

Runu Ghosh Vs. C.B.i

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Court : Delhi

Decided On : Dec-21-2011

Appellant : Runu Ghosh

Respondent : C.B.i

Advocate for Def. : Mr. P.P. Malhotra, Mr. Chetan Chawla

Advocate for Pet/Ap. : Mr. Satish Tamta, Ms. Ruchi Kapur, Mr. S.S. Gandhi, Mr. A. Tiwari, Mr. Arvind Nigam, Mr. Anil Nag

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI RESERVED ON 29.11.2011
DECIDED ON: 21.12.2011 + CRL.A. 482/2002, CRL.A. 509/2002, CRL. M.A.
1839/2002 and CRL.A. 536/2002 CRL.A. 482/2002 RUNU GHOSH Appellant
Through: Mr. Satish Tamta with Ms. Ruchi Kapur, Advocates with appellant in
person. CRL.A. 509/2002 P. RAMA RAO Appellant Through: Mr. S.S. Gandhi,
Sr. Advocate with Mr. A. Tiwari, Advocate with appellant in person. CRL.A.
536/2002 SUKH RAM Appellant Through: Mr. Arvind Nigam, Sr. Advocate with
Mr. Anil Nag, Advocate with appellant in person. versus C.B.I. Respondent
Through: Mr. P.P. Malhotra, ASG with Mr. Chetan Chawla, Advocate. CORAM:
MR. JUSTICE S. RAVINDRA BHAT MR. JUSTICE G.P. MITTAL MR. JUSTICE
S.RAVINDRA BHAT %.

1. The present judgment will dispose off three appeals directed against the judgment dated 5th July 2002 passed by the learned Special Judge in RC 3(A)/96 ACU convicting the three Appellants (Mr. Sukh Ram, Mr. Rama Rao and Ms. Runu Ghosh) for the offence under Section 120-B IPC read with Section 13(1) (d) and Section 13(2) CrI.A.Nos. 482/02, 509/02 and 536/02 Page 1 of the Prevention of Corruption Act, 1988 and convicting Mr. Sukh Ram and Ms. Runu Ghosh, the Appellants in CrI. A. Nos.

536. and 482 of 2002 respectively, additionally for the substantive offence under Section 13(1)(d) read with Section 13(2) Prevention of Corruption Act, 1988. The Appellants (hereafter referred to by their names, for convenience) also challenge the order sentencing them to periods of two and three years rigorous imprisonment (RI) and fine of ` 1 lakh, in default of which they were to further undergo simple imprisonment (SI) for six months for the offences. The appeals were received by the Division Bench, upon a reference regarding the correct interpretation of Section 13 (1) (d) of the Prevention of Corruption Act 1988 (hereafter "the 1988 Act")..

2. Before proceeding it would be necessary to extract the relevant portions of the order (dated 24.09.2009) referring the appeals to the Division Bench. It reads as follows: The issues that arise.

30. In the present case the evidence is essentially in the form of notes on file dated 25th May and 24th July 1993 of Smt.Ghosh and the notes dated 31st August, 19th November and 13th December 1993 of Sri Sukh Ram. There are cases under the PC Act 1988 in which a trap is laid to gather evidence of the public servant accepting illegal gratification or in which a raid is undertaken of the place of residence or work with a view to unearthing the amassing of assets disproportionate to the known sources of income of such public servant. However, according to the CBI, the present case is not linked with the DA case against the Appellants Sri Sukh Ram and Smt.Runu Ghosh. This case is one where the public servant is not shown to have gained any pecuniary benefit but is accused of abusing the official position and obtaining it for another person. The prosecution's case is built around Section 13 (1) (d) (i) to (iii) PC Act 1988..

31. As regards the nature of evidence, to prove the guilt of Sri Sukh Ram, the prosecution relies on the notes on file authored by him and the correspondence involving M/s. ARM. As far as Smt. Runu Ghosh is concerned, apart from the notes on file authored by her, the prosecution relies on the recoveries from her of a set of pearl earrings worth Rs.1500 and two blank letter heads of M/s. ARM in August 1996 from her table drawer. Some of the authors of the various notes on the file have been examined as prosecution witnesses. The offence of criminal conspiracy punishable under Section 120 B is also sought to be proved on the basis of the above evidence..

32. Stemming from the submissions of the learned ASG, an important question that arises for consideration is whether for the purposes of Section 13 (1) (d) CrI.A.Nos. 482/02, 509/02 and 536/02 Page 2 (ii) or (iii) PC Act the prosecution has to prove mens rea. The learned ASG has also filed detailed written submissions on this aspect referring to several decisions of the courts, which have dealt with the provisions of some criminal statutes dispensing with the need to prove mens rea. They however do not appear to have had occasion to deal with the question in the context of Section 13 (1) (d) PC Act 1988. In this context the following passage from Principles of Statutory Interpretation by G.P.Singh (9th edition, pp.779-780) is instructive: When a statute creates an offence, the question whether the offence involved the existence of mens rea as an essential element of it or whether the statute dispenses with it and creates strict liability are questions which have to be answered on a true construction of the statute. The courts, however, regard it as a fundamental principle that an offence cannot be made out without the existence of mens rea, unless from a consideration of the term of the statute and other relevant circumstances it clearly appears that that must have been the intention of Parliament.' The formulations of the rule of construction which have been accepted by the Privy Council and the Supreme Court are those stated by Wright, J. in *Sherras v. De Rutzen*, and by Goddard, C.J. in *Brend v. Wood*. Wright, J. expressed the rule in these words: There is a presumption that mens rea an evil intention, or knowledge of the wrongfulness of the act, is an essential ingredient of every offence, but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals and both must be considered.' And, the formulation by Goddard,

