Bail slip

The appellant in Crl.A.5/2007 Accused No.2 namely V.Ganesh, S/o.Ex.Colonel N.Venkatraman, was ordered to be released on bail by order of this Court dated 03.01.2007 and made in MP.No.1 of 2007 in Crl.A.5/2007 and the Appellant in Crl.A91/07/Accused No.1 viz Rakesh Malhotra was directed to be released on bail as per the order of this Court dated 20.1.2007 and made in Crl.MP.No.1 of 2017 in Crl.A. 91/07.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 30.01.2018	Pronounced on: 21.02.2018

Coram:

The Honourable Dr.Justice G.JAYACHANDRAN

Criminal Appeal Nos.5 & 91 of 2007

1. V.Ganesh ...Appellant/Accused No.2 in Crl.A.No.5 of 2007

2. Rakesh Malhothra ...Appellant/Accused No.1 in Crl.A.No.91 of 2007

/versus/

1. State by
   The Inspector of Police,
   Special Police Establishment,
   Central Bureau of Investigation,
   Anti-Corruption Branch, Chennai.... Respondent/Complainant in Crl.A.No.5 of 2007

2. The Deputy Superintendent of Police,
   SPE/CBI/ACD,
   Chennai. ... Respondent/Complainant in Crl.A.No.91 of 2007

PRAYER in Crl.A.Nos.5 & 91 of 2007: Criminal Appeals are filed under Section 374(2) of Criminal Procedure Code, to set aside the order of conviction and sentence passed in C.C.No.58 of 2000, dated 29.12.2006 on the file of the learned Additional Special Judge for CBI Cases, Chennai.

For Appellant in Crl.A.No.5 of 2007 : Mr. A.V.Somasundaram for M/s. Lakshmi Priya Associates

For Appellant in Crl.A.No.91 of 2007 : Mr.A.R.L. Sundaresan, Senior Counsel for A.L.Ganthimathi

For Respondent in both the appeals : Mr. K.Srinivasan, Special Public Prosecutor (CBI)

COMMOM JUDGMENT

These two Criminal Appeal No:91 of 2007 and Criminal Appeal No:5 of 2017 are filed by the Appellants [A1] Rakesh Malhothra and V.Ganesh [A2] in Special C.C.No.58 of 2000 on the file of learned Additional Special Judge for C.B.I, Chennai dated 29.12.2006 wherein the appellants were found guilty by the Trial Court.

Gist of the case

2. Rakesh Malhothra [A1] the appellant herein is sentenced to undergo 3 years R.I and fine of Rs.5,000/- in default 6 months S.I for offence under Section 120B r/w 420 of IPC and 2 years R.I and a fine of Rs.5,000/- in default 6 months S.I for offence under Section 13(2) r/w 13(1)(d) of Prevention of Corruption Act and V.Ganesh [A2] appellant herein sentenced to undergo 5 years R.I and a fine of Rs.20,000/- in default 6 months S.I for offence under Section 120 r/w 420 IPC. The period of sentence imposed on A1 shall run concurrently. The period of imprisonment already undergone shall be set off under section 428 of Cr.P.C.

3. The charge against the appellant is that A1[Rakesh Malhothra], while working as Senior Manager in Oriental Bank of Commerce, Mount Road, Chennai entered into criminal conspricy with A2 [V.Ganesh] to do illegal act viz., to cheat the Oriental Bank of Commerce, Mount Road, Chennai and to commit criminal misconduct. In pursuant to the conspiracy A2 [V.Ganesh] opened Current accounts in Oriental Bank of Commerce in the name of M/s.Golden Harvest Trading Corporation, Chennai and M/s.Super Capital Marketers and Associates on 15.06.1992 and 22.07.1992 respectively. In his capacity as the branch Manager, these two accounts were introduced by the Rakesh Malhothra [A1]. On 21.12.1992 V.Ganesh [A2] presented a conditional letter of credit bearing No.DPC-OCB-205864 dated 11.12.1992 for US $ 2 Million by M/s. Global Trade Insurance and Management Pvt.Ltd, Singapore with Oriental Bank of Commerce, Mount Road, Chennai drawn at Hong Kong and Shangai Banking Corporation, Singapore.

4. The condition on the letter of Credit was that M/s. Super Capital Marketers and Associates was to comply the requirements of the conditions of the transaction viz., M/s. Super Capital Marketers and Associates should open a back to back Letter of Credit in favour of M/s. Global Trade Insurance for US $ Rs.2.84 million. Without necessary document of certificates containing the said condition of transaction, [A2] V.Ganesh fraudulently and dishonestly submitted incomplete documents to Oriental Bank of Commerce, Mount Road, Chennai through A1.

5. Pursuant to the conspiracy [A1] Rakesh Malhothra knowing fully well that the documents presented by A2 [V.Ganesh] were incomplete without the condition of Letter of credit by M/s. Super Capital Marketers and Associates, however Suppressing the fact had forwarded the application to the Regional Manager with recommendation for discounting the Letter of Credit.

