Bail Slip

The Petitioner/Accused viz S.Murali, S/o.Sivasomandaram was released on bail as per the Order of this Court, dated 02.06.2015 and made in MP.No.1/2015 in Crl.Rc.No.487/2017.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 20..06..2017

Delivered on : 18..07..2017

CORAM

THE HON'BLE MR.JUSTICE N.SATHISH KUMAR

Crl.R.C. No.487 of 2015

1. S.Murali

2. M/s. Tele Date Networking
Services (P) Ltd.,
represented by S.Murali
34, 2nd Floor, I main road
CIT Nagar, Nandanam,
Chennai -35 .. Petitioners/accused 1& 2

vs.

State rep.by
The Deputy Superintendent of Police
CBI/ACB,Chennai .. Respondent/Complainant

Revision Case filed under Section 397 and 401 of Cr.P.C against the conviction and sentence passed by the learned XVIII Additional Sessions Judge, Chennai in C.A.No.184 of 2014 by its judgment dated 18.04.2015.

For petitioners : Mr.N.Ranganathan

For Respondent : Mr.K.Srinivasan
Special Public Prosecutor
for CBI Cases

ORDER

This Revision Petition has been filed by the petitioners challenging the judgment dated 18.04.2015 passed by the learned XVIII Additional Sessions Judge, Chennai confirming the judgment dated 01.07.2014 passed by the learned Additional Chief Metropolitan Magistrate, Egmore, Chennai for the offence punishable under Section 120-B read with 420 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for four years and imposed a fine of Rs.50,000/- in default rigorous imprisonment for one year and under Section 20 read with 4 of the Indian Telegraph Act and sentenced to undergo rigorous imprisonment for one year and a fine of Rs.1000/- in default three months rigorous imprisonment. It has been further ordered that sentences awarded shall run concurrently.

2. Originally, the petitioners/1st and 2nd accused herein, were arrayed as 3rd and 4th accused in the charge sheet and one David Hersch Korn and Hersch Korn Thierry were arrayed as the 1st and 2nd accused. In view of their long absconding, i.e, the 1st and 2nd accused, the case was split up and C.C.No.926 of 2001 was given for the case against the original 1st and 2nd accused and 3rd and 4th in the main case (present accused) are now 1st and 2nd accused in the instant case and Trial went on against the present accused and 20 witnesses were examined and 56 documents were marked. The Trial Court, based on the oral and documentary evidence, found the accused guilty under Section 120-B read with 420 of IPC and under Section 20 read with 4 of the Indian Telegraph Act and imposed punishment as stated above. The lower appellate Court also confirmed the said conviction and sentence. Against which the present revision came to be filed.

3. For the sake of convenience A1 to A4 are referred as mentioned in the charge sheet.

4. The brief facts of the case of the prosecution is as follows:

(i) Joint surprise check was conducted by P.W.1 Vice President of Tata Communications Limited, Chennai along with CBI officers and the vigilance officers of BSNL on 03.8.2000, at the premises of the 4th accused (2nd accused herein) M/s. Tele Data Networking services (p) Limited. In the said surprise check, they found that there were computers and the partition was opened and it was also found that there were telecom equipments live and functioning. There were four ISDN DRI lines from Mambalam exchange connected through Siemens make N.T. and also there was one ISDN PRI lines extended from Mambalam Exchange through RAD make HSDL Modem. They also found that instead of connecting PRI line to authorised equipment, the aforesaid line was connected to one equipment which is switch lab make, PSDN/IP voice switching gateway equipment. The aforesaid equipment was further connected to a Cisco 3600 router through a H.P make Pro curve Switch and also connected to another ISDN BRI line through which this equipment can be controlled from a remote location. Further, they found that display switch lab equipment calls were made to local PSDN numbers and in that, they received calls from foreign countries like France, U.S.A., and Canada.

(ii) After verification, the inspection team found that upon receiving this international incoming calls the switch lab equipments dials the local number and switch as the international incoming calls to the local Telephone number. Since these calls were illegally switched by M/s. Tele Data to the local numbers, the Government of India lost its revenue shares. After finding such illegal activities, proceedings were prepared (Ex.P1) and diagram showing the live set up (Ex.P2) was drawn and attached.

