

**IN THE ARMED FORCES TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

OA NO. 147 OF 2010

BRIG P.S.GILL

...PETITIONER

VERSUS

UNION OF INDIA & OTHERS

...RESPONDENTS

ADVOCATES

**M/S. K. RAMESH & ARCHANA FOR PETITIONER
MR. ANIL GAUTAM FOR RESPONDENTS**

CORAM :

**HON'BLE MR. JUSTICE S.S.KULSHRESTHA, MEMBER
HON'BLE LT. GEN. S.S.DHILLON, MEMBER**

**J U D G M E N T
24.05.2011**

1. It is contended by the learned counsel for the petitioner that even if the entire evidence collected during the course of inquiry is accepted on its face value, no offence is prima facie made out against the petitioner. It is, therefore, necessary to look into the relevant law and the allegations referred to in the charge sheet and then consider whether any offence has been committed to frame charges for trial. The first two charges are in particular on the point of adding two more tendering

stations at Gadarwara, District Narsingpur (MP) and Narsingpur (MP) with the intention to defraud the Government. These charges are as under:

First Charge
AA Sec 52 (f)

SUCH AN OFFENCE AS IS MENTIONED IN CLAUSE (f) OF SECTION 52 OF THE ARMY ACT, WITH INTENT TO DEFRAUD

in that he,

at New Delhi, on 15 Mar 2005, which came to the knowledge of the authority competent to initiate action on 25 Sep 2008, while performing the duties of Chief Director of Purchase, Army Purchase Organization, Ministry of Defence, contrary to Army Purchase Organization, Ministry of Defence, Department of Defence Consolidated Order no.3 of 1987, with intent to defraud, approved addition of two more tendering stations (namely Gadarwara, District Narsingpur (MP) and Narsingpur (MP) in Acceptance of Tender for Risk Purchase Contract No.J-13028/1/4-03/45-RP/2005-PUR III dated 28 Feb 2005 for Masur Whole awarded to M/s. GREEN FED (Gujrat Co-operative Grain Grower's Federation Ltd.,) after issue of Acceptance of Tender on the last day of Delivery Period.

Second Charge
AA Sec 63 (Alternative to first charge)

AN ACT PREJUDICIAL TO GOOD ORDER AND MILITARY DISCIPLINE

in that he,

at New Delhi, on 15 Mar 2005, which came to the knowledge of the authority competent to initiate action on

25 Sep 2008, while performing the duties of Chief Director of Purchase, Army Purchase Organization, Ministry of Defence, contrary to Army Purchase Organization, Ministry of Defence, Department of Defence Consolidated Order no.3 of 1987, improperly approved addition of two more tendering stations (namely Gadarwara, District Narsingpur (MP) and Narsingpur (MP) in Acceptance of Tender for Risk Purchase Contract No. J-13028/1/4-03/45-RP/2005-PUR III dated 28 Feb 2005 for Masur Whole awarded to M/s. GREEN FED (Gujrat Co-operative Grain Grower's Federation Ltd) after issue of Acceptance of Tender on the last day of Delivery Period.

Before scrutinising the evidence to ascertain whether any offence is prima facie made out or not, , it is to be noted that the settled legal position is that if on the basis of material on record the Court could form an opinion that the accused might have committed offence it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence. At the time of framing of the charges the probative value of the material on record cannot be gone into, and the material brought on record by the prosecution has to be accepted as true. Before framing a charge the court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible. Whether, in fact, the accused has committed the offence or not can be decided only during the trial. Charge may although be directed to be framed when there exists a strong suspicion but it is also trite that the

Court must come to a prima facie finding that there exist some materials therefor. Suspicion alone, without anything more, cannot form the basis therefor or held to be sufficient for framing charge. (see **Soma Chakravarty v. State through CBI** - 2007(5) SCC 403). From the side of the petitioner, it is said that as many as six witnesses were examined in the Summary of Evidence and not even a single witness whispered about the culpability of the petitioner in the alleged offence. Inasmuch as the evidence and other materials produced in the Summary of Evidence are silent, it would not remotely refer about any impropriety on the part of the petitioner it cannot be said that there is any illegality. It would not prima facie make out any offence for which above charges have been framed against the petitioner. The petitioner continued to discharge his responsibility as being Senior Officer in a very honest and transparent manner but because of the mistakes of the Headquarter Western Command, the blame was attempted to be shifted against the petitioner without understanding the basic foundation of the case.

