

IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL.A. No. 482 of 2002

SMT. RUNU GHOSH Appellant
Through: Mr.Satish Tamta with Ms.Ruchi
Kapur and Ms. Nisha K.V.Narayanan,
Advocates.

versus

CENTRAL BUREAU OF INVESTIGATION Respondent
Through: Mr.P.P.Malhotra, Additional
Solicitor General with Mr. Jatan Singh and
Mr. Shobhit Mahant, Advocates.

WITH

CRL.A. No. 509 of 2002

P.RAMA RAO Appellant
Through: Mr.S.S.Gandhi, Senior Advocate
with Mr. B.K. Singh, Advocate.

versus

STATE through CBI Respondent
Through: Mr.P.P.Malhotra, Additional
Solicitor General with Mr. Jatan Singh and
Mr. Shobhit Mahant, Advocates.

AND

CRL.A. No. 536 of 2002

SUKH RAM Appellant
Through: Mr. Anil Nag, Advocate.

versus

CENTRAL BUREAU OF INVESTIGATION Respondent
Through: Mr.P.P.Malhotra, Additional
Solicitor General with Mr. Jatan Singh and
Mr. Shobhit Mahant, Advocates.

CORAM:
HON'BLE DR. JUSTICE S. MURALIDHAR

ORDER
24.09.2009

1. These three appeals are directed against the judgment dated 5th July 2002 passed by the learned Special Judge in RC 3(A)/96 ACU convicting the three Appellants for the offence under Section 120-B IPC read with Section 13(1) (d) and Section 13(2) of the Prevention of Corruption Act, 1988 ('PC Act') and convicting Sri Sukh Ram and Smt. Runu Ghosh, the Appellants in Crl. A. Nos. 536 and 482 of 2002 respectively additionally for the substantive offence under Section 13(1)(d) read with Section 13(2) PC Act; the appeals also challenge the orders sentencing the appellants to periods of two or three years' rigorous imprisonment ('RI') and fine of Rs.1 lakh and in default to undergo simple imprisonment ('SI') for six months for the offences.

2. In the considered view of this Court these appeals raise substantial questions of law concerning the interpretation of Section 13 (1) (d) of the Prevention of Corruption Act 1988 (PC Act 1988) and therefore should be heard by a bench of two Hon'ble judges. The background in which these questions arise is set out hereafter in order to appreciate the context in which the questions arise.

3. Appellant Sri Sukh Ram was from 18th January 1993 till 16th May 1996 the Union Minister of State for Communications [MoS (C)] having independent charge. During that period, Smt. Runu Ghosh was the Director (FA-V) in the Department of Telecommunications (DOT).

Appellant Sri P. Rama Rao, was the Managing Director of Advanced Radio Masts Pvt. Ltd. ('M/s.ARM').

4. For the supply of 3000 2/15 MARR Shared Radio Systems a tender was floated on 27th December 1991 by the Department of Telecommunications ('DOT'). The total value of the tender was around Rs.106 crores. 1,000 of these Shared Radio Systems were directed for purchase for the year 1992-93 and 2,000 for the year 1993-94. At the time of floating of the tender, there were two known types of these MARR sets: one was a crystal version, for which a few suppliers had provisional 'type approval certificate', and which was already being supplied to the DOT and in use at various Telecom circles. The other was a synthesised version, for which type approval had not yet been granted. The supply of these sets was part of the rural telecom project to increase connectivity of rural populations in the country. Clause 1.1.10 of the tender conditions stated that "equipment having local oscillators with synthesized frequency control and capability to withstand wide variation of input DC voltage will be preferable."

5. On 6th January 1992, a Tender Evaluation Committee ('TEC') was constituted to evaluate the bids that would be received pursuant to the above tender. Among the 35 entities who submitted bids were M/s.ARM, M/s. Shyam Antenna Electronics Communications Systems, New Delhi ('M/s.Shyam') and M/s. Punjab Wireless Systems Ltd. Chandigarh ('M/s.Punwire'). M/s. ARM submitted its bid on 15th

March 1992. After scrutinising the reports of the Technical Group and the Commercial and Finance Group, which examined the bids, the recommendations of the TEC as regards the price were: “the lowest evaluated offer will cost Rs. 4,56,944 based on the basic price of Rs.3,58,500. However, it is seen that a lower basic price at Rs.3,54,500 (inclusive of packaging and forwarding) has been offered by another bidder (whose evaluated price at site is higher at Rs.4,64,111). Since a basic lower rate is available in the tender this may be considered as the basic ordering price. Excise duty, sales tax, freight, insurance etc may be paid at actuals subject to overall ceiling price of Rs. 4,56,944 at site.”

