IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :19.06.2023	Pronounced on: 10.07.2023

Coram:

THE HONOURABLE Dr. JUSTICE G.JAYACHANDRAN

Criminal Appeal Nos.569 & 586 of 2013

V.Arul Kumar,
S/o. Victor Samraj,
"Bethel", No.169, HIG-2,
II Main Road, Nolambur Phase-I,
Mogappair West, Chennai. ... Appellant/Accused – 1 in Crl.A.No.569 of 2013

/versus/

State: The Inspector of Police,
SPE:CBI:ACB:Chennai,
In R.C.No.48 [A]/2003/CBI/ACB/Chennai. ... Respondent/Complainant in Crl.A.No.569 of 2013

Prayer in Crl.A.No.569 of 2013: Criminal Appeal has been filed under Section 374 r/w 386 of Cr.P.C., pleased to admit this Criminal Appeal on file, call for the records in C.C.No.15 of 2006 on the file of the Hon'ble XI Additional City Civil and Sessions Judge, [CBI Cases Relating to Banks and Financial Institutions, Chennai – 1], set aside the finding and sentence passed in the said case, acquit this appellant of the charges from the said case.

For Appellant in Crl.A.No.569 of 2013 : Mr.S.Shunmuga Velayutham, Senior Counsel for Mr.T.Vijayaraghavan

For Respondent in Crl.A.No.569 of 2013 : Mr.K.Srinivasan, Senior Counsel, Special Public Prosecutor (C.B.I).

M/s.Arihant Foundations & Housing Ltd.,
No.271, Poonamallee High Road,
Chennai,
Represented by O.P.Madhav,
No.271, Poonamallee High Road,
Chennai. ... Appellant/Accused – 2 in Crl.A.No.586 of 2013

/versus/

The Deputy Superintendent of Police,
SPE:CBI:ACB,
Chennai.
In R.C.No.48 (A)/2003/CBI/ACB/Chennai. ... Respondent/Complainant in Crl.A.No.586 of 2013

Prayer in Crl.A.No.586 of 2013: Criminal Appeal has been filed under Section 374 r/w 386 of Cr.P.C., pleased to set aside the conviction and sentence of fine Rs.2000/- imposed by the Hon'ble XI Additional City Civil and Session Judge (CBI Cases relating to Banks and Financial Institutions), Chennai – 1 in C.C.No.15 of 2006, dated 30.07.2013 and acquit the appellant Company of the charges from the above said case.

For Appellant in Crl.A.No.586 of 2013 : Mr.G.Ravi Kumar

For Respondent in Crl.A.No.586 of 2013 : Mr.K.Srinivasan, Senior Counsel, Special Public Prosecutor (C.B.I).

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COMMON JUDGMENT

Based on the source information received in the office of Superintendent of Police, CBI, ACB, Chennai, the Inspector of Police Mr.S.B.Sankar was instructed by the Superintendent of Police to register the case. Accordingly, on 29.10.2003 Sankar in R.C.No.48(A)/2003/CBI/ACB/ Chennai, under Section 120-B r/w 420 of I.P.C, 420 I.P.C, 13(2) r/w 13(1)(d) of P.C Act, 1988 against Shri.V.Arul Kumar, Regional Chief, HUDCO, Chennai and M/s.Arihant Foundations & Housing Ltd., Chennai. Search of the residential premises of Mr.V.Arul Kumar, Shri.Navarathan Lunavat, Managing Director of M/s.Arihant Foundations & Housing Ltd., Chennai and others were conducted. After completion of investigation final report was filed.

2. ***The gist of the final report:-***

A1-V.Arul Kumar, the then Regional Chief, Housing and Urban Development Corporation (HUDCO), Chennai, entered into a criminal conspiracy with A-2 Company M/s.Arihant Foundations & Housing Ltd (AFHL) represented by Navaratan Lunavat (deceased) between 1997 and 2003, to cheat the Housing and Urban Development Corporation (HUDCO) in the matter of loan sanctioned in favour of A2 Company in a fraudulent manner by abusing and misusing the official position and by corrupt and illegal means by Al and in pursuant to which A2 submitted an application on 13.8.1997 to HUDCO, for a loan assistance of Rs.17 Crores, for the construction of "Arihant Majestic Towers" at Koyambedu, Chennai. The HUDCO had agreed in principal to clear the loan proposal on conditions. One among the condition is that, A2 has to open an escrow account with lien in favour of HUDCO. Thereafter the HUDCO had sanctioned a loan of Rs.17.30 crores and an agreement to this effect was entered into between the HUDCO and A2 represented by Navaratan Lunavat (since deceased on 16.10.1997) and a total of Rs.16.50 crores was disbursed. A2 Company not complied with the terms and conditions of the agreement even after rescheduling, the payment of instalment contrarily it went on selling the flats without getting NOC from HUDCO and instead of depositing the sale proceeds into the escrow account, A2 had deposited it into their accounts maintained with other banks. A-l inspite of the specific instructions from Head Office, HUDCO, to file a suit before DRT, sent a draft resolution package falsely projecting the payment by A2. Further, Al had sent a draft resolution vide letter dated 25.11.2002 for restructuring the loan recommending outstanding loan to be treated as fresh loan with additional repayment period for 3 years. Al misusing his official position wrote letters dated 27.02.2003, 30.05.2003 and 02.8.2003 had sought for restructuring of packages instead of taking legal action as suggested by the Head Office. As a consequence, A2 dishonestly and fraudulently, without obtaining NOC sold the flats and failed to deposit the proceeds into the escrow account at HUDCO. Further, A2 failed to create lien of the escrow account. Out of Rs.40,31,48,250/- realized through the sale proceeds of 230 flats. A2 paid only Rs.4,82,55,400/- towards principal and Rs.13,61,10,451.50 towards interest totaling Rs.18,53,67,893.50 as on 26.9.2003 and caused a wrongful loss of Rs.11,87,44,600/- to the HUDCO and corresponding wrongful gain to the Company and thereby, A1 and A2 have committed offences punishable u/s 120-B r/w 420 IPC and u/s. 13 (2) r/w 13 (1) (d) of PC Act 1988.

3. Based on the final report and materials collected during the investigation, the Learned Special Judge framed charges against V. Arul Kumar (A1) and M/s.Arihant Foundation Housing Ltd (A2) as under:-

Charges	Rank of the accused	Offences under Sections
Charge 1	A1 & A2	u/s.120-B r/w 420 of I.P.C and u/s.13(2) r/w 13(1)(d) of P.C Act, 1988.
Charge 2	A2	u/s.420 of I.P.C
Charge 3	A1	u/s.13(2) r/w 13(1)(d) of P.C Act, 1988.

4. Though, in the final report A2 Company was shown as represented by Mr.Navarathan Lunavat by the time, of reading the charges by the trial Court on 17.04.2008, the said Mr.Navarathan Lunavat died. Hence, the Company appointed Mr.O.P.Madhav as its representative. The trial Court allowed the Crl.M.P.No.131 of 2006 filed under Section 305 of Cr.P.C *vide* its order dated 18.07.2006. Hence forth, Mr.O.P.Madhav represented A2 Company.

