

Mohammed Moquim vs State Of Odisha (Vigilance) on 10 April, 2024

Author: B.P. Routray

Bench: B.P. Routray

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLA No.880 OF 2022

From the judgment and order dated 29.9.2022 passed by learned Special Judge, Vigilance, Bhubaneswar in T.R.Case No.1 of 2009.

Mohammed Moquim Ap

Versus

State of Odisha (Vigilance) Re

Advocate(s) appeared in this case:-

For Appellant : Mr.Pitambar Acharya, Sr. Advocate

For Respondent : Mr.S.Das, Sr. Standing Counsel (Vigilance)
Mr.S.K.Das, Standing Counsel (Vigilance)

CORAM : JUSTICE B.P. ROUTRAY

JUDGMENT

10th April, 2024 B.P. Routray,J.

1. The Appellant has been convicted for commission of offences under Sections 468, 471, 420 and Section 120-B of the Indian Penal Code and sentenced to undergo rigorous imprisonment for three years Signed by: CHITTA RANJAN BISWAL Reason: Authentication for each such offence along with payment of fine of Rs.50,000/-. Location: Orissa High Court, Cuttack Date: 10-Apr-2024 15:02:15

2. Appellant is the Managing Director of M/s. Metro Builders Pvt. Ltd. There were five accused persons and the present Appellant was Accused No.4. Accused No.1 (Vinod Kumar) was the Managing Director of Orissa Rural Housing Development Corporation (ORHDC) and Accused No.2 (Swosti Ranjan Mohapatra) was its Company Secretary. Accused No.3 was M/s. Metro Builders Pvt.

Ltd. and Accused No.5 was the Director of M/s. Metro Builders Pvt. Ltd.

3. Prosecution case in brief is that ORHDC, incorporated on 19th August 1994 before the Registrar of Companies, is a Government owned Corporation and its objective was to act as the principal institution for financing, promoting and developing the rural housing and related activities. Accused No.1 & 2, who are the Managing Director and Company Secretary of ORHDC, while discharging their public duties as such, have illegally sanctioned and disbursed the loan amount of Rs.1.5 Crore to M/s. Metro Builders Pvt. Ltd. by abusing their position and without such financial power on their part and without keeping adequate security for the loan amount, and thereby caused wrongful financial loss to ORHDC. It is alleged that M/s. Metro Builders Pvt. Ltd. was a known defaulter to ORHDC as they had not Signed by: CHITTA RANJAN BISWAL Reason: Authentication repaid the previous loan amount of Rs.1 Crore taken for their project Location: Orissa High Court, Cuttack Date: 10-Apr-2024 15:02:15 Metro City I. Present Appellant being its Managing Director managed to get further loan amount of Rs.1.5 Crore along with other co-accused (Piyushdhari Mohanty) in the guise of its new project Metro City II in conspiracy with Accused No.1 and 2, who are the officials of ORHDC. Out of said loan amount of Rs.1.5 Crore, Rs.50 lakhs was adjusted towards repayment of the previous loan of Rs.1 Crore. Further, the loan was disbursed in favour of the Appellant and his company without execution of any registered mortgage deed or tripartite agreement. It is alleged that though the loan of Rs.1.5 Crore was availed for the purpose of construction of apartment, the tripartite agreement between ORHDC, loanee builder and the flat owners was required to be executed. Further, the entire loan amount was disbursed on 28th August 2000 without the authority of the Board of Directors of ORHDC and without having requisite financial power by the Managing Director, ORHDC. The Managing Director, ORHDC did not have any financial power to sanction any loan amount, but only for the first time the Board of Directors authorized the Managing Director in its meeting dated 31st August 2000, i.e. three days after the sanction of alleged loan amount, to sanction the loan up to Rs.5,00,000/- only. So the Managing Director of Digitally Signed ORHDC was not authorized to sanction any loan amount prior to 31st Signed by: CHITTA RANJAN BISWAL Reason: Authentication Location: Orissa High Court, Cuttack Date: 10-Apr-2024 15:02:15 August 2000 that too to the extent of Rs.1.5 Crore. It is also alleged that the loan amount was sanctioned in favour of the Appellant and M/s. Metro Builders Pvt. Ltd. in conspiracy between all the accused persons and for that purpose many documents were forged by the Appellant and the rules have been violated. The Appellant managed to get further loan of Rs.1.5 Crore in the guise of the project Metro City II without paying the previous loan amount taken from ORHDC and by forging the documents like fire certificate and other documents. Such forged documents have been used by the Appellant and other accused persons as genuine documents with knowledge and reason to believe the same as forged documents.

4. The Appellant denied the charge and pleaded innocence with false implication.

5. Learned trial court formulated five points for determination and in the context of present Appellant, it is important to determine that, whether he committed forgery? Secondly, whether the Appellant fraudulently and dishonestly used the document as genuine knowingly or having reason to believe the same to be forged documents, while Digitally Signed getting sanction and disbursal of the loan amount from ORHDC ? Signed by: CHITTA RANJAN BISWAL Reason: Authentication

Thirdly, Location: Orissa High Court, Cuttack Whether forgery is committed with intention that the Date: 10-Apr-2024 15:02:15 documents so forged would be used for cheating to ORHDC ? Fourthly, whether to get sanction and disbursal of such loan amount from ORHDC, the Appellant had conspired with other accused persons?, Fifthly, whether the Appellant along with other co-accused persons has cheated and dishonestly induced the ORHDC to disburse such loan amount by acceptance of forged documents as genuine?

6. Prosecution in order to prove their case have examined seventeen witnesses and marked thirty seven documents as exhibits. On the other hand, the defence did not examine any witness and only marked the documents under Ext.A to S in support of its case.