C.J. is to the following effect: It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that unless a statute either clearly or by necessary implication rules out mens rea as a constituent part of a crime a defendant should not be found guilty of an offence against the criminal law unless he has got a guilty mind.' It has also been said that the presumption of existence of mens rea is a presumption of legality' and in the absence of express words or a truly necessary implication, Parliament must be presumed to legislate on the assumption that the principle of legality will supplement the text'. 'Necessary implication' in this context "connotes an implication which is compellingly clear. Such an implication may be found in the language used, the mischief sought to be prevented and any other circumstances which may assist in determining what intention is properly to be attributed to Parliament when creating the offence. As stated by the Privy Council (Lord Scarman) the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern and it is further CrL.A.Nos. 482/02, 509/02 and 536/02 Page 3 shown that creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act. The climate of both parliamentary and judicial opinion in England has been growing less favourable to the recognition of absolute offences over the last few decades. (emphasis supplied).

32. The question that arises is whether mens rea is impliedly excluded in Sections 13 (1) (d) (ii) and (iii) of the PC Act 1988? To borrow the words of Lord Nichollas quoted in the above passage, can such an implication be found in the language used, the mischief sought to be prevented and any other circumstances which may assist in determining what intention is properly to be attributed to Parliament when creating the offence? It must be added that according to the learned ASG even if the above question were to be answered in the negative, the notes on file, documents and other attendant circumstances prove mens rea beyond reasonable doubt..

33. That brings up the other aspect of the case which is the nature of the evidence adduced by the prosecution. The case of the prosecution is that the decisions dated 19th November and 13th December 1993 of the MoS (C) and the notes

dated 25th May and 24th July 1993 of Smt. Runu Ghosh, in the light of the other evidence including depositions of the witnesses are sufficient to prove the offence of criminal misconduct within the meaning of Section 13 (1) (d) (ii) and (iii) PC Act 1988 beyond reasonable doubt. It was urged that the fact that the price as demanded by M/s. ARM was restored to it by the MoS (C) overriding the advice of his subordinates, which has a financial implication of Rs.1.86 crores for the government was sufficient in itself to characterize the said action as an abuse of official position for the purposes of section 13 (1) (d) (ii) and as being without public interest for the purpose of Section 13 (1) (d) (iii) of the PC Act. The questions that arise in this context are in a government run essentially by an Executive with a Minister heading a Department, and where decisions involving financial implications are taken routinely, when can a decision be said to constitute an abuse of official position? What can be said to be a decision that is not in public interest'? Crl.A.Nos. 482/02, 509/02 and 536/02 Page 4.

34. The importance of the above questions becomes apparent on a comparison of the earlier provision i.e. Section 5(1) (d) PC Act, 1947 with Sections 13(1) (d) (i), (ii) and (iii) of the PC Act 1988: Section 5(1)(d) PC Act, 1947 Section 13(1)(d) (i),(ii) and (iii) PC Act, 1988.

5. Criminal Misconduct.

13. Criminal misconduct by a public servant (1) A public servant is said to commit (1) A public servant is said to commit the the offence of criminal misconduct-- offence of criminal misconduct, -- (a) *** (a) *** (b) *** (b) *** (c) *** (c) *** (d) if he, by corrupt or illegal means or (d) if he,-- by otherwise abusing his position as public servant, obtains for himself or (i) by corrupt or illegal means, obtains for any other person any valuable thing for himself or for any other person any or pecuniary advantage 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; One obvious change is that the words abusing his position as a public servant in Section 13(1) (d) (ii) of the PC Act 1988 are not preceded by the

word otherwise as they were in Section 5 (1) (d) of the PC Act 1947. The intention is perhaps to indicate that Sections 13(1) (d) (ii) and (iii) constitute distinct species of offences not related to Section 13(1)(d) (i) which talks of obtaining by corrupt or illegal means for himself or for any other person any valuable thing or pecuniary advantage. The word obtains which is common to Section 13(1)(d) (i) to (iii) is another key element to the criminal misconduct. Does it then connote the gaining of some advantage which is contrary to or not permitted by law? Then we have Section 13 (1) (d) (iii) of the PC Act 1988 which is a CrI.A.Nos. 482/02, 509/02 and 536/02 Page 5 new species of offence for which there is no corresponding provision in the PC Act of 1947. Whether the absence of adverbs like wilfully, fraudulently, dishonestly, corrupt or illegal means to qualify the verb obtains in this clause would mean that a public servant commits criminal misconduct if he while holding such office obtains for any person (and not for himself) any pecuniary advantage which is without any public interest? The statute appears to offer no guidance as to what can be said to be a decision or act that is without public interest..

35. The above questions do not appear to have arisen directly for consideration in any of the cases cited at the bar particularly in the context of the PC Act 1988. There is no authoritative pronouncement on the above aspects of the law. Given the importance of the questions and the implications it has for numerous other cases that may be pending at various stages, it is considered appropriate to direct that these appeals should be decided by a larger bench of two Hon'ble judges. It is clarified that the submissions of the counsel for the parties on the evidence in the case and the correctness of the findings of the trial court have not been discussed in this order. Those will also have to be examined notwithstanding the answers to the above questions. The appeals may be placed on 9th October 2009 before the appropriate Division Bench subject to the directions of Hon'ble the Chief Justice. S. MURALIDHAR, J. SEPTEMBER 24, 2009 The Facts.

