**REPORTABLE**

**IN THE SUPREME COURT OF INDIA**
**CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO.1001 OF 2001**

**B. RAGHUVIR ACHARYA … APPELLANT**

**VERUS**

**CENTRAL BUREAU OF INVESTIGATION … RESPONDENT**

**WITH**

**CRIMINAL APPEAL NO.1226 OF 2001**

**HITEN P. DALAL … APPELLANT**

**VERUS**

**CENTRAL BUREAU OF INVESTIGATION … RESPONDENT**

**J U D G M E N T**

**SUDHANSU JYOTI MUKHOPADHAYA, J.**

These two appeals under Section 10 of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 (hereinafter referred to as the 'Act, 1992') are preferred by accused Nos.1 and 3 against the judgment and order

dated 6th September, 2001 passed by the Special Court in Special Case No. 8 of 1994 in [RC5(BSC)/93-Bom], convicting and sentencing them.

2. The case of the prosecution, briefly, is as follows:

In September, 1991, an investment of Rs.65 crores came to be made by four subscribers, who applied for purchase of CANCIGO units floated by (Canbank Mutual Fund (hereinafter referred to as 'CMF'), a fund created by Canara Bank. The Andhra Bank and Andhra Bank Financial Services Limited ('ABFSL' for short) made an investment of Rs. 33 crores. Two other transactions were made by the Sahara India and Industrial Development Bank of India ('IDBI' for short) worth Rs.32 crores.

3. During the said period, accused No.1-B.Raghuvir Acharya was the Trustee and General Manager, accused No.2- T.Ravi was the Fund Manager and accused No.3- Hiten P. Dalal was the approved broker of CMF.

4. Further case of the prosecution is that accused No.3 got Andhra Bank to subscribe for the CANCIGO units of Rs.11 crores and got ABFSL to subscribe for the CANCIGO units of Rs.22 crores. The above CANCIGO units worth Rs.33 crores were purchased in the name of Andhra Bank and ABFSL though the consideration amount for purchase of such

units was paid by accused No.3. Accused No.3 got the CANCIGO units purchased in the name of Andhra Bank and ABFSL so as to ensure that he could claim brokerage falsely from CMF. Further, the case of the prosecution is that although the consideration of Rs.33 crores was paid by accused No.3, the brokers stamp on the applications were affixed in order to induce CMF to pay brokerage to accused No.3. The said accused No.3 applied for brokerage as a broker in the said transaction of Rs.33 crores when, in fact, he was not so appointed either by Andhra Bank or by ABFSL. The investment of Rs.33 crores came from accused No.3 for which he was not entitled to claim brokerage as he had not acted as a broker for the said transactions. Similarly, in September, 1991, accused No.3 did not procure business from Sahara India and IDBI and, yet, he claimed and received the brokerage in conspiracy with accused No.1 and accused No.2. It was alleged that accused No.3 never acted as broker in any of the aforesaid transactions but claimed and received the brokerage in conspiracy with the rest two accused.

5. All the three accused were charged for the offences of criminal conspiracy, conspiracy to commit offences of cheating/criminal breach of trust; receiving stolen property and falsification of accounts under Section 120-B, Section 420/409, Section 411, and Section 477-A of Indian Penal Code. Accused No.1 and accused No.2 being public servants were also charged for the offences of criminal misconduct under Section 13(1)(d) read with Section 13(2) of the Prevention of

Corruption Act, 1988. All together 12 charges were framed jointly and severally vide Ex.3.

6. The prosecution had led evidence of 12 witnesses apart from a number of Exhibits in order to prove their case.

7. Learned Judge, Special Court, by the impugned judgment and order dated 6th September, 2001 held the accused No.1 and accused No.3 guilty and convicted and sentenced them as under:

| **Name of the accused/appellant** | **Offences for which convicted** | **Sentenced awarded** |
|---|---|---|
| Accused No.1 — B. Raghuvir Acharya | Convicted for offence of criminal breach of trust under Section 409 IPC | Rigorous imprisonment for three years and fine of Rs.20,000/-, in default rigorous imprisonment for a further period of 6 months. |
| | Convicted for offence under Section 477-A IPC for falsification of accounts of CMF in respect of amount of Rs.32.50 lakhs paid to accused No.3. | Rigorous imprisonment for three years and find of Rs.20,000/-, in default rigorous imprisonment for a further period of six months. |
| | Convicted for offence of criminal misconduct under Section 13(1)(d) r/w Section 13(2) of the Prevention of Corruption Act. | Rigorous imprisonment for three years and fine of Rs.40,000/-, in default rigorous imprisonment for a |

| | | |
|---|---|---|
| | | further period of six months. |
| Accused No.3 – Hiten P. Dalal | Convicted for offence of criminal conspiracy under Section 409 IPC.<br><br>Convicted for offence under Section 477-A IPC.<br><br>Convicted for offence of criminal breach of trust under Section 411 IPC and for being in possession of stolen property. | Rigorous imprisonment for three years and fine of Rs.20,000/-, in default rigorous imprisonment for a further period of 6 months.<br><br>Rigorous imprisonment for three years and fine of Rs.20,000/-, in default rigorous imprisonment for a further period of 6 months.<br><br>Rigorous imprisonment for a period of 3 years and fine of Rs.50,000/-, in default rigorous imprisonment for a further period of six months. |



8. During the trial the Special Court raised 30 points and determined most of them against accused No.1 – B. R. Acharya and accused No.3 – Hiten P. Dalal. The points raised against accused No.2 – T. Ravi, Fund Manager in CMF were answered in his favour and he was acquitted.

