

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION NO.5929 OF 2016

ORDER:

The petitioner/Accused No.15, Sri C.V. Koteswara Rao, who is a Chartered Accountant in M/s Ramasamy Koteswara Rao & Company filed this criminal petition under Section 482 Cr.P.C to quash the proceedings in C.C.No.27of 2013 pending on the file of Principal Special Judge for C.B.I cases, Hyderabad. Though the petitioner was charged for the offences punishable under Sections 120-B r/w 420, 409, 468, 471, 477-A I.P.C and Sections 9, 11, 12, 13(2) r/w 13(1(c) & (d) of Prevention of Corruption Act, 1989 (for short 'P.C. Act'), cognizance was taken only for the offences punishable under Sections 120-B, 420, 468 & 471 I.P.C.

It is the case of the respondent/prosecution that the State Government announced the first I.T. Policy vide G.O.Ms.No.114 Finance & Planning (Planning-IT&C) Department dated 25.05.1999 with an object to transform the State into knowledge society and decided allotment of lands to I.T. Industry through APIIC. Under this policy, each I.T. Park was earmarked 5% total built up space for incubating new companies to provide employment opportunities. Sri I. Syam Prasad Reddy (A-3) Managing Director of M/s Indu Projects Limited (A-4) submitted an application for allotment of Ac.250 of land in Sy.No.99/1 at Mamidipally in Ranga Reddy district along with necessary information viz., copies of certificate of incorporation, Memorandum & Articles of Association, Annual Reports, Statement of Turnover, Network of lead developer/other developers, development plan, copy of General Power of Attorney from lead developer in case of consortium.

Smt.K.Ratnaprabha I.A.S (A-7), Secretary endorsed on the said application **“Process & Put-up”** on the same day. Sri I. Syam Prasad Reddy (A-3) in his application, proposed to develop IT park through a consortium. M/s. Indu Projects Limited (A-4) having turnover for the preceding years was shown at Rs.128.490 crores (2004-05); Rs.59.245 crores(2003-04); Rs.16.615 crores (2002-03) and Rs.1.347 crore (2001-02) and enclosed annual reports. M/s. Golf Links Software Park Private Limited, Bangalore and M/s. Kotak Mahindra Investments Limited, Mumbai were declared as other members of the proposed consortium. Combined Net worth of the consortium was shown at Rs.1,000 crore and enclosed a copy of the Power of Attorney dated 17.12.2005 in favour of M/s. Indu Projects Limited (A-4) as the lead member of the consortium.

The consortium agreement was signed by M/s. Golf Links Software Park Private Limited, Bangalore and M/s. Indu Projects Limited (A-4) and no person from the third member of the proposed consortium i.e. M/s. Kotak Mahindra Investments Limited, Mumbai signed the document. In the application Sri I. Syam Prasad Reddy (A-3) declared that he has fully read, understood and he shall abide by the terms and conditions mentioned in the BOI/Tender document. He further declared that the particulars/information given in the application are correct and in case it is found that the information furnished is found false at any given point of time, either at the time of selection or during execution of the project, the application is liable to be rejected and he will be liable for penalty as decided by the Government. In pursuance of the criminal conspiracy and in active connivance with Sri I. Syam Prasad Reddy (A-3), the petitioner/A-15 being the professional Chartered Accountant and as partner of M/s.

Ramasamy Koteswara Rao, Chartered Accountants, knowing fully well about the functioning and financial status of M/s. Indu Projects Limited (A-4) as auditor, fraudulently issued the fake certificates dated 19.12.2005 certifying that M/s. Indu Projects Limited (A-4) has constructed 27,47,255 sq.ft of projects during the period between 2002-2005 on their own and certificate dated 20.01.2006 certifying that M/s. Indu Projects Limited (A-4) has executed 11,12,540 sq.ft in the year 2002-03; 1,65,715 sq.ft in 2003-04 and 19,69,000 in 2004-05 respectively.