2. From a bare reading of the aforesaid charges it appears that the petitioner in the capacity of his being Chief Director of Purchase, Army Purchase Organisation, Ministry of Defence contrary to APO/MOD Consolidated Order no.3 of 1987, with intent to **defraud/improperly approved addition of two more tendering**

stations namely Gadarwara and Narsingpur in Madhya Pradesh.

For the purpose of drawing the charges, reliance appears to have been placed by the respondents on the exhibits, the details of which may be charted out as under:

| <u><i>Exhibit</i></u> | <u><i>Page</i></u> | <u><i>Para</i></u> |
|---------------------------|--------------------|--------------------|
| <i>L</i> | <i>239</i> | <i>-</i> |
| <i>LXIX</i> | <i>294</i> | <i>-</i> |
| <i>XXVII</i> | <i>193</i> | <i>2</i> |
| <i>VI</i> | <i>141-143</i> | <i>1 and 2</i> |
| <i>II</i> | <i>83-85</i> | <i>--</i> |
| <i>V</i> | <i>139-140</i> | <i>--</i> |
| <i>LXXV</i> | <i>303-305</i> | <i>--</i> |
| <i>XXVIII to XXXIII/I</i> | <i>194-204/80</i> | <i>--</i> |

From the perusal of the exhibits noted above, there is nothing to show that the addition of two tendering stations was not within the powers of the petitioner. Nothing could be pointed out to show the relevancy of these documents for making out prima facie case against the petitioner. Further the statement of the witness namely, PW1 Brig PPS Bal of CDP Army Purchase Organisation, AHQ New Delhi was scrutinised. He was categorical in his statement that he was aware of the Consolidated Order No.3 of 1987 (Ext.2) permits the inclusion of additional tendering station. Ext.1 is related to the letter dated 06.10.2008 written to M/s.

M.P.Trade & Investment Facilitation Corporation Ltd for “procurement of 1000 MT Gram Crushed (Kibbled) against A/T even no. dated 05.12.2007 from M/s. MPTRIFAC-Addition of Tendering Station-Delhi. This one example was quoted by the witness. This itself indicates that the addition of tendering stations is within the discretion of the competent authority to the effect that “stores can be tendered at Delhi as a special case in the subject A/T, subject to the condition that any additional expenditure incurred by the purchaser/savings accruing to the supplier, on account of this addition of tendering Station, shall be reimbursed by the Supplier to the Government” which is also exactly the requirement mandated in defence consolidated Order No.3 of 1987. Further with regard to the making of the additional tendering stations by the accused-petitioner as per the reply of PW1, the contract was amended as required by Government of India orders and the amended contract was also communicated by Exh.VI. There was no objection to such acceptance of tendering stations from Audit authorities or by PCDA. Apart from it, witness also makes it clear in his answer to Question No.4 that the tenderer has option to select stations where he can tender stores as per the contract. The APO does not dictate the tendering stations. However, they must lend themselves to ease of inspection and movement of stores to consignee depots. Lastly this witness also

clarified that by making the addition of two tendering stations no monetary benefits could be acquired by petitioner nor there was any extra expenditure borne out by the respondents owing to acceptance of two new stations by the accused-petitioner. Further by adding these two new stations, no violation of any rule or order was made by the accused-petitioner. PW2 Col Ambrish Malhotra has stated that information regarding the inclusion of additional tendering stations was received in the ST-7/8 office vide CDP (APO) letter No.J-13025/1/4-03/45-RP/2005/PUR III dated 15 March 2005. He has also made it clear that as far as the second charge is concerned, extension of DP and the issue of FPN is given by the CDP (APO) who concludes the contracts of centrally purchased articles. PW6 S.K Sikka, Section Officer, Army Purchase Organisation, New Delhi has also indicated in his statement which reads as under:

“4. Regarding first charge which basically relates to addition of tendering stations, the CDP of APO is empowered vide Consolidated Order Number 3 of 1987 to grant permission for additional tendering stations on the request of the suppliers. This permission is granted subject to the condition that any extra expenditure will be borne by the supplier. An amendment is accordingly carried out in the contract and signed by both the parties i.e. APO and the supplier.”

He has also clarified that CDP have also accorded permission for the same in as many as six cases which were also referred by him in his statement. Even the witness stated that on that day permission was also granted by CDP and there was no objection to it from any quarter. By making addition of these two tendering stations there was nothing on record to substantiate that by an act or omission on the part of the petitioner the supplier had been benefited. To the contrary, extra expenditure incurred in the transportation was borne by the supplier and there was no violation of any of the Government instructions. The petitioner also in Summary of Evidence examined DW1 P.V.D. Prasada Rao, Deputy Secretary to the Government of India, Ministry of Agriculture, Department of Agriculture & Cooperation, New Delhi in his defence whose statement on the questionnaire is as below:

Q2. Does it mean that the addition of the two tendering stations granted to M/s. GRAINFED was granted as an exception?

Ans. Yes. In this RP contract the rate i.e. Rs.1875/- per quintal was very lower compared to the rate i.e. 1921/- per quintal in the defaulted contract. Due to this lower rate, Government stood immensely benefitted. Hence a request of the supplier under this situation was considered exceptional. Any event at this stage leading to frustration

of the contract will have disastrous effect. Further, out of a large number of contracts placed during the period, this was only one request for additional stations and hence was an exception. Even under section 67 of the Indian Contract Act 1872, reasonable facility has to be afforded to the promisee i.e. the supplier. Otherwise he would be excused for non performance of the contract.

DW2 Daya Shankar Foreign Trade Development Officer, Former Section Officer, Army Purchase Organisation, Ministry of Defence, New Delhi stated on the question as under:

Q1. Is the practice of granting additional tendering station a new one?

Ans. No. It is not a new practice. It is going on for decades and I understand that even now it is being done.

From the statement of these witnesses, it is clear that granting of additional tendering of stations is within the power of Chief Director of Purchase. Whatever the discretion was exercised by him was for the benefit of Union of India and in no way such addition of the tendering stations caused any loss. This was in pursuance of the consolidated order 3 of 1987. Even from the statement of PW1 Brig PPS Bal, PW3 Col Rajiv Manocha, PW4 Col Suneel Chaturvedi, PW5 Lt Col TS Mann,

PW6 Sh.S.K.Sikka, no violation of the instructions/rules on the part of the petitioner is decipherable. At the same time, from the side of the prosecution, it is not disputed that in view of the arrangement made in the Department of Defence consolidated order No.3 of 1987, it is within the powers of the Chief Director of Purchase to make addition of tendering stations but it could be done only in exceptional circumstances. There was nothing to show the exceptional circumstances. A note of this fact may be taken that DW 1 Prasada Rao, Deputy Secretary to Government of India, Ministry of Agriculture, New Delhi stated that the contract of addition of tendering stations was for the benefit of Govt. of India as the contract rates were much lower. This itself is the exceptional circumstance.