6. While M/s. ARM had obtained type approval for the crystal version, the type approval for its synthesised version was awaited. M/s.ARM had already supplied 522 crystal version systems to the DOT in the previous years. Of these, 130 had been installed and commissioned in different telecom circles spread over the country. On 4th November 1992 M/s. Shyam wrote to the DDG (MM) stating that their product i.e. 2/15 Shared Radio System (Shyam Make) in the synthesised version had been recommended for type approval. Annexed to the letter was a listing of the features of the Shyam Make Shared Radio System which explained its advantages over the crystal based system.

7. Pending the finalisation of the award of contract pursuant to the tender of 13th January 1992, a provisional purchase order (PO) dated 31st December 1992 for supply of 300 systems of 2/15 MARR was

placed by the DOT on M/s. ARM. A similar order for 200 systems was placed on M/s. Shyam. In the meanwhile, the Union Budget was announced and on 16th April 1993 M/s.ARM wrote to the Member (Production) DOT informing him inter alia that “due to various duty concessions given by the Government and quality measures successfully adopted by us, we could bring down the price of each 2/15 MARR Shared Radio Systems from Rs.3,54,500 to Rs.3,45,000 passing on a net benefit of Rs.9,500 to DOT.” M/s.ARM further informed DOT that the above benefit of Rs.9,500 “would apply to our synthesised version of 2/15 also.”

8. The Director (MMC), Mr.Ujjagar Singh, prepared a note dated 26th April 1993 proposing to procure 2500 systems from the vendors having type approval at the rate of Rs.3,45,000 per system. The file was transmitted to the Member (Finance) and then on to Smt. Runu Ghosh who was the Financial Advisor (FA-V) for approval and finance sanction. Smt.Runu Ghosh wrote a detailed note on the file on 25th May 1993 suggesting that an order for 1500 systems should be placed on M/s.ARM which was the only established supplier and 500 systems on M/s. Shyam and 200 on M/s.Punwire at the revised unit rate of Rs.3,45,000 per system. In response to that note the DDG (PF) commented that it was difficult to say what exactly the reduction in price should be “as it would depend largely on the quantum of imported inputs.” It was suggested that if there was a fresh open competitive tender there could be a reduction of more than Rs.9500/- offered by M/s. ARM. Therefore it was suggested that only 300

systems should be ordered from M/s. ARM at the reduced price and then a fresh short notice tender should be called. When the file was placed thereafter before Sri Ujjagar Singh he proposed that the price should be negotiated with the lowest among the bidders who were having type approval as of that date. He suggested the constitution of a Price Negotiation Committee (PNC).

9. On 4th June 1993 a PNC was set up with the following Members:

1. Shri N.C. Gupta DDG (RN), Chairman,
2. Shri Ujjagar Singh Director (MMC), Member
3. Smt.Runu Ghosh Director (FA-V), Member.

The PNC held its meeting on 10th June 1993 and issued letters to the bidders asking them to bring with them “the break-up of the prices in the form of import component, indigenous component, labour, overhead and financial charges, etc.” The bidders were also asked to work out the revised prices and present them before the PNC. Before the PNC, M/s. ARM offered to supply up to 500 systems at Rs.3,43,500 per system, up to 1000 systems @ Rs. 3,42,800 per system and up to 1500 systems at Rs. 3,42,000 per system. The PNC noted that “Shri P. Rama Rao did not agree for further reduction in price.”

10. It appears that while Sri N.C.Gupta and Sri Ujjagar Singh wanted to incorporate in the minutes of the PNC the proposed reduction in the price of the crystal based version based on a comparison of its features with those of the synthesised version, Smt.Runu Ghosh was of the

view that these aspects were not discussed at the meeting but the facts

appeared to have been gathered subsequently. She accordingly declined to sign the minutes of the PNC. Sri N.C.Gupta by a detailed note dated 13th July 1993 proposed a reduction in the price of the crystal based system by Rs.37,170 per system. He indicated the calculation on the basis of which he was making the proposal. He noted that “it is surprising that Director (FA-V) is not agreeable” to the reduction in the price of the crystal version.

11. On the basis of Sri Gupta’s note, Sri Ujjagar Singh, the other member of the PNC, proposed by his note dated 19th July 1993 that 300 systems of crystal controlled version be procured from M/s ARM at the rate of Rs.3,03,750. He proposed that 2200 synthesised version systems be procured at the rate of Rs.3,40,750. An order for supply of 500 and 700 synthesised MARR systems would be placed on M/s Punwire and M/s. Shyam respectively. The balance quantity of 1000 was proposed to be kept in reserve for vendors who might get type approval later in the year.