3. Mr. Sukh Ram was the Union Minister of State for Communications [MoS (C)] with independent charge for the period of 18th January 1993 to 16th May 1996. Ms. Runu Ghosh was the Director (FA-V) in the Department of Telecommunications (DoT) at that time. Mr. P. Rama Rao was the Managing

Director of Advanced Radio Masts Pvt. Ltd. (M/s.ARM)..

4. The Department of Telecommunications (DoT), on 27th December 1991 issued a tender for the supply of 3000 2/15 MARR Shared Radio Systems; the total value of the tender was around `` 106 crores. 1,000 of these systems were directed for purchase for the year 1992-93 and 2,000 for 1993-94. At the time when the tender was issued, there were two known types of MARR sets; one, a crystal version, for which a few suppliers had provisional type approval certificate, which was already Crl.A.Nos. 482/02, 509/02 and 536/02 Page 6 being supplied to the DoT and was in use in various Telecom circles, and the other a synthesized version, for which type approval had not yet been granted. The supply of these sets was a part of the rural telecom project aimed at increasing tele-density and enabling wider reach of telephony to rural populations in the country. Clause 1.1.10 of the tender conditions stated that equipment having local oscillators with synthesized frequency control and capability to withstand wide variation of input DC voltage will be preferable..

5. On 06.01.1992, a Tender Evaluation Committee (TEC) was constituted to evaluate the bids received pursuant to the above tender. M/s.ARM, M/s. Shyam Antenna Electronics Communications Systems, New Delhi (M/s.Shyam) and M/s. Punjab Wireless Systems Ltd. Chandigarh (M/s.Punwire) were among the 35 entities who submitted bids. ARM submitted its bid on 15.03.1992. After scrutiny of reports of the Technical Group and the Commercial and Finance Group, (which examined the bids), the recommendations of the TEC (marked Ex. PW-3/J1 during the trial) as regards the price were that the lowest basic price at `3,54,500 (inclusive of packaging and forwarding) was being offered by a bidder. It is an undisputed fact that ARM had obtained type approval for the crystal version; however type approval for its synthesized version was awaited. ARM had supplied 522 crystal version systems to DoT in the previous years. Of them, 130 had been installed and commissioned in different Telecom circles all over the country..

6. On 25.11.1992, M/s. Shyam wrote to the DDG (MM) (by a letter, (marked Ex. PW-3/K-9 during the trial) stating that their product i.e. the synthesized version (2/15 Shared Radio System "Shyam Make") had been recommended for type

approval. The letter annexed a list of features of the Shyam Make Shared Radio System, which explained its advantages over the crystal based system. Pending the finalization of the award of contract pursuant to the tender of 13th January 1992, a provisional purchase order (PO) dated 31st December 1992 for supply of 300 systems of 2/15 MARR was placed by the DoT on M/s. ARM. A similar order for 200 systems was placed on M/s. Shyam..

7. The Union Budget was announced and on 16.04.1993, M/s.ARM wrote a letter to the Member (Production) (i.e. Member of the Telecom Commissioner) DoT Crl.A.Nos. 482/02, 509/02 and 536/02 Page 7 (marked Ex. PW-3/K14 during the trial) informing him inter alia that due to Budget concessions, it was able to lower the price of the system: due to various duty concessions given by the Government and quality measures successfully adopted by us, we could bring down the price of each 2/15 MARR Shared Radio Systems from Rs.3,54,500 to Rs.3,45,000 passing on a net benefit of Rs.9,500 to DoT. M/s.ARM further informed DoT that the above benefit of ` 9,500 would apply to our synthesized version of 2/15 also..

8. The Director (MMC), Mr.Ujjagar Singh, prepared a note dated 26.04.1993 proposing to procure 2500 systems from the vendors having type approval at the rate of ` 3,45,000 per system (this note was marked Ex. PW-3/K-15) during the trial). The file was transmitted to the Member (Finance) and then to Ms. Runu Ghosh who was the Financial Advisor (FA-V), to secure approval and finance sanction. On 25.05.1993, she wrote a detailed note on the file (Ex. PW-3/K-19) suggesting that an order for 1500 systems should be placed on M/s.ARM which was the only established supplier, order for 500 systems be placed on M/s. Shyam, and an order for 200 systems be placed on M/s. Punwire at the revised unit rate of ` 3,45,000 per system. In response to this note the DDG (PF) commented (Ex. PW-3/K-20) that it was difficult to say what exactly the reduction in price should be as it would depend largely on the quantum of imported inputs. The officer DDG (PF) Mr. U.S. Prasad suggested therefore, that it would be prudent to order only 300 systems on M/s ARM. It was suggested that if there were a fresh open competitive tender there could be a reduction of more than ` 9500/- offered by M/s. ARM. When the file was then sent to Sri Ujjagar Singh he proposed (by note, Ex. PW-3/K-21, dated 31.05.1993) that the price should be negotiated with the lowest

among the bidders who had type approval, as on that date. He suggested the constitution of a Price Negotiation Committee (PNC). On 4th June 1993 a PNC was set up with Sri N.C. Gupta DDG (RN), (Chairman), Sri Ujjagar Singh Director (MMC, Member) and Ms.Runu Ghosh Director (FA-V, Member)..

