IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL REVISION APPLICATION NOS. 28 and 30 of 2014.

CRIMINAL REVISION APPLICATION NO. 28 of 2014.

1. Dr. Ajoy Estibeiro,
S/o Dr. Jacinto Estibeiro,
Major of age,
R/o. 711 La Campala Colony,
Miramar, Panaji, Goa .. Petitioner

Versus

1. CBI
Through P.P.
High Court of Bombay
Panaji, Goa .. Respondent

Mr. Arun Bras De Sa and Mr. S. Shet, Advocates for the Petitioner.

Mr. Joseph Vaz, Special Public Prosecutor for the Respondent.

AND
CRIMINAL REVISION APPLICATION NO. 30 of 2014.

1. Shri K. S. Sankar, Major in age,
son of Shri K. V. Subramaniam,
resident of 56/104,
Everswhine Millenium Paradise,
Thakur Village, Kandivli
(East, Mumbai 400101) .. Petitioner

Versus

1. Stte
Through CBI/ACB/Goa

2. Dr. Ajoy Estibeiro,
Major in age,
son of Dr. Jacinto Estibeiro,
resident of 711, La Campala Colony,
Miramar, Panaji, Goa.

3. M/s. Medicare Foundation Pvt. Ltd.
1120, Housing Board Colony,
Porvorim, Alto Betim, Goa. .. Respondents

Mr. J. A. Lobo, Advocate for the Petitioner.

Mr. Joseph Vaz, Special Public Prosecutor for the Respondent no.1

Mr. Arun Bras De Sa and Mr. S. Shet, Advocates for the Respondent no.2.

CORAM:- C. V. BHADANG, J.

RESERVED ON:- 7th APRIL, 2015

PRONOUNCED ON:- 5th MAY, 2015

JUDGMENT :

Both these Revision Applications arise out of the order dated 12/05/2014, passed by the learned Special Court for CBI at Mapusa in Special Case No.4/2013/D (Old Special Case No.1/2007). They involve common and connected questions and as such are being disposed of by this common judgment.

2. The petitioner K. S. Sankar in Criminal Revision Application No.30/2014 is the Senior Divisional Manager of National Insurance Company Ltd., Panaji, Divisional Office (Insurance Company, for short), while the petitioner Dr. Ajoy Estibeiro in Criminal Revision Application no.28/2014 is the Director of M/s. Medicare Foundation Private Ltd., which is arrayed as the accused no.3. K. S. Sankar and Dr. Ajoy Estibeiro

are respectively the accused nos.1 and 2 before the learned Special Judge. According to the prosecution, Shri K. S. Sankar in pursuance of a Criminal conspiracy, dishonestly and fraudulently allowed M /s. Medicare Foundation Private Ltd. to act as Third Party Administrator (TPA) without obtaining necessary approval from competent authority of the Insurance Company. No formal agreement or memorandum of understanding was executed and M/s. Medicare Foundation was allowed to enroll members in a Mediclub to form a group. It is the prosecution case that the members of the mediclub, did not comprise of homogeneous group as required. It was further claimed that such members were allowed to claim hospitalisation and other benefits, which were not admissible. Mr. K. S. Sankar in furtherance of the criminal conspiracy, allowed the Medicare Foundation to print self-devised proposal forms by deleting and/ or altering the conditions of the policy although they were not approved by the Competent Authority. It was further alleged that long term policy beyond permissible limits, covering preexisting diseases (which have been excluded), came to be issued. It was alleged that in the process, Mr. K. S. Sankar abused his official position without safeguarding the interest of the Insurance Company, thereby causing a wrongful loss to the Company to the tune of over Rs.7.5 Lakhs. On the basis of these allegations, investigation was conducted and ultimately, a chargesheet came to be filed against the petitioners and M/s. Medicare Foundation Limited for the offences punishable under Sections 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 (the Act, for short) and against the accused nos.2 and 3 i.e. Dr. Ajoy Estibeiro and the Medicare Foundation Ltd, for offence of abetment under Section 109 of Indian Penal Code (IPC), read with Section 13(1)(d) of the Act and against all the three accused for the offences punishable under Sections 120-B and 420 of IPC.

