

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: **17.04-2017**

CORAM

THE HON'BLE JUSTICE T. MATHIVANAN

Criminal Original Petition Nos. 21243 of 2014

and

Criminal Revision Case No.1191 of 2015

in

Crl.M.P.No.3613 of 2014

in

C.CNo.3 of 2014

(On the file of the Special Judge for CBI cases (XII Addl.City Civil Court), Chennai)

1. Naresh Prasad Agarwal,

S/o.Late Shiv Sahai,

Prop. M/s.Shiv Sahai & Sons,

Nos.60-61 Narasimha Dasari Lane,

NSC Bose Road,

Chennai 600 001

....Petitioner in Crl.O.P.No.21243
of 2014

2 .N.Ganesh Agarwal,

S/o.Naresh Prasad Agarwal,

Nos.60-61, Narasimha Dasari Lane,

NSC Bose Road,

Chennai 600 001

....Petitioner in Crl.R.C.No.1191 of
2015

-Vs-

The State, Inspector of Police,
Anti Corruption Bureau,
Central Bureau of Investigation,

Chennai -600 006.

Respondent/Complainant

Respondent in

Crl.O.P.No.21243 of 2014 &

Crl.R.C.No.1191 of 2015

For Petitioner:-

Mr.Muralikumaran, for M/s.Mc.Gan

Law firm

For Respondent:-

Mr. K.Srinivasan, Spl. Public
Prosecutor for CBI (cases)

Crl.O.P.No.21243 of 2014

Invoking the inherent jurisdiction of this Court under the provisions of Section 482 of the Code of Criminal Procedure this petition in Crl.O.P.No.21243 of 2014 is filed to call for the records relating to the case in C.C.No.3 of 2014 on the file of the Special Judge (XII Addl City Civil Court), Chennai and to quash the charge sheet in so far as the petitioner herein is concerned.

Crl.R.C.No.1191 of 2015

The order dated 04.08.2015 and made in Crl.M.P.No.3615 of 2014 in the criminal case in C.C. No.3 of 2014, on the file of the Special Judge (XII Addl City Civil Court), Chennai is under challenge in the Criminal Revision.

COMMON ORDER

Heard Mr.Muralikumaran, learned counsel appearing for M/s.Mc.Gan Law firm, who is on record for the petitioner in Crl.O.P.No.21243 of 2014 and in Crl.R.C.No.1195 of 2015 and Mr. K.Srinivasan, learned Special Public Prosecutor for CBI (cases) appearing for the respondent in both the cases.

2. With the crucial issue, involved in both the petitions is one and the same, and the parties to the petitions are also one and the same, both the petitions have been consolidated together, heard jointly, and disposed of in this common order.

3. Criminal Original Petition No.21243 of 2014 has been filed by Mr. Naresh Prasad Agarwal, who is the second accused in C. CNo.3 of 2014 ,on the file of the learned Special Judge for CBI cases (XII Judge, City Civil Court), Chennai under Section 482 of the Code of Criminal Procedure to quash the charge sheet filed against him by the respondent-police.

3A. The petitioner Mr. Ganesh Agarwal had originally filed a petition in CrI.M.P.No.3615 of 2014 under Section 239 of the Code of Criminal Procedure to discharge him from the criminal case in C.C.No.3 of 2014 pending on the file of the learned Special Judge, CBI cases (XII Additional City Civil Court), Chennai. That petition was dismissed on 04.08.2015. Challenging the correctness of the order, Mr.Ganesh Agarwal (A3) has preferred this petition in CrI.R.C.No.1191 of 2015 before this Court after invoking the revisional jurisdiction of this Court under Sections 397 and 401 of the Code of Criminal Procedure.

4. Section 482 of the Code of Criminal Procedure encompasses the following three ingredients:

- '(a) to make such orders as may be necessary to give effect to any Order under this Code;
- (b) to prevent abuse of process of any Court; &
- (c) to secure the ends of justice '

5. The Apex Court in **State of U.P.Vs. K.K.Gupta, (AIR 1970 SC 1279: (1970 (3) SCC 4: 1970 CrI.L.J. 1142)** has laid down the principles under which the provisions of Section 482 of the Code of Criminal Procedure could be invoked.

1. The powers conferred on the High Court by Section 482 are no doubt very wide, but they are not unlimited. They can be exercised only when-

- (a) the Code makes no specific provision for dealing with the matter;
- (b) the exercise of the inherent power would not be inconsistent with any Express or specific provisions of the Code;
- (c) the Court is satisfied that there is an abuse of the process which calls for its interference ; or
- (d) the , order proposed is necessary-
 - (i) for giving effect to some other order passed under the Code, or
 - (ii) otherwise to secure the ends of justice.

2. Where any of the foregoing reasons does not exist, the High Court cannot exercise its power under Section 482 to quash an order, however, erroneous it may be.

3. Nor can the Court allow an Application under Section 482 without giving any reasons therefor. "

6. Section 397(1) confers a sort of supervisory power. The purpose is to rectify miscarriage of justice. The main consideration was whether substantial justice was done since this Section confers the revisional jurisdiction upon both the Sessions Court as well as the High Court (Criminal). Nobody can claim it as a matter of right as it confers supervisory jurisdiction. When there is a clear illegality in the order of discharge passed by the lower Court, a revision could be entertained.

7. On coming to the provisions of Section 401 of the Code, as it is understood, the object behind this Section is to empower the High Court to exercise the powers of an appellate Court to prevent failure of justice in cases where the Code does not provide for appeal.

The power, however, is to be exercised only in exceptional cases where there has been a miscarriage of justice owing to :

- (i) a defect in the procedure or
- (ii) a manifest error on a point of law;
- (iii) excess jurisdiction,
- (iv) abuse of power, &
- (v) where the decision upon which the trial Court relied has since been reversed or overruled when the revision petition was being heard.

8. As observed by the Supreme Court in State of **M.P. Vs. S.B.Johari**, (AIR 2000 SC 665: (2000) 2 SCC 57: 2000 SCC (CrI) 311 : 2000 CrI.L.J.944), under Section 401 of Criminal Procedure Code quashing of the charge by the High Court would be justified if even on considering the entire prosecution evidence, the offence is not made out.

9. In **Trilok Singh V Satya Deo Tripathi, (AIR 1979 SC 850: (1979) 4 SCC 396: (1980) CrI.L.J. 822)** , the Supreme Court has observed that if the charge in a criminal proceeding constituted a bona fide civil dispute, the High Court can quash the charge.

10. It has mainly been alleged that the petitioners (A2 and A3) along with the 1st accused have conjointly practiced FRAUD on the MMTC Ltd., Chennai. The allegations made against the petitioners (A2 & A3) and the 1st accused are:

Mr.V.Gurumurthi, the then Deputy General Manager (Finance & Accounts) (Bullion Finance) and the then General Manager (Finance & Accounts), MMTC Limited, Chennai, the second accused, Mr. N.P.Agarwal, who is the petitioner in CrI.O.P.No.21243 of 2014 Proprietor M/s.Shiv Sahai and Sons, the third accused, Mr.Ganesh Agarwal, who is non-other than the son of Mr. N.P.Agarwal had entered into a criminal conspiracy at Chennai and other places during the year 2008-2009 and in pursuance of the said criminal conspiracy they had cheated MMTC Limited, Chennai to the tune of Rs.113.32 crores by speculating in Indian rupee US Dollar foreign exchange fluctuations and intentionally omitting to take forward cover for the purchases made under the Buyers Credit Scheme.

11. In pursuance of the criminal conspiracy, A-1 had maintained improper accounts and falsified the books of accounts of the MMTC Ltd., by showing inflated fixed deposit amount of Rs.38,99,01,189/- and deflated loan against deposit amount of Rs.45,43,17,044/- both in the account of MMTC Ltd. and of Union Bank of India, Chennai Main Branch, Chennai. It is also alleged that the first accused Mr. V.Gurumoorthi had obtained pecuniary advantage to the tune of Rs.41,700/- offered by A-2 Shri. N.P.Agarwal and A-3 Ganesh Agarwal in the form of air ticket for his visit to Singapore along with his wife, during October, 2010. Thus A-1 to A-3 have committed the offences punishable under Section 120-B, r/w 420, 477-A IPC and 13(2) r/w 13(1)(d) of Prevention of Corruption Act, 1988.

12. Admittedly on 2nd April, 2008 a Memorandum Of Understanding (MOU) was entered into between MMTC Limited, Chennai and M/s. Shiv Sahai & Sons. As per the Memorandum of Understanding, MMTC Limited, Chennai would

sell gold/silver, imported from various sources and M/s. Shiv Sahai & Sons would purchase them regularly from the MMTC Limited, Chennai either on outright basis or under LC/SBLC basis.

13. The entire dispute is arisen out of this contract under the Memorandum of Understanding, dated 2.4.2008 which was entered into between MMTC Limited, Chennai and M/s. Shiv Sahai & Sons.

14. Under these circumstances, a prime question has arisen as to

"whether a civil liability can be converted into a criminal liability? and if it is done so, could it be construed as abuse of process of Court?"

15. While speaking on behalf of a Division Bench of the Apex Court in **Indian Oil Corporation vs M/S NEPC India Ltd., & Ors.(2006) 6 SCC 736** : **(2006) 3 SCC (Cr.) 188**, Hon'ble Mr Justice Raveendran has dealt elaborately with the point 'Existence or availment of civil remedy under criminal law'. While answering the above question he has observed that:

"It is necessary to take notice of a growing tendency in business circles to convert purely civil disputes into criminal cases. This is obviously on account of a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors. Such a tendency is seen in several family disputes also, leading to irretrievable break down of marriages/families. There is also an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure through criminal prosecution should be deprecated and discouraged."

16. His Lordship has also made reference to the decision **In G. Sagar Suri vs. State of UP [2000 (2) SCC 636]** wherein it has observed thus:

given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which High Court is to exercise its jurisdiction under [Section 482](#) of the Code. Jurisdiction under this Section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice."

17. In **Binod Kumar Vs. State of Bihar (2014 10 SCC 663)**, the Apex Court has observed that a civil liability cannot be converted to a criminal liability and if it is done so, it is deemed to be an abuse of process of Court.

18. With this back drop let us enter into the factual scenario of the case.

19. Mr. Naresh Prasad Agarwal, who is the petitioner in Crl.O.P.No.21243 of 2014 is the father of Mr.N.Ganesh Agarwal, who is the petitioner in Crl.R.C.No.1191 of 2015.

20. Mr. Naresh Prasad Agarwal (hereinafter his name may be referred to as N.P.Agarwal wherever the context so requires) has been shown as the second accused in the case in C.C.No.3 of 2014, pending on the file of the learned Special Judge for CBI cases, (XII Additional Judge, City Civil Court), Chennai, whereas the petitioner in Crl.R.C.No.1191 of 2015, N.Ganesh Agarwal has been shown as the third accused.

21. On perusal of the records it appears that on 13.06.2012, at about 6.30 p.m., the Superintendent of Police, CBI/ACB Chennai based on the reliable information had registered a case in Crime No. RC MAI 2012A 0025E under Section 120B r/w Sections 420,477A of IPC and under Section 13(2) r/w Section 13(1)(2) of the Prevention of Corruption Act, 1988 as against the following three persons:

MMTC Limited (Minerals & Metals Trading Corporation of India),
Chennai Regional Office, Chennai;

2.Thiru.V.Gurumurthy, former General Manager, (Finance & Accounts)
MMTC Limited (Minerals & Metals Trading Corporation of India),
Chennai Regional Office, Chennai; and

3.Thiru.N.P.Agarwal, Proprietor, M/s.Shiv Sahai & Sons, PO Box No.7428,
No.60-61 Narasima Dasari Lane, NSC Bose Road, Chennai-600 001

as well as against unknown officials of MMTC Ltd., Chennai Regional Office,
Chennai and Union Bank of India, Main Branch, Chennai.

22. The petitioner in Crl.O.P.No.21243 of 2014, Mr. N.P. Agarwal was originally ranked as third accused in the First Information Report. Mr. N.Ganesh Agarwal, who has been arraigned as 3rd accused in the Charge sheet (petitioner in Crl.R.C.No.1191 of 2015) was originally not at all shown as an accused in the First Information Report.

23. As per the prosecution, the suspected offences alleged to have been committed by the accused persons are, **"criminal conspiracy, cheating, falsification of accounts and criminal misconduct."**

24. The term offence has been defined in the first part of Section 40 of IPC in the following manner:

"Except in the chapters and sections mentioned in clauses 2 and 3 of this Section, the word 'offence' denotes a thing made punishable by this Code"

The Supreme Court of India in State of **Maharashtra Vs Mayor Hons.George, (AIR 1965 SC 722: 1965 Cri.L.J.641: (1965) 1 SCR 123)** has held that unless statute either clearly or by necessary implication rules out 'mens rea' as a constituent part of a crime an accused should not be found guilty of an offence against the criminal law unless he has got a guilty mind. Absolutely liability is not to be lightly presumed but has to be clearly established. Foreign Exchange Regulation Act (now FEMA) lays an absolute embargo upon person

who without fulfilling legal requirement brings or sends into India any gold. Here simply bringing or sending constitute an offence and no other ingredient is necessary or no other mental condition is postulated as necessary to constitute an offence of contravening the provisions of the Act. If element of mens rea is read into it, still law does not become nugatory and therefore no question of exclusion of mens rea by necessary implication can arise in this case.

In **Nathu Lal Vs State of M.P. (AIR 1966 SC 43: (1966) Cr.LJ 71)**, the Supreme Court has observed that the nature of mens rea that would be implied in a statute creating an offence depends on the object of the Act and the provisions thereof.

In order to get more clarity on the definition of the term 'offence' it may be better to have reference to **Sethia Properties Vs T.R. Bhavanani, (AIR 1961 Cal. 199)**, wherein the Calcutta High Court has observed as under:

"It will be found from the second and third part of Section 40 that in respect of certain sections a thing punishable under local law can also be brought within the purview of the term offence. Thus offence means as defined in S.4 (XXII) Air Force Act, 1950 any act or omission punishable under the Air Force Act and includes a civil offence (i.e. which is triable by a Criminal Court). As defined in Section 3 (XVII) Army Act, 1950 offence means any act or omission punishable under the Army Act and includes a civil offence (i.e. which is triable by a Criminal Court.) As defined in Section 2 Children Act it means any offence punishable under any law for the time being in force. This definition is akin to that of the expression defined in the General Clauses Act. As held in Calcutta case S.3(30) of the Bengal General Clauses Act and S.4(O) of the Cr.P.C. define 'offence to mean' any act or omission made punishable by any law for the time being in force."

It is thus clear that to bring an act within the amplitude of the term "offence" mens rea is an inevitable constituent part.

25. The crucial question as to whether the petitioners were having such

criminal intention to commit the offence as alleged by the prosecuting agency

assumes importance and to be answered by them in an unambiguous manner:

26. Secondly the entire prosecution case seems to have been constructed on the foundation of the Memorandum of Understanding dated 02.04.2008 which was entered into between MMTC Limited, Chennai House, No.6 Esplanade, Chennai 600 108, having registered office at Core 1 Scope Complex No.7 Lodi Road, New Delhi, (hereinafter referred to as 'seller') and M/s. Shiv Sahai & Sons, having its registered Office at P. Box No.7428, Narasima Dasari Lane, 60-61 NSC Bose Road, Chennai - 600 001 (hereinafter referred to as 'customer').

27. Minerals and Metals Trading Corporation of India Limited, (in short it may hereinafter be referred to as MMTC Ltd.,) a public sector undertaking of the Government of India, is one of the agencies of the Government, which is authorized to import bullion (Gold, Silver) under the Export-Import Policy. MMTC Ltd., Chennai Regional Office is also doing bullion trade with the customers. It imports the bullion under the Open General Licence and sells the same to local customers under the following three schemes:-

- (1) Outright Purchase Scheme ;
- (ii) Buyer's Credit Scheme; &
- (iii) Usance Letter of Credit (Usance L.C)/ Stand by Letter of Credit (SBLC)

28. The petitioner N.P.Agarwal (CrI.O.P.No.21243 of 2014) is the proprietor of M/s.Shiv Sahai and Sons dealing in bullion trading. The following are the basic ingredients of the contract entered into between M/s MMTC Limited and M/s.Shiv Sahai and sons:

- a) WHEREAS the 'seller' sells Gold/silver imported from various sources;
- b) WHEREAS the 'customer' wants to purchase Gold/Silver regularly from seller either on OURTRIGHT basis or under LC/SBLC basis;
and
- c) WHEREAS the 'customer' will commit to purchase of minimum quantity of 10 MTs of Standard Gold/20 MTs of Silver within the validity of this understanding.

29. It is significant to note here that clause 11 of the Memorandum of Understanding dated 02.04.2008 stipulates that;

"any dispute or difference whatsoever arising between the 'seller' and 'customer' out of or relating to the construction, meaning, scope, operation or effect of this sale purchase agreement or the validity or the breach thereof shall be settled through arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration and the Award made in pursuance thereof shall be binding on the parties. The venue of arbitration shall be Chennai."

30. It can therefore be capitulated that the entire prosecution case is revolving around the pivot of the Memorandum of Understanding, dated 02.04.2008.

31. Mr. Muralikumaran, learned counsel appearing for M/s.McGan Law Firm, who is on record for the petitioners has submitted that the entire prosecution case as well as the dispute are civil in nature.

32. As it is revealed from the First Information Report, during the period from 2007-2010 at Chennai and at other places Mr. S.Gurusamy (A1), former Chief General Manager, South Zone, MMTC Limited (Minerals and Metals Trading Corporation of India) Chennai Regional Office, Chennai, Mr. V.Gurumurthy (A-2), former General Manager (Finance & Accounts), MMTC Ltd., Chennai Regional Office, Chennai and unknown officials of MMTC Ltd., Chennai Regional Office, Chennai had entered into a criminal conspiracy with Mr. N.P.Agarwal, (A3) Proprietor M/s.Shiv Sahai and Sons and with unknown officials of Union Bank of India Main Branch, Chennai to cheat the MMTC Ltd., in the matter of bullion trading through buyers Credit Scheme and in pursuance of the said conspiracy, Mr.S.Gurusamy (A1), Mr. V.Gurumurthy (A2) and unknown officials of MMTC Ltd., by abusing their official position, had extended undue favours to Mr. N.P.Agarwal, Proprietor, M/s. Shiv Sahai and Sons (A3) and thus caused a wrongful loss to the tune of Rs.89.6 crores on MMTC Ltd by intentionally omitting

to recover the said amount from the account of Mr. N.P.Agarwal, Proprietor of M/s. Shiv Sahai & Sons (A3).

33. Further, in pursuance of the criminal conspiracy Mr. S.Gurusamy (A1), Mr. V.Gurumurthy (A2) and unknown officials of the MMTC Ltd., along with unknown officials of the Union Bank of India, Main Branch had manipulated the books of accounts of MMTC Ltd., and the Union Bank of India and Mr.S.Gurusamy (A1) and Mr.V.Gurumurthy (A2) and unknown officials of the MMTC Ltd., had covered up the unrecovered amount of Rs.89.6 crores as debit balance in the Foreign Vendors Account and thereby caused wrongful gain to Mr. N.P.Agarwal, (A-3) and the other accused themselves. The First Information Report also discloses that the above information establishes prima facie commission of offence, under Section 120-B read with Sections 420 and 477-A of IPC and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988, by Mr.S.Gurusamy (A1), former Chief General Manager, South Zone, MMTC Ltd., (Minerals and Metals Trading Corporation of India), Chennai Regional Office, Chennai, Mr. V.Gurumurthy (A2) and unknown officials of MMTC Ltd., Chennai Regional Office, Chennai and Mr. N.P.Agarwal, (A-3) Proprietor, M/s.Shiv Sahai & Sons and unknown officials of MMTC Ltd., Chennai Regional Office, Chennai and Union Bank of India (Main Branch), Chennai.

34. It may also be pertinent to note here that, as it is revealed from the First Information Report, the first accused Mr.S.Gurusamy (A1), along with the second accused Mr. V.Gurumurthy (A2) and unknown officials of MMTC Ltd., Chennai Regional Office, Chennai had deliberately concealed the transactions to the extent of Rs.36.6 crores on account of failure to take proper foreign exchange cover and Rs.53 crores on account of unauthorized loan against deposits and shown them as a debit balance against the vendor's account in the balance sheet for the year 2010-2011. It is also the specific allegation against Mr.S.Gurusamy (A1) that he along with Mr.V.Gurumurthy (A2) and unknown officials of MMTC Ltd., Chennai Regional Office had failed to safeguard the interests of the MMTC Ltd., by extending undue favours to Mr. N.P.Agarwal (A-3), Proprietor, M/s.Shiv Sahai & Sons by the above said transactions and thereby

caused a wrongful loss to the tune of Rs.89.6 crores to MMTC and a corresponding wrongful gain to the accused themselves.

35. After completion of the investigation, the Inspector of Police CBI/ACB Chennai had filed a final report under Section 173(2) of the Code of Criminal Procedure before the Special Court (CBI cases) on 28.1.2014. It appears that it was forwarded by the Superintendent of Police CBI/ACB Chennai on 27.1.2014.

36. This Court would also like to place it on record, that the investigation pertaining to the allegations leveled against the accused persons 1 to 3 as shown in the First Information Report was taken up by one S.Subramanian, Inspector of Police, CBI/ACB/Chennai and it was he, who had filed the final report on 28.1.2014 before the learned Special Judge for CBI cases (XIII Additional City Civil Court), Chennai.

37. On perusal of the final report, the last paragraph therein reveals that the first accused Mr.V.Gurumoorthi had retired from MMTC Ltd., Chennai on 30th November, 2010 and hence the sanction for prosecution is not required for him. It is also revealed that the allegations against Mr. S.Gurusamy, who was originally cited as accused No.1 in the First Information Report could not be proved conclusively, as the investigation did not reveal his involvement in the case and hence, he was not charge-sheeted.

38. Further, the final report also reveals that one Mr.Ganesh Agarwal has been implicated as third accused. He is none other than the son of Mr. N.P.Agarwal. The final report has further tend to disclose that Mr. Ganesh Agarwal who is the , Proprietor of M/sShiv Sahai and Sons (India) Limited had been actively associated in the bullion business of his father and had also been dealing with the MMTC Ltd., in bullion matters. Therefore, the Investigating Authority had deleted the original first accused Mr. S.Gurusamy, who was the former Chief General Manager (Finance & Accounts) of MMTC Ltd., Regional Office, Chennai ; instead implicated Mr. Ganesh Agarwal, son of Mr. N.P.Agarwal as the third accused alleging that he had been actively associated with the

bullion business with his father.

39. The final report further reveals that during the period from April, 2008 to March 2009, when Mr. V.Gurumoorthi was working as the Deputy General Manager (Finance and Accounts) (Bullion Finance) in MMTC Ltd., Chennai, Mr. N.P.Agarwal, Proprietor, M/s.Shiv Sahai and Sons and his son Mr.Ganesh Agarwal, the third accused had approached him for purchase of bullion i.e. Gold and Silver. While so, all the three accused(A1 to A3) had entered into a criminal conspiracy and in pursuance thereof the 1st accused had imported and supplied 132 bullion consignments under the Buyers Credit Scheme i.e. by availing foreign currency loan from an Overseas Bank (as per annexure I). In pursuance of the criminal conspiracy Accused 1 to 3 had speculated in the matter of foreign exchange fluctuations and devised that they could make huge gains, if the value of Indian Rupee got appreciated against US Dollar.

40. Accused 1 to 3 also had devised that even if there is no appreciation of the value of the Indian rupee against the US Dollars, they could gain on the forward premium amount by not taking forward cover. When the value of Indian rupee against US Dollar started depreciating in June, 2008, the accused 1 to 3 had attended a meeting convened by Mr.S.Gurusamy, the then Chief General Manager, MMTC Ltd., (whose name was originally cited as the first accused in the First Information Report, but subsequently deleted at the time of filing of the final report) and in the said meeting, they were informed of the uncovered foreign exchange position and instructed to fix the exchange rate as the Indian rupee against US Dollar was getting depreciated.

41. In pursuance of the criminal conspiracy, A-3 Mr.Ganesh Agarwal had falsely informed that his interaction with the major banks revealed that the value of Indian rupee would strengthen in the near future and falsely affirmed that they would honour their commitments fully without any loss to the MMTC Ltd., on the due dates. Subsequently the accused 2 and 3 had informed by their letter dated 18th June, 2008 that they were closely monitoring the exchange rate fluctuations and shall cover it immediately as soon as it reached a

comfortable level for them. In the subsequent meeting held by the MMTC officials in August, 2008 also, A2 and A3 had given false assurances that they would cover the foreign exchange.

42. It is also alleged that accused 1 to 3 had intentionally omitted to cover the Indian rupee against the US Dollars, on the date of availing the foreign currency loans.