9. The PNC held its meeting on 10th June 1993. The bidders had been asked to bring with them the break-up of the prices in the form of import component, indigenous component, labour, overhead and financial charges, etc. (These letters CrI.A.Nos. 482/02, 509/02 and 536/02 Page 8 were marked during trial as Ex. PW-3/K-26 to Ex. PW-3/K-28). The bidders were also asked to work out revised prices and present them before the PNC. As a result, M/s. ARM offered to supply up to 500 systems at ` 3,43,500 per system, up to 1000 systems @ ` 3,42,800 per system and up to 1500 systems at ` 3,42,000 per system. The PNC noted that Shri P. Rama Rao did not agree for further reduction in price..

10. It appears that while Sri N.C.Gupta and Sri Ujjagar Singh wanted to incorporate in the minutes of the PNC the proposed reduction in the price of the crystal based version based on a comparison of its features with those of the synthesized version, Ms.Runu Ghosh was of the view that these aspects were not discussed at the meeting but on the other hand, the facts appeared to have been gathered subsequently. She accordingly declined to sign the minutes of the PNC. In the report, marked as Ex.PW 3/K35, the PNC recommended price of ` 3,40,750/- per system together with one duplicate unit each of LNA and Power supply, for synthesized version of 2/15 MARR system. The report observed that crystal based systems were inferior (to the synthesized version) and suffered from serious limitations of delay in dial tone during installation or replacement of RSU unit, which might involve to and fro visits between RSU and BSU, which was not so in the synthesized version. The report also stated that the crystal version did not have the facility of changing subscriber units identification code and therefore needed stocking of comparatively large quantities of spare units and parts for maintenance with added resultant cost. The Committee therefore recommended that crystal version should be bought for a further discounted price. PW-3 Sri N.C.Gupta by a detailed note dated 13th July 1993 proposed (by Ex.PW 3/K39, in the file Ex. PW 3/A) reduction of price by ` 37,170 in case of Crystal Controlled

Systems. For this purpose Mr. N.C. Gupta relied upon the price difference between crystal controlled 1W/4W switchable hand-held VHF FM trans- receiver and 1W/4W switchable hand held VHF FM synthesized trans-receiver, specified in DGS and D Rate Contract. Mr. N.C. Gupta also noted several limitations in case of crystal versions, which made its use- maintenance intensive, and inconvenient. It was observed that in case of the synthesized version, every unit could cater to a number of MARR systems. The note also stated that most of the crystal based systems supplied by that time could soon become spare at the existing locales, on Crl.A.Nos. 482/02, 509/02 and 536/02 Page 9 induction TDMA and CDMA based systems starting from 1994-95 and therefore reuse at other locations would pose serious problems, as regards frequency compatibility. Therefore, purchase of crystal versions even at the reduced price with additional spares was not advantageous to the department especially when the synthesized version with improved facility was available..

11. On the basis of Sri Guptas note, Sri Ujjagar Singh, the other member of the PNC, proposed - by his note dated 19.07.1993 (Ex. PW-3/K-41) that 300 systems of crystal controlled version be procured from M/s ARM at the rate of ` 3,03,750/- each. He proposed that 2200 synthesized version systems be procured at the rate of ` 3,40,750/- each. An order for supply of 500 and 700 synthesized MARR systems was to be placed on M/s Punwire and M/s. Shyam respectively. The balance quantity of 1000 was proposed to be kept in reserve for vendors who might obtain type approval later in the year. Ms. Runu Ghosh did not agree. She wrote a detailed note on the file, on 23.07.1993 (Ex. PW-3/K-42) where she claimed to having discussed the matter with the Sr. DDG (TEC) (Sri S.Muthuswamy) over the phone and that he had confirmed that the crystal based and the synthesized version are not comparable at all. She stated that a letter had been addressed to Sr. DDG (TEC) and that till a reply was received from the TEC, the price reduction of Rs. 34,170 per system worked out on the basis of the rate contract cannot be accepted. Her letter also stated that they should wait for the TEC report before any decision is taken regarding the price at which orders are to be placed..

12. On 26th July 1993 Sri Rakesh Aggarwal, the Director (TR) and the Member of the Technical Group of the TEC, wrote to Ms. Runu Ghosh confirming that the design, concept and application of hand held VHF trans receivers are entirely different from 2/15 MARR and is not proper to compare. (Ex.PW-D2-2). As regards cost comparison between the crystal version with that of the synthesized version, he stated that the TEC did not have any data on costing. However, this depended upon the design, concept and types of components used and is not susceptible to cost comparison as is being attempted. Meanwhile, the file travelled from desk to desk. The Adviser (P) who saw it next agreed with the suggestion of Sri N.C.Gupta that the CrI.A.Nos. 482/02, 509/02 and 536/02 Page 10 price should be reduced by ` 37,170 per system (Ex. PW-3/K-40). The file was sent to the office of Mr. Sukh Ram, who had asked for it, on 23.07.1993. It was returned, since he was pre-occupied with other work, on 02.08.1993 (note exhibited as Ex. PW- 3/K-44). It was requisitioned and submitted to the minister, by Ms. Runu Ghosh, on 05.08.1993 (note exhibited as Ex. PW-3/K-45)..