9. As against accused No.1, learned Special Court held that the prosecution proved beyond reasonable doubt that letter dated 9th March, 1992 of accused No.3 claiming brokerage was received by accused No.1; endorsement on the letter dated 9th March, 1992 is in the handwriting of accused No.1 and that by the said endorsement accused No.1 acting as the General Manager instructed accused No.2 to pay brokerage of Rs. 32.50 lakhs to accused No.3. There was criminal conspiracy between accused No.1 and accused No.3 to procure the brokerage which was not due and payable to accused No.3. Accused No.1 being the General Manager and Trustee of CMF dishonestly and fraudulently induced CMF to part with Rs.32.50 lakhs by authorizing payment of brokerage in favour of accused No.3 knowing fully well that accused No.3 had not acted as a broker in the above said transactions. Accused No.1 acted dishonestly and in breach of Exs.84 and 85 being minutes of the Board Meetings prescribing the mode of payment of brokerage, and thereby committed offence of criminal breach of trust under Section 409 of IPC. There was a criminal conspiracy in the matter of disbursement of brokerage of Rs.32.50 lakhs between accused No.1 and accused No.3 and thereby committed offence under Section 120-B of IPC read with Sections 409, 411 and 477-A of IPC. Accused No.1 thereby committed the offence of criminal misconduct under Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988.

10. Learned counsel for accused No.1 submitted that main allegation against accused No.1 is based on presumption that the endorsement on letter dated 9th March, 1992[Ext.17(i) ] was in the handwriting of accused No.1. Such finding has been given solely on the basis of the statement of PW-5 – Rajesh Pitamberdas Mathija. Learned counsel pointed out that there exists inherent contradiction between the evidence of PW-4 and PW-5 and as PW-5 is not a competent witness under Section 47 of the Indian Evidence Act to provide evidence regarding the handwriting of accused No.1, no reliance can be made on the statement made by him. PW.5 was not familiar with the handwriting of accused No.1 in the course of his business as he was neither from the same department (CANCIGO), nor he worked under accused No.1. Moreover, PW.5 had neither seen accused No.1 writing the endorsement nor was PW.5 recipient of any correspondence himself.

11. As against accused No.3, apart from the allegation of conspiracy between accused No.1 and him, learned Special Court further held that the prosecution has proved beyond reasonable doubt that accused No.3 was not the broker in two transactions of Andhra Bank and ABFSL. It was also proved that accused No.3 did not act as a broker in the transactions of IDBI and Sahara India as well. In spite of this, accused No.3 made false representation by writing letter dated 9th March, 1992 under his own signatures claiming brokerage on the investments of Rs.65 crores knowing that he had not acted as a broker and he was not entitled to

brokerage. Accused No.3 thereby induced CMF to part with payment of Rs.32.50 lakhs and thereby he committed an offence punishable under Section 411 of IPC apart from offence under Section 409 read with 120-B of IPC and 477-A of IPC.

12. Learned senior for accused No.3 contended that accused No.3 was entitled to brokerage under Rule 36 of the Scheme with respect to investment made by Andhra Bank and ABFSL. It was further contended that he was also entitled for brokerage for the investment made by IDBI and Sahara India as well. As per Rule 36 brokerage can be claimed for 'subscribing or procuring the investment in CANCIGO'. Accused No.3 subscribed and procured the investment of Rs.65 crores including Rs.33 crores invested for Andhra Bank and ABFSL.

13. He further submitted that none of the witnesses (PW.4, 5 & 11) positively stated that accused No.3 was not entitled to brokerage on the investment made by Andhra Bank and ABFSL. The Auditors have never raised any dispute as to payment of brokerage to accused No.3. The Trustees and the Board have neither discussed nor have they repudiated the payment of brokerage made to accused No.3. The Bank, which was allegedly put to wrongful loss never filed a complaint against accused No.3. The Board never addressed any letter to accused No.3 calling upon him to explain the payment of brokerage made to him. In fact, the unequivocal stand of PW.11 is that the CMF did not raise queries with regard to

the payment of brokerage on Rs.65 crores to accused No.3 possibly because they may be aware accused No.3 had procured business of Rs.65 crores.

14. It was submitted that such methodology of investment in terms of other i.e. on behalf of accused No.3 is well known in law. The fact that Andhra Bank /ABFSL had invested the said amounts on behalf of accused No.3 and the same was in the nature of a constructive trust has been accepted by this Court in the case of ***Canbank Financial Services v.The Custodian and others, (2004) 8 SCC 355.*** In the said case, this Court has held the said arrangement to be legal. In that view of the matter, the mere fact that Andhra Bank/ABFSL applied for CANCIGO units on behalf of accused No.3 does not show any sort of deception. The CMF itself has found no illegality or deception in the application by Andhra Bank/ABFSL. It is clear from the fact that the CMF has not claimed refund of the brokerage claimed by accused No.3 on the investment made by Andhra Bank /ABFSL.



15. It was also contended that none of the witnesses of the CANCIGO (PW.4, 5 and 11) have come out with a positive assertion that accused No.3 made a fraudulent and/or dishonest representation to CANCIGO which was acted upon by the institution/CMF to its detriment which caused wrongful loss. There is no evidence as to who acted on the representation made by accused No.3.