(iii) On 04.8.2000 another surprise check was conducted on M/s.Tele Data Network Services Pvt Ltd., (2nd accused herein) and proceedings were prepared (Ex.P3) and complete set up diagram showing Finer details of connections (Ex.P4) were marked. They also seized switch lab equipments M.O.1 to M.O.4 in the presence of P.W.1 to P.W.3. P.W.4, P.W.5 and P.W.6 are the subscribers of telephone connection in question and in their evidence, they have deposed that they received overseas calls.

(iv) P.W.2 was working as Assistant Registrar of Companies during the period 30.6.1998 to 30.06.2003. According to him, M/s. Tele Data Networking Services Pvt. Limited was incorporated as company on 10.12.1999. Exs.P5 and P6 are the Memorandum of Association and Article of Association of the said company. They also furnished Form No.18 in respect of the company, which is marked as Ex.P7. As on the date of incorporation of the company one S.Murali, S/o. Sivasomasundaram and Mrs.M.Sathiya, W/o. Murali were the only Directors of the said company, which is evident from Form No.32 (Ex.P8). Similarly, on 29.3.2000, the said Sathiya wife of Murali, resigned from the said company, as could be seen from Ex.P8. Thereafter, one Herchkorn Thierry was co-opted as Director with effect from 22.12.1999, which is evident from Form No.32, (Ex.P10). Again one David Hersch Korn was appointed as Director with effect from 24.01.2000. (Ex.P11) and Form No. 2 allotting equity shares to the newly appointed Directors is marked as Ex.P12. True copies of the Memorandum of Association and Article of Association of Chennai Tele Working Services Pvt. Limited, which was incorporated and registered on 14.5.1998, is marked as Ex.P13.

(v) As per Ex.P14, one Hersch Korn Thierry and S.V.Rajaram, were the Directors of the said company from the date of incorporation. David and Vijayendran were the Directors with effect from 29.5.1998 as could be seen from Ex.P15. Murali and Natarajan were appointed as Directors with effect from 31.5.1999 and 15.7.1998 respectively, which is evident from Ex.P16. The said Natarajan ceased to be Director with effect from 21.12.1998 and S.P.Rajaram ceased to be Director with effect from 01.12.1998 (Ex.P17). As per the Memorandum of Association of the aforesaid two companies, the main objects of the company are one and the same and both of them are connected with data processing, software development, computer consultancy services etc, which is evident from Exs.P6 and P13.

(vi) P.w.9 was the Telecom Officer at the relevant time. According to him, Tele Data Networking Services Pvt., Limited (original 4th accused) haD obtained telephone connection bearing Nos. 4369125, 4369126 and 4369127. He filed Ex.P27 to substantiate the same. Similarly, in respect of the connection bearing Nos. 4369130, 4369131 and 4369132 obtained by Tele Data Networking Private Limited, Ex.P28 has been filed by him. During the year 2000, the aforesaid companies have obtained various telephone connections and the same is evident from Exs.P27 to 33. P.W.11, Commercial Officer in New Lines (SE) has also spoken about the aforesaid connections obtained in Exs.P27 to P33. P.Ws.12 to 15 would depose that they used to receive overseas calls.

(vii) P.W.16, who was working as Senior General Manager at the relevant time, received the particulars regarding illegal calls from Bombay for the period from 28.07.2000 to 03.8.2000 and forwarded the same to the CBI (Ex.P37). P.W.17, who was working as General Manager in M/s. Tata Communications Limited, was also present during the surprise check conducted by the CBI and he has also seen Exs. P3 and P.4. P.W.18 was the Senior Accounts Officer in Chennai Telephones. He has also spoken about the telephone bills relating to the original 4th accused company.