7. The status of the Appellant as the Managing Director of M/s. Metro Builders Pvt. Ltd. is admitted. Similarly, the status of other accused persons as the M.D. and Company Secretary of ORHDC and Director of M/s. Metro Builders Pvt. Ltd. are also admitted. M/s. Metro Builders Pvt. Ltd. applied for the loan on 24th June 2000 and the amount was disbursed on 28th August 2000. The loan amount was to the tune of rupees one crore fifty lakhs. Prior to that, M/s. Metro Builders Pvt. Ltd. had also availed previous loans from ORHDC and it had not repaid the Digitally Signed same entirely. There was outstanding amount of rupees fifty lakhs Signed by: CHITTA RANJAN BISWAL Reason: Authentication against Location: Orissa High Court, Cuttack M/s. Metro Builders Pvt. Ltd. and while sanctioning and Date: 10-Apr-2024 15:02:15 disbursing present loan amount of Rs.1.5 crores, Rupees fifty lakhs was adjusted towards the outstanding of previous loan amount. Prosecution alleges that all the accused persons were in criminal conspiracy for grant of loan of such amount to the tune of Rs.1.5 crore in favour of M/s. Metro Builders Pvt. Ltd. and in execution of the agreement between them, such huge amount of loan was sanctioned and disbursed illegally by forging the documents and without keeping proper security and without verification of documents. In the process, the financial advisor, i.e. Executive Director (Finance) of ORHDC was kept out of the fray and the empanelled legal advisor of ORHDC was not consulted. M/s. Metro Builders Pvt. Ltd. being a loan defaulter to ORHDC is not eligible to get further loan and the loan was disbursed by submission of forged documents. Further, the loan was sanctioned and disbursed by accused no.1 without having any financial power on his part. For the purpose of loan, the Appellant submitted and used forged estimate, forged permission and plan of BDA, forged fire prevention document and opinion of unauthorized Advocate (who is not an empanelled Lawyer of ORHDC).

8. The charges against the Appellant in substance is that, the Signed by: CHITTA RANJAN BISWAL Reason: Authentication Appellant being the M.D. of M/s. Metro Builders Pvt. Ltd. in criminal Location: Orissa High Court, Cuttack Date: 10-Apr-2024 15:02:15 conspiracy with other accused persons has deceived and induced ORHDC to disburse loan amount of Rs.1.5 crores by cheating and using forged documents as genuine.

9. It is the allegation that during July and August, 2000, accused number 1 & 2 while discharging their public duties as the Managing Director and Company Secretary of ORHDC respectively, abused their official position and by making criminal conspiracy with present Appellant and other co-accused persons have illegally sanctioned and disbursed loan to the tune of Rs.1.5 crores to M/s. Metro Builders Pvt. Ltd. without any financial power on the part of accused no.1 and without

keeping adequate security for the loan amount and thereby cheated ORHDC causing wrongful loss. The Appellant being the M.D. of M/s. Metro Builders Pvt. Ltd. deceived and cheated ORHDC in conspiracy with other accused persons to receive aforesaid loan amount of Rs.1.5 crores by using forged documents. No registered mortgage deed was executed nor any tripartite agreement was furnished to receive the loan amount and original documents were not submitted. The loan amount was also not repaid and on the date of registration of F.I.R. the outstanding amount was to the tune of Rs.168.47 lakhs which was Signed by: CHITTA RANJAN BISWAL Reason: Authentication enhanced to Rs.622.25 lakhs as on 30th October, 2007. Location: Orissa High Court, Cuttack Date: 10-Apr-2024 15:02:15

10. Mr. Acharya, learned senior counsel submits on behalf of the Appellant that mere inability to repay the loan amount cannot be treated as cheating and the same cannot give rise for criminal prosecution against the defaulter. It is further submitted that the allegations about forged estimate and plan has been disproved by the officials of BDA (Bhubaneswar Development Authority) and the allegations about submission of forged fire prevention certificate has not been substantiated through adequate evidence. He further submits that the Managing Director of a company cannot be held liable for the actions of the company unless sufficient evidences of his active role are there coupled with criminal intent.

11. Mr. Das, learned senior standing counsel submits on the other hand that, entire series of actions starting from application for loan coupled with the circumstances that the applicant was a loan defaulter and the sanctioning authority did not have any financial power to sanction such huge amount of loan, that too violating the procedures without keeping equitable mortgage against the loan amount and without keeping the original documents of property, do justify the criminal conspiracy by agreement between all the accused persons Signed by: CHITTA RANJAN BISWAL Reason: Authentication including the Appellant with intention to cheat the Corporation Location: Orissa High Court, Cuttack Date: 10-Apr-2024 15:02:15 (ORHDC). The Appellant also used forged documents as genuine knowingly for getting the loan from ORHDC.

12. In the case at hand, as stated above, the status of the Appellant as the Managing Director of M/s. Metro Builders Pvt. Ltd., in whose favour the loan amount was disbursed, remains admitted. The Appellant in his statement under Section 313 of the Cr.P.C. has admitted the same. Further, from the trend of cross-examination of prosecution witnesses it is seen that such position of the Appellant as M.D. of M/s. Metro Builders Pvt. Ltd. is never disputed.

