

# Johan Fernando vs The State on 23 March, 2018

**Author: P.N.Prakash**

**Bench: P.N.Prakash**

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 23.03.2018

Reserved on 08.03.2018

Pronounced on 23.03.2018

CORAM

THE HONOURABLE MR.JUSTICE P.N.PRAKASH

Crl.A.(MD)Nos.565 of 2006,  
580 of 2006 and 160 of 2017

1.Johan Fernando

2.Sharmila : Appellants/Accused Nos.2 and 3  
[Crl.A.(MD).No.565 of 2006]

S.Arumugam : Appellant/Accused No.4  
[Crl.A.(MD).No.580 of 2006]

Raaj Kafur @ Mohd.Asmath  
: Appellant/Accused No.1 [Crl.A.[MD].No.160 of 2007]

Vs

The State,  
Rep by Inspector of Police,  
SPE/CBI/EOW/Chennai,  
FIR No.RC.1/E/2002, CBI/EOW : Respondent/Complainant

PRAYER: Criminal Appeals are filed under Section 374 of the Code of Criminal Procedure against the Judgment dated 12.12.2006 in C.C.No.9 of 2000, on the file of the Special Judge for CBI Cases, Madurai.

Crl.A.[MD].Nos.565 of 2006:-  
!For Appellants : Mr.T.Lajapathi Roy

^For Respondent : Mr.S.Vijayan

Special Public Prosecutor

Crl.A.[MD].No.580 of 2006:-

For Appellant : Mr.N.Sathish Babu

For Respondent : Mr.S.Vijayan

Special Public Prosecutor

Crl.A.[MD].No.160 of 2007:-

For Appellant :

Mr.M.Karthikeya Venkatachalapathi

For Respondent : Mr.S.Vijayan

Special Public Prosecutor

: COMMON JUDGMENT

On the complaint dated 09.04.2002, [EX-P1], given by J.S.Vasan [PW-1], the Deputy General Manager, Canara Bank, Madurai, the Central Bureau of Investigation registered a case in Crime No.RC.1/E/2002, CBI/EOW, on 19.04.2002, vide printed FIR [EX-P243], for the offences under Sections 120-B r/w 420, 409, 467, 468 r/w 471 IPC and Section 13(2) r/w 13(1)(c) and (d) of the Prevention of Corruption Act, 1988 and substantive offences under Sections 420, 409, 467, 468 r/w 471 IPC and Section 13(2) r/w 13(1)(c) of the Prevention of Corruption Act, 1988, against seven accused and after completing the investigation, S.Syed Bazulla, Inspector of Police, CBI, EOW, Chennai, [PW-63], filed a final report on 02.07.2003, before the Special Court for CBI Cases, Madurai, against Niyas Khan @ Abdul Razzaq, [A-1 ? absconding], Raaj Kafur @ Mohammed Asmath [A-2 ? absconding], John Fernando [A-3], J.Sharmila, [A-4], W/o.John Fernando [A-3], S.Arumugam [A-5], A.Sundar Singh [A-6] and T.Mohan [A-7] for the aforesaid offences.

2. After the final report was filed, Raaj Kafur @ Mohammed Asmath [A-2 ? absconding] was arrested by the CBI and apart from this case, there is yet another case of similar nature against him. The case against Niyas Khan @ Abdul Razzaq, [absconding accused ? A-1] was split up, on account of which, there is a change in the array of the accused, namely, Mohammed Asmath [A-1], John Fernando [A-2], J.Sharmila [A-3], S.Arumugam [A-4], S.Sundar Singh [A-5] and T.Mohan [A-6] and charges for the aforesaid offences were framed by the Special Court for CBI Cases, Madurai and the case was taken up as C.C.No.9 of 2003.

3. On the appearance of the accused, they were furnished with the copies of the relied upon documents under Section 207 Cr.PC., and the trial Court framed eight charges against them for the aforesaid offences and when questioned, they pleaded not guilty. In order to prove the case, the prosecution examined 63 witnesses and marked 259 exhibits. When the accused were questioned about the incriminating circumstances appearing against them under Section 313 Cr.PC., they denied the same. On behalf of the accused, no witness was examined, but, EX-D1 to EX-D15 were marked.

4. After analyzing the evidences on record, the Trial Court has acquitted the accused Nos.5 and 6 of all charges, however, convicted the accused Nos.1 to 4 and sentenced them as detailed below:-

Rank of Accused Section of Law Sentence of imprisonment Fine amount 120-B r/w 419, 420, 467, 468, 471 and 420 r/w 511 IPC and Section 13[2] r/w 13[1][d] of the

Prevention of Corruption Act, 1988.

420 IPC 420 r/w 511 IPC 467 IPC 468 IPC 471 r/w 465 IPC 419 IPC To undergo rigorous imprisonment for seven years.

To undergo rigorous imprisonment for seven years.

To undergo rigorous imprisonment for three years.

To undergo rigorous imprisonment for seven years.

To undergo rigorous imprisonment for seven years.

To undergo rigorous imprisonment for two years.

To undergo rigorous imprisonment for three years. Rs.5,00,000/- in default to undergo rigorous imprisonment for six months.

Rs.5,00,000/- in default to undergo rigorous imprisonment for six months.

Rs.5,00,000/- in default to undergo rigorous imprisonment for six months.

Rs.5,00,000/- in default to undergo rigorous imprisonment for six months.

Rs.5,00,000/- in default to undergo rigorous imprisonment for six months.

Rs.5,00,000/- in default to undergo rigorous imprisonment for six months. Rs.5,00,000/- in default to undergo rigorous imprisonment for six months.

2. 120-B r/w 419, 420, 467, 468, 471 and 420 r/w 511 IPC and Section 13[2] r/w 13[1][d] of the Prevention of Corruption Act, 1988.