(viii) P.W.19 was the Deputy General Manager (Central) in Department of Tele Communication, Chennai. According to him, on experimental process the Central Government had given license to run telecommunication operations to private parties like Tata at Andhrapradesh on huge license free and no private parties were authorised to run telecommunication operation in Tamil Nadu. Primary rate access (PRA) or Primary rate Interface (PRI) connect 30 simultaneous calls in one line. Basic Rate Interface (BRI) and Primary Rate Interface (PRI) shall be used only for the customer purpose and cannot be used for switching the calls to public network. Compression techniques shall not be used for public requirement through this equipment and no private parties are authorised to use to switch towards the public network. After receiving vigilance report regarding illegal diversion of calls by using compression techniques to the public network, they have been directed to make surveillance of those illegal activities and to take necessary action and eradicate the same. They have also issued circular to follow the procedure, in this regard. Exs.P38 and P.44 are relating to the installation reports with regard to the lines provided to the 4th accused company and the lines were installed on different dates. Ex.P49 is the internal meter reading calls mail by the 4th accused company.

(ix) P.W.20, Investigating Officer, on the basis of a joint surprise check conducted by them along with officials of VSNL and DOT, registered a case in RC35/A/2000 (Ex.P50) for the offence under Section 120B read with 420 of Indian Penal Code and under Section 20 read with 4 of the Indian Telegraph Act and Section 13 (2) read with 13(1) (d) of the Prevention of Corruption Act against David Hersch Korn, Hersch Korn Thierry, S.Murali (1st petitioner herein) and unknown officials of Department of Tele communication. He also collected M.O.5 and M.O.6 (Video cassettes) and floppys (M.O.7). He also examined the witnesses and recorded their statements. Thereafter, he collected Exs.P51 to P56 print outs of details of calls transmitted to the 4th accused company.

(x) After investigation in the matter, the charge sheet was filed as against the accused which was registered as C.C.No.285 of 2002 in the Court of learned Additional Chief Metropolitan Magistrate, Egmore, Chennai for the offence under Section 120-B read with 420 IPC and Section 20 read with 4 of Indian Telegraph Act, for illegal switching over incoming international calls to various subscribers of Bharat Sanchar Nigam Limited (BSNL) as local calls. The learned Additional Chief Metropolitan Magistrate, Egmore, Chennai, convicted the original 3rd and 4th accused (1st and 2nd accused herein) for the offence under Sections 120-B read with 420 of IPC and sentenced to undergo rigorous imprisonment for four years and to pay a fine of Rs.50,000/- and in default to undergo one year Rigorous imprisonment. Similarly they are convicted for the offence Under Section 20 read with 4 of Indian Telegraph Act and sentenced to undergo one year Rigorous Imprisonment and to pay a fine of Rs.1,000/- in default, to undergo three months Rigorous Imprisonment. The learned Additional Chief Metropolitan Magistrate, Egmore, Chennai further held that the sentence imposed on A4 company will be on A3 and the period of sentence imposed shall run concurrently. Aggrieved over the said judgment, Appeal being Criminal Appeal No.184 of 2014 was filed. The Appellate Court (XVIII Additional Sessions Judge) vide judgment dated 18.04.2015 confirmed the judgment dated 01.07.2014 passed by the learned Additional Chief Metropolitan Magistrate, Egmore, Chennai in C.C. No.285 of 2002.

5. Heard Mr.N.Ranaganathan, learned counsel for the petitioners. He has contended that originally the charge sheet was filed against four accused for the offence under Sections 120- B, read with 420 of IPC and under Section 4 of the Indian Telegraph Act, wherein the petitioners herein were arrayed as 3rd and 4th accused and one David Hersch Korn and Hersch Korn Thierry were arrayed as 1st and 2nd accused. He has further contended that, though the company was originally registered by the absconding accused along with one S.V.Rajaraman on 14.5.1998 under the name and style of M/s. Tele Date Networking Services Pvt. Ltd., for the purpose of doing business of processing, software development, computer consultancy services etc,the prosecution has not chosen to examine the said S.V.Rajaram. Thereafter, one Vinayendran was appointed as Director. Again, one Natarajan Mahalingam was also appointed as Director. According to the learned counsel, the said Natarajan Mahalingam ceased to be a Director with effect from 21.12.1998. Thereafter, the original 3rd accused (1st petitioner/1st accused herein) was appointed as Director with effect from 31.5.1999.