6. In view of the recommendation made by A1 [Rakesh Malhothra] the Regional Manager had permitted the LC discount facility to M/s.Super Capital Marketers and Associates, on condition, the bill should be discounted only after the bank get confirmation from the Hong Kong and Shangai Banking, Singapore and acceptance to the effect that the bills should be paid on due date. The HSBC Singapore on 08.01.1993 conveyed its conditional acceptance of the documents subject to the confirmation of M/s. Super Capital Marketers and Associates opening an irrevocable letter of Credit within 30 days acceptable to M/s. Global Trade Insurance, Singapore. Without complying the requirement stipulated by Regional Office, A1 [Rakesh Malhothra] Branch Manager had released a sum of Rs.5,41,95,655/- into the account of M/s.Golden Harvest Trading Corporation owned by A2[V.Ganesh]. To mislead Hong Kong and Shangai Banking, Singapore, without any authorization A1 [Rakesh Malhothra] had sent two Telex messages to Hong Kong and Shangai Banking, Singapore on 21.01.1993 and 27.01.1993 stating that M/s.Super Capital Marketers and Associates, Chennai would open an LC for US $ 2.84 Million Dollars favouring M/s. Global Trade Insurance, Singapore after 180 days. Induced by the said messages Hong Kong and Shangai Banking, Singapore had in turn conveyed the conditional acceptance of the documents.

7. In pursuant to the conspiracy to cheat the bank a sum of Rs.4.6 crores was released to the demand loan account of M/s. Golden Harvest Trading Corporation owned by A2 [V.Ganesh] by A1 [Rakesh Malhothra] before acceptance of documents and without any application for the said demand loan from A2 [V.Ganesh]. This loan amount was released on 09.02.1993, later transferred to M/s. Ispat Profiles India Limited to which A2 [V.Ganesh] owned a sum of Rs.1,55,71,000/- later the HSBC Singapore, refused the payment on the LC due to non compliance of condition. Thus knowing fully well A1 [Rakesh Malhothra] and A2 [V.Ganesh] pursuant to their conspiracy to cheat, they have made to believe the Oriental bank of Commerce, Chennai that the LC of Rs.2 Million USD is accepted and confirmed by Hong Kong and Shangai Banking, Singapore and siphoned a sum of Rs.5,41,95,655/- thereby committed offence of conspiracy, cheating, and misconduct by a public servant.

Finding of the trial Court and the defence put forth by the appellants:-

8. Based on the reliable information, C.B.I has registered the First Information Report which is marked as Ex.P.57 on 23.03.1995 and taken up the investigation. On completion of investigation, final report has been laid against [A1] Rakesh Malhothra, Senior Manager, Oriental Bank of Commerce, Mount Road Chennai and [A2] V.Ganesh, proprietor of M/s. Golden Harvest Trading Corporation.

9. To prove the charge of conspiracy and cheating as against both the accused and misconduct of public servant against A1, the prosecution as examined 11 witnesses, 65 Exhibits were marked on behalf of the prosecution. On behalf of the defence the order passed by the appellate tribunal for foreign exchange is marked as Ex.D.1.

10. Before the Trial Court while the prosecution canvassing the case of conspiracy and cheating relied upon the documents and evidence let in by them to prove A1 being the Senior Manager of Oriental Bank of Commerce, Mount Road Branch, Chennai between 1991 to 1995 in connivance with A2 [V.Ganesh], Proprietor of M/s. Golden Harvest Trading Corporation and M/s. Super Capital Marketing Association in connection with the service charges payable to M/s. Super Capital Marketer and Associates, M/s. Global Trader Insurance and Management Private Limited, Singapore opened conditional letter of credit for 2 million US Dollars on 11.12.1992 with Oriental Bank of Commerce, Mount Road Branch, Chennai in favour of M/s. Golden Harvest Trading Corporation through HSBC Banking Corporation, Singapore. The letter of credit was opened with condition that M/s. Super Capital Marketer and Associates should open back to back LC in favour of Global Trader Insurance and Management Private Limited for 2.84 US Million Dollars. The requirement that certified issued by Global Trader Insurance and Management Private Limited, Singapore through HSBC Banking and Corporation, Singapore viz., tested telex by oriental Bank of Commerce, Mount Road branch, Chennai though not received, when the conditional LC was received at Oriental Bank of Commerce, Chennai, A1 and A2 conspired together to credit the amount without fulfilling the conditions and with dishonest intention to cheat the bank with draw the same. Thus, a sum of Rs.5,41,95,655/-, was cheated by A2 in connivance with A1.