3. The learned Special Judge heard the parties on the point of framing of charge and by the impugned order, has directed framing of charge as aforesaid. Feeling aggrieved, the petitioners are before this Court.

4. I have heard Shri Arun De Sa, the learned Counsel appearing for the petitioner in Criminal Revision Application No.28/2014 and Shri Lobo, the learned Counsel appearing for the petitioner in Criminal Revision Application No.30/2014. I have also heard Shri Vaz, the learned Special Public Prosecutor for the respondents. With the assistance of the learned Counsel for the parties, I have perused the copy of the chargesheet as also the submissions and the documents produced along with the same.

5. It is submitted on behalf of the petitioners that the investigation was started allegedly on the basis of the receipt of some “source information”, which is not disclosed. It is submitted that no formal First Information Report (FIR) has been registered on the basis of such a “source information”. It is also submitted that neither the Insurance Company nor anybody else has lodged a complaint, about any alleged irregularities or any fraudulent or dishonest act which may be attributable to the applicants, in order to defraud the Insurance Company. It is submitted that in such circumstances, the absence of the particulars as to the “source information” assumes importance. It is submitted that in the absence of the FIR, the investigation could not have been carried out.

6. The learned Counsel has then submitted that one Mr. S. K. Dhar, who was a Regional Manager was well aware of the fact that Medicare Foundation was acting as a TPA in the matter of Group Mediclaim Policy, namely Bhavishya Arogya Policy. It is thus submitted that it cannot be said that the act of applicants/ in engaging the Medicare Foundation as a TPA was without the knowledge or approval of the higher authority. The learned Counsel has taken me through the prosecution case, in order to

point out that there is no material to support any of the allegations made. The learned Counsel would submit that the relevant guidelines covering the medicalim policy were adhered to and there is no material to show that there was any breach on any count. The learned Counsel would submit that the allegations about the Applicant's causing material alterations in the terms and conditions of the medicalim policy so as to include some diseases/ ailments which could not have been covered, is not borne out of the record. The learned Counsel has submitted that on the contrary the record would show that the applicants have incorporated some additional diseases/ ailments in the exclusion clause, which were otherwise permitted to be covered. This would show that the applicants were in fact acting in the interest of the Insurance Company. In so far as the allegations that the group under the medicalim policy was not a homogenous group or that persons of age beyond permissible limits were insured, it is submitted that there was no material to support the same. As regards double payment, in respect of certain insurance claim is concerned, it is submitted that it was out of pure mistake/ inadvertence and the same has been recovered and consequently, there is no loss to the Insurance Company. The learned counsel then referred to the internal audit report dated 11th June 2001, which did not show that there was any irregularities on any such count.

7. On behalf of the applicants, reliance is placed on the decision of the Hon'ble Supreme Court in the case of **C.K. Jaffer Sharief Vs. State (through CBI)**, reported in **(2013) 1 SCC 205**, to submit that dishonest intention is the gist of the offence under Section 13(1)(d) of the Act. It would require both *actus reus* and *mens reas*, which is absent in this case. Reliance is then placed on the decision of the Hon'ble Supreme Court in the case of **A. Subair Vs. State of Kerala**, reported in **(2009) 6 SCC 587**, to submit that the offence under Section 13(1)(d) of the Act, involves demand and acceptance of illegal gratification by the accused, which is lacking in this case. Reliance is then placed on the decision of this Court in the case of **M/s Capman Financials Ltd. Vs. State, CBI** in Criminal Revision No.437/2009, dated 21/10/2009, in which, this Court had discharged the accused from the offence punishable under Section 109 of IPC read with Section 13(2) and 13(1)(e) of the Act. Lastly, reliance is placed on the decision of the Hon'ble Supreme Court in the case of **Yogesh alias Sachin Jagdish Joshi Vs. State of Maharashtra**, reported in **(2008) 10 SCC 394**, in order to submit that if two views are equally possible and the Court is satisfied that evidence produced gives rise to suspicion only, distinguished from grave suspicion,

the Court would be fully justified in discharging the accused.

8. The learned Counsel has placed reliance on paragraphs 8.26 and 10.2 of the CBI Manual. It is contended that the process is issued under Section 190(b) and not under Section 190(a) and (c) of Cr.P.C.

