

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CRIMINAL PETITION No.12684 OF 2010

ORDER:

Accused No.3 in C.C.No.23 of 2004, on the file of Special Judge for Trial of CBI Cases, Hyderabad, filed this petition under Section 482 of Cr.P.C. to quash the proceedings against him, registered for the offences punishable under Sections 120 B read with 420 IPC, 468, 471, 468 IPC and Section 13 (2) read with 13 (1)(d) of Prevention of Corruption Act, 1988 (for short, 'the Act').

2. The petitioner is a Chartered Accountant by profession and issued turn over certificate to obtain import licence to Accused Nos.1, 2 and 4, without verification of records properly and allegedly caused loss to a tune of Rs.5,20,84,464/-.

3. The Government of India formulated a scheme mainly to encourage not only foreign trade, but to secure foreign exchange for the country, whereunder the firms and companies were entitled to import raw material free of customs duty from abroad and convert the same into the final products and send them back to the foreign country on which the Indian Government would get foreign exchange. The Government of India, as a matter of policy, issued notification No.203/92-CUS, dated 19.05.1992, exercising power under Section 25 of the Customs Act, 1962. Under the said scheme, the Government of India invited applications to acquire a licence on satisfying the conditions enumerated under the said notification. As per the said notification, the importer is required to execute a legal undertaking (or Bank Guarantee) in favour of the licensing

authority that he will comply with conditions of licence and based on the said legal undertaking only the Customs Department was required to issue the licence. The petitioner submitted Appendix – 24 B format, which is mandatory to be fulfilled by the importer. It is also contended that neither under the notification issued by the Government of India, nor in the legal agreement, nor in the form of bank guarantee, the certificate issued by the Chartered Accountant has got any relevancy. The domestic turnover certificate which was issued by the petitioner has got absolutely no legal value, as per the terms and conditions, which were required to be fulfilled under the terms of notification.

4. Assuming that the domestic turnover certificate was issued by the petitioner in favour of the defaulter, it is of absolutely no consequence and there is no such legal requirement, which would even remotely implicate the petitioner as a conspirator. But the petitioner being a Chartered Accountant, has issued the alleged certificate enabling Accused No.2 to obtain import licence on 17.01.1994, for issuing of Value Based Advance Licence from the Joint Director of Foreign Trade, Hyderabad for export of dyed printed fabrics ployster yarn seeking custom duty exception of Rs.6,52,01,817/- approximately. For the purpose of obtaining licence, Accused No.2 opened a bank account and with the help of Sri Vishnu Kumar Agarwal (Accused No.5) has taken RCMC certificate, RBI Code, IEC code, SSI registration certificate challan for an amount of Rs.59,450/- from Central Bank of India and fake export orders of M/s.Silkara Trading, Dubai and M/s.M.A.A.Al.Awar Trading,

Dubai. The RCMC submitted by Sri R.K.Sharma (Accused No.2) did not contain the required information which was pointed out by Smt.Sudha, Deputy Director General Foreign Trade, Hyderabad and she instructed Sri D.Gajapathy (Accused No.6) for inspection of the firm M/s.Rajaji Associates and called the firm for personal hearing and to show the original documents.

5. On 24.02.1994, Sri R.K.Sharma (Accused No.2) along with Sri B.P.Agarwal and Sri Vishnu Kumar Agarwal (Accused No.5) met Sri D.Gajapathy (Accused No.6) and Sri Shafat Ahmed (Accused No.7) vide interview slip No.43, dated 24.02.1994, to furnish original documents for perusal and verification and the original export order, which is a vital document for issue of Value Based Advance Licence and fulfilling of export obligation. The said Sri Shafat Ahmed (Accused No.7) misrepresenting the Head Office circular, issued orders for issue of licence without waiting for the confirmation from Dubai by taking the supporting manufacturer's letter.

6. On 25.02.1994, a consent letter of supporting manufacture issued by M/s.Classic Textiles was forged by Accused No.4 Sri B.P.Agarwal and submitted in the JDGFT office. On receipt of the concerned letter Sri Ganapathy (Accused No.6) ordered for issue of licence. Smt.Sudha put up a note saying that the party was a new comer and the bank guarantee should be obtained from the party before issuing the licence. It was agreed by Sri Shafat Ahmed (Accused No.7) and the file was sent to Bond Section.

7. Accused No.2 made a request for accepting legal undertaking instead of bank guarantee by submitting fake domestic turnover certificate issued by

Sri R.K.Agarwal (Accused No.3), Chartered Accountant - petitioner herein. The firm Rajaji Associates is non-existent and never functioned from the premises of 34, Ground Floor, Babukhan Estate, Hyderabad.

8. Thus, the petitioner and other accused conspired together in obtaining export licence in the name of Rajaji Associates, which was never in existence at the given address and caused loss to a tune of Rs.5,20,84,464/-, to the Government by way of customs duty exemption and thus committed the offences punishable under Sections 120 B, read with 420 IPC and 468, 471, 468 IPC and 13(2) read with 13 (1)(d) of Prevention of Corruption Act.

9. The present petitioner accused No.3 mainly contended that the certificate issued by him is based on the books of accounts produced before him being a Chartered Accountant and certificate has no relevance at all for obtaining such certificate of import licence and that it was not in compliance of any legal requirements. Therefore, the question of this petitioner conspiring together with the other accused is a myth and the petitioner cannot be punished for the offences punishable under Sections 120 B, read with 420 IPC and 468, 471 read with 468 IPC and 13(2) read with 13 (1)(d) of Prevention of Corruption Act in C.C.No.23 of 2004.

10. During hearing, learned Senior counsel Sri C.Nageswara Rao, contended that the petitioner is only a Chartered Accountant, whose duty is to verify the books of accounts, issue certificates based on the entries in the books of accounts from the proprietor of M/s.Rajaji Associates - accused No.2 and thus the petitioner is not required to minutely verify the details in the accounts for

issue of such certificate, which is not in compliance of any legal requirements. In support of his contention, he placed reliance on judgment of Madras High Court in **Commissioner of Income Tax, Madras Vs. G.M.Dandekar of M/s.M.K.Dandekar and Company Chartered Accountants, Madras**¹. Finally, he contended that none of the allegations made in the complaint would constitute any offence punishable under Sections referred to above and when the allegations made in the charge sheet does not disclose the details of constituting the offences punishable under Sections 120 B, read with 420 IPC and 468, 471, 468 IPC and 13(2) read with 13 (1)(d) of Prevention of Corruption Act to proceed against the petitioner cannot be doubted and requested to quash the proceedings against the petitioner for various offences referred supra.

11. Learned Special Public Prosecutor for Central Bureau of Investigation (C.B.I.) contended that the act done by this petitioner – Chartered Accountant, who issued turnover certificate, enabling accused No.2 to obtain import licence in the name of a non-existing firm M/s. Rajaji Associates and it was never carrying on any business, by obtaining some fake orders from Classic Textiles through accused No.4 B.P.Agarwal and also placed before the authorities concerned an export order from M/s.M.A.A.Al.Awar Trading, Dubai and M/s.Silkara Trading, Dubai.

