16 SCOB [2022] HCD 178

HIGH COURT DIVISION
(Criminal Revisional Jurisdiction)

Criminal Revision No. 2304 of 2018

Abdul Hye and another
Vs.
The State and another

Mr. S. M. Mahbubul Islam, Advocate
…… for the Convict-petitioners
Mr. Sk. Md. Morshed,
Additional Attorney General with
Ms. Jesmin Sultana Shamsad, DAGs
Ms. Yesmin Begum Bithi, DAGs
Mr. Apurbo Biswas and
Mr. Md. Alauddin, AAGs
…… for the opposite party No. 1

Heard on: 26.01.2021, 02.02.2021, 09.02.2021, 23.02.2021 and 01.03.2021

Present:
Mr. Justice Zafar Ahmed

Editors' Note:
The trial Court found the petitioners guilty under section 466, 468, 471, 420 read with Section 34 of the Penal Code and sentenced them to suffer imprisonment of various length with fine. Appellate Court affirmed the conviction and sentence. On revision, a single Bench of the High Court Division found the petitioners not guilty of forgery but guilty of abetting forgery under section 466/109 of the Penal Code. Charge was not framed against the petitioners under section 466/109 of Penal Code. The High Court Division explaining section 237 and 238 of the Code of Criminal Procedure held that these two sections are exceptions to the general rule that an accused cannot be convicted of an offence in the absence of a specific charge. Under Section 237 an accused may be convicted of an offence, although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made. Moreover, the High Court Division found the petitioners guilty under section 471 of the Penal Code but on a different reasoning than that of Courts below. It held that the petitioners used the forged document in Writ Petition No. 9008 of 2005 as Annexure-C which is evident from the judgment passed by the Appellate Division in Civil Appeal No. 163 of 2009 (reported in 24 BLT (AD) 340) and as such had committed offence punishable under section 471 of the Penal Code. However, the High Court Division found the petitioners not guilty under sections 468 and 420 of Penal Code. Consequently the Rule was discharged with modification of sentences of the petitioners.

Key Words:
Section 463, 464, 466, 471 and 109 of Penal Code; forgery; abetment; Section 237 and 238 of Code of Criminal Procedure, 1898

Trial Court cannot hold something to be forged unless evidence is adduced to that effect:
In this regard, it is relevant to mention that an opinion of the Ministry of Law, Justice and Parliamentary Affairs was attached to the memo dated 14.08.2005 (exhibit-4) in which opinion was given in favour of mutating the tea estate in the name of the petitioner No. 1. The trial Court held that the said opinion was also forged. Be that as it may, the prosecution never alleged that the opinion in question was forged. It did not

produce any evidence to that effect. Therefore, the finding of the trial Court cannot be sustained. ...(Para 23)

Section 463 and 464 of Penal Code:

Evidences of P.W.11 clearly establish that the memo in question (exhibit-4) was a false document within the definition of making a false document given in the 1st clause of Section 464. Undoubtedly, an attempt was made to grab the tea estate by mutating it in the names of the petitioners by using a false document which is an act forgery within the meaning of Section 463. ...(Para 26)

If a document is not tendered in evidence, mere reference of it is not sufficient for holding it to be a legal evidence:

Both the Courts below held that the petitioners created the forged government memo (exhibit-4) and accordingly, found them guilty of the offence under Section 466 of the Penal Code. .... In this regard, the trial Court referred to and relied upon an inquiry report dated 06.04.2005 prepared by the Additional Divisional Commissioner (Revenue), Sylhet Division and the judgment passed in Civil Appeal No. 163 of 2009 (reported in 24 BLT (AD) 340). P.W.7 referred to the inquiry report, but it appears that neither any of the witnesses tendered the said report in evidence nor the maker of the report was examined as a witness. Therefore, the inquiry report is not a piece of evidence. So far as the judgment passed by the Appellate Division is concerned, suffice it to say that the trial Court must come to a finding of its own based on the legal evidences on record. The issue in the reported judgment being different, the same has no bearing upon the issue in hand *i.e.* whether the petitioners created the forged memo (exhibit-4). ...(Para 27)

Section 466 read with Section 109 of the Penal Code:

In the case in hand, the prosecution though failed to prove that the petitioners made the forged government memo, but facts and circumstances clearly point out that they are instrumental in getting the false memo. In such a situation, there is nothing in law to prevent them from being guilty of abetting the offence of making the forged government memo (exhibit-4). Hence, they should be convicted under Section 466 read with Section 109 of the Penal Code, not under Section 466 alone. ...(Para 29)