6. The learned counsel for the petitioners vehemently contended that though the original 3rd accused (1st petitioner / 1st accused herein) has registered the company in the name and style of M/s. Tele Data Networking Services Pvt. Ltd., on 10.12.1999, the absconding accused, by name, Mr.Herchkorn Thierry, (original 2nd accused) and Mr.David Hersch Korn (original 1st accused) were appointed as Directors with effect from 22.12.1999 and 24.01.2000 respectively. It is also the vehement contention of the learned counsel that the petitioners have not played any role in the company. It is submitted that, one J.Sankaravijayan, was authorised to operate the bank account opened in the name of the 4th accused company. However, the prosecution failed to examine the said J.Sankaravijayan.

7. It is also the vehement contention of the learned counsel for the revision petitioners that the 1st petitioner herein was only a paid employee and he has not been participated in the day-to-day affairs of the business and that he is not a technically qualified person to operate the equipments in question installed at the premises of the 4th accused company. The 1st petitioner has no knowledge about the business or illegal activities carried on by the foreigners, i.e.the original 1st and 2nd accused. It is submitted that merely because the 1st petitioner was a Director of the accused company i.e. Tele Data Networking Services (P) Ltd., at the relevant time, it cannot be said that he alone was responsible for the illegal activities done by the other French Directors. There is absolutely, no proof, whatsoever to show that he

gained pecuniary advantage nor had caused any loss to the Government of India.

8. It is contended by the learned counsel that P.W.7 in his evidence has clearly deposed that the bank account was opened only by the absconding accused with Chennai Branch of Standard Chartered Bank and one J.Sankaravijayan, was authorised to operate the said account. Though the 1st petitioner herein was a Director at the relevant time, he was not authorised to operate the said account. The 1st petitioner had no technical knowledge with regard to the equipments installed by the original 1st and 2nd accused. Therefore, according to the learned Counsel, the case of the prosecution that the accused herein had played a role in illegal switching of international telephone calls to several local subscribers of BSNL as local calls, which resulting in revenue loss to the Government of India is highly improbable.

9. The learned Counsel has also contended that the Courts below have committed an error while not appreciating the evidence on record which indicates that the present revision petitioners had not played any role in the commission of the offence. The courts below committed an error in convicting the revision petitioners. Therefore, according to the learned Counsel, the impugned judgments are not based on proper appreciation of evidence. Hence, the learned counsel for the revision petitioners prayed for allowing the revision.

10. Per contra, the learned Special Public Prosecutor submitted that the prosecution has clearly established the role of the accused beyond reasonable doubt. In fact, Exs.P8 to P.11 Form No.32, have been filed to show the changes among the Directors. Ex.P12, Form No.2, submitted by the 2nd petitioner herein /2nd accused company (original 4th accused) has been signed by the original 3rd accused (1st petitioner herein) in the capacity of the Director. Ex.P18 is the account opening Form submitted by the original 4th accused with Standard Chartered Bank. Ex.P20 would go to show that there were many withdrawals by the accused. The aforesaid exhibits would clearly show the dominant role played by the original 3rd accused/ 1st petitioner herein. Exs.P21 to P26 were issued by the original 3rd accused to the beneficiary of the 4th accused company. These exhibits would show that there are inward remittance from foreign countries. The aforementioned facts would clearly show that the 3rd accused was in charge of the 4th accused company at the relevant time. Hence, the learned Special Public Prosecutor submitted that the Courts below, after appreciating the entire evidence in proper perspective, had rightly come to the

conclusion of convicting the accused and the same does not warrant interference.

11. I have gone through the impugned judgment passed by both the Courts below and oral as well as documentary evidence produced on the record. I have also considered the submissions advanced by the learned counsel for the respective parties.

12. Originally, there are four accused in this main case. Apart from the present accused, the CBI has charge sheeted one David Hersch Korn and Hersch Korn Thierry. The said David Hersch Korn and Hersch Korn Thierry were arrayed as 1st and 2nd accused and the petitioners herein were arrayed as 3rd and 4th accused. Since the said David Hersch Korn and Hersch Korn Thierry, original 1st and 2nd accused, are absconding, the case was split up and new C.C.No.926 of 2011 was assigned for the case against the said accused. It is not in dispute that till today, the prosecution could not be able to produce the original 1st and 2nd accused, who are the French nationals, before the Court.