12. The RCMC submitted by Sri R.K.Sharma accused No.2 though not contained required information, the authorities itself is responsible in issuing

¹ AIR 1953 MADRAS 152 (Vol.40, C.N.46) (1)

such export licence in collusion with other accused, if any, but this petitioner is not liable to be prosecuted for the offences and the petitioner requested to quash proceedings against this petitioner.

13. The point that arises for consideration is

“Whether the allegations made in the charge sheet disclosed commission of any offence by this petitioner - accused No.3, for making him liable for the offences punishable under Sections 120 B, 420 IPC and 468, 471, 468 IPC and 13(2) read with 13 (1)(d) of Prevention of Corruption Act? If not whether the proceedings against this petitioner in C.C.No.23 of 2004, pending on the file of Special Judge for CBI cases, are liable to be quashed?”

POINT:

14. It is undisputed fact that the Government of India, while exercising power under Section 25 of the Customs Act, issued notification No.203/92-Cus., dated 19th May, 1992 in Appendix G, inviting applications for obtaining import licence. Accused No.2 claimed to be a Managing Director of M/s.Rajaji Associates, made an application for issuing of import licence in pursuance of the notification dated 19.05.1992. The conditions required to be complied by the applicant are mentioned in the notification. They are as follows:

- i. *The materials imported are covered by a Value Based Duty Exemption Entitlement Certificate (hereinafter referred to as the said certificate), issued by the Licensing Authority in the form specified in the Schedule annexed to this notification;*
- ii. *The importer at the time of clearance of the imported material –*
 - a) *produces proof of having executed a bond or a legal undertaking before the Licensing Authority concerned, for complying with the conditions of this notification; and*
 - b) *makes a declaration before the Assistant Collector of Customs binding himself to pay on demand an amount equal to the duty leviable but for the exemption, on the imported materials in respect of which the conditions specified in this notification have not been complied with;*

Provided that a bond or a legal undertaking and the declaration shall not be necessary in respect of imports made after discharge of export obligation in full, as evidenced by endorsement of Licensing Authority in the said Certificate;

- iii. *The said licence and the said certificate is produced before the proper officer of customs at the time of clearance of imported goods out of customs control;*

Provided that no such imported materials shall be permitted clearance under this notification unless a debit entry has been made in the said licence and the said certificate, by the proper officer of customs;

- iv. *The imports and exports are undertaken from sea ports at Bombay, Calcutta, Cochin, Kandla, Mangalore, Marmgoa, Madras, Nhava Sheva, Paradeep, Tuticorin and Visakhapatnam, or through any of the airports at Ahmedabad, Bangalore, Bombay, Calcutta, Delhi, Jainpur, Varanasi, Srinagar, Trivandrum, Hyderabad and Madras or through any of the Inland Container Depots at Bangalore, Coimbatore, Delhi, New Gauhati Goods Shed, Moradabad, Ludhiana and Hyderabad;*

Provided that the Collector of Customs may be specified order and subject to such conditions as may be specified by him, permit imports and exports from any other sea port, airport, land customs station or inland container depot;

- v. *The export obligation is discharged, within the period specified in the said certificate or within such extended period as may be granted the Licensing Authority, by exporting goods manufactured in India in respect of which –*

(a) no input stage credit is obtained under Rule 56-A or 57-A of the Central Excise Rules, 1944 (hereinafter referred to as the said Rules);

(b) facility under Rule 191-A or 191-B of the said Rules has not been availed; and

(c) drawback has not been claimed either under Section 74 of the Customs Act, 1962 or Customs and Central Excise Duties Drawback Rules, 1971;

- vi. *Exempt materials shall be utilized for discharge or export obligation and no part thereof shall be allowed against the said licence and the said certificate only if it bears endorsement of transferability by the Licensing Authority.”*

15. One of the conditions prescribed for issue of license is of furnishing Bank guarantee vide Appendix 24-A/24-B to the Government or a legal agreement/undertaking in Appendix 24-B, vide condition No. ii (a) referred above. For accepting the legal agreement/undertaking, the exporter, the alleged firm Rajaji Associates has to furnish turnover certificate. In view of the

requirement, the petitioner – accused No.3 issued a certificate dated 14.02.1994, certifying that M/s.Rajaji Associates, 34, Ground Floor, Babu Khan Estate, Basheerbagh, Hyderabad, is having following Domestic Turnover for the years -

Date: 14.02.1994

TO WHOMSOEVER IT MAY CONCERN

This is to certify that M/s.RAJAJI ASSOCIATES, 34, Ground Floor, Babu Khan Estate, Basheerbagh, Hyderabad is having following Domestic Turnovers for the years.

YEAR	DOMESTIC TURNOVER
1990-91	940 Lakhs
1991-92	1264 Lakhs
1992-93	1818 Lakhs

The above Domestic Turnover certified according to the books, documents and explanations produced by the Management.

For R.K.AGARWAL

Chartered Accountant

Sd/-

Proprietor

16. The turnover certificate was issued based on the books, documents and explanations produced by the management. Thus, the petitioner by issuing the certificate dated 14.02.1994, certified that non-existent firm Rajaji Associates is having turnover shown in the certificate for relevant three years mentioned therein. On the basis of the certificate, the officials of the Customs Department accepted the legal undertaking in Form 24-B, so as to obtain import licence with an undertaking to pay the amount if any directed by the Commissioner, subject to conditions contained therein.

17. The main grievance of the respondents is that since the firm was not in existence and the import orders and export orders by two different firms from Dubai are fake and forged and the certificate issued by this petitioner is also not based on any material and it is a false certificate, thereby, the petitioner being the Chartered Accountant, issued such certificate, who is under statutory obligation, without any basis, caused loss to a tune of Rs.5,20,84,464/-. Basing on the investigation done by the Customs Department, a show cause notice was issued to the accused calling upon them to show cause as to why action should not be taken within thirty days from the date of notice. It is alleged in the show cause notice that the Certificate issued by bank, vide reference No.ADV/508, dated 10.11.1993, furnished to JDGFT, wherein the current A/c.No.28050, maintained by M/s.Rajaji Associates, from 03.11.1993 was furnished. M/s.Union Bank of India, Saifabad Branch was visited by officials and the bank account statements of M/s.Rajaji Associates were recovered, which show that only one transaction of Rs.510/- was found during relevant years. The bank official further explained that the account of M/s.Rajaji Associates was opened on introduction by M/s.Nandi Fabrics Private Limited, represented by Mr. Ramesh K Mittal as authorized signatory and on further enquiry, it was ascertained that M/s. Sri Ram Mills had introduced the account of M/s. Nandi Fabrics Private Limited, whose authorized signatory was Mr.B.P.Agarwal. Incidentally cases of misuse of advance licence scheme were registered against M/s. Sri Ram Mills by DRI Regional Unit, Hyderabad and further it was informed that the petitioner - accused No.3, the Chartered