16. It was further contended that the applications of Andhra Bank and ABFSL were duly stamped and Ex.19 clearly states that the applications were on behalf of accused No.3. The Investigating Officer (hereinafter referred to as 'IO') has admitted, in his corss-examination that in the absence of written rule, circular or written instruction, payment of brokerage in good faith and in due course would not amount to an offence. On the other hand it was also admitted by the IO in his cross-examination that it was not the case of the prosecution that any sort of deception was practiced on the trustees and payment was made by them. The IO, therefore, submitted that "there was no question of deception of the Trustees. They have, in fact, authorized accused No.1 and 2 to deal with the funds and pursuant to which Rs.32.50 Lakhs came to be paid".

17. In so far as IDBI and Sahara's investments are concerned, it is contended on behalf of accused No.3 that the accused No.3 was entitled to brokerage because of the tripartite arrangement between CMF, Citibank and accused No.3. The tripartite agreement entailed accused No.3 and the Citi Bank for procuring investment for CANCIGO. CMF would lend 80% of the amount of subscription to Citi Bank @ 15% for one year and accused No.3 would get brokerage on the investment so procured. PW.11 admits that the scheme was in a financial crunch and it was only because of accused No.3 the money was infused in the financially starved scheme. The material on record also establishes that investment by IDBI and Sahara was at

the instance of Citi Bank. The witnesses examined on behalf of IDBI and the Board note Ex.84 clearly show that the said investment was brought about as a result of the efforts on part of Citi Bank. The money so infused in CANCIGO scheme was for the advantage of Citi Bank as 80% of it was available to it at a nominal rate of interest for a year.

18. The witness PW.11 in his cross-examination had admitted that CMF as a matter of fact lent 80% of the amount to Citi Bank for one year at the rate of 15% per year even when rate of interest was fluctuating between 20% to 50%. The amount given to Citi Bank over one year was 80% of entire amount i.e 80% of Rs.65 crores which included Rs.33 crores by and on behalf of the appellant.

19. According to the learned counsel for accused No.3, the said accused cannot be held guilty of cheating under Section 420 IPC. The prosecution case is that the letter Ex.17 was placed before accused No.1, who in turn made his purported endorsement and thereby committed the offence of cheating in conspiracy with accused No.2 and accused No.3. It was submitted that it was not the case of the prosecution that accused No.1 or for that matter anyone else in the CANCIGO mutual fund was cheated by accused No.3 by virtue of representation through Ex.17.

20. It is further contended that the Institution, CMF, is a juristic entity, akin to a Company and it acts through its human agencies. Therefore, for fastening criminal liability onto a Company, the criminal intent of the human agencies of the Company is imperative. The logical consequence is that if a Company/Institution is a 'victim' of cheating then somebody acting for/on behalf of the institution must state how and/or in what manner the institution has been cheated/put to wrongful loss.

21. It was submitted that the transactions with regard to Andhra Bank /ABFSL were considered by a three Judge Bench of this Court in the case of ***S. Mohan v. Central Bureau of Investigation, (2008) 7 SCC 1*** wherein it was held that:

> ***"18.*** *It is not disputed that CANCIGO units worth Rs.33 crores were purchased by Andhra Bank or Andhra Bank Financial Services Limited by making use of the money owned by the appellant Hiten P.Dalal. These two financial institutions impliedly agreed to lend their name and allowed the appellant Hiten P. Dalal to purchase CANCIGO units in their name. It is also important to note that interest due on the CANCIGO units worth Rs.33 crores received from CBMF by Andhra Bank and Andhra Bank Financial Services Ltd. were credited to the account of the appellant Hiten P. Dalal. Therefore, it is clear for all practical purposes that the CANCIGO units worth Rs.33 crores were purchased by the appellant Hiten P. Dalal and he transferred these units to CANFINA and CBMF did not raise any objection in respect of transfer of the CANCIGO units by the appellant Hiten P. Dalal. If at all, it was for CBMF to raise any objection but they*

*did not raise any objection to the transfer of the CANCIGO units.*

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*xxx xxx xxx xxx*

***21.*** *So long as CANFINA has no grievance or complaint against the appellant S. Mohan that he acted contrary to their directions and accepted the CANCIGO units and paid the money to the appellant Hiten P. Dalal, no offence is made out against the appellant S. Mohan either of criminal breach of trust or conspiracy. In fact, PW.1(Mr. Kini, Executive Vice-President) has admitted that CANFINA used to regularly deal in CANCIGO units, that neither the Adult nor RBI made any remarks regarding transactions relating to CANCIGO units and all the transactions relating to CANCIGO units were in the ordinary course of business. Neither Canara Bank nor CANFINA had initiated any disciplinary proceedings against him. They have also not disputed the genuineness of the CANCIGO units which were got encashed by the appellant Hiten P. Dalal."*

22. According to learned Senior Counsel for accused No.3, the prosecution has failed to produce any evidence documentary or testimonial to make out a case of cheating against accused No.3 with respect to the Institution/CMF. There is no material to convict accused No.3 under any of the charges.

23. Mr. Sidharth Luthra, learned Additional Solicitor General, appearing on behalf of CBI submitted that accused No.1 was aware of receipt of Rs.65 crores into the funds of CANCIGO as stated by PW.11 and the payment of brokerage showing the payment of Rs.32.50 lakhs to accused No.3 under application dated 9th

March, 1992, (Ex.17) though accused No.3 was not entitled to receive brokerage. In fact, accused No.1 had personally forwarded the applications of Sahara India to PW.4, as stated by PW.4 and he was the only trustee who was personally looking into all affairs of the scheme and was aware of the source of funds, yet accused No.1 by his omissions led brokerage of Rs.32.50 lakhs be paid to accused No.3 by accused No.2. The handwriting of accused No.1 [Ex.17(i)] has been proved by PW.5.