13. The file was placed before Mr. Sukh Ram, the MoS (C), on 15th August 1993. He noted (Ex. PW-3/K-46) that the case had been unnecessarily delayed and that he would therefore like that the case be decided within a week's time positively. The Member (P) who dealt with the file immediately thereafter recommended (Ex. PW- 3/K-47) that: since the case is already delayed too much, we should try to order the full quantity of the tenders keeping as to small quantities for educational orders so that the targets for opening LDPT is...not delayed any further. After that note, several suggestions as to how the orders were to be split were given by various officers (Sri Ujjagar Singh, on 17.08.1993, Ex. PW-3/K-48; proposing a total financial implication of Rs.81.03 crores; on 23rd August 1993, he reiterated the above figures in note Ex. PW-3/K-54). He suggested that the price for the synthesized version worked out to ` 3,35,639/-. U.S. Prasad, DDG (PF) in his note of 25th August 2003 (Ex. PW-3/K-58) indicated that the price of the crystal version should be ` 3,35,639 - ` 37,170 = ` 2,98,469 per system. The file was then placed before the MoS(C) Sri Sukh Ram on 31st August 1993. He recorded a detailed note (Ex. PW- 3/K-60) and directed that an order for 900 synthesized systems be placed on M/s Shyam, 900 (300 crystal+600 synthesized) on M/s. ARM, 250 on M/s Punwire and 450 on M/s Natelco. The note further concurred with the rest of

the proposals..

14. An APO dated 2nd September 1993 was issued to M/s. ARM (Ex. PW-3/K-67). This was for the supply of 300 crystal version units at the unit price of ` 2,98,469/- and 600 synthesized version units at the unit price of ` 3,35,639/-. It was indicated in the letter that the APO was likely to be converted into detailed purchase order (PO) after your acceptance of the APO and a bank guarantee of ` 1,45,46,205 (5% of the total value of the PO). M/s. ARM wrote a letter on 9th September 1993 (Ex. PW- 3/K-98) forwarding the bank guarantee for supply of 600 synthesized version systems Crl.A.Nos. 482/02, 509/02 and 536/02 Page 11 and assured that the supply of those systems would be completed by the end of December 1993. But in regard to the crystal systems, M/s. ARM protested, saying that: price agreed upon during the PNC meeting, held on, 10.06.93 has not been given and, on the contrary, we have been asked to supply Tx/Rx cards and one subscriber radio equipment, worth about Rs. 30,000/- as additional spare units. The DoT, however, did not agree. By its letter dated 17th September 1993 (Ex. PW- 3/K-102) it informed M/s. ARM to give a clear acceptance of the APO within the time frame indicated otherwise it would reserve the right to procure the item of the synthesized version from any of the sources available to DoT. On 20th September 1993 M/s. ARM wrote to the DoT (Ex. PW-3/K-100) furnishing a bank guarantee for 300 crystal systems for the reduced price..

15. On 11.09.1993 M/s. ARM made a detailed representation to the Minister, Mr. Sukh Ram (Ex. PW-3/K-76) requesting amendments to the APO as regards (a) enhancement of quantity of order for crystal controlled version of 2/15 from 300 to 450 systems; (b) 2) equalization of price of crystal version with that of the synthesized version; (c) Since requirement of spares was not spelt out in the NIT it was to be deleted; (d) Treatment of sales tax, as excluded from the basic price of the system and be treated extra as other statutory levies like excise duty. On the representation of 11.09.1993 the MoS (C) Mr. Sukh Ram, made the following noting (Ex. PW-3/K-77) by hand: How are we offering two rates against the same tenders since we have taken both crystal and synthesized at the same price earlier. Has TEC examined this issue?.

16. M/s. ARMs representation dated 11.09.1993 was then sent for comments to Sri Ujjagar Singh, Director (MMC). He prepared a note dated 04.10.1993 (Ex.PW-3/79) drawing attention to the previous discussion on the file, vis--vis price differential between the two versions, and also stating that the vendor (ARM) had communicated its acceptance and furnished a bank guarantee. This was marked to higher officials, and later, when he received it again, on 15.11.1993, he made a detailed note (Ex. PW-3/K-85) agreeing to the adjustment of the quantities as 450 Crl.A.Nos. 482/02, 509/02 and 536/02 Page 12 each of the crystal and synthesized versions. As regards the price difference, he again referred to the note of Sri N.C.Gupta, which indicated the basis for the reduction in price. Thereafter the file was placed before the Mr. Sukh Ram on 19th November 1993. He wrote a note (Ex. PW-3/K-86) explaining that the price difference was on account of the difference between crystal and synthesized versions of the hand-held VHF trans-receivers but that the TEC (Sri Rakesh Aggarwal) had mentioned that (in the note, exhibited as Ex. PW-4/DZ2 dated 26-07-1993) these trans-receivers are completely different from our 2/15 MARR systems in respect of design, concept and even application. After giving the reasons why the price for the crystal version should not be reduced, the MoS (C) noted that It would therefore be manifestly unjust to arbitrarily reduce the price of the crystal controlled systems of M/s. ARM. He directed that a suitable amendment to be issued, as follows: to the effect that the price of the crystal version of the 2/15 systems should be equal to that of the synthesized version, as in the earlier purchase orders..

17. The file was dealt with on 06.12.1993. Further to Mr. Sukh Rams note, Sri U.S. Prasad DDG (PF) in his note dated 09.12.1993 (Ex. PW-3/K-87) suggested that a legal opinion be called for to confirm whether the offer of a rate lower than that negotiated would be discriminatory. Para 6 of the note agreed with the MOSs view, saying that: the reduction worked out on the basis of the difference in the price of crystal and synthesised version of hand held VHF trans-receivers may not, therefore, be correct. The note, however suggested that in view of the perceived inferiority of the crystal version it would be necessary to make suitable adjustment in the prices though crystal controlled 2/15 MARR systems of M/s. ARM were stated to fully meet DoT specifications and these systems are working

satisfactorily in the field. The note also suggested that the Chief/Sr. Cost Accounts Officer of the Ministry of Finance assisted by a representative of the Member (Services) and/or Member (Technology) should undertake a quick study of the relative merits of the 2 sets as well as their costs..