Sections 237 and 238 of the Code of Criminal Procedure:

The petitioners were not charged with abetting the offence. Sections 237 and 238 of the Cr.P.C. are exceptions to the general rule that an accused cannot be convicted of an offence in the absence of a specific charge. Under Section 237 an accused may be convicted of an offence, although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made. Accordingly, this Court takes the view that the petitioners are guilty for abetting the offence of making forged government memo. ... (Para 29)

Section 471 of the Penal Code:

Using a document as genuine when the document is known to be a forged document is the gravamen of the offence under Section 471 of the Penal Code. To constitute an offence of use of a forged document as contemplated by Section 471, it is sufficient to establish that it is used in order that it may ultimately appear in evidence or that it is used dishonestly or fraudulently. Therefore, in order to bring a person within the purview of Section 471, it is enough if he files a forged document, which he knows or

has reason to believe to be a forged document (*Ramavtar Missir vs Rajindra Singh*, (1961) 2 CrLJ 139). The convict-petitioners abetted in making the forged memo (exhibit-4). They dishonestly used the said forged memo in the writ petition. Therefore, they are guilty of the offence under Section 471 of the Penal Code. ...(Para 31)

JUDGMENT

Zafar Ahmed, J:

1. The instant revision is directed against the judgment and order dated 09.08.2018 passed by the Judge, Jananirapatta Bignokari Aparadh Daman Tribunal and Special Sessions Judge, Sylhet in Criminal Appeal No. 41 of 2017 dismissing the appeal and affirming the judgment and order dated 02.02.2017 passed by the Chief Metropolitan Magistrate, Sylhet in Kotwali G.R. No. 1146 of 2005 arising out of Kotwali Police Station (P.S.) Case No. 12 dated 02.11.2005 convicting the petitioners under Section 466, 468, 471, 420 read with Section 34 of the Penal Code and sentencing them to suffer rigorous imprisonment for 06 years and to pay fine of Tk. 10,000/- each, in default to suffer simple imprisonment for 03 months for the offence under Section 466; rigorous imprisonment for 06 years and to pay fine of Tk. 10,000/- each, in default to suffer simple imprisonment for 03 months for the offence under Section 468; rigorous imprisonment for 01 year for the offence under Section 420; and rigorous imprisonment for 01 year for the offence under Section 471.

2. The appellate Court below did not mention whether the sentences of imprisonment shall run concurrently or consecutively. The trial Court directed to run all the sentences concurrently.

3. The convict-petitioner No.1 Abdul Hye is the son of the convict-petitioner No. 2 Ragib Ali. The then Assistant Commissioner of Land, Sadar Thana, Sylhet, namely S.M. Abdul Kader (P.W.9) is the informant of the case.

4. Prior to lodgment of the instant F.I.R, the informant filed another case being Kowali P.S. Case No. 117 dated 27.09.2005 (G.R. No. 974 2005) against the petitioners and others wherein the accused persons except one Pankaj Kumar Gupta, who was acquitted of the charges, were convicted under Sections 467, 468, 420 and 471 of the Penal Code. The appeal against the said order of conviction is now pending before the lower appellate Court.

5. Earlier, in Writ Petition No. 9008 of 2005 the High Court Division quashed the proceedings of both P.S. Case Nos. 117 dated 27.09.2005 and 12 dated 02.11.2005 (instant case). In Civil Appeal No. 163 of 2009, the Appellate Division on 19.01.2016 set aside the judgment passed in the writ petition. The judgment of the apex Court was reported in 24 BLT (AD) (***Bangladesh vs. Abdul Hye and others***).

6. The prosecution case, as stated in the F.I.R., in short, is that Baikuntha Chandra Gupta gifted all his movable and immovable properties including Tarapur Tea Estate situated at Sadar Police Station under Sylhet district in favour of the Deity Sree Sree Radha Krishna Jieu on 02.07.1915 by a registered deed. Since then the tea estate is being treated as debutter property.