13. The prosecution has framed charges against the accused for the offence under Section 120-B read with 420 IPC and Section 20 read with 4 of Indian Telegraph Act. The prosecution has examined as many as 20 witnesses and marked Exs.P1 to P56 besides M.O.1 to M.O.7. The learned Trial Court convicted the present accused herein for the offence under Section 120-B read with 420 of IPC and under Section 4 of the Indian Telegraph Act. The conviction and sentence imposed by the Trial Court was confirmed by the lower appellate Court.

14. It is well settled that the power of Revision is not automatic and only if the Court satisfies that there was irregularity or illegality in the finding of the Trial Court, such power can be exercised. It is also well settled that Revisional jurisdiction cannot be exercised in re-appreciating evidence. But at the same time, when the Trial Court has mis-read the evidence or not properly appreciated the evidence, the revisional Court can very well look into the evidence to find out whether the orders of the Courts below have suffered from illegality or perversity.

15. In the instant case, the case of the prosecution is that during 1999 -2000, the original 3rd accused (1st accused herein) and absconding accused conspired together and cheated the Government of India by illegally switching over incoming international calls to subscribers of BSNL and in furtherance of the conspiracy the original 1st and 2nd accused along with the 3rd accused (1st petitioner/1st accused herein) floated the company

by name M/s. Tele Data Networking Services (P) Limited (original 4th accused/2nd petitioner/2nd accused herein). Thereafter, the original 3rd accused acquired the BRI and PRI connections on 08.2.2000 from the BSNL. The Original 1st and 2nd accused (absconding accused) procured sophisticated equipments such as Switchlab make PC based ISDN PRI interface exchange with Monitor and keyboard, UB Robotics make Courier I modem, CISCO 3600 series router, HP Procurve 408 Ethernet Switch, RAD made HDSL Modem etc., and got them installed in the office of the original 4th accused company (2nd petitioner/2nd accused herein) during February 2000. After installing the same, the international calls were decompressed and connected to the local subscriber through the PRI connections comprising 30 lines. The incoming international calls are thus routed through the PRI lines and the said calls were treated only as local calls by the Mambalam exchange, which resulted in loss to the Government of India to the tune of Rs.11,80,518.30p. Thus, all the accused had committed offences under Sections 120-B, read with 420 IPC and under Section 20 read with 4 of the Indian Telegraph Act.

16. It is the further case of prosecution that the original 3rd accused (1st petitioner/1st accused herein) alone incorporated the original 4th accused company (2nd accused/2nd petitioner herein), by name, Tele Data Networking Services Pvt. Ltd., in the year 1999 along with his wife. Thereafter, his wife resigned from the post of Director and the original 1st and 2nd accused/ absconding accused were opted as Directors. Thereafter, international calls were decompressed and connected as local calls, which caused loss to the Government. P.W.1, P.W.3 and P.W.20 have clearly spoken about the surprise check conducted in the original 4th accused company, namely, Tele Data Net working Services (P) Limited, situate at C.I.T Nagar, Nandanam, Chennai. They have also spoken about the illegal switching of incoming international calls as local calls. According to them, the CISCO router installed by the accused, dials the ISDN BRI,which establishes a clear channel data link with the foreign country and through the said data link, calls were received from international locations and routed to the switch lab switching gateway equipment. Upon receiving this international incoming calls, the switch lab equipments dials the local number and switch as the international incoming calls to the local telephone numbers and due to which, switching of V.S.N.L.has been bypassed and these calls were illegally switched on by the original 4th accused/ 2nd petitioner/2nd accused herein. The equipments used for this switching have been seized and marked as M.O.1 to M.O.4.