13. So far as sanction and disbursal of loan amount in question in favour of M/s. Metro Builders Pvt. Ltd. is concerned, the same also remains admitted in the statement of the Appellant and other co-accused persons under Section 313 of the Cr.P.C. This aspect of disbursal of loan amount is never questioned by any of the accused persons. M/s. Metro Builders Pvt. Ltd. had applied for loan with the signature of the Appellant as its Managing Director and the loan file was processed in ORHDC. According to the evidence of P.W.9, the Financial Advisor- cum-Chief Accounts Officer, the Project Finance File (Ext.13) in respect Digitally Signed of Metro City II of M/s. Metro Builders Pvt. Ltd. was initiated for Signed by: CHITTA RANJAN BISWAL Reason: Authentication sanction Location: Orissa High Court, Cuttack of loan amount of Rs.1.5 Crores. The file was processed by Date:

10-Apr-2024 15:02:15 Accused No.2 and put up before the M.D. of ORHDC (Accused No.1), who sanctioned the loan vide order dated 5th July 2000. The loan amount was disbursed through different cheques encashed in favour of M/s. Metro Builders Pvt. Ltd. on different dates. The last phase of the loan was released on 28th August 2000. It is further stated by P.W.9 that though he did not have detail knowledge about outstanding amount of previous loan on M/s. Metro Builders Pvt. Ltd., but a sum of Rs.50 lakhs from the present loan amount was adjusted towards the outstanding of earlier loan. In his cross-examination, the Appellant did not dispute sanction and disbursal of aforesaid loan amount in favour of M/s. Metro Builders Pvt. Ltd. On the other hand, the Appellant had cross-examined this P.W.9 regarding the jurisdiction and competency of Accused No.1 to sanction the loan and his financial power to do so. The other accused persons including Accused No.1, who sanctioned the loan, also did not question anything to P.W.9 disputing disbursal of loan amount up-to the tune of Rs.1.5 Crores in favour of M/s. Metro Builders Pvt. Ltd.

14. In this case, the I.O. namely K.S.Balabantaray, who did major part of investigation, died during pendency of the trial. So he could not be examined as a witness in the trial. The subsequent I.O., who Signed by: CHITTA RANJAN BISWAL Reason: Authentication submitted the charge-sheet, has been examined as P.W.15. He has stated Location: Orissa High Court, Cuttack Date: 10-Apr-2024 15:02:15 about the seizure of the file regarding processing of loan amount and other documents justifying the disbursal of such loan in favour of M/s. Metro Builders Pvt. Ltd. The note sheets of account statements for Metro City II project of M/s. Metro Builders Pvt. Ltd. has been marked under Ext.36. As per Ext.36, the outstanding as on 22nd December 2002 was Rs.1,29,68,909/-. Ext.37 is the accounts statement of loan, which shows outstanding of Rs.6,22,25,214/- as on 6th November 2007. Therefore, from analysis of the evidence of P.W.9, 15 and other witnesses as well as the statement of the Appellant and other accused persons recorded under Section 313 of the Cr.P.C., and from the trend of cross-examination of the witnesses, it is established that loan amount of Rs.1.5 Crores was sanctioned and disbursed in favour of M/s. Metro Builders Pvt. Ltd. being applied by it with signature of the Appellant, and the same remained unpaid as on 6th November 2007 with outstanding amount of Rs.6,22,25,214/-.

15. Defence has not brought any evidence or material regarding repayment of loan amount after 6th November 2007. Prosecution also remained silent about the status of unpaid loan as on the date of completion of trial or thereafter. In the appeal before this court, neither Signed by: CHITTA RANJAN BISWAL Reason: Authentication Location: Orissa High Court, Cuttack Date: 10-Apr-2024 15:02:15 party raise any submission regarding repayment of the loan amount subsequently or its status thereafter.

16. It is next to be seen if such loan amount was received by the Appellant as Managing Director of M/s.Metro Builders Pvt. Ltd. in fraudulent and dishonest manner by using forged documents to cheat ORHDC. It is borne from prosecution evidence that on the date of application for loan, M/s. Metro Builders Pvt. Ltd. was a known defaulter having heavy outstanding against him. Ext.32 is the certified note sheets relating to sanction and disbursal of previous project loan in respect of Metro City - I and as per the same, the outstanding dues as on 5th July 2000 over M/s. Metro Builders Pvt. Ltd. was Rs.1,34,44,390/-. It is the consistent evidence of P.W.9, the Financial Advisor of ORHDC that on the date of application, such huge amount of outstanding was there against M/s. Metro

Builders Pvt. Ltd.

17. P.W.14 is the Secretary to Government in Housing and Urban Development Department and Chairman of ORHDC. He has stated in his evidence that, the MD of ORHDC had no financial power to sanction the loan prior to 31.08.2000. For the first time, power to Digitally Signed sanction individual housing loan up-to rupees five lakhs was granted in Signed by: CHITTA RANJAN BISWAL Reason: Authentication st favour Location: Orissa High Court, Cuttack of the MD of ORHDC (Accused No.1) in the 21 Board Meeting Date: 10-Apr-2024 15:02:15 of ORHDC held on 31.08.2000. He has further stated that, there was no post facto approval of the loan sanctioned by the MD of ORHDC and there was absolutely no authorization given by the Board to the MD of ORHDC for sanctioning housing loan prior to 31.08.2000. The powers of the MD has been specifically mentioned in Article 131 (2) of the Articles of Association (Ext.B), which does not authorize the MD to sanction and disburse any loan. It is further stated by P.W.14 that, fiscal prudence requires specific power of an authority to grant, sanction and disburse loan. But here the MD of ORHDC (Accused No.1) did not have any such power to sanction and disburse loans prior to 31.08.2000. This evidence of P.W.14 could not be assailed in his cross-examination.

P.W.9 is the Financial Advisor-cum-Chief Accounts Officer of ORHDC. He has also stated in his evidence that, present loan was sanctioned by the MD beyond his authority and jurisdiction and the file was not processed through him (P.W.9). The loan sanction file (Ext.13) was directly processed by the Company Secretary (Accused No.2) and approved by Accused No.1 to sanction and disburse the loan amount. In the process, the financial advisor of the institution has been ignored and by-passed. So from analysis of the evidences of P.W.14, P.W.9 and Digitally Signed Ext.B, it is clearly established that, the loan to the tune of Rs.1.5 crores Signed by: CHITTA RANJAN BISWAL Reason: Authentication Location: Orissa High Court, Cuttack Date: 10-Apr-2024 15:02:15 was illegally sanctioned and disbursed in favour of M/s. Metro Builders Pvt. Ltd. violating procedural rules.

