

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 06.01.2020

+ **CRL.L.P. 533/2017**

CENTRAL BUREAU OF INVESTIGATION

.....Petitioner

versus

VASANT S BHAT & ORS.

.....Respondents

Advocates who appeared in this case:

For the Petitioner: Mr Rajesh Kumar, SPP for CBI and Ms Saumya Johari, Advocates.

For the Respondents: Mr Radhesh Makrandi and Mr Sumit Madan, Advocates for R-1.
Mr Sudarshan Rajan, Mr Mahesh Kumar and Mr Rohit Kumar, Advocates for R-2 and R-3.

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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 passed by the Special Judge (PC Act) (CBI)-6, Patiala House Courts, New Delhi. By the impugned judgment dated 10.03.2017, the Trial Court acquitted the accused therein of the offences under Sections 420/120B of the Indian Penal Code, 1860 (IPC) and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988.

2. The case before the Trial Court was registered pursuant to a complaint dated 21.08.2006 made by Mr MK Kejriwal, Under Secretary to the Government of India, Ministry of Health and Family Welfare. Thereafter, FIR No. RC SI8 2006 E 0007 under Sections 420/120B of the IPC and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 (hereafter the 'PC Act') was registered against Mr Vasant S Bhat (hereafter 'VSB'); M/s Nestor Pharmaceuticals Ltd. (hereafter 'Nestor'); M/s Pure Pharma Ltd.; and unknown officials of M/s Hindustan Latex Ltd. (hereafter 'HLL') and the Ministry of Health and Family Welfare.

3. It was alleged that between the years 1997 and 2002, VSB had abused his official position. He had entered into a criminal conspiracy with the other accused and showed undue favour to Nestor and M/s Pure Pharma Ltd 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.

4. It was inter alia, alleged that (i) L1 bids (lowest bids) 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; (ii) single bids were accepted from the two aforesaid firms, in violation of tender norms; (iii) the aforesaid two firms had systematically evaded procurement controls by colluding with other accused; (iv) substandard quality pharmaceuticals were supplied by the firms and accepted by HLL; and (v) there was short supply of the requisite drugs by the two aforesaid firms.

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

5.1. VSB – That between the years 2001 and 2004, VSB had abused his position as a public servant by allowing Nestor to supply drugs from its Goa unit even though Nestor had secured the contract for supply of drugs by submitting documents pertaining to its Faridabad unit. VSB did not use his discretion to terminate the contract and thereby, caused pecuniary gain to Nestor amounting to ₹8.70 crores and a corresponding pecuniary loss to the Ministry of Health, Government of India. He, therefore, committed an offence punishable under Section 13(2) read with Section 13(1)(d) of the PC Act.

5.2. Nestor – Nestor was charged through Mr Pradeep Choudhary, Vice President (Institutional Sales) (hereafter ‘PC’). Nestor was charged with cheating the Ministry of Health, Government of India between the years 2001 to 2004 by dishonestly inducing the said department to pay an amount of ₹8.70 crores despite submission of documents of its Faridabad unit against contract agreement bids for the years 2001-02, 2002-03 and 2003-04 in respect of MEM tablets. Further, Nestor was charged with submitting documents (COPPs bearing no. 233/2001 dated 09.11.2001) in respect of bidding year 2001-02 and capacity and qualification certificate dated 09.11.2001, which was unauthorizedly issued from Mr Suresh K Dua (co-accused). It was alleged that this resulted in Nestor obtaining the contract for the supply of MEM tablets worth ₹2.77 crores and this constituted an offence punishable under Section 420 of the IPC.

5.3 Mr Suresh K Dua (hereafter ‘SKD’) – That between the years

2001 and 2004, SKD abused his position as a public servant (Deputy Drug Controller cum Licensing Authority, Haryana) and dishonestly issued COPP certificate bearing no. 233/2001 dated 09.11.2001 in respect of MEM tablets. Further, SKD was charged with unauthorizedly issuing a qualification certificate dated 09.11.2001, which was used by Nestor to secure the contract from HLL. This resulted in a pecuniary advantage amounting to ₹2.7 crores to Nestor and caused a corresponding loss to the Ministry of Health and Family Welfare, Government of India. It was alleged that SKD committed an offence punishable under Section 13(2) read with Section 13(1)(d) of the PC Act.

6. VSB was prosecuted for 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 2001-2004. It was alleged that Nestor had supplied documents regarding supply of drugs from Faridabad Unit, yet, VSB did not use his discretion to terminate the contract and accepted conducting inspections at Nestor's Goa Unit as also 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.

7. The Trial Court had examined the evidence obtaining in the present case and concluded that the prosecution had failed to prove that the COPP in question – COPP bearing no. 233/01 – was issued

unauthorizedly by Mr SK Dua. Further, the Trial Court also concluded that the prosecution had failed to prove any misuse of official position by VSB.

8. The prosecution relied on the testimony of Mr Pehlad Singh who was, at the material time, posted as Assistant in the office the State Drug Controller, Haryana. He deposed as PW-18. He identified his signatures at various places on the documents, which were shown to him. He also identified the signatures of Mr SK Dua on the forwarding letter dated 09.11.2001 (Ex. PW18/A) to Nestor. PW-18 identified the signatures of Mr SK Dua on COPPs bearing nos. 228/01 to 232/01. He deposed that while making an application, a pharmaceutical firm would enclose the list of the product in respect of which the certificates were sought. On being pointedly asked whether Nestor had applied for COPP under WHO GMP or capacity and qualification certificate in respect of MEM tablets, PW-18 stated that he was unable to find out the same after perusing the official records. In his cross-examination, he stated that Nestor's applications dated 06.11.2001 and 07.11.2001 were not handed over to CBI, even though they were available in the original records. Thereafter, he stated that the records were not properly arranged and due to frequent shifting, documents could have been misplaced or may not be where they originally were. He stated that no register is maintained with respect to certificates issued to pharmaceutical firms.

