ORDER BELOW EXH.1

On 27/2/2014 this matter was adjourned to 13/3/2014 for framing of charge against accused. It was submitted that let the accused be given an opportunity of hearing under section 240 Cr.P.C. before framing of charge as, according to them, the draft of charges sought to be framed is not submitted before the Court by the prosecution for perusal. Therefore the learned A.P.P. on 13/3/2014 has submitted draft of proposed charges at Exh.583. Thus the charges sought to be framed for the offences punishable under sections 120 B, 409, 420, 406, 468 and 471 r/w. 34 I.P.C. Since accused wanted to make submissions on the said draft of charge the matter was adjourned to 15/3/2014. Accused No.7 has submitted written submissions at Exh.606. Accused No.9 has submitted written submissions at Exh. 617. Heard learned advocate for accused Nos. 5 and 9. Accused No. 9 also made oral submissions in person. Other accused did not want to make any submissions.

2. I have already narrated the prosecution case while deciding discharge applications of accused Nos. 5, 7 and 10 at Exh. 306, 407 and 502 by common order dt. 7/8/2013. At the cost of repetition the prosecution case, in short, is that all ten accused have hatched a criminal conspiracy to cheat the Osmanabad District Central Cooperative Bank Ltd., Osmanabad (for short "O.D.C.C. Bank")for Rs. 30 crores. At the relevant time deceased accused No.1 was the Chairman of O.D.C.C.Bank while accused No.10 Sunil Kedar was the Chairman of the Nagpur District Central Co-operative Bank Ltd., Nagpur (for short, "the N.D.C.C.Bank"). There was a collusion between

accused No.1 and 10 to purchase government securities through Home Trade Ltd. Washi, New Mumbai, unauthorized broker. Thereupon deceased accused No. 6, Dy. General Manager of O.D.C.C.Bank, demanded a deposit of Rs. 40 crores from N.D.C.C.Bank. Thereafter on 31/1/2002 the N.D.C.C. bank got credited their 30 crores as a deposit in the account of O.D.C.C. bank maintained with Maharashtra State Cooperative Bank Ltd. Mumbai. Then on 1/2/2002 the accused No.4, Deputy Chief Officer of O.D.C.C.Bank, at the instance of accused No.1 and 3 unauthorizedly got credited the said 30 crores in the account of said Home Trade Ltd. for purchasing government securities. Accused No.8, Vice Chairman of Home Trade, then issued false Contract Notes of government securities worth Rs. 29,99,34,591/- to accused No.3 and on the same day the Home Trade Ltd. got credited an amount of Rs. 29,99,99,766-67 ps. in the account of N.D.C.C.Bank with the Maharashtra State Cooperative Bank Ltd. Mumbai. The Home Trade Ltd. also issued a false receipt of Rs. 29,99,34,591/- for purchasing government securities and delivered to accused No.3. On the same day i.e. 1/2/2002 accused No. 8 got transferred Rs. 29,99,99,766=67 in the account of N.D.C.C. Bank towards alleged sale proceeds of Government Securities. It is further alleged that in the meeting dated 8/2/2002 of the Board of Directors of O.D.C.C.Bank there was no discussion on the purchase of government securities from Home Trade and even then on the proceeding register wrong entry is made to the effect that there was a resolution for purchasing government securities and the Board of Directors have unanimously resolved to purchase government securities and that proceeding was signed by accused No.1, 2 and 6. Thus it is the case of prosecution that deceased accused No.1, Chairman of O.D.C.C.Bank and accused No.2 to 6 being main officer bearers of the said bank, without having prior permission from the Commissioner, Cooperative Societies, accepted a deposit of Rs. 30 crores from N.D.C.C.Bank and in violation of R.B.I. directions paid sum of Rs. 29,99,34,591/- to Home Trade for government securities. Thus all accused in furtherance of their common intention have committed offences punishable under sections 120(B), 218, 406, 409, 420, 468, 471 r/w. 34 of I.P.C.

3. In his written submissions Exh. 606 the accused No.7 has prayed for discharge. The sum and substance of his written submissions is as under -