420 IPC To undergo rigorous imprisonment for five years.

To undergo rigorous imprisonment for five years. Rs.5,00,000/- in default to undergo rigorous imprisonment for six months.

Rs.5,00,000/- in default to undergo rigorous imprisonment for six months.

120-B r/w 419, 420, 467, 468, 471 and 420 r/w 511 IPC and Section 13[2] r/w 13[1][d] of the Prevention of Corruption Act, 1988.

420 IPC To undergo rigorous imprisonment for three years.

To undergo rigorous imprisonment for three years. Rs.5,00,000/- in default to undergo rigorous imprisonment for six months.

Rs.5,00,000/- in default to undergo rigorous imprisonment for six months.

120-B r/w 419, 420, 467, 468, 471 and 420 r/w 511 IPC and Section 13[2] r/w 13[1][d] of the Prevention of Corruption Act, 1988.

420 IPC 420 r/w 511 IPC 13(2) r/w 13(1)(d) of the Prevention of Corruption Act, 1988. To undergo rigorous imprisonment for three years.

To undergo rigorous imprisonment for three years.

To undergo rigorous imprisonment for one year.

To undergo rigorous imprisonment for three years. Rs.25,000/- in default to undergo rigorous imprisonment for six months.

Rs.25,000/- in default to undergo rigorous imprisonment for six months.

Rs.25,000/- in default to undergo rigorous imprisonment for six months.

Rs.25,000/- in default to undergo rigorous imprisonment for six months.

The sentences have been ordered to run concurrently. The prosecution has not filed any appeal against the acquittal of accused Nos.5 and 6.

5. The sum and substance of the case of the prosecution is that Mohammed Asmath [A-1] opened Current Account No.2653 in the name of M/s.APN International, on 02.05.2001, Canara Bank, Beach Road Branch, Tuticorin; that Mohammed Asmath [A-1] and the absconding accused - Niyas Khan @ Abdul Razzaq manufactured cheque leaves of various banks; that they filled 20 cheques for various amounts on various dates as if issued to APN International by non-existent account holders; that the cheques were presented in the Canara Bank, Beach Road Branch, Tuticorin, for collection and it appears to have been intercepted en route; that the absconding accused - Niyas Khan @ Abdul Razzaq and Raaj Kafur @ Mohammed Asmath [A-1] prepared forged Inter Branch Advices, [for brevity "the IBA"] as if the cheques have been cleared; that the IBAs were sent by courier to the Canara Bank, Beach Road Branch, Tuticorin; that on the strength of IBAs, various amounts were credited into the account of APN International and were withdrawn.

6. To be more explicit, let us take a sample case. Mohammed Asmath [A- 1] has printed cheque leaves of State Bank of India, Fort, Mumbai, as if the cheques relate to the account of Vijaya Exports, Mumbai, bearing a fictitious account number and also bearing the rubber stamp ?Vijaya Exports? and the signature of same person of Vijaya Exports. The cheque was drawn in the name of APN International for Rs.3,70,410/-. This cheque for Rs.3,70,410/- was presented with the pay-in-slip

[EX-P150], on 23.05.2001, in Canara Bank, Beach Road Branch, Tuticorin. Necessary entries were made in the registers of the branch for the receipt of the cheque. This cheque should be sent for clearance to the Service Branch of Canara Bank in Chennai. In reality, the cheque was not sent to the Service Branch and it was intercepted in the middle and destroyed. After sometime, a fabricated IBA, as if sent by the Service Branch of Canara Bank, was received by the Beach Road Branch, Tuticorin, stating that the cheque has been cleared. On receipt of the IBA, the officer in Canara Bank, Beach Road Branch, Tuticorin, is required to compare the signature in the IBA with the specimen signature of the officer in the same branch of Canara Bank, who signed the IBA and only thereafter, clear the IBA. In this case, most of the officers of the Canara Bank in that branch have not properly compared the signature and have credited the amounts into the account of APN International.

7. It is the case of the CBI that Mohammed Asmath [A-1] was introduced to the bank by John Fernando [A-2], since A-2 was already an account holder and had also taken a loan therefrom; that Sharmila [A-3] is the owner of the property bearing Door No.320-B/1A, South Cotton Road, Tuticorin; that Sharmila [A-3] rented out the said property to Mohammed Asmath [A-1] for business, vide 11 month rental agreement [EX-P17], dated 01.04.2001; that the said rental agreement was submitted by Mohammed Asmath [A-1] along with the account opening form [EX-P15]; that S.Arumugam [A-4], who was the Loan Officer in Canara Bank, Beach Road Branch, Tuticorin, had conspired with A-1 to A-3 and had helped them in removing the fabricated cheques that were presented by Mohammed Asmath [A-1] and accepting the forged IBAs for the purpose of crediting the amount into the account of APN International. This, in short, is the case against the appellants/accused.

8. Though it was the contention of the CBI that Sundar Singh [A-5] and T.Mohan [A-6], who were sub-staff of Canara Bank, Beach Road Branch, Tuticorin, were part of the conspiracy in the removal of the forged cheques and substitution of the forged IBAs, yet, the Trial Court did not find sufficient evidence as against Sundar Singh [A-5] and T.Mohan [A-6] and therefore, they were acquitted of all charges framed against them.

9. Heard the learned counsel appearing for the appellants and the learned Special Public Prosecutor appearing for the CBI.