11. In defence, the learned counsel appearing for the 1st appellant would contend that the amount was transfer to M/s.

Golden Harvest Trading Corporation only after the approval of the Regional Office and Overseas Branch, hence he has not committed any offence. As far as A2 [V.Ganesh] is concerned he had canvassed before the Trial Court that the letter of Credit was opened by consent of parties and same was approved and confirmed by HSBC, Singapore. Later, they refused to honour their commitment leading to default in payment to Oriental Bank of Commerce. For the recovery the debt, the bank has already initiated proceedings before the debt recovery tribunal which is pending. Since, the transaction is purely civil in nature no criminal prosecution can be launched against him. Further, regarding 4.5 crores transferred to the account of M/s.Ispat Profiles India Limited, the 2nd accused contend that this amount subsequently paid back to Oriental Bank of Commerce, Mount Road Branch, Chennai and therefore, there is no loss to the bank. Hence the charge in respect of transferring Rs.4.5 crores in favour of M/s.Ispat Profiles India Limited is unsustainable.

12. A1 [Rakesh Malhothra] has relied upon the order of the appellate authority under the Foreign Exchange Regulation Act which has been marked as Ex.D.1 to impress upon the Court that the competent authority under the Foreign Exchange Regulation Act has found A1 [Rakesh Malhothra] is not liable for any crime and had acquitted it. While the entire transaction is pure and simple money lending, it is a civil dispute which has been given colour of Criminality. The Trial Court relying upon the letter of A1 [Rakesh Malhothra] dated 30.12.1992 which is marked as Ex.P.18 and the letter of 2nd accused dated 04.01.1993 which is marked as Ex.P.19 has held that A2 [V.Ganesh] falsely written that he has enclosed 'applicant certificate'. On 05.01.1993, the Oriental bank of Commerce has forwarded the advice to bank of California. A day before i.e., on 04.01.1993 M/s. Golden Harvest Trading Corporation [A2] had sent a letter Ex.P.25 to Oriental Bank of Commerce seeking loan with self declaration. Without fulfilling the conditions of LC. [A1] has recommended discount of LC in order to help A2 [V.Ganesh]. Though the Regional Office has permitted to discount the LC with condition that it can be discounted only after the acceptance and confirmation from HSBC, Singapore, the LC was discounted without proper acceptance and confirmation. The sanction order of the Regional Office which is marked as Ex.P.45 extracted by the Trial Court and has held that A1 and A2 without complying the condition of LC 11.12.1992, in collusion had issued credit voucher for a sum of Rs.6 crores, after retaining 10% margin deposit money and interest, a sum of Rs.5,41,95,655/- had been credit into the account of M/s. Golden Harvest Trading Corporation.

13. The Trial Court has relied upon the evidence PW.3 [R.Krishnamourthy] that he passed Ex.P.1 credit voucher for Rs.5,41,91,655/- under the Telephonic instruction from A1

[Rakesh Malhothra]. The letter written by A1 [Rakesh Malhothra] as Senior Manager to the Overseas Branch on 23.03.1993 which is marked as Ex.P.32 wherein, A1 [Rakesh Malhothra] has informed that all the terms and condition had been complied in the matter of bill purchase under LC for sum of Rs. 2 Million USD Dollars. Taking into considering the other evidences as corroboration to the case of the prosecution, the trial Court has held both the accused guilty and convicted them.

14. The learned Senior Counsel appearing for the 1st accused [A1] appellant in Crl.A.No.91 of 2000 would submit that A1 as Senior Branch Manager had taken all reasonable steps in the matter of discounting/purchase of the LC presented by A2 [V.Ganesh]. Ex.P.1, credit voucher 08.01.1993 was pursuant to the sanction order accorded by the Regional Office under Ex.P.7. In the letter sent to the Overseas Branch, on 23.12.1992, the Mount Road Branch Office has specifically mentioned that 'applicant certificate' is not enclosed and the same will be submitted by the party directly. Only after disclosure of the above fact, the bill was forwarded to Overseas Bank for collection. This letter signed on behalf of Senior Manager [A1] had specifically made clear to the Overseas Bank that 'applicant certificate' is not furnished by the party. Though it was not enclosed along with the bill, the party has given an undertaking that it will be submit directly. Following this letter, [A1] Senior Manager wrote another letter dated 13.12.1992 to the Regional Manager which is marked as Ex.P.18, forwarding fresh proposal of M/s. Golden Harvest Trading Corporation for discounting the LC value of Rs.2 Million US dollars which was presented earlier and referred in Ex.P.7. In this letter, A1 has specifically mentioned that the proposal to discount the bill will be subject to acceptance of Regional Office. In this letter Senior Manager [A1] has also assigned reason for extending the discount facility to M/s. Golden Harvest Trading Corporation. When a Branch Manager being satisfied about the customer who has deposited a sum of Rs.3.60 crores in the bank and had helped the bank to get FCRN deposit to an extent of Rs.5 crores, in his wisdom had thought the LC presented by the customer for sum of 2 million USD could be purchase, provided the regional office accept the proposal. In the said contest, on 08.01.1993 he had allowed the credit voucher which is marked as Ex.P.1 for a sum of Rs.5,41,95,655/-. Till 09.02.1993 the purchase money of bill discounted was laying in the account of M/s. Golden Harvest Trading Corporation. Had the Regional Office informed him about the Telex Message of HSBC, Banking Corporation dated 06.01.1993 [Ex.P.30] which informs that the 'applicant certificate' issued through issuing bank to advise the bank confirming compliance fulfilment of terms not presented and they refused the document and for time being they hold the documents at their risk and disposal, the branch office could not have discounting the bill and credited the amount in the account of Golden Harvest Trading Corporation. Atleast, had the

branch being informed any time before 10.02.1993 they would have reverted the credit, since, the money was laying in the said account till 09.02.1993. The Regional Office having failed to inform the refusal of LC acceptance by HSBC, Singapore, the first accused being the Branch Manager cannot be found guilty of any conspiracy, cheating or misconduct.