The Home Trade Ltd. had issued Contract Notes in respect of Government Securities in favour of O.D.C.C. Bank in its capacity as a member of the National Stock Exchange for the transactions undertaken by Home Trade on “Principal to Principal” basis as Home Trade was seller of the securities and it had not charged any brokerage to the O.D.C.C.Bank. Thus, Home Trade had not acted as a Broker. The said Notes were issued in accordance with rules of Stock Exchange. Home Trade had agreed to sell securities to the O.D.C.C.Bank from its proprietary account. Therefore the amount paid by the O.D.C.C.Bank was not received or obtained by Home Trade in a fiduciary capacity as a trustee of the said bank. After the said Contract Notes were executed by Home Trade in favour of O.D.C.C.Bank, Home Trade was under an obligation to deliver the securities which were purchased by the O.D.C.C.Bank under the said Contract Notes. Thus, after receipt of amount from the O.D.C.C. bank the Home Trade became owner of that money and was free to utilize that money. The relationship between O.D.C.C.Bank and Home Trade was that of 'Creditor' and 'Debtor'. On account of said relationship a civil liability only arises. The criminal liability arises if the beneficial ownership in the property is not transferred to the accused and he is placed under an obligation to utilize the money for the purpose for which it was handed over to him. Such is not the case and therefore section 406 I.P.C. cannot be invoked as main ingredients required to attract section 406 I.P.C. are missing. As far as offence of cheating is concerned there is no allegation that accused No.7 caused any deception. On the contrary from the complaint and statements of prosecution witnesses it is very clear that the accused had not made any representation much less the false representation. The charge cannot be framed under sections 406 and 420 I.P.C. at the same time and therefore accused No.7 cannot be tried for both offences of cheating and criminal breach of trust. Even charge under section 468 I.P.C. cannot be framed as it is to be firstly established that forged documents were prepared before alleged offence of cheating has taken place. Section 34 does not attract as it is to be firstly established that crime has been committed by several persons. Secondly, there was a common intention and a pre-arranged plan to commit an offence and thirdly there was a participation in the commission of the offence. The leading features of Section 34 IPC i.e. the element of participation in action and common intention are missing. With this it is prayed that accused No. 7 be discharged.

4. In his written submissions at Exh. 617 the accused No. 9 has reproduced the submissions of accused No.7 in Exh. 606. In addition to that he made certain submissions which can be briefly narrated as under.

When accused No. 9 had joined the company – Home Trade he was a mere employee on a monthly salary and posted in the Legal and Secretarial Department. He was appointed as a Company Secretary vide appointment letter dt. 16/11/1994. The role of Secretary was as defined in the Articles of Association of the Company. Accused No. 9 was subsequently appointed as an " Additional Director" on 19/1/2000 and he was designated as an "Executive Director and Company Secretary". He then resigned from the Home Trade vide resignation letter dt. 25/4/2002. During his service he was not entrusted with responsibility of the "Whole Sale Debt Market" Department which used to deal in the Government Securities business. There is no averment also in the F.I.R. or in the statements of the witnesses that the accused No.9 was responsible for the company's dealing in Government Securities. Accused No.7 was C.E.O. and Chairman of Home Trade to whom H.O.D. of Whole Sale Debt Market was directly reporting. There is nothing on record to show that accused No.9 being a Director of the company had participated in any meeting where any discussion or decision relating to the transactions involved in the present case took place. Prosecution has not attributed any role to accused No.9. He was in no way connected to alleged conspiracy.

Accused No. 9 has further contended that there is nothing to show that he was ever entrusted /or dominion over any property of the O.D.C.C.Bank much less dishonestly converted to his own use. Accused No.9 had signed one cheque dt. 1/2/2002 for Rs. 65,409=73 issued in favour of O.D.C.C. Bank and besides this solitary act of signing cheque he did nothing and there is absolutely no evidence and material to show his involvement in the offences in question.

Accused No. 9 has further contended that in the F.I.R. there is no allegation that he had caused any deception. In fact he had not made any representation much less false representation nor he ever visited the O.D.C.C. Bank or present in any meeting. All correspondence/documents exchanged by and between Home Trade and O.D.C.C.Bank were signed by other accused. Thus, O.D.C.C.Bank had not interacted at all with the accused No. 9 at any point of time. There is no evidence or material to proceed against him under section 420 or 406 r/w. 34 I.P.C. In the charge-sheet there is not a single ingredient to attract offences punishable under sections 465 and 471 I.P.C. The Investigating Officer and prosecution have misread the Contract Notes issued by Home Trade as a member of Stock Exchange and hence section 465 I.P.C. does not attract. According to statement of Sahebrao Manikrao recorded by I.O. it is clear that it was accused No.8 alone who gave the said Contract Notes to him and hence section 471 r/w. 34 I.P.C. cannot be invoked against accused No.9. The alleged offences of cheating and criminal breach of trust/misappropriation were committed by other accused during bank hours in the Maharashtra State Cooperative Bank, Fort Branch and hence accused cannot be charged for the alleged offences . In the charge-sheet there is not a single ingredient to attract the offence punishable under section 120-B I.P.C..

Thus, accused No.9 was neither a “Managing Director” nor a “Promoter” or “Promoter Director” of Home Trade. He was a paid Employee working in the Legal & Secretarial Department and he had nothing to do with account, day to day finance and Wholesale Debt Market Departments which used to deal in Government Securities. He had never visited Osmanabad and/or the O.D.C.C. Bank. He had never interacted with anybody in the O.D.C.C.Bank. He has not obtained any personal financial gain out of the said transactions. The element of mens rea is completely absent. Thus, there is nothing on record to charge the accused for the alleged offenes. With this it is prayed that he be discharged.