43. It is also the case of prosecution alleged that the first accused Mr. V.Gurumoorthi in conspiracy with accused 2-3 had intentionally omitted to collect the loss due to speculation on foreign exchange from accused 2 -3. Instead in pursuance of the conspiracy and by abusing and misusing his official position, A-1 Mr.V.Gurumoorthi had availed a series of loans against the fixed deposits (LADs) and made repayments of the foreign currency loans availed for the transactions of accused 2&3. It is also alleged that the accused 2 & 3 knowing fully well that the failure to cover the foreign exchange resulted in loss to the MMTC Ltd., had intentionally omitted to take steps to make payments, but continued to cause the loss to the MMTC Ltd., by speculating on foreign exchange, which resulted in loss to MMTC Ltd., and thereby accused 1 to 3 had cheated the MMTC Ltd., Government of India undertaking to the tune of Rs.113.38 crores by making wrongful loss to the Government and corresponding wrongful gain to themselves.

44. It is also the case of the prosecution that in pursuance of the conspiracy, amongst accused 1-3, A-1 by abusing and misusing his official position, had intentionally omitted to collect from A and A3 an amount of Rs.36.02 crores due to exchange difference, an amount of Rs.36.18 towards interest on loan against fixed deposits and an amount of Rs.18.42 crores towards usance LC charges. It is also the specific allegation against accused-1 that he had deliberately omitted to maintain accounts pertaining to Buyer's Credit Transaction.

45. The prosecution has further alleged that in order to suppress the loss caused due to failure to cover the foreign exchange, A1 by abusing and misusing his official position had transferred a sum of Rs.40,88,23,075/- from the Loan-Against-Deposit account to the HOR Suspense Account, through Journal

Voucher No.JVA09/004803/09-10, dated 1.2.2010 without any supporting documents or evidence. It is further alleged that A-2 & A-3 during the year 2009-2010 and 2010-2011 in pursuance of the criminal conspiracy knowing fully well that they were not eligible for refunds due to the loss caused on account of failure to cover the foreign exchange during the year 2008-2009 applied for refunds of R.33,88,72,922/- and A-1 by abusing and misusing his official position had recommended and approved the same and the amount was paid to A-2 and A-3. According to the prosecution, the Special Audit revealed that the total recoverable amount from A- 2 and A- 3 as on 31.3.2011 was Rs.97.97 crores. This amount includes an amount of Rs.96.58 crores recoverable for the financial year 2008-2009.

46. Eventually, the final report filed by the prosecuting agency discloses as follows:

"By the above said acts, A1 Shri.V.Gurumoorthi, Deputy General Manager (Finance & Accounts) (Bullion Finance) and then General Manager (Finance & Accounts), MMTC Ltd., Chennai, A-2 Shri N.P.Agarwal, Proprietor M/s.Shiv Sahai and Sons and his son A-3 Shri Ganesh Agarwal, entered into criminal conspiracy at Chennai and other places during the year 2008-2009, and cheated the MMTC Ltd., to the tune of Rs.113.38 crores, by speculating in Indian Rupee-US dollar foreign exchange fluctuation and intentionally omitting to take forward cover for the purchases made under the Buyers Credit Scheme. In pursuance of the criminal conspiracy, A-1 maintained improper accounts and falsified the books of accounts of the MMTC Ltd., by showing inflated fixed deposit amount of Rs.38,99,01,189/- and deflated Loan-Against-Deposit amount of Rs.45,43,17,044/- both in the account of the MMTC Ltd., in Union Bank of India, Chennai Main Branch, Chennai.A-1 Shri V.Gurumoorthi also obtained pecuniary consideration to tune of Rs.41,700/- offered by A-2 Shri. N.P.Agarwal and A-3 Ganesh Agarwal in the form of air ticket for his visit to Singapore along with his wife, during October, 2010. Thus A-1 to A-3 committed the offences punishable u/s.120-B,r/w 420 , 477-A IPC and 13(2) r/w 13(1)(d) of PC Act and substantive offences thereof."

47. On a conjoint reading of the allegations made in the First Information Report and in the final report, this Court is able to find that both the First Information Report and the final report are conflicted against each other. Though Mr. S.Gurusamy, had been shown as A-1 in the first information report, his name was subsequently deleted at the time of filing of the charge sheet without assigning any valid reason by simply saying that the allegations against Mr.S.Gurusamy could not be proved conclusively, as the investigation did not reveal his involvement in the case and hence he was not charge sheeted.

48. In this connection, this Court would like to point out that the prosecution has miserably failed to follow the procedures laid down in Chapter 8 and 9 of CBI Manual, which are mandatory in nature. Chapter 8 of CBI Manual deals with complaints and source of information, whereas Chapter 9 deals with preliminary enquiries. Clauses 8.26, 8.27, 8.29, 8.32 of CBI Manual assume much importance and hence they are extracted as hereunder:

" Clause No.8.26 reads thus:

"As a part of their duty and in terms of annual programme of work, all investigating and Supervisory Officers are required to collect quality information regarding graft, misuse of official position, possession of disproportionate assets, fraud, embezzlement, serious economic offences, illegal trading in narcotics and psychotropic substances, counterfeiting of currency, smuggling of antiques, acts endangering wildlife and environment, cyber crimes, serious frauds of banking/financial institutions, smuggling of arms & ammunition, forgery of passports etc. and other matters falling within the purview of CBI and verify the same to ascertain whether any prima facie material is available to undertake an open probe. While all CBI Officers are free to develop such information through discreet means, the Officer developing any information must keep his superior officer informed regarding information being developed by him. The immediate

superior officer may also keep the Competent Authority, i.e. DIG/JD/ADCBI/SDCBI/DCBI informed in case the officer against whom information is being developed is of a rank against whom only such officer can order registration of a case".

Clause No.8.27 is extracted as under:

"The source information once developed must be submitted in writing giving all available details with specific acts of omissions and commissions and copies of documents collected discreetly. The internal vigilance enquiries or departmental enquiry reports should normally not be used as basis for submitting the Source Information. The SP concerned after satisfying himself that there is a prima facie material meriting action by CBI and further verification is likely to result in registration of a regular case, would order verification if it falls within his competence. In the cases which are within the competence of higher officers, he will forward his detailed comments to the DIG and obtain orders from superior officer competent to order registration. The verification of SIRs must begin only after the Competent Authority has approved its registration. At this stage a regular SIR number will be assigned to the SIR which will also be entered in the Source Information sub-module of CRIMES Module with all other details".

Clause No.8.29 reads thus:

After registration, verification may be entrusted to an officer other than who has submitted the SIR. As far as possible, the requisition of records/documents should be avoided during verification of SIRs. In case, it is absolutely necessary to do so, the requisition must go to the concerned Vigilance Officer under the signatures of the SP after obtaining permission from the DIG concerned. It must

Authority has passed orders for registration of an SIR.

Clause No.8.32 envisages that:

The verification of an SIR must be completed within a period of three months. In case of delay, the approval of the Competent Authority should be obtained to carry out further verification beyond the prescribed time-limit.

Chapter 9 deals with preliminary enquiries.

As per Clause 9.1 when a complaint is received or information is available which may, after verification as enjoined in CBI Manual, indicate serious misconduct on the part a public servant but is not adequate to justify registration of a regular case under the provisions of Section 154 of Cr.P.C, a preliminary enquiry may be registered after obtaining approval of the Competent Authority.

Clause 9.7 Contemplates preliminary enquiry registration report.

As soon as it is decided to register a PE, the SP will take action to get the PE Registration Report prepared, which will invariably be vetted by him and in case of important enquiries even drafted by him. Registration Report of PE should be written in the PE Registration Report Form and not on the form prescribed for recording First Information Report under Section 154 Cr.P.C. Beside the allegations in brief, the complete details of the suspects involved should be recorded in the PE Registration Report. In respect of the public servants found involved in the matter, their Group, the Service (IAS, IRS, IPS etc.), present designation, scale of pay, present pay and date of superannuation (if available) should also be mentioned in the P.E. registration report. The copies of the PE Registration Reports should be sent to the authorities mentioned in the Annexure 9-A to this chapter.

Clause 9.10 says that the Preliminary Enquiries relating to allegations of bribery

and corruption should be limited to the scrutiny of records and interrogation of bare minimum persons which may be necessary to judge whether there is any substance in the allegations which are being enquired into and whether the case is worth pursuing further or not.

49. As rightly pointed out by Mr.Muralikumaran, learned counsel appearing for the petitioners no preliminary enquiry registration report is filed in this case. Hence, there is reason to presume that no preliminary enquiry was conducted, in this case. As it is manifested from the FIR, this Court is able to understand that the source of information was received on 13.6.2012 at 06.30 p.m. and the case in Cr.No.R.C.MA1 2012A 0025 was registered on the very same date. The FIR was dispatched to the learned special Judge for CBI Cases, (XII Additional Judge, City Civil Court) Chennai on the said date. It is thus made clear that the procedures enunciated in Chapters 8 and 9 of CBI Manual have not been followed.

50. Clause 9.1 of the CBI Manual says that it is therefore, necessary that the SP must carefully analyze the material available at the time of verifying and verification report submitted by the superior officer, registration of preliminary enquiries is not resorted to where a case can be registered. Where material or information available clearly indicates that it would be a case of misconduct and not criminal misconduct it would be appropriate that the matters referred to the department at this stage by sending a self- contained note. In such cases, no 'preliminary enquiry' should be registered.

51. Mr.Muralikumaran, has contended that the procedure enunciated under CBI Manual are mandatory which ought to have been scrupulously followed by the officers concerned prior to the registration of the case. In support of his contention, he has placed reliance upon the decision of this Court and made in **MCR. Vyas v. Inspector of Police 2014 SCC online Mad 4930**. Paragraph Nos.44, 50 and 54 of this decision are very much relevant.

52. In paragraph No.44, a learned Single Judge of this Court, has made reference to the decision of the Apex Court rendered in **Manu sharma v. State (NCT of Delhi) (2010) 6 SCC 1**. In this case, Hon'ble Mr.Justice P.Sathasivam

Judge of the Apex Court, as he then was, has elaborately dealt with the concept of fair investigation. Relevant portion is extracted here under:

"The First Information Report was registered based on the reliable source information received by the Respondent/CBI Office. The Delhi Special Police Establishment Act 1946 (herein after referred to as the DSPE Act) is a special statute. By reason of the said enactment, the CBI was constituted. My attention has been drawn to the provisions of the CBI Manual, from a perusal whereof, it appears that guidelines and procedures have been enumerated. If source information is received against an officer of high rank, even for verification of source information the Respondent /CBI has to get approval from the Competent Authority (in this case Director of CBI) and after such approval by Competent Authority, the verification officer shall submit his detailed report to the Competent Authority for obtaining orders. Then, after due application of mind, the Competent Authority shall pass orders for preliminary enquiry. The preliminary enquiry may either result in registration of regular case or in departmental action or refer to the concerned Department through a self contain note for such action. For registration of regular case in cases of officer of high rank, orders should be obtained from the Competent Authority. Chapter 8 of CBI Manual clearly states about the above said procedures to be followed.

In paragraph Nos.50, it has been observed that:

"Before going into the merits of the arguments advanced by the learned senior counsel, we have to see whether the provisions of the CBI Manual is

mandatory or directory. In determining the said question, the subject matter, the importance of the provision, the relation of that provision to the general object intended to be served by the Act will decide whether the provision is mandatory or directory. The provisions referred to above would use the words 'shall' and 'must' and as such it can hardly be directory, since the use of such language is per se indicative of the intent that the provision is mandatory. The effect of non compliance with the rule if could deprive the right of the person, then serious prejudice would be caused to the said person.

53. In **Manu Sharma's** case cited supra, the Apex Court has held that if any source of information is received against an officer of high rank even for verification of source information the respondent / CBI has to get approval from the Competent Authority. The Competent Authority is the director of CBI, and after such approval by Competent Authority, the Verification officer shall submit his detailed report to the Competent Authority for obtaining orders. This procedure has not been followed in this case, because the provisions of the CBI manual are mandatory to be followed.

54. In **Nirmal Singh Kahlon v. State of Punjab (2009) 1 SCC 441**, it has been observed by the Apex Court that lodging of FIR by CBI is governed by the manual. It may hold a preliminary enquiry; it has been given the said power in Chapter VI of the CBI Manual. A prima facie case may be held to have established only on completion of a preliminary enquiry". "Following **Vineet Narain case, the Apex Court in Shashikant v. CBI (2007) 1 SCC 630** "has held that CBI Manual has to be mandatorily followed by the Respondent /CBI Police. In a recent Judgment, in **State v. N.S.Gnaneswaran (2013) 3 SCC 594 the Apex Court** has reiterated this ratio.

55. In **Shashikant Versus Central Bureau of Investigation and Others, (2007 I SCC 630)**, while speaking on behalf of a Division Bench of the Apex Court, Hon'ble Mr. Justice S.B. Sinha, has observed that

"When an anonymous complaint is received, no

investigating officer would initiate investigative process immediately thereupon-It may for good reasons to carry out a preliminary enquiry to find out the truth or otherwise of the allegations contained therein".

56. In Paragraph No.77, with reference to the importance of conducting of suitable preliminary enquiry prior to the registration of a regular case **Hon'ble Mr.Justice S.B.Sinha** has observed, after citing the decision rendered by **Mitter, J in P.Sirajjudin vs. State of Madras (1970) 1 SCC 595** in the following words:

"Before a public servant, whatever be his status, is publicly charged with acts of dishonesty which amount to serious misdemeanor or misconduct of the type alleged in this case and a first information is lodged against him, there must be some suitable preliminary enquiry into the allegations by a responsible officer. The lodging of such a report against a person specially one who like the appellant occupied the top position in a department, even if baseless, would do incalculable harm not only to the officer in particular but to the department he belonged to, in general The means adopted no less than the end to be achieved must be impeccable".

57. This Court in **R.Subramaniam (Crl.O.P No.8438 of 2011, & Green Signal Bio Pharma Private Limited rep. by its Managing Director, Sundaraparipooranan (Crl.O.P.No.9611 of 2011) Vs Union Government of India by Additional Superintendent of Police CBI/ACB/Chennai** has held that strict compliance and adherence to the above guidelines are *sin quo non* for the officials, whenever they happen to register and take up a case for investigation. The clauses, enumerated in the above CBI (Crime) Manual, are the complete shape of track to be followed by the investigating officers, who are responsible to take up the investigation in respect of a cognizable offence. This Court in

paragraph 14 of the said Judgment has made a reference to the decision of the Apex Court in **Noor Aga Vs State of Punjab and another, reported in 2008 (56) BLJR 2254** wherein Hon'ble Mr Justice S.B.Sinha while penning down the Judgment on behalf of a Division Bench, in paragraph Nos. 122,123 and 124 has observed as under:

"122. Guidelines issued should not only be substantially complied, but also in a case involving penal proceedings, vis-a-vis a departmental proceeding, rigours of such guidelines may be insisted upon. Another important factor which must be borne in mind is as to whether such directions have been issued in terms of the provisions of the statute or not. When directions are issued by an authority having the legal sanction granted therefor, it becomes obligatory on the part of the subordinate authorities to comply therewith.

*123. Recently, this Court in **State of Kerala and Ors. v. Kurian Abraham(P)Ltd.& anr.**MANU/SC/0801/2008: [2008] 303 ITR 284 (SC) , following the earlier decision of this Court in **Union of India v. Azadi Bachao Andolan** MANU/SC/0784/2003 : [2003] 263ITR 707(SC) has held that statutory instructions are mandatory in nature.*

124. Logical corollary of these discussions is that the guidelines such as those present in the Standing Order cannot be blatantly flouted and substantial compliance therewith must be insisted upon, so that sanctity of physical evidence in such cases remains intact. Clearly, there has been no substantial compliance of these guidelines by the investigating authority which leads to drawing of an adverse inference against them to the effect that had such evidence been produced, the same would have gone against the prosecution. "

58. In the light of the observations made by the Apex Court cited supra , the mandate of the CBI Manual (including the requirement to follow the provisions of Chapters 8 and 9 regarding verification of source information and registration of preliminary enquiries) is not affected by Section 154 of Criminal Procedure Code (See Shahikant V CBI reported in (2007) 1 SCC 630 and State Vs N.S.Gnaneswaran, reported in (2013) 3 SCC 594). While illustrating some types of cases with regard to the requirements of preliminary enquiries Hon'ble

Supreme Court in P.Sirajuddin etc., Vs State of Madras reported in (1970 I SCC 595 has held that in the context of offences relating to corruption, a preliminary enquiry before proceeding against the public servants is must.

59. As it is revealed from the records, MMTC Ltd., (Minerals and Metals Trading Corporation of India) was a 100% largest public sector trading body and the same is a State owned Corporation of the Union of India. It is registered under the Companies Act as a Company and all the shares are owned by the Government of India. As per Section 619 of the Companies Act, 1956 the auditor of a government company shall be appointed or re-appointed by the Central Government on the advice of the Comptroller Auditor- General of India to direct the manner in which the company' s accounts shall be audited by the auditor so appointed. Thus it is clear that the MMTC Ltd., is a State owned Corporation of the Union of India and since its shares are all owned by the Central Government, the Memorandum Of Understanding dated 02.04.2008 entered into between the MMTC Ltd., on the one part and M/s.Shiv Sahai and Sons a proprietorship concern owned by Mr. N.P.Agarwal, the petitioner in CrI.O.P.No.21243 of 2014 ,on the other part, can very well be termed as 'government contract'. Since the Memorandum Of Understanding comes under the category of Government contract, Articles 298,299,300 as well as 14 of the Constitution of India come into play.

60. The principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non-arbitrariness is projected by Article 14 and it must characterize every state action, whether it be under the authority of law or in exercise of executive power without making of law. The State cannot, therefore, act arbitrarily in entering into relationship, contractual or otherwise with a third party, but its action must conform to some standard or norm which is rational or non-discriminatory. The action of the Executive Government should be informed with reason and should be free from arbitrariness.

61. It is indeed unthinkable that in a democracy governed by the rule of law, the executive Government or any of its officers should possess arbitrary

power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and it bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the power involves affection of some right or denial of some privilege. This principle is laid down by the Apex Court in **Ramana Dayaram Shetty Vs. The International Airport Authority of India**, (1979)3 SCC 489: AIR 1979 SC1628) .

62. As observed by the Andhra Pradesh High Court in **Y.Konda Reddy Vs State of A.P. (AIR 1977 AP 121)**, all actions of the State and its instrumentality are bound to be fair and reasonable. The actions are liable to be tested on the touchstone of Article 14 of the Constitution of India. The State and its instrumentality cannot be allowed to function in an arbitrary manner even in the matter of entering into contracts. The decision of the State either in entering into the contract or refusing to enter into the contract must be fair and reasonable. It cannot be allowed to pick and choose the persons and entrust the contract according to its whims and fancies. Like all its actions, the action even in the contractual field is bound to be fair. It is settled law that the rights and obligations arising out of the contract after entering into the same is regulated by the terms and conditions of the contract itself.

63. The same principle is laid down by the Patna High Court in **Pyrites Phosphates & Chemicals Ltd., vs. Bihar Electricity Board, AIR 1966 Part I**, wherein it is observed that:

"The requirement of 'fairness' implies that even administrative authority must act in good faith, and without bias, apply its mind to all relevant considerations and must not be swayed by irrelevant considerations; must not act arbitrarily or capriciously and must not come to a conclusion which is perverse or is such that no reasonable body of persons properly informed could arrive at. The principle of reasonableness would be applicable even in the matter of exercise of executive power without making law. It is settled principle of law that the Court would strike down an administrative action which violates any

foregoing conditions. "

64. This Court has perused the Memorandum Of Understanding dated 2.4.2008 entered into between the MMTC Limited and the petitioner Mr. N.P.Agarwal, who is the proprietor of M/s.Shiv Sahai and Sons. He has been referred to as 'customer' in the above said Memorandum Of Understanding, whereas the MMTC Ltd., has been referred as the 'seller'. At page No.3, at the tail end of the Memorandum of Understanding it seems that on behalf of the MMTC Ltd., (seller) one P.Ramachandran, General Manager had signed. Apart from him, two witnesses have also signed, whereas in the place of 'customer' viz., Shiv Sahai no signature is found and beneath the signature of Mr. P.Ramachandran, it is stated 'MMTC Limited, a Government of India Undertaking, Chennai House, 6, Espalanade, Chennai-600 001.'

65. The Executive Power of the Union of India and the State to carry on any trade or business, acquire, hold and dispose property and make contracts is affirmed by Article 298 of the Constitution of India. It is to be mentioned here that if the formal requirements of Article 299 of the Constitution of India are complied with, the contract can be enforced against the Union or the States. Thus, Article 299 lays down three conditions for making valid contracts in the exercise of the executive power of the Center or a State.

(i) The contract must be expressed to be made by the President or the Governor as the case may be,

(ii) All contracts made in the exercise of the executive power are to be executed on behalf of the President/Governor as the case may be, and

(iii) The execution must be by such person and in such manner as the President or the Governor as the case may be, may direct or authorize.

The expression 'executed' does not by itself contemplate execution of a formal contract by the executing parties.

66. In **Bhikaraj Jaipuria Vs Union of India**, (AIR 1962 SC 113), the Apex Court has held that"it is clear from the words "expressed to be made" and "executed" that there must be a formal written contract. The provisions of Article 299(1) are mandatory in character and any contravention thereof nullifies the contract and makes it void. The provisions of Article 299(1) have

not been enacted for the sake of mere form but they have been enacted for safeguarding the Government against the unauthorized contracts. The provisions are embodied in the constitution on the ground of public policy on the ground of protection of general public and these formalities cannot be waived or dispensed with."

67. The Supreme Court in **State of Bihar Vs Majeed**, (AIR 1954 SC 786) has held that "It may be noted that like other contracts, a Government contract is also governed by the Indian Contract Act, yet it is distinct a thing apart. In addition to the requirements of the Indian Contract Act such as offer, acceptance and consideration, a Government contract has to comply with the provisions of Article 299 of the Constitution. Thus subject to the formalities prescribed by Article 299 the contractual liability of the Central or State Government is same as that of any individual under the ordinary law of contract."

68. On coming to the instant case on hand, this Court finds that no reference is available to show as to whether P.Ramachandran, the then General Manager of the MMTC Ltd., was specifically authorized to enter into a contract with the petitioner Mr. N.P.Agarwal, Proprietor of M/s .Shiv Sahai and Sons , Chennai as contemplated under Article 229 of the Constitution of India.

69. Here, we are not concerned with the validity of the contract. The petitioners in Crl.O.P.No.21243 of 2014 and in Crl.R.C.No.1191 of 2015 also have not disputed the genesis as well as the existence of the Memorandum Of Understanding, dated 2.4.2008.

69 (a) The prime question is as to **whether the petitioners could be prosecuted before a Criminal Court for their alleged failure to make payment to MMTC Ltd., Chennai.**

70. As already discussed in the preceding paragraphs, the entire case has been revolving around the center point of 'Memorandum Of Understanding', dated 2.4.2008. Clause 11 of the Memorandum Of Understanding" enables the parties to go for arbitral proceedings, if any dispute or difference whatsoever arising between them relating to the construction, meaning, scope, operation or effect of the sale purchase agreement, or even if there is any breach thereof,

shall be settled through arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration and the award made in pursuance thereof shall be binding on the parties. "This is the specific stipulations made in clause 11 of the said Memorandum Of Understanding. It is also to be noted that the venue of arbitration shall be 'Chennai'."

71. Page Nos.37 to 72 of the typed set of papers filed by the petitioners contain the copy the plaint filed by MMTC Ltd., in C.S.No.249 of 2013 on the file of this Court. It appears that the above Civil Suit has been filed against the following three persons:

- (a) Shiv Sahai and sons, represented by its proprietor Mr. N.P.Agarwal;
- (b) Shiv Sahai & Sons (India) Ltd., being its successor in title to Shiv Sahai & Sons, a proprietary concern through its directors represented by Mr. N.P.Agarwal; &
- (c) Mr.V.Gurumurthy (Retired General Manager (F & A) of MMTC, Ltd.,

72. It is pertinent to note here that Mr. N.P.Agarwal has been shown as the second accused whereas his son, Mr.Ganesh Agarwal has been shown as the third accused in the charge sheet in C.C.No.3 of 2014, pending on the file of the learned Special Judge for CBI cases, Chennai. Mr. V.Gurumurthy, the then General Manager (Finance & Accounts) of MMTC Ltd, Chennai has been ranked as the first accused in the above said case.