Accountant, in his statement dated 28-05-1997, has interalia stated that he knew M/s. Rajaji Associates through Mr.R.K.Mittal and Mr. B.P. Agarwal, who were clients of his brother Ashok Kumar Agarwal, Advocate. Through them he got introduced to Mr.R.K. Sharma, who requested for a certificate for domestic turnover for M/s.Rajaji Associates. Mr.R.K. Mittal and B.P.Agarwal were brothers and running processing house at Kothur. He had adhered to all basic principles of auditing before issue of certificate to M/s.Rajaji Associates. M/s.Rajaji Associates were basically trading concern dealing in cloth purchase and sales. He did not verify Commercial Tax Department returns of M/s.Rajaji Associates since the same was not required to be verified. While giving the certificate, M/s.Rajaji Associates told that statements of their unit were not ready for audit. He checked the LR's and party's order to verify the sales figures but did not note the transporter name or customer name who placed orders. He did not check the Income Tax returns since the same was not submitted by the party. He personally visited 34, Ground Floor, Babukhan Estate, Hyderabad on 20.01.1994, identified the photographs of Mr.R.K.Sharma as the same person who visited him for the certificate for M/s.Rajaji Associates. He had cross checked the collection register in particular to the collection of cheques and D.Ds. with bank pay-in-slips. On being shown the bank statement of M/s.Rajaji Associates of Union Bank of India, Saifabad branch of Rs.501/- he stated that M/s.Rajaji Associates might have account in other branches which he could not recollect. Mr.R.K.Agarwal, the petitioner herein appears to have knowledge of various activities of Mr.R.K.Sharma, lest he would have definitely

questioned the authenticity of sales and purchase register shown to him, when the fact remains that M/s.Rajaji Associates had never transacted any such business. Mr.R.K.Agarwal had based his certificate on the pay-in-slips, cheques and demand drafts of M/s.Rajaji Associates, whereas again the basic fact is that M/s.Rajaji Associates had transacted business for Rs.501/- only with M/s.UBI, Saifabad during the period of 03.11.1993 to4.1995. Mr.R.K.Agarwal, while inspecting the sale and purchase records along with creditors and debtors ledgers, appears to have never applied his mind to verify the name of the firm. Thus, issued turn over certificate, falsely and thereby sought to take necessary action by the Commissioner of Customs (EP), New Customs House, Ballard Estate, Mumbai. No reply was issued as per the material produced before the Court, but the contention of this petitioner is that he is only a Chartered Accountant. Based on the documents, books of accounts and other documents, produced before him, by Rajaji Associates, he issued the certificate. No doubt for accepting legal undertaking or for issue of export licence, the basis is turnover certificate by this petitioner, though not legal requirement as per the notification referred supra, but the petitioner is a Chartered Accountant whose duty is to verify the accounts and issue certificate while discharging his duties as Chartered Accountant allegedly issued turnover certificate, enabling Rajaji Associates to obtain import licence in Annexure I.

18. As per the investigation, the firm M/s.Rajaji Associates was not in existence in the address given in the certificate i.e., 34, Ground Floor, Babukhan Estate, Basheerbagh, Hyderabad and at the same time, the business

transactions through bank is only to a tune of Rs.510/- during the year. Therefore, *prima facie* Rajaji Associates is not carrying on any business, more particularly, export and import of fabrics from foreign countries.

19. The investigating agency based on the First Information Report in Crime No.RC-21(A)/2000, dated 29.09.2000, several witnesses were examined and recorded their statements under Section 161 (3) of Cr.P.C. On the basis of statement of witnesses recorded during the investigation by the investigating officer, Inspector, CBI Hyderabad, the charge sheet is filed.

20. Smt.R.Sudha, DDGFT, Hyderabad, is the first witness, who stated that the officials of the department along with other accused including the petitioner conspired together and created several documents to support Rajaji Associates in obtaining export – import licence. She also stated about issue of show cause notice, licence created and fake sales, etc. Further, K.Srinivasa Murthy, UDC, O/o.JDGFT, Bangalore, who was dealing with export monitoring section testified about the conspiracy of this petitioner issuing false turnover certificate and furnishing several documents including fake certificate and import export orders by Rajaji Associates and other companies and the statements of other witnesses and also supported the said fact. That apart, officials, Managing Directors, M/s.Classic Textiles Limited, Daman, Mumbai, stated that he was looking after the Classic Textiles Limited, but other Directors viz. Ms.Usha Goel and Gopal Joshi are also there. Their firm is involved in manufacturing of polyester texturized yarn only at Daman and office was at 381, I Floor, Kalbadevi, Narottamwadi, Mumbai and that the letter dated 08.01.1994 is addressed to

M/s.Rajaji Associates, Hyderabad, pertaining to Classic Textiles Limited, Mumbai. He stated that though the copy of the letter pad appears to be of their company, contents of the letter are totally false. He does not know about M/s.Rajaji Associates, Hyderabad and they never placed any order. He also stated that he know Sri B.P.Agarwal and Sri Suresh Adukia through one Mr.Shriram Choudary, Managing Director of M/s.Silkon Silk Mills Limited, Daman, whose factory is situated opposite to their factory i.e., Classic Textiles Limited, Daman and there is no placing of any order by Classic Textiles Limited with M/s.Rajaji Associates, but the letter was created. Similarly, Sri Sriram Vasudev Chowdhary was examined and recorded his statement under Section 161 Cr.P.C. He specifically stated that he was informed to B.P.Agarwal through Sri Suresh Kumar Adukia, who is working as Broker for his business in Mumbai and Surat since 1987. During 1993, end of the year Sri Suresh Kumar Adukia introduced Sri B.P.Agarwal as the Proprietor of M/s.Sriram Mills, Hyderabad and expressed that Sri B.P.Agarwal wants to start a processing unit at Hyderabad as such he wanted to purchase manufacturing unit based at Daman. Since Sri Devaki Nanda Goel, expressed his difficulty in running the manufacturing unit, he desired to sell the same to the interested party, introduced the petitioner and settled a deal for Rs.70 lakhs. Similarly, the statements of other witnesses clearly disclose that Rajaji Associates was not in existence at the address given in the certificate and it was created for the purpose of obtaining import licence *prima facie*. One Sudesh Kumar Punjabi, who is working as Customs House Agent, since 1988, stated that the procedure

to be followed for importing at the sea port and on being shown bill of entry pertaining to M/s.Rajaji Associates, 15 bills of entry of various dates of their company, cleared goods:

S.No.	Bill of Entry No. and Date
1.	13068, 31.03.1994
2.	0012552, 30.03.1994
3.	0012550, 30.03.1994
4.	0012547, 30.03.1994
5.	0013000, 31.03.1994
6.	0012553, 30.03.1994
7.	000 , 05.04.1994
8.	0010401, 28.04.1994
9.	0012549, 30.03.1994
10.	0012548, 30.03.1994
11.	0012551, 30.03.1994
12.	0012472, 29.04.1994
13.	0012473, 29.04.1994
14.	003725, 10.05.1994
15.	003724, 10.05.1994

21. Rajaji Associates purchased goods as high sea sales. As per the procedure of Customs Department, Customs Department has to debit CIF (Cost Insurance Freight) + 2% high-sea sale commission in the advance licence. Similarly, Sri Sudesh Kumar Punjabi also stated about clearance of certain export bills, bill of entry for M/s.Rajaji Associates. But the value of the bill of entries is meager. Thus, the material collected by the investigating agency disclosed that accused No.2 being Proprietor of M/s.Rajaji Associates

transacted business for a meager amount, but did not carry on business to a tune of Rs.5,20,84,464/-. But the petitioner-accused No.3 issued certificate certifying turnover for three different years exorbitantly or at inflated rate.