5. A1-V.Arul Kumar is a Public Servant and A2 a Private Limited Company. They both were tried for the charge of conspiracy to cheat, that apart A-1 was tried for the charge of abusing of his official position to obtain pecuniary advantage and A2 was charged for cheating HUDCO to a tune of Rs.11,87,44,600/-.

6. To prove the charges, the prosecution examined 20 witnesses (P.W.1 to P.W.20) and marked 213 Exhibits (Ex.P.1 to Ex.P.213). On the side of the defence, 2 witnesses (D.W.1 and D.W.2) and 114 Exhibits were marked (Ex.D.1 to Ex.D.114).

7. The trial accepting the prosecution witnesses and documents, Convicted the accused/A1 the Regional Chief of HUDCO, as below:-

Accused	*Offences*	*Conviction and Sentence passed by the Trial Court*
A1	u/s.120-B r/w 420 of I.P.C and u/s.13(2) r/w 13(1)(d) of P.C Act, 1988.	To undergo R.I for one year and to pay fine of Rs.1,000/-, in default to undergo S.I for three months.
	u/s.13(2) r/w 13(1)(d) of P.C Act, 1988.	To undergo R.I for one year and to pay fine of Rs.1,000/-, in default to undergo S.I for three months.

The sentences of imprisonment ordered to run concurrently and the period of imprisonment already undergone as under-trial prisoner was ordered to be set off. The default sentence ordered to run consecutively.

8. Being aggrieved by the conviction and sentence passed by the trial Court, A1/V.Arul Kumar has preferred present Crl.A.No.569 of 2013.

9. A-2, M/s.Arihant Foundations and Housing Ltd (AFHL) represented by Mr.O.P.Madhav was convicted and sentenced as below:-

Accused	*Offences*	*Imposed fine by the Trial Court*
A2 Company	u/s.120-B r/w 420 of I.P.C and u/s.13(2) r/w 13(1)(d) of P.C Act, 1988.	To pay fine of Rs.1000/-
	U/s. 420 of I.P.C	To pay fine of Rs.1000/-

10. Being aggrieved, A2-M/s.Arihant Foundations & Housing

Limited through its representative Mr.O.P.Madhav had preferred Crl.A.No.586 of 2013.

11. Before adverting to the merits of the respective appeals, the gist of the prosecution evidence and gist of the defence evidence been capsulized under:-

11(i). ***Gist of prosecution evidence:-***

Mr.P.S.Rana the then Chairman and Managing Director of HUDCO who accorded sanction to prosecute was examined as P.W.1. The order granting sanction to prosecute A1 is Ex.P.1. The order is dated 03.02.2006. The witness had deposed that he accorded sanction after perusing relevant records and being satisfied that there is a prima facie case against V.Arul Kumar A1.

11(ii). Mr.K.Subramanian (P.W.2), the Executive Director of HUDCO had deposed about the loan agreement entered between HUDCO and M/s.Arihant Foundations & Housing Ltd, on 16.10.1997 and it details. This agreement is marked as Ex.P.2. The crucial and most relevant covenant in this agreement is the opening of an Escrow account by the borrower (M/s.Arihant Foundations & Housing Ltd) to ensure that, all the receipt pertaining to lenders loan and sale proceeds of the project shall be deposited in that account.

11(iii). P.W.2 had also deposed about the internal communication between the Regional Office and the Executive Director (Law) and the Head Office, regarding the modalities in enforcing the terms of contract in respect of granting NOC to the borrow to sell the flats. The communication and notes of the respective Officers in HUDCO are marked as Ex.P.3 to Ex.P.8.

11(iv). P.W.3. Guhan, the then Assistant Chief in Loan Accounts Wing of HUDCO had deposed about the recommendation of the accused to reset the loan of M/s.Arihant Foundations and Housing Ltd, to a current rate of interest applicable to private builder i.e., 13% p.a. Following this recommendation dated 05.09.2002 marked as Ex.P.29, the accused had sent a reminder note on 27.09.2002 (Ex.P.20). Meanwhile, Ex.P.30 the Operational Circular No.45 dated 13.09.2002 issued by the Director, Finance HUDCO, New Delhi. In the light of the above circular (Ex.P.30), the recommendation Ex.P.29 was processed. The Finance Officer (LA) Mr.R.K.Mukerjee in his note

(Ex.P.31) suggested M/s.Arihant Foundations & Housing Ltd, without opting for one time settlement, seek reduction of interest and extension of time. Therefore, in view of Operational Circular No.45 (Ex.P.30) the Regional Office, should in consultation with M/s.Arihant Foundations & Housing Ltd., must come with concrete proposal, for the Head Office to consider resetting of loan.

11(v). At this juncture, it is appropriate to record the substance of operational circular No.45 marked as Ex.P.30. "For being eligible for resetting of interest, the Agency (borrower) should neither be in default nor any other charge or expenses be outstanding for recovery on the date of repayment/reset in any other scheme. Further, relaxation to the guidelines mentioned in this circular would be considered by the Board on case to case basis depending upon the merits of the case."

11(vi). That apart, P.W.3 referring the Ledger No.14687 had deposed that, during the period between 05.09.2002 and 31.03.2004 M/s.Arihant Foundations & Housing Ltd had paid Rs.13,50,000/- towards principal and thereafter, no payment towards principal. The total interest outstanding as on 31.03.2004 was Rs.2,78,73,925/-

11(vii). P.W.4 R.G.Gunawat, the then Senior Finance Officer of HUDCO, HQ, New Delhi, had deposed that the loan release recommendation Ex.P.36 dated 06.08.1999 directs that the disbursement should be through the Escrow Account maintained by the party i.e., A/c.No.13452 of Bank of Baroda, Parliament Street, New Delhi.

11(viii). Jasbir Singh (P.W.5) had corroborated P.W.2 regarding the communication between the Regional Office and Executive Director (Law) and the Head Office regarding issuance of NOC. He had spoken about the suggestion made by Legal Wing and the Regional Office about proposal for issuance of NOC to 3 flats which came up for consideration. The Executive Director (Law) had observed in Ex.P.4, if the property in question is sold at Rs.450/- per sq.ft of built area then entire consideration is to be deposited with HUDCO dues on the date of issuance of NOC. The Regional Chief, Chennai be delegated the power to release the security without referring each case to the Head quarters. However, before releasing the last batch of flats, the Regional Chief (RC) should obtain concurrence from the Internal Audit as well as Law Wing. Therefore, P.W.5 has issued letter dated 29.11.1999 (Ex.P.9) after CMD had approved the note found in Ex.P.4.

11(ix). K.V.R.Sridharan (P.W.6), Deputy Chief Law in South Zonal Office of HUDCO had referred Article 5.4 clause (a) and (b) in the Agreement Ex.P.2 which deals with prior permission from HUDCO before alienating the property and the clause relating to opening of Escrow Account and the reason for insisting to maintain the Escrow Account. When it was brought to the notice of Legal Wing that 39 flats were sold unauthorisedly, violating Article 7(1)(e), he had advised the Regional Office to give a Public Notice in the newspaper cautioning the public not to deal with the property without HUDCO consent (Ex.P.11). He also advised the Regional Office to cancel NOC for 41 flats which were not utilized by the borrower.