24. It is further submitted that the parties accept about the fact that accused No.3 claimed and received brokerage of Rs.32.50 lakhs from CMF on account of CANCIGO scheme receiving an amount of Rs.65 crores as investment (Exts.61 and 62) and Section 313 Cr.P.C. statement of accused No.3 also indicates the same. The issue, however, is whether accused No.3 was entitled to the brokerage amount of Rs.32.50 lakhs and if not, then under what circumstances was the payment made to accused No.3 by accused No.1 and accused No.2 on behalf of the bank. Referring to the impugned judgment passed by the learned Judge, Special Court, it was contended that the mere fact of acquittal of accused No.2 will have no effect, in view of the decision of this Court in ***Devender Pal Singh v. State of NCT of Delhi and Anr., (2002) 5 SCC 234 and Brathi alias Sukhdev Singh v. State of Punjab, (1991) 1 SCC 519;*** that the evidence against accused No.2 can be relooked afresh by the Appellate Court and for seeing the role of accused No.1 and

accused No.3 and the acquittal of accused No.2 would not prejudice the prosecution case.

25. It was further submitted that accused No.3 though never acted as broker in the IDBI and Sahara India, he claimed brokerage from CMF vide letter dated 9th March, 1992 in respect of Andhra Bank, ABFSL, IDBI and Sahara India.

26. The prosecution has proved beyond reasonable doubt that accused No.3 made false representation by writing letter dated 9th March, 1992, (Ex.17) under his own signatures. He claimed brokerage for transactions for which he did not act as a broker. In spite of knowing that he was not entitled to brokerage to the said transactions, he induced CMF to part with payment of Rs.32.50 lakhs.

27. According to the counsel for the CBI, accused No.3 did not produce any witness in his defence to prove that he was in fact the broker who brought about the purported tripartite agreement with Citi Bank. No official of Citi Bank was named, nor examined in this regard, by accused No.3.

28. Learned ASG on behalf of CBI submitted that assuming that this Court were to disagree with the Special Court and hold that evidence against accused No.1 is lacking, this Court can convict accused No.3 for the charge of conspiracy read with Section 409 IPC with unknown persons or with accused No.2 if so established from the available evidence. Alternatively, accused No.3 can be convicted under

Section 420 IPC for which a substantive charge has been framed against accused No.1.

29. On hearing learned counsel for the parties, several facts appear to be admitted on record. These facts are:

The Andhra Bank and ABFSL invested Rs. 33 cores and purchased CANCIGO units floated by CMF. Accused No.3 accepted that the amount of Rs.33 crores was subscribed by him to procure CANCIGO units in the name of Andhra Bank and ABFSL. Accused No.3 was an approved broker for CMF. He claimed that he procured the investments of Rs.65 crores including Rs.33 crores of Andhra Bank and ABFSL and Rs.32 crores invested by IDBI and Sahara India.

30. Accused No.3 made a representation by writing letter dated 9th March, 1992 (Ex.17) under his own signatures claiming brokerage on investment of Rs.65 crores. On the basis of the said letter dated 9th March, 1992 (Ex.17) and an endorsement made thereon [Ex.17(i)] CMF had to part with payment of Rs.32.50 lakhs which was received by accused No.3.

31. Learned Judge, Special Court by the impugned judgment held that accused No.1 being the General Manager and Trustee of CMF having dominion over the funds of CMF made false endorsement on the letter dated 9th March, 1992 authorising payment of brokerage favouring accused No.3 by getting the Fund

Manager signed on the worksheet (Ex.16) containing details regarding brokerage which was made to his knowledge. On the basis of such endorsement made on the letter dated 9th March, 1992 [Ex.17(i)] the Special Court held that accused No.1 acted dishonestly and committed breach of Ex.84 and Ex.85. Thus it was held that accused No.1 thereby committed offence of criminal breach of trust under Section 409 IPC. It was also held that accused No.1 and 3 were involved in criminal conspiracy regarding disbursement of brokerage of Rs.32.50 lakhs and thereby they committed offence under Section 120-B IPC read with Section 409, 411 and 477-A IPC and accused No.1 being a public servant committed the offence of criminal misconduct by dishonestly providing undue pecuniary advantage to accused No.3 to which accused No.3 was not entitled and thereby committed an offence under Section 13(1)(d) of the Prevention of Corruption Act, 1988.

32. The main allegation against accused No.1 is that he made endorsement on letter dated 9th March, 1992 [Ex.17(i)] in his hand-writing. The prosecution relied on the evidence of PW.5 to prove the said allegation.

33. PW.5-Rajesh Pitamberdas Bhathija claimed to be conversant with the hand-writing of accused No.1 because of some purported/alleged correspondence. The witness contradicted himself whereby in an answer to a previous question he asserted that there was no correspondence with accused No.1. The witness-PW.5 failed to specify as to with whom accused No.1 was in correspondence with. The

said witness employs an all encompassing generic term "we had entered into correspondence" which raised doubt. Importantly, no such specific correspondence or material has been placed by the prosecution in support of its bald allegation.

34. In ***Murari Lal v. State of Madhya Pradesh, (1980) 1 SCC 704*** this Court held that in scenarios where there is an absence of expert opinion, a second screening in the form of the court's assessment is essential to ascertain the authorship of document.