17. It is to be noted that merely because the original 3rd accused/ present 1st accused was shown as Director of the 4th accused company/present 2nd accused at the relevant time,

criminal liability cannot be fastened on him on the sole ground that he was appointed as the Director for the said company. It must be established by the prosecution that the 3rd accused / 1st petitioner/1st accused herein, as a Director, had actively participated in the day-to-day affairs of the said company. By relying upon the certificate of Incorporation dated 10.12.1999 in the name of the original 4th accused/ 2nd accused herein, which is marked as Ex.P5, the prosecution has simply proceeded as against the original 3rd accused (1st petitioner/1st accused herein). Of course Ex.P5 dated 10.12.1999 shows that the company was incorporated in the name of the 4th accused (2nd petitioner herein) Tele Date Networking Services Pvt. Ltd., by the 3rd accused (1st accused / 1st petitioner herein) along with his wife. In the Article of Association and Memorandum of Association, which is marked as Ex.P6, the address of the company is shown as 27 Palayakaran Cross Street, Kodambakkam, Chennai - 24. Again it was shifted to No.34, Second Floor First Main Road, C.I.T. Nagar, Nandanam, Chennai - 600 035, which is evident from Ex.P7.

18. On a careful analysis of the entire evidence of P.W.2, it is seen that the wife of the original 3rd accused has resigned from the original 4th accused company on 29.3.2000, which is evident from Ex.P9. In the meanwhile, one Herchkorn Thierry (original 2nd accused/absconding accused) was co-opted as Director with effect from 22.12.1999, as could be seen from Ex.P10, Form No.32. Similarly, one David Hersch Korn, (original 1st accused/absconding accused) was appointed as Director with effect from 24.01.2000.

19. It is curious to note that prior to become Directors in the original 4th accused company / 2nd petitioner herein, in the year 1999, the original 1st and 2nd accused /absconding accused, who were French nationals, have already registered a company on 14.5.1999 in the name and style of Chennai Tele working Services Pvt Limited. The Article of Association and the Memorandum of Association for the aforesaid company is marked as Ex.P13. There were other Directors in the aforesaid company. The Article of Association and Memorandum of Association are also similar to that of the Article of Association and Memorandum of Association framed by the petitioners herein, i.e. the original 3rd accused and 4th accused. Subsequently, the original 1st accused became Director of the original 4th accused company in the year 1999. But the fact remains that the object of both the companies are one and the same. Both the companies are connected with Data Processing, Software Development, Computer Consultancy Services and Software Supply Services.

20. It is further to be noted that all the material objects seized by the prosecution are the machines purchased by the

original 1st accused. Even as per the theory of prosecution, the original 3rd accused has never purchased any such machines. Further, there is no evidence to show that the present accused had purchased the machineries in question, which were used for converting international calls as local calls.

21. In the above background, it has to be analysed whether the original 3rd accused / 1st petitioner herein was in charge of the operation of the above machineries, which were used for converting the international calls as local calls. In this regard, when the evidence given P.W.1, P.W.3 and P.W.17 is carefully read, their evidence would go to show that the original 3rd accused was very well present at the relevant time. In fact, P.W.2, in his evidence, has stated that he has not seen whether any cheque was given by the original 3rd accused for incorporating the aforesaid company. P.W.3, who was the Assistant Vigilance Officer, Chennai Telephones, at the relevant time of surprise check, came to know that some machineries were kept in the closed room and when they opened the room, they found out M.O.S 1 to 4. When they asked the employees about the operation of the said machineries, they were not able to explain the same. They informed that the person, who came from France, used to come and do the operational work of the equipments. This fact would clearly show that only the absconding accused were looking after the affairs of the company at the relevant time. In fact, the evidence given by P.W.3 would clearly establish the fact that the original 3rd accused/1st petitioner herein, was not at all in charge of the day-to-day affairs of the company and also in the operation process of equipments in question.

22. The Trial Court has mainly relied upon the evidence of P.W.7, which would go to show that the accounts were opened in the name of the accused company with the Standard Chartered Bank and in the account opening form, the 3rd accused has signed and that there were foreign remittance credited in the said account.

23. But on a careful perusal of Ex.P18, it is seen that the account opening form was actually filled and signed by the original 2nd accused Herch korn Thierry. In fact, the original 3rd accused, the 1st petitioner herein, has given a letter to the Bank stating that the company has passed resolution to open Current Account with Standard Chartered Bank, Chennai, in the name of Tele Data Networking Services Pvt. Ltd., It is also resolved that Hierchkorn Thierry, the Director of the company alone was authorised to operate the account individually. The letter also indicate that the current account shall be operated by the Herchkorn Thierry individually and not by any other person. Thereafter, again letter was sent to the Bank Officials authorising one J.Sankara Vijayan to operate the

aforesaid account on behalf of the company. It is worthy to mention that the said J.Sankara Vijayan has not been examined.