7. It has been further stated in the F.I.R. that by dint of a general power of attorney being No. 11586 dated 07.08.1988 the absolute authority to manage the tea estate was given to the

petitioner No.1 Abdul Hye. Thereafter, another special power of attorney being No. 14141 dated 12.11.1988 was obtained from the Shebait of the tea estate, namely Pankaj Kumar Gupta and on the basis of the same Rabeya and others executed a registered bainanama being deed No. 12140/1988 for sale of the tea estate to the petitioner No.1. The Shebait of the tea estate applied to the government for permission to transfer the tea estate. The Ministry of Land, vide memo No. Bhu:Ma:/Sha-8/Khajob/53/89/446 dated 12.10.1989 under the purported signature of an Assistant Secretary of the Ministry accorded permission to the Shebait to transfer the tea estate subject to the conditions contained therein. Pursuant to the said permission letter, on behalf of the Shebait one Dewan Mostak Majid executed a lease deed being No. 2395 dated 12.02.1990 for 99 years in favour of the petitioner No.1 in respect of the tea estate fixing the consideration at Tk. 12,50,000/- although the market value of the tea estate was not less than Tk. 800 crore. Subsequently, it was revealed, vide memo No. Bhu:Ma/Sha-8/Khajob/ 319/91/757 dated 12.09.2005 issued by the Ministry of Land that the earlier permission letter dated 12.10.1989 was created by forging the signature of the Assistant Secretary. Kotwali P.S. Case No. 117 dated 27.09.2005 was filed for the said forgery against the petitioners and others.

8. It has been further stated in the F.I.R. that some local persons made a representation dated 29.12.2004 to the Prime Minister of the country to protect the tea estate from the land grabber Ragib Ali (petitioner No.2). Being instructed by the Ministry of Land, the Additional Divisional Commissioner of Sylhet Division conducted an inquiry and submitted a report regarding various irregularities in respect of the tea estate and made recommendations to take specific steps.

9. Thereafter, on 20.08.2005 the office of the Deputy Commissioner, Sylhet as well as the informant received a letter being No. Bhu:Ma:/Sha-8/Khajob/399/91/170 dated 14.08.2005 (exhibit-4) shown to have been issued by the Ministry of Land under the purported signature of the Senior Assistant Secretary of the said Ministry (P.W.11) wherein it has been stated that the representation dated 29.12.2004 was false and baseless and that the inquiry report was inconsistent. The Deputy Commissioner was asked to mutate the properties of Tarapur Tea Estate. A copy of the opinion of the Ministry of Law, Justice and Parliamentary Affairs was attached to the said memo.

10. The specific prosecution case as stated in the F.I.R. is that the purported signature of the Senior Assistant Secretary contained in the memo dated 14.08.2005 (exhibit-4) was compared with signatures of the said Senior Assistant Secretary contained in other letters which were lying with the office of the Deputy Commissioner, Sylhet and inconsistency in the signatures was detected. In order to ascertain the genuineness of the said memo (exhibit-4), the Deputy Commissioner wrote a letter dated 24.08.2005 to the Ministry of Land. The Ministry, vide letter dated 31.10.2005 (exhibit-7) confirmed that the memo dated 14.08.2005 (exhibit-4) was forged. Accordingly, allegations were brought against the petitioners for the offence of forgery and other offences.

11. An Inspector of Police of PBI (P.W.6) investigated the case and submitted charge sheet being No. 132 dated 10.07.2016 under Sections 466, 468,471,420 read with Section 34 of the Penal Code against the convict-petitioners.

12. After submission of the charge sheet, the case was taken up for trial. Charge was framed against the petitioners under Sections 466, 468,471,420 read with Section 34 of the Penal Code which could not be read over to them as they were absconding. Subsequently,

they were arrested by police. The prosecution examined 11 witnesses. They were extensively cross-examined by the defence. The petitioners were examined under Section 342 of the Code of Criminal Procedure (in short, the 'Cr.P.C.') wherein they pleaded that they were innocent and wanted to examine witnesses in their defence. Accordingly, the defence examined 2 witnesses. The prosecution produced oral as well as documentary evidences to prove the case. The defence did not produce any documentary evidence.

13. The trial Court held that in order to misappropriate Tarapur Tea Estate, the petitioners forged two government memos, namely memo dated 12.10.1989 and memo dated 14.08.2005 (exhibit-4) respectively. The trial Court further held that the petitioners forged those memos for the purpose of cheating and fraudulently used them as genuine for illegal gain and thus, committed the offences under Sections 466, 468, 471, 420 and 34 of the Penal Code and accordingly sentenced them thereunder as stated above.