73. In the suit in C.S.No.249 of 2013, the plaintiff (MMTC Ltd.,) has sought the following reliefs as against the defendants:

- i) directing the defendants to pay jointly and severally, the plaintiff a sum of Rs.96,10,12,547/-;
- ii) directing the defendants 1 and 2 to pay jointly and severally the plaintiff a sum of Rs.2,13,14,744/- in addition to the amount stated in prayer (i) above;
- iii) directing the defendants to pay jointly and severally to the plaintiff a sum of Rs.74,59,25,228/- as interest on the sum of Rs.96,10,12,547/- at the rate of 18% p.a. from the due date of

- payment till the filing of the suit;
- iv) directing the defendants 1 and 2 to pay jointly and severally, to the plaintiff a sum of Rs.38,63,820/- as interest on the sum of Rs.2,13,14,744/- at the rate of 18% p.a. from the due date of Payment till the filing of the suit;
 - v) directing the defendants to pay the plaintiff interest on the sum of Rs.170,09,37,775/- at the rate of 18% p.a. from the date of filing of the suit till the date of realization; and
 - vi) directing the defendants 1 and 2 to pay the plaintiff interest on the sum of Rs.2,51,78,564/- at the rate of 18% p.a. from the date of filing of the suit till the date of realization.

74. On perusal of the records, this Court is able to find that the defendants 1 and 2 viz., Shiv Sahai and Sons, represented by Mr. N.P.Agarwal (Director) seems to have filed an Application in I.A.No.2830 of 2013 in C.S.No.249 of 2013, on the file of this Court as against the plaintiff, MMTC Limited, Chennai and thereby requested the Court to refer them as well as the plaintiff to arbitration, as per the terms and conditions of clause 11 of the Memorandum Of Understanding, dated 02.04.2008, , and as accepted between the parties vide communications exchanged between them dated 23.8.2012, 17.10.2012, 7.1.2013, 10.1.2013, 17.1.2013, 29.1.2013, 31.1.2013, 4.2.2013, 5.2.2013, 6.2.2013 and 26.2.2013, since nothing remains to be decided in the suit except reference to arbitration.

75. The respondent/plaintiff has contested the above said Application by filing their counter-affidavit. After hearing both parties, a learned single Judge of this Court, (R.S.Ramanathan,J) while allowing the said Application has held that " having regard to the fact that the respondent/plaintiff submitted to the arbitration proceedings initiated by the applicants, it is not open them to recede and file a Suit in respect of the dispute covered under MOU and also in respect of various claims made against the applicants. Therefore, I am of the firm view that the dispute raised in the Suit is liable to be referred to Arbitration, as the same is

covered under clause 11 of MOU, dated 2.4.2008.”

76. This Court would like to place it on record certain observations made by the learned single Judge in the order referred to above, as they are very much relevant for the disposal of these petitions.

(para 22) ..According to me, except, bald allegations in some paragraphs stating that the third defendant, in connivance and in collusion with the applicants, fudged the accounts and caused loss to the respondent/plaintiff, no specific allegations were levelled against the first and second defendants for having connived and conspired with the third defendant and caused loss, and main allegations were made only against the third defendant for having tampered the accounts and concealed certain facts to the respondent and made false representations to the respondent regarding the transaction of the first and second defendants made under the buyer credit scheme.

(para 25).. As stated supra, in the plaint, specific allegations of fraud were made only against the third defendant who was the officer of the respondent/plaintiff, and there were no detail, regarding the role played by the first and second defendants in connection with the fraud committed by the third defendant. In such circumstances it is to be seen whether the application has to be rejected on the ground that fraud has been alleged in the plaint.

(para 27). Reverting to the facts of the present case, it is seen that the allegations of fraud were made against the third defendant, who was the Officer of the respondent-Corporation and by reason of the fraudulent conduct of the third defendant, applicants/defendants 1 and 2 made wrongful gains and that was sought to be recovered in the suit. In other words, the allegations of fraud were made only against the third defendant, and except the allegation that the third defendant in connivance and in collusion with the applicants fudged the accounts and caused loss to the respondent/plaintiff, no specific allegations were made against the applicants. Further, the respondent was able to find out the actual loss caused by the third defendant and the wrongful gains made in favour of the

applicants. by reason of the fraud committed by the third defendant. Therefore no detailed evidence, accordance to the respondent has to be let in, as everything has been borne out of records. Hence, in my opinion, having regard to the allegations made in the plaint, the Judgment reported in (2010) 1 SCC 72 (supra) cannot be relied upon by the learned senior counsel for the respondent/plaintiff to substantiate their contention that the application is liable to be rejected.

(para 29). Considering the allegations made in the case, as quoted above, the Hon'ble Supreme Court held that no serious allegations of fraud were made for not referring the dispute to arbitration. According to me, in the case on hand, as stated supra, no serious allegations of fraud were attributed against the applicants/defendants 1 and 2 and the allegations of fraud, or suppression of facts were made only against the third respondent, who was the Officer of the respondent-Corporation.

(para 31). In the Judgment reported in (2003) 6 SCC 503 (supra), viz., the Judgment relied upon by the learned senior counsel for the applicants, the Hon'ble Supreme Court held as follows:

"If, in an agreement between the parties before the Civil Court, there is a clause of arbitration, it is mandatory for the civil Court to refer the dispute to an arbitrator. In the instant case, the existence of an arbitral clause in the agreement is accepted by both the parties as also by the Courts below. Therefore, in view of the mandatory language of Section 8 of the Act, the Courts below ought to have referred the dispute to arbitration."

(para 32). Therefore, in view of the ratio decidendi laid down by the Hon'ble Supreme Court, point No.1 is answered in favour of the applicants by holding that no specific allegations, much less, any allegations of fraud were made against the applicants, and having regard to the fact that the third defendant was the Officer of the respondent/plaintiff and he fudged the accounts of the respondent/plaintiff, and thereby, caused wrongful gains to the applicants and the respondent/plaintiff was also able to deduct some amount and quantified the loss suffered by them and also having regard to

clause 11 of MOU, the dispute has to be referred to arbitration and it need not be tried by the civil Court."

77. The learned Judge has further observed that no such allegation of fraud was made out as against Shiv Sahai and Sons (India) Ltd., represented by Mr. N.P.Agarwal (Director). The learned Judge after referring to the serious allegation of fraud that has been attributed against the third defendant, viz., Mr.V.Gurumurthy, (retired General Manager (Finance & Accounts) of MMTC Ltd, Chennai, who has been shown as 1st accused in the charge-sheet , which is sought to be quashed in this case, has ultimately found that the dispute arising between the parties to the Memorandum Of Understanding, dated 2.4.2008 is civil in nature for which no prosecution could be launched.

78. The view expressed by this Court has also been endorsed by the learned single Judge (R.S.Ramanathan,J) of this Court and that is why he has concluded that the respondent/plaintiff (MMTC Ltd.,) had submitted to the arbitration proceedings initiated by the applicants viz., Shiv Sahai and Sons and M/s.Shiv Sahai and sons (India) Ltd., represented by Mr. N.P.Agarwal (Director). In his order, the learned single Judge has also concluded that when the Suit itself is not maintainable in pursuance of clause 11 of the Memorandum Of Understanding, dated 2.4.2008, criminal prosecution could not be launched against the petitioners.

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79. On the other hand, Mr. K.Srinivasan learned Special Public Prosecutor (CBI cases) appearing for the respondent in both the cases has submitted that the order, dated 30.6.2014 passed by the learned single Judge of this Court in I.A.No.2830 of 2013 in C.S.No.249 of 2013 was challenged by the MMTC Limited, Chennai before the Division Bench of this Court in O.S.A.No.244 of 2004. The Division Bench of this Court headed by the Hon'ble Chief Justice as he then was, after hearing both sides, had

dismissed the Appeal in O.S.A.No.244 of 2014 with a finding that the Appeal is meritless.

80. This Court has also perused the Judgment of the Division Bench, dated 28.10.2014, wherein the Hon'ble Chief Justice, while penning down the Judgment, has made reference to paragraph 8 of the plaint in C.S.No.244 of 2013. In paragraph 4 of the Judgment, the Hon'ble Chief Justice has observed that:

" a perusal of the plaint shows that in paragraph 8, there is a categorical averment that a request was made by the first respondent/first defendant for commencement of purchase of bullion under Buyers' Credit Scheme and on that basis, goods were sold on the understanding that all expenses and losses in respect of the transactions will be on the account of the first respondent. These transactions took place from the period 01.04.2007 to 31.12.2012. The plaint also alleges that the third defendant (not a party in this appeal), an employee of the appellant, was looking after the books of accounts during the period 01.04.2007 to 30.11.2010."

In paragraph 8 of the Judgment, it has been observed that

"Some discrepancies in transactions are stated to have been detected by the Special Audit, post an internal audit. This Special Audit Report was submitted by the Chartered Accountants. It is in view thereof that the appellant alleges fraud having been practiced on the appellant."

81. In paragraph 12 of the above said Judgment the Hon'ble Chief Justice has made a reference to Section 8 of the Arbitration and Conciliation

Act, 1996 and clause 11 of the Memorandum of Understanding dated 2.4.2008 has also been referred to. In paragraph 12 of the Judgment, it has been observed that "In so far as the first two respondents are concerned, they moved an application under Section 8 of the Arbitration, and Conciliation Act, 1996, alleging arbitration agreement inter se the parties in the Memorandum signed by the parties.

82. Based on clause 11 of the Memorandum of Understanding, dated 2.4.2008, it was contended before the Division Bench that in view of the above said clause, the dispute between the parties is one of accounting and the appellant should not be permitted to wriggle out of the mode of resolution of disputes by arbitration. Further, with reference to clause 11 of the Memorandum of Understanding, the Hon'ble Chief Justice in paragraph 16 of the Judgment has observed that " There is really no dispute about the existence of arbitration clause. If one may say, there is a dual plea raised by the appellant:

(a) that in view of the allegations of fraud, which are really serious in nature and the charge sheet having been filed, this is an appropriate case where trial should take place before the Civil Court;

(b) the third defendant becomes necessary to the proceedings, who is not a party to the arbitration clause and the allegations of fraud are not only against the third defendant, but also against the first two defendants/respondents.

83. Paragraph 19 of the said Judgment also assumes much importance. It is extracted as under:

"We find it quit surprising, if not shocking, that a public Sector enterprise should do such 'U' turn and that too, on a simple issue as to the forum before which the disputes ought to be settled. This is the background in which the suit has come to be filed."

84. Mr. K.Srinivasan learned Special Public Prosecutor (CBI cases)

appearing for the respondent in both the petitions has canvassed that the Judgment in the above said O.S.A. No.244 of 2014 dated 28.10.2014 was challenged before the Apex Court in a Special Leave Petition No.9678 of 2015. It appears that the Hon'ble Supreme Court of India has granted an interim order, but the details of the orders are not available in the typed set of papers. However, from page No.30 of the Index annexed to the typed set of papers filed by the learned Special Public Prosecutor, this Court is able to understand that the above said Special Leave Petition came up before the Supreme Court on 5.7.2016 and on that day, the Hon'ble Supreme Court has ordered that "interim order to continue till the next date of hearing"

85. Mr. Muralikumaran, learned counsel appearing for M/s. Mcgan Law Firm, has submitted that the entire case of prosecution, as observed by the Division Bench of this Court in the afore said Judgment in O.S.A.No. .244 of 2014 dated 28.10.2014 is civil in nature and therefore, the criminal proceedings initiated by the respondent police against the petitioners could not be maintained.

85 (a) As indicated by Mr. Muralikumaran, at page No.4 of the plaint under the caption of 'Buyers Credit Scheme', it has been stated that Buyers credit (BC) is an extension of the outright sale scheme. There is an arbitrage opportunity due to interest disparities in India and overseas. In order to avail this benefit, the plaintiff (MMTC Ltd.,) was requested by the customer to avail buyer's credit. Even in the charge sheet also, the respondent/police has stated that "the extended scheme of the outright purchase scheme mentioned above is the buyer's credit scheme" He has also submitted that it was accepted by both the parties that under the buyer's credit scheme, the entire value of the Bullion including LIBOR (London Inter Bank Offered Rates) and SPREAD and extra amounts for arranging the buyer's credit was to be paid upfront by the customer to the MMTC.

86. He has also adverted to that it is an accepted fact that under the buyer's credit scheme, the amount deposited by the customer towards the

http://www.judis.011 which includes an additional payment towards LIBOR, SPREAD and

further 5% of the additional deposit of the value towards dollar/rupee value fluctuation is deposited by MMTC Ltd., in its name in the bank as fixed deposit and based on that, MMTC gets a credit or loan from the foreign banks where the lending interest rate is lesser than the interest on fixed deposits and pays the supplier abroad.

87. Mr. Muralikumaran, learned counsel for the petitioner has elaborately made submission on the following issues:-

- a) That the entire transaction is civil in nature and also the dispute.
- b) When the Loss has not been recovered, is it due to fudging of account and whether there is any fraud ?
- c) Why Loss occurred ?
- d) Who has to conclude Fraud ?
- e) Why the complaint ?
- f) Whether the CBI is influenced in this matter ?
- g) The Legality of the Complaint
- h) Whether the Criminal Complaint was given to arm-twist, threaten, coerce and harass the customer?
- i) The Legality of the Special Audit Report.
- j) The correctness of the Special Audit Report.
- k) Report of CAG to Ministry.
- l) When there is no prosecution, under the special enactment / special law, can there be a prosecution under the General Law?

88. He has invited the attention of this Court to the order in Crl.R.C.Nos.1312 and 1337 of 2012 dated 14.02.2013, passed by this Court and the counter Affidavit of MMTC in Application No. 2830 of 2013 in C.S.No. 249 of 2013, and contended that the entire amount for the bullion lifted by the petitioners were paid upfront.

89. Relying on the CAG report, the plaint in C.S.No. 249 of 2013, counter affidavit in Application No. 2830 of 2013 and the charge-sheet, he pointed out that MMTC if the transactions are to be treated as buyer's credit deposits the sale consideration as fixed deposits in the name of MMTC itself and based on

that deposit loan is taken from foreign banks.

90. He further contends that with regard to the allegations of loss towards foreign exchange at Rs.36.02 crores, interest on the LAD which was alleged to have not been passed on to the customer at Rs. 36.18 crores and loss of a sum of Rs. 18.42 crores towards usance of LC charges, that the foreign exchange loss even according to prosecution was due to not taking up of the forward cover and taking up forward cover is the duty of the MMTC. Relying on the CAG report and the Special Audit report in Page.No. 498, the counsel for the petitioners contended that the instruction of the Central Office of MMTC was not followed by the Regional Office of MMTC, with regard to taking of forward cover and the same is purely a lapse on the part of the MMTC and the loss resulted due to the said lapse is being resisted by the petitioners by initiating arbitration proceedings. The MMTC has also filed a Civil Suit claiming the very same amount contending that the loss is caused due to the petitioners' action.

91. It is to be noted that at the last paragraph of Chapter V of the Report No. 13 of 2013 (page No.218 of the Index to the additional typed set of papers) it is stated that the bullion drill mandates obtaining of Foreign Exchange Rate Cover (FERC) to hedge against exchange rate fluctuations. The cost of such FERC is to be borne by the customer. Instructions issued in March and September, 2008 mandated compulsory FERC for hedging all BCs in case of gold transactions. Further, as per the instructions issued on 18th December,2016, each transactions to be treated as separate and squared off on completion so as to avoid carry forward of balances. In other words, hunching of transactions was prohibited.

92. In the charge sheet, the respondent has mainly alleged that the first accused Mr. V. Gurumoorthi, the then Deputy General Manager (Finance & Accounts) (Bullion Finance) and the then General Manager (Finance & Accounts) MMTC Ltd., Chennai, the second accused, Mr. N.P.Agarwal, Proprietor of M/s.Shiv Sahai and Sons and his son Mr. Ganesh Agarwal had entered into a criminal conspiracy at Chennai and in other places during the year 2008-2009 and cheated the MMTC Ltd., to the tune of Rs.113.38 crores

by speculating in Indian Rupee-US Dollar foreign exchange fluctuation and intentionally omitted to take forward cover for the purchases made under the Buyers Credit Scheme. It is also alleged that in pursuance of the criminal conspiracy, first accused Mr.V.Gurumoorthi had maintained improper accounts and falsified the books of accounts of the MMTC Ltd., by showing inflated fixed deposit amount of Rs.38,99,01,189/- and deflated Loan-Against-Deposit amount of Rs.45,43,17,044/- both in the account of the MMTC Ltd., in Union Bank of India, Chennai Main Branch, Chennai . The first accused Mr. V.Gurumoorthi also obtained pecuniary consideration to the tune of Rs.41,700/- offered by the second accused Mr. N.P.Agarwal and by the third accused Mr.Ganesh Agarwal in the form of air ticket for his visit to Singapore along with his wife, during October, 2010. Therefore, the respondent has levelled charges against the petitioners that they had committed offences of criminal conspiracy, cheating, falsification of accounts, criminal misconduct and corruption after obtaining pecuniary consideration.

93. In this connection, this Court would like to refer to the provisions of Sections 233 and 233A of the Companies Act, 1956. Section 233 says that if any auditor's report is made, or any document of the company is signed or authenticated, otherwise than in conformity with the requirements of Section 227 and 229, the auditor concerned and the person, if any, other than the auditor, who signs the report or signs or authenticates the document shall, if the default is willful, be punishable with fine which may extend to Rs.10000/- (Rupees ten thousand only)

Section 233A deals with the Power of Central Government to direct special audit in certain cases.

Sub Section (1) enacts that

Where the Central Government is of the opinion-

- (a) that the affairs of any company are not being managed in accordance with sound business principles or prudent commercial practices, or
- (b) that any company is being managed in a manner likely to cause serious injury or damage to the interests of the trade, industry or business in which it

(c) that the financial position of any company is such as to endanger its solvency;

the Central Government may at any time by order direct that a special audit of the company's accounts for such period or periods as may be specified in the order, shall be conducted and may by the same or a different order appoint either a chartered accountant as defined in clause (b) of sub section (1) of section 2 of the Chartered Accountants Act, 1949 (whether or not such chartered accountant is a chartered accountant in practice within the meaning of that Act) or the company's auditor himself to conduct such special audit.

94. As contemplated under Section 233 of the Companies Act, if any auditor's report is made or any document of the company is signed or authenticated, if any default occurs, the person who actually committed the willful default shall be punishable with fine which may extend to Rs.10000/- (Rupees ten thousand only)

What Section 233A of the Companies Act would say is that the Central Government is empowered to direct special audit in certain cases if it is of the opinion that the affairs of the company are not being managed in accordance with sound business principles or prudent commercial practices. It also says that any company is being managed in a manner likely to cause serious injury or damage to the interests of the trade, industry or business in which it pertains. As per clause (c) of sub section (1) in case the financial position of any company is such as to endanger its solvency the Central Government may at any time order to conduct a special audit on the company's accounts.

95. As already stated, clause 5.1 of Chapter V of Report 13 of 2013 (page No.218 of the Index to the additional typed set of papers filed by the petitioner) says that there is non recovery of dues due to lapses in bullion transactions and camouflaged accounting. It also says that failure to adhere to the instructions on bullion trading, camouflaged accounting and ineffective internal control in MMTC Limited Chennai resulted in non-realization of dues amounting to Rs.295.99 crores from customers and avoidable loss of

Rs.53.27 crore (till December 2012) towards interest. The Report (at page No.219) further proceeds to say that in so far as the Chennai Regional Office of the Company is concerned it was noticed in audit that the Chennai Regional Office of the company failed to adhere to the bullion drill, instructions issued by the company from time to time and the internal control measures in day to day operations which resulted in huge loss to the company as discussed in the succeeding paragraphs.

96. The next paragraph of the Report refers to the Memorandum of Understanding dated 2.4.2008 entered into between the petitioner, Mr. N.P.Agarwal and the MMTC Ltd., It reads that "The Chennai Regional Office of the Company entered into gold trading under Buyers Credit System with M/s.Shiv Sahai and Sons (M/s.SSS) from 2007-2008 onwards. However, it was observed that foreign exchange exposure was not hedged as the forward cover was kept open. As per para 7 (i) of the Agenda item No.2 given in the 'Note for Consideration of Audit Committee of Directors' for 67th meeting of the Committee held on 10th February, 2012, the differential exchange rate and the buyers' credit expenditure to the tune of Rs.36.36 crores was not debited to the account of M/s.SSS during financial year 2008-2009."

.....

The Report further reads thus: सत्यमेव जयते

"The Management while admitting the audit observations regarding non debiting the interest on LADs to the customer's accounts and non posting the debit entries towards differential costs in the accounts of M/s.SCL replied (March and November, 2012) that:

As M/s. Shiv Sahai & Sons expected that Rupee will appreciate, the forward cover was kept open;

Volume of bullion transactions at RO, Chennai were on a large scale and hence it was not possible to settle on transaction basis;

Bullion Trading Systems (BTS) has been upgraded to incorporate

Buyer's Credit and SBLC with effect from 04th July, 2012;

In the Bullion Trade, there have been the causes of pending recoveries from the customers on account of lack of commercial prudence and delay in booking of accounting transactions, delay in reconciliation of bank account, non-maintenance of proper record of financial securities (Fixed Deposits etc.,) failure to seek periodical timely confirmation of balances from the customers, non accounting of interest and other expenses recoverable from the customers, recovery of TDS from the customers, wrong refunds to the customers, misuse of suspense accounts to manipulate vendor accounts which could not be pointed out by professional internal Auditors (CA) and Statutory Auditors.

Reply of the Management was not acceptable in view of the following:

Keeping FERC open was in violation of the specific instructions mandating compulsory FERC requirements issued on 10th March, 2008;

The contention of the Management that it was not possible to settle on transaction to transactions basis was not acceptable as it is contrary to company's own specific instructions dated 18th December, 2006 which required that each transaction be treated as separate and carry forward of balances be avoided. It further stipulated that any release of bullion to any of the customers was to be made only when the party account was fully reconciled and should be upto date

The changes effected in Bullion Trading System will be assessed in future only. The fact, however, remains that Company sustained losses due to poor internal controls.

The reply was silent on the reasons due to which Corporate Office failed to monitor and implement the norms/principles of accounting. The primary responsibility of ensuring adherence to bullion drill and internal orders and preparation of true and fair

financial statements was that of the Management/Corporate Office of the Company. The Company also did not provide any reason for transferring unclassified/unlinked entries from suspense account to vendors account.

Thus failure in adherence by RO, Chennai to the instructions on bullion trading, camouflaged accounting and ineffective internal control resulted in non-realization of dues Rs.99.82 crores and avoidable loss of Rs.38.56 crore (till December, 2012) towards interest to the Company."

97. At page No.88 of the additional typed set of papers , 'Tour Report on visit to MMTC Chennai (10.9.08 to 14.09.08) find a place. In paragraph No. 4 of that report it is stated that the fixed deposit receipts are made in the name of MMTC Ltd., and lodged with banks due to lien against Buyers Credit or loan and all the deposits are maintained with ten banks in respect of transactions with Shiv Sahai. Beneath this line, the position in respect of Shiv Sahai as on 12.09.08 is given. The report further says that the transactions involving bullion trade and especially Buyer's credit requires regular maintenance of records with close monitoring and control. In view of huge volume of work and quantum of trade, there is urgent requirement for posting of two officials in Commodity Section and two in Finance at the operational level in Bullion Division. The report further says that due to lien against Buyers Credit or loan, fixed deposits were made in the name of MMTC Ltd., Chennai and that all the deposits were maintained with ten banks in respect of transactions with Shiv Sahai.

98. It is also to be noted that this report has given advice to the management that in view of huge volume of work and quantum of trade there is urgent requirement for posting of two officials in Commodity Section and two in Finance at the operational level in Bullion Division. The report further depicts the real situation that there was inadequate

strength in the Officers level.

99. Therefore, as argued by Mr. Muralikumaran, the situation 'wanting of officials' has left the management in the condition of "improper maintenance of accounts".

100. The counsel for the petitioners has further contended that as per the accounting standards, the foreign exchange fluctuation is to be booked as a loss or gain and therefore is purely Civil in Nature. Further with regard to the loss due to loan against deposit the counsel contended that even as per the Special Audit report in Page No.65, the loans were taken on the deposits to take advantage on the arbitrage. He also points out the special audit report to contend that with regard to fixed deposit interest, interest on loan, fixed deposit were maintained in single code and MMTC itself has accepted that it was not passed as a whole due to paucity of time and pressure of account closing for the year 2009-2010. Further with regard to loss due to usance of LC, pointing out to Page.No.516 of the special audit report the counsel for the petitioners contended that the beneficiary bank straight away claimed it from the usance letter credit bank, who in turn debited it in the account of MMTC.

101. Pointing out all the above the Learned Counsel for the petitioners contended that when the entire amount was paid upfront and MMTC mismanaged the said amount which resulted in loss to MMTC, the initiation of criminal proceedings is a case of clear arm-twisting.

102. He has further pointed out that in the reply made to the audit observations of the CAG, fraud was not alleged even by MMTC with regard to the very same issue. The counsel for the petitioner vehemently contends that the very same issues arose with 3 others as found in special audit report in Page. Nos. 14, 24, 61, 106-110, 151,154, 446 and 502, but no prosecution against them were launched.