18. The matter was again placed before the MoS (C), Mr. Sukh Ram who on 13.12.1993 reiterated (by note Ex. PW-3/K-89) his earlier view. He pointed out that in CrI.A.Nos. 482/02, 509/02 and 536/02 Page 13 view of the observations of the TEC, the basic premises for cost reduction for crystal versions were wrong and we should not persistently repeat that a crystal version is inferior and therefore, its cost should be less than that of synthesised version. He further wrote that the "perceived inferiority" was merely a matter of opinion of one or two officers and unsubstantiated by any comparative data in the actual working of crystal and synthesized version in the field. This note also stated that since the same tender was being operated, and that since the previous procurement did not make any differentiation in the price of the two products, price differentiation, now would be arbitrary. He declined to reconsider his earlier decision and ordered that the amendment should be issued at the earliest..

19. The file reveals that Sri N. Vittal, Chairman of the Telecom Commission called Sri S. Muthuswamy, Senior DDG (TEC) for a discussion vis--vis the technical aspects of the two versions. In his note dated 29.12.1993 (Ex. PW-3/K-91) Sri. Vittal stated that as a result of this discussion, in terms of output of performance, the two products were comparable. Sri Vittal again discussed the matter with the MoS (C) and wrote a note on 12.01.1994 (Ex. PW-3/K-93) stating: Discussed with the MOS(C), I brought to his notice that there could be a difference of view that because technically the crystal and the synthesized version are different, there has to be price differential. MOS(C) clarified that he has gone into the issue thoroughly and he was convinced that there has been certain degree of injustice done to the ARM and in view of specific orders given in his note of 13th Dec, 93, action for immediately implementing his orders may be taken..

20. A two and a half years later, based on information, the Anti Corruption Unit-IV of CBI registered a case i.e. RC 3(A)/96/ACU-IV under Section 120 B IPC and

Sections 13(1)(d) read with Section 13(2) PCA on 8th August 1996 alleging that Mr. Sukh Ram had in his capacity as MoS (C) and Ms. Runu Ghosh in her capacity as Director (FA- V), being public servants, acted in conspiracy between themselves and with M/s ARM and by corrupt and illegal means or by abusing their position as public servants caused pecuniary advantage either to M/s. ARM and/or to themselves..

21. After conclusion of the investigation, a charge sheet was filed before the Trial Court on 01.03.1997; after hearing the parties submission, the Court framed charges CrI.A.Nos. 482/02, 509/02 and 536/02 Page 14 against the three Appellants, on 20.05.1998. The Appellants pleaded not guilty, and claimed trial. During the trial, the CBI relied on the testimony of 21 prosecution witnesses, besides contents of several exhibits. After replying to queries posed by the Court under Section 313, Cr. P.C, the defence relied on the testimony of four witnesses, and also produced exhibits. By the impugned judgment and order, the Trial Court held the Appellants guilty of the offences in the manner described above. The Court held that the entire conspectus of circumstances proved that the Tender Notice had clearly indicated that the preferred product of procurement was the synthesized version, which despite availability, was not sought to be purchased. Though the order placed for the first 500 included some versions of the crystal type, by the time the rest of the order could in fact materialize, the Department had the option to procure the preferred technology. Ms. Runu Ghosh's notes questioning the action of senior officers in regard to the costing of the crystal version, despite overwhelming opinion of all officials with technical expertise, her correspondence with ARM, the manner in which she advocated its cause, and the recovery of ARMs signed and blank letterheads from her official desk, proved her prominent role in the ultimate price reduction ordered by Mr. Sukh Ram, in November, 1993. As regards Mr. Sukh Ram, the Court, after considering all the notings, and in particular his observations on 15.08.1993 and 31.08.1993, held that after approving the price reduction in respect of ARMs crystal version of the product, no fresh material surfaced, which could have reasonably enabled him to reverse the decision, later in November 1993, directing cost reduction. It was held that in fact ARM had accepted the offer, and after initially hesitating to furnish a bank guarantee, complied with that procedure; Mr. Sukh Ram could not claim

ignorance of these facts, since he had gone through the entire file before he took the decision, directing price reduction, which directly benefitted ARM. The role of Mr. Rama Rao, was held to have been proved as that of a conspirator, complicit in the fact that his concern, ARM was the sole beneficiary of the price revision order by Mr. Sukh Ram. The price revision caused loss to the public exchequer, as substantial amounts were paid to ARM, which ought not to have been paid in the first instance. Mr. Rama Rao was held guilty as a conspirator, it was for the benefit of his company (ARM) that the price equalization was directed on a Crl.A.Nos. 482/02, 509/02 and 536/02 Page 15 review, after receipt of his representation. Provisions of the Prevention of Corruption Act, 1988.

22. The 1988 Act repealed the pre-existing law. Section 2 contains definitions including the expressions "public duty" and "public servant". Section 7 criminalizes the acceptance of gratification by a public servant, from any person, for himself or for any other person, (other than legal remuneration), as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person or for rendering or attempting to render any service or disservice to any person, and makes the offences punishable with imprisonment, which is not less than six months but which may extend to five years and with fine. Section 8 criminalizes the taking of such gratification as a motive or reward for inducing, by corrupt or illegal means, any public servant, whether named or otherwise, to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favour or disfavour to any person, or to render or attempt to render any service or disservice to any person with the Central Government etc, and renders it punishable. Section 9 renders illegal the act of taking or agreeing to take gratification for inducing, by the exercise of personal influence, any public servant to do any of the things mentioned in the previous things, and makes such acts or omission, punishable. Section 10 punishes the crime of abetment by anyone, of the offences in Sections 8 or.