11(x). K.A.Raman (P.W.7), Law Officer had in detail deposed about the loan agreement Ex.P.2, subsequent correspondence betweeen A2 and the Regional Office, refusal to issue NOC in view of the violation, Writ Petitions filed by the borrower and its consequence. His testimony reveals that A2 accepted all the conditions imposed by HUDCO except condition No.3 in Ex.P.59. The said condition No.3 in Ex.P.59 mandates the borrower to give an undertaking that no flats will be legally transferred till full payment of HUDCO dues. The evidence of P.W.7 and the letter of the borrower addressed to the Housing Secretary which is marked as Ex.P.64 dated 06.12.2000 discloses that, the borrower has felt there is irregularities in HUDCO and the interest collected from him must be reduced to 16.5%. The representation of the borrower been negatived by the Secretary, Housing and Urban Development Corporation, on 19.04.2001. This witness has identified NOC issued by HUDCO for various purchasers. He has signed in those NOC on the approval of the accused.

11(xi). P.W.8 and P.W.9 are the Technical Appraiser for the Majestic Tower promoted by A2 M/s.Arihant Foundations and Housing Ltd. P.W.10. R.Murugesan was the Deputy Manager (Legal) at HUDCO was working under K.A.Raman (P.W.7). Rest of the prosecution witnesses except P.W.10 are the Technical personals of the HUDCO who had dealt with the loan file of M/s.Arihant Foundations and Housing Ltd and their testimony are related to identification of the correspondence etc.,

11(xii). The rest of the witnesses are (i). The Bank staffs of Bank of Baroda, New Delhi and Assistant Branch Manager of Bank of Baroda, Mount Road Branch, Chennai. They have deposed about the transaction of the A2 Company and the statement of accounts. (ii). The Officer who were part of investigation.

12. *Gist of defence evidence:-*

Two witnesses (D.W.1 and D.W.2) and 114 Exhibits (Ex.D.1 to Ex.D.114) on the side of the accused discloses that, D.W.1 A.Sivasankar, the Finance Officer/Senior Manager of HUDCO, Regional Office Chennai, had written the letter Ex.P.65 to the Manager of Bank of Baroda Purasaiwalkam Branch to create lien over the Escrow Account No.12048 for Rs.109.85 lakhs. For his letter Ex.P.112, calling for detail of the Escrow Account of M/s.Arihanth Foundations and Housing Ltd, he received reply informing that, as on 27.12.2000, M/s.Arihanth Foundations and Housing Ltd had paid the dues and was out of default. D.W.2 Mr.S.K.Sinha, the then Executive Director (Law), HUDCO Regional Office, Chennai had admitted that he concurred the proposal mooted by A-1 for resetting the loan of M/s.Arihanth Foundations and Housing Limited.

13. The defence exhibits are the documents which are part of the file No.14687 maintained by HUDCO, Regional Office marked by prosecution as Ex.P.3, file relating to Default Monitory Review Committee, Loan release advice from HUDCO, Head Quarters Notes regarding issuance of NOC to sale the flats to the individual buyers. These documents are relied by the first accused/Appellant Arul Kumar to impress that, he had discharged his duty within the discretionary power conferred on him and decision was not taken by him unilaterally. The loan transaction pertaining to A-2 was done in consultation with Head quarters and all the actions were the outcome of the collective decision and not his individual decision. The prosecution has failed to prove that, he and A-2 had conspired to cheat the HUDCO. There is no material to show that there was pecuniary loss to the HUDCO.

14. ***Contention of the Learned Senior Counsel for the first accused Arul Kumar-the appellant in C.A.No.569 of 2013:-***

14(i). For the purpose of convicting the appellants 1 and 2, the Learned Special Judge has relied upon witnesses namely the evidence of P.W.3 D.Guhan, P.W.5 Jasbir Singh, P.W.7 Raman, P.W.13 Subramanian, P.W.14 RekhaSarathi and P.W.17 Rengaraj.

14(ii). To the effect that, the appellants have violated the procedures prescribed by the HUDCO and as against the terms of agreement entered between the HUDCO and M/s.Arihant Foundations Housing Ltd., The Learned Judge has given a finding that, the appellants have acted against the instructions of head office, which amounts to attract the ingredients of criminal misconduct as alleged in the charge sheet and abuse of official position and thereby, caused huge loss to HUDCO. Before arriving at the conclusion, the Learned Judge not taken into considering the following facts elucidated during the examination of these witnesses:-

14(iii). P.W.3 Guhan during cross examination states that "As per this note, (Ex.P-13) it is clear that for the above reasons, the Regional Office only proposed commencement of legal action against AFHL". Further states that, "As per D-14, from April 2002 to September 2002 there was continuous payments by AFHL. In Ex.P-29, it is mentioned that, "on approval of default resolution restructuring package the Regional Office will enable the Regional Office to resolve the major default without recourse to legal action. In Ex.P-29 it is mentioned that there has been a regular flow of funds from AFHL, a sum of Rs. 79.02 lakhs have been received"

14(iv). P.W-3 Gugan had deposed that, as per Ex.D-16, Senior Finance Officer, Ganesh stated that, till 7.8.2003 a sum of Rs.17.53 crores have been received against the sanctioned loan of Rs.16.70 crores. The said Ex.D.16 also states that, from February 2002 till 7.8.2003 (18 months) Rs.6.37 crores was received. Against the projection made by the Regional Office to receive Rs.130 lakhs for the September quarter (3 months), whereas the actual receipt in just one month itself is Rs.92.26 lakhs. Based on payment received as indicated by Mr.Ganesh (SFO) in Ex.D.16 projections made by the Regional office in their note of 05.09.2002 (Ex.P-29) is workable and realistic.

14(v). P.W-3 Guhan states that, he is aware of Board note dated 09.12.2002. He referred in the above note two issues namely legal action through DRT and withdrawal of criminal cases. Till this point of time no one in Head Office said "No" to the proposal of Regional Office and directed him to proceed with the case before the DRT." Further, he states that default resolution package of the Regional office was processed in the Head Office during the period from 10.1.2003 to 26.08.2003. From processing the Board Note there is no clear direction to proceed with legal action. Even the note of Chairman and

Managing Director found in Ex.P-3 and R.P. Singhal's letter dated 1.09.2003 (Ex.D-10) does not categorically say to the regional office to proceed with the legal action to DRT. I am shown Ex.P-19, D4, D5,P23, P24, D6, P27, D7, D8, D9, and D10 and Ex. P-3. The said is marked as Ex.D-17. After the approval to take legal action by Chairman and Managing Director was given on 11.6.2002, there have been 12 correspondences from Head Office to the Regional Office.