9. The prosecution also relied on the testimony of Mr Daryao Singh Rohilla who, at the material time, was posted as Assistant in the

office of the State Drug Controller, Haryana. He deposed as PW-19. PW-19 was confronted with the letter dated 07.11.2001 (Ex. PW16/A) and he identified his signatures. He also identified the signatures of Mr SK Dua at point C of the said exhibit. He also identified the signatures of Mr SK Dua at point X on a letter (Ex. PW18/A) for the issuance of WHO GMP certification. Thereafter, PW-19 identified his signatures and the signatures of Mr SK Dua on various documents, which he was confronted with. However, when PW-19 was confronted with COPP no. 233/01, he stated that the signatures on the same are like those of Mr SK Dua, however, he cannot tell with certainty without perusing the original of the aforesaid COPP. He stated that the said certificate is not available in the original record brought to Court nor any noting dealing with such request is on record. In his cross-examination he specifically denied that the certificate dated 09.11.2001 was issued by Mr SK Dua, unauthorizedly. 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 the corridors/verandahs loosely. He stated that it is possible that documents could be damaged during shifting.

10. In view of the aforesaid, the Trial Court concluded that the prosecution had failed to produce strong and convincing evidence to establish that COPP in question (bearing no. 233/01) and the qualification cum performance certificate, both dated 09.11.2001, were not officially issued by the State Drug Controller, Haryana. The Court noticed that the prosecution had relied upon the testimony of

PW-18, however, he was unable to affirm whether the signatures appearing on the COPP were those of Mr SK Dua. The Trial Court noted that official witnesses had not identified the signatures of Mr SK Dua on the alleged certificate and further, the said documents were not sent for scientific examination to arrive at the conclusion that Mr SK Dua did, in fact, sign those documents. Further, the Trial Court also noted that the list of requisite items for which the certificates were applied for is annexed to the original record, however, the same was not seized by the investigating officer. The Trial Court concluded that all the aforesaid facts create a doubt as to the prosecution's claim that the COPP bearing no. 233/01 and the certificate dated 09.11.2001 were unauthorizedly issued by Mr SK Dua.

11. The Trial Court further noted that since it was the admitted case of the prosecution that COPPs bearing nos. 228/01 to 232/01 and WHO GMP certificate issued on 09.11.2001 were issued following proper procedure, there was no occasion for the State Drug Controller to issue one certificate unauthorizedly. Thus, the Trial Court's view that the evidence placed on record is insufficient to establish that COPP bearing no. 233/01 and the WHO GMP certificate dated 09.11.2001 issued to Nestor were issued unauthorizedly by Mr SK Dua, is a plausible one.

12. Mr Kumar, learned counsel for CBI focused his submissions to assail the findings of the Trial Court in absolving Nestor of the offence of supplying the product from its Goa unit and absolving VSB of accepting such supplies. He submitted that the said unit was not

granted the WHO GMP Certificate and therefore, was ineligible to supply any products. He submitted that VSB had abused his official position by accepting the products from the said Unit after inspection. He stated that this clearly established that VSB was guilty of committing an offence 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 VSB 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). Nestor had two 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 in respect to the Goa Unit. Therefore, according to CBI, the supplies made from the said Unit were not in conformity with the contractual obligations.

13. This Court had pointedly asked Mr Kumar whether there was any clause in the agreement/contract entered into with Nestor that stipulated that the Nestor would supply products only from its WHO GMP certified 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.

14. This Court finds the aforesaid contention to be unmerited. Clause 13.3(c) of Instructions to bidders specify qualification criteria for a bidder to qualify. In terms of the said clause, a bidder was required to furnish documentary evidence to the satisfaction of the purchaser (HLL) 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 GM WHO Certificate, albeit, for its Faridabad Unit. Thus, admittedly, Nestor was eligible to bid for the contract in question. Nestor’s bid was evaluated along with other bids and it was awarded the contract.

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

16. There is also no evidence on record to establish that any undue profit had been made by Nestor on account of meeting its contractual obligations by supplying products from its Goa unit. There is no material to indicate that the cost incurred by Nestor for manufacturing the products at its Goa unit was cheaper than the cost of manufacturing the products at its 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 Trial Court concluded that the charge for commission of an offence for cheating was not established.

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

18. The Trial Court also held that the prosecution had failed to establish that VSB 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.”

19. Clause (i) of Section 13 (i) (d) of the PC Act is wholly inapplicable. The allegation against VSB, 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 as, concededly, there was no stipulation in the contract in question 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.

20. 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 offence are not established in this case.

21. 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 require that the manufacturing unit meet the requisite standards. Whilst this may not be an answer to the allegations regarding breach of contract, if it is assumed that the contract specifically 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 was in force at the material time.

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

23. 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.

24. The petition is, accordingly, dismissed.

JANUARY 06, 2020
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VIBHU BAKHRU, J