18. Prosecution alleges that, to get sanctioned and disbursal of such loan amount, present Appellant being the MD of M/s. Metro Builders Pvt. Ltd. had submitted certain forged documents such as, BDA Plan Approval Letter, Estimate and No Objection Certificate of the Fire Prevention Officer. The Appellant also used the legal opinion of an unauthorized Advocate in his support.

19. Coming to see the Plan Approval Letter of Bhubaneswar Development Authority (BDA), the relevant witnesses are P.W.1, 3, 7 & 8, who are the officials of BDA. P.W.1 is the Junior Assistant, who spoke about seizure of two files, P.W.3 is the Enforcement Officer, P.W.7 is the Assistant Town Planner and P.W.8 is the Planning Assistant of BDA.

P.W.3 has said that upon direction of higher authority he had made a confidential enquiry on the allegations against the then Assistant Town Planner namely, Sudhir Ranjan Mohanty in connection with the Building Plan Approval of M/s. Metro Builders Pvt. Ltd., and during Digitally Signed enquiry it is found that, the then Town Planning Staff had fraudulently Signed by: CHITTA RANJAN BISWAL Reason: Authentication approved Location: Orissa High Court, Cuttack the 2nd phase construction plan (Metro City-II) in connivance Date: 10-Apr-2024 15:02:15 with Metro Builders. P.W.7, who was the Assistant Town Planner, has said in his evidence that, the Appellant as

the MD of M/s. Metro Builders Pvt. Ltd. submitted the application for approval of construction of residential apartment up-to sixth floor on 28.08.1998 along with necessary documents. The documents include Ext.C - the No Objection Certificate of Fire Prevention Officer and Ext.E - the Structural Safety Certificate. The plan was approved on 26th September, 1998 and the approval letter is marked under Ext.3/17.

20. According to the evidence of P.W.3, lot of irregularities were committed by the then Assistant Town Planner of BDA and Junior Town Planner in connivance with the applicant to get the Plan Approval Letter. It is true that the plan was approved by the Chairman of BDA, who is the competent authority and based on his approval order, the letter under Ext.3/17 was issued. The said plan approval letter was never recalled or cancelled by the BDA. At this stage, it is now important to look into the prosecution allegations about the No Objection Certificate (Ext.C). Prosecution alleges that, the No Objection Certificate (Fire Safety Certificate) with regard to prevention of fire as submitted by the Appellant to get the plan approved in favour of M/s. Metro Builders Pvt. Signed by: CHITTA RANJAN BISWAL Reason: Authentication Ltd. is a forged document. In this regard the evidence of P.W. 17 is Location: Orissa High Court, Cuttack Date: 10-Apr-2024 15:02:15 pressed into. Said P.W.17 is the State Fire Prevention Officer and he has stated that no such "No Objection Certificate" was ever issued to the Advisor-cum-Planning Member of BDA relating to multi-storey building complex of Metro City. He has further stated that the 'No Objection Certificate' marked under Ext.C is a forged and fabricated document.

It needs to be mentioned here that Ext.C marked by the Appellant during cross-examination of P.W.7 is the purported letter of the Fire Prevention Officer, Odisha in letter no.216/FPW dated 23rd July 1998, addressed to the Advisor-cum-Planning Member of BDA relating to issue of NOC on fire safety point of the proposed building complex- Metro City. P.W.17 was working as the Fire Prevention Officer, Odisha on 23rd July 1998 and he produced the copy of the dispatch register of his office from 21st to 30th July 1998 to justify that no such letter as per Ext.C was ever issued by their office. Rather letter no.216 was issued on 27th July 1998 and addressed to the Station Officer of Nilagiri Fire Station. Said P.W.17 has also clarified this in his letter No.6/FPW dated 5th August 2005 marked under Ext.30.

There has been an attempt made through cross-examination of Digitally Signed said P.W.17 to say that Ext.C was issued by his predecessor namely, Signed by: CHITTA RANJAN BISWAL Reason: Authentication Location: Orissa High Court, Cuttack Date: 10-Apr-2024 15:02:15 Biranchi Narayan Mohapatra. But this statement of P.W.17 made in his cross-examination is found unbelievable and appears to be a development. It is for the reason that, P.W.17 has not stated anything about issuance of Ext.C by his predecessor in his letter under Ext.30 nor had he stated anything about Biranchi Narayan Mohapatra in his statement made before the I.O. under Section 161 of the Cr.P.C. Further, it is mentioned by P.W.17 in his examination in chief that, there is one post of Fire Prevention Officer for the State of Odisha, who is only competent to issue 'No Objection Certificate' regarding fire safety, and he has said in his cross-examination that Biranchi Narayan Mohapatra was working as Fire Station Officer (not same as Fire Prevention Officer). Therefore, the evidence of P.W.17 as stated in his examination in chief remains firm and could not be demolished by the defence in the cross-examination. It is further noticed that, P.W.17 was examined in chief on 1st February 2019,

when the Appellant did not cross-examine him and this witness was cross-examined by the Appellant and Accused No.5 on 9th July 2019. Thus, on analysis of the evidence of P.W.17 and the I.O. (P.W.15) as well as from the contents of the Ext.30 and Ext.C, it is established that Ext.C, which was submitted by the Appellant to BDA Digitally Signed for approval of the plan, is a forged document. Signed by: CHITTA RANJAN BISWAL Reason: Authentication Location: Orissa High Court, Cuttack Date: 10-Apr-2024 15:02:15 Undoubtedly, 'No Objection Certificate' regarding fire safety is one of the essential documents required to be submitted for getting approval of the plan in respect of a multi-storey building complex. When the 'No Objection Certificate' under Ext.C is proved to be a forged document and utilized by the Appellant to get the plan approved by BDA, the consequent approval of the plan in plan approval letter under Ext.3/17 is proved to be the forged one also.