15. Further to buttress the submission, the learned Senior counsel for the appellant referring the adjudication order of the Appellate Authority for FERA at Delhi which is marked as Ex.D.1 would submit that the appellate authority of Foreign Exchange Regulation had considered the matter in the angle of Foreign Exchange Regulation and had categorically held that on considering the matter deeply they are unable to persuade themselves the content of letter dated 13.12.1992 standing alone amount to abatement. Apart from A1 it is collective responsibility of the banking Officials who had dealt the letter of A1, to exercise due diligence.

16. The learned Senior counsel appearing for the 1st appellant would further submit that except writing letter to Regional Office recommending and expressing the proposed action of purchasing the bill on certain conditions which is any normal prudent Banker would do in the given circumstances, no other act had been done by the accused A1. For the purchase of Bill on receipt of sanction from the Regional Office, unknowing the refusal of HBSC to honour the same, the accused A1 cannot be held criminally liable. The Trial Court without proper appreciation of evidence and the role of A1 in the given circumstances had erroneously held them guilty which requires interference.

17. The learned counsel appearing for A2 would submit that the First Information Report registered based on the source information on the premises that the LC is a bogus and forged documents proved to be wrong. According to the PW.10 [Ramasamy] the LC is a genuine document. The HSBC Banking Corporation had all time confirmed its genuineness and also accepted the same. Because the 'applicant certificate' was not enclosed along with the bill, subsequently they have refused to honour the bill. While so, the basics of the investigation namely FIR which is marked as Ex.P.57 which contains incorrect information had lead to improper investigation and injustice result.

18. The Trial Court failed to appreciate the fact that earlier complaint given by PW.7 to the local police had been investigated and closed as mistake of fact. Since, the entire dispute is of civil in nature, the Oriental Bank of Commerce had not lodged any complaint knowing fully well that there is no

element of criminality in the transaction except failure in repayment. The Bank had rightly resorted to recovery proceedings under DRT Act by initiating action before Tribunal. The party likely to be aggrieved in this case is the Oriental Bank of Commerce. The enforcement agency which takes care of Foreign Exchange Regulation had also come to a conclusion that there is no Foreign Exchange violation and had exonerated the persons alleged to have been involved in the subject transaction. While so, the Trial Court had erroneously held the appellant guilty of conspiracy, cheating and misconduct.

19. It is contented by the learned counsel for the appellant in Crl.A.No.5 of 2007 A2 [V.Ganesh] that none of the prosecution witness has deposed that the LC which was purchased by the Oriental Bank of Commerce, Mount Road Branch is bogus or forged document. It has been elucidated through witness PW.6 that the loan extended to the Golden Harvest Trading Corporation is well secured by equitable mortgage of the properties at Nellore and Mylapore. In a genuine and bonafide trade transaction. The Global trade Insurance and Trade Management Private Limited for reason best known had withheld the 'applicant certificate' and had committed breach which has led to refusal of honouring the LC by HSBC Singapore. On the promise of Global trade Insurance and Trade Management Private Limited, A2 had requested for discounting the bill and A1 had forwarded the proposal to Regional Office. In turn the Regional Office had also permitted the branch office to purchase the bill on certain condition. If the intention of A2 was to cheat the Bank, then as soon as the money was credited into the account of Golden Harvest Trading Corporation on 07.01.1993 he would have withdrawn the money immediately. Money so deposited in his account was withdrawn only on 10.02.1993. After knowing that HSBC Singapore had refused to honour the bill all earnest effect has been taken by A2 to repay the debt. However, the bank has resorted to cohesive measure which has crippled the company finance flow.

20. The learned counsel for the appellant V.Ganesh also brought to the notice of this Court that, pending appeal they have settled the due to the bank through one time settlement scheme and as of now, there is no due to Oriental Bank of Commerce, Chennai. Hence submitted that taking into account of subsequent settlement of the due and the conviction being only for 120-B r/w 420 IPC the case of appellant has to be viewed sympathetically besides the merit canvassed in the appeal.