24. Of course, the aforesaid Bank statement shows that some foreign remittance credited to their account. But the fact remains that the original 3rd accused, i.e. the 1st petitioner herein, has never operated the said account, which is evident from the the records.

25. It is to be noted that the original 2nd accused was co-opted as Director on 22.12.1999. It is the case of the prosecution that he has purchased all the materials which were used for converting international calls as local calls. Thereafter, the original 1st accused, David Hersch Korn, became Director on 24.01.2000. After the original 2nd accused became Director, the account was opened with the Standard Chartered Bank on the next day, i.e. 23.12.1999 in the name of the original 2nd accused, Herch Korn Thierry and all the telephone connections in question were applied on 28.12.1999, which is also evident from Ex.P27. These facts would clearly indicate the fact that the absconding accused has taken advantage by misusing the name of the company incorporated by the original 3rd accused/1st petitioner for doing certain illegal connections. This fact was further fortified by the very allegation of the prosecution that all the materials were purchased by the 1st accused alone to divert calls. Unfortunately, these illegal connections were obtained and bank accounts were opened only after the original 3rd accused came into picture as Directors. Therefore, merely the fact that the company was incorporated by the 3rd accused/1st petitioner herein by signing the document, the same itself cannot be a ground to presume that there was a conspiracy with the original 1st and 2nd accused.

26. It is further to be noted that the investigation officer has also admitted in the cross examination that the account opened with Standard Chartered Bank was operated by the original 2nd accused. He has also admitted that the said Hersch Korn Thierry, the original 2nd accused gave letter to the Bank Officials authorising one J.Sankara Vijayan to operate the said account. The investigating officer, in the cross examination, specifically admits that the original 3rd accused, i.e. the 1st petitioner herein, has no role to operate the account. He has categorically admits in the cross examination that the said Hersch Korn Thierry, has not authorised any person to operate the account. The investigating officer has also admitted that he has not investigated the fact that who has paid Rs.50,000/- at the time of opening of the said account. Further he has deposed that during investigation, he came to know that one Natarajan, the Proprietor of Tryme Advertising has handed over the cheque for Rs.50,000/- to the original 2nd accused at the

time of opening account. He has also stated that during investigation he came to know that the original 3rd accused/1st petitioner herein has not paid any amount to enable the original 2nd accused for opening the said amount. He has also stated in the cross examination that even after investigation, the account opened in the name of the 4th company was operated by the absconding accused and some amounts were withdrawn by them from the said account. Similarly, he has also admitted that there is no document to show that the original 3rd accused, i.e.the 1st petitioner herein has gained undue advantage from the 4th accused company.

27. Therefore, when the 1st petitioner had no technical knowledge about the equipments installed in the premises and when it is clearly established that those equipments were purchased only by the absconding accused and that the bank account was opened and operated by them separately, it is not fair on the part of the Courts below to convict the original 3rd accused/1st petitioner herein. As discussed supra, the original 3rd accused (1st petitioner / 1st accused herein) has not played any role at any point of time in the commission of the offence. The opening of the alleged bank account and obtaining all the telephone connection after the induction of the original 3rd accused, would clearly show that the original 3rd accused/1st petitioner herein, in fact, had no knowledge about the illegal operations carried on by the Foreigners/absconding accused.

28. In this circumstances, merely because the 1st petitioner was shown as a Director in the company, he cannot be attributed to the knowledge of the criminal activities of the other accused. Further, there is no evidence available on record to show that the petitioner has lawfully gained any pecuniary advantage from such activities. These aspect would create serious doubt about the involvement of the original 3rd accused / 1st petitioner herein in the alleged crime.