103. He has further maintained that though there is a vague allegation of the prosecution contending that Mr. V.Gurumoorthy has mismanaged his official position, there is no documentary evidence to prove as to what his position was

and how he misused it. Further placing reliance on the Memorandum and Article of Association of the MMTC the learned counsel for the petitioners contended that the administration of the MMTC is vested with the Board and with regard to Loans and deposits it specifically states that, it can be done only by Board resolutions and the Board functions. The Department of Public Enterprises under the Ministry of Heavy Industries and Public Enterprises, Government of India Guidelines issued on Corporate Governance for Public Sector Enterprises, which MMTC Board of Directors in its meeting adopted the said guidelines as Board Charter. Even under the same as per clause 3.2 the power to invest funds and take loans can be exercised only by the Board through its meetings. The power to borrow money and invest funds and to make loans to other functionaries can only be by means of resolutions at Board Meeting. No such resolution has been produced by the prosecution to show that all through the period it was only Mr. V. Gurumurthy was empowered by the Resolutions of the MMTC Board to Invest funds i.e., to make deposits and take loans against it.

104. This Court has also perused the "Standing Order on Role of Audit in Relation to Cases of Fraud and Corruption". This Standing Order seems to have been issued in the Office of the Comptroller and Auditor General of India. Clause 2 of this Standing Order refers to Fraud examination. It enacts that fraud examination is a part of the normal auditing procedures. Fraud has a legal (criminal) connotation. Audit teams/officers do not make legal determinations of whether fraud has actually occurred. Hence Audit teams/officers can put red flags (an indication that further scrutiny of the items would be required) which need further investigation by appropriate agencies. When the evidence is clear, audit teams/officers can come to a conclusion about a suspected fraud and include in their findings.

105. With reference to respective responsibilities of management and audit, clause 3 of the Standing Order states that the responsibility for the prevention and detection of fraud and error rests primarily with the management of the audited entity through the implementation and continued operation of accounting and control systems designed to check fraud. Audit must, however, evaluate and report on the adequacy of the systems in place

and competence with which the management has discharged its responsibility in relation to prevention, detection, response and follow up/remedial measures in relation to fraud and corruption.

106. Further the Standing Order on Role of Audit in relation to cases of fraud and corruption says about fraud awareness of the audit planning stage and vigilance about fraud at audit execution stage. This Court has also perused the Annexure to the Standing Order on role of audit and corruption. Clause 1.1 of Annexure says that examination of system for detection and prevention of fraud and corruption will be an integral part of all regularity audits and also of performance audit, when it forms one of the audit (sub) objectives.

Clause 2 says that fraud examination is a part of the normal auditing procedures and it includes:

Being alert for situations, control weakness, inadequacies
In record keeping, errors and unusual transactions or
Results, which could be indicative of fraud, corruption,
Improper expenditure or lack of probity; and

Focusing audit strategy on areas and operations prone to fraud and corruption by developing effective high risk indicators for fraud

Clause 3.7 reads as under:

"The mandate of Government Audit is broader than solely that of financial statement auditor and includes responsibility for verification of regularity and performances. Hence, the auditor should be aware of the possibility of fraud not only in the preparation and presentation of financial statements but in other areas covered by regularity (compliance) and performance audits as well"

Clause 7 envisages respective responsibilities of management and audit.

Clause 7.1 says

"It is the responsibility of those charged with governance of

the entity to ensure through oversight of management, that the entity establishes and maintains internal control to provide reasonable assurance with regard to reliability of financial reporting, effectiveness and efficiency of operations and compliance with applicable laws and regulations.”

Clause 7.2 reads that

in relation to fraud, it is important to recognize that the responsibility for the prevention and detection of fraud and error rests primarily with the management of the audited entity through the implementation and continued operation of accounting and control systems designed to check and fraud.

Clause 19.1 says that

reports of individual cases of suspected/presumptive fraud/corruption should be addressed confidentially, in the first instance to the Controlling authority concerned with the approval of Group Officers.

107. On perusal of the records, this Court finds that the instructions given in this Annexure to the Standing Order on Role of Audit in relation to cases of fraud and corruption have not been followed by the MMTC Limited.

Clause 19.7 says that

cases relating to suspected/presumptive fraud and corruption should be highlighted in the Inspection Reports, Audit Notes et., and also in the Audit Reports. All such cases should be printed in bold type.

108. Mr. Muralikumaran, while advancing his arguments has invited the attention of this Court to Indian Audit and Accounts Department Auditing Standards (2nd Edition 2002).

Chapter IV of the Auditing Standards contemplates reporting standards.

Clause 9 of Chapter IV says that fraud, illegal acts and other non compliance.

Clause 9.1 reads that when auditors conclude based on evidence obtained, that fraud or an illegal act either has occurred or is likely to have occurred they should report relevant information. Auditors need not report

information about fraud or an illegal act that is clearly inconsequential. Auditors should also report other noncompliance (for example a violation of a contract provision) that is material to the financial statements.

Clause 9.6 of Chapter IV of the Auditing Standards envisages that the management is responsible for taking timely and appropriate steps to remedy fraud or illegal acts that auditors report to it. When fraud or an illegal act involves assistance received directly or indirectly from another government or agency, (for example Central Government Grants received by the State Government or a government agency including the autonomous body received a government grant) auditors may have a duty report it directly (to the other government/agency), if management fails to take remedial steps.

109. Section 619 of the Companies Act, 1956 deals with Application of sections 224 to 233 to Government companies. Sub Section (3) of Section 619 of the Companies Act contemplates that the Comptroller and Auditor- General of India shall have power--

(a) to direct the manner in which the company's accounts shall be audited by the auditor appointed in pursuance of sub-section (2) and to give such auditor instructions in regard to any matter relating to the performance of his functions as such;

Sub Section 3(a) of Section 619 of the Act says that the Comptroller and Auditor- General of India shall have power to give directions to the auditor appointed in pursuance of sub section (2) to do the auditing work in respect of the company's accounts in such a manner

110. Page No.66 of the additional typed sets of papers contains the directions under Section 619(3)(a) of the Companies Act, 1956. Annexure IV deals with system of Accounts & financial control. Clause V deals with fraud/risk. Clause 5 of Annexure V poses the following question:

"Does the Company have separate Vigilance Department/Wing? To what extent is it effective in its duty and whether the reports are submitted to the Board."?

Clause 11 deals with 'Internal Audit System'

111. Annexure II of the Directions under Section 619(3) (a) of the Companies Act, 1956 is about sub directions to statutory/branch auditors on the accounts of MMTC Limited for the year 2008-2009. Page No.91 of the additional typed set of papers contains the special report submitted by Purushottam and Company, Chartered Accountants. Paragraph 3 of the report says as follows:

"3. We further report that

In our opinion and to the best of our information and according to the explanations given to us, the Accounts of the Chennai Regional Office together with the Accounting Policies and Notes on Accounts forming part thereof give the information required by the Companies Act, 1956 in the manner so required and subject

to:-

Note No.10(a) of Schedule 21 to Accounts regarding non realization of sale value amounting to Rs.24.72 crores, the effect of which on the financial statements are not ascertainable.

Note No.12 of Schedule 21 to Accounts on non confirmation/ Reconciliation of certain accounts shown under sundry Debtors/sundry creditors/loans and advances, the effect of Which on the financial statements are not ascertainable. "

112. From the above context, this Court understands that the financial statements of MMTC Limited were not ascertainable and that there was non realization of sale value amounting to Rs.24.72 crores. This report conveys the meaning that there was mismanagement and improper maintenance of accounting system. In Clause 6 of the report of Purushottam and Company, Chartered Accountants, it is stated that we are informed that Regional Office, Chennai has assigned internal audit to an outside agency. In our opinion, the Region has an internal audit system commensurate with the size and nature of its business.

113. In this connection, Mr. Muralikumaran, learned counsel appearing for the petitioner has raised a question that " when the Region has an internal audit system commensurate with the size and nature of its business what

necessitated them to assign the internal audit work to an outside agency?." Besides clause 6 clause 7 of the Report says that maintenance of cost records has not been prescribed for Regional Office, Chennai by the Central Government under clause (d) of sub section (1) of Section 209 of the Companies Act, 1956.

114. Purushottam and Company, (Chartered Accountants), Chennai in their report says that "However, the internal control mechanism needs to be strengthened in the following areas:

- a) Active and prompt follow up of old debts, advances and claims by the respective commodity division; and
- b) Periodic confirmation of outstanding balances and reconciliation of control accounts.

From the report of Purushottam and Company, Chartered Accountants Chennai, this Court finds that the internal control mechanism of MMTC Ltd., was not in an expected level. There was lack of follow up action in respect of recovery of old debts, advances and claims by the respective commodity division and therefore it was suggested that these mechanisms need to be strengthened.

115. From the perusal of the records it is manifested that the petitioner, N.P.Agarwal, Proprietor of Shiv Sahai and Sons, Chennai seems to have written three letters to Mr. Oorkavalan of M/s. MMTC Limited, Chennai. In the letters, dated 19.09.2011 and 22.09.2011 he had expressed his anguish with reference to the non-furnishing of break up or particulars of purchases made by M/s. MMTC Ltd., Chennai during the financial year 2008-2009 and in the above said letters, he has stated that despite several requests were made M/s. MMTC Ltd., Chennai had never provided him any break up details for the entire INR fixing, which was done by M/s .MMTC Ltd., itself. In an another letter, dated 22.09.2011 he has stated that it was the practice of M/s. MMTC Ltd., to make outright purchase and to make payments and to take steps (only) of gold/silver bullion. With reference to this , he has stated in the above said letter that with regard to buyer's credit from beginning till today MMTC had

never provided him any details and decisions regarding the buyer's credit scheme taken at MMTC discretion without consulting him or disclosing any details, and therefore he did not know as to why MMTC Chennai had been maintaining this secrecy with them. However, no satisfactory reply was given by MMTC Ltd., Chennai to N.P.Agarwal.

116. In the letter, dated 11.10.2011 addressed to Mr. Oorkavalan of M/s.MMTC Limited, Chennai, the petitioner Mr. N.P.Agarwal had expressed his anxiety saying that "As informed to you earlier, forex buying was done by your good office for the FY 2008-09 and no day wise, week wise, month wise or year wise details were provided to us. We further bring it to your notice that Mr. Ganesh deputed an accountant for reconciliation on two occasions, as required by you. But reconciliation was not possible. Finally, he had handed over the available statement of records to Mr. Oorkavalan.

117. Under these circumstances, ignoring the grievances expressed by the petitioner in their letters as aforesaid, Mr. Oorkavalan Deputy General Manager (F & A) of M/s.MMTC Limited, Chennai in his letter, dated 28.12.2011 addressed to M/s.Shiv Sahai & Sons, has stated that MMTC Ltd., had sent three debit notes with debit notes and credit notes towards interest on loan against deposits for the FY 2008-09,2009-10 and 2010-11 and thereby requested the petitioner to pay a sum of Rs.33,90,15,577/- along with interest at 18% per annum, immediately towards the above debit/credit notes.

118. In this connection, Mr. Muralikumaran, learned counsel for the petitioners has contended that the petitioners had already sent several letters to MMTC Ltd., Chennai requesting them to furnish necessary details about the transactions. In this regard he has raised a question that without furnishing the required details with reference to their purchases, how, MMTC Ltd., Chennai could have claimed a sum of Rs.33,90,15,577/- towards interest on loan against deposits for the FY 2008-09,2009-10 and 2010-11 along with interest at 18% per annum? He has also stated that the above facts would clearly indicate that the entire transaction was civil in nature and as such the dispute

between the parties concerned ought to have been sorted out through the procedures known to common law and not through criminal proceedings.

119. It may also be relevant to make reference to the letter, dated 31.12.2011 addressed to MMTC Ltd., Chennai by Shiv Sahai and Sons. In this letter, the petitioner has stated that the entire buyers credit business was solely handled by MMTC and hence they did not have the records with them. Under these circumstances, the petitioners had sought some clarification from MMTC Ltd., Chennai for the purpose of reconciliation of accounts and to check and confirm what M/s MMTC Ltd., have claimed was correct or not. The following clarifications were sought for from MMTC Ltd., by the petitioner in the said letter, dated 31.12.2011:

" Please provide us details of each and every individual buyer's credit transaction undertaken by you, for the said period along with the details of the deposits made by you from the funds provided by us. In particular, please provide the following:

- a. The date of the transactions;
- b. The quantity of the Metal (gold or silver)
- c. The price fixed with the foreign supplier including Cantango charges, if any ;
- d. The date of the delivery agreed with the foreign supplier;
- e. The date on which the payment has to be made to the Banker providing the buyer's credit;
- f. Our confirmation for the said deal under Buyer's Credit System;
- g. The details of the forward rate booked for the payment to be made to the banker providing the Buyer's Credit;
- h. The details of the fixed deposits made with the Banker by the funds provided by us along with the interest rate agreed and the tenure of the fixed deposit.
- i. Details of all other charges to be paid by us for this deal;
- j. The expected profits to be earned by us for this deal, since we would not

there would be loss from day one.

120. On behalf of M/s MMTC Ltd., Chennai one Mr. Umesh Sharma, who was the then Chief General Manager (IA) had addressed a letter dated 5.1.2012 to M/s. Venkat & Rengaa, Chartered Accountants, Chennai with reference to the subject of 'special audit of bullion transactions and reconciliation of debit balances in the sundry creditors account of RO Chennai' The scope of auditing work was for analyzing/locating debit balance of Rs.116.69 crores.

121. In an another letter, dated 8.2.2012, addressed to M/s. MMTC Ltd., Chennai, the authorized signatory on behalf of Shiv Sahai & Sons (India) Pvt Ltd., in paragraph 2(e) has stated that "we hereby reiterate that for us to reconcile the accounts in the interest of MMTC , it would be mandatory that you please provide us the details as requested by us in our letter, dated 31st January, 2011. " In paragraph 3 (c) they have stated that "we have never refused any legitimate payments due to MMTC . Actually we would have always paid in excess to MMTC for all our Cash and Carry business. It is a universal fact that MMTC would never deliver any metal to any customer, unless the entire funds for the said metal has already been reached the bank account of MMTC. Hence, you could not have delivered 1000's of tones of metal to us over the past 4-5 years, without receiving the entire funds from us.

122. On perusal of the report of the Auditors on the Accounts of the Chennai Regional Office of MMTC for the year ending 31st March, 2012, M/s. Vardhaman & Co., Chartered Accountants in their report dated 13.6.2012 have stated thus:

Item No.1

a) Note No.32 Extra Ordinary items representing the adhoc provisions of Rs.115,57,18,266/- pending completion of Internal Investigation/Special Audit on account of acts of commission and omission pertaining to amount recoverable from Debtors/others

Particulars	Amount (Rs.)
M/s.Shiv Sahai & Sons	91,79,79,805
M/s Surana Corporation	18,21,59,354
Claims pending	5,55,79,107
Total	115,57,18,266

b) Note No.33- Non confirmation/non-reconciliation of certain accounts shown under sundry debtors/sundry creditors/loans and advances/claim recoverable;

c) **Non confirmation of extra ordinary balance in the following accounts:**

- i) Amount payable to M/s. Adani Global Pte Ltd. (Singapore)
Rs.440,80,76,107/- credit balance-towards supply of coal from Indonesia;
- ii) Amount **receivable** from M/s. Tamil Nadu Generation and Distribution Corporation Ltd. (M/S.TANGEDCO) –Debit balance of Rs.443,12,64,201/- towards purchase of coal from MMTC.
- iii) M/s. Titan Industries-Credit balance of Rs.12,23,92,414/-
- iv) M/s.Shiv Sahai & Sons-Debit balance of Rs.91,79,79,805/-
- v) M/s.Surana Corporation-Debit balance of Rs.18,21,59,354/-
- vi) M/s.GRT Group-Credit balance of Rs. 19,486/-
- vii) Code No.12401/-
Foreign Currency Loan from bank Rs.597,05,13,188/-

IN VIEW OF THE NON CONFIRMATION OF BALANCE (CREDIT/DEBIT BALANCES) IN RESPECT OF ABOVE MENTIONED DEBTORS/CREDITORS ITEM NO.1 (a),(b) & (c), WE ARE UNABLE EITHER TO FORM ANY OPINION OR TO COMMENT UPON THEIR IMPACT ON THE FINANCIAL RESULTS FOR THE FINANCE YEAR ENDED 31.03.2012.

123. In the very same report in clause III (a), M/s.Vardhaman and Co., Chartered Accountants Chennai have stated that

"As on 1.4.2011, this account showed a debit balance of Rs.116,68,79,881.91.

In 2011-12, this debit balance was adjusted/transferred in to-Claims recoverable-Pending Reconciliation-Account Code No.25258

Further, the following transactions were recorded in the above accounts-Account Code No.25258 (during the Financial Year 2011- 2012)

M/s.Shiv Sahai & Sons

Particulars	Year	Amount Rs.
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Buyers Credit Exchange difference	2008-09	36.36.15,997.00
FDR maturity wrongly credited to party in books of accounts	2007-08	6,00,00,000.00
Interest on loan against deposit not debited to party	2008-09	33,90,15,577.00
Interest on loan against deposit not debited to party	2008-09	11,10,73,887.00
Interest on loan against deposit not debited to party	2007-08	37,23,756.00
Buyers credit charges	2007-08	60,19,137.00
Buyers credit expenses	2007-08	22,33,001.27
Silver invoices not completed in BTS	2008-09	1,42,44,831.56
FDT interest wrongly credited in the books of accounts	2008-09	97.36,159.00

In paragraph 4 the Chartered Accountants have expressed their opinion with reference to internal audit that 'in our opinion the Internal Audit carried out by the firm of Chartered Accountants is not effective and also not commensurate with the assets of the company, the nature of business and in the area of clause 2(a) referred to therein.

124 .Ultimately in page No.14 at paragraph 15 of the Report of M/s.Vardhaman and Co., Chartered Accountants, it is stated that" based upon the audit procedure performed and information and explanations given by the management, we report that no fraud on or by the region has been noticed as reported during the course of our audit."

125 . In the letter dated 17.10.2012 addressed by one Tarun Gulati on behalf of ELP addressed to the Registrar, Indian Council of Arbitration, New Delhi it is stated that in the course of the audit of the transactions with Shiv Sahai, it came to our knowledge that Shiv Sahai in connivance and in conspiracy with some of our officers have fraudulently manipulated the accounts and thereby cheated MMTC of the amounts due to MMTC under the MOU and a special audit has been directed which is in progress, and the final report is expected shortly. In the last line of the said letter, it is sated that' we

accordingly also request you to extend the date for filing of the defence statement and counter claim."

126. On perusal of this letter it is revealed that this letter was written to the Registrar of Indian Council of Arbitration , New Delhi with reference to a matter of arbitration between M/s.Shiv Sahai and Sons, Chennai and M/s. MMTC Ltd., Chennai.

127. In this connection, it is imperative on the part of this Court to state that in the Audit report dated 13.6.2012 given by M/s. Vardhaman and Co., Chartered Accountants it is stated that based upon the audit procedure performed and information and explanations given by the management, we report that no fraud on or by the region has been noticed as reported during the course of our audit. When the Chartered Accountants, viz., M/s.Vardhaman and Company themselves were able to say that during the course of their audit, they did not notice any fraud on or by the region, how, could M/s ELP say that in the course of the audit of the transactions with Shiv Sahai it came to their knowledge that the Shiv Sahai & Sons in connivance and in conspiracy with some of their officers had fraudulently manipulated the accounts and thereby cheated MMTC of the amounts due to MMTC under the MOU.

128. From the angle of judicial perception this court would like to say that it is very easy to make such allegations against a person, but it is very difficult to prove or substantiate those allegations against such a person. Similarly, in the given case on hand also, the prosecuting agency is able to say that the petitioners and the third accused had entered into a criminal conspiracy and in pursuance of their conspiracy, they had cheated the MMTC Ltd., and thus caused pecuniary loss equally pecuniary gain to the petitioners 1 and 2. As aforesaid, all such allegations are to be proved by the person who is making it and the burden of proof solely rests on the shoulders of the prosecuting agency to bring home the alleged guilt of the petitioners..

provisions of Sections 101, 102 and 103 of the Indian Evidence Act. Section 101 of the Indian Evidence Act enacts that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

130. Per Lord MAUGHAM in **Constantine Line Vs. I.S.Corpn. (1941) 2 ALL ER 165,179**), the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for a negative is usually incapable of proof. It is an ancient rule founded on consideration of good sense and should not be departed from without strong reasons. It is also to be noted here that a person who desires to assert a particular fact, it is for him to prove its existence. In view of the provisions of Sections 101 and 102 of the Indian Evidence Act the burden of proving a fact always lies upon a person who asserts. Until such burden is discharged the other party is not required to be called upon to prove his case.

131. The court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party. This ratio has been laid down in **Bibhuti Vs Bhusan Datta Vs Samarendra Nath Misra, (2002 (3) CHN 482 (Cal)**

132. The strict meaning of the term 'Onus probandi' is this that if no evidence is given by the party on whom the burden is cast, the issue must be found against him. (Per PARKE B, in **Barry Vs Butlin, 2 Moo PCC 430**) That is the reason why in criminal cases, the Courts used to say that the prosecution must prove its case beyond all reasonable doubts.

133. In so far as this case is concerned, the whole edifice is founded on the basis of 'fraud'. When the Chartered Accountants M/s.Vardhaman and Co., has been able to say that during the course of their audit they did not notice

any fraud, the allegations made by the prosecuting agency has become pale into insignificance.

134. On perusal of the records, this Court is able to find that the letter, dated 18.02.2013 seems to have been addressed by ELP, signed by one Tarun Gulati, partner, to the Registrar, Indian Council of Arbitration, New Delhi is with reference to the matter of arbitration between M/s.Shiv Sahai and Sons Chennai and M/s.MMTC Ltd., Chennai .

Paragraph 2 of this letter is very much relevant, wherein it is stated that

"we state that there is no arbitration agreement and therefore, the present arbitration is not maintainable. Further, we wish to point out that the arbitration is not maintainable as in the course of the audit of the transactions with the claimants. It came to our knowledge that the claimants in connivance and in conspiracy with some of our officers have fraudulently manipulated the accounts and thereby cheated our clients of the amounts due to them. A case has also been initiated by the Central Bureau of Investigation (CBI) which has filed an FIR against the claimants and others, and presently, the matter is under investigation. The present case appears to be a counter blast to the proceedings referred above and is not maintainable, especially in view of the decision of the Hon'ble Supreme Court in the case of N.Radhakrishnan v Maestro Engineers (2010) 1 SCC 72). For the above stated reasons the arbitration instituted is not maintainable."

135. With reference to the above context, this Court would like to point out that clause 11 of the MOU, dated 2.4.2008 stipulates that if any dispute arises between the parties to the Agreement, it shall have to be resolved through arbitration. This fact cannot be denied either by MMTC Ltd., Chennai or by Shiv Sahai and Sons, Chennai. When such being the case, how M/s ELP in their letter dated 18.02.2013 which was addressed to the Registrar, Indian Council of Arbitration, New Delhi could say that there was no arbitration

agreement between the MMTC Limited Chennai and Shiv Sahai and Sons, Chennai?

136. Page Nos.202 to 216 of the additional typed set of papers contain the replies to the RTI Application of N.P.Agarwal. In Serial No.27 of this reply there is a query;

"If the Auditors have pointed out certain issues, which have significance and relevance to the financial result of a PSU, and no action has been taken, then who is responsible for the same?"

For this query, it is replied that

"Only supplementary or test audit is done by CAG u/s619 of the Companies Act, 1956."

Serial No.28, is the query relating to "whether the situation as specified under Section 233A of the Companies Act, prevails in MMTC Ltd.,? If so, whether CAG/Central Government have ordered any special Audit of MMTC Ltd., or any of its Regional Offices? Please also furnish us the details of the appointment of Special Audit done by you under Section 233A?", for which it is replied that "CAG's Report on the given subject has been laid in Parliament, Central Government takes decision on special audit as per section 233A."

Serial No.135 is with reference to the following query:

" whether MMTC RO has maintained any records to show which party's funds were placed in FDR and LAD taken against which FDR. If not, how the interest Debits and Credits are debited/credited to Customers Account? In such circumstances, the liability fixed or charged on the customers, the interest credits/debits and the customer balances shown in the financial statements are correct and accurate and the Financial Statements show a true and fair view?

(i) The sale of Gold by the RO is done under Outright or Loan Schemes. whatever be the scheme, the delivery of Gold to customer is done on receipt of Money or LC/BG.

(ii) RO takes 100/110% cash margin/SBLC for the scheme and opens SBLC in

favour of the supplier.

(iii) MMTC also takes Buyer's Credit from Indian Banks in foreign currency for immediate payment to the Supplier and the same to be liquidated in 90 days. The entire value for the supply is obtained as margin from the customer and placed as FD with the Bank granting buyer's credit.

