occurrence*** *have to be considered to decide about the complicity of the accused."*

*** *** ***

26. We may usefully refer to ***Ajay Aggarwal v. Union of India***[10]*. It was held:*

"8. … It is no necessary that each conspirator must know all the details of the scheme nor be a participant at every stage. It is necessary that they should agree for design or object of the conspiracy. Conspiracy is conceived as having three elements: (1) agreement; (2) between two or more persons by whom the agreement is effected; and (3) a criminal object, which may be either the ultimate aim of the agreement, or may constitute the means, or one of the means by which that aim is to be accomplished. It is immaterial whether this is found in the ultimate objects. The common law definition of "criminal conspiracy" was first stated by Denman in ***Jones case***[11] *that an indictment for conspiracy must 'charge a conspiracy to do an unlawful act by unlawful means' and was elaborated by Willies, J on behalf of the Judges while referring the question to the House of Lords in* ***Mulcahy v. R.***[12] *and House of Lords in unanimous decision reiterated in* ***Quinn v. Leathem***[13]*:*

'A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more, to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, actus contra actum, capable of being enforced, if lawful; and punishable if for a criminal object, or for use of criminal matters.'

9. This Court in ***E.G. Barsey v. State of Bombay***[14] *held:*

'The gist of the offence is an agreement to break the law. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done had not been done. So too, it is an ingredient of the offence that all the parties should agree to do a single illegal act. It may comprise the commission of a number of

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[10] (1993) 3 SCC 609: 1993 SCC (Cri) 961: JT (1993) 3 SC 203
[11] R. v. Jones, (1832) 4 B & Ad 345: 110 ER 485
[12] (1868) LR 3 HL 306
[13] 1901 AC 495
[14] AIR 1961 SC 1762: (1961) 2 Cri LJ 828

acts. Under Section 43 of the Indian Penal Code, an act would be illegal if it is an offence or if it is prohibited by law.'

In ***Yash Pal Mittal v. State of Punjab***[15] *the rule was laid down as follows: (SCC p. 543, para 9)*

'... The very agreement, concert or league is the ingredient of the offence. It is not necessary that all the conspirators must know each and every detail of the conspiracy so long as they are co-participators in the main object of the conspiracy. There may be so many devices and techniques adopted to achieve the common goal of the conspiracy and there may be division of performances in the chain of actions with one object to achieve the real end of which every collaborator must be aware and in which each one of them must be interested. There must be unity of object or purpose but there may be plurality of means sometimes even unknown to one another, amongst the conspirators. In achieving the goal several offences may be committed by some of the conspirators even unknown to the others. The relevant factor is that all means adopted and all illegal acts must be and purported to be in furtherance of the object of the conspiracy even though there may be sometimes misfire or overshooting by some of the conspirators.'

10. In ***Mohd. Usman Mohd. Hussain Maniyar v. State of Maharashtra***[16]*, it was held that for an offence under Section 120-B IPC, the prosecution need not necessarily prove that the conspirators expressly agreed to do or cause to be done the illegal act, the agreement may be proved by necessary implication."*

15. From the facts found by me, it is clearly established that A-2 was more than enthusiastic (in fact, thrill?) processing the file relating to the Society (Barak Valley Hills Tribe Development Council) and got the approval of A-1 conveniently ignoring the advice of PW 4 who had asked him to process all the applications together and not piecemeal. This, as noted earlier, is against the established office practice and procedure or against the official transaction norms, which are consistently followed in any office of public character. A-1 has no autocratic or arbitrary power to by-passed all normal channels

[15] (1977) 4 SCC 540: 1978 SCC (Cri) 5
[16] (1981) 2 SCC 443: 1981 SCC (Cri) 477

of the decision-making process as otherwise there is point of appointing Sectoral Heads such as Planning Advisor, Forest Advisor, Financial Advisor, etc. Again, as found by me earlier, though Paper Mark 2 is not admissible in evidence as well as not binding instruction, yet the fact in terms of such advice, the fact PW 4 had clearly advised A-2 to keep the processing of the application till the scheme was evolved, which was ignored by him on the pretext that he was doing so on the advice of A-1, is not denied in the cross-examination. Moreover, the testimony of PW 7 has clearly established that no financial concurrence to the proposed sanctioned amount was accorded by PW 5 is not shaken in his cross-examination. In addition, no reason was assigned by A-1 and A-2 for selecting, among 29 applications, the application of the Society for the grant. The subsequent conduct of A-2 for not making over the file relating to *Agar* and *Texus bacatta* plantation to PW 16 (Forest Advisor) is another circumstance indicating the act of commission or omission by A-1 and A-2,. Why should they try to hide such file to the officials of their own establishment? There is no rational explanation for keeping these officials out of the loop unless they had an intention to abuse their official positions to dole out undue financial assistance to the Society, which, as it turned out, did not utilize the grant for the purpose for which it was sanctioned, namely, for intensive plantation of *Agar*. Similarly, as against the rate for plantation of *Agar* estimated by the Ministry of Environment & Forest, Government of India, whose expertise and authority in a case of this nature cannot be easily questioned, for Rs. 10,215/- per hectare, both A-1 and A-2 approved the estimate for the plantation @ Rs. 1,02,375/- per hectare, which