21. Regarding submission of the estimate, it is seen that P.W.16 is the Proprietor of 'Development Engineers', who has stated in his evidence that, the estimate submitted by M/s. Metro Builders Pvt. Ltd. and available in the project finance file under Ext.13 has not been issued by him. The signature appearing therein is not of him, and the seal and signature appearing in the so called certificate of 'Development Engineers' is forged. He has further stated that, the certificate under Ext.13/11 and the estimate under Ext.13/12 are forged documents. The defence has been failed to bring anything in his cross-examination to demolish his evidence except the statement that Ext.13/11 and Ext.13/12 could have been issued by any other official. A thorough analysis of the evidence of P.W.16 justifies the prosecution case that the certificate and Signed by: CHITTA RANJAN BISWAL Reason: Authentication estimate under Ext.13/11 and Ext.13/12 submitted by M/s. Metro Location: Orissa High Court, Cuttack Date: 10-Apr-2024 15:02:15 Builders Pvt. Ltd. for sanction of loan, are forged documents. It is to be mentioned here that, the defence does not dispute the authority of P.W.16 as the source and author of the documents under Ext.13/11 and Ext.13/12. When the authority of P.W.16 as the Proprietor of 'Development Engineers' is not disputed and P.W.16 denies his signature and seal on the document, no reason is left to deny the documents as forged.

22. The legal opinion used in the process of sanction of loan was given by an Advocate namely, Purna Chandra Rath (P.W.13). He is not the empanelled lawyer of ORHDC. One Shri Pratap Kumar Das was the sole legal retainer of ORHDC during the period 2000-01. It is not that the opinion of a legal expert not authorized by ORHDC was used for processing the file for sanction of the loan, but it is interesting to see the note sheet under Ext.13 where it is mentioned that "the legal opinion obtained from our legal retainer opined that the land offered, is free from any litigation and is suitable to be taken as a mortgage as a security against the loan." Therefore, the use of legal opinion of P.W.13 stating that the same is the opinion of the legal retainer of ORHDC is itself illegal and cannot be treated as a safe and reliable Signed by: CHITTA RANJAN BISWAL Reason: Authentication Location: Orissa High Court, Cuttack Date: 10-Apr-2024 15:02:15 document for the purpose of granting loan. Accordingly prosecution is found to have satisfied it's case here also.

23. Apart from above, several other irregularities have been brought on record through prosecution evidence. First of all, no equitable mortgage in respect of the property has been created for the loan amount keeping the original title deeds. Secondly, against the valuation of the property at Rs.25 lakhs, loan of Rs.1.5 Crores was disbursed. Thirdly, not a single original document was kept in the

file (Ext.13) before disbursement of the loan amount. P.W.9, who is the financial head of the Institution (ORHDC), has not been consulted nor the file was routed through him.

24. In order to satisfy the ingredients to constitute the offence of cheating, there should be fraudulent or dishonest inducement of the person deceived by the accused who intentionally induced him to deliver the property. It is needless to say that a person who dishonestly induced any person to deliver any property is liable for the offence of cheating. Having analyzed the evidences and the circumstances brought on record through evidence, it is seen that all the accused persons have acted in Digitally Signed tandem with agreement between them to disburse the loan amount of Signed by: CHITTA RANJAN BISWAL Reason: Authentication Rs.1.5 Location: Orissa High Court, Cuttack Crores in favour of M/s. Metro Builders Pvt. Ltd. The offence of Date: 10-Apr-2024 15:02:15 criminal conspiracy can be satisfied through circumstantial evidence with necessary implications. In Baldev Singh vs. State of Punjab, (2009) 6 SCC 564, the Hon'ble Supreme Court have held as follows:-

"17. Conspiracy is defined in Section 120-A IPC to mean:

"120-A. Definition of criminal conspiracy.--When two or more persons agree to do, or cause to be done,--

(1) an illegal act, or (2) 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.

Explanation.--It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object."

An offence of conspiracy which is a separate and distinct offence, thus, would require the involvement of more than one person. Criminal conspiracy is an independent offence. It is punishable separately, its ingredients being:

- (i) an agreement between two or more persons;
- (ii) the agreement must relate to doing or causing to be done either
 - (a) an illegal act;
 - (b) an act which is not illegal in itself but is done by illegal means.

It is now, however, well settled that a conspiracy ordinarily is hatched in secrecy. The court for the purpose of arriving at a finding as to whether the said offence has been committed or not may take

into consideration the circumstantial evidence. While however doing so, it must be borne in mind that meeting of the mind is essential; mere knowledge or discussion would not be sufficient.

18. Adverting to the said question once again, we may, however, notice that recently in *Yogesh v. State of Maharashtra* [(2008) 10 SCC 394 : (2009) 1 SCC (Cri) 51 : (2008) 6 Scale 469] a Division Bench of this Court held: (SCC p. 402, para 25) "25. Thus, it is manifest that the meeting of minds of two or more persons for doing an illegal act or an act by illegal means is sine qua non of the Digitally Signed between them by direct proof. Nevertheless, existence of the conspiracy Signed by: CHITTA RANJAN BISWAL Reason: Authentication and its objective can be inferred from the surrounding circumstances and Location: Orissa High Court, Cuttack the conduct of the accused. But the incriminating circumstances must form Date: 10-Apr-2024 15:02:15 a chain of events from which a conclusion about the guilt of the accused could be drawn. It is well settled that an offence of conspiracy is a substantive offence and renders the mere agreement to commit an offence punishable, even if an offence does not take place pursuant to the illegal agreement."