22. Now the question is whether issuance of such certificate would constitute an offence punishable under Section 120 B of IPC?

23. Section 120 B deals with the punishment for criminal conspiracy. The offence of criminal conspiracy is defined under Section 120A. To prove such criminal conspiracy, the Courts cannot expect the direct evidence, the Court can draw inference based on the conduct prior to and subsequent to the commission of such offence, in consequence of the agreement between the parties to do an illegal act or to do an act which is not illegal by illegal means, in pursuance of the agreement arrived by the accused. To establish criminal conspiracy, no direct evidence is required to be produced and the Court shall take into consideration, the conduct of the petitioner, both prior and subsequent to decide his complicity for the offence punishable under Section 120-B IPC.

24. Section 120-B I.P.C. deals with punishment for criminal conspiracy. The offence of 'criminal conspiracy' is defined under Section 120A I.P.C and according to it, when two or more persons agree to do, or cause to be done an illegal act, or an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy, provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless

some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

25. Thus, the most important ingredient of the offence 'criminal conspiracy' is the agreement between two or more persons to do an illegal act or an act not illegal by illegal means (**Kehar Singh and others v. State (Delhi Admin.)**)². The offence of conspiracy is complete when two or more conspirators have agreed to do or cause to be done an act which is itself an offence, in which case no overt act need be established (**Lennart Schussler and another v. Director of Enforcement and another**)³.

26. The basic ingredient to constitute an offence punishable under Section 120B I.P.C. is that there must be an agreement between the parties to do an act by illegal means or to do an act, which is not illegal by illegal means. In **Noor Mohammad Mohd. Yusuf Momin v. The State of Maharashtra**⁴, an identical issue came up for consideration before the Honourable Apex Court and the Honourable Apex Court clearly laid down distinction between Section 34, Section 109 and Section 120B I.P.C. and held that Section 34 I.P.C. embodies the principle of joint liability in doing a criminal act, the essence of that liability being the existence of a common intention. Participation in the commission of the offence in furtherance of the common intention invites its application. Section 109 I.P.C. on the other hand may be attracted even if the abettor is not present when the offence abetted is committed provided that he has instigated

² AIR 1988 SC 1883

³ AIR 1970 SC 549

⁴ AIR 1971 SC 885

the commission of the offence or has engaged one or more other persons in a conspiracy to commit an offence and pursuant to that conspiracy some act or illegal omission takes place or has intentionally aided the commission of an offence by an act or illegal omission. Turning to the charge under Section 120B I.P.C., criminal conspiracy was made a substantive offence in 1913 by the introduction of Chapter V-A in the Indian Penal Code. Criminal conspiracy postulates an agreement between two or more persons to do, or cause to be done an illegal act or an act which is not illegal, by illegal means. It differs from other offences in that mere agreement is made an offence even if no step is taken to carry out that agreement. Though there is close association of conspiracy with incitement and abetment the substantive offence of criminal conspiracy is somewhat wider in amplitude than abetment by conspiracy as contemplated by Section 107 I.P.C. A conspiracy from its very nature is generally hatched in secret. It is, therefore, extremely rare that direct evidence in proof of conspiracy can be forthcoming from wholly disinterested quarters or from utter strangers. But, like other offences, criminal conspiracy can be proved by circumstantial evidence. Indeed, in most cases proof of conspiracy is largely inferential though the inference must be founded on solid facts. Surrounding circumstances and antecedent and subsequent conduct, among other factors, constitute relevant material. In fact because of the difficulties in having direct evidence of criminal conspiracy, once reasonable ground is shown for believing that two or more persons have conspired to commit an offence then anything done by anyone of them in reference to their common intention

after the same is entertained becomes, according to the law of evidence, relevant for proving both conspiracy and the offences committed pursuant thereto. As seen from the principle laid down by the Honourable Apex Court in the above judgment, there must be two or more persons to do an unlawful act by illegal means to constitute an offence punishable under Section 120B I.P.C.

27. Learned counsel for the petitioner placed reliance on the judgment of the Full Bench of the Apex Court in **Ram Narayan Popli v. CBI** (referred supra), wherein a similar question came up for consideration with regard to the offence punishable under Section 120-B IPC, wherein, the Supreme Court held in various paragraphs as follows:

“It was observed by this Court in *State of Kerala v. P. Sugathan and Anr.*, [2000] 8 SCC 203, it would be extremely difficult to find direct evidence in case of criminal conspiracy. The circumstances and surrounding factors have to be taken note of. In the instant case, the accused 1, 2 and 5 have submitted that the role of PW-5 as described is that he did not want to be directly shown in the picture. In fact, A-I wanted that MUL did not want to involve brokers and did not want to deal with them. This itself deals of fatal blow to the stand taken by the accused that there was no prohibition of acting through brokers and the intention was that dealing would be directly with the bank and not through any broker or intermediary. Much has been made out of use of the word 'through' in the resolution. If the clear understanding of A-I was that the deal should not be dealt with or involved any broker then the question of A-5 acting as broker does not arise. Use of the expression "through" is indicative of the fact that emphasis was on securities being not purchased in the open market, but "through" named PSU. These PSU were admittedly not brokers. They were either Banks or financial institutions. Evidence clearly shows that A-5 wanted that he will not directly come to the picture, and would not appear in the books of accounts of MUL; but would stand to gain by way of commission and as a brokerage from the Bank. The statement of A-I that he would look into any good proposals if A-5 does not come to the picture shows that the actual state of affairs was intended to be hidden from the MUL authorities and a totally distorted picture was sought to be given. These are factors which does not go in favour of the accused as contended, and on the contrary clearly proves conspiracy.

Much has also been submitted that repayment has been made. That itself is not an indication of lack of dishonest intention. Some times, it so happens that with a view to create confidence the repayments are made so that for the future transactions the money can be dishonestly misappropriated. This is a part of the scheme and the factum of repayment

cannot be considered in isolation. The repayment as has been rightly contended by the Solicitor General can be a factor to be considered while awarding sentence, but cannot be a ground for proving innocence of the accused.

The elements of a criminal conspiracy have been stated to be: (a) an object to be accomplished, (b) a plan or scheme embodying means to accomplish that object, (c) an agreement or understanding between two or more of the accused persons whereby, they become definitely committed to co-operate for the accomplishment of the object by the means embodied in the agreement, or by any effectual means, (d) in the jurisdiction where the statute required an overt act. The essence of a criminal conspiracy is the unlawful combination and ordinarily the offence is complete when the combination is framed. From this, it necessarily follows that unless the statute so requires, no overt act need be done in furtherance of the conspiracy, and that the object of the combination need not be accomplished, in order to constitute an indictable offence. Law making conspiracy a crime, is designed to curb immoderate power to do mischief which is gained by a combination of the means. The encouragement and support which co-conspirators give to one another rendering enterprises possible which, if left to individual effort, would have been impossible, furnish the ground for visiting conspirators and abettors with condign punishment. The conspiracy is held to be continued and renewed as to all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design. (See: American Jurisprudence Vol.11 See 23, p. 559). For an offence punishable under Section 120-B, prosecution need not necessarily prove that the perpetrators expressly agree to do or cause to be done illegal act; the agreement may be proved by necessary implication. Offence of criminal conspiracy has its foundation in an agreement to commit an offence. A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and an act of each of the parties, promise against promise, actus contra actum, capable of being enforced, if lawful, punishable if for a criminal object or for use of criminal means.