10. The entire case is borne out by records. To prove that Mohammed Asmath [A-1] had opened the Current Account No.2653 in the name of APN International, on 02.05.2001, Canara Bank, Beach Road Branch, Tuticorin, the prosecution examined one S.Arumugam [PW-44], who was the Branch Manager of Canara Bank, Beach Road Branch, Tuticorin, at the relevant point of time. In his evidence, he has stated that the account in the name of APN International, represented by Mohammed Asmath [A-1], was opened by him, vide account opening form [EX-P15]; that Mohammed Asmath [A-1] submitted the rental agreement, dated 01.04.2001, [EX-P17], entered into between him and Sharmila [A-3] as address proof; that John Fernando [A-2], who is already an account holder in the said branch was the introducer.

11. Mohammed Asmath [A-1] has not denied the opening of the current account No.2653. Similarly, John Fernando [A-2] has also not denied that he was not the introducer. That apart, there is a photo of Mohammed Asmath [A-1] affixed in the current account opening form [EX-P15] and he was present in flesh and blood before the Trial Court and hence, it cannot be stated that the prosecution had failed to prove the opening of current account No.2653 by Mohammed Asmath [A-1] in the name of APN International.

12. At this juncture, it may be relevant to state here that one Raaj Kafur had opened Savings Bank Account No.20637, in his name in Lakshmi Vilas Bank at Sivakasi, which fact has been spoken by Muralidharan [PW-37], Branch Manager of Lakshmi Vilas Bank, Sivakasi Branch. The account opening form of Raaj Kafur has been marked as EX-P206 and that also contains his photograph. This Court perused the photograph of Mohammed Asmath [A-1] in the account opening form [EX-P15] of Canara Bank with the photograph in the account opening form [EX-P206] of Lakshmi Vilas Bank and found that both the photographs are of the same person. It is not the case of Mohammed Asmath [A-1] that he has a twin brother, by name, Raaj Kafur and that the said Raaj Kafur had opened the account in Lakshmi Vilas Bank. On the contrary, it is the defence of Mohammed Asmath [A-1] that Raaj Kafur is his alias. That is the line of his cross-examination of Muralidharan [PW-37], which is extracted below:-

"There is no column stating that the alias should be given in the a/c opening form. EX-Po6. There is no column giving details about other bank a/c of the person, who open the a/c."

Apart from this, Mohammed Asmath [A-1] has not asked any question. Thus, from the analysis of the evidence of Arumugam [PW-44], Branch Manager of Canara Bank, Beach Road Branch, Tuticorin and Muralidharan [PW-37], Branch Manager, Lakshmi Vilas Bank and on a perusal of EX-P15 and EX-P206, it is apparent that Mohammed Asmath [A-1] had opened account No.2653 in the name of APN International, represented by Mohammed Asmath [A-1] in Canara Bank, Beach Road, Tuticorin and he is the person, who has also opened Account No.20637 in the name of Raaj Kafur in Lakshmi Vilas Bank, Sivakasi.

13. How did this fraud come to light?. N.Zelesky [PW-12], who was working as Officer in Canara Bank, Beach Road Branch, Tuticorin, at the relevant point of time, in his evidence, has stated that on 04.08.2001, the fraud came to light, which was confirmed on 06.08.2001. The relevant portion of the evidence given by N.Zelesky [PW-12] is as under:-

"The alleged fraud came to light on 04.08.2001, and it was confirmed on 06.08.2001. On 06.08.2001, everybody was tense in the bank and John Fernando came to the bank. He was the introducer. He was asking about clearance of certain cheques, lodged in C.A.No.2653 of APN International properly. He went and met Arumugam Officer directly. He spoke to him certain time and left the place immediately."

14. M.J.P.Devadass, [PW-11], Deputy General Manager, Canara Bank, Beach Road Branch, Tuticorin, commenced enquiry and found out that the IBAs, on the strength of which amounts were

credited into the account of APN International, were forged documents. It was found that out of 20 cheques that were presented by Mohammed Asmath [A-1], the amounts relating to 13 cheques alone were credited into his account and the bank found out that the other seven IBAs were fabricated and therefore, the payment qua those cheques was stopped. That is why, there are two categories of transfers, namely, completion of the offences and attempts to commit the offences. The following two tabular columns will graphically describe the case of the prosecution as well as the proof of the allegations:-

CHART NO.I FIRST CATEGORY - COMPLETED Sl.No. Exhibits Cheque No. Date  
Amount Rs.

issued by Drawn On Pay-in-slip marked as IBA No. 977081 23.05.2001 3,70,410/-

Vijaya Exports SBI, Fort, Mumbai.

EX-P150 27924 912569 06.05.2001 4,65,000/-

A/c.No.864 SBI, Fort, Mumbai.

EX-P149 27894 977099 02.06.2001 4,92,000/-

Vijaya Exports SBI, Fort, Mumbai.

EX-P151 27925 977087 23.05.2001 6,42,000/-

Vijaya Exports SBI, Fort, Mumbai.

EX-P157 35396 977090 21.06.2001 5,42,000/-

Vijaya Exports SBI, Fort, Mumbai.

EX-P152 35438 977086 21.05.2001 8,35,700/-

Vijaya Exports SBI, Fort, Mumbai.

EX-P153 35509 977079 23.05.2001 7,78,900/-

Vijaya Exports SBI, Fort, Mumbai.

EX-P154 35506 977089 23.05.2001 7,95,000/-

Vijaya Exports SBI, Fort, Mumbai.

EX-P155 35595 977098 11.06.2001 8,58,000/-

Vijaya Exports SBI, Fort, Mumbai.

EX-P156 39795 527922 02.07.2001 3,33,600/-

Vijay Exports Indian Bank, Cosmopolitan Hospital Branch, Trivandram. EX-P158 527920 30.06.2001 5,60,841/-

Vijay Exports Indian Bank, Cosmopolitan Hospital Branch, Trivandram. EX-P159 933053 07.07.2001 4,46,000/-

Deccan Exports UCO Bank, Perambur, Chennai.