19. Yet again in *Nirmal Singh Kahlon v. State of Punjab* [(2009) 1 SCC 441 : (2009) 1 SCC (Cri) 523 : (2008) 14 Scale 639] this Court following *Ram Lal Narang v. State (Delhi Admn.)* [(1979) 2 SCC 322 : 1979 SCC (Cri) 479] held that a conspiracy may be a general one and a separate one meaning thereby a larger conspiracy and a smaller conspiracy which may develop in successive stages. For the aforementioned purpose, the conduct of the parties also assumes some relevance.

20. In *K.R. Purushothaman v. State of Kerala* [(2005) 12 SCC 631 :

(2006) 1 SCC (Cri) 686] this Court held: (SCC pp. 636-38, paras 11 & 13) "11. Section 120-A IPC defines 'criminal conspiracy'. According to this section when two or more persons agree to do, or cause to be done (i) an illegal act, or (ii) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy. In *Major E.G. Barsay v. State of Bombay* [AIR 1961 SC 1762 : (1962) 2 SCR 195] Subba Rao, J., speaking for the Court has said: (AIR p. 1778, para 31) '31. ... The gist of the offence is an agreement to break the law. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done has not been done. So too, it is not an ingredient of the offence that all the parties should agree to do a single illegal act. It may comprise the commission of a number of acts.' ***

13. To constitute a conspiracy, meeting of minds of two or more persons for doing an illegal act or an act by illegal means is the first and primary condition and it is not necessary that all the conspirators must know each and every detail of the conspiracy. Neither is it necessary that every one of the conspirators takes active part in the commission of each and every conspiratorial acts. The agreement amongst the conspirators can be inferred by necessary implication. In most of the cases, the conspiracies are proved by the circumstantial evidence, as the conspiracy is seldom an open affair. The existence of conspiracy and its objects are usually deduced from the circumstances of the case and the conduct of the accused involved in the conspiracy. While appreciating the evidence of the conspiracy, it is incumbent on the

court to keep in mind the well-known rule governing circumstantial evidence viz. each and every incriminating circumstance must be clearly established by reliable evidence and the circumstances proved must form a chain of events from which the only and no other hypothesis against the guilt is possible. Criminal conspiracy is an independent offence in the Penal Code. The unlawful agreement is Signed by: CHITTA RANJAN BISWAL Reason: Authentication sine qua non for constituting offence under the Penal Code and not an Location: Orissa High Court, Cuttack Date: 10-Apr-2024 15:02:15 accomplishment. Conspiracy consists of the scheme or adjustment between two or more persons which may be express or implied or partly express and partly implied. Mere knowledge, even discussion, of the plan would not per se constitute conspiracy. The offence of conspiracy shall continue till the termination of agreement."

25. Further, the Supreme Court has explained in Ram Narayan Poply Vs- CBI, AIR 2003 SC 2748, that, "Privacy and secrecy are more characteristics of conspiracy, than of a loud discussion in an elevated place open to public view. Direct evidence in proof of a conspiracy is seldom available. Offence of conspiracy can be proved by either direct or circumstantial evidence. It is not always possible to give affirmative evidence about the date of the formation of the criminal conspiracy, about the persons who took part in the formation of the conspiracy, about the object, which the objectors set before themselves as the object of conspiracy, and about the matter in which the object of conspiracy is to be carried out, all this is necessarily a matter of inference."

26. In State of Maharashtra vrs. Som Nath Thapa, (1996) 4 SCC 659, it is observed that, to establish a charge of conspiracy 'knowledge' about indulgence in either an illegal act or a legal act by illegal means is necessary. In some cases, intent of unlawful use being made of the goods or services in question may be inferred from the knowledge itself. Digitally Signed This apart, the prosecution has not to establish that a particular unlawful Signed by: CHITTA RANJAN BISWAL Reason: Authentication Location: Orissa High Court, useCuttack was intended, so long as the goods or service in question could not Date: 10-Apr-2024 15:02:15 be put to any lawful use. Finally, when the ultimate offence consists of a chain of actions, it would not be necessary for the prosecution to establish, to bring home the charge of conspiracy, that each of the conspirators had the knowledge of what the collaborator would do, so long as it is known that the collaborator would put the goods or service to an unlawful use.

27. As discussed earlier, the documents under Ext.C, Ext.3/17, Ext.12/11 and Ext.13/12 are proved as forged documents. Section 464 of the IPC defines making a false document and Section 468 provides that whoever commits forgery intending that the documents shall be used for the purpose of cheating, shall be punished with imprisonment of such description. Section 471 provides that whoever fraudulently and dishonestly uses as genuine knowingly or having reason to believe to be a forged document, shall be punished for such description. An analysis of Section 464, 468, 470 and 471 of the IPC makes it understand of making a false document by forgery. As per Section 463, whoever makes any false document intending to cause damage or injury to the public or to any person, or to cause any person to part with property, or with intent to commit fraud or that fraud may be committed, is said to Signed by: CHITTA RANJAN BISWAL Reason: Authentication have

committed forgery. Location: Orissa High Court, Cuttack Date: 10-Apr-2024 15:02:15 The documents narrated above, have been used by the Appellant as the M.D. of M/s. Metro Builders Pvt. Ltd. to get the loan disbursed in favour of his company. Use of such forged documents coupled with the circumstances discussed earlier that how the loan was processed for disbursement are enough to attract the offences under Sections 468/471 along with the offence of cheating under Section 420 of the IPC. To constitute an offence of cheating under Section 415 of the IPC, it is required to be established that a person has been induced, either fraudulently or dishonestly, to deliver any property to any person. In Mohd. Ibrahim vrs. State of Bihar, (2009) 8 SCC 751, the Hon'ble Supreme Court has observed that, for the offence of cheating, there should not only be the cheating, but as a consequence of such cheating, the accused should also have dishonestly adduced the person deceived to delivery any property. In the present case, when the documents under Ext.C, 3/17, 13/11, 13/12 and other documents, are established as forged and have been used to process the loan in favour of the accused company, the dishonest and fraudulent intention of the Appellant as the M.D. of the company is clearly satisfied. Use of these forged documents have resulted disbursement of the loan of Rs.1.5 Crores in favour Digitally Signed of the company.