A Consultative Committee on IT Industry (CCITI) headed by Smt.K.Ratnaprabha (A-7), Secretary along with Sri D. Pardhasaradhi Rao (A-10), Chief Engineer, APIIC and others discussed the issue of allotment of lands to M/s. Indu Projects Limited (A-4), M/s. Brahmani Infratech Private Limited and M/s. K. Raheja Corporation Private Limited and resolved to adopt transparent and short duration method to identify the developers who can bring in quality IT space along with associated social infrastructure on large scale. The Committee, after deliberations, evolved two fold criteria for selection of the developers. On the technical front, it was decided that the company should have developed and/or constructed either on its own or on behalf of reputed clients, the buildings related to IT Parks/SEZ and/or large commercial, residential, office building projects not less than a minimum of 4 Million (40 lakh) Sq.ft. Projects under development or at the proposal shall not form part of the constructed space. The Committee also decided that the developer company should have minimum net-worth of Rs.250.00 crore as per the last audited annual accounts and the developer was required to submit the basic documents like annual reports; net worth statements; IT

returns for preceding 3 years. The Committee further decided that the experienced companies that built space should continue in the consortium of developers till completion of the project and till at least 50% of the built-up space is occupied.

Subsequent to CCITI meeting, Smt. K. Ratnaprabha (A-7) has forwarded the applications of M/s. Indu Projects Limited (A-4), M/s. Brahmani Infratech Private Limited, M/s.K. Raheja Corporation Private Limited and M/s. Maven Park to APIIC with a direction to examine the applications, keeping in view the parameters evolved in the CCITI's meeting for selection of IT park developers.

On 09.01.2006, Sri B.P. Acharya (A-9) addressed letters to the above companies to furnish the information in the checklist of the criteria along with necessary supporting documents to APIIC for evaluation. In response to the letter dated 09.01.2006 of Sri B.P. Acharya (A-9), Sri I. Syam Prasad Reddy (A-3) submitted a letter dated 20.01.2006 stating that they have requisite experience and know how to develop SEZ, along with their strategic allies and proposed to form a Special Purpose Vehicle (SPV) with M/s. Infrastructure Development Finance Company (M/s. IDFC) and M/s. Golf Links Software Park Pvt. Ltd., to develop SEZ and requested for allotment of 250 acres of land.

M/s. Indu Projects Limited (A-4) declared that they were to be the lead consortium member, whereas, M/s. IDFC, Mumbai and M/s. Golf Links Software Park Pvt. Ltd., Bangalore as financial and technical members respectively. Net worth of M/s. Indu Projects Limited (A-4), lead member, for the year 2003-04 was shown at Rs.36.30 crore and the turnover of preceding three year was shown

at Rs.128.49 crore (2004-05); Rs.59.24 crore (2003-04) and Rs.16.61 crore (2002-03). The net worth of M/s. IDFC was shown as Rs.886.86 crore. In the experience column, consortium members viz., M/s. Indu Projects Limited (A-4) and M/s. Golf Links Software Park Pvt. Ltd., together were shown to have developed 42,94,767 sq.ft. In the certificate dated 20.01.2006 which was certified by the petitioner herein/As-15, it was shown to have developed 11,12,540 sq.ft in the year 2002-03; 1,65,715 sq.ft in 2003-04 and 19,69,000 in 2004-05 respectively and M/s. Golf Links Software Park Pvt. Ltd., Bangalore was shown to have developed 10,47,512 sq.ft during the years 2001-02 to 2003-04. Thus, the petitioner herein/A-15 issued certificates certifying the execution of work by M/s. Indu Projects Limited (A-4) at inflated rate so as to get allotment of land satisfying the eligibility conditions to grab the development project. Therefore, this petitioner/A-15 allegedly conspired with the other accused viz., Sri I. Syam Prasad Reddy (A-3), M/s. Indu Projects Limited (A-4) and M/s. Golf Links Software Park Pvt. Ltd., and issued such certificates. Therefore, he is charged for the offences punishable under Sections 120-B r/w 420, 409, 468, 471, 477-A I.P.C and Sections 9, 11, 12, 13(2) r/w 13(1)(c) & (d) of P.C. Act, but, later cognizance was taken only for the offences punishable under Sections 120-B, 420, 468 & 471 I.P.C by the Special Judge for C.B.I cases, Hyderabad.