(iv) In all above Buyer's Credit Schemes, the exchange cover was supposed to be taken and MMTC limits were not to be used. The extinguishment of the liability was to be done out of the FD/LC available i.e. self-liquidating."

For this query it is simply replied "As referred above"

137. M/s. MMTC Ltd., Chennai has addressed a letter dated 28th August, 2014 to the petitioner Mr. N.P.Agarwal, Proprietor M/s.Shiv Sahai & Sons and M/s.Shiv Sahai & Sahai (India) Ltd., This letter is with reference to the petitioner's RTI application dated 5.6.2014 addressed to PID, CAG, New Delhi. In this letter, MMTC Ltd., has stated that "the replies to the RTI application to the petitioner, dated 5.6.2014 is denied under Section 8(1)(h) of the Right to Information Act, 2005. In an another letter, dated 15.9.2014 addressed to the petitioner, Mr. N.P.Agarwal by one Ashwini Kapoor who had signed on behalf of MMTC Ltd., in her capacity as the then General Manager & PIO it is stated that "In this regard it is to inform you that the information sought is under CBI investigation and also under argument in the appropriate legal Court, providing any information to you in the matter at this stage can hamper the CBI investigation and court proceedings as such information sought cannot be provided under Section 8(d) & (h) of the RTI Act, 2005.

138. Page 233 of the additional typed set of papers contains the reply given on behalf of MMTC Ltd to the query made by the proprietor, M/s.Shiv Sahai and sons (India) Ltd. Serial No.5 is the query made by Mr. N.P.Agarwal which reads as follows:

"Please provide a copy of the communication by which the appointment of M/s. Venkat and Ranga, Chartered Accountants to

conduct a Special Audit on the Bullion Transactions of Chennai Regional Office of MMTC Ltd., was brought to your notice and knowledge. If such appointment is brought to your notice, please furnish the copy of the communications, note sheets, documents by which the said appointment be construed as, appointed in accordance with the provisions of Sec. 233 of the Companies Act, 1956 or not”?

For this query, it was answered as “This office has not made any appointment of Special Auditor”

139. Such an answer given by M/s.MMTC Ltd., Chennai is absolutely wrong and seems to be absurd, because with reference to the subject ‘special audit of the bullion transactions and reconciliation of debit balances in the sundry creditors account of Regional Office, Chennai’ on behalf of MMTC Ltd., Chennai a letter was addressed on 5.1.2012 to M/s.Venkat and Rengaa, Chartered Accountants, signed by one Umesh Sharma, the then Chief General Manager (IA), wherein it is stated that “we are pleased to inform you that the competent authority has approved the appointment of your firm as per the terms and conditions thereon. The scope of this work was to analyze and locate the debit balance of Rs.116.69 crores.

140. From the above context, this Court finds that the appointment of M/s.Venkat and Rengaa, Chartered Accountants was approved by the management of MMTC Ltd., Chennai, but in their reply MMTC Ltd., Chennai has gone to the extent of saying lie that their Office had not made any appointment of Special Auditor viz., appointment of M/s.Venkat and Rengaa , in respect of the transactions of Chennai Regional office of MMTC Ltd.,Chennai.

141. In a communication dated 24.9.2014 addressed to Mr. N.P.Agarwal (the petitioner), as it is seen from page No.241 of the additional typed set of papers, the Indian Audit and Accounts Department, Office of the Principal Director of Commercial Audit and Ex-Officio Member, Audit Board-1 has given a reply with reference to supply of information under RTI Act, 2005. In Serial

"Whether the said Special Audit Report of Chennai Region copy was forwarded/provided to CAG for their perusal? If so, what was the action taken by CAG in relation to the same?"

By way of reply it is stated

" that Audit Para (para No.5.1) on the subject has been published in on CAG's Audit Report No.13. Union Government (Commercial) of 2013 may be referred to. Please visit the web link www.cag.gov.in."

In the remarks column it is stated that "This office has not appointed any special auditor for MMTC and the special audit report was not forwarded by MMTC for our perusal. Though, it was obtained while processing the audit para, the audit observation was first brought to the notice of MMTC through Inspection Report issued on 16.1.2012 based on our test audit. Final audit para was published in CAG Audit Report No.13, Union Government (Commercial) of 2013 and the same was tabled in Parliament.

142. Article 89 of Articles of Association (as amended upto 20.07.2010) confers some powers on the Directors subject to Section 292, 296 and 297 of the Companies Act, 1956. Section 292 of the Companies Act, 1956 says that the Board of Directors of the company shall exercise the following powers on behalf of the company, and it shall do so only by means of resolutions passed at meetings of the Board:-

(a) the power to make calls on shareholders in respect of money unpaid on their shares;

(aa) the power to authorize the buy back referred to in the first proviso to clause (b) of sub section (2) of Section 77A;

(b) the power to issue debentures;

(c) the power to borrow moneys otherwise than on debentures;

(d) the power to invest the funds of the company; and

(e) the power to make loans .

143. Clause 1.0 of Board Charter is the background wherein it is stated that the department of public enterprise under Ministry of Heavy Industries and public enterprises, Government of India has issued detailed guidelines on corporate governance for Central Public Sector Enterprises (CPSEs) MMTC Board of Directors in its 384th meeting held on 31st January, 2011 has approved adoption of these guidelines. The guidelines envisage inter alia a formal statement of Board Charter clearly defining the roles and responsibilities of the Board and individual directors. Accordingly, this Board Charter has been approved by the Board in its 392nd meeting held on 12th December, 2011.

Clause 3.0 contemplates the responsibilities and powers of the Board of Directors wherein it is stated that the operations of the company shall be managed under the directions of the Board within the framework set out by the Companies Act, 1956 and the Memorandum and the Articles of Association of the Company.

144. Serial No.3 of Standing Order on Role of Audit in Relation to Cases of Fraud and Corruption distinguishes the characteristics of fraud :

"3.1 Fraud should be distinguished from error. The distinguishing factor between fraud and error is whether the underlying action is Intentional or unintentional. For examples, the following actions amount to error and not fraud.

A mistake in gathering or processing data from which financial statements are prepared.

An incorrect accounting estimate arising from oversight or misinterpretation of acts and

A mistake in the application of accounting principles relating to measurement, recognition, classification, presentation or disclosure.

3.2. The meaning and nature of fraud can be understood by referring to the following definitions:

Fraud is an intentional act by one or more individuals among management, those charged with governance, employees or third parties, involving the use of deception to obtain an unjust or illegal advantage.

Fraud involves deliberate misrepresentation of facts and/or significant information to obtain undue or illegal financial advantage"

145. The following seven bullet points have been enumerated under item No. 15.14 of Standing Order on Role of Audit in Relation to Cases of Fraud and Corruption:

(1) "reporting losses of shortages of public monies, departmental revenues or receipts', stamps opium, stores or other property held by or on behalf of, Government irrespective of the cause of loss and manner of detection by the subordinate authority concerned to the next higher authority as well as to the Statutory Audit Officer and to the concerned Principal Accounts Officer, even when such loss has been made good by the party responsible for it, except cases which need not be reported under the provisions of GFRs:

(2) bringing cases involving serious irregularities to the notice of Financial Adviser or Chief Accounting Authority of the Ministry or Department concerned and the Controller-General of Accounts, Ministry of Finance, redrawing of amounts lost through misappropriation, defalcation, embezzlement etc. bearing of loss to Government on account of culpability of Government servants by the Central Government Department or State Government concerned with the transaction;

(3) making recovery from the erring Government officials;

(4) reporting of all cases involving loss of Government money arising from erroneous or irregular issue of cheques or irregular accounting of receipts will be reported to the Controller General of Accounts along with the circumstances leading to the loss to enable him to take steps to remedy defects in rules or procedures, if any, connected therewith;

(5) reporting of losses above the prescribed value due to suspected fire, theft, fraud etc., to the police for investigation as early as possible; a formal investigation report should be obtained from the Police Authorities in all cases, which are referred to them;

(6) fixing of responsibility for loss on the concerned officers;

(7) prompt disposal of cases of loss at each stage of detection, reporting , write off, final disposal, in cases of losses including action against delinquents and remedial measures.”

All the above seven points are bullet points pertaining to auditors to be followed scrupulously.

146. The Learned counsel for the petitioners points out to Page.No. 419 of the special audit report to contend that even the special audit did not find any cheques having been issued for placement of FD's. It was further contended by the counsel for the petitioners that the investigation to make out a prima facie case did not even set out as to :-

1. *What are the powers of the MMTC Ltd, Board ?*
2. *What are powers of the Directors?*
3. *What are the departments ?*
4. *Who are the Heads of the Departments ?*
5. *What are the respective Roles & Duties ?*
6. *What are the Resolutions of the Board empowering each person to deal with the money?*
7. *What are the Resolutions of the Board authorizing investments and taking loans ?*
8. *Who are the persons, who are authorised to sign the cheques?*
9. *What are the procedures involved in the same?*
10. *What are the MMTC regulations, norms, resolutions pertaining to making of deposits?*
11. *What are the MMTC regulations, norms, resolutions pertaining to taking of Loans?*
12. *Who has issued the Cheques for placement of FDs ?*
13. *If Cheques were not issued, what are the documents that formed basis for placement of FDs ?*
14. *What are the documents that formed basis for taking Buyer's credit from Banks abroad?*

15. *What are the documents that proves who were responsible for choosing the bank in which the Deposits are to be made?*

147. The Counsel for the petitioner pointing out to page No.418 of the special audit report contends that the schedule files were not there, neither the FD's copies were available for verification. He points out many instances citing the special audit report in page Nos.434, 435, etc. to contend that there was a complete mismanagement of the finance and accounts by MMTC, as a whole and not by any single individual.

148. Article 123 of Articles of Association says about the Annual Report of Directors, while Article 124 deals with particulars of profit and loss account. As envisaged under Article 127 of the Articles of Association audit should be done atleast once in a year. As per Article 128, the auditors of the company shall be appointed or reappointed by the Central Government on the advice of the Comptroller and Auditor General of India and his/their rights and duties shall be regulated by Sections 224 to 233 read with Section 619 of the Act.

As per Article 132, the audited accounts shall be conclusive. It further says that every account of the company when audited and approved by a general meeting shall be conclusive except as regards any error discovered therein within three months next after the approval thereof. Whenever any such error is discovered within the period, the account shall forthwith be corrected and thenceforth shall be conclusive.

149. In vol.3 at page No.406, Clause 40 of the Special Audit Report submitted by Venkat and Rangaa, Chartered Accountants narrates that an enterprise should disclose:

" (a) the amount of exchange differences included in the net profit or loss for the period and

(b) net exchange differences accumulated in foreign currency transaction reserve as a separate component of shareholders' funds, and a reconciliation of the amount of such exchange differences at the beginning and end of the period"

However, the profit and loss does not have any figure relating to Loss/Gain on foreign exchange. The revaluation difference has been routed through Purchase and Sales Accounts as detailed below. In our opinion, the same is in contravention of the provisions of AS 11.

150. M/s. Venkat and Rangaa, Chartered Accountants in their Special Report pertaining to Chennai Regional Office for the years 2007-2008 to 2009-2010 have given their observations on verification of purchases and sales as under:

(see page 19 of vol.1 of Special Audit Report)

- '1. Bullion Drill instructions have not been followed in several cases.
2. To satisfy the customers' needs to take input credit, invoices have been issued outside the BTS system and also accounted for gold issued on loan basis.
3. Sales and purchases accounting during the year varied from time to time and leads to a lot of confusion.
4. The reporting of turnover and purchase to statutory authorities are also incorrect.
5. VAT Audit was conducted from 15.7.2011 to 29.7.2011 by CTO enforcement and show-cause notice has been issued for various deviations. RO has replied to the show -cause notice and we will submit our observations after completion of audit of all years.
6. The quantity of purchases and quantity of sales disclosed in the annual accounts is incurred for gold OGL.
7. Customs duty debited to P&L is in excess by Rs.
8. Purchase booking not done as per the quantity and invoice received from the vendor on a regular basis through BTS.'

Rangaa, the Auditors have given their observations on verification of FDRs, of which clauses 5 and 15 are very much relevant.

'5. We also find that no cheque has been issued for placement of FD's. All these are not in line with the established accounting practices.

15. Internal control mechanism is totally absent in the area of placement of FD or loan account."

152. Page No.456 of volume 3 contains the report on special audit of MMTC Limited RO Chennai for the year ending March, 2010, wherein it is stated that

" Thus there were several carried forward mistakes which sought to be corrected by transferring the net difference of Rs. 56.83 crores from FDR account to Suspense Account. Similarly differences existed in loan against deposits which also corrected by passing entry for Rs. 40.80 crores. Due to operation of single code for FDR as well as Loan against deposit in 2007/08 and major part of 2008/09, both got mixed up and in the absence of complete documentary evidence, the above entries were passed as a whole due to paucity of time and pressure of account closing for the year 2009-10"

153. The reply of MMTC Ltd., Regional Office, Chennai to the remarks made by the auditors is found at page No.458 of volume 3 of Special Audit Report. It is extracted herewith:

"We wish to inform that the FDR as well as LAD was maintained in a single code from 1.4.2007 to 30.9.2008. At the instances of the auditors, the account was bifurcated and the same was not done correctly. In order to cover the differences in 2008/09, the LAD of UBI as per books was understated by Rs.45.44 crores (Reported by Special auditors in 2008/09). The differences in loan against deposits was corrected by passing entry for Rs.40.80 crores. Due to operation of single code for FDR as well as Loan Against Deposit in 2007/08 and major part of 2008/09 both got mixed up and in the absence of complete documentary evidence, the above entries were passed as a whole due to paucity

of time and pressure of account closing for the year 2009-10”

In their reply, the MMTC Ltd., Regional Office Chennai themselves have confessed their mistake stating that the bifurcation of accounts at the instance of the auditors was not done properly and that the differences in loan against deposit was corrected by passing entry for Rs. 40.80 crores. They have also stated that the major part of 2008-09 got mixed up due to operation of single code for FDR as well as loan against deposit in 2007-08. They have also stated that in the absence of complete documentary evidence, the above entries were passed as a whole due to paucity of time and pressure of account closing for the year 2009-10.

154. As it is seen from page No.434 of volume 3, with reference to special audit of bullion transactions of MMTC Ltd., the auditors have stated thus:

“Our observations on verification of purchases and sales is as under:

1. No documents, given to the bank for obtaining loan against deposits are produced to us.
2. Confirmations from the customers are not available and it appears that the customers are claiming that they do not have records to verify and confirm the dues.
3. LADS and FDs are not properly matched making it difficult, if not impossible to charge differential interest to customers individual job order files should contain these details to enable correct debit and proper recovery.

155. With reference to verification of Fixed Deposit as per books with confirmation from the Banks the auditors have stated that:

“the maintenance of FD account (24800) and Loan Against Deposit during the year is not proper. More than Rs.4900 crores was transacted in fixed deposit account on behalf of the customers with a closing balance of Rs.1924 crores, the maintenance of the details is totally absent. As already reported from time to time, account opening forms, fixed deposit copies, FD register

for which the FD's were placed are not available."

156. From the above facts, it can easily be understood that the MMTC Ltd., Chennai had not been maintaining the accounting system properly.

157. Page No.519 of Volume-3 contains the report on Special Audit of MMTC Ltd., Regional Office, Chennai for the year ending March, 2009. Here, it is stated that there was short debit to party till 31.3.2009 (net) Rs.106,09,25,183/-. It is further stated that the entire problem arose because the FDR's were placed for a longer period and to meet the payment obligations on the loans LAD on FDRs were taken. As an alternative we have calculated the amount due to Shiv Sahai assuming the FDR's were placed for the period of Buyer's Credit/Usance L/c and adopted the relevant rate of the period actual tenor of the concerned banks.

158. At page Nos.66-67 of volume I of Report on Special Audit of MMTC Ltd., Regional Office, Chennai for the year ending March, 2009 the auditors have stated as follows:

UNQUOTE

We have carefully gone through the reports of the teams and have done independent analysis of the data for Buyers' Credit taken during 2008-09. Taking into account, what should be the position of FD and LAD be as explained above; our comments on the above figures are given below.

1. FD should be equal to BC O/S or may be 110% of the BC O/S. As the BC O/S Rs.1499 crores, FD should be maximum of Rs. 1650 crores. However, the FD on that date was Rs. 2288 crores. How is it possible as no customer pays advance money for gold not lifted?

2. There was no necessity for a LAD of Rs.776 crores as on 12.9.08 which is within a period of 18 days has increased to Rs.885 crores?. It should have been NIL as per the reasoning given above. They have also stated that

however, if the value of the subsequent supply is more than the previous one, additional FD would have to be placed. Thus, from both the situations, the necessity for LAD continuance for a long period is not necessary. The value of FD should be equal to the value of gold taken on loan.

159. At page 591 of volume-3 of Report on Special Audit of MMTC Ltd., Regional Office, Chennai for the year ending March, 2011 the auditors have stated that there were many contra entries passed during the year. There were totally 266 contra entries passed throughout the year. Bank receipt entries were reversed by bank payment entries and similarly debit notes were reversed with credit notes. So many entries were passed unnecessarily leading to confusion.

160. At page No.25 of Volume-I under the head "Suspense Accounts", the auditors have stated that the RO had operated three suspense accounts during the year through which the transactions amounting to Rs.8205.01 crores were passed. In respect of 72000, though overall suspense account shows a ZERO balance, entries passed through three cost centers have not been matched. RO is yet to identify the difference.

161. At page No.33 of Vol. I the auditors have stated that the RO has invoiced 10 kgs. of gold delivered to SHIV SAHAI in the next financial year.

Their observations on stock reconciliation are :

1. Reconciliation has been done overall for the stock received and Stock issued without bifurcating into outright and loan
2. Stock issue Vs Invoicing reconciliation was not done
3. At our insistence only the above reconciliation was done
4. In the delivery challan and stock register, type of issue (outright/loan) is mentioned, records for stock received/issued on loan basis the details are available only in work sheets. We were not in a position to match the final purchase/invoice from the ERP
5. Year and stock bifurcated between consignment and loan stock.

6. Despatches for loan/sale report is awaited from EDP department of CO

7. Confirmation for loan stock/ vendor as well as customer not available.
8. Confirmation for stock at MMTC Vault-Copy of stock register given.
9. Register for SBLC received/SBLC issued is maintained in worksheets."

162. In the conclusion of their report the auditor M/s. Venkat and Rangaa, Chartered Accountants , as it is seen from page No.547 of volume 3 have stated as follows:

- "1. The established systems laid down has been followed during the current year and violations were minimal.
2. The accounts of MMTC Limited has been maintained in an improper manner and several transactions are not accounted though lot of improvement were noticed compared to previous years.
3. It took time for verification due to volume and we have to spend considerable time to analyze and form an opinion in view of the maintenance of accounts was not as per laid down norms, though there was considerable improvement as compared to previous years.
4. Our verification of accounts reveals that there was no internal control in financial matters as well as in accounting of the transactions. A control up to certain level has been observed in the books of accounts 2010-11. Only a few entries have been passed without any proper documentary evidence and proper authorization.
5. This report is issued on the basis of the ERP reports furnished to us and the documents and explanations provided to us.
6. The entire Suspense accounts transactions and purchase accounting has not been matched. We are not in a position to express a view/opinion on the impact of the above on the difference in vendor account.
7. No confirmation of balances have been obtained either from Vendors or from Customers.
8. There is no maker checker concept and some irrelevant codes have been used."

papers, MMTC Ltd., Chennai have issued a debit note dated 08.09.2011 for buyers credit expenses for the financial year 2008-09 to M/s.Shiv Sahai and sons and thereby they have claimed Rs.36,36,15,997/-. For the above said Debit Note M/s Shiv Sahai and Sons have given a reply dated 19.9.2011 to M/s. MMTC Ltd., Regional Office Chennai, wherein they have stated that to the best of our knowledge we state that no payments are due on account of buyer's credit expenses or on any other account for the financial year 2008-09 since we always had the practice of making payments and taking delivery from MMTC. They have also stated that despite several requests your office never provided us any break up or particulars of the said purchases. MMTC Ltd., was requested to provide them the records in respect of purchase of INR fully for the financial year 2008-09.

164. A very same reply has been given by M/s. Shiv Sahai and Sons in their another letter, dated 22nd September, 2011, as it could be seen from page 4 of second additional typed set of papers. In an another letter dated 11.10.2011, addressed to MMTC Ltd., Chennai M/s.Shiv Sahai and Sons have stated that the name of the bank, the transaction details and other details which are required to verify the transactions are not provided to us and in the above pretext it would not be possible for us to verify transactions after 3-4 years. They have also stated that your good office is never providing us any details of buyers credit as well as any debit/credit note particulars.

165. It is significant to note that the first information report in Crime No. RC MAI 2012A 0025E seems to have been registered on 13.6.2012 at 6.30 p.m. The First Information Report itself reveals that the alleged offence is stated to have been taken place during the period 2007-2008. The averments of the first information report further reveals that from January, 2008 to April, 2008, while purchasing bullion under the Buyer's Credit Scheme, the first accused Mr. S.Gurusamy (as per the FIR), the second accused Mr..S.Gurumoorthy and unknown officials of MMTC Ltd., Chennai Regional Office, Chennai had allowed Mr. N.P.Agarwal, Proprietor, M/s.Shiv Sahai & Sons, Chennai (third accused) to speculate beyond the period of ninety days and deliberately failed to take steps

with reference to cover premium/foreign exchange fluctuations . M/s. Venkat and Rangaa, Chartered Accountants Chennai seems to have submitted their auditing report on 20.07.2012.

166. From the above context it can easily be inferred that the First Information Report is antedated as 13.06.2012, when the audit report was filed on 20.7.2012. When there is a confliction between the dates, viz., the date on which the FIR was registered and the date on which the audit report was filed by M/s.Venkat and Rangaa Chartered Accountants, a crucial question that arises for consideration of this Court is as to how the respondent-police (CBI) could have predicted or pre-conceived that the accused persons including Mr. N.P.Agarwal, Proprietor of M/s.Shiv Sahai and Sons (third accused) had caused wrongful loss to the tune of Rs.36.6 crores to MMTC Ltd, Chennai and corresponding gain to themselves.

167. Viewing this from any angle, this Court finds that a dark cloud prevails over the genesis of the First Information Report .

167. He further points out that when the FIR had the following names :-

S.Gurusamy, former Chief General Manager, South Zone, MMTC Limited, Chennai Regional Office, Chennai.

V.Gurumurthy, formet General Manager (Finance and Accounts), MMTC Limited, Chennai Regional Office, Chennai.

N.P.Agarwal, Proprietor, M/s. Shiv Sahai & Sons

and many other unknown officials as being involved in the conspiracy belonging to MMTC and Union Bank of India, the MMTC was able to pre-empt the names in the charge sheet and filed the civil suit deleting the name of Mr. Gurusamy (as found deleted in the charge sheet) and not naming any other person in MMTC or the bank, as liable for the loss. Pointing out the same the learned counsel for the petitioners contends that the criminal prosecution has been initiated only to

divert the entire issue, as the arbitration proceedings initiated by the petitioners' would lead to demonstration of the lapses on the part of MMTC higher officials.

168. In the letter dated 7.1.2013 addressed to Mr. N.P.Agarwal, MMTC Ltd., has stated that already M/s.Shiv Sahai and Sons through RFA, dated 14.12.2012 had made a revised claim in ICA to the extent of Rs.69,96,51,666/- as against MMTC,. as a co-claimant with Shiv Sahai and Sons (india) Ltd., covering the period from 2008-09 to 2011-12. This letter also reveals that MMTC had made a counter-claim to the extent of Rs.98,24,83,155/- with interest at 18% per annum by way of issuing debit notes. To the letter dated 7.1.2013 written by MMTC, Mr. N.P.Agarwal, Proprietor of M/s.Shiv Sahai and Sons through their Lawyer and International Attorneys, Surana & Surana, Chennai had replied on 10.1.2013 wherein it is stated that M/s.MMTC Ltd, had requested to change the rules governing the arbitration from ICA to LCIA India Rules, sighting cost effectiveness. It is also stated that their clients (M/s.Shiv Sahai and Sons) felt that even LCIA may be a costly affair. Instead they felt that if MMTC agrees they do not mind in referring the dispute between MMTC and M/s.Shiv Sahai and Sons to a sole arbitrator to be jointly appointed by MMTC and M/s.Shiv Sahai and Sons. The sole arbitrator could be a retired Supreme Court Judge, residing in Chennai. The venue of arbitration shall be at Chennai. They also felt that this could be a better and cost effective solution, than moving from ICA to LCIA.

169. The above letter issued by MMTC Ltd., Chennai dated 7.1.2013 and the other letter dated, 10.1.2013 issued on behalf of M/s.Shiv Sahai & Sons, (India) Ltd., Chennai for and on behalf of Shiv Sahai and Sons would go to show that both parties were willing to sort out their disputes through arbitral proceedings.

