IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :11.07.2018

PRONOUNCED ON: 31.07.2018

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Criminal Appeal No.304 of 2009

State by CBI .. Appellant

/versus/

1.TM.Selvaganapathy
Ex.Minister for Local Administration,
2-C, Padmalaya Towers,
Janaki Avenue,
M.R.C.Nagar,
Chennai 600 021.

2.C.Bommai Nayakan
Ex.Branch Manager,
ECIL Ltd.
No.78, III Main Street,
C.I.T. Nagar,
Chennai 600 035.

3.B.Purushothaman
Dy.General Manager,
ECIL Ltd., D24, Ysodaya Complex,
Tarnaka Street No.19,
Secunderabad-13. .. Respondents

Criminal Appeal filed under Section 378 of the Code of Criminal Procedure Code, 1973 praying to set aside the order of acquittal of the respondents/accused by the Principal Special Judge for CBI Cases, Chennai by the judgment dated 23.01.2009 in C.C.No.4 of 2000.

For Appellant :Mr. K.Srinivasan, Spl.PP(CBI)

For Respondents :Mr.V.Karthic, Sr.C.for Mr.Raghavendra, Mr.S.Srivatsa & Mr.V.Karthikeyan for R1

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Mr.K.S.Dinakaran, Sr.C for
Mr.R.Karthikeyan for R2 and R3

J U D G M E N T

This appeal is by the State against the order of acquittal passed by the Principal Special Judge, CBI Cases, Chennai in C.C.No.4 of 2000 dated 23.01.2009.

2. The first respondent TM.Selvaganapathy was the former Minister in the Government of Tamil Nadu during 1994 to 1996; the second respondent C.Bommainayakan was the Branch Manager of Electronics Corporation of India Limited(in short "ECIL"), Chennai and the third respondent B.Purushothaman was the Senior Manager(Marketing), Electronics Corporation of India Limited (ECIL), Hyderabad during the relevant point of time.

3. The charge against the respondents as framed by the trial Court is extracted below:

> "Charge No.1:-
>
> Firstly, that you A1 T.M.Selvaganapathy, then Minister for Local Administration, Government of Tamil Nadu, you A2 Bommanaickan, then Branch Manager, Electronics Corporation of India Limited, Chennai, you A3 Purushotham, then Sr.Manager (Marketing),ECIL, Hyderabad, Vijayakumar, absconding accused and approvers viz., Balendran, Kuandaivelu, V.K.Kumar, Duraisamy and Anbuselvan entered into a criminal conspiracy during the period between 1994 and 1996 at Chennai, Erode, Coimbatore, Madurai, Hyderabad and other places agreed to do or cause to be done an illegal act viz., to commit criminal misconduct and to get illegal gratification other than legal remuneration and to cheat ECIL in the matter of sale of colour TV sets to Directorate of Rural Development (DRD), Govt. of Tamil Nadu and payment of sales commission and in furtherance of the said criminal conspiracy, you A1 T.M.Selvaganapathy demanded an amount of Rs.2500/- per colour TV set as illegal gratification from you A2 Bommanaicken for placing supply orders for supply of colour TV by ECIL and finally you A1 agreed to accept illegal gratification of Rs.2,400/- per set as commission for placing supply orders in favour of ECIL; you A2

