

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 06.01.2020

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CRL.L.P. 520/2017 and CRL.M.A. 14976/2017

CENTRAL BUREAU OF INVESTIGATION

..... Petitioner

versus

M P GUPTA & ORS

..... Respondents

Advocates who appeared in this case:

For the Petitioner: Mr Mridul Jain, SPP for CBI.

For the Respondents: Mr Himanshu Anand Gupta, Advocate for R1.

Mr Sudarshan Rajan, Ms Anjali Kumari and Mr Rohit Kumar, Advocates for R-2.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner has filed the present petition, *inter alia*, seeking leave to appeal against a judgment dated 10.03.2017 (hereafter 'the impugned judgment') passed by the Special Judge (PC Act) (CBI)-6, Patiala House Courts, New Delhi.

2. By the impugned judgment, the Trial Court acquitted the accused therein of the offences under Sections 420/468/471/120B of the Indian Penal Code, 1860 (IPC) and Section 13(2) read with Section 13(1)(d)

of the Prevention of Corruption Act, 1988 (hereafter the 'PC Act').

3. Mr MK Kejriwal, Under Secretary to the Government of India, Ministry of Health and Family Welfare had made a complaint dated 21.08.2006. Thereafter, FIR No. RC SI8 2006 0008 under Sections 420/120B of the IPC and Section 13(2) read with Section 13(1)(d) of the PC Act was registered against Mr MP Gupta (hereafter 'MPG'), M/s Nestor Pharmaceuticals Ltd. (hereafter 'Nestor'), M/s Pure Pharma Ltd. (hereafter 'Pure'), unknown officials of HSCC India Ltd. (hereafter 'HSCC') and unknown members of Ministry of Health and Family Welfare, Government of India.

4. In the aforementioned FIR, it was alleged that between the years 1999 and 2002, MPG entered into a criminal conspiracy and showed undue favour to Nestor and Pure in awarding supply contracts of pharmaceuticals and medical kits under the Child Survival and Safe Motherhood (CSSM) and Reproductive and Child Health (RCH-I) projects.

5. It was, *inter alia*, alleged that the lowest bids (L1) were ignored on flimsy grounds on several occasions and orders were placed with the two aforesaid firms, resulting in the contracts being awarded at abnormally higher rates; single bids were accepted from the two aforesaid firms, in violation of tender norms; the aforesaid two firms had systematically evaded procurement controls by colluding with each other; substandard quality pharmaceuticals were provided by the said

firms and accepted by HSCC; and there was short supply of the requisite drugs by the two aforesaid firms.

6. On 11.08.2015, the Trial Court framed the following charges against the accused:-

6.1. MPG was charged of abusing his position as a public servant, between September 2000 to 2001, by allowing the supply of drugs from the Goa unit of Nestor, despite Nestor submitting documents regarding supply of the requisite drugs from its Faridabad unit. MPG did not use his discretion to terminate the contract and thereby, caused pecuniary gain to Nestor and pecuniary loss to the Ministry of Health, Government of India and thus, committed an offence punishable under Section 13(2) read with Section 13(1)(d) of the PC Act.

6.2. Nestor and Mr Pradeep Choudhary, Vice President (Institutional Sales) (hereafter 'PC') were charged with cheating the Ministry of Health, Government of India by dishonestly inducing the said department to grant a contract worth ₹23.69 crores to Nestor by using forged documents (COPPs bearing nos. 84/2000, 85/2000, 102/2000 and 103/2000) and by supplying the requisite drugs from its Goa unit while securing the contract on documents relating to its Faridabad unit and thus, committing an offence punishable under Section 420 of the IPC. Nestor and PC were also charged with committing the offence punishable under Section 471 of the IPC, on account of fraudulently and dishonestly using the aforesaid COPPs to secure a supply contract from the Ministry of Health/HSCC.

7. MPG was prosecuted for committing an offence under Section 13 (1) (d) read with Section 13(2) of the PC Act. It is alleged that he had abused his position as a public servant by allowing Nestor to supply drugs from its Goa unit, which was contrary to the contract agreement of the year 2000-2001. It was alleged that Nestor had supplied documents regarding supply of drugs from its Faridabad unit, yet, MPG did not use his discretion to terminate the contract. He conducted pre-delivery inspection(s) at Nestor's Goa unit and accepted supplies from the said unit. It is alleged that he had caused a pecuniary advantage to Nestor and a corresponding loss to the Ministry of Health and Family Welfare, Government of India.