> "**12….***There may be cases where both sides call experts and two voices of science are heard. There may b e cases where neither side calls an expert, being ill able to afford him. In all such cases, it becomes the plain duty of the court to compare the writings and come to its own conclusion. The duty cannot be avoided by recourse to the statement that the court is no expert. Where there are expert opinions, they will aid the court. Where there is none, the court will have to seek guidance from some authoritative textbook and the court's own experience and knowledge. But discharge it must, its plain duty, with or without expert, with or without other evidence. We may mention that Shashi Kumar v. Subodh Kumar and Fakhruddin v. State of M.P. were cases where the Court itself compared the writings."*

35. In the present case what the prosecution ought to have produced is the alleged material on the basis whereof PW.5 claimed familiarity with the

handwriting of the author. In absence thereof, the Special Court was precluded from having any independent assessment.

36. Another question that arises is whether PW.5 was a competent witness under Section 47 of the Indian Evidence Act to provide evidence regarding the handwriting of accused No.1. Section 47 of the Indian Evidence Act reads:

> *"**Section 47 - Opinion as to handwriting, when relevant.-** When the Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact.*
>
> *Explanation.-A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him."*

37. This Court in ***Fakhruddin v. State of M.P., AIR 1967 SC 1326*** has held that the premise of the witness claiming familiarity with the handwriting of the author must be tested.

> *"11. Both under s.45 and s.47 the evidence is an opinion, in the former by a scientific comparison and in the latter on the basis of familiarity resulting from frequent observations and experience. In either case the Court must satisfy itself by such means as are open that the opinion may be acted upon. One such means open to the Court is to apply its own observation to the admitted or proved writings and to compare them with the disputed one, not to become an handwriting expert but to verify the premise of the expert in the one case and to appraise the value of opinion in the other case."*

38. The prosecution's failure to produce material before the Special Judge on which PW.5 claimed familiarity with the handwriting of accused No.1 is fatal. It can safely be stated that the prosecution has failed to establish the premise of witness in order to allow the Special Court to appreciate the veracity of assertions made by PW.5.

39. In ***Mobarik Ali Ahmed v. State of Bombay., (1958) SCR 328 at page 342*** this Court held as follows:

> *"….It may be proof of the handwriting of the contents, or of the signature, by one of the modes provided in ss.45 and 47 of the Indian Evidence Act. It may also be proved by internal evidence afforded by the contents of the document. This last mode of proof by the contents may be of considerable value where the disputed document purports to be a link in a chain of correspondence, some links in which*

*are proved to the satisfaction of the Court. In such a situation the person who is the recipient of the document, be it either a letter or a telegram, would be in a reasonably good position both with reference to his prior knowledge of the writing or the signature of the alleged sender, limited though it may be, as also his knowledge of the subject, matter of the chain of correspondence, to speak to its authorship. In an appropriate case the court may also be in a position to judge whether the document constitutes a genuine link in the chain of correspondence and thus to determine its authorship."*

40. The question for our consideration is whether there is any credibility in the evidence of PW.5. Admittedly, PW.5 was not posted in CANCIGO. He came from CANGILT for the purpose of auditing in April, 1992 i.e after the payment of brokerage (paid on 10th March, 1992).Therefore, the question arises whether PW.5 was familiar with the handwriting of accused No.1 in the course of his business as he was neither from CANCIGO nor was working under accused No.1. PW.5 had neither stated that he had seen accused No.1 writing the endorsement nor he himself was the recipient of any correspondence made by accused No.1. Therefore, it is clear that PW.5 had no prior knowledge of the handwriting of accused No.1 or the signatures of the author, and he was not a part of the chain of correspondence to speak of its authors. It can be safely stated that PW.5 does not come within the

ambit of Section 47 of the Indian Evidence Act to provide evidence regarding the handwriting of accused No.1.

41. The sole witness who could have claimed familiarity with the handwriting of accused No.1 was Suchaita Vaidhya since there was a purported endorsement on the same letter by her as deposed by PW.5. She was a member of the secretarial staff and was a link in the chain of correspondence in order to qualify under Section 47 of the Indian Evidence Act to depose as to the authorship of the endorsement. She was a crucial witness; however, for the reasons best known to prosecution they have chosen not to examine Suchaita Vaidya though she was cited as a witness.

42. PW.4- Rajesh Chandrakant Pawar, was transferred in June, 1991from CANGROWTH to CANCIGO. He was aware of the scheme and worked under accused No.2. In his deposition PW.4 stated that the endorsement [Ex.17(i)] was in the handwriting Mr. Anil Narichania, AGM. For the reason best known to the prosecution, they have not cited Mr. Anil Narichania as one of the witnesses. Though PW.4, in his examination-in-chief specifically stated that the endorsement [Ex.17(i)] was in the handwriting of Mr. Anil Narichania, he was not declared hostile. We find a blatant contradiction and discrepancy in the evidence of PW.5

who attributes the endorsement to accused No.1 and, therefore, it will not be desirable to rely on his evidence.

43. Apart from the statement of PW.5, there is no material to prove the involvement of accused No.1. As noted above, PW.5's evidence is beset with many unsatisfactory features which renders it clearly unreliable and in any case inadequate to establish the charges levelled against accused No.1. On a close scrutiny of the entire material on record, we have no hesitation to hold that the learned Special Court was not correct in taking the view that the prosecution has successfully established the charges against accused No.1 and wrongly held him guilty for the same.

44. The evidence on record shows that in September, 1991 CMF received, broadly, four applications for purchase CANCIGO units from Andhra Bank, ABFSL, IDBI and Sahara India to the tune of Rs.65 crores. At that time accused No.1 was the General Manager. He was also the Trustee and author of Ex.84. He also took the decision as one of the Trustees in the meeting of the Board on Ist November, 1990 to pay brokerage. The evidence also shows that the applications were routed to PW.4 through the General Manager. PW.4 in his evidence deposed that the applications of Sahara India were routed through the General Manager but there is nothing on the record to show that letter dated 9th March, 1992 (Ex.17) was received by accused No.1. The finding of the Special Judge that the letter dated 9th

March, 1992 was received by accused No.1 is not based on evidence, therefore, such finding cannot be upheld. In any case mere receiving of a letter cannot be a ground to hold that the endorsement at Ex.17(i) was made by accused No.1.