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Bommanaicken by misusing or abusing your official position offered illegal payments to the distributors in the guise of sales commission at the rate of Rs.2500/- per TV set and asked approvers to return Rs.2400/- per TV set after retention of Rs.100/- by the approvers, and you A2 Bommanaicken and you A2 Purushotham sent quotation dated 08.05.1994 to Government of Tamil Nadu offering to sell colour TV's at the cost of Rs.13,500/- per set. You A1 T.M.Selvaganapathy on 30.08.1994 approved purchase of 1250 colour TV's resulting in issue of G.O.Ms.No.158 dated 01.09.994 for the purchase of 1250 colour TV's from ECIL and Government of Tamil Nadu placing supply orders in favour of ECIL for supply of 1250 colour TV's: you A2 Bommanaicken and A3 Purushotham with dishonest intention to mobilise amounts to pay illegal gratification initiated a proposal dt.17.9.94 after the issue of GO for sanction of sales commission of Rs.2500/- per set fraudulently showed as if sale of 1250 colour TV's to Government of Tamil Nadu was pursuant to the canvassing by Distributors viz., M/s Bharani Enterprises represented by Shri Balendran and Arun Electronics represented by Kolandaivelu, another supply order for supply of 462 colour TV's was directly issued by DRD/Tamil Nadu Government. On ECIL: A3 Purushotham without any sanction of competent authority permitted payment of sales commission of Rs.2500/- per set to M/s Indshri Exports represented by Anbuselvan for 462 TV sets fraudulently showing as if the order for 462 TV sets were procured by the canvassing of Indshri Exports ECIL directly supplied 1712 colour TV's to Government of Tamil Nadu as per the supply orders directly placed on ECIL without the involvement of any service rendered by distributors; A2 Bommanaicken and A3 Purushotham caused issue of credit notes to the tune of Rs.73,70,000/- being the sales commission in favour of M/s Bharani Enterprises, M/s Arun Electronics, M/s Sri Jayanthi Electronics suppressing the facts A2 Bommanaicken and A3 Purushotham sanctioned and issued pay orders for

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Rs.11,55,000/- as sales commission to M/s Indshri Exports, the approvers, Shri Balendran, Kolandaivelu and V.K.Kumar received the credit notes for Rs.41,82,500/-, Rs.22,42,500/- and Rs.9,45,000/- respectively adjusted the same to their accounts and returned paid the amount of Rs.12,60,000/-, Rs.10,50,000/- and Rs.4,92,632/- respectively after deduction of Rs.100/- per set to you A2 Bommanaicken which in turn was paid to A1 T.M.Selvaganapathy by you A2 Bommanaicken and approver Duraisamy as a reward for having placed supply orders in favour of ECIL for the supply of colour TV's, Vijayakumar encashed demand drafts issued in his name for Rs.4,95,632/- and Rs.3,50,000/- respectively to V.K.Kumar and Balendran (approvers) through his account with TNSC Bank, Santhome Brnach and handed over the same to Duraisamy(approver) who in turn along with you A2 Bommanaicken paid it to you A1 T.M.Selvaganapathy as a reward for having placed supply orders in favour of ECIL for the supply of colour TV sets: Anbuselvan, approver encashed the pay orders issued by ECIL for Rs.11,55,000/- towards sales commission through his account with Catholic Syrian Bank, Purasawakkam and handed over the proceeds to approver Duraisamy, who in turn along with you A2 Bommanaicken paid the same to you A1 T.M.Selvaganapathy as already agreed upon as a reward for having placed supply orders to ECIL: you A1 T.M.Selvaganapathy accepted the amount of Rs.40,60,632/- paid as bribe which was already demanded by you A1 for having placed supply orders on ECIL: you A2 Bommanaicken and A3 Purushotham abused your official position and caused payment of Rs.85,25,000/- by corrupt or illegal means without public interest means towards sales commission in the name of distributors/agents who did not canvas for issue of GO/supply orders by Government of Tamil Nadu in favour of ECIL resulting in ECIL sustaining wrongful loss of Rs.85,25,000/- causing corresponding pecuniary advantage for yourselves; you A2 Bommanaicken and A3 Purushotham paid illegal

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gratification of Rs.40,50,632/- to A1 T.M.Selvaganapathy, Shri Duraisamy, approver and you A2 Bommanaicken handed over the said bribe amount to you A1 T.M.Selvaganapathy on various occasions and you A1 to A3 thereby committed an offence punishable u/s 120-B r/w 420 IPC, 7,13(2) r/w 13(1)(d) of P.C. Act, 1988 and within my cognizance.

Charge No.2:-

Secondly, that you A2 Bommanaicken and A3 Purushothaman in pursuance of the said criminal conspiracy and in course of the same transaction as detailed in Charge No.1 cheated ECIL by making ECIL to believe that a total amount of Rs.85,25,000/- @ Rs.2500/- per TV set was meant for making payment as agent's commission as detailed below and dishonestly induced ECIL to issue credit notes/pay orders/cheques for a total sum of Rs.85,25,000/- showing as if the amount was meant for payment towards agents/distributors commission and thereby you A2 and A3 committed an offence punishable u/s 420 IPC(23 counts) and within my cognizance.