14. Being aggrieved, the petitioners preferred an appeal in the Court of Sessions Judge, Sylhet. The appeal was heard on transfer by the Special Judge and Jananirapatta Bignokari Aparadh Tribunal, Sylhet. The learned Judge of the Tribunal was pleased to dismiss the appeal upholding the conviction and sentence passed by the learned Magistrate. The lower appellate Court, though assigned its own observations, but ultimately did not interfere with the findings and reasons given in the judgment passed by the trial Court. Thereafter, the petitioners moved this Court challenging the judgment and order of dismissal of the appeal and obtained the instant Rule in the revision.

15. The learned Advocate for the petitioners, at the outset, submits that the memo dated 12.10.1989 was the subject matter of the earlier Kotwali P.S. Case No. 117 dated 27.09.2005. The learned Advocate further submits that in the instant case, the said memo was included in the description of the charge, but the prosecution did not make any attempt to prove by adducing any evidence that the memo was forged, yet both the Courts below held that the petitioners had forged the said memo dated 12.10.1989 and used it as genuine. In this regard the learned Additional Attorney General submits that in the case in hand the specific prosecution case is that the petitioners forged the memo dated 14.08.2005 (exhibit-4) and used it as genuine and therefore, both the Courts below ought to have confined to the points of determination with regard to the memo dated 14.08.2005 only. He further submits that the memo dated 12.10.1989 was referred to build up a scenario of forgery committed by the petitioners which culminated in forging the memo dated 14.08.2005 and using the same as genuine. Upon perusal of the evidences and material on records, it appears that a separate case was initiated for forgery with regard to the memo dated 12.10.1989. Since the commission of the offence of forgery with regard to the said memo is a distinct offence, I find substance in the submissions of the learned Additional Attorney General. Accordingly, in the instant revision the only issue for determination is whether the conviction and sentence passed by the Courts below relating to forgery of the memo dated 14.08.2005 (exhibit-4) by the petitioners and use of it as genuine by them is maintainable.

16. The learned Advocate for the petitioners next submits that in the instant case the charge was defective. The learned Additional Attorney General, on the other hand, refers to Sections 225 and 537 of the Cr.P.C. and submits that since the defence was not misled by the error in the charge, the same did not cause a failure of justice. The learned Advocate for the petitioners found it difficult to lay his hands on the argument.

17. The first question to be answered is whether the memo dated 14.08.2005 (exhibit-4) was forged. P.W.9 (the then Assistant Commissioner of Land, Sylhet Sadar and informant of the case) deposed that after receipt of the memo in question, the then Deputy Commissioner

of Sylhet raised a doubt about the genuineness of the same. He wrote a letter to the Ministry of Land for clarification. The Ministry, vide memo dated 31.10.2005 (exhibit-7) confirmed that the memo dated 14.08.2005 was forged.

18. For ready reference the memo dated 14.08.2005 (exhibit-4) is reproduced below:

গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
ভুমি মন্ত্রনালয়
শাখা নং-৮

নং-ভূম/শা-৮/খাজব/৩৯৯/৯১/১৭০ তারিখ: ৩০-০৪-১৪১২ সাং
১৪-০৮-২০০৫ ইং

প্রেরক ঃ শাহ মো: ইমাদাদুল হক
সিনিয়র সহকারী সচিব
ভূমি মন্ত্রনালয়।

প্রাপক ঃ জেলা প্রশাসক
সিলেট।

বিষয় ঃ তারাপুর চা বাগানের উপর অতিরিক্ত বিভাগীয় কমিশনার (রাজস্ব), সিলেট এর তদন্ত প্রতিবেদন সংক্রান্ত প্রসংগে।

সুত্র ঃ অতিরিক্ত জেলা প্রশাসক (রাজস্ব), সিলেট। সিনিয়র সহকারী কমিশনার, সিলেট। সহকারী কমিশনার (ভূমি), সদর উপজেলা, সিলেট, সমন্বয়ে গঠিত বিভাগীয় কমিশনারের কার্যালয়, সিলেট হইতে তদন্ত প্রতিবেদন দাখিল।

উপরোক্ত বিষয়ে সুত্রোল্লিখিত তদন্ত প্রতিবেদনে দেখা যায় অভিযোগকারী জনাব লাবলু মিয়া, হিরণ মিয়াম, বশির আহমদ এবং হাশিম মিয়া গত ২৯/১২/২০০৪ ইং তারিখে মাননীয় প্রধানমন্ত্রীর দপ্তর বরাবর যে আবেদন করিয়াছেন তাহা মিথ্যা ও ভিত্তিহীন বলিয়া প্রমানিত হইয়াছে। সিলেট জেলার সদর থানাধীন তারাপুর চা বাগানটির ইতিপূর্বে যে সকল মতামত, তদন্ত ও অন্যান্য প্রয়োজনীয় দলিলাদি সংগ্রহ করা হইয়াছে তাহার সংজ্ঞে বিভাগীয় কমিশানর কার্যালয় হইতে যে তদন্ত প্রতিবেদন তৈরী করিয়া মন্ত্রনালয়ে প্রেরণ করা হইয়াছে তাহাতে অসংগতি ও অসামাঞ্জস্য।