15. P.W.5, Jasbir Singh, in the cross-examination has admitted that, as per Ex.P.6 note sent by Raman, Law Officer, has stated that the M/s.Arihant Foundations Housing Ltd., has already deposited the entire sale proceeds to HUDCO and not to the Escrow Account. As per Ex.P.6, the Assistant Chief Law of Southern Zonal Office by note dated:16-11-1999 recommended the issuance of NOC to the Head Office. By seeing the documents and Ex.P.3, he states that, he himself or any one in head office or Zonal office did not raise any objection regarding the deposit of amount directly to HUDCO instead of Escrow account. He also states that, regarding the implication of Escrow Account, Law Wing has nothing to do with. Only the finance people have to look into these aspect. From the above admission made in the cross-examination by PW.5, it is revealed that the condition that all the money has to be routed throw the escrow account has not been followed and it has not been insisted by Head Office or any one and hence, it was permitted at Head Office. Hence, the allegation that, it should be routed through Escrow Account is ruled out.

16. P.W-7 Raman during the cross examination had deposed that, an exclusive office Memorandum on Operation of Escrow account-procedure thereof dated 11.04.1996 (Ex.D-26) brought out by the Director, Finance. As per these Office Memorandum, Escrow Account, its operation along with repayment of HUDCO dues is to be monitored by the Regional Chief and/or by its Finance deputy. He further states that, in Chennai Regional Office in addition to the AFHL project there were also other private sector projects with the stipulation of escrow account as part of security package. In Chennai RO, the finance discipline officers will review and monitors Escrow Account.

16(i). Further, P.W-7 Raman during cross examination states that "Ex.P-58 offer letter was drafted by me (PW-7) and issued to AFHL"..."Ex.P-2 (loan agreement between HUDCO and AFHL) was drafted and executed by him (PW-7) on behalf of HUDCO"

16(ii). P.W-7 Raman states that, had clearly indicated the Regional Chief had given direction (Ex.D-28) to process sanction letter conditions on the file. The legal, Finance and Technical Officers had processed the sanction letter condition (Ex.D-29) and compliance of the same are attached as a separate note in the very 1st loan release recommendation submitted to Head Office. P.W-7 had recorded in Ex.D-29 that in respect of escrow condition, finance wing should ensure compliance before release of first installment of loan.

16(iii). Further, PW-7 states that, as per D-30, Escrow Account was opened vide account No.12048 with Bank of Baroda, Purasaiwakkam Branch. As per recommendation for disbursement of loan under Ex.D-31, Assistant Finance Office Krishnan (LW-13) had once again confirmed opening of Escrow account. PW-7 had clearly confirmed that as per Ex. D-31 there were no outstanding conditions to be complied with reference to Escrow account before the release of 1st instalment of loan.

16(iv). P.W-7 Raman states that, Ex.D-32 letter dated 22.11.2001, had written to Bank of Baroda, Purasaiwakkam Branch, Chennai had clearly mentioned about the existence of lien of HUDCO on the Escrow Account. By this letter of Law Officer, Raman, Bank of Baroda was put on notice about the existence of the lien.

16(v). Further, P.W-7 Raman states that, as per Ex.P.9 the then Assistant Chief Law in Head Office directed that entire sale consideration is deposited with HUDCO. Accordingly, by letter dated 30.11.1999 (Ex.P-73) addressed to AFHL, Raman had written that, sale consideration shall be deposited with HUDCO directly and not into Escrow Account. The Executive Director at Head Office vide letter dated 25.06.2002 (Ex.D-33), addressed to Regional Office had once again directed that, in case flats are sold, the entire sale proceeds are to be credited to HUDCO.

16(vi). P.W-7 Raman in the cross examination states that in Ex.P-6, when PW-7 had specifically brought out that AFHL had deposited the entire sale proceeds directly to HUDCO and not into escrow account, as per his knowledge, Head Office did not objected to it, although direct deposit to HUDCO instead of Escrow Account is contradictory to sanction condition. While according delegation to RC for issue of NOC, as per letter dated

29.11.1999 Ex. P-9, the then Assistant Chief Law (PW-5) directed the entire consideration is to be deposited with HUDCO. Hence, as per P.W- 7 letter to AFHL in Ex.P-73, he had stated that, sale consideration shall be deposited to HUDCO directly and not into escrow account. Three years later, once again as per letter dated 25.06.2002 Ex.D-33, the then Chief Infrastructure (PW-2) directed the entire consideration are to be credited to HUDCO only.

16(vii). PW-7 Raman in the cross examination further states that, as per Head Office letter dated 25.06.2002 in Ex.D-33 and his noting in the file in Ex.D-40, there was regular delegation of power for RC to consider NOC. Again by Head Office letter Ex. D-17 dated 22.05.2003, reaffirmed regular delegation of power to Regional Office to approve the issuance of NOC. During these period AFHL was in default, while Head Office confirmed the delegation of powers to RC to approve the issuance of NOC.

16(viii). Further, P.W-7 Raman in the cross examination states that "Now I am shown letter dated 10.01.2001(LD-79)/Ex.D-77, 11.04.2001(LD-79)/Ex.D-80 and 12.04.2001 (LD-79)/Ex.D-81, 03.07.2002 and 26.08.2002 (LD-80), 18.12.2002, 03.03.2003, 18.03.2003 and 17.09.2003 (LD-81)/Ex.D-

98. By these letters, during 2001 to 2003 even though Regional Office was considering the issue of NOC while payments were received from AFHL, turned down the request of NOC by AFHL as required funds were not paid by AFHL”

16(xi). Regional Chief's letter to AFHL dated 28.12.1998 on Ex.D-111 of AFHL file LD-17. In this letter, V.Arul kumar had objected to transfer of funds from escrow account to another current account No.11934 and further also advised the AFHL to regulate all the expenses through escrow account.

16(x). PW-7 Raman as per cross stated that, as per note dated 17.04.2002 in Ex. P-13, Regional Office initiated the note proposing to file a case in DRT against AFHL. The scenario at that time was non-payment, prolonged default by AFHL, some flats were registered without NOC and the cases filed by HUDCO against AFHL.

16(xi). Further, PW-7 Raman during cross examination states that he remember that when AFHL was in default and the cheque issued by AFHL were dishonoured, Regional Office promptly filed six cases as per sec 138 of N.I. Act and processed the same. “He states that, a letter marked as Ex.D-45, by this letter, The Regional Office turned down the request of AFHL regarding non presentation of post dated cheques issued by AFHL.

16(xii). P.W-7 Raman in the cross states that, by Ex.P-17 (dated 20.06.2002), RC stated that, after his earlier note of 17.04.2002 (Ex.P-13), AFHL paid Rs.80 lakhs and additional Rs.60 lakhs is also being received. Regional Office had mentioned in this note that if the resetting proposal of the agency is not acceptable to the management, the same may be intimated to Regional Office for taking legal action as already approved by Head Office. As per Ex.P-29, Regional Office stated that, if the default resolution package did not work, where the default continued beyond one quarter, Regional Office can resort to legal process. The object of this stipulation by Regional Office was only to only allow time for recovery of dues from AFHL, while at the same time not allowing AFHL to get away from legal process if, default continued after approval of the default resolution proposal.