29. Therefore, merely on the basis of the certain documents submitted by him during incorporation and account opening form was submitted in the name of the original 4th accused company, the 2nd petitioner herein, criminal liability cannot be fastened as against the original 3rd accused/ 1st petitioner herein unless prosecution has established that he had played prominent role in the affairs of the company and he was actively participated in the day day-to-day affairs of the company. Absolutely, there is no evidence, whatsoever on record to prove the case as against the original 3rd accused/ 1st petitioner herein with complexity of the crime beyond reasonable doubt.

30. This Court finds that both Courts below have committed an error while not appreciating the evidence on record from

which it is crystal clear that the 3rd accused / 1st petitioner herein had not played any role in the commission of the offence.

31. Both the Courts below failed to appreciate that one of the cardinal principles of our system of administration of justice in criminal cases is that a person arraigned as an accused in presumed to be innocent unless that presumption is rebutted by the prosecution by production of evidence as may show him to be guilty of the offence, with which he is charged.

32. The onus and burden of proving the guilt of the accused is upon the prosecution and unless it relieves itself of the burden, the Courts cannot record the finding of the guilt of the accused.

33. Thus, going by the above said aspect and from the above re-appreciation of the evidence in this case, the prosecution has miserably failed to discharge its duty in order to prove the case beyond reasonable doubt against the 3rd accused and, therefore, no conviction can be based merely on assumption and presumptions. The Courts below committed a glaring error in convicting the original 3rd accused (1st revision petitioner/1st accused). It is primarily the duty of prosecution to bring home the guilt of the accused by leading cogent reliable and unimpeachable evidence. It is also the duty of the prosecution to establish these aspects beyond reasonable doubt and they must coexist. If it is not proved by the prosecution, the benefit would be extended to the accused.

34. Hence, in view of the above mentioned facts, circumstances and the nature of glaring illegalities, perversities in the manner in which both the lower Courts have considered the material on record along with adverse inference of those material and witnesses not examined, this Court is of the view that the charge against the original 3rd accused/1st petitioner herein is liable to be set aside.

35. In fine,

(a) The Criminal Revision is partly allowed.

(b) The judgment dated 18.4.2015 passed by the XVIII Additional Sessions Judge, Chennai in Criminal Appeal No.184 of 2014 along with the judgment dated 01.07.2014 passed by the Additional Chief Metropolitan Magistrate, Egmore, Chennai in C.C.No.285 of 2002 are hereby quashed and set aside in respect of the 1st petitioner herein alone (original 3rd accused / 1st accused herein). The 1st petitioner/1st accused herein (original 3rd accused) is ordered to be acquitted from the alleged offence.

(c) The fine amount paid, if any, is ordered to be refunded.

(d) The Bail bond, if any executed by the 1st petitioner/ 1st accused herein (original 3rd accused) shall stand cancelled.

36. Insofar as the original 4th accused (2nd petitioner/2nd accused herein) is concerned, since it is clearly established that equipments were purchased by the absconding accused and that the bank account was opened in the name of the company and operated by them separately, the original 4th accused (2nd petitioner/2nd accused) cannot be acquitted. The law is well settled that as regards company, the court can always impose a sentence of fine and the sentence of imprisonment can be ignored as it is impossible to be carried out in respect of a company. This appears to be the intention of the legislature and hence, this Court finds no difficulty in construing the statute in such a way. Therefore, since the 4th accused company (2nd petitioner/2nd accused) is held liable for the act done by the original 1st and 2nd accused/absconding accused, instead of imposing sentence of imprisonment, fine of Rs.51,000/- (in both counts) is imposed against the 2nd petitioner herein, which may be recovered from the 4th accused company (2nd petitioner/2nd accused herein) in accordance with law.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

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TO

1.XVIII Additional Sessions Judge,
Chennai.

2.Additional Chief Metropolitan Magistrate,
Egmore, Chennai

3.Record Keeper,
Criminal Section,
High Court of Madras.

4.The Public Prosecutor,
High Court, Madras.

5.The Deputy Superintendent of Police,
CBI Cases, ACB, Chennai.

6.The superintendent,
central prison, puzhal,
chennai-66.

+1cc to Mr.N.Ranganathan, Advocate SR.No.50020

Crl.RC No.487 of 2015

MP(CO)

GN(22/08/2017)