45. Considering the aforesaid, we feel it expedient to record that the Special Court fell into a manifest error in coming to a conclusion with regard to accused No.1, as reflected in the judgment under appeal, which cannot be sustained. The appeal (Criminal Appeal No.1001 of 2001), therefore, succeeds and is allowed and the appellant – B.R. Acharya is acquitted of all the charges, his bail bonds shall stand discharged.

46. It is the case of prosecution that for various acts done by accused No.3, he used accused No.1, the Trustee and General Manager of CMF to commit criminal breach of trust in respect of funds of CMF. In this context, it was submitted that under the general charge of criminal conspiracy, all those acts also constitute cheating and criminal breach of trust.

47. The evidence of PW.11 shows that accused No.3 was the broker for CMF. He was also a member of the Stock Exchange. He had an account in Andhra Bank. In the case of Andhra Bank and ABFSL, Rs.33, crores invested by them in CMF belonged to accused No.3. This is also evidenced by the two cheques (Ex.29 and Ex.30). It was the accused No.3 who induced Andhra Bank and ABFSL to apply

for allotment of CANCIGO units as apparent from the applications (Ex.19 and Ex.15) which had been signed by the two officers-Dhankumar and Kalyanaraman, who were accused in some other matter. This position is not even disputed by accused No.3. The reason is not known as to why accused No.3 got Andhra Bank and ABFSL to apply. The IO has rightly pointed out in his evidence, repeatedly, that accused No.3 was not concerned with the generation of funds in this case. Applications for allotment were made by Andhra Bank and ABFSL but no entry regarding the transactions were made in the books of Andhra Bank and ABFSL. Therefore, it is clear that accused No.3, to whom Rs.33 crores belongs got Andhra Bank and ABFSL to apply for the units but kept the said matter hidden by not recording the same. In September, 1991, accused No.3 affixed the brokers stamp on the applications (Ex.19 and Ex.15). Knowing fully well that the investors were not Andhra Bank and ABFSL, he had got officers of Andhra Bank and ABFSL to sign the application forms. Both these officers are accused in other cases. By affixing the rubber stamp of the broker, accused No.3 falsely represented to CMF that he had brought subscriptions from Andhra Bank and ABFSL as a broker and, accordingly, claimed brokerage. Even before September, 1991, he wrote a letter (Ex.18) to Andhra Bank to the effect that units worth Rs.11 crores would be given to Andhra Bank and ABFSL. They were offered as security for ready forward transaction with ABFSL as evident from the statement of PW.11. From the

evidence of PW.11 it is clear that the entire record of CMF shows that pursuant to the applications (Ex.19 and Ex.15) made by Andhra Bank and ABFSL, accounts were opened in the names of Andhra Bank and ABFSL as subscribers. The names of Andhra Bank and ABFSL found place in the Investment Register [Ex.38(i) and Ex.39(i)] and also Investors Fund Ledger [Ex.A3(35)(2) and Ex.A3(37)(1)]. Thereby CMF had recognized only Andhra Bank and ABFSL as their investors and the units could be redeemed only by Andhra Bank and ABFSL. The brokers stamp was affixed on them by accused No.3 only with a view to claim brokerage. Although he was aware that the total amount of Rs.33 crores was invested by him. Even the half yearly interest which was paid on the investments of Rs.33 crores on 8th January, 1992 by CMF was only in the names of the subscribers- Andhra Bank and ABFSL. The evidence further shows that after receiving the income distribution cheques, Andhra Bank and ABFSL transferred the amount to the account of accused No.3 pursuant to his letter (Ex.12). This was on 9th January, 1992 and, yet, accused No.3 made an application vide Ex.17 claiming brokerage from CMF as a broker and not as an investor. Accused No.3 never objected to allotment of units in favour of Andhra Bank and ABFSL. In his statement under Section 313 of the Criminal Procedure Code stated that he was aware of CMF simultaneously deploying 80% of Rs.65 crores at 15% per annum in Citi Bank. Yet, accused No.3 concealed the true nature of the transactions of Rs.33 crores in

the names of Andhra Bank and ABFSL though it was known to him on 9th March, 1992 that the half yearly interest came to him not from CMF but from Andhra Bank and ABFSL. In view of the aforesaid evidence if learned Judge, Special Court held that on 9th March, 1992 accused No.3 dishonestly claimed brokerage from CMF by putting brokers stamp and by disguising his investment of Rs.33 crores on Ex.19 and Ex.15, no interference is called for against such finding.

48. In September, 1992, after the scam became public, the interest warrants were returned by Andhra Bank and ABFSL disclaiming their investments. With regard to the rest of two transactions of Sahara India and IDBI, the evidence on record shows firstly, that on applications of IDBI and Sahara India there is no brokers stamp. Despite there being no brokers stamp on these applications accused No.3 had wrongfully and dishonestly claimed brokerage on 9th March, 1992.