170. To the letter dated 10.1.2013 written by M/s. Surana and Surana International Attorneys, Chennai on behalf of M/s.Shiv Sahai & Sons , M/s. MMTC Ltd., through their Law firm ELP have given a reply dated 17.1.2013, wherein they have stated that the proposal of ad hoc arbitration before a single arbitrator is not acceptable to their clients. They have also made

reference to the letter, dated 7.1.2013 addressed on behalf of MMTC Ltd., for reference of all disputes between the parties to arbitration. In this connection, they had requested M/s. Shiv and Sahai and Sons to confirm the following arbitration clause between the parties within seven days of the receipt of their letter.

"All disputes, differences and claims of whatsoever nature arising between parties i.e. Shiv Sahai & Sons and Shiv Sahai & Sons (India) Ltd., on one hand and M/s.MMTC Ltd., on the other out of or in relation to the construction meaning, scope operation or effect under the said MOU, dated 02.04.2008 or otherwise for the period 2007-08 to 2011-2012 be referred to arbitration under the ICA Rules. The number of arbitrator shall be three. The seat of arbitration shall be Chennai. The language shall be English. "

171. For this letter, M/s Surana and Surana International Attorneys on behalf of M/s.Shiv and Sahai and sons had issued a reply on 29.01.2013 through which M/s.Shiv and Sahai and sons had expressed their willingness to refer all disputes, differences and claims of whatsoever nature arising between the parties i.e. (a) M/s.Shiv and Sahai and sons and (b) M/s.Shiv and Sahai and Sons (India) Ltd., on the one hand and MMTC Ltd., on the other hand to arbitration under the ICA Rules. They had also accepted that the number of arbitrators shall be three to be appointed as per the ICA Rules. They had also accepted that Chennai shall be the sitting of arbitration and the language of the arbitration shall be English. With reference to the complaint lodged by M/s/MMTC Ltd., with CBI M/s.Shiv Sahai and Sons through their Law firm M/s. Surana and Surana have stated as follows:

Complaint lodged by your client with Central Bureau of Investigation (CBI):

- a. Your client accepts that the disputes are only in civil in nature and (not criminal at all), as it has agreed to get into Arbitration to resolve all disputes with our clients. However, the action of your client to have lodged a complaint with Central Bureau of

Investigation (CBI) against our clients, is surprising to our clients.

- b. Due to this complaint, our clients are put to undue hardship and harassment and are sustaining huge loss, since all their stock- in-trade and cash balances as on 20-06-2012 were seized by CBI along with all relevant documents pertaining to transactions with MMTC. This clearly proves that your client being a government entity, is using another government agency, i.e. CBI, and is acting high handedly, in arm twisting our clients.
- c. For our clients to produce all relevant records pertaining to their bona fide transactions with your client and to prove their claims against your client in the Arbitration proceedings contemplated herein, they would require all the documents seized by CBI (based on your client's complaint).
- d. Hence our clients require that your client consents to CBI returning all the seized documents, stock -in -trade and cash.
- e. Our clients have no objection in your filing or continuing the complaint against the ex or present officers of MMTC and proceeding against them, since that would be an internal matter of MMTC.
- f. By returning the seized documents, stock and cash to our clients, your client will be creating a level playing field and all disputes can be well resolved by the Arbitration in the way suggested by your client.
- g. Even if your client does consent for and return all the seized documents, stock and cash, and thus desires to continue to arm twist our client, nevertheless, our clients would still agree to refer all disputes to Arbitration (ICA-Three Arbitrators), so that all disputes between the parties can be resolved.
- h. It is hoped that your client will be fair and reasonable by consenting to CBI returning back to our clients' all the seized documents, stock and cash."

Sahai and Sons would go to show that the disputes between them are only civil in nature and not criminal.

173. It is to be noted that in paragraph 30 of the plaint in the suit in C.S.No.249 of 2013, filed by M/s.MMTC Ltd., as against the petitioners and the first accused Mr. V.Gurumurthy, M/s. MMTC Ltd. has made a reference to the criminal complaint lodged by them before the CBI against M/s.Shiv Sahai and Sons and others to investigate the alleged fraud. M/s. MMTC Ltd., Chennai being the plaintiff has stated that there was no arbitration agreement between the parties and that the dispute could not be sorted out before the arbitral proceedings. The specific averments made by the plaintiff in paragraph 37 of the plaint clearly shows that M/s. MMTC Ltd., has been playing a dual role. On one occasion, as could be seen from the letters, which are referred to in the earlier paragraphs, they have admitted that on account of clause 11 of MOU, the disputes could be referred to arbitration for sorting out their differences. On the other occasion, MMTC Ltd., Chennai initiated criminal proceedings against M/s.Shiv Shai and Sons, alleging that they have committed the offence of cheating by falsification of records with the connivance of Mr. Gurumoorthy, the then General Manager of MMTC Ltd., Chennai. The act of MMTC Ltd., Chennai seems to be absolutely absurd.

174. In paragraph 16 of the Judgment dated 28.10.2014 made in O.S.A.No.244 of 2014, a Division Bench of this Court headed by the Hon'ble Chief Justice has observed that there is really no dispute about the existence of arbitration clause. If one may say there is a dual plea raised by the appellant

" (a) that in view of the allegations of fraud, which are really serious in nature and the charge sheet having been filed, this is an appropriate case where trial should take place before the Civil Court.

(b) the third defendant becomes necessary party to the proceedings, who is not a party to the arbitration clause and the allegations of fraud are not only against the third defendant, but also against the first two defendants/respondents."

175. In order to support his contentions, Mr.Muralikumaran, learned counsel for the petitioner has placed reliance upon the decision of the Apex Court in **ALL CARGOMOVERS (INDIA) PRIVATE LIMITED AND OTHERS Vs DHANESH BADARMAL JAIN AND ANOTHER (2007) 14 SCC 776**. In this case, the parties had entered into a contract of carriage. The first respondent had approached the appellant for delivery of six consignments valued at US \$ 98,715.29 to the original assignee, M/s. Universal Apparels (EPZ), Mombassa, Kenya. By reason of a fax message the appellants had asked their counter parts in Mombassa, Kenya to confirm delivery of consignment asking it to see that the cargo is delivered only against presentation of original bills of lading. The goods in question were said to have been delivered by the agent of the petitioner to the original consignee without their producing the bills of lading. The respondent complainant had issued a notice to the accused persons attributing negligence to the agencies in delivering the cargo without the original bill of lading, committing a breach of carriage and acting in violation of their contract and obligation. A claim for a sum of US \$ 84,353.31 was made and a suit was filed by the respondent. More than one year after filing of the suit a complainant petition was filed against the appellants for committing breach of trust by causing criminal misappropriation of the valuable property of the complainant. With reference to the application for quashing the order issuing summons to the appellant was dismissed by the High Court which held that the allegations made in the complaint prima facie disclosed the offence of breach of trust. The appeal preferred before the Apex Court was allowed. While allowing the Appeal Hon'ble Mr Justice S.B.Sinha has spoken on behalf of the Division Bench as follows:

"The allegations made in the complaint petition, even if given face value and taken to the correct in its entirety, do not disclose an offence. No allegation whatsoever was made against the appellants in the notice. What was contended was negligence and/or breach of contract on the part of the carriers and their agent. Breach of contract simpliciter does not constitute an offence. For the said purpose, allegations in the complaint petition must disclose the necessary ingredients therefor. Where a civil suit is pending and the complaint petition has been filed one year after filing of the civil suit, the court can for the

purpose of finding out as to whether the said allegations are
 prima facie correct, take into consideration the
 correspondences exchanged

by the parties and other admitted documents. It is one thing to say that the Court at this juncture would not consider the defence of the accused but it is another thing to say that for exercising the inherent jurisdiction of this Court, it is impermissible also to look to the admitted documents. Criminal proceedings should not be encouraged, when it is found to be mala fide or otherwise an abuse of the process of the court. Superior Courts while exercising this power should also strive to serve the ends of justice."

176. While advancing his arguments, Mr. Muralikumaran, learned counsel for the petitioner has invited the attention of this Court to page 221 of the second additional typed set of papers, wherein the statement of LW1 Mr. CA.S.Manisekaran, partner M/s.Venkat & Rangaa, Chartered Accountants is available. He has stated in his statement before the Investigating Officer under Section 161 (3) of the Code of Criminal Procedure that their firm undertook special audit of the accounts of MMTC Ltd., Regional Office, Chennai for the years April, 2007 to March, 2011. He has further stated that on verification of the account for the financial year 2008-09 which was started in March, 2012 and completed in June, 2012 the special audit revealed that a total difference of Rs.105.92 crores was not debited by MMTC Ltd., to various customers accounts such as M/s.Khazana Jewellery, M/s. GRT Group, M/s.Surana Corporation Ltd., M/s.Shiv Sahai and Sons and MMTC Ltd., and it was found that an amount of Rs.45.01 crores towards LAD interest, Rs.36.36 crores towards Buyer's Credit exchange difference relating to the transactions held in 2008-2009, Rs.0.22 crores towards Buyer's Credit exchange difference relating to the transactions initiated in 2007-08 and settled in 2008-09, Rs.0.97 crores towards FDR interest were found to have wrongly credited to M/s.Shiv Sahai and Sons instead of M/s.Surana Corporation Limited and raising of invoice for the supply of silver amounting to Rs.1.42 crores not completed in the BTS. He has also stated that the total amount not debited to M/s.Shiv Sahai and Sons was found initially to be of Rs.83.98 crores. The remaining amount of Rs.21.94 crores pertaining to M/s.Surana Corporation Limited (Rs.17.74 crores), Rs.3.43 crores to be debited to the MMTC Ltd., Calcutta and Rs.0.77 crores to be debited to M/s.Khazana

Jewellery.

177. He has further stated that all LADs were taken to settle the Buyer's Credit loans. Since M/s.Shiv Sahai and Sons only had availed the Buyer's Credit facility from the MMTC Ltd., (except for one transaction to another customer), it was concluded that all cost of LAD has to be recovered from the customer. In this manner, we found a total amount of Rs.71.97 crores incurred on account of the interest on LAD for M/s.Shiv Sahai and Sons Out of this amount Rs.26.99 crores was debited to M/s.Shiv and Sahai and sons during the FY 2008-09 itself having a balance of Rs.44.98 crores un-debited to M/s.Shiv Sahai and Sons.

178. In his statement he had also admitted that the benefit of availing the Buyer's Credit Scheme is higher margin for the MMTC Ltd., and the arbitrage benefit to the customer. The arbitrage benefit is obtained as the difference between the interest earned on the funds placed as FDRs and the LIBOR and other cost incurred for availing the Buyer's Credit cash in foreign currency. According to him, as per the agreement of the MMTC Ltd., the decision to keep the exchange open or covered lies with the customer.

179. Ultimately, he has stated that as per his analysis of accounts the loss incurred during 2008-09 due to the failure to cover the foreign exchange was concealed in the books of accounts of MMTC Ltd., by inflating fixed deposit to the tune of Rs. 40 crores and deflating the loan against deposit amount by Rs. 45 crores totaling to Rs. 85 crores in Union Bank of India. This has been done in the books of accounts of the MMTC Ltd., for accounts closing of the financial year 2008-09. It is to be highlighted that according to the Chartered Accountant, Manisekaran, during the accounts closing of the year 2009-2010, and 2010-2011, the above amount has been concealed by transfer to the 'suspense account' and then to the 'vendor's account' of M/s.Natexis Commodity Markets Ltd., and thereby during the accounts closing of the year 2010-2011, the excess debit balance of Rs.116.69 crores was parked in the vendor's account of M/s.Natexis Commodity Markets Ltd.,

(3rd accused) had filed a petition in Crl.M.P.No.3615 of 2014 under Section 239 of the Criminal Procedure Code to discharge him from the criminal case in C.C.No.3 of 2014. This petition was strenuously resisted by the respondent-police (CBI). After hearing both parties, the learned Special Judge for CBI cases (XII Additional Judge, City Civil Court), Chennai while dismissing the said petition had found that the ingredients for constituting the offence against the petitioner (3rd accused) could be culled out from the materials and evidence adduced by the prosecution during the course of trial. He had also found that on perusal of the documents and the statements of witnesses produced along with the charge sheet, it could be seen that a prima facie case was made against the petitioner (3rd accused) and the evaluation of materials projected by the prosecution disclosed that there were sufficient grounds for proceeding further against the petitioner. Challenging the order, dated 04.03.2015 the petitioner (3rd accused) had preferred the Criminal Revision Case before this Court in Crl.R.C.No.1191 of 2015.

181. What he would contend in the petition in Crl.M.P.No.3615 of 2014 is that even though the first information report was registered against two of the officials of MMTC Ltd., Chennai viz., Mr.Guruswami and Mr. Gurumoorthi by preempting the charge sheet, dated 27.01.2014, a Civil Suit was filed against Mr. V.Gurumoorthi who is named in the charge sheet as the 1st accused and the civil suit also confines its litigation only against Mr.Gurumoorthi even before the conclusion on the investigation by the CBI 'as to whether Mr.Guruswami who is named as an accused in the first information report had committed any offence or not?' Secondly, he had contended that if any adequate grounds were available to proceed against him, he (A3) would have been implicated or impleaded in the first information report as one of the accused even at the earliest point of time. Thirdly, he would contend that, when the Superintendent of Police, CBI, who happened to register the FIR, was able to conclude that a prima facie case was made out as against Mr. Guruswami and Mr.Gurumoorthi to proceed against them under Sections 120-B r/w 420 477-A IPC and under Section 13(2) r/w 13(1)(d) of Prevention of Corruption Act, 1988, the Investigating Officer, who is in the cadre of Inspector of Police had not

satisfactorily given any reason for the deletion of Mr. Guruswami at the time of filing the charge sheet and to include his name (3rd accused). Fourthly, he would contend that no charges were made against him (3rd accused) as alleged by the prosecution to conclude that he had been actively participating in the bullion purchase transactions with the MMTC Ltd., Chennai along with his father Mr. N.P. Agarwal. Fifthly he would contend that no documents were forthcoming from the side of the respondent-police to show or to substantiate the allegations that he (3rd accused) had actually participated in the meeting held by the officials of MMTC Ltd., to discuss upon the foreign exchange position in respect of the bullion transactions. Equally no evidence is available to show that he had assured to cover the foreign exchange position. Eventually he had contended before the trial Court for his discharge from the clutches of the charges under Section 120-B, r/w 420, 477-A IPC and Section 13(2) r/w 13(1)(d) of Prevention of Corruption Act, 1988.

182. On the other hand the respondent-police had contended that
- (a) the petitioner (3rd accused) had played an active role in the commission of the crime and it is in evidence that it was well within his knowledge that the buyer's credit was availed for the bullion transactions and that forward cover was not taken for such buyer's credit transactions held on behalf of the petitioner;
 - (b) Fixed Deposits were made as per the wishes and instructions of the petitioner;
 - (c) The petitioner (3rd accused) along with two other accused had devised a method by which even if the value of the Indian rupee against US Dollar did not get appreciated they could gain on the forward premium amount by not taking forward cover;
 - (d) the petitioner (3rd accused) along with two accused had, in pursuance of the criminal conspiracy, intentionally omitted to cover the Indian rupee against US Dollar on the date of availing of the foreign exchange loan and the petitioner along with two other accused had speculated and continued to keep the foreign exchange open (uncovered) or to cover the foreign exchange very late;
 - (e) during the relevant period in spite of mismatch the first accused had passed

a sum of Rs.111 crores as the interest earned on the First Deposit to the concern of the petitioner and his father;

(f) The petitioner along with two other accused had cheated the MMTC Ltd., a Government of India undertaking to the tune of Rs.113.38 crores by making wrongful loss to the Government and corresponding wrongful gain to themselves and an amount of Rs.36.02 crores due to exchange difference, and an amount of Rs.36.18 towards interest on loan against fixed deposits and an amount of Rs.18.42 crores towards usance LC charges.

(g) During the year 2009-2010 and 2010-2011 the petitioner (3rd accused) and his father A2), knowing fully well that they were not eligible for refunds due to the loss caused on account of failure to cover the foreign exchange during the year 2008-2009 applied for refund of R.33,88,72,922/- and the 1st accused by abusing and misusing his official position had recommended and approved the same and the said sum was paid to the petitioner and his father (2nd accused) According to the prosecution, the Special Audit revealed that the total recoverable amount from A- 2 and A- 3 as on 31.3.2011 was Rs.97.97 crores.

(h) the first accused Mr.. Gurumoorthi had obtained pecuniary advantage to the tune of Rs. 41,700/- offered by the petitioner (3rd accused) and his father (2nd accused)

(i) The allegations against Mr. Guruswami, who was cited as 1st accused in the first information report could not be proved conclusively, as investigation did not reveal his involvement in the case and hence he is not charge sheeted.

(j) The loss on exchange inclusive of forward premium charges left uncovered in buyer's credit amounted to Rs.109 crores.

(k) The petitioner along with other accused had not only cheated the Government but also attempted to suppress the loss by falsifying the accounts of the MMTC Ltd., Chennai by obtaining inflated fixed deposit statements to the tune of Rs.38.39 crores and the loan against deposit statements to the tune of Rs.45.43 crores.

183. The submission placed on behalf of the petitioner Mr. Ganesh Agarwal was not accepted by the trial Court. The contentions put forth on behalf

of the petitioner was that in the Memorandum of Understanding, dated 02.04.2008 which was entered into between MMTC Limited, Chennai and M/s. Shiv Sahai & Sons, he (3rd accused) was not a signatory and therefore there was no nexus between him and the transactions.

184. The other contentions placed before the trial Court on behalf of 3rd accused was that due to the fluctuations of international prices of various commodities being dealt with by MMTC Ltd., Chennai it might have incurred huge loss and to cover up its mal-administration and mismanagement, the higher officials of MMTC Ltd., might have fudged the books of accounts and the petitioner (Ganesh Agarwal) was not liable for any maladministration and mismanagement of MMTC Ltd., Chennai.

185. One more contention which was placed before the trial Court, on behalf of the petitioner (Ganesh Agarwal) was that he was not listed as a defendant in the suit in C.S.No.249 of 2013 and that the dispute between the parties to the Memorandum of Understanding, dated 02.04.2008 was only civil in nature and as such it could be settled through arbitral proceedings.

186. The Trial Court after citing the decisions of the apex Court in **Kailash Varma vs Punjab State Civil Supplies (2005 (2) SCC 420)** and **Trisuns Chemical Industry case (1999 (2) SC 112)** had observed that the existence of an arbitration proceedings or a civil suit does not absolve the offender of the criminal prosecution, if the acts of the accused disclosed criminal offences. Finally, the petition in CrI.M.P.No.3615 of 2014 filed by the petitioner (3rd accused) was dismissed.

187. This court has carefully perused the impugned order of the learned Special Judge, dated 04.08.2015. The learned Special Judge, had, in the impugned order made reference to the statements of prosecution witnesses viz., L.Ws. 82, 83, 86 and 17 and other documentary evidences.

188. During the course of his arguments before this Court, Mr. K.Srinivasan, learned Special Prosecutor (CBI) has drawn the attention of this Court to the statements of the prosecution witnesses viz., L.W.1 Mr. CA. S. Manisekaran, partner M/s.Venkat and Rangaa, Chartered Accountants, Chennai, L.W.17 Mr. William Saidanha, Chief General Manager, (Retd) MMTC Ltd., Mumbai

,L.W.82 Mr. Vithaldas, Manager, M/s.Shiv Sahai and Sons, Chennai, L.W.83, Mr.Prabhat Kumar Jain, Manager, M/s.Shiv Sahai and Sons, Chennai, L.W.85 Mr.Dllip Kumar, Director, Miles and Miles Tours and Travels Pvt., Ltd., Chennai, L.W.86 Mr. P.M.Satish, Collection Staff, Miles and Miles Tours and Travels Pvt., Ltd., Chennai, as well as to the letter, dated 18.06.2008 written on behalf of M/s.Shiv Sahai and Sons to the General Manager, MMTC Ltd., Chnnai (Document No.404)

189. The statements of the above witnesses do not contain any incriminatory materials as against the petitioners.

190. Mr. K.Srinivasan, learned Special Public Prosecutor for CBI cases has also made reference to the decisions of the Apex Court and made in **State of Orissa vs Debendra Nath Padhi ((2005) 1 SCC 568)**. In this case, while penning down the Judgment on behalf of a three Judges of the Apex Court, Hon'ble Mr Justice Y.K. Sabharwal, has answered a crucial question which was raised for the consideration of the Bench. The question is :

"Can the trial Court at the time of framing of charges consider the material filed by the accused"?

Prior to find answer for this question the learned counsel who was arguing before the Bench had relied upon a decision of the apex Court made in **Satish Mehra V Delhi Administration & another (1996 (9) SC 766) : 1996 SCC Crl. 104).**

Supporting the views of the apex Court expressed in **Satish Mehra's case** (cited above) the learned counsel for the accused had contended, that on the ground of justice, equity and fairness and also on the touchstone of [Article 21](#) of the Constitution of India, a reversal of that view would lead to unnecessary harassment to the accused by having to face the trial for years, waste of valuable time of the court, heavy cost, despite the fact that even at the early stage of framing of charge or taking cognizance the accused is in a position to produce unimpeachable material of sterling quality to clinchingly show that there is no prospect of conviction at the conclusion of the trial. Satish Mehra's case was further supported on interpretation of [Sections 227](#) and [239](#) of the Code. In this regard, Hon'ble Mr Justice Y.K. Sabharwal observed as under:

"We are unable to accept the aforesaid contention. The reliance on Articles 14 and 21 is misplaced. The scheme of the Code and object with which Section 227 was incorporated and Sections 207 and 207 (A) omitted have already been noticed. Further, at the stage of framing of charge roving and fishing inquiry is impermissible. If the contention of the accused is accepted, there would be a mini trial at the stage of framing of charge. That would defeat the object of the Code. It is well-settled that at the stage of framing of charge the defence of the accused cannot be put forth. The acceptance of the contention of the learned counsel for the accused would mean permitting the accused to adduce his defence at the stage of framing of charge and for examination thereof at that stage which is against the criminal jurisprudence. By way of illustration, it may be noted that the plea of alibi taken by the accused may have to be examined at the stage of framing of charge if the contention of the accused is accepted despite the well settled proposition that it is for the accused to lead evidence at the trial to sustain such a plea. The accused would be entitled to produce materials and documents in proof of such a plea at the stage of framing of the charge, in case we accept the contention put forth on behalf of the accused. That has never been the intention of the law well settled for over one hundred years now. It is in this light that the provision about hearing the submissions of the accused as postulated by Section 227 is to be understood. It only means hearing the submissions of the accused on the record of the case as filed by the prosecution and documents submitted therewith and nothing more. The expression 'hearing the submissions of the accused' cannot mean opportunity to file material to be granted to the accused and thereby changing the settled law. At the state of framing of charge hearing the submissions of the accused has to be confined to the material produced by the police."

191. Mr. K.Srinivasan, learned Special Public Prosecutor has invited the attention of this Court to the charge sheet, dated 27.01.2014 filed by the Investigating officer before the learned Special Judge under Sections 173(2) of Criminal Procedure Code. The charges leveled against the

petitioners as well as the first accused in this case as it is seen from the last paragraph of page Nos. 136 to 140 of the Index to the second additional typed set of papers have already been discussed in the preceding paragraphs and hence they need not either be repeated or reiterated once again.

192. Mr. K.Srinivasan, has also invited the attention of this Court to the impugned order, dated 04.08.2015 made in CrI.M.P.No.3615 of 2014 as well as to paragraphs 28,30, 33 to 42. This Court has also already discussed about those paragraphs. Mr. K.Srinivasan, learned Special Public Prosecutor for CBI cases has also made reference to the decision of the apex Court in **Amit Kapoor Vs Ramesh Chander and another (2012) 9 SCC 460**),

193. The extent and scope of the powers exercisable by the High Court under Section 397 of Criminal Procedure Code independently or read with Section 482 of the Criminal Procedure Code was considered as a question of law that arose more often than not in criminal case. In this case paragraphs 11 to 13 and 17 are very much relevant and they are extracted as hereunder:

“ (Para 11) Before examining the merits of the present case, we must advert to the discussion as to the ambit and scope of the power which the courts including the High Court can exercise under [Section 397](#) and [Section 482](#) of the Code. [Section 397](#) of the Code vests the court with the power to call for and examine the records of an inferior court for the purposes of satisfying itself as to the legality and regularity of any proceedings or order made in a case. The object of this provision is to set right a patent defect or an error of jurisdiction or law. There has to be a well- founded error and it may not be appropriate for the court to scrutinize the orders, which upon the face of it bears a token of careful consideration and appear to be in accordance with law. If one looks into the various judgments of this Court, it emerges that the revisional jurisdiction can be invoked where the decisions under challenge are grossly erroneous, there is no compliance with the provisions of law, the finding recorded is based on no evidence, material evidence is ignored or

judicial discretion is exercised arbitrarily or perversely. These are not exhaustive classes, but are merely indicative. Each case would have to be determined on its own merits.