5. I have also gone through the documents with list Exh. 618 placed by accused No.9. In his oral submission the accused No.9 has submitted that during his tenure not a single Contract Note was signed by him. He then pointed out certain investigation papers in support of his contentions in his written submissions. It is also submitted that Government Securities are regulated by RBI who is thus Regulating Authority. It is then submitted that copies of meetings of Home Trade are not forthcoming. His isolated act of signing cheque is sufficient not to frame charge. Ld. Adv. for accused No.9 has also pointed out certain investigation papers and submitted that there is no sufficient material to frame charge against accused No.9.

6. The Ld. Special Public Prosecutor Shri.B.N.Karanjkar has submitted that as per written submissions of accused No.9 itself accused No.9 was appointed as a "Additional Director" and he worked as "Executive Director and Company Secretary" at the relevant time and therefore it could not be said that his role was to sign cheque only. In the submission Ld. Spl. P.P. there is sufficient material to show the involvement of accused No.9. Accused No.7 was the Chairman and there is strong material to show his involvement. Thus, at this stage there is sufficient material to frame charge as per draft of charges.

7. In the instant case the prosecution comes out with a specific case that in the meeting of Board of Directors of O.D.C.C.Bank held on 5/1/2002 the General Manager (deceased accused No.2) had pointed

out that since interest on deposit of Rs. 2 Crores previously accepted at the instance of deceased accused No.1 from N.D.C.C. Bank and another deposit accepted from Akola Bank was more, they were not profitable. Despite this deceased accused No.6 by his letter dated 29/1/2002 in the capacity of General Manager of O.D.C.C. Bank had informed N.D.C.C. Bank that as per discussions held the O.D.C.C. Bank was ready to accept a deposit of 40 Crores from N.D.C.C. Bank on interest @ 10 % per annum. Next transactions which took place within 3 – 4 days are crucial. The O.D.C.C. Bank and N.D.C.C. Bank have their respective current account with Apex Bank i.e. Maharashtra State Co-operative Bank, Mumbai. On 31/1/2002 N.D.C.C. Bank got debited Rs. 30 crores from their current account and credited it to the current account of the O.D.C.C. Bank. It was at the instance of accused No.10, the then Chairman of N.D.C.C. Bank. On the next day i.e. on 1/2/2002 the Chairman and other office bearers of O.D.C.C. Bank (Deceased accused Nos. 1, 2 and 3) and present accused Nos. 3 to 5 got credited said 30 crores to the account of Home Trade. Prosecution's further case is that on 1/2/2002 accused No.8 got credited Rs. 29,99,99,766-67 ps from the above 30 crores to the account of N.D.C.C. Bank. According to prosecution, Home Trade has issued a false receipt to O.D.C.C. Bank, that the Home Trade is unauthorized company dealing in government securities and that accused No.7 to 9 are its directors. Rs. 30 crores received from N.D.C.C. Bank hurriedly got transferred in the account of Home Trade who, in turn, immediately transferred to N.D.C.C. Bank and according to prosecution, this is nothing but a misappropriation of huge amount of Rs. 30 crores by the Chairman and Bank Officers of O.D.C.C. Bank and all accused have committed criminal conspiracy for misappropriation etc. and ultimately cheated the O.D.C.C.Bank.

8. Looking to the above prosecution case the points raised by the accused Nos. 7 and 9 are to be seen. As per contentions of accused No. 9 he was initially posted in the Legal and Secretarial Department and later on appointed as a Additional Director on 19/1/2000 and designated as Executive Director and Company Secretary vide letter dt. 1/4/2000. He stated to be resigned from the company on 25/4/2002 i.e. after the offences in question. According to prosecuting story narrated in the charge-sheet the entire episode was nothing but a well planned camouflage to cheat the O.D.C.C. Bank.

9. According to prosecution, O.D.C.C. Bank never received RBI receipts of Government Securities from Home Trade and therefore deceased accused No.1 was insisting on Home Trade to return the amount of 30 crores . Accordingly, Home Trade issued a cheque of Rs. 30,89,07,975/- for returning amount to the O.D.C.C Bank but that cheque was bounced. Home Trade merely issued Contract Notes and not Government Securities.

10. I have already considered gravamen of the charge while deciding discharge applications Exh. 306, 407 and 502. The discharge application Exh. 407 of accused No.7 has already been rejected by common order dt. 7/8/2013. The points raised by accused Nos. 7 and 9 in the written submissions and at the time of oral submission are to be considered at the trial as they are touching the merits of the case and hence those can be considered after recording of evidence. The question regarding sufficiency of evidence and its reliability are not to be seen at this stage of framing of charge. Elaborate examination of

statements recorded by I.O. is not warranted at this stage. Thus, looking to the prosecution case and investigation papers I am of the opinion that charge need to be framed for the alleged offences.