9. On the contrary, Shri Vaz, the learned Counsel for the respondent has supported the impugned order. Reliance is placed on the decision of the Hon'ble Supreme Court in the case of **Bhaskar Lal Sharma and Another Vs. Monica and Others**, reported in **(2014) 3 SCC 383**, in order to submit that at this stage, appreciation of the material, even in a summary manner is not permissible. That can be done only at the trial. It is submitted that the allegations and the material produced, if prima facie show complicity of the accused, they cannot be discharged. It is submitted that there is enough material to prima facie show that the accused had hatched a criminal conspiracy to cause wrongful loss to the Insurance Company and wrongful gain to themselves. It is submitted that original accused nos.2 and 3 were allowed to act as TPA, without formal approval from the competent authoriity. Even assuming that Mr. S. K. Dhar was aware about the same, it cannot obviate the necessity of a formal approval by

the competent authority. It is submitted that personal knowledge of Mr. Dhar even assuming to be there, cannot be a substitute for such an approval. It is submitted that there is enough material to prima facie indicate that the material terms of the Group Mediclaim Policy were altered, so as to confer benefits which were not permissible as per rules, thereby causing wrongful loss to the extent of 7.5 lakhs to the Insurance Company.

10. It is submitted that once the investigation has disclosed these aspects the absence of particulars as to the "source information" would pale into insignificance. The learned Counsel would submit that in such circumstances, even the audit report dated 11/06/2001 would not come in the way of framing charge.

11. I have carefully considered the rival circumstances and the submissions made. At the outset, it would be necessary to notice the provisions of Section 5 of the Act, to the extent relevant read as under :

> "***5. Procedure and powers of special Judge***
>
> *(1) A special Judge may take cognizance of offences without the accused being committed to him for trial and, in trying the accused persons, shall follow the procedure prescribed by the Code of Criminal Procedure, 1973 for the trial of warrant cases by*

Magistrates.
(3) Save as provided in sub-sections (1) or sub-section (2), the provisions of the Code of Criminal Procedure, 1973, shall, so far as they are not inconsistent with this Act, apply to the proceedings before a special Judge; and for the purposes of the said provisions, the Court of the special Judge shall be deemed to be a Court of Session and the person conducting a prosecution before a special Judge shall be deemed to be a public prosecutor.
(4) In particular and without prejudice to the generality of the provisions contained in sub-section (3) The provisions of sections 326 and 475 of the Code of Criminal Procedure, 1973, shall, so for as may be, apply to the proceedings before a special Judge and for the purposes of the said provisions, a special Judge shall be deemed to be a Magistrate.
(5) A special Judge may pass upon any person convicted by him any sentence authorised by law for the punishment of the offence of which such person is convicted.
(6) A special Judge, while trying an offence punishable under this Act, shall exercise all the powers and functions exercisable by a District Judge under the Criminal Law Amendment Ordinance, 1944."

12. Thus, subsection (1) of Section 5 of the Act would make it clear that the procedure for trial before the Special Judge is governed by the Code. The special Judge (who is of the rank of a District and Sessions Judge) can take cognizance of the offence under the Act, without the accused being committed to him for trial. The Special Judge, shall follow the procedure for warrant triable cases under the Code.

13. It would be then necessary to note provisions of Section 190(1) of the Code which read as under :

> "**190.** ***Cognizance of offences by Magistrates***- *(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under Sub-Section (2), may take cognizance of any offence-*
>
> *(a) upon receiving a complaint of facts which constitute such offence;*
>
> *(b) upon a police report of such facts;*
>
> *(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.*"

14. Thus, it can be seen that the Magistrate (and a Special Judge in a trial under the Act) can take cognizance of offence under the Act, in any of the three modes. In the present case, it is obviously under Section 190(1)(b) of the Code that is on a police report. It is difficult to see as to how this would militate against the order refusing to discharge the applicants.

15. Section 239 of Cr.P.C., which applies to the trial of warrant provides as to when the accused shall be discharged. The said section provides that where the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused and record the reasons for so doing. Thus, unless and until it is shown that the charge is groundless, the Court is not obliged to discharge the accused.