3. The respondents have further referred to the Government of India letter dated 28.03.2005 (Ext.35), which refers about the particulars of the articles, approving the tendering stations. The relevant portion of that notification reads as under:

| Description of stores | Accounting Unit | Qty In MT | Delivery Period | Price per qtl. | Total Cost in Rs. |
|---|-----------------|-----------|-----------------|----------------|---|
| Masar whole as per revised ASC specification no.113-B (FAQ) | Quintal | 979.600 | 01-15 March, 05 | Rs.1,875/- | 1,83,67,500/- (Rupees One Crore eighty three lakhs sixty seven thousand five hundred only) |

It is said that as per the contract the delivery period was from 01-15th March, 2005, but on 03.03.2005 the petitioner received a communication from M/s. Green Fed Co-op Ltd for the addition of tendering stations. On the basis of this letter, some communication was made to the Ministry of Defence from the office of the petitioner on 09.03.2005, whereby request was made to offer their comments/views in the matter of the addition of tendering stations as requested by M/s.Green Fed Co-op. Ltd. Various noting from the office took place. First the proposal was dropped on 15.03.2005 itself and subsequently it was approved on that very day and the approval was also communicated on that very day (vide exh.27). From such communication, the prosecution has not been able to point out as to how and in what manner the petitioner had defaulted prima facie making out an offence.

4. Lastly, reference was made to the letter written by petitioner to the Ministry of Defence, Army Purchase Organisation vide Exh.LLL dated 12.09.2005 wherein it was stated that the petitioner made acquiescence to the allegations appearing against him. It was misconstrued by the prosecution. This letter refers on the subject of grant of relaxation in terms and conditions of APO and acceptance of tender stocks under appeal of price reduction. Para 4 of the said letter was referred which may also be quoted for appropriating the answer to the

point agitated from the side of prosecution. However, in the case of risk purchase contracts, no relaxation of any kind to the terms and conditions of the original contract including specifications can be granted under any circumstances, as it would mean that stocks in RP contract are accepted on different terms and conditions compared to the original contract and in such case, the claim of RP loss will be held totally illegal and invalid by the Arbitrator and/or Courts of Law. This is in the context of the revision of rates and has nothing to do with the tendering stations and for which the safeguards have already been provided in the defence consolidated Order No.3 of 1987. Nothing could be pointed out that there is any violation of this order. Merely on the basis of suspicion which has no foundation even to prima facie show the lapses on the part of the petitioner, which may ultimately result to his culpability.

5. Charge Nos. 3 to 6 pertain to making defiance of Para 4(iii) of No. J-11011/1/2000/ Government of India, Ministry of Defence, APO Guidelines which prohibit the deviation from AFC specifications and price reduction in risk purchase contract. But with intend to defraud, acquiesce with decision of Director General of Supplies. All the four charges read as under:

THIRD CHARGE**AA SEC. 52(f)****SUCH AN OFFENCE AS IS MENTIONED IN CLAUSE (f) OF SECTION 52 OF THE ARMY ACT, WITH INTENT TO DEFRAUD**

in that he,

at New Delhi, on or about 29 July 2005, which came to the knowledge of the authority competent to initiate action on 25 Sep 2008, while performing the duties of Chief Director of Purchase, Army Purchase Organization, Ministry of Defence, and being aware that para 4(VI) of No. J-11011/1/2000-CDN, Govt of India, Min of Def, APO Guidelines to prevent legal complications dt 30 Mar 2000 prohibited any deviation from ASC Specification and Price reduction in Risk Purchase contracts, with intent to defraud acquiesced with decision of Director General of Supply and Transport vide letter No.69642/5/1-05/163-RP/05/Q/ST-7 dt 29 Jul 2005 granting relaxation to M/s Punjab State Civil Supplies Corporation Ltd in a Risk Purchase Contract Acceptance Tender No. J-13075/5/163/2005-PUR III dt 27 Jun 2005 for 350/400 grains per 100 gms of Kabli Chana on price reduction of 0.5% instead of 300-350 grains per 100 gms as stipulated in Revised ASC specification No. 97.