12. Smt. Runu Ghosh did not agree. She wrote a detailed note on the file on 23rd July 1993 wherein she stated that she had discussed the matter with the Sr. DDG (TEC) (Sri S.Muthuswamy) over phone and he had confirmed that the crystal based and the synthesised version “are not comparable at all.” She stated that a letter had been addressed to Sr. DDG (TEC) and that till a reply was received from the TEC, “the price reduction of Rs. 34,170 per system worked out on the basis of the rate contract cannot be accepted.” She advised that they should “wait

for the TEC report before any decision is taken regarding the price at which orders are to be placed.”

13. On 26th July 1993 Sri Rakesh Aggarwal, the Director (TR) and the Member of the Technical Group of the TEC, wrote to Smt. Runu Ghosh confirming that “the design, concept and application of hand held VHF trans receivers are entirely different from 2/15 MARR and is not proper to compare.” As far as comparison of the cost of the crystal version with that of the synthesised version, he stated that the TEC did not have any data on costing. However, this depended “upon the design, concept & types of components used and is not susceptible to cost comparison as is being attempted.”

14. Meanwhile, the file travelled from desk to desk. The Adviser (P) who saw it next agreed with the suggestion of Sri N.C.Gupta that the price should be reduced by Rs. 37,170 per system. Sri Ujjagar Singh, Director (MMC) wrote a note on 19th August 1993 giving the financial implication for the purchase of 2500 systems of which 300 were to be crystal based. He pointed out that after accounting for a price reduction of Rs.35,000 per system and Rs.3,40,750/- per system of the synthesised version (2200 numbers), the sum worked out to Rs 81.03 crores.

15. The file was placed before Sri Sukh Ram, the MoS (C), on 15th August 1993. He noted that the case had been unnecessarily delayed and that he “would therefore like that the case be decided within a

week's time positively." The Member (P) who dealt with the file immediately thereafter recommended that "since the case is already delayed too much, we should try to order the full quantity of the tenders keeping as to small quantities for educational orders so that the targets for opening LDPT is...not delayed any further." Sri Ujjagar Singh then gave a revised suggestion whereby an order for 800 systems would be placed on M/s. ARM i.e. 500 of the synthesised version and 300 of the crystal version. 900 of the synthesised version would be placed on M/s. Shyam and 500 on M/s. Punwire. 100 systems were to be reserved for future tender. The total financial implication was Rs.81.03 crores. On 23rd August 1993 Sri Ujjagar Singh reiterated the above figures except to the extent that he suggested orders for 800 systems each be placed on M/s. Shyam and M/s. ARM and 450 systems each on M/s. Punwire and M/s. NATELCO. He suggested that the price for the synthesised version worked out to Rs.3,35,639. U.S. Prasad, DDG (PF) in his note dated 25th August 2003 indicated that the price of the crystal version should be Rs.3,35,639 – Rs.37,170 = Rs.2,98,469 per system.

16. With all the above notes when the file was placed before the MoS(C) Sri Sukh Ram on 31st August 1993 he wrote a detailed note and directed that an order for 900 systems be placed on M/s Shyam, 900 (300 crystal+600 synthesised) on M/s. ARM, 250 on M/s Punwire and 450 on M/s Natelco. He then added "Rest as proposed. Necessary action may be taken immediately so that our rural development targets do not suffer any more."

17. Based on the above noting of the MoS (C), an APO dated 2nd September 1993 was placed on M/s. ARM. This was for the supply of 300 crystal version units at the unit price of Rs.2,98,469 and 600 synthesised version units at the unit price of Rs.3,35,639. It was indicated in the letter that the APO was likely to be converted into detailed purchase order (PO) “after your acceptance of the APO and a bank guarantee of Rs.1,45,46,205 (5% of the total value of the PO)”. M/s. ARM wrote a letter on 9th September 1993 forwarding the bank guarantee for supply of 600 synthesised version systems and assured that the supply of those systems would be completed by the end of December 1993. However as regards crystal version M/s. ARM protested and pointed out that “ price agreed upon during the PNC meeting, held on, 10.06.93 has not been given and, on the contrary, we have been asked to supply Tx/Rx cards & one subscriber radio equipment, worth about Rs. 30,000/- as additional spare units.” The DOT, however, did not agree. By its letter dated 17th September 1993 the DOT informed M/s. ARM that it should give a clear acceptance of the APO within the time frame indicated “otherwise DOT reserve the right to procure this item of the synthesised version from any of the sources available to DOT.” On 20th September 1993 M/s. ARM wrote to the DOT furnishing a bank guarantee for 300 Nos. of the crystal version for the reduced price.