Under Section 227 of Cr.P.C., which applies to the trial before the Court of Sessions says that where the Judge considers that there is no "sufficient ground for proceeding, against the accused", he shall discharge the accused and record the reasons for so doing.

16. Although, the phraseology used in Section 239 and Section 227 of Cr.P.C. may be different, the fact remains that the prosecution case and the material produced need not be examined in details, at the stage of framing of charge and while considering the prayer for discharge. The Court is not supposed to examine or sift the material, in order to find out whether a case for conviction is made out or not. It is now well settled that where the material gives rise to a grave suspicion as against suspicion only, the Court may refuse to discharge the accused.

17. The case of **Bhaskar Lal Sharma and Another** (supra), may not be of much help as that arose out of an application under Section 482 of Cr.P.C. for quashing of an offence under Section 406 of IPC. The Hon'ble Apex Court in the context of the parameters applied, while considering the case for quashing, has held that appreciation of the material, even in a summary manner, of averments made in the complaint/petition/FIR is not permissible, at the stage of quashing of criminal proceedings.

18. In the case of **Yogesh alias Sachin Jagdish Joshi** (supra), the question was about discharge of the accused from an offence punishable under Section 302 and 120-B of IPC, which was a Sessions triable case. The Hon'ble Apex Court has inter alia held that in relation to Section 120-A of IPC, the basic ingredient of the offence of criminal conspiracy are: "(i) an agreement between two or more persons; (ii) the agreement must relate to doing or causing to be done either (a) an illegal act; or (b) an act which is not illegal in itself but is done by illegal means". The Hon'ble Apex Court has also found that a conspiracy by its very nature, is always hatched in secrecy and it is impossible to adduce direct evidence of the common intention of the conspirators. Therefore, the meeting of minds of the conspirators, can be

inferred from the circumstances proved by the prosecution, if such inference is possible. In relation to the scope and ambit of powers of the trial Court under Section 227 of Cr.P.C., it has been held that if two views are equally possible and if the Judge is satisfied that evidence produced gives rise to suspicion only, he will be fully within his right to discharge the accused. The Hon'ble Apex Court has explained the expression “not sufficient ground for proceeding against the accused” appearing in Section 227 of Cr.P.C. It may be mentioned that in Section 239 of Cr.P.C., the expression used is that the Magistrate shall discharge the accused where he considers the charge against the accused to be “groundless”.

19. In the case of **A. Subair** (supra), it has been held that demand and acceptance are the necessary ingredients under Sections 7 and 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act. That was a case where there was a demand for illegal gratification of Rs.25/- only. It was held that it was not sufficient proof as the gratification was too trivial.

There cannot be any dispute with the proposition that an offence would require both the ingredients namely, physical element and mental aspect.

20. In the case of **C.K. Jaffer Sharief** (supra), the appellant-accused, who was then working as the Minister of Railways was the head of two public sector undertakings. The four employees from the said public undertakings had accompanied the appellant to London on deputation. It was the case that while in London, these employees had assisted the appellant in performing certain tasks connected with the discharge of duties as a Minister, In this peculiar circumstances, it was held that it was difficult to visualise as to how in the light of the above facts, demonstrated by the materials revealed in the course of investigation, the appellant can be construed to have adopted illegal means or to have abused his position as a public servant or gained pecuniary advantage either for himself or for any of the aforesaid four persons.

21. In an unreported decision of this Court, in the case of **M/s Capman Financials Ltd. Vs. State, CBI** (Criminal Revision Application No. 437/2009), a FIR was registered for the offence punishable under Section 120-B of IPC read with Section 13(2) and Section 13(1)(d) and (e) of the Prevention of the Corruption Act, against the Assistant Vice President of Department of Investments, UTI Mumbai, on deputation and the accused nos. 2 to 5, with an allegation that while the Assistant Vice President was