(para 12) Another well-accepted norm is that the revisional jurisdiction of the higher court is a very limited one and cannot be exercised in a routine manner. One of the inbuilt restrictions is that it should not be against an interim or interlocutory order. The Court has to keep in mind that the exercise of revisional jurisdiction itself should not lead to injustice ex facie. Where the Court is dealing with the question as to whether the charge has been framed properly and in accordance with law in a given case, it may be reluctant to interfere in exercise of its revisional jurisdiction unless the case substantially falls within the categories aforesaid. Even framing of charge is a much advanced stage in the proceedings under the [Cr.P.C.](#)

(para 13) Framing of a charge is an exercise of jurisdiction by the trial court in terms of [Section 228](#) of the Code, unless the accused is discharged under [Section 227](#) of the Code. Under both these provisions, the court is required to consider the 'record of the case' and documents submitted therewith and, after hearing the parties, may either discharge the accused or where it appears to the court and in its opinion there is ground for presuming that the accused has committed an offence, it shall frame the charge. Once the facts and ingredients of the Section exists, then the Court would be right in presuming that there is ground to proceed against the accused and frame the charge accordingly. This presumption is not a presumption of law as such. The satisfaction of the court in relation to the existence of constituents of an offence and the facts leading to that offence is a sine qua non for exercise of such jurisdiction.

(para 17) It may even be weaker than a prima facie case. There is a fine distinction between the language of [Sections 227](#) and [228](#) of the Code. [Section 227](#) is expression of a definite opinion and judgment of the Court while [Section 228](#) is tentative. Thus, to say that at the stage of framing of charge, the Court should form an opinion that the accused is

certainly guilty of committing an offence, is an approach which is impermissible in terms of [Section 228](#) of the Code”.

194. Mr. Muralikumaran, learned counsel for the petitioners has contended that neither serious nor any specific allegation was attributed against the petitioners with reference to the commission of alleged crime and that the disputes over the stipulation of Memorandum of Understanding, dated 02.04.2008 did not constitute an offence. He has also contended that where a civil suit was pending and the complaint was filed one year after the filing of the suit the Court for the purpose of finding out as to whether such allegations were prima facie correct has to take into consideration the correspondences exchanged between the parties.

195. In this case, the first information report seems to have been registered by the respondent police on 13.06.2012. The charge sheet seems to have been filed before the Special Court on 28.01.2014, but the suit seems to have been filed in March, 2013. As argued by Mr. Muralikumaran, the petitioner (Mr. Ganesh Agarwal) is neither an accused in the First Information Report nor a party to the suit in C.S.No.249 of 2013. In the First Information Report in RC MA1 2012 A 0025, it is alleged that the accused persons 1 to 3 viz, Mr. S.Gurusamy, Mr. V.Gurumurthy, and Mr. N.P. Agarwal, had committed an offence under Sections 120-B, r/w 420 477-A IPC and Section 13(2) r/w 13(1)(d) of Prevention of Corruption Act, 1988 and the Superintendent of Police, who seems to have registered the case on 13.06.2012 has also alleged in the first information report that Mr. S.Gurusamy, (1st accused), Mr. V.Gurumurthy (2nd accused) and unknown officials of MMTC Ltd., Chennai Regional Office, Chennai had deliberately concealed the transactions of Rs.36.6 crores on account of failure to take proper foreign exchange cover and Rs.53 crores on account of unauthorized Loan Against Deposits, and showed them as a debit balance against the vendor's account in the balance sheet for the year 2010-11. He has also stated that Mr. S. Gurusamy, (1st accused), Mr. V.Gurumurthy (2nd accused) and unknown officials of MMTC Ltd. Chennai Regional office had further failed to safeguard the interests of the MMTC Ltd., Chennai by extending undue favours to Mr. N.P. Agarwal, Proprietor M/s. Shiv Sahai and sons (A3) by the above said transactions, thereby causing a wrongful loss to the tune of

Rs.89.6 crores to MMTC Ltd., Chennai and a corresponding wrongful gain to the accused themselves.

196. Virtually, what the Superintendent of Police CBI, who happened to register the case has stated is, that the above information discloses prima facie commission of offences under Section 120-B, r/w 420 , 477-A IPC and Section 13(2) r/w 13(1)(d) of Prevention of Corruption Act, 1988 by Mr.S. Gurusamy, (1st accused) former Chief General Manager, South Zone MMTC Limited, Chennai Regional Office, Chennai, Mr.V.Gurumurthy, (second accused), former General Manager, (Finance & Accounts), MMTC Limited Chennai Regional Office, Chennai; and Mr.N.P.Agarwal (3rd accused), Proprietor, M/s.Shiv Sahai & Sons and unknown officials of MMTC Ltd., Chennai Regional Office, Chennai and Union Bank of India, Main Branch, Chennai.

197. It is pertinent to note here that no case was registered against any other officials of MMTC Ltd., Chennai Regional office, Chennai excepting Mr.S.Gurusamy , former Chief General Manager, South Zone, MMTC Ltd., Chennai and Mr.V.Gurumurthy, former General manager (Finance & Accounts), MMTC Ltd, Chennai. It is also significant to note here that even though several allegations are leveled against the unknown officials of Union Bank of India, Main Branch, Chennai, no such officer of that bank has been roped into the criminality.

198. The Investigation officer, Mr.S.Subramanian, Inspector of Police, CBI/ACB/Chennai has stated that the allegations against Mr.S.Gurusamy who is cited as first accused in the first information report could not be proved conclusively, as the investigation did not reveal his involvement in the case and hence he is not charge sheeted. Obviously, Mr. S.Subramanian, Inspector of Police, CBI/ACB/Chennai is inferior in rank to the Superintendent of Police, who happened to register the case on 13.06.2002. As per the Superintendent of Police, who had registered the case, the source information discloses prima facie commission of offence under Sections 120-B, r/w 420 , 477-A IPC and Section 13(2) r/w 13(1)(d) of Prevention of Corruption Act, 1988 by Mr.S. Gurusamy, (1st accused), former Chief General Manager, South Zone MMTC Limited, Chennai Regional Office, Chennai, Mr.V.Gurumurthy, (second accused), former General Manager, (Finance & Accounts), MMTC Limited Chennai Regional Office,

Chennai and Mr.N.P.Agarwal (3rd accused), Proprietor, M/s.Shiv Sahai & Sons and unknown officials of MMTC Ltd., Chennai Regional Office, Chennai and Union Bank of India, Main Branch, Chennai.

199. When the Superior Officer, viz., the Superintendent of Police, CBI/ACB, Chennai had found a prima facie case against Mr.S.Gurusamy, Mr. V.Gurumurthy and Mr. N.P.Agarwal, how an officer inferior, in rank, who had taken up the case for investigation could say that the allegations made against Mr.S.Gursamy who is cited as first accused in the first information report could not be proved conclusively? Further, the Inspector of Police, who filed the final report has not stated as to whether any investigation in any manner was conducted in respect of the alleged involvement of the unknown officials of MMTC Ltd. Regional office Chennai and the unknown officials of Union Bank of India, Main Branch, Chennai.

200. On perusal of the charge sheet the Investigation Officer has never stated or assigned any reason for his omission or failure to investigate about the involvement of the unknown officials of both MMTC Ltd., Regional Office, Chennai and the Union Bank of India, Main Branch, Chennai.

201. In fact, the charge sheet was filed before the Special Court on 28.01.2014, but the First Information Report was registered on 13.06.2012. The Investigation Officer appears to have taken more than one and half years for the completion of the investigation and filing the final report.

202. Mr.Muralikumaran, learned counsel for the petitioner would contend that the learned Special Judge for CBI cases, (XII Additional Judge, City Civil Court), Chennai had miserably failed to consider the nature of the case as well as the lacuna on the part of the prosecution. He would further submit that the petitioner, Mr.Ganesh Agarwal had filed a petition in CrI.M.P.No.3615 of 2014 under Section 239 of the Criminal Procedure Code to discharge him from the clutches of the charges levelled against him. However, the ingredients of the provisions of Sections 227 and 239 of the Criminal Procedure Code were omitted to be considered by the learned Special Judge.

203. What Section 227 of the Criminal Procedure Code says is, that If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution

in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.

204. This Section empowers the Sessions Judge to discharge the petitioner/accused at an initial stage. Obviously, the Sessions Judge has to

- (a) examine the record of the case and the documents received;
- (b) hear the submissions on behalf of the accused and the prosecution on the question "whether there is sufficient ground for proceeding against the accused";
- (c) If it is in the affirmative, he shall proceed to frame charge under Section 228.

205. On coming to the provisions of Section 239 of the Criminal Procedure Code it enacts that:

" If, upon considering the police report and the documents sent with it under section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing."

206. Section 239 of the Criminal Procedure Code shall have to be read with the provisions of Section 241(1) which follows, being complementary to each other. Reading the two together, the meaning is that if there is no ground for presuming the accused to have committed an offence, there is no ground for framing a charge under section 240(1) and the accusation brought against the accused must in such a case, be held to be groundless, for the purpose of Section 239

207. "Groundless" in other words, means that there is no prima facie case regarding the commission of an offence. If the evidence which the Prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence (if any), cannot show that the accused committed the offence, then

there is no ground for framing a charge.

208. With reference to the distinction between the provisions of Section 227 and Section 482 of Criminal Procedure Code, Mr. Muralikumaran, learned counsel for the petitioner has made reference to the decision of the Apex Court in **Rukmini Narvekar Vs Vijaya Satardekar and others ((2008) 14 SCC 1)** In this case, while speaking on behalf of a Division Bench of the Supreme Court, Hon'ble Mr Justice Altamas Kabir, while concurring with the views of Hon'ble Mr Justice Markandey Katju in paragraph nos. 36 & 38 has observed as under:

"(36). While deciding the questions referred to it, the larger Bench made a conscious distinction between a proceeding under [Section 227](#) Cr.P.C. before the trial court and a proceeding under [Section 482](#) Cr.P.C. and made a reference to the Court's power to consider material other than those produced by the prosecution in a proceeding under [Section 482](#) Cr.P.C. It is in that context that while holding that the decision rendered in Satish Mehra's case (supra) was erroneous, the larger Bench held that if the submission that the accused would be entitled to produce materials and documents in proof of his innocence at the stage of framing of charge, was to be accepted, it would be unsettling a law well settled over a hundred years. It is in that light that the provisions of [Section 227](#) Cr.P.C. would have to be understood and that it only means hearing the submissions of the accused on the records of the case filed by the prosecution and documents submitted therewith and nothing more. The larger Bench arrived at a definite conclusion that the expression "hearing the submissions of the accused" cannot mean an opportunity to file material to be granted to the accused and thereby changing the settled law. At the stage of framing of charge hearing the submissions of the accused has to be confined to the material produced by the police.

(38).....However, in a proceeding taken therefrom under [Section 482](#) Cr.P.C. the Court is free to consider material that may be produced on behalf of the accused to arrive at a decision whether the charge as framed could be maintained. This, in my view, appears to be the intention of the legislature in wording [Sections 227](#) and [228](#) the way in

which they have been worded and as explained in Debendra Nath Padhi's case (supra) by the larger Bench therein to which the very same question had been referred."

209. While penning down the Judgment on behalf of a Division Bench of the Supreme Court in **Rajiv Thapar and others Vs Madan Lal Kapoor (2013) 3 SCC 330**, Hon'ble Mr Justice J.S.Khekar has observed that:

"The discretion vested in a High Court under [Section 482](#) of the Cr.P.C. can be exercised suo-moto to prevent the abuse of process of a court, and/or to secure the ends of justice. The High Court, in exercise of its jurisdiction under [Section 482](#) of the Cr.P.C., must make a just and rightful choice. This is not a stage of evaluating the truthfulness or otherwise of allegations levelled by the prosecution/complainant against the accused. Likewise, it is not a stage for determining how weighty the defences raised on behalf of the accused are. Even if the accused is successful in showing some suspicion or doubt, in the allegations levelled by the prosecution/complainant, it would be impermissible to discharge the accused before trial. This is so, because it would result in giving finality to the accusations levelled by the prosecution/complainant, without allowing the prosecution or the complainant to adduce evidence to substantiate the same. The converse is, however, not true, because even if trial is proceeded with, the accused is not subjected to any irreparable consequences. The accused would still be in a position to succeed, by establishing his defences by producing evidence in accordance with law. Where the prosecution/complainant has levelled allegations bringing out all ingredients of the charge(s) levelled, and have placed material before the Court, prima facie evidencing the truthfulness of the allegations levelled, trial must be held.

His Lordship has also with reference to the inherent jurisdiction of the High Court under Section 482 of Criminal Procedure Code has further observed as under:

"The issue being examined in the instant case is the jurisdiction of the High Court under [Section 482](#) Cr.P.C., if it chooses to quash the initiation of the prosecution against an accused, at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charges. These are all stages

before the commencement of the actual trial. To invoke its inherent jurisdiction under [Section 482](#) Cr.P.C. the High Court has to be fully satisfied, that the material produced by the accused is such, that would lead to the conclusion, that his/their defence is based on sound, reasonable, and indubitable facts; the material produced is such, as would rule out and displace the assertions contained in the charges levelled against the accused; and the material produced is such, as would clearly reject and overrule the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. It should be sufficient to rule out, reject and discard the accusations levelled by the prosecution/complainant, without the necessity of recording any evidence. For this the material relied upon by the defence should not have been refuted, or alternatively, cannot be justifiably refuted, being material of sterling and impeccable quality. The material relied upon by the accused should be such, as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power under [Section 482](#) Cr.P.C. to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice.

The following steps should be followed by the High Court to determine the veracity of a prayer for quashing of proceeding raised by an accused by invoking the power vested in the High Court under [Section 482](#) of the Cr.P.C.:-

(i) Step one: whether the material relied upon by the accused is sound, reasonable, and indubitable, i.e., the material is of sterling and impeccable quality?

(ii) Step two: whether the material relied upon by the accused would rule out the assertions contained in the charges levelled against the accused, i.e., the material is sufficient to reject and overrule the factual assertions contained in the complaint, i.e., the material is such as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false?

(iii) Step three: whether the material relied upon by the accused, has not been refuted by the prosecution/complainant; and/or the material is such that it cannot be justifiably refuted by the prosecution/complainant?

(iv) Step four: whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?

If the answer to all the steps is in the affirmative, judicial conscience of the High Court should persuade it to quash such criminal proceedings, in exercise of power vested in it under [Section 482](#) Cr.P.C. Such exercise of power, besides doing justice to the accused, would save precious court time, which would otherwise be wasted in holding such a trial (as well as, proceedings arising therefrom) specially when, it is clear that the same would not conclude in the conviction of the accused."

The Counsel for the petitioners point out that there is no role played by the petitioners in the entire mismanagement of MMTC and it was purely a lapse on the part of the Regional Office of the MMTC and to cover up the same only the criminal proceedings has been initiated. In support of his contentions, the learned Counsel for the petitioners refers to the following observations of the Special Audit Report:-

Page No.33 of the Special Audit Report : "Sl. No 7 that there is no confirmation from the vendor as well as the customer and that the Special Audit was not in a position to match the final purchase / invoice from ERP".

At page No.47 - "Sl. No. 4, Confirmation from the customer are not available and it appears that the customers are claiming that they do not have records to verify and confirm the dues. This is a serious lapse as interest debits towards LAD, balance due as per MMTC records and as per their statements will show huge differences.

At page No. 48 " ... As already reported from time to time, account opening forms, fixed deposit copies, FD register, for which the FDs were placed are not available"

At page No. 66 - "*No record for either placing FD or reasons for taking LAD have been maintained.*"

At page No. 411 - "*separate buyer's credit statement not obtained and produced for verification*".

At page No. 412 – *"The Chennai RO informed that the finalisation file for the above year was lost and hence were not in a position to give us how the final figures were arrived at as per audit. Neither the copies of the FDRs were preserved nor a register was maintained giving detail of FDR number, date of deposit, period, rate of interest, maturity date, Amount, maturity amount".*

"Similarly no details of premature closure or for loan against deposits were furnished to us for verification".

...

"The Regional Office does not have any copy of the FDR application or Loan against FD application to verify who signed the same on Company's behalf."

At page No. 418 :-

1. *RO has maintained a single ledger code 24800 for both FD as well as LAD. Bank wise FD details are not available.*
2. *We have been informed that the schedules file has been misplaced and details for final bank wise list of FD is not available.*
3. *Neither FD copies are available for verification nor has a FD register been maintained.*
4. *Several Fund transfers for placement of FD in other banks has been made but the same has not been routed through the current account of the other banks.*
5. *We also find that no cheque has been issued for placement of FDs. All these are not in line with the established accounting practices."*

At page No.433 - *"In respect of the above, the repayment is more than the outstanding as on 31.3.2009 by Rs 2,90,00,000/- RO was not in a position to explain how the difference was adjusted in the books of Accounts".*

At page No.434 *"Observation 1. No documents given bank for*

obtaining loan against deposits were produced to us.

Observation 2. Confirmations from the customers are not available and it appears that the customers are claiming that they do not have records to verify and confirm the dues.

"4. Verification of FD as per books with confirmation from the banks:

The maintenance of FD account (24800) and loan against deposit during the year is not proper. More than Rs. 4900 crores was transacted in Fixed Deposit account on behalf of customers with a closing balance of Rs 1924 crores, the maintenance of the details is totally absent. As already reported from time to time, account opening forms, fixed deposit copies, FD Register, for which the FDs were placed are not available."

At page No.435 - "RO has not maintained any FD Register as per the instructions given by CO Internal Audit specifying the date, amount, period, rate of Interest, date of maturity, purpose and for which loan / sbic the same was placed."

At page No.442 - "8. This report is issued on the basis of ERP reports furnished to us and the documents and explanations provided to us. (9) The entire suspense accounts transactions and purchase accounting has not been matched. We are not in a position to express a view / opinion on the impact of the above on the difference in vendor account. (10) No confirmation of balances have been obtained either from Vendors or from Customers"

At page No.443 - "12. No proper supporting/details exist for majority of Debit notes, credit notes, Journal entries. Our verification and findings are consequently hampered to a certain extent and we have drawn our conclusions based on data produced and explanations furnished to us".

At page No.503 - "11. The entire suspense accounts transactions and purchase accounting has not been matched. We are not in a

position to express a view / opinion on the impact of the above on the difference in vendor account”.

At page No.46 - *“The entries for LAD taken and LAD paid were not properly made due to mix up in FD and LAD accounts. For eg. In Indian Bank LAD received Rs. 312.9 crores and LAD repaid Rs. 161.07 Crores were passed in FD account. The LAD of Rs 52.45 Crores adjusted against FD was not passed”.*

and contends that neither in the Internal Audit nor in the Regular Audit or in the Special Audit or in the reply given to the CAG, any fraud was alleged and in such circumstances, only when the demand was resisted by initiating arbitration proceedings, some interested officials of the MMTC who wanted to cover up their lapses alleged fraud and given a criminal complaint to divert the issue.

He further contends pointing out the CAG instructions, Section 209 of the Companies Act 1956 and the MMTC Board charter that it is the Directors who are responsible for the loss i.e., accordingly MMTC, in order to cover up their negligence, the present criminal proceedings have been initiated.

There is no valid reply by the prosecution for all these contentions.

Therefore,

When the entire amount of the Bullion along with the additional charges such as LIBOR, SPREAD etc. has been paid by the customers and in the absence of any allegation of fraud being alleged in the Internal Audit, External Audit, Special Audit and CAG Audit and even at the time of raising the demand for the losses occurred, alleging a fraud subsequently and launching of criminal proceedings is a clear case of arm twisting.

The so-called official implicated as Accused No.1, is only a Deputy General Manager of MMTC, Chennai Regional Office, Chennai, at that time. There were many higher officials above him and there is no documentary evidence to prove as to how he was responsible and how he is empowered individually to make Crores and Crores of deposits in various accounts and also to take Crores and Crores of

loans on the said deposits individually.

Moreover, the observations in the Special Audit Report clearly shows the lapses on the part of the administration of the Regional Office of the MMTC in handling the finances and accounts.

If it is a case of loss and it is recoverable from the customer, it has to be worked out only as per the provisions of the MoU. The way in which the name of Mr. Gurusawamy, which was found in the FIR being left out in the Civil Suit even before the Charge Sheet is filed by CBI and filing the Civil Suit deleting the name of Mr. Guruswamy and not including other officials of MMTC and Union Bank of India clearly demonstrates the fact of the MMTC's interference in the launching of the prosecution. Therefore, allowing the prosecution to proceed with the case further will be an abuse of process of law, apart from the fact that the dispute is completely civil in nature and is deliberately given a criminal colour.

210. In **Rishipal Singh V State of Uttar Pradesh & another (2014) 7 SCC 215**) His Lordship Hon'ble Mr Justice N.V.Ramana, J on behalf of a Division Bench of the Supreme Court has observed that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the Court is as to whether the uncontroverted allegations as made in the complaint prima facie establish the case and that the High Court should not convert itself into a trial Court and dwell into disputed questions of fact. The object of Section 482 is to prevent abuse of process of Court and to secure ends of justice. High Courts need to be circumspect and exercise power under Section 482 in exceptional circumstances depending upon facts of each case. If allegations leading to criminal prosecution prima facie do not disclose or constitute offence then power under Section 482 can be exercised, however, disputed questions of fact cannot be decided like trial Court. Frustrated litigant need not be permitted to vent vindictiveness through abuse of process of law and such proceedings are required to be stopped in early stages.

211. This Court has carefully perused the order of the learned Special Judge, dated 04.08.2015 and made in CrI.M.P.No.3615 of 2014 in C.C No.3 of 2014.

On perusal of the said order along with other materials placed before this Court, this Court finds that no prima facie case is made out against the petitioner Mr. Ganesh Agarwal. The same view has also been taken by a learned single Judge of this Court in his order, dated 30.06.2014 made in Application No.2830 of 2013 in C.S.No.249 of 2013. A Division Bench of this Court has also confirmed the said order of this Court by its Judgment, dated 28.10.2014 made in O.S.A .No. 244 of 2014.

212. The learned Special Judge for CBI cases ought to have allowed Crl.M.P.No.3615 of 2014 in C.C .No.3 of 2014. Unfortunately, the Special Judge, had, without considering the submissions made on behalf of the petitioner as well as the materials placed on his behalf dismissed the said petition saying that the ingredients for constituting the offence against the petitioner can be culled out only from materials and evidence adduced by the prosecution during the course of trial. This is absolutely wrong and in total negation of the law laid down by the Apex Court in **Rukmini Narvekar Vs Vijaya Satardekar and others ((2008) 14 SCC 1)**.

213. The Memorandum of Understanding dated 02.04.2008 and clause 11 thereof would clearly indicate that the entire transaction is civil in nature. It is to be noted that the MMTC Ltd., Chennai had also filed a Civil Suit in C.S.No.249 of 2013, which is still pending on the file of this Court for recovery of certain amounts from the petitioners and the first accused. If a business decision had resulted in loss even as per the prosecution case, (as found in the charge sheet in the middle of page No.5) it would be in the account of the customer. Claiming the same, debit notes were raised by MMTC Ltd Chennai and arbitration proceedings were initiated by M/s. Shiv Sahai and Sons. . All the above facts would clearly indicate and prove that the entire transaction which took place between MMTC Ltd., and M/s. Shiv Sahai and Sons are completely civil in nature.

214. This Court takes the risk of repetition, that in the charge sheet the loss towards foreign exchange was quantified as Rs.36.02 crores, the interest on Loan against Fixed Deposit which was not passed on the customer was fixed as Rs.36.18 crores, and a loss of a sum of Rs.18.42 crores was fixed towards

usage of LC charges. The total amount thus covered under the charge sheet is Rs. 90.52 crores. However, it seems that there are a lot of variations with reference to the quantum of loss shown in the First Information Report as well as in the charge sheet.

215. A cursory reading of the averments of page no.6 of the charge sheet which runs over the next page would go to show that out of 132 bullion consignments eight buyer's credit resulted in gain but, major number of consignments during the relevant period resulted in loss.

216. It could be seen from document No. 51 which is a tour report, that there was an acute man power shortage and the report suggested to engage sufficient man power to complete the task and to reconcile all the imports of bullion. The report of M/s.Purushothaman and Company, Auditors for the year ending 31st March, 2009 would also go to show that the internal mechanism needs to be strengthened and proper utilisation of the BTS Software to account the bullion trading to be done effectively.

217. As rightly argued by Mr. Muralikumaran, learned counsel for the petitioner, the prosecution did not produce even a single scrap of paper to show that Mr.V.Gurumoorthi was either authorised person or the only person authorised to make deposits and to take loans from foreign banks.