16(xiii). PW-7 Raman in the cross states that, Ex.P-44, core committee's minutes of meeting held on 14.09.2002. The recommendation in respect of AFHL was "*Prima facie* the option which gives HUDCO dues as of dated along with penal interest, compound interest till date the full and final payment appear reasonable for acceptance by HUDCO." Committee though recommended pursuing action through DRT for other 3 agencies namely TLV Builder, and others, did not recommend DRT route for AFHL. RC cannot proceed through DRT against AFHL but has to wait for Boards approval. As recorded in Ex.P-44, AFHL had sold 207 flats, whereas NOC has been issued for 65 flats only and a sum of Rs.8.09 crores was to be received in respect of flats already sold for getting NOC. Core committee did not say "no" to the resetting proposal of Regional Chief.

16(xiv). PW-7 Raman as per cross Ex.D-10 (Sighal's letter to place before Board) dated 01.09.2003, the Head Office did not say "no" to the default resolution package but mentioned that if the package approved by the Board, AFHL should not ask for resetting of interest. Till 01.9.2003 the actions of RC are correct.

16(xv). PW-7 Raman during cross examination states that "as law officer of HUDCO, I am the custodian of the original property document mortgaged towards security. It is also my duty to monitor the release of part security, full security, encumbrance of property, dealing with advocate and all other legal matters. In my absence sometimes, Dy. Manager (Law) of Niwas will take care of legal matters."

16(xvi). P.W-7 Raman during cross examination states that, in Ex.D-52 & Ex.D-53 in the said notes both of them have noted as "although sale deeds have been registered without NOC from HUDCO, still HUDCO's right is protected as ours is the first charge on the property HUDCO security is intact" and states that "It is correct to state that since HUDCO holds the original property document and also a mortgage of the property, registration of flats without NOC from HUDCO does not dilute the security of HUDCO". Ex.D-13 is dated 24.01.2008. It is correct to the state that even by January 2008, the registration of the flats by AFHL could not be stopped by the Office".

16(xvii). PW-7 Raman as per Cross states that, as per Ex. D-54, the RC vide his letter dated 29.09.2003 sought explanation from Managing Director, AFHL on the act of AFHL in registering sale deeds in favour of buyers without NOC from HUDCO more particularly when HUDCO has been issuing NOC even when the firm was in default. Several exhibits have not been shown by the Investigation Officer to P.W-7.

17. The evidence of PW-13 V.T.Subramanian as per cross examination states that, have processed NOC based on Head Office letter dated 25.06.2002 in Ex.D-33 while AFHL was in Default. My immediate Superior was Arul kumar A1. The Head Office letter authorized RC to issue NOC while AFHL was in default as per letter dated 25.06.2002 and the agency was at default from 30.03.2001. During the intervening period between 30.03.2001 to 25.06.2002, A1 had not issued any NOC by himself. As per Head Office letter in Ex.D-17 dated 22.5.2003 Head Office again confirmed the powers of Regional Office to issue NOC for release of part security upon receipt of proportionate loan and interest for the flat under consideration and without dilution of minimum security cover as per sanction. I have processed the NOC and recommended it for approval of Arulkumar (A1) only after the criteria as stipulated by Head Office from time to time was ensured. The Regional Office was following the procedure laid by Head Office in Processing and issuing NOC while using delegated powers.

17.(i). Further, he states that, after his note in Ex.P.145, A.1 had confirmed the receipt of required amount by M/s.Arihant Foundations Housing

Ltd., to HUDCO and also that M/s.Arihant Foundations Housing Ltd., in addition had agreed to pay Rs.7 lakhs. Seeing the note by Ganesh, of file LD.81, he confirmed the receipt of Rs.7 lakhs towards NOC for Gurumoorthy and Lakshmi. The same is marked as Ex.D.57.

18. P.W-14 RekhaSarathi as per cross states that, moved for One Time Settlement after October 2003. The OTS was not considered by Head Office. One of the grounds for not considering the OTS is availability of larger value of project property held by HUDCO against the dues of A2.

19. P.W-17 Rengaraj states that the bank account is a single person operated account of AFHL as per the AFHL Board resolution dated 13.10.1997 furnished to the bank. It is correct to say that the authorised signatory of account No.12048 is only Mr.Navaratan Lunavat, Managing Director of AFHL. It is correct to state that, it is not a joint account of AFHL and HUDCO. Seeing the letter dated 29-5-1999 by Finance Officer, HUDCO with a copy to AFHL, he confirms that it is correct to state that by this letter, HUDCO has requested the bank to earmark an amount of Rs.109.81 lakhs from the balance of A/c.No.12048 and provide lien to HUDCO until the amounts are settled by AFHL to HUDCO. He also states that on seeing Ex.D.32 he confirmed that the lien earmarked for Account No.12048 with respect to the amount payable to HUDCO was reiterated. He also confirms that HUDCO Regional office has been constantly and periodically in correspondence with their bank and monitoring the account No.12048. Referring to the documents shown to him, he stated that it is correct, HUDCO regional office has informed about the lien and requested statement of accounts. The additional sanctioning condition stipulating AFHL to submit an undertaking that, no flats will be legally transferred till full repayment of HUDCO dues was communicated to AFHL by law officer Raman (PW.7) vide letter dated 06-10-1997 (Ex.P.61). AFHL in reply to Ex.P.61 vide letter dated 16-10-1997 (Ex.P.62) agreed to all sanction conditions except the additional sanction condition of no legal transfer communicated in Ex.P.61. Along with the recommendation for release of loan all sanction conditions were processed by the Regional office (Ex.D.29, D.30 and Ex.D.31) and the request of AFHL to amend the additional sanction condition "no legal transfer" was recommended to head office. The loan release was approved by head office and disbursement was made considering the request of AFHL to amend/drop the additional sanction condition of no legal transfer. Further, as in Ex.P.9 till 29-11-1999, all NOCs for release of flats were approved by head office and thus the head office had permitted legal transfer of flats to facilitate sale of flats and to meet part of project expenses and repayments out of sale proceeds.

20. Contention of the Learned Counsel appearing for the Second accused M/s.Arhihant Foundations and Housing Ltd the appellant in C.A.No.586 of 2013:-

The prosecution in entirely grossly misconceived and motivated. The delay in repayment of loan been projected as cheating. The dishonest intention to induce and deceive the HUDCO has not been proved by the prosecution. The terms of the agreement and the communication between the borrowing company and HUDCO speaks volume that it is a pure contractual dispute which has been solved later and no due payable to HUDCO on the date when the final report taken on file by the Court in the year 2006. The respondent police based on alleged source information without proper preliminary enquiry registered F.I.R and acted upon it without any basis. The flats were sold as per the terms of the loan agreement after obtaining NOC issued by HUDCO.