EX-P160 329142 933051 05.07.2001 5,38,500/-

Deccan Exports UCO Bank, Perambur, Chennai.

EX-P161 329437 CHART NO.II SECOND CATEGORY - ATTEMPT Sl.No. Exhibits Cheque No. Date Amount Rs.

issued by Drawn On Pay-in-slip IBA No. not marked 933064 15.06.2001 6,25,000/-

Deccan Exports UCO Bank, Perambur, Chennai.

EX-P144 Not available 933065 15.07.2001 5,10,000/-

Deccan Exports UCO Bank, Perambur, Chennai.

EX-P162 332506 933084 15.05.2001 6,32,000/-

Deccan Exports UCO Bank, Perambur, Chennai.

EX-P147 332625 119635 06.07.2001 6,70,000/-

Deepak Enterprises Vijaya Bank, Race Course Road, Bangalore.

EX-P148 552465 not marked 119634 06.07.2001 7,82,000/-

Deepak Enterprises Vijaya Bank, Race Course Road, Bangalore.

EX-P143 Not received 119639 24.07.2001 5,78,000/-

Deepak Enterprises Vijaya Bank, Race Course Road, Bangalore.

EX-P145 Not available 119638 27.07.2001 3,20,001/-



Deepak Enterprises Vijaya Bank, Race Course Road, Bangalore.

EX-P146 Not available

15. D.Baskaran, [PW-26], Senior Manager, in charge of Canara Bank, Beach Road Branch, Tuticorin, between August 2002 and September 2003, in his evidence, has proved and correlated the bogus IBAs with the pay-in-slips [challans] and in the second category, namely, attempt category, the prosecution was able to secure the bogus cheques themselves and those cheques have been marked as exhibits, the details of which are as follows:-

CHART NO.III S.No. Challan marked as and Date of challan Cheque No., Cheque  
Date & T.T. Confirmation advice/ Amount (Rs.) IBA No. EX-P143 24.07.2001 119634  
24.07.2001 not available 7,82,000/-

not available EX-P144 24.07.2001 933064 15.06.2001 not available 6,25,000/-

not available EX-P145 30.07.2001 119639 24.07.2001 EX-P12 5,78,000/-

not available EX-P-146 30.07.2001 119638 27.07.2001 Ex.P.13 3,20,001/-

Not available EX-P147 24.07.2001 933054 15.05.2001 Ex.P.6 6,32,000/-

332625

6. EX-P148 24.07.2001 119635 06.07.2001 Ex.P.9 6,70,000/-

552465 EX-P149 14.05.2001 912569 06.05.2001 Ex.P.24 4,65,000/-

27894

8. EX-P150 23.05.2001 977081 10.05.2001 Ex.P.25 3,70,410/-

27924

9. EX-P151 23.05.2001 977099 15.05.2001 Ex.P.26 4,92,000/-

27924

10. EX-P152 12.06.2001 977090 24.05.2001 Ex.P.27 5,42,000/-

35438

11. EX-P153 12.06.2001 977086 21.05.2001 Ex.P.28 8,35,700/-

35509

12. EX-P154 12.06.2001 977079 23.05.2001 Ex.P.29 7,78,900/-

35506

13. EX-P155 12.06.2001 977089 23.05.2001 Ex.P.30 7,95,000/-

35595

14. EX-P156 06.07.2001 977098 11.06.2001 Ex.P.31 8,58,000/-

39795 EX-P157 12.06.2001 977087 23.05.2001 Ex.P.32 6,42,000/-

35396

16. EX-P158 05.07.2001 527922 02.07.2001 Ex.P.33 3,33,600/-

17. EX-P159 05.07.2001 527920 30.06.2001 Ex.P.34 5,60,841/-

18. EX-P160 14.07.2001 933053 07.07.2001 Ex.P.35 4,46,000/-

329142

19. EX-P161 14.07.2001 933051 05.07.2001 Ex.P.36 5,38,500/-

329437

20. EX-P162 24.07.2001 933065 15.07.2001 Ex.P.37 5,10,000/-

332506

16. Apart from the aforesaid evidence, he has also given the entire details about the various amounts paid by cheques by Mohammed Asmath [A-1] to M/s.Mariya Reals, John Fernando [A-2], Sharmila [A-3] and M.Augastine [PW- 54], an employee working under John Fernando [A-2]. In the cross-examination of this witness, he was asked as to whether it is the duty of the officers of the bank to first verify and compare the signatures in the IBAs with the specimen signatures available with them, for which the witness said in the affirmative. It is true that the clerk in the branch should have to verify the signatures in the IBAs received from the Service Branch of the bank with the specimen signature supplied to them and only thereafter, credit the amount. The failure of those staff to verify the signatures before crediting the amount can amount to dereliction of duty alone, unless it is shown that they have deliberately credited the amount into the account of Mohammed Asmath [A-1], pursuant to a common design.

17. In this case, the CBI have not prosecuted any of the staff on this score. Failure of those staff to verify the signature in the IBAs will not make the IBAs genuine. In order to prove that the IBAs, namely EX-P6, EX-P9, EX-P13 and EX-P24 to EX-P36 did not emanate from the respective Service Branches of Canara Bank, the prosecution have examined K.S.V.Shenoy, [PW-6], Divisional Manager, Canara Bank, Account Section, Bangalore, K.Srinivas [PW- 7], Account Section, Bangalore and P.D.Thakker [PW-23], Clearing Section, Canara Bank, Mumbai, who have given evidence in one voice that the IBAs, namely, EX-P6, EX-P9, EX-P13 and EX-P24 to EX-P36 were not issued by the Service Branch at all. In the cross-examination of P.D.Thakker, [PW-23], it has not been suggested that the IBAs were genuine one and that they had emanated only from the Service Branch. In the cross-examination of P.D.Thakker [PW-23], he has been asked as to whether he had lodged any complaint to the police with regard to the forged IBAs, for which he replied in the negative. In the opinion of this Court, P.D.Thakker [PW-23], who was working in the Service Branch. Mumbai, would not have been aware of the forged IBAs that were submitted to the Canara Bank, Beach Road Branch, Tuticorin. Therefore, the question of lodging the complaint to the police at Mumbai will not arise at all. The prosecution did not rest on its oars by merely proving that the IBAs were forged documents, but, went one step ahead to say that the account holders, who had purportedly issued the cheques, were non-existent persons.