49. It was the case of accused No.3 that there was prior agreement between him, CMF and Citi Bank under which Citi Bank got the units purchased in the names of Sahara India and IDBI. What is relevant is allotment of units in favour of Andhra Bank, ABFSL, Sahara India or IDBI. It is to be noticed that the ownership of the units is with Andhra Bank, ABFSL, Sahara India or IDBI. It is evident from CANCIGO Certificates that at the expiry of one year, Sahara India and IDBI got CANCIGO units encashed and they have received the entire money in their accounts on the basis that they were the owners of the units. The evidence of

PW.2, PW.6 and PW.7 on behalf of IDBI and Sahara India, shows that no broker was involved in the transactions involving purchase of CANCIGO units of Rs.32 crores face value. The case of the prosecution is very simple that out of four applications for allotment of units, two contained rubber stamp and rest of two applications of Sahara India and IDBI did not bear rubber stamp. The case of the prosecution is that brokerage was dishonestly claimed by accused No.3 with full knowledge that he has not acted as a broker.

50. In cross-examination, the defence examined PW.11 extensively in support of their case that brokerage was payable to accused No.3 even if there was no brokers stamp affixed on the applications in cases where the officer paying the brokerage is satisfied that the business was procured by the broker. It was contended on behalf of accused No.3 that brokerage was payable even on self investments. However, PW.11 in his cross-examination has deposed that even in cases where the brokers stamp does not find place on the applications for allotment of units, the broker was required to forward the applications for allotment under his covering letter to CMF. In this case, the defence has not produced any such covering letter in support of their case. Similarly, they have not produced any correspondence with CMF claiming brokerage on that basis. Therefore, it is clear that accused No.3 was not the broker with regard to four investments in question.

51. PW.2, PW.6 and PW.7, employees of IDBI and Sahara India were extensively cross-examined by the defence and, yet, no case was made by the defence from any of the three witnesses regarding any correspondence between accused No.3 and IDBI and Sahara India authorizing him to collect brokerage from CMF between September, 1991 and March, 1992. Therefore, the prosecution has proved that accused No.3 is guilty of making a false representation to CMF with full knowledge and it was so made to deceive CMF to part with an amount of Rs.32.50 lakhs.

52. On 9th March, 1992 accused No.3 knew that Andhra Bank and ABFSL were not the actual investors. He also knew that brokerage was payable only if the business was procured for CMF as he was aware of the decision of Board. He was the approved broker of CMF and had bought the units in the names of Andhra Bank and ABFSL, which is admitted. He knew that that as the subscriber of units, he was not entitled to brokerage yet, he claimed brokerage as a broker vide Ex.17. Therefore, it is clear that both the transactions of Andhra Bank and ABFSL got disguised. Their true nature was suppressed. Though no brokerage was payable on such transactions, Ex.17 was written by accused No.3 with dishonest intention. Without Ex.17, accused No.3 could not have succeeded in obtaining from CMF an amount of Rs.32.50 lakhs.

53. Now the question arises as to what will be the effect of acquittal of co-accused Nos.1 and 2 on the case of accused No.3. According to the appellant if co-accused No.1 is acquitted and in view of acquittal of co-accused No.2 no charge under Sections 409, 411 and 477-A substantiate against accused No.3 and he cannot be punished with the aid of Section 120-B IPC.

54. Per contra, according to the learned counsel for the CBI, even if this Court disagrees with the Special Court and holds that the that evidence against accused No.1 is lacking, this Court can convict accused No.3 for the charges of conspiracy read with Section 409 IPC with unknown person or accused No.2 if so established from the available evidence. Alternatively, accused No.3 can be convicted under Section 420 IPC for which a substantive charge had been framed against him.

55. This Court in ***Devender Pal Singh(supra),*** held that acquittal of one accused does not raise doubt against conviction of another accused person. A plea that acquittal of the co-accused has rendered the prosecution version brittle has no substance. Acquittal of co-accused on the ground of non-corroboration has no application to the accused himself.

56. The question arises whether accused No.3 can be convicted for the alternative charge under Section 420 of the IPC for which a substantive charge had been framed against him. In this connection we may refer to decision of this Court

in ***Satyavir Singh Rathi v. State through CBI, (2011) 6 SCC 1,*** wherein this Court held:

> "68. We find the situation herein to be quite different. We must notice that the charges had indeed been framed in the alternative and for cognate offences having similar ingredients as to the main allegation of murder. Section 386 Cr.P.C. refers to the power of the appellate court and the provision insofar relevant for our purpose is sub-clause (b)(ii) which empowers the appellate court to alter the finding while maintaining the sentence. It is significant that Section 120-B IPC is an offence and positive evidence on this score has to be produced for a successful prosecution whereas Section 34 does not constitute an offence and is only a rule of evidence and inferences on the evidence can be drawn, as held by this Court in *Lachhman Singh v. State, AIR 1952 SC 167*. We are, therefore, of the opinion that the question of deemed acquittal insuch a case where the substantive charge remains the same and a charge under Sections 302/120-B and an alternative charge under Sections 302/34 IPC had been framed, there was nothing remiss in the High Court in modifying the conviction to one under Sections 302/307/34 IPC. It is also self-evident that the accused were aware of all the circumstances against them. We must, therefore, reject Mr. Sharan's argument with regard to the deemed acquittal in the circumstances of the case."