8. The Trial Court had examined the evidence obtaining in the present case and concluded that the prosecution had failed to prove that the COPPs submitted by Nestor were forged. The COPPs bearing serial No. 84/2000 for the drug Irofol tablets (PW 5/H1); COPPS bearing serial no. 85/2000 for Nesfol Tablets (PW 5/H2); COPPs serial No. 102/2000 for drug CO-TRIMOXAZOLE TABLETS tablet (PW 5/H3); and COPPs bearing serial no. 103/2000 for METHYLERGOMETRINE MALEATE tablets (PW 5/H4) were alleged to be fabricated.

9. The prosecution had relied on the testimony of Mr M.L. Garg, who was the State Drug Controller, Haryana during the period 1998 to 31.08.2000. He had deposed as PW 5. He deposed that he had issued COPPs in respect of twenty items to Nestor in response to its applications (Ex. PW 5/E-1 and Ex. PW 5/E2). He deposed that the allegedly fabricated COPPs (COPPs nos. 84/2000, 85/2000, 102/2000,

103/2000 exhibited as Ex.PW5/H-1 to PW5/H-4) were not issued by him. However, he could not identify his signatures as the same were photocopies. He also stated that COPPs for the drugs mentioned in the said documents (Ex. PW 5/H-1 to PW 5/H-4) were not even applied for by Nestor. Thus, according to his testimony, such COPPs could not be issued to Nestor, as it had not even applied for the same. He stated that after serial no. 79, he did not issue any COPPs to Nestor on 13.06.2000. Insofar as his statement recorded on 26.07.2008 under Section 161 Cr.P.C. is concerned, he denied having recorded any such statement on that date.

10. PW 5 deposed that he could not state whether the signatures appearing on COPPs serial Nos. 84/2000, 85/2000, 102/2000, 103/2000 (Marked as PW 5/H-1 to 5/H-4) were his or not without seeing the originals. PW 5 was cross-examined. In his cross-examination, he stated that he was not aware whether any Register/Log Book was maintained in the office with respect to the issuance of COPPs on a daily/regular basis. He stated that he could not recollect whether Nestor had applied for COPPs for exporting to Nigeria or Nepal in the year 2000. He stated that he could not recollect the number and specifications of COPPs issued by him in June, 2000 to various pharmaceutical companies. He clarified that he could recollect the facts regarding Nestor since he had examined the original record of the office, which was brought by Shyam Lal, an employee of the Drug Controller Authority of Haryana, to the CBI Office. He stated that he made abstracts on the basis of the examination of the records and therefore, could state that neither of the

COPPs in question (PW 5/H-1 to Ex. PW 5/H-4) were covered under the applications made by Nestor and the same were issued by him.

11. It is apparent from the plain reading of PW 5's testimony that he had deposed on the basis of the record that was brought by one of the employees of the Drug Controller Authority, Haryana to the office of CBI. The file containing the record for issuance of COPPs (Marked as D-24) was shown to Sh Shyam Lal. He deposed as PW 11. He affirmed that the signatures bearing on the said file were that of Sh Jai Bhagwan Rohilla, the then Superintendent of Directorate General Health Services of Haryana. He stated that the original record was kept with the record keeper and he had collected information from the office records and furnished the same to CBI. In his cross-examination, he testified that the records were voluminous and were pertaining to various pharmaceutical companies. He stated that the records were also kept in corridors/galleries of the premises. He also admitted that he had sent a letter, *inter alia*, stating that certain records were missing. He stated that he had no knowledge whether the record regarding grant of and rejection of COPPs were kept in the office. He affirmed that regular order sheets are written regarding grant and rejection of COPPs or any other certificate, which includes the reasons for such decision.

12. Investigating Officer Inspector Satish Chand Jha deposed as PW 15. He could not recollect whether Shyam Lal (PW 11) had brought the record from the office of the State Drug Controller. He could not inform the Court as to the date when the file D-24 was seized by him. He admitted that there was no seizure memo regarding file D-24. He

admitted that the page numbers 696 to 737 of the said file were missing. He affirmed that he did not make any inquiry from Shyam Lal regarding the missing pages. He neither visited the office of the Drug Controller nor recorded any statement of the Record Keeper from the office. The order sheets granting and rejecting COPPs were also not seized. He stated that he did not investigate as to whether any register was maintained with respect to the applications received from various pharmaceutical companies. He also affirmed that he had not checked the complete record regarding issuance of COPPs.