218. It is therefore clear that it is the duty of the prosecution to put forth some documents such as Board's resolution, its guidelines, norms and authorisations pertaining to making of deposits and availing of loans from the deposits for the purpose of making out a prima facie case. In the absence of such documents, it can easily be presumed that the prosecution has miserably failed to make out a prima facie case as against the petitioners.

219. On careful examination of the materials placed before this Court, this Court finds that there is no investigation on the line as to how, crores and crores of deposits were made in banks out of the sale proceeds without paying the suppliers and how loans were taken and how the banks were chosen for deposits as well as for taking loans and why for the serious lapses no bank officials were made liable?. Moreover, no documents were produced by the respondent-police (CBI) which led to the making of deposits and taking of loans.

220. Even as per the Special Audit Report, the entire problem was due to the placing of fixed deposits for a longer period. It could be seen from page no.66 of the Special Audit Report which proceeds to say that the Fixed Deposits as well as LADs were in excess to the extent of Rs.776 crores/Rs.885crores.

221. The Investigating Officer has miserably failed to find an answer for the question:

“as to whether the allocation of duties and responsibilities including the delegation of powers at various levels of management is fair/proper/justifiable and the same have been adequately defined by the prosecution?”

222. This Court from the related materials is able to find that the Comptroller and Auditor General of India came down heavily on MMTC Ltd., pointing out that there was failure to adhere to the instructions and non-realisation of dues on the avoidable loss towards interest.

223. On perusal of the averments made in the first information report as well as in the charge sheet this Court is of considered view that M/s.Shiv Sahai and Sons had resisted the claim made by M/s. MMTC Ltd., Chennai and ultimately, if, in the arbitration, it is proved that the loss occurred to MMTC Ltd., Chennai was due to the negligence on the part of the officials of MMTC Ltd., they would be held liable independently. As discussed in the beginning paragraphs of this Order, there is no legality or genuineness in the complaint.

224. As contemplated under Section 233A of the Companies Act, the Special Audit can be appointed only by the Central Government. This , so called Special Audit was not appointed by the Central Government nor by the Comptroller and Auditor General of India In so far as the case on hand is concerned, as could be seen from the reply given for the RTI, by the Comptroller and Auditor General of India, the so called Special Audit Report was not placed before the Comptroller and Auditor General of India for his comments and observations.

225. It could be seen from the report of the Comptroller and Auditor General of India, that the matter was reported to the Ministry in March 2013 and it is stated that the reply is awaited. The report of the Comptroller and Auditor General of India will be a very crucial issue as to how, the Ministry wanted the matter to be dealt with because under Section 619A read with Section 233A sub

clause 6 of the Companies Act, the Central Government is empowered to take action on such reports.

226. The Special Audit Report says that the maintenance of accounting system is improper. There was inadequate strength at the official level for maintaining the accounts with reference to the financial transactions.

227. On a careful perusal of the entire records placed before this Court, it is found that no incriminating materials are available as against the petitioners to show that they had indulged in the practice of fraud in connivance with the Mr. V. Gurumoorthi (1st accused). The allegations of fraud were made only against the first accused Mr.V. Gurumoorthi and not against the petitioners. It is to be noted that even as per the prosecution case, the first accused Mr.V.Gurumoorthi in connivance and in collusion with the petitioners had fudged the accounts and caused loss to the MMTC Ltd., Chennai From this language, it could be easily understood that no serious allegations of fraud were made against the petitioners because the petitioners could not have had access to the accounts maintained by the MMTC Ltd., Chennai as they were supposed to have handled only by the officials of MMTC Ltd., Chennai.

228. A perusal of the entire charge sheet it would go to show that no prima facie case is made out as against the petitioners to continue the prosecution. Even if the case against the petitioners is allowed to proceed further by way of trial, the chance of conviction would be bleak.

229. It is to be noted that taking into consideration the entire allegations made in the charge sheet, this Court is of firm view that all the allegations are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the petitioners.

230. With reference to Section 120B IPC, it provides punishment of criminal conspiracy. Section 120A IPC defines the term 'criminal conspiracy'. The opening portion of the First Information Report reads that during the period from 2007 to 2010 at Chennai and at other places Mr. S.Gurusamy (A1 as per FIR),former Chief General Manager, South Zone, MMTC Ltd., Chennai Regional Office, Chennai, Mr. V.Gurumurthy (A-2 as per FIR),

former General Manager (Finance & Accounts), MMTC Ltd., Chennai Regional Office, Chennai and unknown officials of MMTC Ltd., Regional Office, Chennai had entered into a criminal conspiracy with Mr. N.P.Agarwal, (A3 as per FIR) Proprietor M/s.Shiv Sahai and Sons and with unknown officials of Union Bank of India Main Branch, Chennai to cheat the MMTC Ltd., in the matter of bullion trading through buyers Credit Scheme.

231. 'Conspiracy' in terms of Section 120B of the Code is an independent offence. The ingredients of criminal conspiracy as laid down by the Apex Court in **R.Venkatakrishnan V CBI (2009 11 SCC 737):AIR 2010 SC 1812: 2009 (11) SCALE 102: (2009) 13 SCR 762** are:

- (i) an agreement between two or more persons;
- (ii) the agreement must relate to doing or causing to be done either
 - (a) an illegal act;
 - (b) an act which is not illegal in itself but is done by illegal means.

In **Lennart Schussler vs Director of Enforcement, New Delhi (1971) 1 SCJ 199): (1971) 1 33 Mad LJ (SC 33)**, the Apex Court has held that :

"The gist of the offence under Section 120A is that agreement between two or more persons to do or cause to be done an illegal act or a legal act by illegal means subject to the proviso that the agreement does not except agreement to commit offence, amount to a conspiracy unless it is followed by an overt act done by one or more persons in pursuance of such an agreement. An agreement to do an illegal act which amounts to a conspiracy will continue as long as the members of the conspiracy remain in agreement and as long as they are acting in accord and in furtherance of the object for which they entered into the agreement."

232. In the charge sheet it is stated that during the period 2008-2009 A1 to A3 (as per charge sheet) (1) Mr.V.Gurumurthy, former General Manager (Finance & Accounts), MMTC Ltd., Chennai Regional Office, Chennai and unknown officials of MMTC Ltd., Chennai Regional Office, Chennai (2) Mr.

N.P.Agarwal, Proprietor M/s.Shiv Sahai and Sons and (3) Mr. Ganesh Agarwal (A3 as per charge sheet) had entered into a criminal conspiracy at Chennai and other places to do or cause to be done certain illegal acts., viz., to cheat MMTC Ltd., Chennai (A Government of India Undertaking) in the matter of purchase of gold under the Buyer's Credit Scheme.

233. One can easily infer and understand the contradiction and inconsistency between the First Information Report and the charge sheet with reference to the alleged offence of conspiracy.

234. As seen from the First Information Report, the check period is 2007 to 2010. As per the charge sheet, the check period is 2008-2009. When the First Information Report itself says that Mr. S.Gurusamy, former Chief General Manager, South Zone, MMTC Limited Chennai, Regional Office, Chennai along with Mr. V.Gurumurthy, former General Manager (Finance & Accounts), MMTC Ltd., Regional Office, Chennai had entered into a criminal conspiracy with Mr. N.P.Agarwal, (A3 as per FIR), Proprietor M/s.Shiv Sahai and Sons, the prosecution, suddenly takes an " U " turn in the charge sheet by deleting the name of Mr.S.Gurusamy, former Chief General Manager, South Zone, MMTC Ltd., Regional Office, Chennai and included the name of Mr. Ganesh Agarwal' in the category of conspirators.

235. The place and the period where and when the alleged criminal conspiracy took place have not been clearly identified. The prosecution has not come forward with a definite case of conspiracy. This Court has thoroughly discussed about this in the earlier paragraph of this Order. Having taken into consideration of all the relevant facts and circumstances with reference to the alleged criminal conspiracy, this Court is of considered view that no concrete and clinching evidence is available to indict the petitioners to say that they had committed the offence of conspiracy, because the ingredients for making out a case of conspiracy are not available in this case.

236. In the absence of any clinching and unassailable evidence to charge the petitioners with Section 120B IPC this Court finds that no prosecution under Section 120A IPC could be launched against the petitioners to punish them under Section 120B IPC.

says that Mr. Mr. S.Gurusamy, former Chief General Manager, MMTC Limited Chennai and Mr. V.Gurumurthy, had entered into a criminal conspiracy with Mr. N.P.Agarwal, (A3 as per FIR), Proprietor M/s.Shiv Sahai and Sons to cheat MMTC Ltd., Chennai, whereas in the charge sheet the prosecution says that Mr. V.Gurumurthy had entered into a criminal conspiracy with Mr. N.P.Agarwal and Mr. Ganesh Agarwal to cheat MMTC Ltd., Chennai.

238. In this connection a question that arises for the consideration of this Court is "who had actually committed the offence of criminal conspiracy?"

Section 415 of IPC is relating to the offence of cheating. It reads that :
 "whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

Explanation— A dishonest concealment of facts is a deception within the meaning of this section

Section 416 IPC deals with Cheating by personation

Section 417 IPC is the penal provision for cheating. It reads that whoever cheats shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Section 418 IPC deals with Cheating with knowledge that wrongful loss may ensue to person whose interest offender is bound to protect.

Section 420 deals with Cheating and dishonestly inducing delivery of property. It enacts as under:

"whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to

Simple cheating is punishable under Section 417 IPC, but where there is delivery or destruction of any property or alteration or destruction of any valuable property resulting from the act of a person deceiving this section (420 IPC) comes into operation. For an offence under this Section, it must be proved that the complainant parted with his property acting on a representation which was false to the knowledge of the accused and that the accused had a dishonest intention from the outset. (See **Moharik Ali's case (1958 SCR 328: AIR 1957 SC 857)**)

The offence under Section 420 IPC has the following essentials:

- (i) There must be deception i.e. the accused must have deceived some one:
- (ii) That by the said deception. The accused must induce a person:
 - (a) to deliver any property; or
 - (b) to make, alter or destroy the whole or part of the valuable Security or anything which is signed or sealed and which is capable of being converted into a valuable property;
- (iii) That the accused did so dishonestly.

239. For a person to be convicted under Section 420 IPC, it has to be established not only that he has cheated someone but also that by doing so he has dishonestly induced the person who was cheated to deliver any property etc.,

The alleged deceit when arises out of breach of business contract which was purely civil transaction, it does not create any criminal liability. This principle is laid down in **Vinar Ltd., V Chenab Textile, 1989 Cri.L.J. 1858 (J & K)**

240. In the given case on hand, as it is seen from the final report, that in pursuance of the conspiracy A1 to A3 had speculated in Indian rupee-US Dollar Foreign Exchange fluctuation and they had intentionally omitted to take forward cover for the purchases made and availed foreign exchange loan under Buyer's Credit Scheme and thereby caused wrongful loss of Rs.113.38 crores to the MMTCL Ltd., Chennai and corresponding wrongful gain to the petitioners. In order to substantiate these allegations no substantial or adequate grounds are available against the petitioners. Admittedly, the transaction between the

complainant MMTC Ltd., and the petitioners is a commercial transaction. In the absence of proof of conspiracy and the criminal intention to cheat the MMTC Ltd., it could not be heard to say that the petitioners have committed the offence of cheating. Everything is borne out by records as stated in the Special Audit Report. The failure, on the part of the officials of MMTC Ltd., to maintain proper accounting system could not rise to the commission of any offence much less the offence of cheating. Therefore, the alleged charges leveled against the petitioners under Section 120B r/w Section 420 IPC are liable to be quashed, as no case of cheating is made out.

241. The next charge levelled against the petitioners is under Section 477A IPC. At the outset, this Court would say that the charge under Section 477A of IPC as well as under Section 13(2) r/w 13(1)(d) of Prevention of Corruption Act, 1988 could not be made against the petitioners, as they are not concerned with this offence. The reason why is that the offence under Section 477A IPC is relating to falsification of accounts and the offence under Section 13(1)(d) of Prevention of Corruption Act, 1988 is relating to criminal misconduct by a public servant.

Section 13(1)(d) of Prevention of Corruption Act, 1988 enacts that a public servant, if said to commit the offence of criminal misconduct,—

(a).....

(b).....

(c)

(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;

The offence under Section 13(1)(d) of Prevention of Corruption Act, 1988 certainly cannot be connected with the petitioners because Mr. N.P.Agarwal (A2) being the proprietor of M/s.Shiv Sahai and Sons is one of the parties to the Memorandum of Understanding, dated 02-04-2008. The MMTC Ltd., is also one of the parties. However, the third accused Mr. Ganesh Agarwal is not a party to the contract. Since the petitioners are third parties to the administration of MMTC Ltd., the offences under Sections 477A and Section 13(1)(d) of the Prevention of Corruption Act, 1988 cannot be linked with them. Section 13(2) of the Prevention of Corruption Act, 1988 is the penal provision for the offences under Section 13(1)(a)(b)(c)(d)&(e) of the Prevention of Corruption Act, 1988. Therefore, since they are not connected with the above said charges under Section 13(1)(d) of the Prevention of Corruption Act, 1988 they cannot be punished even if the charge is proved against them under Section 13(2) of the said Act.

242. For the foregoing reasons the charges under Section 477A IPC and Section 13(2),r/w 13(1)(d) of the Prevention of Corruption Act, 1988 would not be attracted as against the petitioners, as no prima facie case is made out against them.

243. One more allegation leveled by the prosecution against the petitioners is that during October, 2010 Mr. N.P.Agarwal (A2) and Mr. Ganesh Agarwal (A3) had offered pecuniary consideration to A1 Mr. V.Gurumurthy by purchasing Air ticket from Chennai to Singapore for Rs. 41,700/- for A1 and his wife Mrs. Kausalya Gurumurthy from M/s.Miles and Miles Tours and Travels Private Ltd.. and A1 Mr.V.Gurumurthy had accepted the same.

244. To prove this charge, the prosecuting agency has failed to make out a case. L.W.85 (Listed witness 85) Mr. Dilipkumar is the Proprietor of M/s.Miles and Miles Tours and Travels Private Ltd., . He says that their Office used to book air tickets either through M/s.Agbar Travels, Nungambakkam, Chennai or through M/s.Riya Travels, Egmore, Chennai. He never stated in his statement, through which travel agency he had booked air tickets for Mr. V.Gurumurthy and

Travels, Nungambakkam, Chennai or from M/s.Riya Travels, Egmore, Chennai was examined by the prosecution in order to prove the charge of pecuniary consideration.

245. No person who has been indicted with a particular charge could be convicted on the basis of mere gesture and surmise.

246. In so far as the charge under Section 420 of IPC is concerned, a short question which arises for consideration is as to whether the case of cheating within the meaning of Section 415 of IPC has been made out or not?"

247. In **B.Suresh Yadav V Sharifa Bee and Anr.(2008 Cri.L.J. 431(SC): AIR 2008 SC 210**, the apex Court has held that for the purpose of establishing the offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. In a case of this nature, it is permissible in law to consider the stand taken by a party in a pending civil litigation.....When a stand has been taken in a complaint petition which is contrary to or inconsistent with the stand taken by him in a civil suit, it assumes significance. In paragraph 17 of the above said decision, the apex Court has made reference to **Hira Lal Hari Lal Bhagwati v CBI, New Delhi (2003) 5 SCC 257**). In this case, the apex Court has opined :

" It is settled law, by a catena of decisions, that for establishing the offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. From his making failure to keep promise subsequently, such a culpable intention right at the beginning that is at the time when the promise was made cannot be presumed.

committing offence under Section 420 of the Indian Penal Code does not arise. (See also **Hira Lal Hari Lal Bhagwati v CBI, New Delhi ((2005) 3 SCC 670)** and **Indian Oil Corporation V NEPC India Ltd., & Ors. (2006) 6 SCC 736)** "

248. As held by the apex Court in **G.Sagar Suri & Anr. V State of U.P & Ors. (2000) 2 SCC 636)** (cited supra) the jurisdiction under Section 482 of the Code has to be exercised with great care. In exercise of its jurisdiction, the High Court is not to examine the matter superficially. It is to be seen if a matter, which is essentially of a civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal Court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which the High Court is to exercise its jurisdiction under Section 482 of the Code. Jurisdiction under this Section has to be exercised to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

249. In the light of the observations made by the Hon'ble Supreme Court in **BINOD KUMAR AND OTHERS vs STATE OF BIHAR AND ANOTHER ((2014) 10 SCC 663)** a civil liability cannot be converted into a criminal liability and that therefore, the charge sheet filed as against the petitioners can be quashed on the ground that the allegations made in the charge sheet, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the petitioners. The charge sheet also deserves to be quashed on the ground of abuse of process of Court, as the criminal proceedings initiated by the prosecuting agency is manifestly attended with malafide with an ulterior motive for wreaking vengeance on the petitioner.

250. In the result,

Criminal Original Petition No.21243 of 2014

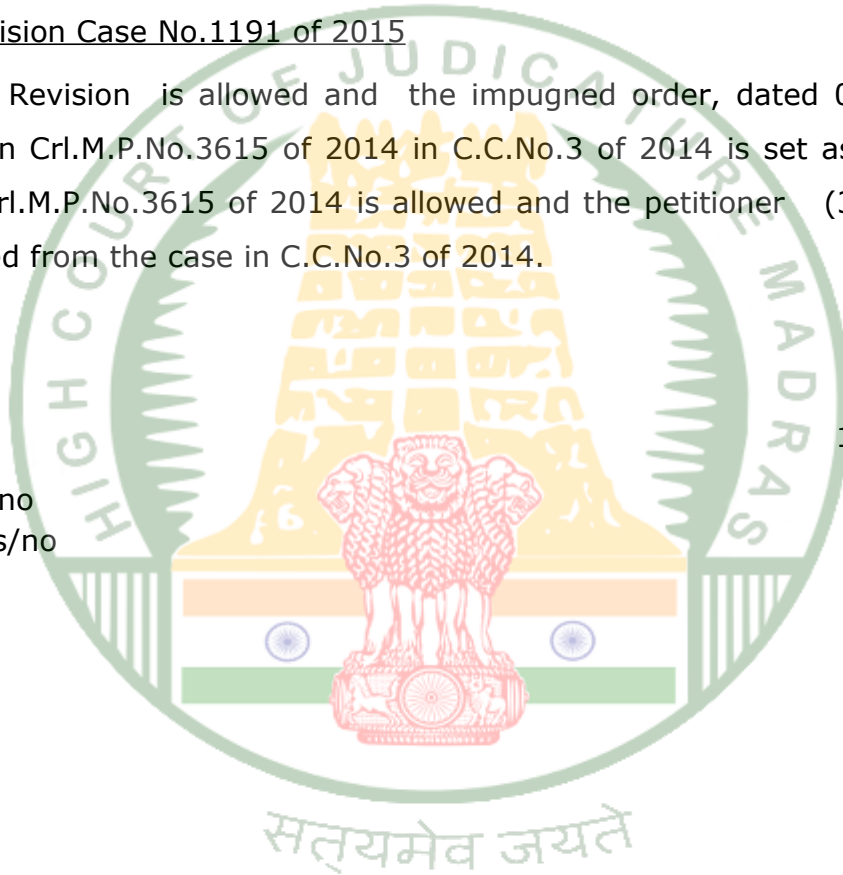
(a)Petition is allowed and the charge sheet in C.C.No.3 of 2014 pending on the file of the learned Special Judge for CBI cases (XII Additional Judge, City Civil Court), Chennai in so far as the petitioner Mr. N.P.Agarwal is concerned quashed ;

Criminal Revision Case No.1191 of 2015

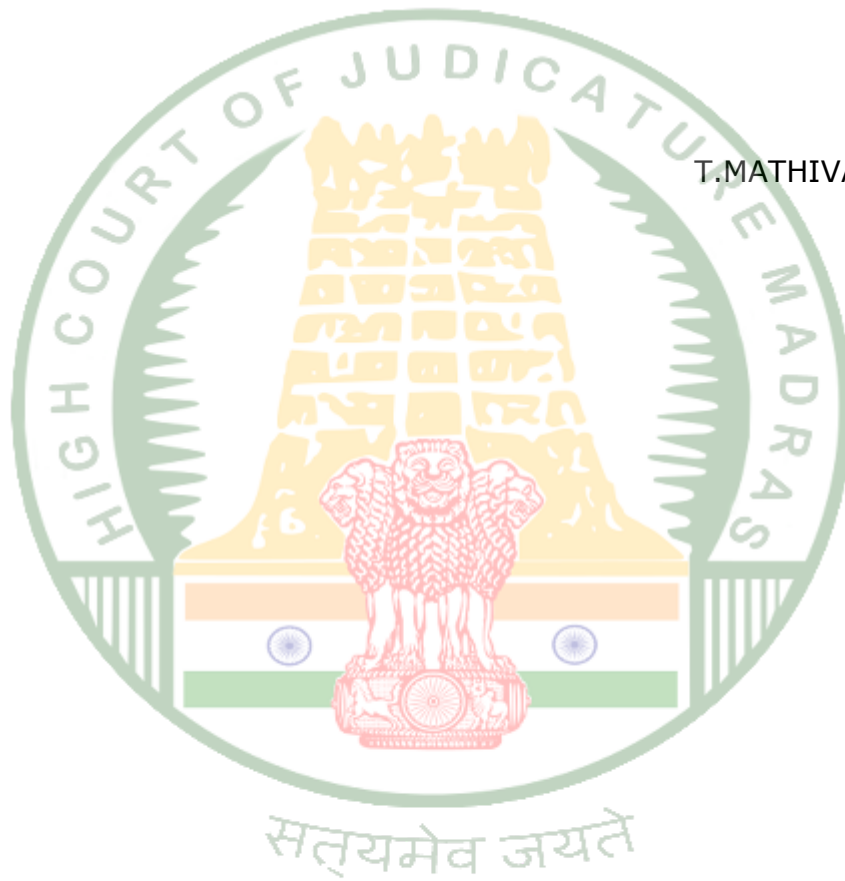
(b) Criminal Revision is allowed and the impugned order, dated 04.08.2015 and made in Crl.M.P.No.3615 of 2014 in C.C.No.3 of 2014 is set aside. The petition in Crl.M.P.No.3615 of 2014 is allowed and the petitioner (3rdaccused) is discharged from the case in C.C.No.3 of 2014.

17.04.2017

Index:- yes/no
Internet: Yes/no



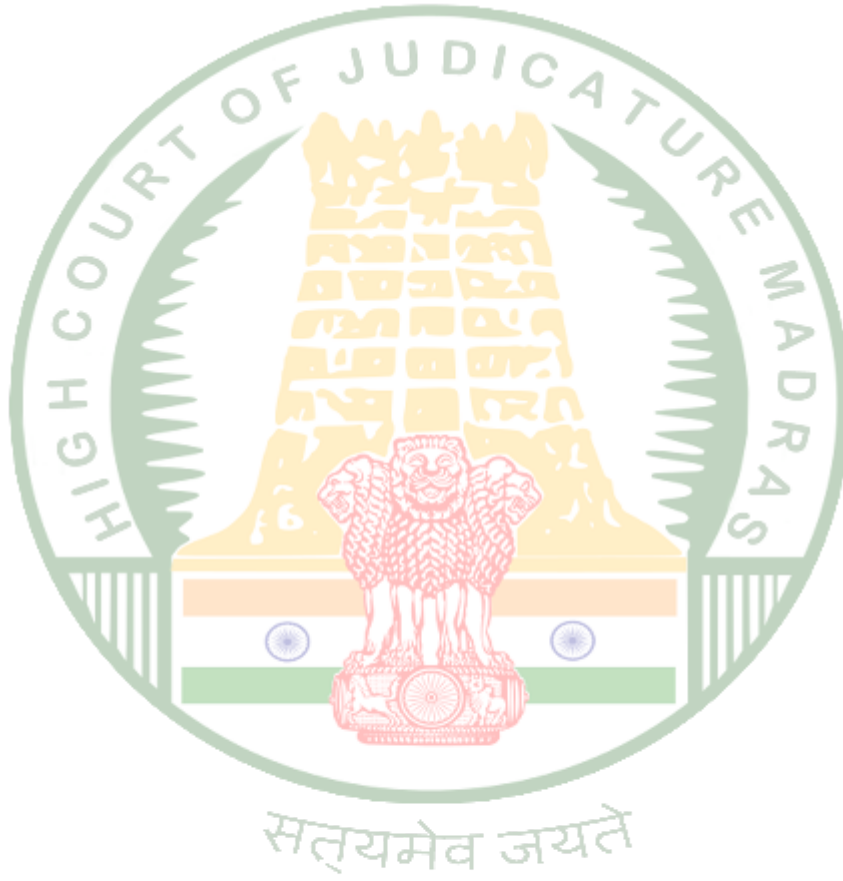
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T.MATHIVANAN.J.,

Criminal Original Petition Nos. 21243 of 2014
and
Criminal Revision Case No.1191 of 2015

17.04.2017



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