18. Serial Nos.1 to 9 given in the Chart No.I, above, relate to issuance of nine cheques by Vijaya Exports, Mumbai, from the account in State Bank of India, Fort Branch, Mumbai.

19. M.B.Rao, [PW-36], Deputy General Manager, Vigilance, State Bank of India, Mumbai, has deposed in his evidence that there is no such account in the name of Vijaya Exports in State Bank of India, Fort Branch, Mumbai. He has given a report [EX-P205] in this regard. It was suggested to him that he had not properly conducted the enquiry at State Bank of India, Fort Branch, Mumbai and has given wrong information. Beyond that, there is no cross- examination of this witness. If it is the case of Mohammed Asmath [A-1] that Vijaya Exports is not a fictitious entity and that the cheques given to him by Vijaya Exports were genuine cheques, then, he should have pleaded this and established this at least by preponderance of probabilities under Section 106 of the Indian Evidence Act, 1872, though not by proof beyond reasonable doubt.

20. Serial Nos.10 and 11 relate to two cheques, that are stated to have been issued by Indian Bank, Cosmopolitan Hospital Branch, Trivandram. Prakash [PW-43], Branch Manager, Indian Bank, Thikud Branch, Trivandram, has deposed that there is no such Cosmopolitan Hospital Branch, Trivandram of Indian Bank. He has not been cross-examined at all on this aspect. This clearly shows that Mohammed Asmath [A-1] has deposited into his account the cheques of a non-existent branch of Indian Bank.

21. As regards Item Nos.12 and 13 of Chart No.I, the prosecution examined R.Kannan [PW-4] Senior Manager, Purusavakkam Branch, Chennai. In his evidence, Kannan [PW-4] has stated that there is no account in the name of Deccan Exporters in UCO Bank, Purusavakkam Branch, Chennai. It may be relevant to state here that the cheques relating to Item Nos.12 and 13 were drawn on UCO Bank, Perambur Branch, Chennai, by Deccan Exporters in favour of APN International.

22. Now, coming to Item Nos.4 to 7, in the second category, [Chart No.II], namely, attempt category, four cheques have been issued by Deepak Enterprises drawn on Vijaya Bank, Race Course Road Branch, Bangalore, in favour of APN International. C.N.Grows [PW-9], who was the Assistant Branch Manager, Race Course Branch, Vijaya Bank, Bangalore, from July 2002 to May 2003, has stated that EX-P12 and EX-13, two cheques, were not issued by the said branch and there was no account in the name of Deepak Enterprises in that branch. He has further deposed that Account No.1760, that is shown in EX-P12 and EX-P13, relates to the account of one Manohar Lal Majitha. In the cross-examination, he was asked as to whether he had verified, if Manohar Lal Majitha had more than one account, for which he has stated that he did not. It is common knowledge that one cannot have two accounts in his name in the same branch. Here the question is as to whether Deepak Enterprises had issued EX-P12 and EX-P13. No questions have been asked with regard to Deepak Enterprises to this witness.

23. Thus, from the analysis of the evidence of R.Kannan [PW-4], C.N.Grows, [PW-9], M.B.Rao, [PW-36] and E.R.Prakash [PW-43], there can be no scintilla of doubt that Vijaya Exports, Deccan Enterprises and Deepak Enterprises were non-existent entities and the cheques manufactured in their names were presented by Mohammed Asmath [A-1] in his account for clearance with Canara Bank, Beach Road Branch, Tuticorin.

24. In fine, the prosecution have proved beyond reasonable doubt that Mohammed Asmath [A-1] had opened Current Account No.2653 in the name of APN International in Canara Bank, Beach Road Branch, Tuticorin; that he had deposited 20 cheques on various dates; that out of 20 cheques, the amounts relating to 13 cheques, totally amounting to Rs.76,58,751/-, have been credited into his account, namely, Current Account No.2653, on the strength of fabricated IBAs, namely, EX-P24 to EX-P36; that he has withdrawn those amounts in quick succession also; that Mohammed Asmath [A-1] has an account in the name of Raaj Kafur in Lakshmi Vilas Bank, Sivakasi Branch.

25. Now, turning to the case of John Fernando [A-2] and J.Sharmila [A- 3], the learned counsel appearing for the appellants/accused Nos.2 and 3 submitted that John Fernando [A-2] had merely introduced Mohammed Asmath [A- 1] to the bank, for which, he cannot be termed as a conspirator. The learned counsel further submitted that Sharmila [A-3] had no role to play, as she was in the family way, during the relevant point of time and all her affairs were managed by her husband - John Fernando [A-2].

26. Per contra, Mr.S.Vijayan, learned Special Public Prosecutor appearing for the CBI, submitted that Sharmila [A-3] had an account in the name of Mariya Reals with UCO Bank, Tuticorin Branch; that Mohammed Asmath [A-1] has paid huge amounts by cheque to the said account and also into the account of Augustine [PW-54], who was working under John Fernando [A-2]. Augustine [PW-54], in his evidence, has stated that he was working under John Fernando [A-2] between 2000 and 2001 and was receiving salary of Rs.1,500/-. He has further stated that John Fernando [A-2] was running a firm, in the name and style "Maria Constructions" and that he worked under John Fernando [A-2] and has received payments directly from Mohammed Asmath [A-1], vide EX- P46 EX-P51, EX-P53, EX-P54, EX-P58, EX-P62, EX-P67 and EX-P106 to EX-P109. In the cross-examination by John Fernando [A-2] and Sharmila [A-3], it was suggested to him that he had

not worked under John Fernando [A-2], which suggestion he has denied. He was asked to produce any record of salary, for which he has stated that he has no records for having received salary.