21. There is no proof for illegal diversion of the fund meant to deposited in the Escrow Account. Small variation without any dishonest intention will not attract offence of cheating. The Majestic Tower Project was carried on by M/s.Arihanth Foundations and Housing Ltd in the budget of about Rs.600 crores. Totally 310 flats were constructed. HUDCO finance contribution was only Rs.16.50 crores. The Company mobilised the rest of the money from other sources. At the verge of completing the project, when the Company started selling the flats certain issues arosed and same was sorted out after the intervention of the Board Directors, Ministry of Housing and High Court orders. The prosecution witnesses P.W.2, P.W.3 and P.W7 had deposed about the communication between the borrower and HUDCO as well as the internal communication between the Regional Office and Head Office of HUDCO. These communication clearly prove the transactions were transparent and no secrecy involved. Hence, the allegation A2 along with A1 hatched conspiracy is unfound.

22. No doubt, A2 to discharge the debts gave six cheques and same were dishonoured, for want of fund. For that, HUDCO had initiated criminal prosecution under Section 138 of N.I Act. Later, the entire dues were cleared, after the default resolution package was not accepted by HUDCO. This fact is admitted by the Investigation Officer P.W.20 Mr.S.B.Sankar in his cross examination which reads as under:-

> *"As per my investigation the actual amount disbursed by HUDCO to AFHL for the concerned project was Rs. 16.50 crores. My investigation was also disclosed that the entire amount was utilized only to the concerned project and the concerned project was also completed. My investigation also discharged that AFHL-A2 has made payment of Rs.18,53, 67,893.50."*

23. In fact, the A-2 M/s.Arihant Foundations and Housing Ltd., had repaid Rs.34.02 crores towards principal and interest for the loan availed and no due is pending. Thus, no offence of cheating or loss to HUDCO is proved. The delay in repayment was due to the haste action of HUDCO cautioning the public through paper publication and the registration of case by C.B.I. The transaction were purely civil in nature. The trial Court erred in convicting the M/s.Arihant Foundations and Housing Ltd., for conspiracy and cheating.

24. **Response by the Learned Senior Counsel/Special Public Prosecutor for the respondent/C.B.I:-**

(i). The evidences of P.W.1 to P.W.20 would categorically conclude that Al was the Regional Manger HUDCO, Chennai and he was in charge of the Chennai Regional Office and he has recommended the loan proposal for A2 company and subsequently after getting sanction from the competent authority he had permitted A2 to misutilise the funds of the HUDCO, by way of permitting A2 company in getting the NOC's and by violating the HUDCO guidelines, HUDCO Head Office Instructions, Circulars, Superior Officers specific instructions in writing etc., and by violating the Ex.P2 agreement and without protecting the interest of the HUDCO.

(ii). The evidence adduced in the case categorically establishes that Al had issued the NOC to sell the flats on the request of A2 and facilitated them to sell the flats according to their whims and fancies. A1, at the Regional Head, has not ensured that the payments are forthcoming correspondingly in the Escrow account, maintained by HUDCO and A2 company with Bank of

Baroda. This failure of A1 had facilitated A2 to divert the funds to other accounts and thereby caused a huge out sanding with HUDCO. The evidence of PW5 would show that under article 5.4 clause (a) & (b) of Ex.P.2, the borrower shall not part with possession of the property except to the flat purchasers and the borrower shall not sell or otherwise alienate the property without obtaining express permission of HUDCO.

(iii). On the basis of the request of A2 made in Ex.P.144, on 19.09.2000, A2 company addressed the HUDCO Regional Office for issuing of N.O.C. in the name of S.Gurumurthy and G.K.Lakshmi. In the said letter A2 has indicated that after receipt of N.O.C. the bank will release an amount of Rs.7 lakhs in favour HUDCO. A1 prepared a note for N.O.C. on the basis of the request of A2 made in Ex.P.144. P.W.13 had recommended issuance of NO.C subject to receipt of Rs.7 lakhs. On the same page, the Regional Chief A1 had indicated that the proportionate amount of money has already been repaid by Agency and received by the HUDCO Regional Office and further, he had observed that A2 has also agreed to pay Rs.7 lakhs after issuance of N.O.C. Based on this NOC was issued to A2's company. This is also against the instructions of the HO. The overt acts of A1 clearly attracts the ingredients of criminal misconduct as alleged in the charge. The abuse of official position by A1 has caused a huge loss to HUDCO.

(iv). The evidence adduced by the prosecution categorically proves that A2 has availed the loan from HUDCO by way of executing Ex.P.2 agreement and as per the agreement he has to make all the sale proceeds through the escrow account jointly maintained by HUDCO and A2 with Bank of Baroda and the statement of account Ex.P.202 would show that there was no regular payment in correspondence to the sale made by the company, A2, of the Flats at Arihant Towers, Koyambedu and finally a huge outstanding in the account of HUDCO by A2 Company. The evidence of P.W.3, is to the effect that the “loan ledger of No. 14687 of M/s.Arihant Foundation & Housing Ltd., shows that during the period from 5.9.2002 to 31.3.2004 there was a repayment of Rs.13,50,000/- towards principal and subsequently there was no repayment towards principal. The total outstanding interest was for Rs.2,78,73,925/- as on 31.3.2004.

(v). As per clause No.5, 4(B) of the loan agreement, Ex.P.2, the A2 shall not sell, mortgage, lease, surrender or otherwise howsoever alienate the property or any part thereof without express consent from the respondent, therefore the issue of NOC by the respondent is mandatory. Under article 5.4 clause (a) & (b) of Ex.P.2, the borrower shall not part with possession of the property except to the flat purchasers and the borrower shall not sell or otherwise alienate the property without obtaining express permission of HUDCO. If he does, it would be a default under article 7(1)(e).

(vi). Further, Ex.P.213 series, the Encumbrances certificates in hundreds collected by HUDCO, for their verification would further corroborate that during the relevant period of the conspiracy, A2 had sold the flats which are in fact financed by HUDCO and the payments are to be routed thorough the Escrow account for the benefit of HUDCO to adjust the loan amount whereas the funds been diverted by A2 and the account has become outstanding. For recovery, HUDCO filed a suit in DRT, Ex.P.39 note of HUDCO categorically prove that 39 flats were sold unauthorisedly by the borrower M/s.Arihant Foundation and Housing Ltd. It is further pertinent to note the evidence adduced in the case establishes that, A2 had a bounden duty that after sale of each flat he had to pay the sale proceeds to clear the outstanding loan amount with HUDCO and in this case they had failed to do so and finally ended in filing a suit for recovery. The act of A2 clearly attracts the ingredient of cheating. A2 had obtained the NOC's with the connivance of A1 the Regional Manger and sold the same to public by way of executing the sale Deed and the corresponding amount received by them was misappropriated according to their whims and fancies thereby A2 got a wrongful gain and a corresponding wrongful loss to HUDCO. The sale proceeds obtained by A2 by way of utilizing the NOC issued illegally by Al are in fact ought to have been remitted with HUDCO, but A-1 dishonestly did not ensure the remittance with intention to aid A2 Company to obtain wrongful gain. Thus, the element of conspiracy between Al and A2 has been clearly established in the case.

Point for consideration:-

Whether the trial Court erred in appreciating the evidence requires interference?

25. Though voluminous documents and lengthy arguments placed before this Court to examine the decision of the trial Court, the long and short of the case is, whether violation of the terms of loan contract was incidental in the course of business, occurred unintentionally or whether the violation was pre-conceived by A1 and A2 with dishonest intention to cheat HUDCO?