18. In the meanwhile on 11th September 1993 M/s. ARM made a detailed representation to the MoS(C) asking that the following

amendments be carried out to the APO:

- 1) Quantity for crystal controlled version of 2/15 be enhanced from existing 300 to 450 systems. We have produced 450 systems and was agreed in the PNC meeting that DOT would take all 450 nos.
- 2) The price of crystal controlled version of 2/15 be made equal to that of synthesised version as per the previous orders placed in December'92 on M/s Shyam (200 sys.) & M/s ARM (300 sys.) against the same Tender No spares were asked in the previous order for crystal controlled 2/15. The requirement of spares is even not mentioned in the Tender Enquiry. Hence the supply of spares to be please deleted from the P.O.
- 3) Sales Tax, excluded from the basic price of the system and be treated extra as other statutory levies like excise duty.”

19. There is a controversy as to when the above letter was in fact received in the office of the MoS (C). The date stamp on a copy thereof indicates that it was received on 27th September 1993, by which time M/s. ARM had furnished a bank guarantee for the supply of the 300 crystal based systems at the reduced price. On the representation of 11th September 1993 the MoS (C) made the following noting by hand:

“How are we offering two rates against the same tenders since we have taken both crystal and synthesised at the same price earlier. Has TEC examined this issue?”

20. M/s. ARM's representation dated 11th September 1993 was then sent for comments to Sri Ujjagar Singh, Director (MMC), who prepared a detailed note dated 15th November 1993 agreeing to the adjustment of the quantities as 450 each of the crystal and synthesised versions. As regards the price differential, he again referred to the note of Sri N.C.Gupta which indicated the basis for the reduction in price. Thereafter the file was placed before the MoS (C) on 19th November 1993. He wrote a detailed note explaining that the price difference was on account of "the difference between crystal and synthesised versions of the hand-held VHF trans-receivers" but that the TEC (Sri Rakesh Aggarwal) had mentioned that "these trans-receivers are completely different from our 2/15 MARR systems in respect of design, concept and even application." After giving the reasons why the price for the crystal version should not be reduced, the MoS (C) noted that "It would therefore be manifestly unjust to arbitrarily reduce the price of the crystal controlled systems of M/s. ARM." He directed that a suitable amendment be issued "to the effect that the price of the crystal version of the 2/15 systems should be equal to that of the synthesised version, as in the earlier purchase orders."

21. The file thereafter appears have been dealt with next only on 6th December 1993. Further to the above note of the MoS (C), Sri U.S. Prasad DDG (PF) in his note dated 9th December 1993 suggested that a legal opinion should be called for to confirm the offer whether the offer of a rate lower than that negotiated would be discriminatory. In

para 6 of this note he concurred with the view of the MOS (C) that “the reduction worked out on the basis of the difference in the price of crystal and synthesised version of hand held VHF trans-receivers may not, therefore, be correct.” He however suggested that in view of the ‘perceived inferiority of the crystal version’ it would be necessary to make suitable adjustment in the prices “even though crystal controlled 2/15 MARR systems of M/s. ARM are stated to fully meet DOT specifications and these systems are working satisfactorily in the field.” He suggested that the Chief/Sr. Cost Accounts Officer of the Ministry of Finance “assisted by a representative of the Member (Services) and/or Member (Technology) should undertake “a quick study of the relative merits of the 2 sets as well as their costs.”

22. The matter was again placed before the MoS (C) on 13th December 1993 and he reiterated his earlier view. He pointed out that in view of the observations of the TEC, the basic premises for cost reduction for crystal versions were wrong and therefore “we should not persistently repeat that a crystal version is inferior and therefore, its cost should be less than that of synthesised version.” He noted that the “perceived inferiority” thus appears to be merely a matter of opinion of one or two officers and is not substantiated by any comparative data in the actual working of crystal and synthesised version in the field.” He felt that “Offering same price for two versions of one equipment, which are equally acceptable as per our tender specifications and have been earlier accepted against the same tender at the same price, cannot invite any audit objection, all the more so when there is no basis for

arbitrarily reducing the price of one version of the equipment since there are neither any negative reports from the field about the working of that equipment nor any technical grounds, as established by the TEC letter.” Declining therefore to reconsider his earlier decision he ordered that the amendment “should be issued at the earliest, as should have been done in the first place instead of putting up the file again with flimsy reasons for not complying with my orders.”

23. The matter did not end there. Sri N. Vittal, Chairman of the Telecom, Commission called Sri S. Muthuswamy, Senior DDG (TEC) “for a discussion to understand the technical aspects of the crystal as well as the synthesised version.” In his note dated 29th December 1993 Sri Vittal stated that as a result of this discussion “I understand that when it comes to output in terms of performance, they are comparable. In view of this, we may take further action for implementing the directives of the MOS (C).” However there appears to have been a further delay in actually implementing the Minister’s order. Sri Vittal again discussed the matter with the MoS (C) and wrote a note on 12th January 1994 stating:

“Discussed with the MOS(C), I brought to his notice that there could be a difference of view that because technically the crystal and the synthesised version are different, there has to be price differential. MOS(C) clarified that he has gone into the issue thoroughly and he was convinced that there has been certain degree of injustice done to the ARM and in view of specific orders given in his note of 13th Dec, 93, action for immediately implementing his orders may be taken.”