9. Section 13, which is material for the purposes of this judgment, reads as follows: "13. Criminal misconduct by a public servant.--(1) A public servant is said to commit the offence of criminal misconduct,-- (a) if he habitually accepts or

obtains or agrees to accept or attempts to obtain from any person for himself or for any other person any gratification other than legal remuneration as a motive or reward such as is mentioned in Section 7; or (b) if he habitually accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person, any valuable thing without consideration or for a consideration which he knows to be inadequate from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by him, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any CrI.A.Nos. 482/02, 509/02 and 536/02 Page 16 person whom he knows to be interested in or related to the person so concerned; or (c) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do; or (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) if he or any person on his behalf, is in possession or has, at any time during the period of his office, been in possession for which the public servant cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income. Explanation.--For the purposes of this section, known sources of income means income received from any lawful source and such receipt has been intimated in accordance with the provisions of any law, rules or orders for the time being applicable to a public servant. (2) Any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall be not less than one year but which may extend to seven years and shall also be liable to fine. Appellants' arguments.

23. Mr. R. Gandhi, Senior Advocate, argued on behalf of the Appellant Mr. Rama Rao; Mr. Satish Tamta, Advocate argued on behalf of the Appellant Ms. Runu Ghosh, and Mr. Arvind Nigam, Senior Advocate, appeared and argued Mr. Sukh Rams appeal. Mr. P.P. Malhotra, the learned Additional Solicitor General for the Union argued on behalf of the CBI, the prosecuting agency..

24. The first common argument on behalf of all the Appellants was that the charges framed against each of them were rolled up, and nowhere adverted to the specific offence under Section 13 (1) (d) (iii). It was submitted that even the essential ingredient of the offence, i.e. a public servant obtaining for someone a valuable thing, contrary to public interest, was missing from the charges. In these circumstances, stated counsel, the conviction of Mr. Sukh Ram and Ms. Runu Ghosh was not sustainable. Elaborating on this, counsel urged that the charge framed was that the public servants acted against the advice of the officials, resulting in pecuniary CrI.A.Nos. 482/02, 509/02 and 536/02 Page 17 advantage to the extent of ` 1.68 crores to ARM. The charge nowhere reflected the elements of obtaining pecuniary advantage, to a third party without public interest. The omission of these from the charges framed, prejudiced the trial, and consequently, urged counsel, the impugned judgment was liable to be set aside. Reliance was placed on judgment in Nanak Chand v State of Punjab AIR 1955.

274. The omission to state the necessary ingredients and the supporting facts, in the submission of counsel, contravened Sections 212 and 213, Cr. P.C, which were incurable. Relying on the decision reported as Chittaranjan Das v State of WB AIR 1963 SC 1696, it was urged the trial and conviction were vitiated..

25. It was argued next, by counsel for all the Appellants that mens rea, or criminal intent, has to be construed as an integral part of Section 13 (1) (d) (iii). In support of the submission, it was urged that mens rea is implicit in the entire provision, as is evident from the use of expressions such as "habitual acceptance" of "gratification" (Section 13 (1) (a)); "habitual acceptance" of something for inadequate consideration knowing that to be so "in any proceeding or in connection with any official act of the public servant (Section 13 (1) (b)); or if the public servant dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant (Section 13 (1) (c)); or if the public servant, by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage (Section 13 (1) (d) (i)); or the abuse of position as a public servant resulting in his obtaining for himself or for any other person any valuable thing or pecuniary advantage.. Elaborating, it was urged that each offence under Section

13 (1) was designed to address a certain kind of behaviour, i.e. acceptance of gratification (for himself or for someone else); acceptance of something for inadequate consideration, with a view to secure advantage, in the course of doing something official; conversion of property entrusted to the public servant, in that capacity; using "corrupt" means to "obtain" valuable thing or pecuniary advantage, either for himself or someone else; "abuse" of office as public servant, to obtain a valuable thing or pecuniary advantage. Like in the case of the other offences under Section 13 (1) (d), the offence under Section 13 (1) (d) (iii) required the prosecution to prove that the accused had "obtained" for someone, a CrI.A.Nos. 482/02, 509/02 and 536/02 Page 18 "valuable thing" or "pecuniary advantage" "without public interest". Each necessary ingredient "obtaining" and "without public interest" implied that the accused had to possess criminal intent..

26. Counsel placed strong reliance on the following passage in the decision reported as *M. Narayanan Nambiar v. State of Kerala*, 1963 Supp (2) SCR 724: "10. A decision of the Judicial Committee in *Francis Hart Dyke (Appellant) and Henry William Elliott, and the owners of the steamtug or Vessel Gauntlet*'.