21. In support of the submission he also relied upon the judgment of the Supreme Court in rendered C.B.I Vs Sadhu Ram Singla & Ors others reported in 2017 (1) MLJ (Crl) 724 (SC)

22. In response, the learned Special Public Prosecutor appearing for C.B.I cases would submit that the appellants had full knowledge that the LC presented for Rs.2 Million US Dollars will not be honoured by the HSBC, Singapore for want of

'Applicants Certificate' However, created records as if the LC is a genuine document and after 180 days on its presentation, the money will be realised. By creating records as if all the necessary documents sought by HSBC, Singapore has been furnished to it, A1 has purchased the LC by negotiating the same. Though A2 firm was not provided with the facility of Foreign Bill purchase, as an extraordinary case A1 has impressed upon the Regional Bank by projecting A2 as a valuable customer and obtained sanction order from the Regional Bank. Though the Regional Office has granted sanction subject to certain condition, A1 has conveniently flouted upon those conditions and without complying the condition, had purchased the bill and deposited the money in the account of A2 and subsequently allowed A2 to withdraw the same on 10.02.2003 in spite of receiving Telex Message from HSBC, bank as early as 06.01.2003 and 08.01.2003. Thus, the scheme of conspiracy well webbed by A1 and A2 and siphoned of Rs.5 crores. Though A2 might have settled the debt through one time settlement, the loss incurred to the public sector company and the criminal design successfully executed by A1 and A2 needs no sympathy. Therefore, the Trial court judgment is to be confirmed.

Point for consideration

> Whether the finding of the Trial Court that A1 and A2 conspired to cheat the Oriental Bank of Commerce is substantiated with proof beyond reasonable doubt?

23. To determine the above point, it is essential to extensively refer the deposition of PW.2 [M.Sethuraman] who was the Manager Oriental Bank of Commerce, Overseas Branch. He has identified the Ex.P.2, the Telex to Mount Road Branch in which A1 [Rakesh Malhothra] was Senior Branch Manager. The LC which was opened by HSBC, Singapore on behalf of M/s.Global Trade Insurance Management, Singapore in favour of M/s.Golden Harvest Trading Corporation [Owned by A2]. He has spoken about the terms and condition found in Ex.P.2.

24. According to this witness the terms and conditions of the LC are (i). signed Commercial invoice in triplicate (ii). Applicant certificate issued through issuing bank via tested telex to advising bank confirming compliance fulfilment of terms and conditions in accordance with their [Applicants] requirements to met by M/s. Super Capital Marketers and Associates (iii). This credit is transferable to the beneficiaries in India by the Advising bank only in which case a certificate from the bank confirming the transfer require.

25. M/s. Super Capital Marketers and Associates should fulfil the terms and condition imposed by M/s.Global Trade Insurance Management Private Limited and there must be a certificate to that effect. PW-2 has perused the Ex.P.2 on 12.02.1992 and had put his initial and written “Test to be authenticated”. To know the authenticity of the message, he wanted to confirm the test code through his Bombay office.

Therefore, 30.12.1992, the Overseas Branch has sent a message to Bombay Branch to confirm the correctness of the test code. The said communication is marked as Ex.P.3. In response to this Communication, the Bombay Branch has informed by way of Telex on 05.01.1993 confirming the Test Code found in LC is correct. The said message of Bombay branch is marked as Ex.P.4. This confirmation according to PW.2 was after contacting the HSBC Bank, Singapore and verifying the authenticity of the LC. Therefore, from this portion of his evidence, it is established that the LC which is marked as Ex.P.2 is genuine LC. So on that day ie., when LC was presented by A2 firm, there is no sign to any conspiracy to cheat the bank.

26. Before getting the confirmation about the genuineness of the LC from the HSBC, Singapore through the Bombay Branch, the Overseas Bank on the receipt of Ex.P.2, had advice the GHTC on 14.12.1992 that the LC will be processed. After test code verified, the receipt of this communication from the Overseas Branch, the Oriental Bank of Commerce, Mount Road Branch had acknowledged the same which is marked as Ex.P.6.

27. In response to the said communication Ex.P.5 dated 14.12.1992, Mount Road Branch has informed the Overseas Branch vide letter dated 23.12.1992 which is marked as Ex.P.7 that the party [M/s.Golden Harvest Trading Corporation] had not enclosed the 'applicant certificate' and the party has informed the same will be submitted directly. This letter is signed by PW.4 [Leelavathi] on behalf of the Senior Manager A1 [Malkothra]. From the Exhibits as well as from the deposition of PW.2 it appears that the branch office at Mount Road Branch while requesting the Overseas Branch to negotiate the bill in dispute had also informed the Overseas Branch that the party has not enclosed applicant certificate which is mandatory for negotiation and also placed on record that the party has promised to submit the applicant certificate directly.

28. The reason for not enclosing of applicant certificate by the official at Mount Road, Branch is the outcome of undertaking given by GHTC vide letter dated 21.12.1992 which is marked as Ex.P.8. This letter is signed by A2 as President of GHTC. It is addressed to Mount Road Branch, Oriental Bank of Commerce. Ex.P.9 is invoice of the GHTC raised for the service rendered to M/s.Global Trade Insurance Management Private Limited this invoice is dated 21.12.1992. The LC referred in Telex marked as Ex.P.2 is dated 11.12.1992 which is draw to ensure the payment of invoice. Ex.P.9. Along with the invoice a request for negotiating the document is given by A2 [V.Ganesh]. He had also executed the bill of exchange on the same day. The said bill of exchange is marked as Ex.P.10.