No doubt in the case of conspiracy there cannot be any direct evidence. The ingredients of offence are that there should be an agreement between persons who are alleged to conspire and the said agreement should be for doing an illegal act or for doing illegal means an act which itself may not be illegal. Therefore, the essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence or by both, and it is a matter of common experience that direct evidence to prove conspiracy is rarely available. Therefore, the circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused."

28. In view of the law declared by the Apex Court, though all the witnesses stated nothing about entering into agreement to do an illegal act or an act which is not illegal by illegal means, the Court can draw an inference from the conduct and other circumstances of the case and arrive at a conclusion.

Therefore, merely because none of the witnesses did not state anything against the petitioner in the statements recorded under Section 161 (3) Cr.P.C., the proceedings against the petitioner for the offence punishable under Section 120 B cannot be quashed.

29. The other offence petitioner allegedly committed is the offences punishable under Sections 420, 468, 471 of IPC.

30. Section 420 deals with the punishment for cheating and inducing any person with dishonest intention to part with any property etc. Section 415 defined the word cheating, which is as follows:

Cheating.—Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to “cheat”.

31. The ingredients to constitute the offence punishable under Section 420 is laid down by the Apex Court in **V.Y.Jose v. State of Gujarat**⁵, which are as under:”

“An offence of cheating cannot be said to have been made out unless the following ingredients are satisfied:

(i) deception of a person either by making a false or misleading representation or by other action or omission;

(ii) fraudulently or dishonestly inducing any person to deliver any property; or

(iii) To consent that any person shall retain any property and finally intentionally inducing that person to do or omit to do anything which he would not do or omit.

For the purpose of constituting an offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation.

⁵ (2009) 3 SCC 78

Even in a case where allegations are made in regard to failure on the part of the accused to keep his promise, in absence of a culpable intention at the time of making initial promise being absent, no offence under Section 420 of the Indian Penal Code can be said to have been made out.

An offence of cheating may consist of two classes of cases:

- (1) where the complainant has been induced fraudulently or dishonestly. Such is not the case here;
- (2) When by reason of such deception, the complainant has not done or omitted to do anything which he would not do or omit to do if he was not deceived or induced by the accused.”

32. In view of the law declared by the Apex Court, in order to constitute an offence punishable under Section 420, there must be a cheating and inducement with a dishonest intention to part with any amount of property etc., by a person who was deceived by the accused. Here, based on the turnover certificate, allegedly issued by this petitioner – accused No.3, being a Chartered Accountant, based on the books of accounts and other documents produced before him, he issued turn over certificate enabling authorities of Customs Department to accept the legal undertaking which a *sina qua non* for issuing import licence, as an alternative to furnish bank guarantee. Basing on legal undertaking, accused No.1 issued import licence exempting custom duty on the material purchased, imported by accused No.2 from foreign companies and claimed exemption of Rs.6,52,01,817/- approximately by accused No.2, but when the records are verified, accused No.2 did not transact any business during relevant years mentioned in the certificate to the amount stated therein and issued such certificate enabling the customs Department to accept the legal undertaking, instead of furnishing bank guarantee, caused huge loss to the extent of Rs.5,20,84,464/-, by way of exemption of customs duty based on

fake import and export orders. Therefore, the petitioner is a person who issued such certificate is responsible directly for issue of import licence to accused No.2. Therefore, when the petitioner induced by issuing turnover certificate to accede to legal undertaking which is a pre-condition for issue of licence is suffice to conclude that petitioner also took part in the fraud, cheating and inducements to issue such import licence in favour of accused No.2, thereby caused loss to a tune of Rs.5,20,84,464/- approximately. The act of this petitioner would fall within the definition of cheating under Sections 415 and 420 of IPC, by applying the principles laid down in **V.Y.Jose's** case(supra), to the present fact of the case. Consequently, I find that the role played by this petitioner by issuing false turnover certificate enabling accused No.2 to obtain import licence furnishing legal undertaking instead of furnishing bank guarantee *prima facie* constitutes offence punishable under Section 420 IPC, as the said Rajaji Associates is never in existence at the address given and did not transact the business to claim exemption of Rs.6,52,01,817/-. Therefore, I find *prima facie* material against this petitioner to proceed for the offences punishable under Section 420 IPC.

33. The other offence allegedly committed by the petitioner is the offences punishable under Section 468 IPC. Section 463 IPC defined the word forgery and Section 468 deals with punishment for such offence. But the allegations made in the charge sheet including the statement of the witnesses recorded under Section 161 Cr.P.C. do not constitute the offence punishable under Sections 468 and 470 IPC.

34. One of the major contention raised by the learned Senior counsel Sri C.Nageswara Rao is that the duty of the auditor is to verify the books of accounts and issue turnover certificate based on the entries in the books of accounts and other documents placed before him and thereby he cannot be prosecuted for the offences referred supra. His contentions are based on the judgment of the Apex Court in **Commissioner of Income Tax, Madras Vs. G.M.Dandekar of M/s.M.K.Dandekar and Company Chartered Accountants, Madras** (supra). The Madras High Court while dealing with the duties of the Chartered Accountant to Income Tax Department being an auditor, held as follows:

“If the Chartered Accountant was auditing the accounts of a joint stock company, he is under a clear duty to “probe into the transactions” and report on their true character. But when the auditing relates to the accounts of individuals, the auditor acts only for those individuals and it is his duty to act on their instructions, and to audit the accounts produced by them and prepare statements from them. He is under an obligation to them to perform the auditing with due skill and diligence and if he does that it is difficult to see what further obligation he has in the matter and in favour of whom. The accountant is under a duty to prepare and present correct statements of the accounts of the assessee, and he should, of course; neither suggest nor assist in the preparation of false accounts. But he is under no duty to investigate whether the accounts produced by the assessee are correct or not. That is a matter for the decision of the Income-Tax Tribunals. He is under no duty to the department and thereby accountant was not guilty of any conduct which rendered him unfit to be a member of the Institute”.

35. This decision deals with the duties of the Chartered Accountant towards Income Tax Department. But this judgment though referred in the later judgment of this Court in **Indian Institute of Chartered Accountants Vs. Mukesh Gong and Company**, held that issue of false certificate to the public while inviting investments amounts to serious misconduct. Therefore, based

on the judgment referred supra, it is difficult to held that this petitioner is not responsible for such acts.

