

*** "REPORTABLE"**
HIGH COURT OF DELHI AT NEW DELHI

+ Crl. Rev. (P). 164/2005

Date of decision: January 23, 2009

CBI Petitioner
! Through : Mr. Ashish Kumar, Adv.

Versus

\$ SHRI ARUN KUAMR GOENKA & ANR.
..... Respondents
^ Through : Mr. Sidharth Luthra, Sr. Adv.
with Ms. Smriti Sinha, Adv.
for R-1
Mr. P.S. Singhal, Adv. for R-2.

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CORAM:
HON'BLE MS. JUSTICE ARUNA SURESH

- (1) Whether reporters of local paper may be allowed to see the judgment?
- (2) To be referred to the reporter or not? Yes
- (3) Whether the judgment should be reported in the Digest ? Yes

JUDGMENT

ARUNA SURESH, J.

1. Impugning the order of learned Special Judge dated 7.12.2004 whereby he discharged the accused persons/respondents in complaint case No.

15/1999 titled as CBI v. Arun Kumar Goenka and others, this petition has been filed.

2. Succinctly, case of the prosecution is that accused Arun Kumar Goenka and other directors of M/s Premier Vinyl Flooring Limited (hereinafter referred to M/s. PVFL) in criminal conspiracy with accused K.M. Udupa, bank officer, cheated Canara Bank, Sadarjung Development Area, New Delhi to the tune of Rs. 1,41,81,277/- in respect of two import bills namely FIBC 13/97 for US\$ 243250.02 and FISC 51/97 for US\$ 113040/- in favour of M/s. PVFL received by Canara Bank on 22.1.1997 and 26.3.1997 respectively. Foreign Department (South) of the Canara Bank received foreign import bill for collection on 20.1.1997 from Overseas Chinese Bank, Taoyuan (Taiwan) No. 288, San Ming Road, Sector-3, vide their covering letter No. 7AMMRDA00012/246 dated 14.1.1997 on behalf of M/s. Hi-Lingos Co. Ltd., Taiwan drawn on M/s. PVFL amounting to Rs 2,43,250.02 along with necessary documents. The delivery of documents was to be made against payment/acceptance in two

installments i.e. first delivery against payment (DP) for US\$ 168640/- and second delivery against acceptance (DA) for US\$ 74,610.02 and the payment was to be made within 45 days from 26.12.1996. The other import bill for collection was received by the said branch on 22.3.1997 from Overseas Chinese Bank, Taiwan vide covering letter 7AMMRDP00035/246 dated 18.3.1997 on behalf of M/s. Hi-Lingos Co. Ltd., Taiwan drawn on M/s. PVFL amounting to Rs.1,13,040 along with necessary documents. The instructions from the Overseas Chinese Bank in this case was delivery against payment (DP) basis. However, accused K.M. Udupa, officer, posted in the foreign department of the branch handed over original bills of lading, invoices, packing list, certificate of origin etc. to M/s. PVFL without fulfilling the stipulated conditions. This resulted into the company taking delivery of the consignment from Custom Authorities without making the payment to the Overseas Chinese bank as per instructions. The Canara Bank had, therefore, to make payment

amounting to Rs. 1,41,81,277/- to the Overseas Chinese Bank as per instructions to M/s Hi-Lingos Company, Taiwan resulting into consequential loss.

3. Chargesheet was filed. M/s. PVFL was discharged vide order dated 18.11.2003. By the impugned order dated 7.12.2004, the remaining two accused persons namely Arun Kumar Goenka and K.M. Udupa (respondents) were also discharged.
4. Learned counsel for the petitioner, Mr. Ashish Kumar, has argued that accused K.M. Udupa in criminal conspiracy with Arun Kumar Goenka parted with the documents pertaining to the said import bills without obtaining the payment against the documents and facilitated accused Arun Kumar Goenka to obtain the goods from Customs authority by using the said documents. The bank was cheated of Rs. 1,41,81,277/-, which it had to pay to Overseas Chinese Bank on 16.4.1998 for onward payment to exporter M/s Hi-Lingos Company, Taiwan because M/s PVFL did not pay the dues to the bank in respect of the said two bills. It is

submitted that the Special Judge failed to appreciate the facts and circumstances of the case and took an erroneous view while discharging the said two accused persons observing that proper procedure was followed by K.M. Udupa while delivering the documents to accused Arun Kumar Goenka pertaining to both bills as delivery was against acceptance basis wherein he could have delivered the documents only against payment.

5. Ms. Smriti Sinha, learned counsel for respondent No. 1 refuted the submissions of the learned counsel for the petitioner and have argued that FIBC 13/97 for US\$ 2,43,250.02 was on delivery against acceptance basis and the payment was to be paid within 45 days after receipt of bill of lading and there is no evidence whatsoever to show that when the documents of this transaction were delivered by K.M. Udupa to accused Arun Kumar Goenka, M/s PVFL had not accepted its liability to pay the amount. They have further argued that as against bill FISC 51/97 for US\$ 1,13,040/- which was a case of delivery against payment, a letter of

request was made by M/s. PVFL to the Overseas Chinese Bank for splitting the payment and therefore, this transaction was converted into a transaction of delivery against acceptance. They further argued that letters were issued by M/s. PVFL to Canara Bank, SD Area for accepting the payment in two instalments within 45 days. Hence, according to them, there was no criminal conspiracy between the accused persons with a view to cheat the Canara Bank to the tune of Rs. 1,41,81,277/-.

