

Special Case No.43/2017

CNR No.MHPU01 -012364-2017

Lt.Gen.(Retd.) Jatinder Singh and others

ORDER BELOW EXH.120

1] This is an application filed by accused no.4 Lt. Col. Subramanian K.S. under section 227 of Cr.P.C. and requested to discharge him from the offences punishable under section 420, 120-B of Indian Penal Code and section 11 and 13(1)(d) r.w. 13(2) of Prevention of Corruption Act.

2] It is the accusation of the CBI against accused Lt. Col. Subramanian is that during a period 2011 onwards he was posted as Assistant Quarter Master General at NDA. The process to purchase the readymade garments at the funds of candidate's parents have been initiated in the NDA in year 2011. Accordingly, Board of Officers (BOO) have been appointed to conduct the market survey to purchase the garments. It was headed by Ravindra Reddy and others. The BOO has conducted the market survey and accordingly referred the name of five vendors namely Raymonds, M/s. Bombay Dyeing, K.K. Apparels, Siyaram, Athelate (Vision Sports) for purchasing the garments. The note-sheet came to the accused for further process. At that time accused being a conspirator to commit the offence he added the name of M/s Rituraj and General Industries, M/s. Kaprilla Enterprises, S.Kumar and M/s. Kapoor and Companies. Thereafter, the note-sheet has been forwarded to the approval through proper channel. Accordingly, his superiors given the approval for selecting the samples through

another BOO. The BOO has selected the samples and sent to accused. Then accused made the note and sent to his superior for approval through proper channel. Then samples were approved by the Commandant and tendering process was completed. In the audit report objections were taken to the tender of Mr. Kapoor in respect of the cost. The reply was prepared by the accused under the conspiracy and sent to his clerk namely Mr. Birender Arya along with Mr. Kapoor in the office of Mr. Gupta. Where Mr. Gupta made discussions with Kapoor and Joshi and rectified the objections. It is further case of prosecution that in pursuance of the conspiracy accused have been benefited from Mr. Kapoor's firm. Therefore, CBI has conducted the investigation and filed the charge-sheet.

3] Accused has filed this application and contended that there is no sufficient material to say that he is part of conspiracy to commit the offence of cheating and criminal misconduct by the public servant. According to him, the letters of M/s Rituraj and General Industries, M/s. Kaprilla Enterprises, S.Kumar and M/s. Kapoor and Companies were already in file and they were willing to participate in the tendering process. Therefore, he added their name by making the note-sheet and send it for approval to his superiors through proper channel. He further submitted that the aforesaid act does not indicate that he has been benefited by M/s. Kapoor and Company. According to him, there is no document to show that, he is involved in such a offence.

4] According to accused, he was on leave when tendering process was completed by Major Nitesh under the approval of Colonel administration. No documents are produced to show his

involvement and therefore he requested to discharge him from the aforesaid offences.

5] The CBI has filed the say and submitted that there is prima facie documents on record showing that BOO did not consider the firm namely M/s Rituraj and General Industries, M/s. Kaprila Enterprises, S.Kumar and M/s. Kapoor and Companies in the process. Despite this to favour Mr. Kapoor the accused knowingly and intentionally being a conspirator introduced their names and ultimately succeeded to accept the tender of Mr. Kapoor. According to CBI, the accused is a person who committed the misconduct by sending his own officials along with the Mr. Kapoor by drafting the reply for the objections. It indicates he is a conspirator to commit the offence. According to CBI, there is statement of Mr. Birender Reddy and PW 15 Viren indicates there is involvement of accused in the commission of offence. Therefore, CBI requested to reject the application.

6] Heard learned advocate for accused Mr. Shah and Mr. Sachin Patil. Advocate for accused submitted that these letters relating to firm of Kapoor was already invited on record by BOO. He further argued that except Reymonds and Bombay Dyeing no other firms are branded companies. Therefore, adding the name of aforesaid few companies does not mean that accused was part of the conspiracy. He further urged that the accused was on leave since 27/5/2011 to 26/6/2011. The tendering process was completed during this period and therefore he cannot be called as conspirator. He further urged that he is not authority to approve the tender. His superiors are there to approve the tenders and select the

branded companies. Therefore, according to him he is innocent. He requested for discharge.