36. The petitioner is a Chartered Accountant and the Government is a third party and the auditor's legal liability to the third parties is also relevant at this stage. When a professional man, in the course of his practice, causes harm to someone, other than the person who has engaged his services, the extent of his legal liability to the injured party is not always clear. This is so even when the petitioner is a member of one of the older professions, since most of the decided cases have involved injuries to clients rather than to the third parties. The lack of precedent is even more pronounced in the case of public accountants, whose status as a major professional group is relatively new. Moreover, the utility of few decisions that do exist in this field is limited, as a basis for prediction, by the probability that each new case which arises will be distinguishable on its facts from all the cases that have gone before. Nevertheless, the best way to gain an understanding of the present state of common law on accountants' liabilities to the third parties is to study the cases involving this problem, with brief excursions into related cases involved in member of other professions. Moreover, it has been said with reference to the decision on accountants' liability that "...an intimate knowledge of facts and the law of these cases and their possible implications will do more than anything else to develop a technique of imaginative thinking and alertness in our work and awareness of the importance of complying with our own standards". When a tort of fraud involves, false representations, willfully or

recklessly made for the purpose of tricking or leading another on to his damage, several ailments must be present. First, there must be false representation. Silence where there is a duty to speak is considered equivalent to a false representation. Second, the person maintaining the representation must know or believe that it is false, or be in conscious ignorance of its truth and must make it with an intent to deceive. Finally, the third party i.e. Customs department must have relied on the representation and must have suffered injury thereby. The tort of negligence may be defined as failure to use that degree of care which a person of ordinary carefulness would use under the circumstances. Among the “circumstance”, of course, would be the petitioner’s status as a member of a skilled profession. For example, the making of a false representation with honest belief in its truth, but with lack of reasonable care in ascertaining the facts or in the manner of expressing the conclusion, would constitute negligence. In view of the constant development of auditing standards and techniques and the inevitable factual differences from case to case, the meaning of “reasonable care” in the field of auditing cannot be definite or fixed.

37. In **Landell Vs. Lybrand**⁶ handed down by the Supreme Court of Pennsylvania in 1919, the accounting firm of Lybrand, Ross Brothers and Montgomery had audited the financial statements of a client corporation for the year 1911 and certified their accuracy. Landell, the plaintiff, alleged that he had relied on this audit report in purchasing shares of the client company’s

⁶ 264 Pa.406, 107 Atl. 783 (1919)

stock. He alleged further that the stock was actually worthless, that the certificate was false and untrue, and that the negligence of the accounting firm was the cause of his loss. He conceded, however, that the report had been shown to him by somebody other than the accounting firm and that it had not been made with intent to deceive him in particular. The Court held that even if his allegations were all true the plaintiff could recover nothing from the accountants, for the following reasons:

There were no contractual relations between the plaintiff and defendants, and, if there is any liability from them to him, it must arise out of some breach of duty, for there is no averment that they made the report with intent to deceive him. The averment in the statement of claim is that the defendants were careless and negligent in making their report; but the plaintiff was a stranger to them and to it, and, as no duty rested upon them to him, they cannot be guilty of any negligence of which he can complain.

38. In another judgment in **Glanzer Vs. Shepard**⁷, a certificate of balance sheet showed a net worth of some \$1,071,000. As a matter of fact company was insolvent on December 31st, 1923, although it was not declared bankrupt until 1925. Stern and his subordinates, as officers of the firm, had falsified the books so as to set forth accounts receivable and other assets which were wholly fictitious and to omit accounts payable for merchandise which had been purchased and received. During 1924 Sterna and Company requested and obtained a series of large loans from the plaintiff, including a loan of \$165,000 in one month alone. As a condition of these loans the plaintiff demanded a balance sheet certified by public accountants, and Stern submitted one of the thirty two counterpart originals certified by the defendants.

⁷ 233 NY 236, 135 NE 275 (1922)

In 1926, the plaintiff sued the defendants to recover the loss of more than \$187000 which it had suffered by relying upon the audit certificate. The plaintiff alleged that both parts of the certificate contained misrepresentation, first where the accountant certified that to their own knowledge the balance sheet corresponded to the accounts, and second where they certified to a belief that the balance sheet presented a true and correct picture of the client's financial condition. The theory of the plaintiff's case was that the first sentence of the certificate, being a statement of fact, constituted fraud, while the second sentence, being an erroneous statement of opinion by persons in the business of expressing such opinions, constituted negligence.

39. If the theory of negligence is applied to the present facts of the case, it may be a ground to claim compensation in common law for the gross negligence on the part of the accountant. If the professional Chartered Accountant's negligence is culpable, it constitute an offence. In one of the cases decided by Delhi High Court reported in **Council of The Institute of Chartered Accountants of India Vs. Dayal Sing F.C.A. and others**⁸, the Division Bench of the High Court held that issuance of false certificate of having got the required contribution for availing term loan from the bank amount to other misconduct under the Act. Punishment of removal from rolls was affirmed by the Division Bench of the High Court of Delhi. In another judgment in **Before the Securities and Exchange Board of India, Mumbai**⁹, the learned Single

⁸ AIR 2007 Delhi 263

⁹ MANU/SB/0006/2018

Judge adverted to the judgment of this Court in ICAI Vs. Mukesh Gong, wherein this Court (myself is one of the member of the Bench) observed as under:

“The Chartered Accountant is a professional whose expertise in accountancy is acknowledged. He is a member of an expert body and of a premier institute of India. The certificate issued by an Auditor has its own impact on the public at large, as it is largely on the basis of this certificate that the general public subscribe to the shares of the company. Reckless certification by an Auditor, which has resulted in the public being misled into subscribing to the shares of the company in the public issue, would undoubtedly amount to gross negligence. Large sections of society rely on the certification by the Chartered Accountants for taking many vital decisions. It is imperative that utmost care and caution is exercised in issuing such certificates, and the objectivity, integrity, reliability and credibility of the information therein is ensured. Of late, several instances have come to light where, due to the erroneous/ambiguous advice tendered by Chartered Accountants, borrowal accounts have had to face quick mortality resulting in huge losses for banks and financial institutions. To ensure public faith and protect gullible small investors from being cheated of their life savings, the Institute should ensure that its members possess competence of a high order, their character is above board, and their integrity beyond reproach. Chartered Accountants are responsible to the public for their actions, as heavy reliance is placed on their credibility by the general public consisting of investors, banks, financial institutions, Governments etc. The Chartered Accountants duty is not merely to his client, but extends to various segments of society, more particularly in the commercial field, on whose expertise, integrity and impartiality they rely on in taking various decisions.

Gross negligence, sometimes called ‘willful blindness’ is the same thing as ‘negligence’, with the additional of a vituperative epithet.”

175. In Registrar of Companies, Bombay Vs. P.M.Hegde (MANU/TN/0456/1954 : AIR 1954 Mad. 1080) decided on 30th April 1954, the Hon'ble Madras High Court, in the context of alleged failure of an auditor to verify the cash on hand as on the date of balance sheet properly, considered the question whether the auditors job is to verify mathematical accuracy of the entries in various documents. The Hon'ble High Court of Madras therein had referred to the following case, before confirming that the auditor failed to discharge his duty as an auditor of the Rural Bank of India Limited:

'Leeds Estate, Building & Investments Company Vs. Shepherd' (1887) 36 Ch D 787 at p.802, Stirling J. observed thus:

"It was in my opinion the duty of the auditor not to confine himself merely to the task of verifying the arithmetical accuracy of the balance sheet, but to inquire into its substantial accuracy, and to ascertain that it contained the particulars specified in the articles of association (and consequently a proper income and expenditure account) and was properly drawn up, so as to contain a true and correct representation of the state of the company's affairs."(emphasis applied).

176. In Halsbury's Law of England, Second Edn. Vol. V at page 385, we find the following:

"It is the duty of an auditor to verify not merely the arithmetical accuracy of the balance sheet but its substantial accuracy, to see that it includes the particulars required by the articles and by statute, and contains a correct representation of the state of the company's affairs. While, therefore, it is not his duty to consider whether the business is prudently conducted, he is bound to consider and report to the shareholders whether the balance sheet shows the true financial position of the company. To do this he must examine the books and take reasonable care to see that their contents are substantially accurate."