11. Accused No.9 has relied on decision in P.N. Sehgal Vs. Amar Nath (Punjab Law Reporter, VOL. LXXXII- 1980, Page 39) to contend that an offence under section 406 I.P.C. is in a way anti-thesis of the offence under section 420 I.P.C. as in case of criminal misappropriation the property is voluntarily kept in the custody of accused while in the case of cheating the accused by adopting deceitful means induces the complainant to part with property.

12. Accused No.9 then relied on decision in State Vs. Tirath Das (A.I.R.1954 ALL.583). It appears from this decision that section 405 I.P.C. based on the idea that the property entrusted or in respect of which dominion is passed over the accused is doesn't becomes his property so that he can used it for his own purpose. Where a relationship of debtor and creditor created between the parties the beneficial ownership in the money passes and hence person receiving property can use it for his own purpose.

13. Last ruling relied on by accused No. 9 is the decision of Hon'ble Gujrat High Court in Girasia Lakhubha Pathubha V/s. State of Gujrat (1966 Cri.L.J. 727). In that case the complainant, accused Nos. 1 and 2 being relatives were owners of lands jointly. For a loan the lands were mortgaged by mortgage-deed. It was properly executed by accused Nos. 1 and 2. But one third person signed it for the company. After document has registered the complainant gave application to the

bank that his signature had been forged. The said third person was not prosecuted but the accused were convicted under relevant sections read with section 34 I.P.C. It was held that a mere forgery as such was not a criminal act which could be done by several person and hence it was not a case for applying section 34. S. 34 applies when a criminal act committed by several persons. There can be criminal act which cannot be committed by several persons. If in such a case the criminal act is done by several persons, it amounts to a repetition of the criminal act.

14. However, we are at the stage of framing of charge against the accused. Having gone carefully through the charge-sheet and the investigation papers the prosecution case of scam of 30 crorers is based on peculiar facts and circumstances alleged, because not only Chairman and Bank Officers of the O.D.C.C. Bank but also outsiders alleged to have cheated the bank by entering into criminal conspiracy, misappropriation of money, fabrication of documents for the purpose of cheating etc. Therefore, at this stage this Court felt doubt as to which of the several acts (which may be proved) will constitute the offence on account of the nature of the acts or series of acts alleged against the accused. I therefore of the opinion that Section 221 Cr.P.C. attracts. It reads as under -

> <u>Where it is doubtful what offence has been committed -</u>
>
> (1) If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once ; or he may be charged in the alternative with

having committed some one of the said offences.

(2) If, in such a case the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of sub-section (1), he may be convicted of the offence which he is shown to have committed, although he was not charged with it.

Illustrations

(a) A is accused of an act which may amount to theft, or receiving stolen property, or criminal breach of trust or cheating. He may be charged with theft, receiving stolen property, criminal breach of trust and cheating, or he may be charged with having committed theft, or receiving stolen property, or criminal breach of trust or cheating.

(b) In the case mentioned, A is only charged with theft. It appears that he committed the offence of criminal breach of trust, or that of receiving stolen goods. He may be convicted of criminal breach of trust or of receiving stolen goods (as the case may be), though he was not charged with such offence."

The above illustrations below S. 221 Cr.P.C. amply clarifies the position. In Sunil Kumar Paul Vs. State of West Bengal (AIR 1965 SC 706) it was observed that all possible offences which can be made out on the basis of allegation made by prosecution in the complaint, or in the charges submitted by the investigation agency, can be charged.

15. Thus, let there be charges as per draft of proposed charge at Exh.

583 wherein charges under different heads are shown. Section 465 I.P.C. should be deleted from charge Nos. 6 and 8. The charge at Sr. No.3 for offence under section 420 should be modified as it should be charge against all accused inasmuch as the ultimate sufferer stated to be O.D.C.C.Bank.

16. Hence case is now adjourned for framing of charge as today accused Nos. 7 to 10 are absent. The matter is adjourned to 8/5/2014 for framing of charge as accused No.7 is from Calcutta, accused Nos. 8 and 9 are from Mumbai and accused No.10 is from Nagpur. Parties are aware of the fact that Hon'ble Supreme Court had directed previously to dispose of this matter by the end of October, 2013. The Hon'ble Supreme Court has now extended the time till 31/10/2014 for disposal of this case vide order dt. 28/3/2014 copy whereof is at Exh.635 communicated by letter Exh.634. Hence all accused shall remain present for framing of charge on 8/5/2014 without fail.

sd/-

Date :- 6/5/2014.

(C.P.Gaddam)
Chief Judicial Magistrate,
Osmanabad.