The main contention of the learned Senior Counsel for the petitioner Sri T.Niranjan Reddy before this Court is that, the petitioner is only a Professional Chartered Accountant and there is nothing wrong in issuing certificates, certifying the work executed by M/s. Indu Projects Limited (A-4) for the relevant years and he

had no criminal intention to defraud the Government or to falsify the accounts, thereby, there is absolutely no *prima facie* material to proceed against this petitioner for the offences punishable under Sections 120-B, 420, 468 & 471 I.P.C. But, the Special Judge for C.B.I cases took cognizance mechanically.

It is also contended that the Special Judge for C.B.I cases can issue summons only after forming an opinion on the basis of due application of mind, since issue of summons will have serious consequences to face the criminal charges. Apart from that, none of the witnesses, more particularly, L.W-11 stated nothing against the petitioner to constitute any offence allegedly committed by him. In the absence of any evidence, proceeding against this petitioner/A-15 is nothing but abuse of process of the Court.

It is further contended that, the petitioner is only a professional Chartered Accountant who issued a certificate based on the books produced before him and no criminal attributions can be made against him to rope him in serious offences punishable under Sections 120-B, 420, 468 & 471 I.P.C and prayed to quash the proceedings against the petitioner/A-15.

During hearing, learned Senior Counsel for the petitioner demonstrated that the petitioner did not certify execution of work for more than 42,94,767 sq.ft which is the basic requirement to fulfil the conditions of tender. Only Sri I. Syam Prasad Reddy (A-3) allegedly included the work executed by M/s. Golf Links Software Park Private Limited, Bangalore, being the lead partner of the consortium and, therefore, the petitioner who issued a certificate cannot be saddled with any criminal liability and drawn attention of this Court to the certificates issued by this petitioner and also

the letters addressed by M/s. Indu Projects Limited (A-4) to establish *prima facie* case that the petitioner did not certify that M/s. Indu Projects Limited (A-4) executed the work for more than 42,94,767 sq.ft during relevant period.

The main contention of the learned counsel for the petitioner is that, when there is no material *prima facie* to conclude that this petitioner committed any offence, the Court cannot proceed against this petitioner, since it amounts to abuse of process of this Court and prayed to quash the proceedings against the petitioner by applying the principle laid down by the Apex Court in **State of Haryana v. Bhajan Lal**¹.

Whereas, Sri K. Surender, learned Special Public Prosecutor for C.B.I contended that the two certificates dated 19.12.2005 and 20.01.2006 were issued by this petitioner obviously for the reason that, M/s. Indu Projects Limited (A-4) has to get the work allotment, otherwise M/s. Indu Projects Limited (A-4) would not be eligible for making an application for the work. Therefore, based on the two certificates, learned Special Public Prosecutor would contended that there is *prima facie* material against this petitioner and if the Court finds *prima facie* material to proceed against this petitioner to constitute the offences allegedly committed by him, the Court cannot quash the proceedings at this stage and prayed to dismiss the petition.

Considering rival contentions, perusing the material available on record, the point that arise for consideration is

¹ 1992 Supp. (1) SCC 335

“Whether there is prima facie material to proceed against this petitioner for the offences punishable under Sections 120-B, 420, 468 & 471 I.P.C. If not, whether the proceedings against this petitioner in C.C.No.27of 2013 pending on the file of Principal Special Judge for C.B.I cases, Hyderabad are liable to be quashed?.”

P O I N T:

It is an undisputed fact that this petitioner/A-15 is a professional Chartered Accountant who issued certificates dated 19.12.2005 and 20.01.2006, certifying the works executed by M/s. Indu Projects Limited (A-4) for the years 2002-2005. But, the eligibility for grant of work is execution of work not less than a minimum of 4 Million (40 lakh) Sq.ft. Initially, in the certificate dated 19.12.2005, the petitioner certified that M/s. Indu Projects Limited (A-4) executed work of 27,47,255 sq.ft during the period 2002-2005 and the total cost of the projects was Rs.177.22 crores; whereas, in the certificate dated 20.01.2006, the petitioner stated that M/s. Indu Projects Limited (A-4) executed work of 32,47,255 sq.ft at various places in India during the period 2002-2005 and the total cost of the projects was Rs.219.07 crores.

A comparative table of the two certificates issued by this petitioner are shown herein for better appreciation of the case.