7] Learned Senior Special prosecutor urged that the points raised by accused cannot be considered at the stage of adjudication of this application. Such type of points can be considered at the time of final trial. He further urged that the statement of Ravindra Reddy and Viren discloses that the accused time to time helped Mr. Kapoor and Company to succeed in the tender processing. It indicates he was part of the conspiracy. The note-sheets prepared by the accused itself a proof of fact he intentionally added the name of Mr. Kapoor and others when BOO has not recommended his name for the tendering purpose. According to CBI, there is sufficient material to frame the charge against accused. Hence, they requested to reject the application.

8] It is settled principle of law that while entertaining the application under section 227 of Cr.P.C. it is for the Court to hear the prosecution and accused. It is for the Court to go through the material available on record against the accused. If there is no sufficient ground for proceeding against the accused, he shall be discharged.

9] The substantive allegations against this accused is that he entered into criminal conspiracy along with the rest of accused in order to favour M/s. Kapoor and Company and thereby he added his name in the note-sheet though its name was not recommended by BOO.

10] The essence of a criminal conspiracy is the unlawful

combination and ordinarily the offence is complete when the combination is framed. Offence of criminal conspiracy consists not merely in the intention or more but in the agreement of two or more to do unlawful act by unlawful means.

11] It is settled position of law that if the available material considered as it is genuine and true then no conviction is warranted then it is desirable to discharge the accused.

12] It is admitted fact that the accused is public servant and he was discharging the duty as a Assistant Quarter Master General, ranking in Lt. Colonel. It is admitted fact that the report of BOO dtd. 23/9/2010 they have recommended the names of five Firms i.e. M/s. Raymonds, M/s. Bombay Dyeing, M/s. K.K. Apparel, M/s. Siyaram and M/s. Athelate for further procurement process. The BOO further submitted in the report that the above firms may be contacted to participate in the tendering for procurement of readymade garments for cadets of NDA. The BOO had submitted the various documents along with Appendix A to E for further process.

The noting sheet dtd. 23/12/2010 signed by Col. Admin discloses that “ the BOO was conveyed to identify the branded clothing items for the cadets. The item at flag B, are of miscellaneous nature. It will be difficult to find out branded Companies for supply of these items. However, it is recommended that a separate BOO may pleased be conveyed for the purpose as some of the members in the present Board have proceeded on posting etc.”. It indicates that Col. Admin did not consider the proposal of BOO dtd. 23/9/2010 and accordingly BOO afresh was to be formed. Therefore, question of adding the names of Kapoor and

Firms by the accused in addition to the the names recommended by BOO does not remains.

13] The letter dtd. 24/1/2011 signed by Lt. Col. A.S. Kanwar, predecessor of accused, discloses that he has called upon the willingness to undertake the work of providing readymade garments and participate in the tender processing afresh. It means that the recommendation of earlier BOO was not considered and it came to an end. The said letter has been served to Raymond Ltd., Siyaram and Bombay Dyeing only. However, the letter page no.74 of D-7 discloses that S.Kumar has given a letter to NDA and expressed its willingness to participate in tender processing. Accordingly, letter dtd. 15/2/2011 signed by Lt. Col. A.S. Kanwar discloses that he has taken the cognizance of the request of S.Kumar. Rituraj Textiles also issued a letter to the Commandant NDA Khadakwasla dtd. 24/2/2011 and expressed they are interested to participate in the tender. The page no.93 of D-7 discloses that Kapoor & Company gave a letter to the Commandant, NDA Khadakwasla dtd. 15/3/2011 and sought an opportunity to participate in the tender process. Page no.80 of D-7 discloses that Kaprilla Enterprises also issued a letter to the Commandant dtd. 01/3/2011 and requested to allow him in the tender process. It means that these all are the letters received to NDA in response to the letter signed by A.S. Kanwar, Lt. Col. dtd. 24/1/2011. Accused is not the person who called upon these firms to submit their willingness for participation in the tendering process.