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28. In the case at hand, it is the Appellant, who applied with his signature in the capacity of M.D. of M/s. Metro Builders Pvt. Ltd. for grant of loan. He is the applicant also before the BDA in the same capacity to get the plan approval letter. The law has been well settled in plethora of decisions regarding liability of the Directors of a company in commission of offence by the company. In Sunil Bharati Mittal vs. C.B.I. (2015) 4 SCC 609, the Supreme Court while considering the circumstances, when Director/Person in-Charge of the affairs of the company can also be prosecuted, have held that a corporate entity is an artificial person which acts through its Officers, Directors, Managing Directors, Chairman etc. and if such of a company commits an offence involving mens rea, it would normally be the intent and action of that individual who would act on behalf of the company. The relevant observations are as follows:

"39. In Iridium India [Iridium India Telecom Ltd. v. Motorola Inc., (2011) 1 SCC 74 : (2010) 3 SCC (Cri) 1201] , the aforesaid question fell directly for consideration, namely, whether a company could be prosecuted for an offence which requires mens rea and discussed this aspect at length, taking note of the law that prevails in America and England on this issue. For our benefit, we will reproduce paras 59-64 herein: (SCC pp. 98-100) "59. The courts in England have emphatically rejected the Digitally Signed which was an outcome of an act of will needing a particular state Signed by: CHITTA RANJAN BISWAL Reason: Authentication of mind. The aforesaid notion has been rejected by adopting the Location: Orissa High Court, Cuttack doctrine of attribution and imputation. In other words, the criminal Date: 10-Apr-2024 15:02:15 intent of the 'alter ego' of the company/body corporate i.e. the person or group of persons that guide the business of the company, would be imputed to the corporation.

60. It may be appropriate at this stage to notice the observations made by MacNaghten, J. in *Director of Public Prosecutions v. Kent and Sussex Contractors Ltd.* [1944 KB 146 :

(1944) 1 All ER 119 (DC)] : (KB p. 156) A body corporate is a "person" to whom, amongst the various attributes it may have, there should be imputed the attribute of a mind capable of knowing and forming an intention--indeed it is much too late in the day to suggest the contrary. It can only know or form an intention through its human agents, but circumstances may be such that the knowledge of the agent must be imputed to the body corporate. Counsel for the respondents says that, although a body corporate may be capable of having an intention, it is not capable of having a criminal intention. In this particular case the intention was the intention to deceive.

If, as in this case, the responsible agent of a body corporate puts forward a document knowing it to be false and intending that it should deceive, I apprehend, according to the authorities that Viscount Caldecote, L.C.J., has cited, his knowledge and intention must be imputed to the body corporate.

61. The principle has been reiterated by Lord Denning in *Bolton (H.L.)(Engg.) Co. Ltd. v. T.J. Graham & Sons Ltd.* [(1957) 1 QB 159 : (1956) 3 WLR 804 : (1956) 3 All ER 624 (CA)] in the following words: (QB p. 172) A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are Directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by the law as such. So you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company. That is *Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.* [1915 AC Signed by: CHITTA RANJAN BISWAL 705 : (1914-15) All ER Rep 280 (HL)] (AC at pp. 713 & Reason: Authentication 714). So also in the criminal law, in cases where the law Location: Orissa High Court, Cuttack Date: 10-Apr-2024 15:02:15 requires a guilty mind as a condition of a criminal offence, the guilty mind of the Directors or the managers will render the company themselves guilty.

62. The aforesaid principle has been firmly established in England since the decision of the House of Lords in *Tesco Supermarkets Ltd. v. Nattrass* [1972 AC 153 : (1971) 2 WLR 1166 : (1971) 2 All ER 127 (HL)] . In stating the principle of corporate liability for criminal offences, Lord Reid made the following statement of law: (AC p. 170 E-G) 'I must start by considering the nature of the personality which by a fiction the law attributes to a corporation. A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the

company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent. In that case any liability of the company can only be a statutory or vicarious liability.'

63. From the above it becomes evident that a corporation is virtually in the same position as any individual and may be convicted of common law as well as statutory offences including those requiring mens rea. The criminal liability of a corporation would arise when an offence is committed in relation to the business of the corporation by a person or body of persons in control of its affairs. In such circumstances, it would be necessary to ascertain that the degree and control of the person or body of persons is so intense that a corporation may be said to think and act through the person or the body of persons. The position of law on this issue in Canada is almost the same. Mens rea is attributed to corporations on the principle of 'alter ego' of the company.

64. So far as India is concerned, the legal position has been in *Standard Chartered Bank v. Directorate of Signed by: CHITTA RANJAN BISWAL Enforcement* [(2005) 4 SCC 530 : 2005 SCC (Cri) 961] . On a Reason: Authentication detailed consideration of the entire body of case laws in this Location: Orissa High Court, Cuttack Date: 10-Apr-2024 15:02:15 country as well as other jurisdictions, it has been observed as follows: (SCC p. 541, para 6) '6. There is no dispute that a company is liable to be prosecuted and punished for criminal offences. Although there are earlier authorities to the effect that corporations cannot commit a crime, the generally accepted modern rule is that except for such crimes as a corporation is held incapable of committing by reason of the fact that they involve personal malicious intent, a corporation may be subject to indictment or other criminal process, although the criminal act is committed through its agents.'"