Certificate dated 19.12.2005				Certificate dated 20.01.2006			
Year	Name & nature of the project	Area constructed	Total cost of the project (Rs crores)	Year	Name & nature of the project	Area constructed	Total cost of the project (Rs crores)
2002-05	Construction of Houses including developmental works for D.D.A on Turnkey Basis Pocket B2 and D at Bakkarwala, New Delhi	8,82,540 sq.ft	52.64	2002-05	Construction of Houses including developmental works for D.D.A on Turnkey Basis Pocket B2 and D at Bakkarwala, New Delhi	8,82,540 sq.ft	52.64
2002-05	Construction of Auditorium, Hostel Block II, Indoor Stadium, Nursing College, Lakes & Landscaping, Roads & Services for NEIGRIHMS Shillong (Package – IV of phase-I & Package V of phase II)	2,30,000 sq.ft	36.40	2002-05	Construction of Auditorium, Hostel Block II, Indoor Stadium, Nursing College, Lakes & Landscaping, Roads & Services for NEIGRIHMS Shillong (Package – IV of phase-I & Package V of phase II)	2,30,000 sq.ft	36.40
2003-04	Construction of office space for M/s Goldmans Sachs, near Challgata Village at Airport road, Bangalore	1,65,715 sq.ft	11.50	2003-04	Construction of office space for M/s Goldmans Sachs, near Challgata Village at Airport road, Bangalore	1,65,715 sq.ft	11.50
2004-05	Construction of 10 storied Buildings at Malleshwaram Bangalore for Embassy Heritage	1,85,000 sq.ft	19.17	2004-05	Construction of 10 storied Buildings at Malleshwaram Bangalore for Embassy Heritge	1,85,000 sq.ft	19.17
2004-05	Construction of Software Building for M/s Symphony	2,50,000 sq.ft	12.02	2004-05	Construction of Embassy Habitat Building Complex, Bangalore	5,00,000 sq.ft	41.85
2004-05	Construction of Software building for MNC at Cherri hills, Bangalore	3,34,000 sq.ft	16.72	2004-05	Construction of Software Building for M/s Symphony	2,50,000 sq.ft	12.02
2004-05	Construction of Pine Valley Software Park at Bangalore	7,00,000 sq.ft	28.77	2004-05	Construction of Software building for MNC at Cherri hills, Bangalore	3,34,000 sq.ft	16.72
				2004-05	Construction of Pine Valley Software Park at Bangalore	7,00,000 sq.ft	28.77
	Total	27,47,255 sq.ft			Total	32,47,255 sq.ft	219.07

A bare perusal of certificates shows that, the work allegedly executed by M/s. Indu Projects Limited (A-4) during the year 2004-2005 i.e “**Construction of Embassy Habitat Building Complex, Bangalore for construction of 5,00,000 sq.ft worth Rs.41.85 crores**” is not find place in the certificate dated 19.12.2005, but it was added in the certificate dated 20.01.2006.

The petitioner also issued certificate for M/s. Golf Links Software Park Pvt. Ltd., Bangalore certifying that, M/s. Golf Links Software Park Pvt. Ltd., executed work of 10,47,512 sq.ft worth Rs.314.25 crores.

On 19.01.2006, M/s. Indu Projects Limited (A-4) addressed a letter to M/s. Ramasamy Koteswara Rao & Co., informing that due to inadvertence and error on their part, they could not include one of the works executed by M/s. Indu Projects Limited (A-4) and obtained certificate of works executed and furnished information afresh about the work executed during the period 2002-2005 with a request to include the work shown in bold italics of the table with other works. M/s. Indu Projects Limited (A-4) also furnished the details of the works in the table along with the letter, which is inclusive of the work executed by M/s. Indu Projects Limited (A-4), discloses the work executed by M/s. Indu Projects Limited (A-4) at different places and the table is extracted hereunder:

S.No	Name of the project	2001-2002	2002-2003	2003-2004	2004-2005	Cumulative revenue till 2004-05	Turnover from 01.04.2005 to 18.12.2005	Total
	DDA- Delhi	13.48	124.11	207.95	131.67	477.21	29.19	536.40
	HSCC - Shillong	-	14.56	132.24	156.82	303.62	60.38	364.00
	Goldman Sache, Bangalore	-		22.28	92.73	115.01		115.01
	Embassy heritage	-	-	-	178.76	178.76	12.95	191.71
	Embassy Habitat	-	-	-	159.12	159.12	259.39	418.51
	Global Symphony	-	-	-	93.75	93.75	26.45	120.20
	Cherry Hills	-	-	-	125.60	125.60	41.59	167.19
	Pine Valley	-	-	-	81.27	81.27	206.43	287.70
	Total	13.48	138.67	362.47	1019.72	1534.34	656.38	2190.72

As per certificate dated 20.01.2006, the additional work executed is also included i.e **Construction of Embassy Habitat Building Complex, Bangalore for construction of 5,00,000 sq.ft worth Rs.41.85 crores.** M/s. Indu Projects Limited (A-4) allegedly executed different works at different areas and as per the above referred table, it is difficult to find out as to what was the work executed by M/s. Indu Projects Limited (A-4). A letter was submitted by M/s. Indu Projects Limited (A-4) to APIIC on 20.01.2006, annexing criteria for selection of developers in the proposed IT/SEZ in Mamidipally & Raviryal Villages, Maheshwaram Mandal, Ranga Reddy district. In column No.8 of the said communication, M/s. Indu Projects Limited (A-4) stated about its experience in developed projects since 2002-2003.

The proforma was signed by the authorized signatory of M/s. Indu Projects Private Limited (A-4) and on the basis of two certificates issued by this petitioner and proforma issued by M/s. Indu Projects Private Limited (A-4), M/s. Indu Projects Private Limited (A-4) could grab the work allotting Ac.250.00 by the Government. If, M/s. Indu Projects Private Limited (A-4) was found ineligible, M/s. Indu Projects Private Limited (A-4) ought not to have grabbed the work including allotment of Ac.250.00 for development of IT Park/SEZ. Only on the ground of issuing certificates by this petitioner, M/s. Indu Projects Private Limited (A-4) could get the work done. The basis for issuing certificate is only the information submitted by M/s. Indu Projects Private Limited (A-4) along with letter dated 19.01.2006 and issuance of certificate based on such letter without verifying the necessary material, creates any amount of suspicion. On the other hand, second certificate was issued immediately on receipt of letter from

M/s. Indu Projects Private Limited (A-4). Even, the information furnished along with the criteria for allotment shows that M/s. Indu Projects Private Limited (A-4) claimed that it executed 42,94,767 sq.ft work during the relevant years. The certificate issued by this petitioner clearly shows that M/s. Indu Projects Private Limited (A-4) executed various projects at various places in India which are shown in two different tables extracted above. But, those certificates were issued without any material produced before the Auditor i.e. the petitioner herein. Therefore, issuing certificates within a month with major variation in the quantum of work executed by the company lead the Investigating Agency to conclude that accounts were falsified and manipulated so as to grab the execution of work from the State; otherwise, M/s. Indu Projects Private Limited (A-4) would not have been eligible to execute such work, since it has not executed 42,94,767 sq.ft work, satisfying eligibility i.e. execution of 4 million sq.ft which is the minimum requirement to get the allotment of work.

If, this false certificate was not issued by this petitioner, *prima facie*, M/s. Indu Projects Private Limited (A-4) ought not have grabbed the work and some other eligible bidder would have secured the work. Therefore, it is evident from the material that, this petitioner issued a certificate certifying the work executed by M/s. Indu Projects Private Limited (A-4) at inflated rate without verifying any material. But, based on the letter addressed by M/s. Indu Projects Private Limited (A-4), issue of such certificate clearly indicates that this petitioner has accommodated M/s. Indu Projects Private Limited (A-4) to grab the work based on such false certificate *prima facie*.

The main endeavour of the learned counsel for the petitioner before this Court is that, the only witness examined before the Court to *prima facie* establish the complicity of this petitioner is L.W-11 – Sri Gopinath Ambadi Thody, s/o late V.B.K. Nair, Senior Vice President, Embassy Group. In the statement of Sri Gopinath Ambadi Thody, recorded under Section 161 Cr.P.C dated 06.08.2013 he stated about the total work executed and eligibility criteria etc., for the work, including allotment of plots. But, the statement of the witness is silent about the role played by this petitioner in issuing certificate, certifying the work executed by M/s. Indu Projects Private Limited (A-4) at inflated rate.