FOURTH CHARGE**AA SEC. 63 (Alternative to third charge)****AN OMISSION PREJUDICIAL TO GOOD ORDER AND MILITARY DISCIPLINE**

in that he,

at New Delhi, on or about 29 July 2005, which came to the knowledge of the authority competent to initiate action on 25 Sep 2008, while performing the duties of Chief Director of Purchase, Army Purchase Organisation, Ministry of Defence and being aware that para 4(VI) of No. J-

11011/1/2000/CDN, Govt of India, Min of Def, APO Guidelines to prevent legal complications dt 30 Mar 2000 prohibited any deviation from ASC Specification and Price reduction in Risk Purchase contracts, improperly acquiesced with decision of Director General of Supply and Transport vide letter No. 69642/5/1-05/163-RP/05/Q/ST-7 dt 29 Jul 2005 granting relaxation to M/s Punjab State Civil Supplies Corporation Ltd in a Risk Purchase Contract Acceptance Tender No. J-13075/5/163/2005-PUR III dt 27 Jun 2005 for 350-400 grains per 100 gms of Kabli Chana on price reduction of 0.5% instead of 300-350 grains per 100 gms as stipulated in Revised ASC specification No. 97.

FIFTH CHARGE
AA SEC. 52(f)

SUCH AN OFFENCE AS IS MENTIONED IN CLAUSE (f) OF SECTION 52 OF THE ARMY ACT, WITH INTENT TO DEFRAUD

in that he,

at New Delhi, on or about 23 Aug 2005, which came to the knowledge of the authority competent to initiate action on 25 Sep 2008, while performing the duties of Chief Director of Purchase, Army Purchase Organization, Ministry of Defence, and being aware that para 4(VI) of No. J-11011/1/2000-CDN, Govt of India, Min of Def, APO Guidelines to prevent legal complications dt 30 Mar 2000 prohibited any deviation from ASC Specification and Price reduction in Risk Purchase contracts, with intent to defraud acquiesced with decision of Director General of Supply and Transport vide letter No.69644/7/4-05/165-R/05/Q/ST-7 dt 23 Aug 2005 granting relaxation to M/s MMTC in a Risk Purchase Contract Acceptance Tender No. J-13075/7/165/2005-PUR III dt 27 Jun 2005 for 350-400 grains per 100 gms of Kabli Chana on price reduction of 0.5% instead of 300-350 grains per 100 gms as stipulated in Revised ASC specification No. 97.

SIXTH CHARGE**AA SEC. 63 (Alternative to fifth charge)****AN OMISSION PREJUDICIAL TO GOOD ORDER
AND MILITARY DISCIPLINE**

in that he,

at New Delhi, on or about 23 Aug 2005, which came to the knowledge of the authority competent to initiate action on 25 Sep 2008, while performing the duties of Chief Director of Purchase, Army Purchase Organisation, Ministry of Defence and being well aware that para 4(VI) of No. J-11011/1/2000/CDN, Govt of India, Min of Def, APO Guidelines to prevent legal complications dt 30 Mar 2000 prohibited any deviation from ASC Specification and Price reduction in Risk Purchase contracts, improperly acquiesced with decision of Director General of Supply and Transport vide letter No. 69644/7/4-05/165-R/05/Q/ST-7 dt 23 Aug 2005 granting relaxation to M/s MMTC in a Risk Purchase Contract Acceptance Tender No. J-13075/7/165/2005-PUR III dt 27 Jun 2005 for 350-400 grains per 100 gms of Kabli Chana on price reduction of 0.5% instead of 300-350 grains per 100 gms as stipulated in Revised ASC specification No. 97.

It is submitted on behalf of the petitioner that it was not within the purview of the petitioner to ascertain as to what correspondence had taken place in between supplier and the DGST. Further, it is only the responsibility of DGST for ensuring quality control and he is also the appellate authority in that regard, as is also clear from the statements of PW 1 Brig PPS Bal and PW 2 Col Ambrish Malhotra. When DGST was the sole authority to grant relaxation in the specification, there remains