13. In view of the aforesaid, the Trial Court concluded that the prosecution had failed to produce strong and convincing evidence to establish that the COPPs in question, Ex. PW 5/H-1 to Ex. PW 5/H-4, were forged or fabricated or that they had not been issued by the State Drug Controller, Haryana. The Court noticed that the prosecution had relied upon the testimony of PW 5, however, he was unable to affirm whether the signatures appearing on those COPPs were his without examining the original record. He clarified that he was aware of the facts on the basis of the record brought by Shyam Lal (PW 11) from the office of the Drug Controller. It was, thus, apparent that he had not examined the entire record before his deposition and had based his testimony only on the records brought by Sh Shyam Lal from the office of the Drug Controller. It also appeared that the said record was not the complete record. Moreover, PW 5 had also denied that his statement under Section 161 of the Cr.P.C. had been recorded on 26.07.2008.

14. The Trial Court had examined the file D-24 and noted that Nestor

had submitted applications seeking certificates of twenty different pharmaceutical products and all the said certificates were granted. The Court noted that Nestor's application was on page number 694 of the file D-24 and the pharmaceutical products were mentioned on page number 695, however, further pages of the file were missing. The Court also noted that Nestor had made another application on 25.09.2000 seeking certificates with respect to sixty-three pharmaceutical products. On the basis of that application, Certificates starting from serial no. 80/2000 to 142/2000 were granted. However, serial numbers 84/2000, 85/2000, 90/2000, 97/2000, 98/2000, 99/2000, 100/2000, 102/2000 and 103/2000 were missing even though, those numbers fell within the sequence from 80/2000 to 142/2000. The COPPs, which are alleged to have been forged bear numbers falling within the said sequence. However, the prosecution did not place any information with regard to the said numbers. There was no evidence to establish that application bearing those numbers had been rejected or had been issued to any other company.

15. The Trial Court's view, that the evidence placed on record is insufficient to establish that the certificates COPPs furnished by Nestor were forged or fabricated, is a plausible one. In all fairness, Mr Jain, learned counsel appearing for CBI also did not advance any arguments to contest the aforesaid conclusion.

16. Mr Jain restricted his submissions to assail the findings of the Trial Court, absolving Nestor of the offence of supplying products from its Goa unit and absolving MPG of accepting such supplies. He

submitted that Nestor's Goa unit was not granted the WHO GMP Certificate and therefore, was ineligible to supply any products. He submitted that MPG had abused his official position by accepting the products from the said Unit after inspection. He stated that this clearly established that MPG was guilty of committing the offence punishable under Section 13(1)(d) read with Section 13(2) of the PC Act. Correspondingly, PC and Nestor were also guilty of committing offences punishable under Section 420 of the IPC. He submitted that the Trial Court had erred in not appreciating that PC, Nestor and MPG had conspired together to benefit Nestor and consequently, cause a loss to the Government. He referred to Clause 13.3 (c) of the Instructions to Bidders and submitted that a bidder would not be eligible for submitting a bid, unless the bidder had received a satisfactory GMP Inspection Certificate in line with WHO Certification Scheme on pharmaceuticals (WHO GMP Certificate).

17. Nestor has two manufactures units – one at Faridabad and the other at Goa. Whilst the Faridabad Unit had been granted WHO GMP Certification, no such certification had been granted to the Goa Unit. Therefore, according to CBI, the supplies made from the said Unit were contrary to the contract. Mr Jain submitted that a lower bid of one of the pharmaceutical companies (M/s. Neon Antibiotics) was rejected on the ground that it did not have a WHO GMP Certificate. He submitted that thus, there was no doubt that supplies were required to be made from the unit possessing a WHO GMP Certificate.

18. Before proceeding further, it is important to note that the total

value of the contract awarded to Nestor for RCH/Kit-A/2000 and RCH/Kit-B/2000 was ₹34,77,57,866/-. Out of the aforesaid, only products worth ₹3,84,73,769/- were supplied from the Goa Unit. The Trial Court noted that this was only 11.06% of the total value of the contract awarded to Nestor for the year 2000-2001. Thus, approximately 89% of the products were supplied from the Faridabad unit which, admittedly, was compliant as it was granted the WHO GMP Certification. The Trial Court was of the view that in the aforesaid facts, it was difficult to impute that Nestor/PC had any dishonest intentions from the beginning.