27. John Fernando [A-2], in his statement under Section 313 of the Code of Criminal Procedure, has stated as follows:-

"Maria Constructions is my Company. I have no connection with Augastine. False evidence".

28. The evidence of F.Eliece [PW-52] appears to be very relevant in this case. F.Eliece [PW-52] is the father-in-law of John Fernando [A-2]. He has stated that Sharmila [A-3] is his daughter; that John Fernando [A-2] is doing construction work; that John Fernando [A-2] was getting construction work from a company; that the said company had given a cheque [EX-P80], dated 02.07.2001, for Rs.1,65,000/-, which has been drawn in favour of Eliece, issued by APN International from their account No.2653, Canara Bank, Beach Road Branch, Tuticorin. He has further deposed that he had collected the money from the bank and when he came out of the Branch, Niyas Khan @ Abdul Razzaq and Mohammed Asmath [A-1] came in a Car and asked him to give the money and he had handed over the money to them and they left. In the cross- examination, he has stated that the said cheque was not given by John Fernando [A-2], but, by Niyas Khan @ Abdul Razzaq.

29. Is John Fernando [A-2] merely an introducer of Mohammed Asmath [A- 1] to the Canara Bank, Beach Road Branch, Tuticorin, only for the purpose of opening the account?. Had John Fernando [A-2] confined himself to that role, then, there is possibility for this Court to draw an inference in his favour. On the contrary, it is seen that his employee - Augastine [PW-54], his father-in-law - Eliece [PW-52] and Mariya Reals have all been paid huge amounts by Mohammed Asmath [A-1]. His father-in-law - Eliece [PW-52] has stated that after he had withdrawn the amount, he handed over the money to Mohammed Asmath [A-1]. This, in the opinion of this Court, would not have happened, without the knowledge of John Fernando [A-2]. Therefore, this Court has no doubt in holding that John Fernando [A-2] was not a mere introducer of Mohammed Asmath [A-1] to the Canara Bank, Beach Road Branch, Tuticorin, but, he was in active league with Mohammed Asmath [A-1], as could be seen from the following evidence of J.P.Devadass [PW-11], who was the Senior Manager in Canara Bank, Central Office, Mumbai and who was directed by the Deputy General Manager to conduct enquiry into the affairs of the Branch. J.P.Devadass [PW-11] has further stated as follows:-

"After reaching Tuticorin, I visited the house of John Fernando. He informed me that A.P.N.International represented by a person whose name I do not remember wanted to open an a/c for business in Dry flower witness as that the name is Mohammad Asmad. He told me that who have rented his house for office of APN International and that it was in the rear side portion of the House. But, he did not come forward to show that exact the office."

[Emphasis Supplied]

30. From his evidence, it is crystal clear that J.P.Devadass [PW-11] had gone to the house of John Fernando [A-2] to conduct the physical verification and had met him; that John Fernando [A-2] initially told J.P.Devadass [PW-11] that he does not remember the name of the owner of APN International; that John Fernando [A-2] did not come forward to show the portion, that was rented out to Mohammed Asmath [A-1]. This is an incriminating conduct of John Fernando [A-2], which is relevant under Section 8 of the Indian Evidence Act, 1872 and he has not given any explanation with regard to this, when he was questioned under Section 313 of the Code of Criminal Procedure, except saying that J.P.Devadass [PW-11] did not come to his house. This Court has no reasons to disbelieve the evidence of J.P.Devadass [PW-11]. Thus, this Court is of the view that John Fernando [A- 2] is not as an innocent as a lamb to be let off.

31. Mohammed Asmath [A-1] has made payments of Rs.75,000/- to M/s.Mariya Constructions by cheque, [EX-P45] and to John Fernando [A-2] for Rs.5,00,000/- by cheque [EX-P85] and Rs.2,64,000/- by cheque [EX-P55]. John Fernando [A-2] has not given any explanation as to the circumstances, under which he has received such payments from Mohammed Asmath [A-1].

32. The learned counsel appearing for the accused submitted that the charge of conspiracy has been fixed from 1998, whereas, even according to the case of the prosecution, Mohammed Asmath [A-1] took on rent the property of John Fernando [A-2] and Sharmila [A-3] only on 01.04.2001, [vide EX-P17 - rental agreement]. This argument cannot hold water, in the light of Section 10 of the Indian Evidence Act, 1872, which reads as follows:-

10. Things said or done by conspirator in reference to common design-.

"When there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by an one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it".

33. In this case, Mohammed Asmath [A-1] and the absconding accused - Niyas Khan @ Abdul Razzaq had entertained the idea of printing cheque leaves, opening accounts and defrauding the banks from 1998, since then they were working and in the year 2001, John Fernando [A-2] joined their bandwagon of Mohammed Asmath [A-1] and by introducing Mohammed Asmath [A-1] to the branch; creating a document as if he is a tenant in his property; receiving huge amounts via Augustine [PW-54] and Mariya Reals; not taking J.P.Devadass [PW- 11] and showing him the portion, which was allegedly rented out to Mohammed Asmath [A-1].