6. Mr. P.S. Singhal, learned counsel for respondent No.2 has also made identical submissions.
7. I do not find any merits in the submissions of the learned counsel for the petitioner. Perusal of the first bill FBC 6043/97 (FIBC 13/97) on the face of it indicates that the documents were to be delivered to the importer M/s. PVFL against acceptance and the payment was to be made within 45 days from 26.12.1996.
8. Thus, it is clear that the import against this bill was

on delivery against acceptance basis from its inception itself and therefore, to say that accused K.M. Udupa conspired with Arun Kumar Goenka and released the documents without obtaining payment against the advice of Overseas Chinese Bank, Taiwan, would not be in the correct perspective of the transaction. It in no manner indicate any criminal conspiracy having been hatched between the accused persons.

9. As regards second instrument FSC1802/2192/97, initially the delivery of documents was against payment but subsequently a request was made by M/s PVFL to the Overseas Chinese Bank to receive the amount of the bill in two installments of US \$50,000 and US \$ 63040 which was accepted by the said bank vide their swift message dated 18.9.1997 and the information was accordingly conveyed to Manager, Canara Bank, S.D. Area, New Delhi vide letter dated 24.9.1997. This letter resulted into conversion of bill FISC 51/97 (FSC1802/2192/97) from delivery against payment to delivery against acceptance. It is pertinent to

mention here that certain documents find mention in the statement of the witnesses examined by the prosecution under Section 161 Cr.P.C. but those documents though collected by the CBI but were not filed in the court with the chargesheet. Some of these documents were correspondence which took place between M/s. PVFL and Overseas Chinese Bank pertaining to the second FISC 51/97 were not relied upon nor filed on the record by the CBI. They were so placed on the orders of the court passed in an application filed by the respondent.

10. In a business transaction of imports there are generally three procedures which are being followed by the parties and bankers. In the first procedure imports are allowed against letter of credits where payment is granted by the bank by opening the letter of credit in the name of the importer in favour of the exporter. The second procedure is the procedure of delivery of documents against payment where documents of import are sent by the customer to the bank with

instructions that the documents would be delivered to the importer only after the payment was made and the third procedure which can be followed is delivery of documents against acceptance of liability by the importer subject to payment being made after given number of days or even without specifying the number of days for making payment.

11. In the present case, the exporter had followed the third procedure for processing the documents i.e. the procedure of delivery of documents against acceptance of liability by the importer. Admittedly the second bill FISC 51/97 was initially on delivery against payment basis and later it was converted into delivery against acceptance basis.
12. Under these circumstances, it would be a fallacy to say that both the accused persons criminally conspired together to cheat the bank by accused K.M. Udupa releasing the documents in favour of Arun Kumar Goenka, the director of M/s PVFL treating it as a transaction of delivery of documents against acceptance of liability whereas transaction

was delivery of documents against payment.

13. The trial court took into consideration the statement of the witnesses recorded by the prosecution and the documents relied upon and unrelayed upon by the CBI before considering if prima facie any charges were made out against the accused persons. The relevant observations of the trial court on the said two bills are contained in paras 42, 44 and 45:

“42. The recital of the entire evidence collected during investigation was necessary to show that the entire investigation has persisted on the basis that the two transactions were done on delivery against payment basis. The documents, however, show that the import against FIBC 13/97 was on delivery against acceptance basis from the very beginning, while the second import of FISC 51/97 was initially on delivery against payment basis, but was later on converted to delivery against acceptance basis.

44. FIBC 13/97 (FBC 1802/643/97) for US \$ 243250.02 was on delivery against acceptance basis and the payment was to be made 45 days after B/L where B/L stands for the date of bill of lading. There is no evidence whatsoever to show that when the documents on this transaction were delivered by

accused KM Udupa to accused Arun Kumar Goenka, M/s. PVFL had not accepted the liability to pay the amount. No witness has stated anything about this fact.

45. The second instance of FISC 51/97 (1802/2492/97) was a case of delivery against payment. Admittedly a request was made by M/s. PVFL to the Overseas Chinese Bank for splitting the payment. The Overseas Chinese Bank agreed to receive the payment in two installments of US \$ 50000 and US \$ 63040. This transaction was, therefore converted to a transaction of delivery against acceptance. There are letters from M/s. PVFL dated 12.1.98 addressed to Canara Bank, S.D. Area, New Delhi accepting the liability of both the payments within 45 days. The acceptance of liability by the company is, therefore, available in the records of the bank."

14. The trial court, therefore, was right in its approach.

It observed that prima facie it was apparent that the import transactions were on the basis of delivery against acceptance and company M/s. PVFL had accepted its liability and that therefore, it cannot be said that there was any cheating done by the company or by the accused persons. Even no offence for breach of trust is made out against K.M. Udupa. The approach of the trial court in discharging the accused persons vide its order

dated 7.12.2004 was just and rationale. I do not find any reason to interfere in the same. Hence, petition is dismissed.

15. Attested copy of the order be sent to the trial court.

(ARUNA SURESH)
JUDGE

January 23, 2009
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