19. This Court had pointedly asked Mr Jain whether there was any clause in the agreement/contract entered into with Nestor that stipulated that Nestor required to supply the products only from its WHO GMP Certificate Unit, that is, the Faridabad Unit. The learned counsel fairly answered in the negative. He, however, submitted that it was implicit in the bidding documents that supplies were required to be made from a WHO GMP Certified Unit.

20. This Court finds the aforesaid contention to be unmerited. Clause 13.3 of the Instructions to Bidders stipulates the qualification criteria for a bidder to qualify. Sub-clause (c) of Clause 13.3 required the bidder to furnish documentary evidence to the satisfaction of the purchaser (HSCC) that *“it has received a satisfactory GMP inspection certificate in line with the WHO certification scheme on pharmaceuticals moving in country of manufacture of the goods or has been certified by the Inspectional Convention (PIC), and has demonstrated compliance with*

the quality standards during the past two years prior to bid submission". There is no dispute that Nestor complied with the said criteria, as it was awarded the WHO GMP Certificate, albeit, for its Faridabad Unit. Thus, admittedly, Nestor was eligible to bid for the contract. Its bid was evaluated along with other bids and Nestor was awarded the contract.

21. The contract itself did not specify that all supplies were to be made from any specific unit. In the circumstances, it is difficult to accept that Nestor could be prosecuted for fulfilling its obligation by making part of the supplies from its Goa unit.

22. There is also no evidence on record to establish that any undue profit was made by Nestor, on account of meeting its contractual obligations by partly supplying products from its Goa unit. There is no material to indicate that the cost of manufacturing the product at Goa was cheaper than the cost of manufacturing the product at the Faridabad Unit. There is also no evidence on record to establish that the goods supplied by Nestor were substandard or did not meet the specifications. In the circumstances, the Court concluded that the charge for commission of an offence of cheating was not established.

23. This Court finds no infirmity with the aforesaid view.

24. The Trial Court also held that the prosecution had failed to establish that MPG was guilty of an offence under Section 13 (1) (d) read with Section 13 (2) of the PC Act. It is relevant to set out Clause 13 (1) (d) of the PC Act, as was in force at the material time and the

said provision is set out below:-

“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; or

(e) ****

(2) Any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall not be less than four years but which may extend to ten years and shall also be liable to fine.”

25. Clause (i) of Section 13 (i) (d) is wholly inapplicable. The allegation against MPG, essentially, is that he had abused his position as a public servant to obtain a pecuniary advantage for Nestor. At the outset, it is clear that the prosecution has failed to establish that Nestor had obtained any pecuniary advantage by making supplies from its Goa Unit. The question whether Nestor was required to supply products only from its Faridabad Unit is a contentious issue since, concededly, there was no stipulation in the contract to the aforesaid effect. As noticed above, the requirement for a bidder to be WHO GMP compliant was a

condition of eligibility to participate in the bids. In the present case, Nestor is a company and a WHO GMP Certificate had been issued to Nestor, albeit, with respect to its Faridabad Unit.

26. This Court is not called upon to determine whether Nestor had breached its contractual obligations. Nestor was, *inter alia*, charged for committing an offence under Section 420 of the IPC and as stated above, the necessary ingredients for commission of such an offence are not established in this case.

27. The Trial Court had also noticed that the Nestor was granted a license under Schedule M of the Drugs and Cosmetics Act, 1940. This also requires that the manufacturing unit meet the requisite standards. Whilst this may not be an answer to the allegations regarding breach of the contract, if it is assumed that the contract obliged Nestor to make supplies from its Faridabad Unit, it does indicate – in absence of any evidence to the contrary – that there was no pecuniary advantage to Nestor and a corresponding loss to the Government so as to attract the provisions of Clauses (2) and (3) of Section 13 (1)(d) of the PC Act, as in force at the material time.

28. It is also relevant to note that there is no material whatsoever to establish that MPG had either demanded or had derived any illegal benefit from conducting inspections at Nestor's Goa unit or accepting supplies made therefrom.

29. In view of the above, this Court finds no infirmity with the decision of the Trial Court to acquit the respondents of the alleged

offences. The petition is, accordingly, dismissed. The pending application is also disposed of.

VIBHU BAKHRU, J

JANUARY 06, 2020

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