M/s BHARANI ENTERPRISES:

Sl. No.	Credit Note & Date	Number of TV sets x Rs.2500/-	Amount Rs.
1.	3085 dt.26.12.94	400 X 2500	10,00,000/-
2.	3098 dt.22.2.95	30 X 2500	75,000/-
3.	3100 dt. 22.2.95 Home & Farms (Sister concern)	210 X 2500	5,25,000/-
4.	3105 dt.31.3.95	500 X2500	12,50,000/-
5.	3119 dt.31.7.95	207 X 2500	5,17,500/-
6.	3132 dt.30.10.95	54 X 2500	1,35,000/-
7.	3149 dt.30.3.96	272 X 2500	6,80,000/-

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Sl. No.	Credit Note & Date	Number of TV sets x Rs.2500/-	Amount Rs.
	Total	1673 X 2500	41,82,500/-

ARUN ELECTRONICS:

Sl.No.	Credit Note & Date	Number of TV sets x Rs.2500/-	Amount Rs.
8.	3086 dt.26.12.94	200 X 2500	5,00,000/-
9.	3107 dt.31.3.97	220 X 2500	5,50,000/-
10.	2029 dt.20.2.95	160 X 2500	4,00,000/-
11.	2034 dt.31.3.95	65 X 2500	1,62,500/-
12.	2043 dt.31.7.95	199 X 2500	4,97,500/-
13.	2045 dt.31.8.95	13 X 2500	32,500/-
14.	2060 dt.30.3.96	40 X 2500	1,00,000/-
	Total	897 X 2500	22,42,500/-

SRI JAYANTHI ELECTRONICS:

Sl.No.	Credit Note & Date	Number of TV sets x Rs.2500/-	Amount Rs.
15.	3106 DT.22.2.95	40 X 2500	1,00,000/-
16.	3106 dt.31.3.95	224 X 2500	5,60,000/-
17.	3121 dt.31.7.95	84 X 2500	2,10,000/-
18.	3133 dt.31.10.95	11 X 2500	27,500/-
19.	3140 dt.30.3.96	19 X 2500	47,500/-
	Total	378 X 2500	9,45,000/-

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M/S INDHRI EXPORTS:

Sl. No.	Credit Note & Date	Number of TV sets x Rs.2500/-	Amount Rs.
20.	CV-617 DT. 5.3.96 Cheque No.949108	---	1,75,000/-
21.	CV-486 dt.20.12.95 Cheque No.946678	230 X 2500	2,30,000/-
22.	CV-354 dt.13.10.95 Cheque No.945548	---	1,70,000/-
23.	CV-963 dt.9.5.95 Cheque No.940863	232 X 2500	5,80,000/-
	TOTAL	462 x 2500	11,55,000/-

(23 counts)

Charge No.3:

Thirdly, that you A1 T.M.Selvaganapathy, being a public servant as Minister for Local Administration, Government of Tamil Nadu in pursuance of the said criminal conspiracy and in the course of the same transactions as mentioned in charge No.1, you A1 demanded and accepted total sum of Rs.40,50632/- @ Rs.2400/- per TV set from A2:Bommanaicken Visweswaran and approver Duraisamy as illegal gratification on various occasions other than the legal remuneration as motive or reward for having approved the purchase order for purchase of 1250 colour TV sets and other TV sets purchased by affluent panchayat unions and caused placement of supply orders in favour of ECIL, Hyderabad and thereby committed an offence punishable u/s 7 of P.C. Act, 1988 and within my cognizance.

Charge No.4:

Fourthly, that you A1 T.M.Selvaganapathy in purusance of the said criminal conspiracy and the course of the same transaction abetted the commission of offence of cheating by A2 Bommanicken and A3 Purushotham by

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quoting the price of one colour TV set at Rs.13,500/- showing as if it included agents/distributors commission and other incidental price rice of Rs.2500/- per set knowing that of Rs.2400/- per TV set would be paid as bribe to you A1 T.M.Selvaganapathy and dishonestly induced A2 Bommanaicken and A3 Purushotham to place supply orders for supply of 1250 colour TV sets @ Rs.13,500/- per set and thereby you A1 committed an offence punishable u/s 109 r/w 420 IPC and within my cognizance.