উক্ত তারাপুর চা বাগানটির নামজারীরর বিষয়ে আইন, বিচার ও সংসদ বিষয়ক মন্ত্রনালয়ের মতামতের সত্যায়িত ফটোকপি এতদসংগে প্রেরণ করা হইল। উল্লেখিত চা বাগানটি নামজারীর ব্যাপারে আইন, বিচার ও সংসদ বিষয়ক মন্ত্রনালয়ের মতামতের আলোকে পরবর্তীতে প্রয়োজনীয় কার্য্যক্রম গ্রহন করিবার জন্য অনুমতিক্রমের অনুরোধ করা হইল।

স্বাক্ষর
(শাহ মো: ইমদাদুল হক)
সিনিয়র সহকারী সচিব।

তারিখ: ৩০-০৪-১৪১২ সাং
১৪-০৮-২০০৫

19. The memo dated 31.10.2005 (exhibit-7) is also reproduced below:

গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
ভুমি মন্ত্রনালয়
শাখা নং-৮

নং-ভূঃমঃ/শা-৮/খাজব/৩১৯/৯১/৯১৯ তারিখ: ৩১/১০/২০০৫ ইং

প্রেরক ঃ শাহ মো ঃ ইমাদাদুল হক
সিনিয়র সহকারী সচিব

প্রাপক ঃ জেলা প্রশাসক
সিলেট।

বিষয় ঃ **তারাপুর চা বাগানের উপর অতিরিক্ত বিভাগীয় কমিশনার (রাজস্ব), সিলেট এর তদন্ত প্রতিবেদন এবং ভূমি মন্ত্রনালয়ের সিনিয়র সহকারী সচিব জনাব শাহ ইমদাদুল হকের স্বাক্ষরটির সাথে জেলা প্রশাসনে প্রাপ্ত অন্যান্য পত্রের স্বাক্ষরের সহিত অসামঞ্জস্য পরিলিক্ষিত হওয়া প্রসংগে।**

সুত্র ঃ তাহার স্মারক নং এস,এ/বন্দো/৫-৫/৯৯-০৫/২০৩৯, তারিখ ঃ ২৪০৮/২০০৫ ইং।

উপরোক্ত বিষয় ও সুত্রের বরাতে আদেশক্রমে জানানো যাইতেছে যে, ভূমি মন্ত্রনালয়ের ৮ নং শাখা হইতে ১৪/৮/২০০৫ ইং তারিখে কোন পত্রই ইস্যু/জারী করা হয় নাই এবং ১৭০ নং স্মারকে মাননীয় প্রধানমন্ত্রীর অনুমোদনক্রমে র‍্যাপিড এ্যাকশন ব্যাটালিয়ন (র‍্যাব-২) কে ঢাকা জেলায় ৭.০০ একর খাস জমি বন্দোবস্ত দেওয়া হইয়াছে। সুতরাং দেখা যাইতেছে যাচাইয়ের জন্য প্রেরীত ভূমি মন্ত্রনালয়ের ১৪/৮/২০০৫ ইং তারিখের ১৭০ নং স্মারকের কথিত পত্রটি জালিয়াতির মাধ্যমে সৃজন করা হইয়াছে। তারাপুর চা বাগানের জমি জবর দখলের মাধ্যমে আত্মসাৎ, মেডিকেল কলেজ ও মার্কেট নির্মাণ এবং হাউজিং প্লট বিক্রয়ের সাথে মিঃ আব্দুল হাই ও জনাব রাগীব আলী গং সরাসরি জড়িত। উক্ত ভুয়া পত্রটি স্বাথ-সংশ্লিষ্ট ও সংঘবদ্ধ দলেরই কাজ মর্মে প্রতীয়মান হইতেছে। ফলে উক্ত পত্র সৃজনের সহিত স্বার্থ সংশ্লিষ্ট ব্যক্তিদের বিরুদ্ধে সরকারী সম্পত্তি আত্মসাতের নিমিত্ত জাল-জালিয়াতির মাধ্যমে ভূয়া পত্র/সরকারী আদেশ সৃজনের দায়ে পৃথক ফৌজদারী মামলা রুজু করিবার জন্য অনুরোধ করা হইল। পরবর্তী অগ্রগতি মন্ত্রনালয়কে অবহিত করণের জন্যও অনুরোধ করা হইল।