24. Over a year and a half later, based on a source information, the

Anti Corruption Unit-IV of the CBI registered the file case i.e. RC 3(A)/96/ACU-IV under Section 120 B IPC and Sections 13(1)(d) read with Section 13(2) PCA on 8th August 1996 alleging that Sri Sukh Ram had in his capacity as MoS (C) and Smt. Runu Ghosh in her capacity as Director (FA- V) being public servants acted in conspiracy amongst themselves and with M/s ARM and by corrupt and illegal means or by abusing their position as such public servants caused pecuniary advantage either to M/s. ARM and to themselves.

Present case not linked to the DA Case against Appellants

25. It requires to be mentioned at this stage that during the investigation of the present case a raid was conducted on 16th August 1996 at the residence of Sri Sukh Ram. According to the CBI as a result thereof documents relating to various immovable properties and unaccounted cash were recovered. A separate case, RC-IVA/96/ACU-IV, (hereafter 'DA case') was thereafter registered on 27th August 1996 against Sri Sukh Ram for possessing assets disproportionate to his known sources of income. The DA case was tried separately and a judgment was delivered on 20th February 2009 by the trial court convicting Sri Sukh Ram for the offence under Section 13 (2) read with Section 13 (1) (e) PC Act and by an order dated 25th February 2009 sentencing him to three years' RI and fine and 6 months' SI in default. CrI. A. No. 287 of 2009 filed by Sri Sukh Ram against the said judgment has been admitted and is pending in this Court.

26. It is not the case of the CBI that the money and documents relating

to properties seized from the residence of Sri Sukh Ram in the DA case are linked to the present case. Sri S.S. Gandhi, learned Senior counsel appearing for Appellant M/s. ARM submitted that the CBI did examine if a bundle of currency notes recovered from the residence of Sri Sukh Ram could be traced to M/s. ARM but did not find such link. Neither before the trial court nor before this Court has the CBI argued that the DA case and the present case are connected.

27. Likewise, as regards Smt. Runu Ghosh, a separate case RC No. 5(A)/96/CBI/ACU-IV/N.Delhi was registered after the CBI conducted a raid at her residence on 16th August 1996. The search resulted in recovery of documents showing acquisition of properties disproportionate to her known sources of income. The resultant trial ended with her conviction by the trial court for the offence under Section 13(2) read with Section 13 (1) (e) by a judgment dated 12th May 2009. Thereafter, by an order dated 15th May 2009, she was sentenced to 3 years' rigorous imprisonment along with fine of Rs. 1 lakh and six months simple imprisonment in default of its payment. The Criminal Appeal No. 490/2009 filed by her against the said judgment has been admitted by this court on 9th July 2009 and is pending consideration. It is again not the case of CBI that the aforementioned DA case against Smt. Runu Ghosh is in any manner linked to the present case.

The Trial Court's findings

28. Reverting to the case on hand, the trial court upon examination of

the evidence came to the conclusion that both Sri Sukh Ram and Smt. Runu Ghosh:

“Grossly abused their position as public servants for the purpose of obtaining pecuniary advantage for ARM by making the Public Exchequer pay the same price for 450 2/15 crystal controlled MARR systems at which synthesized version of the system were purchased, though crystal controlled version was an inferior version of the system and therefore deserved a reduced price.”

“Accused Sukh Ram and Runu Ghosh were supposed to exercise their powers and discharge their functions for public good and public interest but they used their powers and offices to help ARM in getting a pecuniary advantage, to which it was not entitled. Their acts and conduct were arbitrary and unreasonable.”

“The facts and circumstances stated above, prove beyond reasonable doubt that the intention of accused Sukh Ram and Runu Ghosh was to cause wrongful loss to the Public Exchequer and wrongful gain to ARM by giving to it, same price for crystal version as was given for synthesized version and therefore they acted dishonestly in using their official position as public servants.”

As regards M/s. ARM the trial court concluded:

“ARM was the sole beneficiary of the order passed by accused Sukh Ram giving same price to crystal version which was given to synthesized version. This is not a case where a number of persons benefited from a common order. Accused P. Rama

Rao being Managing Director of ARM and being the person who was pursuing the matter with the department, there can be no reasonable doubt about his being a party to this conspiracy.”