29. Ex.P.9 which is the invoice of Rs.2 Million US Dollars has been raised by M/s.Golden Harvest Trading Corporation towards service charge for arrangement of sale/purchase contracts for scrap metals. Ex.P.13, the certificate issued by M/s.Super Capital Management and Associates is a firm controlled and managed by A2 [V.Ganesh]. As its President A2 had given a certificate that M/s.Golden Harvest Trading Corporation had fulfilled the terms and condition in respect of the contract for sale and purchase of scrap metal with M/s. Gobal Trade Insurance Management Private Limited.

30. Being satisfied with the genuineness of these documents namely Ex.P.8, Ex.P.9, Ex.P.10, Ex.P.13 and the Overseas branch has forwarded all the documents to HSBC Bank, Singapore with covering letter dated 29.12.1992. The said covering letter which is marked as Ex.P.14 indicates that Overseas Branch has requested HSBC Singapore to remit the proceedings in their International Account No.41-143156-1121 with the Bank of California International New York, USA.

31. On the part of A1 [Rakesh Malhothra] as Branch Manager of Oriental Bank of Commerce, Mount Road Branch, Chennai on presentation of LC by A2 [V.Ganesh] had duly forwarded the same to the Overseas Branch disclosing all the facts including non-enclosure of 'applicant certificate'. Admittedly, he had enquired with HSBC Bank at Singapore about the credit worthiness of M/s. Gobal Trade Insurance Management Private Limited, Singapore and in response to his letter which is marked as Ex.P.15, the HSBC Bank, Singapore has forwarded the confidential report about the credit worthiness of M/s.Global Trade Insurance Management Private Limited, Singapore and the same is marked as Ex.P.17. The perusal of Ex.P.17 issued by HSBC, Singapore reveals that M/s. Global Trade Insurance Management Private Limited, is an existing firm having transaction with HSBC, Singapore since 27.09.1990 with authorized capital of Rs.5 lakhs dollars HSBC, Singapore and paid up capital of Rs.5 lakhs, Singapore dollars. The HSBC has certified that M/s. Global Trade Insurance Management Private Limited, Singapore is a company maintaining fairly active and satisfactory account. Only after making preliminary enquiry about the credit worthiness of the Oriental bank of Commerce at Singapore and getting confirmation about the genuineness of LC. A1 has sought permission of the Regional Office for purchasing the bill. In his request dated 13.12.1992, he had assigned the reasons for his proposal to purchase the bill. The reason found in Ex.P.18 that the M/s.Golden Harvest Trading Corporation and M/s.Super Capital Marketers and Associates both firms held by [A2] have deposit to a tune of Rs.3.6 crores and they have helped the bank to get FCRN deposits to the extent of Rs.5 crores is not disputed. A1 has also indicated that he will discount the bill only after

acceptance by Overseas Branch.

32. The Zone of suspicion against A1 [Rakesh Malhothra] and A2 [V.Ganesh] commences at this stage. When the negotiation of the bill itself was under process, through Ex.P.18 Letter A1 [Rakesh Malhothra] had expressed his intention to purchase the bill. Though the facility of purchasing International LC was not provided for M/s. Golden Harvest Trading Corporation or to M/s. Super Capital Marketers and Associates, A1 [Rakesh Malhothra] has recommended bills purchase facility for the reason stated in its letter which is marked as Ex.P.18. Thereafter, A2 [V.Ganesh] had furnished another set of request letter for negotiating, along with the documents like bill of exchange and invoice which is marked as Ex.P.19, Ex.P.20, Ex.P.21. In Ex.P.19 dated 04.01.1993 which is the request letter for negotiation, though it is almost same that of the Ex.P.8 dated 21.12.1992, the words, “will be received by you directly”, written in hand after, 'Applicants certificate' issued through issuing bank via tested Telex to your good selves found in Ex.P.8 is conspicuously absent in Ex.P.19.

33. In the cross examination of PW.2 it is elicited that the 'Applicants Certificate' in this case is a certificate to be issued by M/s. Global Trade Insurance Management Private Limited and the applicant certificate is the essential condition of honouring the LC. It is a proven fact that the applicant certificate which was essential document and which is required for HSBC, Singapore to honour the commitment had not produced either directly by the Global Trade Insurance Management Private Limited or through by M/s.Global Harvest Trading Corporation. This failure on the part of the 2nd accused has lead to HSBC, Singapore refuse honouring the LC.