26. On 13.08.1997, M/s.Arihant Foundations & Housing Ltd., (AFHL) through its Managing Director Mr.Navaratana Lunavat sought loan assistance from HUDCO for Rs.17 crores for construction of the project "Arihant Majestic Towers" at Koyambedu. HUDCO on specific conditions sanctioned loan of Rs.17.30 crores out of which Rs.16.50 crores disbursed. The funds were transferred from Bank of Baroda, Parliament Street, New Delhi, account of HUDCO, to the Escrow Account No.12048 opened by the borrrower at Bank of Baroda, Purasaiwalkam Branch at Chennai.

27. The evidence proves that M/s.Arihant Foundations & Housing Ltd., had sold 39 flats without obtaining NOC from HUDCO. From 31.03.2001, there was no payment from M/s.Arihant Foundations & Housing Ltd., towards the loan due. Hence, HUDCO had taken steps for recovery in the following manner:-

> *a). A Public Caution Notice was issued by Regional Office in the local Daily News Papers through advocate on 10.04.2002 cautioning the public not to deal with the property without express consent from HUDCO.*

b). When illegal registration of few flats without NOC was found, vide letter of 21.05.2002 Ex.D-88, the NOC earlier issued for 41 flats were cancelled as they were not utilized for registration of flats till that time.

c). Further when there was no repayments by AFHL, a recall notice was issued to AFHL and other land owners vide letter dated 09.04.2002 Ex.D-68.

d). 6 criminal cases under section 138 of NI Act for post-dated cheque bouncing were filed against AFHL.

28. The terms and conditions of the agreement Ex.P.2 mandates the borrower has to open an Escrow Account and shall ensure all the receipts shall be deposited in that account. Contrarily the borrower on various incidents violated this condition. The borrower repaid the loan and fully cleared the dues only after taking coercive steps and nearly after 8 years. The borrower justifies the violation on the ground that the loan is sanctioned based on the collateral security of other immovable property of A2, so the dilation of funds does not cause any financial damage to HUDCO. The first accused rely upon the letters and notes sent to the Head Office pleads that the responsibility to monitor the escrow account is vest with Monitory wing under Finance Officer to emphasis recovery is not his responsibility. In fact, when it was brought to his notice that funds from escrow account transferred to another current account No.11934 of AHFL to regularise the Escrow fund, he had not taken any measure for recovery, but only delayed the recovery process suggesting resetting of the loan.

29. Relying upon evidence of D.W.1 A.Sivashankar, the first accused submit that, after the renewal of escrow account against his opinion on 22.05.1999, the Head Office released fund to A2 M/s.Arihant Foundations & Housing Ltd. It is contended that because of his (A1) instruction, Sivashankar (D.W.1) wrote to Bank of Baroda, the letter dated 29.05.1999 to earmark a sum of Rs.109.81 lakhs as lien to HUDCO from the amount lying in the escrow account.

30. The contention of the A1 and A2 and the justification offered fails to answer the question why A1 did not acted as per the Head quarters direction regarding recovery of due from AFHL and why he continue to issue NOC without collecting the amount mentioned i.e., Rs.450 per sq.ft. The Head quarters authorised him to take decision on issuing NOC on condition that he must ensure recovery of minimum Rs.450/- per sq.ft before issuing NOC. In one case, (Gurumoorthy and Lakshmi) Head quarter had specifically directed A1 to issue NOC after collecting Rs.7 lakhs, but in gross violation of this mandate, A1 had issued NOC without remittance of Rs.7 lakhs by the borrower and had facilitated A2 to sell the flat. The default by the borrower for over and above one year, alienation of the flats illegally without getting NOC from HUDCO though known to A1, he did not act with alacrity required for a financier, but actually allowed A2 to dilate the security. The first charge over the property which was 204% above the loan amount cannot be a honest justification to allow the borrower to sell the flats and create third party rights without the consent of the first charge holder namely the HUDCO. When the terms of loan agreement and the subsequent correspondent clearly mandates that he shall not issue NOC without ensuring recovery of the minimum amount mentioned, A1 had intentionally failed to ensure repayment.

31. From the evidence, it is obvious that, A1 had no intention to prevent A2 from violating the terms of contract (i.e.,) illegal selling of flats without consent of HUDCO. He had no intention to take steps for recovery, even though A2 stopped paying the dues since 31.03.2001. Under the guise of exercising his discretionary power, A-1 had issued NOC without collecting the amount mentioned in Ex.P.4 notes i.e.,Rs.450/- per sq.ft. His belated action against A2 M/s.Arihant Foundations & Housing Ltd was after repeated instruction from the Head Quarters.

32. From the written submission made by the Learned Counsel appearing for the respondent/A2, this Court understand that the A2 cleared the dues only on 22.08.2011 pursuant to the order passed in O.A.No.211 of 2004 on the file of DRT, Chennai.

33. For the loan of Rs.16.50 crores availed from HUDCO with a promise to repay it with interest and also to maintain an Escrow Account and credit the sale proceeds of the flats, in gross violation of the terms of the condition, A2 had sold away many of the flats without NOC. For the flats for which NOC given, with the condition a portion of the sale proceed to be credited in the escrow account was not brought. After 11 years, A2 had cleared the due at the rate of 9% p.a. Thus, the monetary loss to HUDCO and the pecuniary advance obtained by A2 due to the misconduct of the A1 is palpably seen from the evidence.

34. The Learned Counsels for the appellants rely upon the following judgments for the dictum mentioned to emphasis that a). strong suspicion will not take the place of proof beyond doubt. b). To punish under Section 420 of I.P.C. *Mens rea* is necessary and without proof of *mens rea,* conviction under Section 420 of I.P.C cannot be sustained. c). For the purpose of procedural lapse, one cannot be subjected to criminal prosecution. At the most, only departmental proceedings are permissible.

(i). In ***Abdulla Mohammed Pagarkar -vs- State (Union Territory of Goa, Daman and Diu)*** *r*eported in ***(1980) 3 SCC 110***, wherein, it has held that;

> "*24. Learned counsel for the State sought to buttress the evidence which we have just above discussed with the findings recorded by the learned Special Judge and detailed as Items (a) to (e) in para 9 and Items (i) and (iii) in para 10 of this judgment. Those findings were affirmed by the learned Judicial Commissioner and we are clearly of the opinion, for reasons which need not be restated here, that they were correctly arrived at. But those findings merely make out that the appellants proceeded to execute the work in flagrant disregard of the relevant rules of the G.F.R. and*

even of ordinary norms of procedural behaviour of government officials and contractors in the matter of execution of works undertaken by the Government. Such disregard however has not been shown to us to amount to any of the offences of which the appellants have been convicted. The said findings no doubt make the suspicion to which we have above adverted still stronger but that is where the matter rests and it cannot be said that any of the ingredients of the charge have been made out."