57. In ***Sunil Kumar Paul vs. State of West Bengal, AIR 1965 SC 706,*** the accused was charged for the offence under Section 409 IPC. In the said case the Court held that the accused could have also been charged for the offence under Section 420 IPC and held:

> *"**(15)**. It is urged for the appellant that the provisions of s. 236 Cr.P.C. would apply only to those cases where there be no doubt about the facts which can be proved and a doubt arises as to which of the several offences had been committed on the proved facts. Sections 236 and 237 read :*
>
> *"236. 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.*
>
> *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.*
>
> *x x x x x x*
>
> *237. If, in the case mentioned in section 236, 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 that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it.*

*Illustration*

*A is 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 framing of a charge under s. 236 is, in the nature of things, earlier than the stage when it can be said what facts have been proved, a stage which is reached when the court delivers its judgment. The power of the Court to frame various charges contemplated by s. 236 Cr.P.C. therefore arises when it cannot be said with any definiteness, either by the prosecutor or by the Court, that such and such facts would be proved. The Court has at the time of framing the charges, therefore to consider what different offences could be made out on the basis of the allegations made by the prosecution in the complaint or in the charge submitted by the investigating agency or by the allegations made by the various prosecution witnesses examined prior to the framing of the charge. All such possible offences could be charged in view of the provisions of s. 236 Cr.P.C. as it can be reasonably said that it was doubtful as to which of the offences the facts which could be ultimately proved would constitute. The facts which must have been alleged prior to the stage of the framing of the charge in the present case must have been what had been stated in the charge-sheet submitted by the Investigating Officer, 24-Parganas, which is printed at p. 3 of the appeal record. This charge-sheet narrates in the*

*column meant for the name of offences and circumstances connected with it :*

*"that on the 6th October 1956 Sunil Kumar Paul, a Public servant in the employment of the office the Sub-Divisional Health Officer, Barrackpore i.e., (clerk) dishonestly drew Rs. 1,763-6-0 excluding Postal Life Insurance deduction of Rs. 5-10-0 from the State Bank of India, Barrackpore Branch by submitting a false duplicate Estt. Pay Bill under head 39 for the month of September 1956 for the office of the said S.D.H.O., Barrackpore. The money drawn was not credited to the office of the Sub-Divisional Health Officer, Barrackpore."*

*It is practically on these facts that the conviction of the appellant for an offence under s. 420 I.P.C. has been founded. It follows that the Special Court could therefore have framed a charge under s. 420 I.P.C. at the relevant time if it had been of the opinion that it was doubtful whether these facts constitute an offence under s. 409 I.P.C. as stated in the charge-sheet or an offence under s. 420 I.P.C.*

***(16).*** *When a charge under s. 420 I.P.C. could have been framed by the trial Court by virtue of s. 236 Cr.P.C. that Court or the appellate Court can, in law, convict the appellant of this offence instead of an offence under s. 409 I.P.C. if it be of the view that the offence of cheating had been established. This would be in accordance with the provisions of s. 237 Cr.P.C.*

*(17) It is then urged for the appellant that under the proviso to s. 4 of the Act, the Special Court can try any other offence only when the accused is specifically charge with that offence. The language of the proviso does not lead to such a conclusion. It provides for the trial of the accused for any other offence provided the accused could*

*be charged with that offence at the same trial under the provisions of the Code of Criminal Procedure. The proviso does not say that the charge must be framed, though of course, if the trial Court itself tries the accused for a certain offence, it will ordinarily frame a charge. The proviso empowers a Court to try the accused for that offence and has nothing to do with the power of the trial court or of the appellate Court to record a conviction for any other offence when an accused is being tried with respect to an offence mentioned in the Schedule. The Court's power to take recourse to the provisions which empower it to record a conviction for an offence not actuality charged, depends on other provisions of the Code and the Act.*

***(24)** The ingredients of two offences must be different from one another and it is therefore not necessary to consider whether the ingredients of the two offences are in any way related. The Court has to see, for the purpose of the proviso, whether the accused could be charged with any offence other than the one referred to in the allotment order, in view of the provisions of the Code. There is nothing in the proviso which could lead to the construction that any limitations other than those laid down by the provisions of the Code of Criminal Procedure were to affect the nature of the offence which could be tried by the Special Court.*

***(25.)** We are therefore of opinion that the Special Court could try the appellant for the offence under s. 420 I.P.C. and that therefore the High Court was right in altering his conviction from that under s. 409 to s. 420 I.P.C."*

58. In this case the prosecution proved that the accused No.3 deceived CMF by making a false representation dated 9th March, 1992 and dishonestly induced the official of CMF to deliver Rs.32.50 lakhs in his favour and he dishonestly received the amount and thereby committed offence under Section 420 IPC. Accused No.3 was originally charged for the offence of cheating, criminal breach of trust for receiving stolen property/falsification of accounts under Section 120-B, Section 420/409 of the IPC apart from Section 411 and Section 477-A of the IPC. We, therefore, alter his conviction from that of under Section 409 to Section 420 of the IPC and convict him for the offence under Section 420 of the IPC and sentence him to undergo rigorous imprisonment for three years.



59. Further, as the prosecution successfully established the ingredients of theft for receiving stolen property from Canara Bank i.e. Rs.32.50 lakhs against accused No.3, we uphold the order of his conviction and sentenced passed by the Special Court under Section 411 of the IPC.

However, in view of the acquittal of accused Nos.1 and 2, the order of conviction of accused No.3 under Section 477-A is set aside. The judgment dated

6th September, 2001 passed by the learned Special Judge is affirmed with modification as mentioned above. The appeal (Criminal Appeal No.1226 of 2001) filed by the appellant-Hiten P. Dalal is dismissed. The bail bonds of the appellant – Hiten P. Dalal, if he is on bail, shall stand cancelled and he is directed to be taken into custody to serve out the remainder of the sentence.

**…..…….J.**
**( G.S. SINGHVI )**

**…..…….J.**
**( SUDHANSU JYOTI MUKHOPADHAYA)**

**NEW DELHI,**
**JULY 1, 2013.**