Submissions of Counsel

29. Although lengthy arguments were advanced by counsel for accused and the prosecution, the submissions relevant for the present order of reference are alone set out hereafter. On behalf of appellant Sri Sukh Ram it was submitted that the mere making of a representation by an aggrieved tenderer for restoring to it the price at which the goods were agreed to be supplied cannot be stated to be illegal nor can the acceptance of such representation by the MoS (C) be stated to be a corrupt act attracting the offence under Section 13 (1) (d) (i) of the PC Act 1988. Moreover, the decision of the MoS (C) dated 19th November 1993 was a reasoned one and merely because the representation was accepted did not make his decision dishonest. This was a possible view to take. A wrong decision did not necessarily mean that the person making such decision was guilty of criminal misconduct attracting the offence under Section 13(1) (d) (i), (ii) or (iii) of the PC Act 1988. On behalf of Appellant Sri P Rama Rao it was submitted that the offence under Section 120 B IPC was not attracted at all since there was no evidence to show that any one from M/s. ARM had personally met Sri Sukh Ram or Smt. Runu Ghosh at any point of time. On behalf of Smt. Runu Ghosh it is submitted that there was no occasion for her to handle the file between 31st August 1993 and 19th November 1993

when the Minister accepted the representation of M/s. ARM. Consequently, she could not be said to be part of any decision by which a pecuniary advantage ensued to M/s. ARM. It is pointed out that the attempt at showing the recovery from her in August 1996 of a set of pearl earrings valued at Rs.1500 or the recovery of the two blank letterheads of M/s. ARM from her table drawer in August 1996 long after the transactions in question took place did not prove the existence of a conspiracy in 1993. It is submitted that there is no material on record to link Smt. Runu Ghosh with the conspiracy to commit any offence under Section 13 (1) (d) read with Section 13 (2) PC Act.

30. On behalf of all the Appellants generally it was submitted that the prosecution had failed to prove *mens rea* in the actions or omissions of the appellants which was an essential ingredient of the offence under Sections 13 (1) (d) read with Section 13 (2) PC Act. It is submitted that a wrong decision is not necessarily a corrupt one. It is submitted that the offence of a public servant “abusing his position” in terms of Section 13(1) (d) of the PC Act 1988 includes the ingredient of *mens rea* which has necessarily to be proved by the prosecution beyond reasonable doubt. It is submitted that in the absence of any evidence to show that the accused deliberately abused their official position for the pecuniary advantage of M/s. ARM the offence under Section 13(1)(d) cannot be attracted. The mere fact that a decision was taken by the MoS(C) on 19th November 1993 to accept the representation of M/s. ARM, as part of his official functions, did not attract the offence of “obtaining” for M/s. ARM a pecuniary advantage that could be termed

as “criminal misconduct.” Reliance is placed on the decision of the Supreme Court in *M. Narayanan Nambiar v. State of Kerala AIR 1963 SC 1116*, *S.P.Bhatnagar v. State of Maharashtra AIR 1979 SC 626*, *S.K.Kale v. State of Maharashtra AIR 1977 SCC 822*, *Sita Sharan v. State of Bihar 1984 CRI.L.J. 878 (Patna)* and *Saran Singh Rattan v. State of Punjab AIR 1957 SC 637* and *Srinivas Mall Bairoliya v. Emperor AIR (34) 1947 PC 135*.

29. Appearing on behalf of the CBI, Sri P.P.Malhotra learned Additional Solicitor General (ASG) and Sri Jatan Singh, learned Advocate submitted that the wording of Section 13(1) (d) (ii) and (iii) PC Act of 1988 was different from the corresponding provision in the 1947 PC Act i.e. Section 5(1) (d). It is submitted that a reading of Sections 7 and 11 of the PC Act 1988 indicated that the offence described therein contemplated the existence of *mens rea* without which the offence would not be complete. Therefore it was significant for the Parliament to clarify in Section 20 (2) of the PC Act 1988 (corresponding to Section 4 of the PC Act of 1947) that once it was proved by the prosecution that the accused (public servant) had obtained a gratification from any person, then it would be presumed that he accepted it “as a motive or reward” or “without consideration which he knows to be inadequate.” Once it was proved that a public servant had accepted an illegal gratification then the element of *mens rea* need not be proved. Drawing an analogy, it is submitted that the wording of Section 13(1)(d)(ii) and (iii) indicates that the *mens rea* need not be proved by the prosecution once it is shown that the public