বিষয়টি জরুরী।

সংযুক্ত ঃ ০২ ফর্দ।

স্বাক্ষর
(শাহ মো: ইমদাদুল হক)
সিনিয়র সহকারী সচিব।
তারিখ: ৩১/১০/২০০৫ ইং

20. The learned Advocate for the petitioners submits that neither the prosecution obtained opinion of the handwriting expert in respect of the disputed signature nor the trial Court took recourse to Section 73 of the Evidence Act, 1872 which provides for the direct comparison by the Court of the disputed signature with undisputed one. The learned Advocate submits that in the circumstances it cannot be said that the disputed signature contained in exhibit-4 has been proved beyond reasonable doubt as forged.

21. P.W.11 Shah Imdadul Huq, under whose purported signature the memo in question (exhibit-4) was shown to have been issued, categorically deposed before the Court that he did not sign the said memo and that the memo was created using his name and forging his signature. Memo dated 31.10.2005 (exhibit-7) issued under the purported signature of P.W.11 fortifies the fact that the signature contained in exhibit-4 was forged. Exhibit-7 was not challenged by the defence. In this regard, the trial Court observed, "…রাষ্ট্রপক্ষের গুরুত্বপূর্ণ সাক্ষী পি. ডব্লিউ-১, পি. ডব্লিউ-৯ ও পি. ডব্লিউ-১১ নির্দিষ্টভাবে আসামীদের বিরুদ্ধে যে জাল জালিয়তির অভিযোগ উত্থাপন করেছেন ঐ স্মারকপত্র বিষয়ে অর্থ্যাৎ ১৪/০৮/২০০৫ তারিখের কথিত স্মারকপত্র বিষয়ে এই ০৩ (তিন) জন সাক্ষীকে আসামীপক্ষ সুনির্দিষ্টভাবে কোন জেরা করেন নাই দু একটি সাজেশন দেয়া ছাড়া। যদিও ঐ সাজেশনগুলো এই সাক্ষীরা অস্বীকার করেছেন".

22. In view of the evidences and materials on record and reasons assigned by the trial Court I am of the view that examination of the disputed signature by an expert or comparison of the same with undisputed one by the Court was not at all necessary.

23. In this regard, it is relevant to mention that an opinion of the Ministry of Law, Justice and Parliamentary Affairs was attached to the memo dated 14.08.2005 (exhibit-4) in which opinion was given in favour of mutating the tea estate in the name of the petitioner No. 1.

The trial Court held that the said opinion was also forged. Be that as it may, the prosecution never alleged that the opinion in question was forged. It did not produce any evidence to that effect. Therefore, the finding of the trial Court cannot be sustained.

24. Section 463 of the Penal Code defines 'forgery'. Section 463 runs thus:

> 463. **Forgery—**Whoever makes any false document or part of a document, with intent to cause damage or injury, to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intend to commit fraud or that fraud may be committed, commits forgery.

25. Section 464 of the Penal Code lays down provisions regarding 'making a false document'. For ready reference Section 464 is quoted below:

> 464. **Making a false document—** A person is said to make a false document—
> Firstly.-Who dishonesty or fraudulently makes, signs, seals or executes a document or part of a document, or makes any mark denoting the execution of a document, with the intention of causing it to be believed that such document or part of a document was made, signed, sealed or executed by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed or executed, or at a time at which he knows that it was not made, signed, sealed or executed; or
> Secondly.-Who, without lawful authority, dishonestly or fraudulently, by cancellation or otherwise, alters a document in any material part thereof, after it has been made or executed either by himself or by any other person, whether such person be living or dead at the time of such alteration; or
> Thirdly.-Who dishonestly or fraudulently causes any person to sign, seal, execute or alter a document, knowing that such person by reason of unsoundness of mind or intoxication cannot, or that by reason of deception practiced upon him he does not know the contents of the document or the nature of the alteration.