(ii). In ***C.Chenga Reddy and others -vs- State of Andhra Pradesh*** reported in ***(1996) 10 SCC 193,*** wherein it has held that:-

*"**21.** In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence. In the present case the courts below have overlooked these settled principles and allowed suspicion to take the place of*

proof besides relying upon some inadmissible evidence.

22. *On a careful consideration of the material on the record, we are of the opinion that though the prosecution has established that the appellants have committed not only codal violations but also irregularities by ignoring various circulars and departmental orders issued from time to time in the matter of allotment of work of jungle clearance on nomination basis and have committed departmental lapse yet, none of the circumstances relied upon by the prosecution are of any conclusive nature and all the circumstances put together do not lead to the irresistible conclusion that the said circumstances are compatible only with the hypothesis of the guilt of the appellants and wholly incompatible with their innocence. In Abdulla Mohd. Pagarkar v. State (Union Territory of Goa, Daman and Diu) [(1980) 3 SCC 110 : 1980 SCC (Cri) 546] under somewhat similar circumstances this Court opined that mere disregard of relevant provisions of the Financial Code as well as ordinary norms of procedural behaviour of government officials and contractors, without conclusively establishing, beyond a reasonable doubt, the guilt of the officials and contractors concerned, may give rise to a strong suspicion but that cannot be held to establish the guilt of the accused. The established circumstances in this case also do not* *establish criminality of the appellants beyond the realm of suspicion and, in our opinion, the approach of the trial court and the High Court to the requirements of proof in relation to a criminal charge was not proper. That because of the actions of the appellants in breach of codal provisions, instructions and procedural safeguards, the State may have suffered financially, particularly by allotment of work on nomination basis without inviting tenders, but those acts of omission and commission by themselves do not establish the commission of criminal offences alleged against them..."*

(iii). In ***Madhusudanan -vs- State Represented by Deputy Superintendent of Police*** reported ***2020 SCC OnLine Mad 7053,*** wherein, it has held that:-

"14....

......

......

(xvi) There is no evidence to show that A3 had actively participated in the day to day affairs of M/s. Vindia Exports. The accused had marked Exs.D1 to D4. D1 is the letter dated 31.03.1995, wherein A2 stated his intention to repay the loan and also furnished stock statement position. Ex.D2 is the receipt memo, wherein M/s. Vindia Exports correspondence files and original

security documents have been received by CBI from the Manager on 29.10.1997. Ex.D3 is the plaint copy of O.A. No. 220 of 1999 filed by the Bank before DRT, Chennai against M/s. Vindia Exports and Ex.D4 is the proceedings extracts of O.A. No. 220 of 1999. From Ex.D4 it is seen that the original documents received from the bank were with CBI and from the year 1999 till the year 2006, the documents could not be produced despite notice sent to the respondent/CBI. Thereafter, during the pendency of the appeal the loan amount was settled to the bank as seen from Exs.C1 to C4. Ex.C1 is the acceptance of OTS by the bank on 11.03.2015. Thereafter, on 09.04.2015 before Lok-adalath, OTS settlement is recorded. By Ex.C3 compromise memo has been filed before DRT-III in O.A. No. 220 of 1999 which was renumbered as O.A. No. 2 of 2008. The DRT in O.A. No. 2 of 2008 in proceedings dated 21.05.2015 recorded the bank accepting and receiving the OTS amount and also discharging the mortgage properties.

....

(xviii) The citations relied upon by the learned counsel for the appellant/A1 for the proposition that PW2, the Regional Manager is not the appointing authority and he is not competent to issue sanction order and it is only the General Manager. Hence, PW2, who is subordinate to General Manager cannot issue sanction order [Ex.P2]. Further from the evidence of PW2, it is

clear that PW2 has not independently perused the documents and applied his mind while according sanction. The admitted position is that sanction for prosecution can be given by the appointing authority or removing authority must be higher in the rank of appointing authority. Further, for the proposition of procedural lapse, only department proceedings could be initiated and not a criminal case."

35. At the outset, it is the duty of the Court to make clear that, this is not a pure Civil dispute which later settled by consent. It is a case a sum of Rs.16.50 advanced to A2 on specific condition and A2 admits violation of the condition. It is not mere violation of condition, it is coupled with default in payment. A2 was able to manipulate with the help of A1 to sell the flats without NOC or with conditional NOC but without complying the condition. HUDCO being a Non-Banking Financial Institution cannot be satisfied with penalising the borrower who had cheated the institution and sold away the property charged with them and thereby, caused dilation of security. It has to recover the money to the extent possible. Hence, it has initiated recovery proceedings in the year 2004 but could able to recovery only with 9% interest as against the agreed 22% interest. The less interest and delay in recovery is due to the dilation of the security. Had A1 prevented A2 from illegally alienating the flats in Majestic Towers, Koyembedu, HUDCO could have_recovered the loan as per schedule along with the rate of interest agreed. If A1 not issued NOC without compliance of pre-condition, the recovery would have been possible without any hassle.

36. The criminal intention to cheat *"mens rea"* is well prove the moment A2 sold 39 flats illegally without getting consent from HUDCO and on diversion of the sale proceeds elsewhere without crediting it in the Escrow Account meant for it. The committee from the Head quarters which repeatedly insisted A1 to take action went into the deaf ears of A1. He was pursuing his proposal of restructuring in favour of the defaulter A1 and delayed recovery action. This is not a simple insubordination to attract departmental action but an act of misconduct but abuse of the official position to make illegal pecuniary advantage for himself or for any person.

37. Conspiracy are hatched in secrecy. Hardly, there will be direct evidence. Yet, in this case, the meeting of mind between A1 and A2 is exposed through the letters of A1 seeking restructuring and the favourable proposal of A1 forwarding to Head quarters placing facts contrary to records, are proof of meeting of mind to do an illegal act.

38. At the end, this Court finds that A2 had successfully delayed the payment. Not only delayed the payment, but repaid it with lesser rate of interest instead of 22% agreed under Ex.P.2 and claimed by HUDCO or 16.5% as he sought under the restructure proposal. A2 was able to prolong the repayment because of the inaction of A1/V.Arul Kumar and the said inaction is not due to innocence or improper exercise of his discretion but due to wilful misconduct and conspiracy with A2.

39. Hence, these ***Criminal Appeal Nos.569 & 586 of 2013 are dismissed.*** The judgment of the trial Court passed by XI Additional City Civil and Sessions Judge, (CBI Cases Relating to Banks and Financial Institutions), Chennai in C.C.No.15 of 2006 is confirmed. The trial Court is directed to secure the appellant/A-1 and commit him to the prison to undergo the remaining period of sentence. The period of imprisonment already undergone by the accused shall be set off under Section 428 of Cr.P.C.

10.07.2023

Index :Yes/No.
Internet :Yes/No.
Speaking order/non speaking order
bsm
To:-
1.The XI Additional City Civil and Sessions Judge, [CBI Cases], Chennai – 1.
2.The Inspector of Police, SPE:CBI:ACB:Chennai.
3.The Special Public Prosecutor, High Court, Madras.

DR.G.JAYACHANDRAN,J.

bsm

Pre-delivery common judgment made in
Criminal Appeal Nos.569 & 586 of 2013

10.07.2023