When these two certificates and the information furnished by M/s. Indu Projects Private Limited (A-4) clearly show that there is a lot of variation of about 5,00,000 sq.ft of work executed by M/s. Indu Projects Private Limited (A-4), it is for the petitioner to show as to how he issued two certificates within a span of one month. Such disputed question cannot be decided in a petition filed under Section 482 Cr.P.C and such question can be decided only based on the evidence available on record. Therefore, mere absence of any oral statements on record is not sufficient to conclude that there is no *prima facie* material against this petitioner to proceed against him for various offences. Moreover, when the material on record i.e. undisputed documentary evidence placed on record, it is sufficient to conclude that this petitioner issued two different certificates with a view to grab the work, certifying that M/s. Indu Projects Private Limited (A-4) executed the work at inflated rate, and it indicates the malafides on the part of the petitioner in issuing certificates to accommodate M/s. Indu Projects Private Limited (A-4) to become eligible and to grab the work. Such

intention can be gathered based on the material available on record, including the other circumstances. Therefore, the petitioner by his illegal act, in pursuance of the implied agreement between himself and M/s. Indu Projects Private Limited (A-4), issued such certificates.

The most important ingredient of the offence of conspiracy is the agreement between two or more persons to do an illegal act and such agreement can be inferred from the circumstances of the case based on the material, since conspiracy is a secret act, which cannot be proved by any direct evidence, but based on the conduct of the parties before, at and after commission of alleged offence, the Court can draw inferences. However, issuance of a certificate is sufficient to complete when two or more conspirators have agreed to do or accepted to be done an act, it itself is an offence. Therefore, from the material produced before this Court, by drawing inferences based on the conduct of the petitioner, after the alleged incidents, it is difficult to express its opinion as to which offence the petitioner committed. But, the material *prima facie* shows that the petitioner issued such false certificates with a view to make M/s. Indu Projects Private Limited (A-4) eligible to knock the bid and grab the work, which lead to serious financial loss to the Government in the course of execution of work by M/s. Indu Projects Private Limited (A-4) *prima facie*. If, no such certificate was issued, the petitioner ought not to have grabbed the work either independently as a member or lead member of the consortium. Therefore, the petitioner who issued a certificate which is the basis for allotting the work to M/s. Indu Projects Private Limited (A-4) cannot be exonerated from his liability at the threshold. Therefore,

issuing such false certificates *prima facie* is suffice to conclude that this petitioner committed an offence.

The offences allegedly committed by the petitioner are punishable under Sections 120-B, 420, 468 & 471 I.P.C.

Section 120-B I.P.C 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 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.

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.

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).

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 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

² AIR 1988 SC 1883

³ AIR 1970 SC 549

⁴ AIR 1971 SC 885

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.

The Full Bench of the Apex Court in **Ram Narayan Popli v. CBI**⁵, wherein a similar question came up for consideration with

⁵ (2003) 3 SCC 641

regard to the offence punishable under Section 120-B IPC, 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-1 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-1 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-1 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, the; 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.”

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.

The other offences petitioner allegedly committed are the offences punishable under Sections 409, 420, 468, 471, 477-A of IPC.

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”.

The ingredients to constitute the offence punishable under Section 420 I.P.C is laid down by the Apex Court in **V.Y.Jose v. State of Gujarat**⁶, 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. Even in a case where allegations are made in regard to failure on the part of the

⁶ (2009) 3 SCC 78

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."

In view of the law declared by the Apex Court, in order to constitute an offence punishable under Section 420 I.P.C, there must be 'cheating' and 'inducement with a dishonest intention' to part with any amount of property etc., by a person who was deceived by the accused.

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.

It is contended 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.

In **Commissioner of Income Tax, Madras Vs. G.M.Dandekar of M/s.M.K.Dandekar and Company Chartered Accountants, Madras**⁷ the Madras High Court while dealing with

⁷ AIR 1953 Madras 152

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 assesseees, 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 assesseees 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”.