14] Accused transferred from Jodhpur to NDA Khadakwasla and assumed his duties on 19th March, 2011. He has taken the charge of Mr. Kanwar. He has gone through these documents as

referred above. The accused has sent a draft on 29th March, 2011 for its approval to the Deputy Commandant through Col. Admin wherein list of items have been mentioned by him. Thereafter, he has prepared the note-sheet dtd. 31/3/2011 wherein in para 8 very first time accused mentioned that M/s. Raymond, M/s. S. Kumar, M/s. Rituraj, M/s. Siyaram, M/s. Bombay Dyeing, M/s. Kaprilla and M/s. Kapoor & Company expressed their willingness to supply branded clothing as per requirement of NDA. In the same noting accused has mentioned that there should be sample selection board and once the samples are selected and approved by BOO commercial bids will be issued to all the Firms who have participated in the tendering for samples to obtain their best commercial offers for the items approved by the BOO to ensure wider competition.

The note-sheet further discloses that the accused has recommended that all the procedure laid down in Defence Procurement Manual for procurement out of public fund will be followed for this contract also. The samples were selected by BOO on 12/5/2011. The accused has prepared the note-sheet on 24/5/2011. It appears from the documents filed by the accused that he was on leave since 27th May, 2011 to 26th June, 2011. It appears from the letter page no.179 of D-7 dtd. 6th June, 2011 that the final tenders were issued. The note-sheet dtd. 25/6/2011 further discloses in para 5 that Major Nitesh Sutar stated that the price negotiations with Mr. Kapoor & Company, Pune was carried out on 24/2/2011. The BOO proceeding for PNC are placed at flag D. The BOO has recommended that the rates of M/s. Kapoor & Company are reasonable and the rate contract may be awarded to them after obtaining sanction of the Commandant. This indicates that the

accused is not the person who recommended the name of M/s. Kapoor and Company for its approval to the Commandant. During the particular period he was on leave.

15] Now it would be proper to see what is the intention of the accused to add the names of Mr. Kapoor & company and others in the note-sheet. I have already stated that by virtue of the note-sheet signed by Lt. Col. Reddy the recommendation of BOO dtd. 23/12/2010 was not continued. The accused resumed his duty on 19th March, 2011 and immediately after considering the all documents he has obeyed an order of Lt. Col. Reddy to form a BOO afresh. In the findings of Col. Reddy it is transpired that the items required for NDA candidates are miscellaneous and not possible to get the branded material. The letter of M/s Kapoor & Company, Rituraj etc. were available in the file as discussed above in response to the letter signed by Lt. Col. Kanwar. Considering the aforesaid scenario when officer joined the duty and taken the charge it is but natural for him to prepare the note-sheet from the available record. Accordingly, he has prepared note-sheet mentioning the names of various Firms for approval purpose. It does not mean that he has any dishonest intention to prepare such a note.

The further fact is that according to CBI the accused hatched conspiracy with rest of accused. To that effect there is no counter material on record to show that the accused had met Kapoor & Company and thereafter he has inserted his name in the note-sheet. Further there is no otherwise material on record to show that at the time of preparing the note-sheet there was otherwise reason for accused to insert the names of Kapoor & Company.

Thus, from the available material it appears under bonafide ground accused has prepared the note-sheet and forwarded for approval. So it does not constitute his act to prepare the note-sheet was in pursuance of the conspiracy with the other accused persons. In these circumstances the statement of Col. C. Ravindra Reddy is not helpful to consider the prima facie the accused was involved in the criminal conspiracy.

16] It appears from the record that there were number of irregularities committed while issuing the tender in favour of Mr. Kapoor. Mr. Kapoor was warned by the NDA about its irregularities while supplying the garments in earlier contracts. It was held he was local supplier and also dealing with the NDA since long. He was acquainted with the officers who were already resumed in NDA.

17] The second accusation against accused is that there were various audit objections to the present tender processing. Accordingly, accused was directed to give the reply on those objections. The accused signed D-19 and D-20 and given the reply to those objections. The accused was not final authority to sort out the issue but it was required to be approved by Colonel Admin. The reply was sent but audit objections were not settled and accordingly letter dtd. 30/9/2011 have been issued by Audit to NDA and called the detail reply. The reply was prepared at D-22. It was signed by Col. Singh and not by the accused.