Charge No.5:

Fifthly, that you A1 T.M.Selvaganapathy, being a public servant in pursuance of the said criminal conspiracy and in the course of the same transaction as mentioned in charge No.1 during the period mentioned above by corrupt or illegal means abusing your position as such public servant obtained for yourself pecuniary advantage to the extent of Rs.40,60,632/- from A2, A3 and Visweswaran/approvers and thereby committed an offence specified in Sec.13(1)(d) of P.C. Act 1988 punishable u/s 13(2) of that Act and within my cognizance.

Charge No.6:

Sixthly, that you A2 Bommanaicken and you A3 Purushotham being the public servants in pursuance of said criminal conspiracy and in the course of the same transaction as stated in the 1st charge and during the period mentioned in the 1st charge by corrupt or illegal means and abusing your official position as public servants obtained a pecuniary advantage for yourselves and A1 and absconding accused to the extent of Rs.85,25,000/- and thereby committed offence u/s 13(1)(d) punishable u/s 13(2) of P.C.Act, 1988."

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4. To prove the above charges, the prosecution has granted pardon to few of the accomplices and treated them as approvers and examined as prosecution witnesses. Besides independent witnesses, official witnesses and investigation officers were examined totally numbering 50. The prosecution has relied 177 exhibits. In defence, 9 exhibits are marked.

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5. The trial Court has acquitted all the accused holding that the prosecution has failed to prove the conspiracy between the accused persons to do any illegal act. The decision to purchase colour TVs were consequent to the policy decision of the State, in which A1 had no role. The price of colour TV had been fixed pursuant to the Committees recommendation duly constituted for the said purpose. There is no evidence to prove that A2 and A3 had attained any pecuniary advantage. The approver PW-39, who claims that he developed acquaintance with A1 during his train journey and acted as a conduit to A1 in getting kickback for awarding colour TV supply contract to ECIL is not proved. Witness PW39 is not a trustworthy reliable witness. The contradictions between the prosecution witnesses namely PW8, PW-39, PW-40 and PW50 in respect of the location of the A1's residence and delivering cash to A1 by PW-39 renders the prosecution case unbelievable.

6. Aggrieved by the order of acquittal, the present appeal is preferred pointing out the following errors as grounds of appeal.

1. The order of the learned Special Judge acquitting the respondent/accused is contrary to law against weight of evidence probabilities of the case.

2.The learned Judge failed to consider the oral evidence and also the important documentary evidence let in by the prosecution to substantiate their case.

3.The learned Judge ought to have accepted the sanction order given by the Chairman and Managing Director of electronic corporation of India Ltd. (ECIL) who is also a competent authority to remove both the accused from service. The sanction order passed by the Chairman and Managing Director of ECIL is perfectly valid and the trial Court has erred is holding that the sanction order given by the Chairman and Managing Director is improper.

4.The learned trial Judge erred in holding that the sanctioning authority did not apply his mind. A reading of the evidence of the Chairman and Managing Director of ECIL Ltd. would clearly show that he did apply his mind before granting sanction.

5.The learned trial Judge ought to have accepted the evidence of PW-40, PW-41 and PW-45 who corroborated PW-39(approver) evidence to show that several lakhs of rupees had gone into the hands of A2 from the concerned bank.

6.The learned trial Judge ought to have seen

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that there was sufficient corroboration in material particulars to support the evidence of approver PW-39.

7. The learned trial Judge was wrong is coming to the conclusion that the prosecution did not exactly specify the peace where the conspiracy was hatched.

8.The learned trial Judge ought to have seen the chain of evens i.e the transaction of the bank is dispensing the amount to A2 and he handing over the same to A1 as admitted by the approver will prove the prosecution case beyond reasonable doubt.

9.The learned trial Judge ought to have seen that the failure of the Audit Committee to raise objections in this transaction does not bar an investigation by the appellant/complainant.

10.The learned Judge ought to have seen that the initiation of departmental action against some other staff on the same set of charges have no bearing on the criminal action initiated by the appellant/complainant.