26. Evidences of P.W.11 clearly establish that the memo in question (exhibit-4) was a false document within the definition of making a false document given in the 1st clause of Section 464. Undoubtedly, an attempt was made to grab the tea estate by mutating it in the names of the petitioners by using a false document which is an act forgery within the meaning of Section 463.

27. Both the Courts below held that the petitioners created the forged government memo (exhibit-4) and accordingly, found them guilty of the offence under Section 466 of the Penal Code. In so doing, the appellate Court below observed, " আসামী-আপীলকারীরা তাহাদের বিরুদ্ধে আনা অভিযোগ এবং মামলার কার্যক্রম নিষ্ফল করার সকল অপচেষ্টা ক্রমাগতভাবে করিয়া গিয়াছেন। এইরুপ কার্যকলাপ দ্বারা এবং আসামীদের সুবিধা ভোগের বিবরন দ্বারা এবং চার্জশীট দাখিলের পর পলাতক হওয়ার দ্বারা ইহা সুনির্দিষ্টভাবে ইঙ্গিত করে যে, জাল-জালিয়াতিপূর্ণ কাগজপত্র এবং উহা দ্বারা প্রতারনা করার ক্ষেত্রে আসামী-আপীলকারীরা অতি দক্ষতা ও তৎপরতা দেখাইয়াছেন। উক্ত কার্যকলাপে আসামী-আপীলকারীদের অংশগ্রহন ছিল অতি সূষ্ট এবং সুনির্দিষ্ট". In this regard, the trial Court referred to and relied upon an inquiry report dated 06.04.2005 prepared by the Additional Divisional Commissioner (Revenue), Sylhet Division and the judgment passed in Civil Appeal No. 163 of 2009 (reported in 24 BLT (AD) 340). P.W.7 referred to the inquiry report, but it appears that neither any of the witnesses tendered the said report in evidence nor the maker of the report was examined as a witness. Therefore, the inquiry report is not a piece of evidence. So far as the judgment passed by the Appellate Division is concerned, suffice it to say that the trial Court must come to a finding of its own based on the legal evidences on record. The issue in the reported judgment being different,

the same has no bearing upon the issue in hand *i.e.* whether the petitioners created the forged memo (exhibit-4).

28. The learned Advocate for the petitioners submits that since there is no evidence on record to show that the petitioners created the forged memo in question the Courts below wrongly convicted them under Section 466 of the Penal Code for forging the government memo.

29. It is true that the P.W.s could not state who created the forged memo (exhibit-4). Referring to the evidences of the P.W.s the lower appellate Court observed, "এজহারে বর্নিত চিঠিটা কাহার মাধ্যমে জাল এবং জাল চিঠি কিভাবে ডিসপ্যাচে আসিয়াছে ইহা কেহ বলিতে পারিবেন না মর্মে তাহারা জেরায় বলিয়াছেন". Be that as it may, evidences on record have established the facts that Tarapur Tea Estate was a debutter property; that it was being managed by the Shebait of the Deity before it was grabbed by the petitioners; that they managed to obtain a long term lease deed for 99 years in respect of the tea estate; that they thereupon established a Medical College, housing estate and a super market by damaging the tea plantations and utilized a portion of the tea estate for the purposes other than the purposes for which the property was dedicated to the Deity. Had the forgery in respect of the Government memo dated 14.08.2005 (exhibit-4) not been detected, the tea estate would have been mutated in the names of the petitioners. Therefore, the petitioners are unquestionably the beneficiaries of the forgery. D.W. Nos. 1and 2 are Assistant Managers of Malnichara Tea Estate owned by the petitioner No.2 Ragib Ali. Their evidences establish the facts that the petitioners are rich and influential persons. In the case in hand, the prosecution though failed to prove that the petitioners made the forged government memo, but facts and circumstances clearly point out that they are instrumental in getting the false memo. In such a situation, there is nothing in law to prevent them from being guilty of abetting the offence of making the forged government memo (exhibit-4). Hence, they should be convicted under Section 466 read with Section 109 of the Penal Code, not under Section 466 alone. The petitioners were not charged with abetting the offence. Sections 237 and 238 of the Cr.P.C. are exceptions to the general rule that an accused cannot be convicted of an offence in the absence of a specific charge. Under Section 237 an accused may be convicted of an offence, although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made. Accordingly, this Court takes the view that the petitioners are guilty for abetting the offence of making forged government memo (exhibit-4).