servant abused his official position for obtaining for another person a pecuniary advantage although not to himself. It is submitted that Section 13(1)(d) (iii) is an independent offence which is even wider. There it was enough to prove that the public servant obtained for a person a pecuniary advantage which was “without any public interest.” According to the learned ASG, the very nature of the said offences was such that that the person committing them had to have a guilty mind. And this was why the legislature had perhaps not used the words “knowingly”, “wilfully”, “fraudulently”, “dishonestly”, “corrupt or illegal means”, or “without consideration”, to qualify the offences under Section 13 (1) (d) (ii) or (iii) PC Act 1988. Reliance is placed on the decisions in *Ranjit D. Udeshi v. State of Maharashtra* [1965] 1 SCR, *Pyrali K. Tejani v. Mahadeo Ramchandra Dange* (1974) 1 SCC 167, *Radhey Shyam Khemka v. State of Bihar* (1993) 3 SCC 54, *Dineshchandra Jamnadas Gandhi v. State of Gujarat* (1989) 1 SCC 420 and *Sarjoo Prasad v. The State of Uttar Pradesh* [1961] 3 SCR 324. In the context of the Customs Act and the presumption of *mens rea*, reliance is placed upon the decision in *State of Maharashtra v. Mayer Hans George* [1965] 1 SCR 123. Reliance is placed on certain passages of **Principles of Statutory Interpretation** (9th Edition 2004) by Justice G.P. Singh. Reliance is also placed on the judgment in *Indo-China Steam Navigation Co. Ltd. v. Jasjit Singh, Additional Collector of Customs, Calcutta* (1964) 6 SCR 594 and *R.S. Joshi, Sales Tax Officer, Gujarat v. Ajit Mills Limited* (1977) 4 SCC 98. As regards the question of *mens rea* not having to be proved, reliance was placed on the judgments in *P.N.Krishna Lal v. Govt. of Kerala* 1995

Supp (2) SCC 187, Assistant Commissioner, Bangalore v. Velliappa Textiles Ltd. (2003) 11 SCC 405 and Union of India v. Ganesh Das Bhojraj AIR (2000) SC 1102.

The issues that arise

30. In the present case the evidence is essentially in the form of notes on file dated 25th May and 24th July 1993 of Smt.Ghosh and the notes dated 31st August, 19th November and 13th December 1993 of Sri Sukh Ram. There are cases under the PC Act 1988 in which a trap is laid to gather evidence of the public servant accepting illegal gratification or in which a raid is undertaken of the place of residence or work with a view to unearthing the amassing of assets disproportionate to the known sources of income of such public servant. However, according to the CBI, the present case is not linked with the DA case against the Appellants Sri Sukh Ram and Smt.Runu Ghosh. This case is one where the public servant is not shown to have gained any pecuniary benefit but is accused of abusing the official position and obtaining it for another person. The prosecution's case is built around Section 13 (1) (d) (i) to (iii) PC Act 1988.

31. As regards the nature of evidence, to prove the guilt of Sri Sukh Ram, the prosecution relies on the notes on file authored by him and the correspondence involving M/s. ARM. As far as Smt.Runu Ghosh is concerned, apart from the notes on file authored by her, the prosecution relies on the recoveries from her of a set of pearl earrings worth Rs.1500 and two blank letter heads of M/s. ARM in August

1996 from her table drawer. Some of the authors of the various notes on the file have been examined as prosecution witnesses. The offence of criminal conspiracy punishable under Section 120 B is also sought to be proved on the basis of the above evidence.

32. Stemming from the submissions of the learned ASG, an important question that arises for consideration is whether for the purposes of Section 13 (1) (d) (ii) or (iii) PC Act the prosecution has to prove *mens rea*. The learned ASG has also filed detailed written submissions on this aspect referring to several decisions of the courts, which have dealt with the provisions of some criminal statutes dispensing with the need to prove *mens rea*. They however do not appear to have had occasion to deal with the question in the context of Section 13 (1) (d) PC Act 1988. In this context the following passage from **Principles of Statutory Interpretation** by G.P.Singh (9th edition, pp.779-780) is instructive:

“When a statute creates an offence, the question whether the offence involved the existence of *mens rea* as an essential element of it or whether the statute dispenses with it and creates strict liability are questions which have to be answered on a true construction of the statute. The courts, however, regard it as a fundamental principle that an offence cannot be made out without the existence of *mens rea*, ‘unless from a consideration of the term of the statute and other relevant circumstances it clearly appears that that must have been the intention of Parliament.’ The formulations of the rule of construction which have been accepted by the Privy Council and the Supreme Court are those stated by Wright, J. in *Sherras*

v. De Rutzen, and by Goddard, C.J. in *Brend v. Wood*. Wright, J. expressed the rule in these words: ‘There is a presumption that *mens rea* an evil intention, or knowledge of the wrongfulness of the act, is an essential ingredient of every offence, but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals and both must be considered.’ And, the formulation by Goddard, C.J. is to the following effect: ‘It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that unless a statute either clearly or by necessary implication rules out *mens rea* as a constituent part of a crime a defendant should not be found guilty of an offence against the criminal law unless he has got a guilty mind.’ It has also been said that the presumption of existence of *mens rea* is ‘a presumption of legality’ and ‘in the absence of express words or a truly necessary implication, Parliament must be presumed to legislate on the assumption that the principle of legality will supplement the text’. **‘Necessary implication’ in this context “connotes an implication which is compellingly clear. Such an implication may be found in the language used, the mischief sought to be prevented and any other circumstances which may assist in determining what intention is properly to be attributed to Parliament when creating the offence.”** As stated by the Privy Council (Lord Scarman) **the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern and it is further shown that creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act.** The climate of

both parliamentary and judicial opinion in England has been growing less favourable to the recognition of absolute offences over the last few decades.” (emphasis supplied)