7. Heard the learned Special Public Prosecutor appearing for the appellant/State and the learned Senior counsels appearing for the appellants.

8. After careful perusal of entire records and the submissions made by the learned counsels, this Court finds that the reason given by the trial Court for acquitting the accused persons is a plausible view. The prosecution had failed to conduct the investigation properly and collect adequate materials to place before the Court to substantiate the charges.

9. The contention of the learned Special Public Prosecutor appearing for the appellant/State that the evidence of the approver (PW-39) is corroborated through the evidence of PW-40 (K.R.Balendran), PW-41(S.Kulandaivelu) and PW-45(C.K.Kumar) to show that several lakhs of rupees has been transacted, is not correct.

10. PW-39(S.Duraisamy) approver is the sheet anchor of the prosecution case. He claims that he was involved in export and import business, but no material placed by the prosecution to show that he was really involved in any export and import business or atleast a person trustworthy from A1 point of view to believe and entrust PW-39 to negotiate and act as conduit in the alleged act of crime.

11. PW-39(S.Duraisamy) had deposed that he got acquaintance of A1(T.M.Selvaganapathy) during his train journey from Chennai

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to Coimbatore, during the year 1993, when A1(T.M.Selvaganapathy) was the Minister in the Government of Tamil Nadu. He had further deposed that A1 told him that the Government has decided to procure 4000 colour TVs and told him to contact ECIL Company and ask Rs.2,500/- commission for each TV. So, at the behest of A1, he met A2(C.Bommanaicken) and after deliberation, A2 (C.Bommanaicken) agreed to give Rs.2,400/- as commission per colour TV. He has further deposed that the first instalment of Rs.5 lakhs was paid in cash by A2(C.Bommanaicken) and PW-8 (Visweswaran). He received that from them and handed it over to A1(T.M.Selvaganapathy) at his residence. The second instalment of Rs.5 lakhs was handed over to PW-39(S.Duraisamy) by A2 (C.Bommanaicken) and PW-40 (Balendran). He in turn gave it to A1 (T.M.Selvaganapathy). The 3rd instalment of Rs.10 lakhs was given to him in cash by A2(C.Bommanaicken) and PW8(Visweswaran); he in turn delivered it to A1(T.M.Selvaganapathy). His further evidence is that the cheque payments to Indshri Exports made by ECIL company under Exs.P39 to P41 for Rs.2,30,000/- dated 28.12.1995; Rs.5,80,000/- dated 09.05.1995 and Rs.1,70,000/- dated 13.10.1995 respectively were handed over to Anbuselvan (PW-44) Partner of Indshri Exports. PW-44 [Anbuselvan] encashed the cheques, brought the cash to the office of the approver and gave to him. PW-39 in turn, went to the house of A1 along with A2 and handed it over to him. He has deposed that in a similar fashion the cash withdrawn as against four cheques issued in the name of Vijayakumar were also handed over to A1 by him.

12. PW-44 (Anbuselvan) admits that he had no connection with ECIL. He has identified the statement of account No.36/92 (Ex.P121) maintained by him with Catholic Syrian Bank, Purasawalkam. He also admits that he received four cheques (Exs.P39 to P41) from ECIL and encashed those cheques and handed over the cash to PW-39 (approver). In his cross examination, he reiterates that as and when he withdrew the money, he handed over the cash to PW-39(S.Duraisamy). This witness have not spoken anything about what happened thereafter. The money so encashed and given to PW-39(S.Duraisamy), reached A1 according to the evidence of PW-39. This vital fact stands without corroboration not spoken or supported by any other witness.