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**⁸ held that issue of false certificate to the public while inviting investments amounts to serious misconduct.

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,

⁸ 2016 (6) ALT 606

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, wilfully 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.

In **Landell Vs. Lybrand**⁹ 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 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.”

In another judgment in **Glanzer v. Shepard**¹⁰, 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

⁹ 264 Pa.406, 107 Atl. 783 (1919)

¹⁰ 233 NY 236, 135 NE 275 (1922)

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 amounts 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.

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.

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**¹¹, 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 account of others amounts to misconduct under the Act. Punishment of removal from rolls was affirmed by the Division Bench of the High

¹¹ AIR 2007 Delhi 263

Court of Delhi. In another judgment in **Before the Securities and Exchange Board of India, Mumbai**¹², the learned Single Judge adverted to the judgment of this Court in ICAI Vs. Mukesh Gong, wherein this Court 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 ‘wilful 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

¹² MANU/SB/0006/2018

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.”

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**¹³, the Division Bench of the Apex Court held that the 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

¹³ 2018 (1) RCR (Criminal) 336

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**¹⁴, 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.

In **Sushil Suri Vs. Central Bureau of Investigation and another**¹⁵, 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

¹⁴ MANU/SC/0209/2012: (2012) 11 SCC 321

¹⁵ MANU/SC/053/2011 : (2011) 5 SCC 708

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 Madura) to encash the pay orders/bank drafts issued by PSB in favour of the suppliers of machines, thereby directly rotating back the loan 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.

Based on the said judgments, the Apex Court declined to quash charge sheet against the petitioners therein. The facts of the **Ashok Sadarangani and another Vs. Union of India and others** (supra) and **CBI Vs. Harisingh Ranka**¹⁶ 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**¹⁷, 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

¹⁶ CRIMINAL APPEAL No(s). 1289 OF 2017
(Arising out of SLP (Crl.) No.5857 of 2012)

¹⁷ 2011 X AD (Delhi) 28, 184 (2011) DLT 385, 2012 (1) RCR (Criminal) 571

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

The Apex Court in **Bishandas Vs. State of Punjab and another**¹⁸ 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.

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)**¹⁹, wherein it is held that even when a certificate was 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,

¹⁸ (2014) 15 SCC 242

¹⁹ 2017 LawSuit (Cal) 1622

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.

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.

The other offence allegedly committed by the petitioners is punishable under Section 477-A I.P.C i.e. which deals with falsification of accounts, whoever, being a clerk, officer or servant, or employed or acting in the capacity of a clerk, officer or servant, wilfully, and with intent to defraud, destroys, alters, mutilates or falsifies any book, electronic record paper, writing, valuable security or account which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or wilfully, and with intent to defraud, makes or abets the making of any false entry in, or omits or alters or abets the omission or alteration of any material particular from or in, any such book electronic record, paper, writing, valuable security or account, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both. The explanation thereto explained that it shall be sufficient in any charge under this section to allege a general intent to defraud without naming any particular person intended to be defrauded or specifying any particular sum of money intended to

be subject of the fraud, or any particular day on which the offence was committed.

Section 409 I.P.C deals with Criminal breach by trust of public servant, or by banker, merchant or agent and according to it, whoever, being in any manner entrusted with property, or with any dominion over property in his capacity as a public servant or in the way of his business as a banker, merchant, factor broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. The petitioner is neither a banker, merchant or agent, thereby, Section 409 I.P.C has no application, whereby, he is not liable to be prosecuted for the offence punishable under Section 409 I.P.C.

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.

In **State of Haryana v. Bhajan Lal (referred supra)**, 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 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."

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 Sections 409, 468, 471, 477-A IPC and consequently the proceedings against this petitioner for the offence punishable under Sections 409, 468, 471, 477-A IPC are liable to

be quashed, while directing the Special Judge to proceed against the petitioner for the offence punishable under Section 120 B r/w Section 420 and Sections 9,11,12,13(2) r/w 13(1)(c) of Prevention of Corruption Act.

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

Consequently, miscellaneous applications pending if any, shall stand closed.

JUSTICE M. SATYANARAYANA MURTHY

Date: 28.12.2018

SP