18] Now it would be proper to see the statement of Birender Singh Arya. It discloses that the accused persons have not followed open tendering system. I have already told accused was not present

on duty when tender was issued in favour of M/s. Kapoor & Company. The accused is not the person who has stated that the price of the readymade garments given by Kapoor was the lowest tender. He was the another officer. There was no comments about the fact of banning M/s. Kapoor & Company. There is no material to show that the accused was aware Mr. Kapoor was banned. There is no material to say that accused was aware M/s. Kapoor & Company was warned to improve the quality.

19] Mr. Birender Singh Arya further stated that accused had called him in his chamber on one occasion. At that time Karan Kapoor and his father Ramesh of M/s. Kapoor & Company were present in the room. Accused directed him to take draft reply of the audit objection to Shri. R.K. Gupta, Senior Account officer along with Karan Kapoor and his father. He went to the office of R.K. Gupta in the vehicle of Kapoor. Mr. Arya was not given any written order. It appears from his further statement that he has given the draft reply to R.K. Gupta which was given by accused. On perusal Mr. Gupta called Shri. Joshi from his office. Shri.Joshi was given the draft and asked to go through and suggest required rectification so that the reply could be accepted and settlement memo be issued. Accordingly, after discussion between R.K. Gupta and Joshi they have carried out corrections in the reply and then proceeded ahead. If these facts taken as it is true it indicates that the accused was not the part of conspiracy because if he was part of the conspiracy he would have discussed with Mr. Gupta directly and then he should have prepared the reply. Mr. Gupta and Mr.Joshi themselves made various rectifications in the reply and then complied the objections. It

indicates that accused was not the part of the conspiracy. No doubt as per statement of Mr. Arya it appears he carried the draft along with Kapoor's family. The tender was passed in favour of Mr. Kapoor. Therefore, he must be interested to remove the objections and in these circumstances if he approached to the concerned officers, gives information it does not mean that the said officer was under gloves in hand with the Kapoor and family. The accused hand over the draft with his staff Mr. Arya and not given the said draft with Mr. Kapoor. It indicates that he has taken reasonable care while sending the draft. Therefore in these circumstances directions by accused to Mr. Arya to go with Mr. Kapoor does not amounts he is part of conspiracy.

20] I accept the fact that the accused has added the name of Kapoor and others in the note-sheet and send it for approval. Further I admit accused has allowed Mr. Arya to go with M/s. Kapoor & Company along with the reply to the office of Mr. Gupta. Despite this it cannot be a proof of fact to prove these acts have been done by the accused in pursuance of the conspiracy. The record indicate some of the officers met to the Kapoor in Hotels and Kapoors have spent for their stay but accused was not with them. In these circumstances, the aforesaid material relied by the prosecution are not sufficient proof to frame the charge under section 120-B r.w. section 420 of Indian Penal Code and Section 11 and 13(2) r.w. 13(1)(d) of Prevention of Corruption Act. As there is no sufficient material to put the involvement of accused in the conspiracy, I am not supposed to compel the accused to face the trial. Justice not only to be done but it seems to be done. In the

present case considering allegations against accused the more responsibility is casted on the court to consider the all facts in proper prospective and administer the justice. Thus, I hold that there is some substance in the application. Accused entitled for discharge. Hence, I pass following order -

ORDER

- 1] Application is allowed.
- 2] Accused Lt. Col. Subramanian is hereby discharged from the offences punishable under section 120-B r.w. section 420 of Indian Penal Code and Section 11 and 13(2) r.w. 13(1)(d) of Prevention of Corruption Act vide CBI case RC PUNE/2014/A0004.

(Pralhad C.Bhagure)
Special Judge (CBI-ACB cases), Pune.

Date - 27/11/2018

I affirm that the contents of this PDF file order are same word for word as per original order

Name of Steno : Smt. Bharati R. Jakka
Court Name: : Shri.Pralhad C.Bhagure
Special Judge CBI, ACB, Pune.
Order signed by PO : 27/11/2018
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