13. Thus, in the chain of an alleged crime of kick back, what is proved through prosecution witnesses is, the trail of money starts from ECIL, lands in the account of Anbuselvan (PW-44), later withdrawn by PW-44 (Anbuselvan). He had handed over the money to PW-39 Duraisamy (approver). But the last link, A1 receiving it from PW-39 as bribe for purchasing colour TV from ECIL is missing. The sole deposition made by the approver that he took the cash and handed it over to A1 not only unreliable,

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but also unbelievable for the simple fact that the money had flown from ECIL to Anbuselvan on three different dates through three different cheques. There is no clarity from the evidence of PW-44 or PW-39 as to whether, the amount found in these three cheques (Rs.2,30,000/-; Rs.1,70,000/- and Rs.5,80,000/-)were given to A1 by PW-39 in one instalment or in piece meal. In this regard, the contradictions of PW-40(K.R.Balendran) also gains significance because this witness says that he received the cheque of Rs.2,30,000/- drawn in favour of Indshri Exports. He went and encashed it along with A2 (C.Bommanaicken) and gave the money to PW-39 (approver) at Sidhartha Apartment who encashed the cheques marked as Ex.P39 to Ex.P41 itself had thus become doubtful in view of PW-40 evidence. If one look at the evidence of PW-39 in isolation, the amount, which he has alleged to have given to A1 by cash does not tally with these 3 cheques or the alleged kick back of Rs.2,400/- per colour TV. Therefore, the failure of the prosecution in marshalling the evidence adequately to prove the charges has forced the trial Court to acquit the accused.

14. The law of evidence says that the statement of an accomplice is admissible in evidence but it requires strong corroboration. In this case, PW-8(M.J.Visweswaran) has not supported the case of the prosecution and had been treated as hostile witness. PW-40 (K.R.Balendran) has not deposed anything to lend credence to the deposition of PW-39, that he along with A2 and PW-39 (approver) went to the house of A1 to deliver the cash of Rs.5 lakhs. PW-44 (Anbuselvan) who admits the encashment of the cheques Exs.P39 to 41 issued by ECIL would depose that he had encashed that cheques at the request of PW-39 and gave the cash to him. Whereas PW-40 deposes that he encashed the cheque drawn in favour of M/s Indshri. The evidence of PW-44 (Anbuselvan, Prop. M/s Indshri) definitely have some bearing in the case of the prosecution because Indshri Exports has nothing to do with ECIL. It is not in the trade of electronic goods. It is neither an agent or distributor of ECIL. The communication [Ex.P68] which discloses the decision of ECIL to give commission of Rs.2,500/- to the dealers, who had successfully procured order to the tune of Rs.1.6 cores does not show M/s Indshri Exports as one of the dealer. Both Exs.P68 and P69, which are the relevant documents in this aspect mentions only M/s Bharani Enterprises; and M/s Arun Electronics. So, there is a grave suspicion that the amounts paid by ECIL to Indshri Exports may be for kickback. However, the prosecution has miserably failed to carry forward this chain. No material evidence to establish that the money paid by ECIL to Indshri Exports finally reached A1(T.M.Selvaganapathy) and that payment was towards the order placed to ECIL for procuring colour TVs. But for the transaction covering Exs.P39 to P41 cheques, there is no other evidence to show, in the process of procuring around 3750 colour

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TVs from 3 different companies viz., ECIL, Uptron and ET & T, A1 received kickback from ECIL.

15. When two views are possible from the evidence on record and the view taken by the trial Court in favour of the accused is one of the two views, though the opposite view may also be equally possible, the appellate Court cannot substitute the opposite view adverse to the accused, who has gained acquittal from the trial Court. Thus the Hon'ble Supreme Court says in Chandrappa & Ors vs State Of Karnataka reported in 2007 (4) SCC 415 and in few more cases following Chandrappa judgment.

16. The lapse of prosecution to collect and place adequate materials has led the trial Court to arrive at the conclusion that the accused are not proved guilty. The reasoning assigned by the trial Court to acquit the accused persons does not seems to be perverse. Therefore, this Court is not inclined to interfere with the finding of the trial Court.

17. In the result,

This Criminal Appeal is dismissed. The order of acquittal passed by the Principal Special Judge for CBI Cases, Chennai by the judgment dated 23.01.2009 in C.C.No.4 of 2000 is hereby confirmed.

Sd/-
Assistant Registrar(CS-IX)

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Sub Assistant Registrar

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To
1.The Principal Special Judge
for CBI Cases, Chennai.

2.The Special Public Prosecutor
for CBI Cases, High Court, Madras.

+1cc to Mr.K.SRINIVASAN, Advocate, S.R.No. 51755

delivery order made in
Crl.A.No.304 of 2009

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