posted and functioning as Assistant Vice President of Department of Investments, UTI Mumbai and Senior Vice President on deputation to ISL, Belapur, New Mumbai, during the period from 10.01.1989 to 31.03.1998 had abused his official position and as a public servant and amassed assets to the tune of Rs.22,92,034/- by corrupt and illegal means which were disproportionate to his known sources of income. It appears that when the final charge sheet was filed, offence punishable under Sections 120-B of IPC and Section 13(1)(d) of the Act were dropped and only charges levelled were under Section 109 of IPC i.e. abetment read with Section 13(2) read with Section 13(1)(e) of the Act. The learned Single Judge of this Court after noticing that, admittedly, no charge under Section 13(1)(d) of the Prevention of Corruption Act and Section 120-B of IPC were levelled against the applicants (M/s Capman Financials Ltd. and two others), as the prosecution on its own had dropped these charges, there was no material on record to show that the accused no. 1 had shown favour to the applicants and they in turn had issued cheque as motive or reward for showing such favour. Since the charge of conspiracy and misconduct were dropped, this Court on examination of material found that there was no material to show that all these applicants have abetted the offence under Section 13(1)(e). In my considered view, the case is clearly distinguishable on facts.

22. Coming back to the present case, the learned Special Judge on examination of material has found that the accused no. 3 M/s Medicare Foundation Pvt. Ltd. was acting as third party administrator (TPA) from opening of the branch and settled the claims by making upfront payments. The learned Counsel also found that there was no written agreement between the Insurance Company and accused no. 3 for appointing the later as a TPA. Thus, merely because, the then Regional Manager, Shri S.K. Dhar was aware that M/s Medicare Foundation Pvt. Ltd. were acting as TPA would not be sufficient to counter the allegation, at this stage that the accused no. 3 was permitted to act as TPA without any formal agreement.

23. The learned Special Judge has thereafter found on the basis of the statement of the witnesses that there were various discrepancies in issuing the policy certificates and accepting the proposal forms. It was also found that proposal forms did not bear any signature or remark or any date stamp or noting regarding the acceptance. There were no medical reports taken of persons above 60 years of age. In some of the cases, the proposal mentioned about the existence of diseases like heart diseases, mental retardation, piles, hernia, but no exclusion was explicitly

mentioned in the policy that inclusions were made through endorsement (like in policy no. 8500017). It was found that the copy of the policy was not available in the endorsement register with respect to the entries made between September, 1998 and October, 1998. It was also found that there was material to show that the lifetime cover is given not only to group mediclaim policy holders but also to individual mediclaim policy holders, who have insured without approval of Regional office or Head office. It would be apposite to reproduce paras 18 to 21 of the impugned order as under:

> *18. There is also evidence on record to show that as far as underwriting of long term group medical polices are concerned there is a standard procedure laid down by the company which is as follows:-*
>
> *1. For a Group Mediclaim Policy a homogeneous group has to propose for taking such a cover as per the normal terms and conditions of the Group Mediclaim policy.*
>
> *2. In the event of any deviation from the standard policy, a detailed proposal is to be sent by the operating office to its controlling office for approval.*
>
> *3. On receipt of approval the same is communicated to the Proposer for finalizing a Memorandum of Understanding (MOU) with the operating office.*
>
> *4. A formal proposal in standard proposal form alongwith the premium in form of cheques/DD alongwith signed copy of MOU is*

to be submitted by the Group to the operating office.

5. All the documents submitted by the Group as above alongwith the list of person covered in the Group are scrutinized and the decision is taken for underwriting of the business.

6. The premium is deposited and cash receipt generated and handed over to the Insured.

7. At the operating office necessary entries are made in the daily Collection Register and Premium Register accounting for the said business.

8. The policy is printed out on the standard policy format of the Company incorporating all the details provided on the proposal form and MOU. Then the original policy is signed, properly stamped as per stamp applicable and is handed over to the Insured. A copy of this policy is also preserved as docket for future use.

19. There is evidence to show that the group covered by M/S Medicare Foundation Pvt. Ltd. (accused no. 3) was not homogeneous group and its size was not disclosed, that there were no terms and conditions finalized before accepting the premium, that there were deviations from the standard policy, that there were no standard proposal forms, that the proposal forms were not approved by the Controlling Officer and premium for the group had come through several installments.