34. In this regard, it is pertinent to refer the Ex.P.25 the letter of GHTC signed by 2nd Accused which is addressed to the Senior Manager [A1], Mount Road Branch. In this letter A2 [V.Ganesh] has stated that he has complied all the request and enclosed the application form for the necessary Foreign Uses Documentary Bills Purchase Limited [FUDBP]. When the request [FUDBPL] from the customer namely A2 [V.Ganesh] was received by the A1 [Rakesh Malkothra] only on 04.01.1993, surprisingly A1 [Rakesh Malhothra] through Ex.P.18 has recommended for extending the facility to A2 firm on 13.12.1992 itself. Further, in the letter of 2nd accused dated 04.01.1993 addressed to A1 [Rakesh Malhothra] the accused [A2] has specifically stated that he has submitted all the documents required for ILC bill to A1 [Rakesh Malhothra] for negotiating the ILC Bills. This statement of A2 [V.Ganesh] found in his letter addressed to A1 [Rakesh Malhothra] is apparently a false statement. Since, A2 [V.Ganesh] had never produced any applicant certificate which is very

essential for completing the formality of honouring the Letter of Credit to HSBC, Singapore his assertion in Ex.P.25 has mislead the Bank. A-1 who as Branch Manager though had knowledge about the falsehood found in Ex.P.25 did not care to alert the Regional Bank for obvious reason.

35. From this point onwards it would been seen that despite non production of applicant certificate, A1 [Rakesh Malhothra] has recommended for extending the ILC bill purchase facility. A1 [Rakesh Malhothra] had recommended even before formal request made by A2 [V.Ganesh]. This conduct of A1 [Rakesh Malhothra] favouring A2 [V.Ganesh] indicates that there is element of indiscretion and excessive exercise of power and not mere error of judgment. On perusing the Ex.P.30, this Court finds that HSBC, Singapore through its telex Message dated 06.01.1992 had informed the Oriental bank of Commerce, Mount Road Branch that the documents forwarded in connection with the LC containing following discrepancy.

> " Applicant's Certificate issued through issuing Bank to advising Bank confirming compliance fulfilment of terms not presented.
>
> In accordance with Article 16 of UCP400 We have to refuse the documents at this time, and we hold them at your risks and disposal.
>
> However, We will refer the discrepancies to the applicant.
>
> In the meantime, please forward your instructions, if any, for attention GUAN quoting our Ref. COL:USD2, 000,000.00=01060604"

36. Again on 08.01.1993, another telex Message which is marked as Ex.P.31 had been sent to Oriental bank of Commerce, Mount Road Branch wherein the HSBC Bank, Singapore has informed the Mount Road branch as under:

> " Further to UR Telex Message Dated 05Jan93 Advising you on discrepancies noted on the above documents, applicant advises that documents are accepted subject to acceptable to issuance of confirmed irrevocable letter of credit acceptable to applicant. Opened by Super Capital Marketers and Associates and Received by us (Hongkong and Shanghai and Received by us within 30 days from today. Meanwhile, we hold documents at your disposal."

37. In spite of intimation and discrepancy made known to A1 [Rakesh Malhothra], suppressing the information found in Ex.P.30

and Ex.P.31 had informed the Overseas Branch on 23.01.1993 that HSBC, Singapore had confirmed they have obtained the necessary documents and all the terms and conditions have been complied with. This letter which is marked as Ex.P.32 clinches the issue involved in this case.

38. The conduct of A1 [Rakesh Malhothra] favouring A2 [V.Ganesh] by recommending the extension of ILC Bill purchase to A2 firm even before a formal request received from him. Informing the Regional office that A2 [V.Ganesh] has produced all necessary documents and had complied all terms and condition, in spite of receiving the Telex Message, from HSBC Singapore on 06.01.1993 and 08.01.1993, reporting about non-compliance of condition. The discrepancy in the document and non-production of applicant certificate clearly show that A1 [Rakesh Malhothra] knowing fully well had mislead the Regional office by informing that A2 [V.Ganesh] had complied all the conditions and had extended the facility of discounting the ILC bills drawn for a sum of Rs.2 Million US Dollars which A2 is not otherwise eligible. Ultimately, the money credited into the account of M/s. Golden Harvest Trading Corporation had later become a bad debt.

39. The learned counsel appearing for the 2nd appellant would submit that pending appeal the second appellant had settled all dues to OBC, Chennai under one time settlement and therefore there is no pecuniary loss to the Oriental Bank of Commerce. Further, it is also contended by the counsel that the appellant was convicted only for offence of conspiracy to cheat the Bank and no conviction for any substantive offence since the offence of conspiracy or cheating not proved by the prosecution, taking into considering cumulatively, A2 should be acquitted.

40. It is also contended by the learned counsel that while co-conspirator A1 [Rakesh Malhothra] was sentence only for 3 years for the same offence. A2 [V.Ganesh] cannot be slapped with 5 years R.I. The discrimination in the pattern of sentence is one of the indication that the trial Court has not exercise its judicial mind.

41. As far as the learned counsel appearing for the A1 [Rakesh Malhothra] would submit that whatever action done by the A1 as Senior Manager, it was with the Bonafide intention to auger the turn over of the bank. Only after obtaining adequate security and taking note of the credential of A2 [V.Ganesh] firm he had recommended for LC purchase. Error in the judgment in exercising of power should not be taken as act of conspiracy to cheat the bank or misconduct of abusing the official position.