was almost ten times more. The fact that NA did not utilize the fund released to the Society for Agar plantation has been clinchingly proved by PW 19 and PW 21. The financial assistance was granted at the initiative of NA, who was the then Chairman of the Society.

16. In my opinion, the totality of the circumstances established in the foregoing have unerringly proved beyond any shadow of doubt that A-1, A-2 have hatched a criminal conspiracy to abuse their official positions in collusion with NA to hand out undue pecuniary advantage to the order of Rs. 5,75,859/- which is a public money and have in process wrongful loss to the Government of India. Consequently, I unhesitatingly hold that the three officials and non-officials accused, namely, Shri Tikap Ringu (A-1), Shri Jatin Dutta (A-2) and Shri T. Sangkhum (NA) are guilty of the offence punishable under Section 120-B IPC. However, as there is no appeal against the acquittal of NA, no formal conviction order can be passed against him and is, therefore, allowed to go scot free. Though the ingredients of the offences punishable under Section 420/409 read with Section 34 IPC are also made out against all these accused, I refrain from dealing with the same for the simple reason that no argument was advanced by the parties in this behalf. I am also constrained to observe that the sentence imposed upon both the appellants are inadequate considering the gravity of the criminal misconduct proved against him, but I decline to interfere therewith in the absence of appeal by the CBI for enhancement of their sentence. Of course, a number of doubts are sought to be created by Mr. S.P. Mahanta, the learned counsel for A-2 on the evidence of the prosecution, I am of the firm

view that the doubts pointed out by him are merely in the realm of possible doubts. On the contrary, the kind of doubts pointed out by the learned counsel are completely answered by Apex Court in the ***State of Punjab v. Karnail Singh, (2003) 11 SCC 271*** in the following manner:

> *"12. Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty is not doing justice according to law. (See* ***Gurbachan Singh v. Satpal Singh***[12]*.) The prosecution is not required to meet any and every hypothesis put forward by the accused. (See* ***State of U.P. v. Ashok Srivastava***[13]*.) A reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. If a case is proved perfectly, it is argued that it is artificial; if a case has some flaws inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty persons must be allowed to escape. Proof beyond doubt is a guideline, not a fetish. [See* ***Inder Singh v. State*** *(****Delhi Admn***[14]*.)]. Vague hunches cannot place of judicial evaluation. "A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties." (Per Viscount Simon in* ***Stirland v. Director of Public Prosecution***[15] *quoted in* ***State of U.P. v. Anil***[16]***,*** *SCC p. 692, para 17.) Doubts would be called reasonable doubt if they are free from a zest for abstract speculation. Law cannot afford any favourite other than the truth. (See:* ***Shivaji Sahabrao Bobade v. State of Maharashtra***[17]*,* ***State of U.P. v. Krishna Gopal***[18] *and* ***Gangadhar Behera v. State of Orissa***[19]*.)*

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[12] (1990) 1 SCC 445: 1990 SCC (Cri) 241: AIR 1990 SC 209
[13] (1992) 2 SCC 86: 1992 SCC (Cri) 241: AIR 1992 SC 840
[14] (1978) 4 SCC 161: 1978 SCC (Cri) 564: AIR 1978 SC 1091
[15] 1944 AC 315: (1944) 2 All ER 13(HL)
[16] 1988 Supp SCC 686: 1989 SCC (Cri) 48: AIR 1988 SC 1998
[17] (1973) 2 SCC 793: 1973 SCC (Cri) 1033: (1974) 1 SCR 489
[18] (1988) 4 SCC 302: 1988 SCC (Cri) 928: AIR 1988 SC 2154
[19] (2002) 8 SCC 381: 2003 SCC (Cri) 32: (2002) 7 Supreme 276

17. For the afore-mentioned reasons, both the appeals sans merit are, therefore, dismissed. The bail-bonds of both the appellants (A-1 and A-2) stand cancelled. They shall surrender before the learned Special Judge, Shillong on or before 19-2-2013. On their surrender, they shall be taken into custody forthwith to serve out the sentence imposed upon them by the impugned judgment. Send down the L.C. record without any loss of time.

JUDGE