20. The evidence also reveals that the proposal forms are jointly in the name of the company and M/s Medicare Foundation Pvt. Ltd. without there being any agreement to that effect between the parties in writing. In the proposal forms certain conditions have been deleted and in some forms there are no conditions at all printed. There is evidence on record to confirm that the Divisional office cannot either delete or amend these terms and conditions. There is also material on record to show that these conditions can be deleted or amended only by the appropriate authority who can only be the company itself. Accused no. 1 in his capacity as Divisional Manager could not have deleted or amended these terms and conditions. Record do not show that he had any power to do so. There is also evidence to show that accused no. 3 did not have any authority to amend these terms and conditions which are printed on the standard proposal forms of the company.

21. One of the witnesses Shri Hemant S. Jambhekar, Assistant Manager of Divisional office has stated that he had cancelled about 118 policies/endorsements on them as per the advise of the Regional office. He has stated that these policies were issued to individuals with clauses and conditions of Bhavishya

Arogya policy for a period of more than one year when under the guidelines they could have been issued only for a period of one year and that the clauses and conditions attached to these policies were different one from that of stipulated mediclaim policies. The records also reveal that Insurance Company had paid an amount of Rs.6,51,171/- by way of refunds to Medicare Foundation Pvt. Ltd. for the period 1999-2000 which included even the group discounts."

I do not find that any exception can be taken to the observations and the findings recorded. The applicants cannot seek detailed appreciation and evaluation of the material on record at this stage.

24. Insofar as submissions based on paragraphs 8.26 and 10.2 of the CBI Manual are concerned, the relevant paras read as under:-

"**8.26** *As a part of their duty and in terms of annual programme of work, all Investigating and Supervisory Officers are required to collect quality information regarding graft, misuse of official position, possession of disproportionate assets, fraud, embezzlement, serious economic offences, illegal trading in* *narcotics and psychotropic substances, counterfeiting of currency, smuggling of antiques, acts endangering wildlife and environment, cyber crimes, serious frauds of banking/financial institutions, smuggling of arms and ammunition, forgery of passports etc. and other matters falling within the purview of CBI and verify the same to ascertain whether any prima facie material is available to undertake an open probe. While all CBI officers are free to develop such information through discreet means, the officer developing any information must keep his superior officer informed regarding information being developed by him. The immediate superior officer may also keep the Competent Authority, i.e. DIG/JD/ADCBI/SDCBI/DCBI informed in case the officer against whom information is being developed is of a rank against whom only such officer can order registration of a case.*

10.2 *While registering the FIR, the legal requirements of section 154 Cr.P.C. should be fully complied with. If the information is given orally, it shall be reduced into writing verbatim and shall include the answers to any question put to the informant. If a written complaint is received, an exact copy must be reproduced in the FIR. Every such*

> *information, whether reduced into writing or given in writing, which forms basis of the FIR, shall be signed by the person giving it. In case, the person is illiterate, his thumb impression will have to be secured. The refusal to sign or give thumb impression, as the case may be, on the First Information Report is an offence under Section 180 IPC."*

25. It is difficult as to how the provisions as contained in the aforesaid Manual can come to the aid of the petitioners particularly, at the stage when the petitioners are seeking discharge.

Clause 8.26 which provides for "source information reports" says that, as part of their duty, all Investigating and Supervisory Officers are required to collect quality information regarding graft, misuse of official position, possession of disproportionate assets, fraud, embezzlement etc.

Clause 10.2 says that while registering the FIR, the legal requirements of Section 154 of Cr.P.C. should be fully complied with. In my considered view the submissions based on Clauses 8.26 and 10.2 of the CBI Manual would not come to the aid of the petitioners at least at the stage of seeking discharge. Thus, the submissions based on the same has to be refuted.

26. I have given my anxious consideration to the rival circumstances and the submissions made including the submissions based on the absence of the FIR, as also the CBI Manual. In my considered view, these are the aspects which can be considered at trial and not at the stage of examination of the question whether the petitioners are entitled to be discharged. In my considered view, this cannot be a case in which, the material would lead only to a suspicion and not grave suspicion, so as to entitle the petitioners to a discharge. At any rate, the impugned order does not show exercise of its jurisdiction with material irregularity, so as to warrant interference under Section 397 of Cr.P.C.

In the result, the Criminal Revision Applications are dismissed.

C. V. BHADANG, J.

SMA/EV