no role on the part of the petitioner in the capacity of CDP to overrule the decision of DGST. Moreover, whatever guidelines were issued, that were for the purpose of avoiding litigation. But it did not confer any discretion on the part of the petitioner to have interfered with the decision of DGST. However, from the side of the respondents, much thrust was laid that since DGST had violated the guidelines while giving relaxation of PR contrary to policy, but the petitioner was also under obligation not to have acquiesced to such decision when he was well aware of the guidelines. There is no dispute on the point that DGST was the competent authority for making relaxation in the specification. There is also ample evidence that the DGST being competent authority permitted to despatch 400 grains per 100 gms. in the place of 300-350 grains per 100 gms. DGST also appears to have made reduction of 0.5% from the contract amount, in that the Government money to the tune of Rs.7,57,480.16 was saved in the matter of supplier M/s. Punjab State Civil Supplies Corporation Ltd pertaining to Charge Nos. 3 and 4. Similarly, within his powers, he granted relaxation to M/s. MMTC to the tune of Rs.4,48,050.00. There appears to be no participation on the part of the petitioner in the decision making process for giving relaxation. Further, there could be no reason for making acquiescence to the decision given by DGST. He had no power to oppose to whatever relaxation was

given by DGST within his powers. Accepting the entire prosecution version that it is the DGST who is said to have violated the orders, which was communicated to the petitioner, who had acquiesced the same or accepted the same, no offence prima facie is made out against the petitioner.

6. The 7th charge pertains to improper issue of letter dated 2.8.2005, 12.9.2005 and 30.9.2005 pertaining to PR in RP contracts without taking into account or accounting for the existing guidelines to prevent legal complications dated 30.3.2000 prohibiting price reduction in RP contracts. It is submitted on behalf of the petitioner that the guidelines dated 30.3.2000 is a mere guideline and it cannot be construed to be a full policy and cannot have the force of any law or rules. The APO letters dated 2.8.2005, 12.9.2005 and 30.9.2005 are generic and in conformity with the terms and conditions of the APO contract pertaining to price reduction in the contract and the DGST is fully empowered to issue clarificatory letters in the larger interest of the institution. There is no malice on the part of the petitioner. We have gone through the letters dated 1.8.2005, 2.8.2005, 12.9.2005 and 30.9.2005 sent by the petitioner. They are in clarificatory form and are in no way contrary to the guidelines issued by the Government of India. No contradiction from the Government guidelines is appearing from the testimony of PW 1 Brig

PPS Bal (Q No. 38), PW 6 S.K Sikka (Q. No. 20), DW 1 Prasada Rao (Para 9) referring that APO letter of 30.3.2000 is not a policy letter but simply a guideline. So is the position of APO letter dated 2.8.2005. All these letters referred to in the charge are generic clarifying aspects of PR in RP contracts. There appears to be no violation of any of the policy from the side of the petitioner. This offence is also not prima facie made out.

7. From the perusal of the entire evidence collected at the stage of recording of summary of evidence, there appears to be no prima facie case against the petitioner to proceed with the trial against him. Even if the entire evidence produced from the side of the prosecution before the stage of summary of evidence is accepted to be true on its face value, no offence is said to have been committed by the petitioner. There is no ground to proceed with the trial against him. Reliance may be placed in the case of **State of Bihar v. Ramesh Singh** (1977(4) SCC 39), wherein the apex Court held thus:

“4. Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the court to think that there is ground for presuming that the accused has committed an offence then it is not open to the court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the

accused which is to be drawn at the initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the court should proceed with the trial or not. **If the evidence which the prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial.”**

Identical view was taken by the apex Court in **Union of India v. Prafulla Kumar Samal and another** (1979(3) SCC 4), **Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijjaya and others** (1990(4) SCC 76) and **P. Vijayan v. State of Kerala and another** (2010(2) SCC 398) as well. From the materials on record, no prima facie case is made against the petitioner. All the charges framed against him are not sustainable.

8. In view of the aforesaid discussion, the appeal is allowed and the charges against the petitioner are quashed.

(S.S DHILLON)
MEMBER

(S.S KULSHRESTHA)
MEMBER