40. It is abundantly clear from the above that the principle which is laid down is to the effect that the criminal intent of the "alter ego" of the company, that is the personal group of persons that guide the business of the company, would be imputed to the company/corporation. The legal proposition that is laid down in the aforesaid judgment in *Iridium India case* [*Iridium India Telecom Ltd. v. Motorola Inc.*, (2011) 1 SCC 74 :

(2010) 3 SCC (Cri) 1201] is that if the person or group of persons who control the affairs of the company commit an offence with a criminal intent, their criminality can be imputed to the company as well as they are "alter ego" of the company.

41. In the present case, however, this principle is applied in an exactly reverse scenario. Here, company is the accused person and the learned Special Magistrate has observed in the impugned order that since the appellants represent the directing mind and will of each company, their state of mind is the state of mind of the company and, therefore, on this premise, acts of the company are attributed and imputed to the appellants. It is difficult to accept it as the correct principle of law. As demonstrated hereinafter, this proposition would run contrary to the principle of vicarious liability detailing the circumstances under which a Director of a company can be held liable.

42. No doubt, a corporate entity is an artificial person which acts through its officers, Directors, Managing Director, Chairman, etc. If such a company commits an offence involving mens rea, it would normally be the intent and action of that individual who would act on behalf of the company. It would be more so, when the criminal act is that of conspiracy. However, at the same time, it is the cardinal principle of criminal jurisprudence that there is no vicarious liability unless the statute specifically provides so.

43. Thus, an individual who has perpetrated the commission of an offence on behalf of a company can be made an accused, along with the Digitally Signed criminal intent. Second situation in which he can be implicated is in those Signed by: CHITTA RANJAN BISWAL cases where the statutory regime itself attracts the doctrine of vicarious Reason: Authentication Location: Orissa High Court, Cuttackliability, by specifically incorporating such a provision. Date: 10-Apr-2024 15:02:15

44. When the company is the offender, vicarious liability of the Directors cannot be imputed automatically, in the absence of any statutory provision to this effect. One such example is Section 141 of the Negotiable Instruments Act, 1881. In *Aneeta Hada [Aneeta Hada v. Godfather Travels & Tours (P) Ltd., (2012) 5 SCC 661 : (2012) 3 SCC (Civ) 350 : (2012) 3 SCC (Cri) 241]*, the Court noted that if a group of persons that guide the business of the company have the criminal intent, that would be imputed to the body corporate and it is in this backdrop, Section 141 of the Negotiable Instruments Act has to be understood. Such a position is, therefore, because of statutory intendment making it a deeming fiction. Here also, the principle of "alter ego", was applied only in one direction, namely, where a group of persons that guide the business had criminal intent, that is to be imputed to the body corporate and not the vice versa. Otherwise, there has to be a specific act attributed to the Director or any other person allegedly in control and management of the company, to the effect that such a person was responsible for the acts committed by or on behalf of the company."

29. Similarly, in *Shiv Kumar Jatia vrs. State (NCT) of Delhi*, (2019) 17 SCC 193, it is held that, "21. By applying the ratio laid down by this Court in *Sunil Bharti Mittal [Sunil Bharti Mittal v. CBI, (2015) 4 SCC 609 : (2015) 2 SCC (Cri) 687]* it is clear that an individual either as a Director or a Managing Director or Chairman of the company can be made an accused, along with the company, only if there is sufficient material to prove his active role coupled with the criminal intent. Further the criminal intent alleged must have direct nexus with the accused. Further in *Maksud Saiyed v. State of Gujarat [Maksud Saiyed v. State of Gujarat, (2008) 5 SCC 668 : (2008) 2 SCC (Cri) 692]* this Court has examined the vicarious liability of Directors for the charges levelled against the Company. In the aforesaid judgment this Court has held that, the Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company, when the accused is a company. It is held that vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. It is further held that statutes indisputably must provide fixing such vicarious liability. It is also held that, even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability."

30. When the Appellant is the undisputed Managing Director of M/s. Signed by: CHITTA RANJAN BISWAL Reason: Authentication Metro Builders Pvt. Ltd. and he has played his active role for

getting the Location: Orissa High Court, Cuttack Date: 10-Apr-2024 15:02:15 building plan approved and the loan amount was sanctioned in favour of the company on his application, the same coupled with the irregularities committed while sanctioning the loan, the criminal intent of the appellant is established having direct nexus with the offences committed. There are sufficient evidences available on record against the Appellant for his active role played in getting the loan sanctioned in favour of the company. In addition to this, it is seen from the loan file under Ext.13 that, the loan was sanctioned on the security of the personal of guarantee, indemnity and assurance of the present Appellant as the M.D. of M/s. Metro Builders Pvt. Ltd. It is further indicated from the evidences that the Appellant along with other co-accused persons have intentionally and knowingly used series of forged documents, as discussed above, to get the loan sanctioned in favour of accused company without any justification. It is true that mere inability to repay the loan amount would not give rise to criminal prosecution. But here in the present case, fraudulent and dishonest intention of the Appellant as the M.D. of the accused company has been established through prosecution evidence to show his intention to get the loan sanctioned and such conduct of the Appellant from the very date of application for Digitally Signed loan is clear on record to satisfy the existence of mens rea on his part. Signed by: CHITTA RANJAN BISWAL Reason: Authentication Location: Orissa High Court, Cuttack Date: 10-Apr-2024 15:02:15 Considering all such materials and the evidences, coupled with the circumstances narrated above, it is held that the prosecution has successfully proved the charges against the Appellant. The findings of the learned trial court and the conviction are thus confirmed.

31. Keeping in view the extent of sentence and the nature of offences as well as the role played by the Appellant in committing the offences, no reason is found to interfere with the sentencing.

32. In the result, the appeal is dismissed. The bail bonds are cancelled. The LCR may be returned.

(B.P. Routray) Judge C.R.Biswal, A.R.-cum-Sr.Secretary Signed by: CHITTA RANJAN BISWAL
Location: Orissa High Court, Cuttack Date: 10-Apr-2024 15:02:15