177. In – ‘In re London and General Bank (No.2)’, 1895-2 Ch 673 (D) at pp.682-3 Lindley L.J. after stating that the business of the auditor is to ascertain and state the true financial position of the company at the time of the audit, and that his duty is confined to that, asked the question, “How is he to ascertain that position?” and answers it thus:

“The answer is, by examining the books of the company, but he does not discharge his duty by doing this without inquiry and without taking any trouble to see that the books themselves show the company’s true position. He must take reasonable care to ascertain that they do so. Unless he does this his audit would be worse than an idle farce.....But his first duty is to examine the books, not merely for the purpose of ascertaining what they do show, but also for the purpose of satisfying himself that they show the true financial position of the company.”

178. Again in the case CA Rajesh Dudhwala Vs. Disciplinary Committee decided by the Gujarat High Court on 6th November, 2012 where the writ was filed by a Chartered Accountant challenging the decision of the institute to **debar** him from active practice for a period of one year, it was observed as under:

“27. A Chartered Accountant has an obligation, not only statutory but also moral and social, to be absolutely and completely diligent and cautious and careful while preparing, signing and certifying Annual Accounts and/or Audit report. Several Government and private organizations and individuals rely on the report/certificate by Chartered Accountant and once a particular factual aspect or entries, etc. are prepared, signed and certified by Chartered Accountant they are ordinarily accepted without further probing or investigation. In such circumstances, the duty and obligation of being absolutely diligent, conscious and careful is multiplied manifold and a Chartered Accountant should not, and cannot take, such obligation or perform his duties lightly or casually. A mistake by a petty clerk or lower level accountant may be dealt with in different manner but a mistake

by a Chartered Accountant cannot be treated with indifference or casually or lightly....”

179. In short, the law has assigned a very crucial and pivotal role to independent auditors in a public company. The certifications issued by Auditors have a definitely influence on the minds of the investors. The auditors owe an obligation to the shareholders of a company to report the true and correct facts about its financials since they are appointed by the shareholders themselves. I would put it that, the duty of a Chartered Accountant is not only towards his clients, but also towards the larger public which includes, the banks and other financial institutions, the government departments like tax department, other sectoral regulators in the country etc., besides the investors. Nothing assumes importance to a market regulator than the fact that these certifications appear to be reduced to unseen understandings between the auditors and their paymasters and a mere projection of a paper exercise for record purposes.

And finally, the Board in para 181, concluded as under:

The auditors, at every instance, have done a passive, peripheral or a superficial verification which apparently is only to show on records that some verifications have been done. For every vital aspect, such as verification of invoices and bank balances, subsequent realization of debtors, they relied on BRS, OF, IMS, bank statements procured from the company. The plea that nothing aroused their suspicion itself shows that they have not looks for any circumstances beyond the comparisons or verifications against the records provided the company. This appears to have been done by them to create records for an eyewash of an audit exercise.”

40. The duties of the auditors are highlighted in the above judgments. Failure to exercise due diligence amounts to misconduct. Similarly, in **Central Bureau of Investigation Vs. Hari Singh Ranka and others {2018 (1) RCR**

(Criminal) 336} , the Division Bench of the Apex Court held that investigation disclosed that Export Packing Credit (EPC) is the facility granted by the Bank to enable the borrower to purchase raw material, process them, and export the finished goods. The repayment of EPC is by way of proceeds received by realization of Export Bills by the Bank. For the purpose of releasing the Export Packing Credit (EPC), the company was obliged to submit to the Bank Confirmed Export orders based upon which the Bank was to release the EPC within the overall sanctioned limit. Investigation reveals that there are 33 such instances wherein S/Sh.Hari Singh Ranka (A1) and Sachin Ranka (A2) conspired with the other accused authorized signatories viz. S/Sh.Ram Ratan Maheshwari (A6), Tarachand Chajera (A7), Vimal Prakash Agarwal (A8), Pradeep Kumar Jain (A9), Sureshchand Maheshwari (A10) and Hansmukh Das Sethi (A11), through M/s.Modern Denim Limited (A13) and authorized them to issue request letters to the Bank for release of Packing Credit Advances.

The above said accused persons through their company M/s.Modern Denim Limited (A13) availed 33 packing Credit Advances for exporting denim fabric to 10 Foreign Buyers by submitting orders in the form of sale contracts of M/s.Modern Denim Limited itself instead of a firm order of the company. The sale contracts are not of Foreign Buyers and they are in the letter head of Modern Denim Limited itself. The identity of authorized signatory on the sale contract of the letter head of Modern Denim Limited is not known and so also the authorized signatory who has signed on behalf of a foreign buyer. The document is as such a fake export order. In 5 instances even the purported

sale contracts are only photocopies and the originals were not submitted to the bank authorities. No LC was opened for any guarantee for realization of funds. Finally against all these 33 instances of packing credit advances, no export was made by the accused persons through M/s.Modern Denim Limited. Consequently, since no foreign bills were sent for collection or discount, no money could be realized by the Bank. However, it was revealed during investigation that the Export Packing Credit Advances obtained by the accused persons were never utilized for the purchase of raw material for export and instead, the funds were used for liquidating/clearing off the dues. The said facility was provided basing on the documents that sale contract were prepared on the letter head of M/s.Modern Denim Limited. It is further the case of the prosecution that the advances obtained by the accused persons were never utilized for purchase of the material thereto to execute the aforesaid purchase orders, but were diverted by the accused persons to liquidate the outstanding dues of M/s.Modern Denim Limited against the LCs. which has devolved. The banks had suffered the loss of Rs.599.08 lakhs in the aforesaid 33 instances where packing credit was availed on the basis of false and forged purchase orders. As per the charge sheet, the respondents had got LCs issued from the bank in favour of fictitious companies propped up by them and the fictitious beneficiary companies had got letters of credits discounted by attaching their bogus bills. The names of 10 fictitious companies have been mentioned in the charge sheet. Thus, allegation of forgery is very much there. The Apex Court declined to quash the proceedings placing reliance of the

judgment in **Ashok Sadarangani and another Vs. Union of India and others**¹⁰, wherein the CBI made an allegation that they had secured credit facility by submitting forged documents as collected and utilized such facilities in a dishonest and fraudulent manner by obtaining letters of credit in respect of foreign suppliers of goods without actually bringing any goods but inducing the bank to negotiate letters of credit in favour of the foreign suppliers and also by exercising the cash credit facility. Thereby the persons, who issued certificates are also liable for the offences.