42. In the light of the above discussion this Court holds that the prosecution has proved the case against the A1 [Rakesh Malhothra] and A2 [V.Ganesh] that there was meeting of mind to cheat the Oriental Bank of Commerce by recommending ILC facility knowing full well that the LC offered by A2 [V.Ganesh] has been refused to be hounoured by HSBC, Singapore as early as 06.01.1993 and reinforced through the Telex on 08.01.1993 which are marked as Ex.P.31 and Ex.P.32. In spite of his knowledge about these two telex messages, A1 [Rakesh Malhothra] has forwarded the letter Ex.P.31 dated 23.01.1993 to Overseas Branch as if A2 [V.Ganesh] had complied all the terms and condition.

43. Conspiracy normally hatched in secrecy. The act done in pursuant to the conspiracy would be manifestly seen only through the result of the conspiracy. In this case prosecution has proved through evidence that, in spite of restricted permission granted by Regional Office to extend the loan facilities, A1 [Rakesh Malhothra], without compliance of the pre-condition by A2 [V.Ganesh], had extended the loan knowing fully well that A2 [V.Ganesh] has not complied the condition. The manner in which he has recommended for extending the facility even before formal application from A2 [V.Ganesh] and discounting the LC which was refused to be honoured, clearly indicates the intention of cheating and the meeting of mind between A1 and A2 to cheat the bank. The only mitigating circumstances in this case is that after long drawn Civil litigation A2 has come forward to settle the due and affidavit is filed before this Court that under one time settlement Scheme, he has cleared the due to Oriental Bank of Commerce.

44. Exonerating the 1st accused by the Appellant tribunal for Foreign Exchange Regulation Act does not mean he is to be exonerated from the offence of conspiracy and cheating. The scope and ambit of the appellate tribunal for Foreign Exchange Regulation is to probe into violation of Foreign Exchange Regulation. In this case the prosecution has projected offence of cheating pursuant to conspiracy. Therefore Ex.D.1, the order of the appellate authority is of no avail. Having held that the both the accused are guilty of cheating pursuance to conspiracy. A1 as a public servant has failed to conduct himself with due diligence which a banker is expected of. He had abused his power to show undue and illegal pecuniary advantage to A2, which holds him liable for offence under section 13(1)(d) of PC Act punishable under Section 13 (2) of Prevention of Corruption Act.

45. Likewise omission to sentence the offenders for the substantive offence of cheating under Section 420 IPC does no way prejudice the offenders who are the appellants herein. While the prosecution has proved the case of conspiracy to

cheat, omission to give separate finding and sentence for the offence of cheating is a curable defect and will not vitiate the trial or the judgment.

46. In the result, the judgment of the Trial Court holding A1[Rakesh Malhothra] guilty for offence under section 120-B r/w 420 and 13(2) r/w 13(1)(d) of PC Act and as A2 [V.Ganesh] guilty of offence under Section 120-B r/w 420 is hereby confirmed. Considering the mitigating circumstances pointed out above, the sentence imposed by the Trial Court is modified as below.

Rank of the accused	Conviction under Section	Sentence imposed by the Trial Court	Sentence modified by this Court.
A1	Under Section 120-B r/w 420 of IPC and	To undergo 3 years R.I and a fine of Rs. 5,000/- in default 6 months S.I	To undergo 1 year S.I and a fine of Rs.5,000/- in default 2 months S.I
	Under Section 13(2) r/w 13 (1)(d) of PC Act.	To undergo 2 years R.I and a fine of Rs. 5,000/- in default 6 months S.I	To undergo 1 year S.I and a fine of Rs.5,000/- in default 2 months S.I
A2	Under Section 120-B r/w 420	To undergo 5 years R.I and a fine of Rs. 20,000/- in default 6 months S.I	To undergo 1 year S.I and a fine of Rs. 20,000/- in default 2 months S.I.

The sentence imposed by this Court shall run concurrently. The period of sentence already undergone shall be set off.

45. With the above said modification the Criminal Appeal Nos.91 & 5 of 2007 are disposed of. The appellants herein are directed to surrender before the Trial Court within a period of 30 days, failing which the Trial court shall execute the warrant and secure the appellants to undergo the remaining period of sentence.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

bsm

To
1. The Inspector of Police,
   Special Police Establishment,
   Central Bureau of Investigation,
   Anti-Corruption Branch, 3rd floor,
   Sastri Bhavan, Haddow Road, Nungambakkam, Chennai-6.

2. The Deputy Superintendent of Police,
   SPE/CBI/ACD,
   Chennai.

3. The Additional Special Judge (CBI),
   Chennai.

4. The Special Public Prosecutor,(CBI)
   High Court, Madras.

5.The Superintendent, Central Prison, Puzhal, Chennai

+1cc to M/s.Lakshmipriya, Advocate Sr.No.13597/18
+1cc to Mr.AL.Ganthimathi, Advocate Sr.No.13632 dt.22.3.2018

SV(CO)
sm:12.3.2018

judgment made in
Criminal Appeal Nos.5 & 91of 2007