32. The question that arises is whether *mens rea* is impliedly excluded in Sections 13 (1) (d) (ii) and (iii) of the PC Act 1988? To borrow the words of Lord Nichollas quoted in the above passage, can “such an implication be found in the language used, the mischief sought to be prevented and any other circumstances which may assist in determining what intention is properly to be attributed to Parliament when creating the offence?” It must be added that according to the learned ASG even if the above question were to be answered in the negative, the notes on file, documents and other attendant circumstances prove *mens rea* beyond reasonable doubt.

33. That brings up the other aspect of the case which is the nature of the evidence adduced by the prosecution. The case of the prosecution is that the decisions dated 19th November and 13th December 1993 of the MoS (C) and the notes dated 25th May and 24th July 1993 of Smt.Runu Ghosh, in the light of the other evidence including depositions of the witnesses are sufficient to prove the offence of “criminal misconduct” within the meaning of Section 13 (1) (d) (ii) and (iii) PC Act 1988 beyond reasonable doubt. It was urged that the fact that the price as demanded by M/s. ARM was restored to it by the MoS (C) overriding the advice of his subordinates, which has a

financial implication of Rs.1.86 crores for the government was sufficient in itself to characterize the said action as an “abuse” of official position for the purposes of section 13 (1) (d) (ii) and as being “without public interest” for the purpose of Section 13 (1) (d) (iii) of the PC Act. The questions that arise in this context are in a government run essentially by an Executive with a Minister heading a Department, and where decisions involving financial implications are taken routinely, when can a decision be said to constitute an “abuse” of official position? What can be said to be a decision that is not in ‘public interest’?

34. The importance of the above questions becomes apparent on a comparison of the earlier provision i.e. Section 5(1) (d) PC Act, 1947 with Sections 13(1) (d) (i), (ii) and (iii) of the PC Act 1988:

Section 5(1)(d) PC Act, 1947	Section 13(1)(d) (i),(ii) and (iii) PC Act, 1988
5. Criminal Misconduct (1) A public servant is said to commit the offence of criminal misconduct— (a) *** (b) *** (c) *** (d) if he, by corrupt or illegal means or by otherwise abusing his position as public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage	13. Criminal misconduct by a public servant (1) A public servant is said to commit the offence of criminal misconduct, — (a) *** (b) *** (c) *** (d) if he,— (i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or (ii) by abusing his position as a

	public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or (iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest;
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One obvious change is that the words “abusing his position as a public servant” in Section 13(1) (d) (ii) of the PC Act 1988 are not preceded by the word “otherwise” as they were in Section 5 (1) (d) of the PC Act 1947. The intention is perhaps to indicate that Sections 13(1) (d) (ii) and (iii) constitute distinct species of offences not related to Section 13(1)(d) (i) which talks of obtaining by “corrupt or illegal means for himself or for any other person any valuable thing or pecuniary advantage.” The word “obtains” which is common to Section 13(1)(d) (i) to (iii) is another key element to the “criminal misconduct”. Does it then connote the gaining of some advantage which is contrary to or not permitted by law? Then we have Section 13 (1) (d) (iii) of the PC Act 1988 which is a new species of offence for which there is no corresponding provision in the PC Act of 1947. Whether the absence of adverbs like “wilfully”, “fraudulently”, “dishonestly”, “corrupt or illegal means” to qualify the verb “obtains” in this clause would mean that a public servant commits criminal misconduct if he while holding such office obtains for any person (and not for himself) any pecuniary advantage which is “without any public interest”? The statute appears to offer no guidance as to what can be

said to be a decision or act that is “without public interest”.

35. The above questions do not appear to have arisen directly for consideration in any of the cases cited at the bar particularly in the context of the PC Act 1988. There is no authoritative pronouncement on the above aspects of the law. Given the importance of the questions and the implications it has for numerous other cases that may be pending at various stages, it is considered appropriate to direct that these appeals should be decided by a larger bench of two Hon’ble judges. It is clarified that the submissions of the counsel for the parties on the evidence in the case and the correctness of the findings of the trial court have not been discussed in this order. Those will also have to be examined notwithstanding the answers to the above questions. The appeals may be placed on 9th October 2009 before the appropriate Division Bench subject to the directions of Hon’ble the Chief Justice.

S. MURALIDHAR, J.

SEPTEMBER 24, 2009

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