34. Now, turning to the case of Sharmila [A-3], though Maria Reals is in her name and the Current Account No.5080 was operated by her, yet, it is seen from the evidence that she was in the family way during the relevant point of time and all her affairs were handled by her husband - John Fernando [A-2]. Even when she was examined under Section 313 of the Code of Criminal Procedure,

she has stated as follows:-

"It is true that I had an a/c. I was 8 months pregnant during that time. I do not know about the transactions. I sign and hand over to my husband."

35. The evidence of prosecution witnesses show that it was John Fernando [A-2], who used to come to the bank very frequently and no one has given evidence that Sharmila [A-3] used to accompany him or take active participation in the business. Hence, this Court is of the view that the evidence on record is insufficient for convicting Sharmila [A-3].

36. Now, reverting back to the case of S.Arumugam [A-4], the learned counsel appearing for the appellant/accused No.4 submitted that the prosecution have not adduced any evidence to show that he was in league with Mohammed Asmath [A-1]; that he handed over the fabricated cheques that were presented by Mohammed Asmath [A-1] for clearance at the branch, back to Mohammed Asmath [A-1]; that he was instrumental in accepting the forged IBAs and crediting the amounts into the account of Mohammed Asmath [A-1].

37. Mr.S.Vijayan, learned Special Public Prosecutor, submitted that Arumugam [A-4], who was the Loan Officer, Canara Bank, Beach Road Branch, Tuticorin, was himself having an account No.10110 in the said branch; that Arumugam [A-4] had got a cheque for Rs.60,000/- from one Asian Building Consultant; that Arumugam [A-4] deposited the cheque into his account for clearance, on 24.07.2001; that on the same day, Mohammed Asmath [A-1] had also deposited three cheques given to APN International by Deccan Exports for clearance; that the Register [EX-P41], shows that the entries in EX-P41, namely, Entry Nos.1501, 1502 and 1503 relate to three cheques of Mohammed Asmath [A-1] and entry No.1507 relates to the cheque of Arumugam [A-4]; that the three cheques of Arumugam [A-1] found in Entry Nos.1501, 1502 and 1503 do not find place in Letter Forwarding Cheques For Collection [EX-P44], but, whereas the cheque of Arumugam [A-4] finds place therein. From this, the learned Special Public Prosecutor wants this Court to draw an inference that Arumugam [A-4] had handed over the three cheques back to Mohammed Asmath [A-1] and had sent only other cheques, including his own cheque for collection. Had the prosecution adduced evidence to show that "the Letter Forwarding Cheques for Collection" [EX-P44] was prepared by Arumugam [A-4], then, there can be no escape route for Arumugam [A-4]. Unfortunately, for the prosecution and fortunately for Arumugam [A-4], the Handwriting Expert, who had compared the handwritings in EX-P44, with that of Arumugam's [A-4], has opined that he has not been able to come to a definite conclusion. Apart from the inconclusive opinion of the Handwriting Expert, there is no other collateral evidence to show that Arumugam [A-4] was in charge of writing [EX-P44]. The overwhelming evidences adduced by the prosecution show that Arumugam [A-4] was a Loan Officer in that branch and that he was close to John Fernando [A-2] and was helping John Fernando [A-2]. Strong reliance was placed by the prosecution on the explanation letter [EX-P14] submitted by Arumugam [A-4] to Devadass [PW-11], during enquiry. On a thorough reading of the said letter, it is seen that Arumugam [A-4] has stated that he was taking all efforts to recover the loan that was sanctioned to John Fernando [A-2]. The said letter can only show his proximity to John Fernando [A-2] and nothing beyond that.

38. The learned Special Public Prosecutor placed reliance upon the following portion of the evidence of Arumugam [PW-44], who was the then Senior Manager of Canara Bank, Beach Road Branch, Tuticorin:-

"John Fernando was having current a/c in the branch. He was given a PMRY loan a/c. Abdul razak came and said that he was going to give construction work to John Fernando and was prepared to settle with outstanding and request it the compromise proposal to be sent to Regional Office. Arumugam Officer also involved that their loan will be settled in this manner and proposed settlement in that way. The document shown to me is the specimen writing of A-5 - Sundar Singh. This is EX-P233. [6 sheets]. The CDP shown to me this is signed by Arumugam Officer [A-4]. This is EX-P234. In EX-P23, statement of a/c there is credit given to deposit of outstanding cheques and amounts were also withdrawn from SB.No.2653, amounting to Rs.about 76 lakhs".

39. In the cross-examination, he has stated as under:-

"EX-P5 compromise proposal has been signed by me. I have also signed in 6th page of EX-P5. Loan Officer cannot send compromise proposal by himself to regional office."

40. The learned Special Public Prosecutor submitted that a sum of Rs.70,000/- was transferred from the Savings Bank Account No.2653 of Mohammed Asmath [A-1] to the loan account of John Fernando [A-2], for which Arumugam [A-4] is responsible, as he had brokered the settlement. He also submitted that Arumugam [A-4] has gone to the house of John Fernando [A-2].

41. The learned counsel appearing for the appellant/fourth accused submitted that as a Loan Officer, Arumugam, [A-4] had gone to the house of John Fernando [A-2] for the purpose of recovering PMRY loan that was sanctioned to John Fernando [A-2] and therefore, that cannot lead to the inference that Arumugam [A-4] was in league with Mohammed Asmath [A-1] in the fraud in question. He further submitted that when the absconding accused - Niyas Khan @ Abdul Razzaq and John Fernando [A-2] came to the branch for settlement of the loan amount, Arumugam [A-4] participated in the negotiation and ensured that a sum of Rs.70,000/- was transferred from the account No.2653 into the loan account of John Fernando [A-2], in order to see that the bank did not suffer any loss.