41. In **Sushil Suri Vs. Central Bureau of Investigation and another**¹¹, the Apex Court made the following observations:

“It is manifest from a bare reading of the charge sheet, placed on record, that the gravamen of the allegations against the appellant as also the co-accused is that the company, acting through its directors in concert with the Chartered Accountant and some other persons: (i) conceived a criminal conspiracy and executed it by forging and fabricating a number of documents, like photographs of old machines, purchase orders and invoices showing purchase of machinery in order to support their claim to avail hire – purchase loan from PSB;

(ii) on the strength of these false documents, PSB parted with the money by issuing pay orders and demand drafts in favour of the company; and

(iii) the accused opened six fictitious accounts in the banks (four accounts in Bank of Rajasthan and two in Bank of Madras) to encash the pay orders/bank drafts issued by PSB in favour of the suppliers of machines, thereby directly rotating back the loan

¹⁰ MANU/SC/0209/2012: (2012) 11 SCC 321

¹¹ MANU/SC/053/2011 : (2011) 5 SCC 708

amount to the borrower from these fictitious accounts, and in the process committed a systematic fraud on the bank (PSB) and obtained pecuniary advantage for themselves.

Precise details of all the fictitious accounts as also the further flow of money realized on encashment of demand drafts/pay orders have been incorporated in the charge-sheet. Additionally, by allegedly claiming depreciation on the new machinery, which was never purchased, on the basis of forged invoices, etc., the accused cheated the public exchequer as well.

42. Based on the said judgments, the Apex Court declined to quash charge sheet against the petitioners therein and the facts of the above judgments in **Ashok Sadarangani and another Vs. Union of India and others** (supra) and **CBI Vs. Harisingh Ranka**¹² are almost identical to the present facts and circumstances and also principles laid down therein has direct application to the present case. Similarly, in **Hardayal Gumber and others Vs. CBI and others**¹³, the learned Single Judge of Delhi High Court held that false and forged document regarding completion of work, bill receipt etc, held that when loan was sanctioned on the basis of sale deed executed by accused No.2 therein in favour of his wife accused No.3 on basis of photocopy of sale deed in violation of bank rules and regulations, Accused No.2 had used original sale deed to obtain another loan from State Bank of Patiala. The act of the petitioners constituted an offence as he produced false and forged work completion certificate, bill receipt, etc. Though the petitioner has paid entire amount due to

¹² CRIMINAL APPEAL No(s). 1289 OF 2017
(Arising out of SLP (Crl.) No.5857 of 2012)

¹³ 2011 X AD (Delhi) 28, 184 (2011) DLT 385, 2012 (1) RCR (Criminal) 571

bank and were issued no due certificate, the method adopted by the petitioner to get loan sanctioned could not be accepted and thereby crime cannot be quashed.

43. One of the contention raised by the learned counsel for the petitioner is that charge sheet was filed for various offences, though the role played by the petitioner is limited. Issue of turnover certificate enabling accused No.2 to execute a legal undertaking, instead of furnishing bank guarantee to obtain import licence is not in dispute, but issue of a certificate would not constitute the offence. The Apex Court in **Bishandas Vs. State of Punjab and another**¹⁴ held that the appellant being Sarpanch was legally bound to issue certificate containing correct information. However, he intentionally issued false certificate containing false information which would constitute an offence punishable under Section 177 IPC. But, there is no evidence to show that issuance of false certificate by the appellant with a dishonest intention to make wrongful gain for himself. Therefore, the ingredients for the offence punishable under Section 420 IPC are not proved and the conviction under Section 420 IPC was set aside.

44. Even if this principle is applied in the facts of the case, apparently, the certificate issued by the petitioner accused No.3, certifying that the turn over of accused No.2 is false, as he did not verify the records and other material and therefore that would attract the offence punishable

¹⁴ (2014) 15 SCC 242

under Section 177 IPC *prima facie*. Moreover, the proof of offence punishable under Section 420 IPC depends upon the evidence adduced before the Court and if prosecution was able to produce the evidence that this petitioner issued such certificate consciously knowing the ill consequences that flow from such act with a dishonest intention to make wrongful gain for himself and to cause wrongful loss to person deceived, part with any property, it would constitute an offence punishable under Section 420 IPC also. Therefore, whether the petitioner has issued false turnover certificate with a dishonest intention or not is the question of fact and it can be proved only by adducing satisfactory evidence to record conviction of the petitioner for the offence punishable under Section 420 IPC. But at this stage it is difficult to quash proceedings on the ground that these allegations do not constitute offence, if the principles laid down in *Bishandas case* (supra) is applied in the present facts in issue, to constitute an offence under Section 177 IPC, subject to proof of dishonest intention to have wrongful gain. The material on record *prima facie* point out complicity of the petitioner for the offence punishable under Section 420 IPC.

45. An identical question has come up before the High Court of Calcutta in **Mahesh Agarwalla Vs. Assistant Director, Directorate of Enforcement (ED), Government of India, Central Bureau of Investigation (CBI)**¹⁵, wherein it is held that even when a certificate was

¹⁵ 2017 LawSuit (Cal) 1622

issued with false statements projected financial statements of the firm and there is ample material on record to show that such projected statements were based on forged and fabricated documents and had been generated to create false impression with regard to the financial liability of the firms. Based on such financial status of Chartered Accountant, sanctioned cash credit facilities in total deviation of bank proceeds, fraudulently. Preparation of projected statements made in bank to believe in same status which *prima facie* constitutes an offence, though the Chartered Accountant exonerated for his misconduct by the Institute of Chartered Accountants of India, still the proceedings against him cannot be quashed.

46. Persuaded by this principle, applying the principle laid down in Bishandas case and other cases applied to the present facts of the case, proceedings against the petitioner cannot be quashed for the offences punishable under Sections 120 B and 420 IPC, while finding no material against the petitioner for the offences punishable under Sections 468 and 471 IPC.

47. The power of this Court under Section 482 Cr.P.C. is permitted and this Court on exercising such power under rarest of the rare cases under Section 482 Cr.P.C. conceive inherent jurisdiction of the Court to implement orders passed by this Court to prevent abuse process of the Court and to secure ends of justice. Keeping the scope of Section 482 Cr.P.C., the Apex Court in **Bhajanlals case** laid down following seven guidelines. In **State of Haryana v.**

Bhajan Lal¹⁶, the Supreme Court in the backdrop of interpretation of various relevant provisions of the Cr. P. C. under Chapter XIV and of the principles of law enunciated in a series of decisions relating to the exercise of the extraordinary power under Article 226 of the Constitution of India or the inherent powers under section 482 Cr. P. C. gave the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of the court or otherwise to secure the ends of justice. The broad guidelines laid down by the Supreme Court in this regard are:-

"(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under section 156 (1) of the Code except under an order of a Magistrate within the purview of Section 155 (2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a magistrate as contemplated under Section 155 (2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or

¹⁶ 1992 Supp. (1) SCC 335

where there is a specific provision in the Code or the Act concerned, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.”

48. According to the guidelines, if the allegations made in the complaint or charge sheet *prima facie* disclose commission of offence, accepting allegations on its face value, the Court cannot exercise power to quash the proceedings. But, in the present case, allegations made in the charge sheet though constitute offence punishable under Section 120 B and Section 420 IPC, but no *prima facie* material is found against this petitioner for the offence punishable under Section 468 and 471 IPC and consequently the proceedings against this petitioner for the offence punishable under Sections 468 and 471 IPC are liable to be quashed, while directing the Special Judge to proceed against the petitioner for the offence punishable under Section 120 B, 420 and Section 13 (2) read with Section 13(1)(d) of Prevention of Corruption Act.

In the result, the Criminal Petition is allowed in part.

M. SATYANARAYANA MURTHY, J

Dt.12.10.2018

vhb