30. Now, I turn to the conviction of the petitioners under Section 471 of the Penal Code for using the forged memo as genuine. Referring to the evidences of P.W. Nos. 2, 3, 5, 7 and 10 the lower appellate Court observed that these P.W.s could not say how did the said forged memo reach the dispatch section of the office of the Deputy Commissioner, Sylhet or who sent the memo to the concerned office (জাল চিঠি কিভাবে ডিসপ্যাচে আসিয়াছে ইহা কেহ বলিতে পারিবেন না মর্মে তাহারা জেরায় বলিয়াছেন। ....এজাহারে বর্নিত জাল চিঠি কে, কিভাবে উক্ত দপ্তরে পৌঁছাইয়া দিয়াছেন ইহা জেরা কালে এই সাক্ষীরা সুনির্দিষ্ট করিয়া বলিতে পারেন নাই). The learned Advocate for the petitioners submits that having made these observations and without giving any cogent reason based on legal evidences, the appellate Court below committed illegality in upholding the conviction the petitioners under Section 471 of the Penal Code. The learned Additional Attorney General, on the other hand, submits that the petitioners used the forged memo (exhibit-4) in Writ Petition No. 9008 of 2005 as Annexure-C which is evident from the judgment passed by the Appellate Division in Civil Appeal No. 163 of 2009 (reported in 24 BLT (AD) 340). Referring to the memo in question, the apex Court observed,

> "*It is alleged that this letter was procured by resorting forgery. On the other hand, writ petitioners claimed that the Ministry issued this letter. This being a disputed question of fact cannot be decided in a summary manner in writ jurisdiction".*

31. Using a document as genuine when the document is known to be a forged document is the gravamen of the offence under Section 471 of the Penal Code. To constitute an offence of use of a forged document as contemplated by Section 471, it is sufficient to establish that it is used in order that it may ultimately appear in evidence or that it is used dishonestly or fraudulently. Therefore, in order to bring a person within the purview of Section 471, it is enough if he files a forged document, which he knows or has reason to believe to be a forged document (***Ramavtar Missir vs Rajindra Singh***, (1961) 2 CrLJ 139). The convict-petitioners abetted in making the forged memo (exhibit-4). They dishonestly used the said forged memo in the writ petition. Therefore, they are guilty of the offence under Section 471 of the Penal Code.

32. At this juncture, the learned Additional Attorney General frankly and candidly submits that evidences on record and findings of the Courts below do not attract the provisions of Section 420 of the Penal Code and for this reason the conviction under Section 468 of the Penal Code (forgery for the purpose of cheating) cannot be sustained. I find substance in the submissions. Hence, the petitioners are acquitted of the charge under Sections 420 and 468 of the Penal Code.

33. In this case, unfortunately the prosecution did not make any attempt to unearth who actually made the forged government memo (exhibit-4) and who else were involved in the said act of forgery. The trial Court rightly observed that concerned employees of the local administration and others aided the petitioners in the entire process of forgery. The prosecution also failed to find out who sent the forged memo to the dispatch section of the office of the Deputy Commissioner, Sylhet. In this regard, the investigation conducted by police was perfunctory in nature. The investigating agency failed to undertake any real or effective effort to unearth or detect the other perpetrators involved in the forgery and in the transactions carried out with the forged memo. Considering all these aspects as well as the attending facts and circumstances of the case, in my view, rigorous imprisonment for 02 years 06 months is appropriate sentence for the offence committed under Section 466 read with Section 109 of the Penal Code. Rigorous imprisonment for 01 year for the offence under Section 471 is maintained. The sentence of fine is upheld.

34. Accordingly, orders of this Court are as follows:

Conviction and sentence of the petitioners under Section 466 of the Penal Code is modified. They are convicted under Section 466 read with Section 109 of the Penal Code and sentenced to suffer rigorous imprisonment for 02 years 06 months and also to pay a fine of Tk. 10,000/- each, in default to suffer simple imprisonment for 03 months more. Conviction and sentence of the petitioners under Section 471 of the Penal Code is affirmed, but both the sentences are directed to run concurrently.

35. The petitioners are acquitted of the charges under Sections 420 and 468 of the Penal Code. The convict-petitioners are directed to surrender before the Court concerned within 01 month from the date of receipt of this judgment to serve out the remaining portion of sentence of imprisonment, failing which the Court concerned shall take steps in accordance with law to secure the arrest of the petitioners.

36. In the result, the Rule is discharged with modification of conviction and sentence and with directions made above.

37. Send down the lower Court records (LCR) at once. Communicate the judgment and order to the Court concerned forthwith.