42. The learned Special Public Prosecutor submitted that Zelesky [PW- 12] has stated in his evidence that the alleged fraud came to light on 04.08.2001 and it was confirmed on 06.08.2001. On 06.08.2001, everybody was tense in the bank and John Fernando [A-2] came to the bank. He was the introducer. He was asking about clearance of certain cheques, lodged in C.A.No.2653 of APN International. He went and met Arumugam officer directly. He spoke to him on certain occasions and left the place immediately.



43. From the above, the learned Special Public Prosecutor wants this Court to draw an inference that Arumugam [A-4] was also a conspirator, as otherwise, why should John Fernando [A-2] go to Arumugam [A-4], when others have cold shouldered [A-2].

44. In the opinion of this Court, the aforesaid evidences unmistakably show that Arumugam [A-4] knew John Fernando [A-2] very well and Arumugam [A- 4] was very keen in getting back the dues under the PMRY loan that was sanctioned to John Fernando [A-2]. Just because John Fernando [A-2] had gone to the desk of Arumugam [A-4] and spoken to him, one cannot draw an inference that Arumugam [A-4] was also a party to the conspiracy with Mohammed Asmath [A-1] and John Fernando [A-2] in the fraud, without anything more. In Paragraph No.280 of the Judgment, the Trial Judge has given certain reasons for convicting Arumugam [A-4], which is as under:-

"280. I am conscious of the fact that contradictory findings have been given with respect to A.4 and A.5. There has been direct evidence with respect to A.4 being in direct contact with at least A.2 prior to the commencement of conspiracy. This fact assumes further importance, when it is seen that the first cheque deposited in the account of APN International was dated 06.05.2001 being cheque No.912569, for Rs.4,65,000/-, issued from account No.864 and drawn on SBI, Fort Market, Mumbai. The cheque is a forged cheque. This has been deposited on 06.05.2001, within four days of the opening of the fraudulent account by A-1 and the absconding accused and introduced by A.3. It is in this context that the acquaintance of A.2 with A.4 and vice versa on the date of opening the account and prior to that assumes significance. The conspirators had already prepared the forged cheques and also the forged IBAs. This must pass the scrutiny of a bank staff and the only staff member any of the accused knew before the commencement of the operation was A.4. This is one major ground which has induced me to give contrary findings with respect to A.4 and A.5 apart from the discussions analyzed above".

45. The aforesaid reasoning, once again, shows that a mere acquaintance of Arumugam [A-4], who is, admittedly, a Loan Officer in the bank, with John Fernando [A-2], who had borrowed money from the bank and had not repaid the amount, cannot lead to the conclusion about the complicity of Arumugam [A-4] in the offence. Hence, this Court is of the view that the evidence against Arumugam [A-4] is insufficient to fasten criminal liability.

46. The learned counsel appearing for the second accused, at this juncture, submitted that John Fernando [A-2] had undergone 11/2 years of imprisonment earlier and therefore, leniency may be shown to him. In the opinion of this Court, no leniency can be shown to him, as the evidence on record clearly shows that he had actively participated in the offence with Mohammed Asmath [A-1] and had irresponsibly put his pregnant wife - Sharmila [A-3] in peril.

47. In the result, CrI.A.[MD].No.160 of 2007 filed by Raaj Kafur @ Mohd.Asmath [A-1] is dismissed and the conviction and sentence imposed on him, by Judgment dated 12.12.2006, made in C.C.No.9 of 2000, on the file of the Special Judge for CBI Cases, Madurai, is confirmed.

Bail bond executed by him and the sureties shall stand cancelled. The Trial Court shall take steps to secure Raaj Kafur @ Mohd.Asmath [A-1] and to commit him to prison to serve the sentence imposed on him. CrI.A.(MD).No.565 of 2006 filed by .John Fernando [A-2] is dismissed and the conviction and sentence imposed on John Fernando [A-2], by Judgment dated 12.12.2006, made in C.C.No.9 of 2000, on the file of the Special Judge for CBI Cases, Madurai, is confirmed.

Bail bond executed by him and the sureties shall stand cancelled. The Trial Court shall take steps to secure John Fernando [A-2] and to commit him to prison to serve the sentence imposed on him. CrI.A.(MD).No.565 of 2006 filed Sharmila [A-3] is allowed in part; the conviction and sentence imposed on Sharmila [A-3], by Judgment dated 12.12.2006, made in C.C.No.9 of 2000, on the file of the Special Judge for CBI Cases, Madurai, is set aside and she is acquitted of all charges framed against her.

Fine amount, if any, paid by her shall be refunded to her. Bail bond executed by Sharmila [A-3] and the sureties shall stand terminated. CrI.A.(MD).No.580 of 2006 filed by S.Arumugam [A-4] is allowed and the conviction and sentence imposed on him, by Judgment dated 12.12.2006, made in C.C.No.9 of 2000, on the file of the Special Judge for CBI Cases, Madurai, is set aside and he is acquitted of all charges framed against him. Fine amount, if any, paid by him shall be refunded to him. Bail bond executed by S.Arumugam [A-4] and the sureties shall stand terminated.

It is made clear that the acquittal of S.Arumugam [A-4] is not on the ground that he has been falsely implicated, but, on account of benefit of doubt. The acquittal is without prejudice to the departmental action, if any, against S.Arumugam [A-4].

P.S.:

If there are any demonetized currency notes available in the Trial Court, the Trial Court is directed to prepare a panchanama in the presence of CBI Officers and send the same to the Reserve Bank of India, Chennai, for conversion under Specified Bank Notes [Deposit of Confiscated Notes] Rules, 2017 and to confiscate the amount to the State by remitting it to the State Treasury.

To

- 1.The Special Judge for CBI Cases, Madurai.
- 2.The Inspector of Police, SPE/CBI/EOW/Chennai.
- 3.The Special Public Prosecutor, Madurai Bench of Madras High Court, Madurai.

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