1. cited by the learned counsel as an aid for construction neatly states the principle and therefore may be extracted: Lord Justice James speaking for the Board observes at p. 19: No doubt all penal Statutes are to be construed strictly, that is to say, the Court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip, that there has been a *casus omissus*, that the thing is so clearly within the mischief that it must have been intended to be included if thought of. On the other hand, the person charged has a right to say that the thing charged although within the words, is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair common sense meaning of the language used, and the Court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument. In our view this passage, if we may say so, restates the rule of construction of a penal provision from a correct perspective. As we will presently show the case of the

appellant on the facts found clearly falls not only within the words of clause (d) but also within its spirit. Indeed if his argument be accepted not only we will be doing violence to the language but also to the spirit of the enactment. First taking the phraseology used in the clause, the case of a public servant causing wrongful loss to the Government by benefiting a third party squarely falls within it. Let us look at the clause by otherwise abusing the position of a public servant, for the argument mainly turns upon the said clause. The phraseology is very comprehensive. It covers acts done otherwise than by corrupt or illegal means by an officer abusing his position. The gist of the offence under this clause is, that a public officer abusing his position as a public servant obtains for himself or for any other person any valuable thing or pecuniary advantage. Abuse means misuse i.e. using his position for something for which it is not intended. That abuse may be by corrupt or illegal means or otherwise than those means. The word otherwise has wide connotation and if no limitation is placed on it, the words corrupt, illegal, and otherwise mentioned in the clause become surplusage, for on that construction every abuse of position is gathered by the clause. So some limitation will have to be put on that word and that limitation CrI.A.Nos. 482/02, 509/02 and 536/02 Page 19 is that it takes colour from the preceding words along with which it appears in the clause, that is to say something savouring of dishonest act on his part..

27. It was submitted that the consistent approach of the courts, while interpreting the Prevention of Corruption Act, 1947 as well as the 1988 Act, has been to insist that the prosecution should establish the requisite mental intent on the part of the accused and further that such preconditions are to be read as essential ingredients in every penal statute. Reliance was placed on the judgements reported as *Soma Chakravarthy v State* 2007 (5) SCC.

403. Similarly, the decision in *Ram Krishan v. State of Delhi*, 1956 SCR 182 to the following effect, is relied upon: We have primarily to look at the language employed and give effect to it. One class of cases might arise where corrupt or illegal means are adopted or pursued by the public servant to gain for himself a pecuniary advantage. The word obtains, on which much stress was laid does not eliminate the idea of acceptance of what is given or offered to be given, though it connotes also an element of effort on the part of the receiver. One may accept

money that is offered, or solicit payment of a bribe, or extort the bribe by threat or coercion; in each case, he obtains a pecuniary advantage by abusing his position as a public servant. The word obtains is used in Sections 161 and 165 of the Penal Code. The other words corrupt or illegal means find place in Section.

162. Apart from corrupt and illegal means, we have also the words or by otherwise abusing his position as a public servant. If a man obtains a pecuniary advantage by the abuse of his position, he will be guilty under sub- clause (d). Sections 161, 162 and 163 refer to a motive or a reward for doing or forbearing to do something, showing favour or disfavour to any person, or for inducing such conduct by the exercise of personal influence. It is not necessary for an offence under clause (d) to prove all this. It is enough if by abusing his position as a public servant a man obtains for himself any pecuniary advantage, entirely irrespective of motive or reward for showing favour or disfavour. To a certain extent the ingredients of the two offences are common, no doubt..

28. Reliance was particularly placed on the following observations in Major S.K. Kale v. State of Maharashtra, (1977) 2 SCC 394, to say that the burden lay upon the prosecution to prove dishonest or criminal intent, of the accused, in acting in the alleged manner, in securing an advantage or "obtaining" it for someone: ..it was for the prosecution to prove affirmatively that the appellant by corrupt or illegal means or by abusing his position obtained any pecuniary advantage for some other person. In view of the clear defence taken by the appellant it is obvious that it was for the prosecution to prove that the accused made no CrI.A.Nos. 482/02, 509/02 and 536/02 Page 20 enquiries, that the accused made a departure from the normal procedure with oblique motive, and that the accused knew that PW 2 would make a profit of 45 per cent whereas others would be satisfied with a profit of 10-15 per cent. The High Court, to begin with, started with the presumption that the accused led no evidence to show that he made any enquiries. Again, the decision in S.P. Bhatnagar v. State of Maharashtra, (1979) 1 SCC 535 that the court has to see whether the accused abused their position and acted dishonestly or with a corrupt or oblique motive was pressed into service. Other decisions in Abdulla Mohammed Pagarkar v State 1980 (3) SCC 110; A. Wati Ao v State of Manipur 1995 (6) SCC 488; C.K. Damodaran Nair v Govt of India 1996 (9) SCC

477; M. Mohiuddin v State of Maharashtra 1995 (3) SCC 567 and R. Balakrishna Pillai v State of Kerala 2003 (9) SCC 700 (to the effect that the offence requires intention, and the element of mental state would be necessary to do a conscious act to get the required result of pecuniary advantage or to obtain any valuable thing, even if it is for someone else..) were also relied on in support of the argument that the Court has to be satisfied about proof of criminal intent..

29. It was submitted that for more than five decades, the law in India has been consistent in that penal statutes are always to be construed in favour of the citizen to make unlawful acts which are done or performed with intention, or the requisite mens rea. Learned counsel relied on the decision reported as State of Maharashtra v. Mayer Hans George AIR 1965 SC 722 and R.S. Joshi, Sales Tax Officer, Gujarat v. Ajit Mills Limited (1977) 4 SCC 98..

30. It was submitted, on behalf of Mr. Sukh Ram and Ms. Runu Ghosh, that the prosecution in the present case was unable to prove any of the charges, pertaining to the offences embodied in Section 13 (1)(d), i.e. of obtaining through "corrupt or illegal means" or by "abuse" of office, or "obtaining" for someone else, a valuable thing, or pecuniary advantage, with loss to public interest. Counsel submitted that the prosecution in this case did not prove that the crystal version, procurement of which was approved, - a fact not disputed- either caused pecuniary advantage of such a kind to ARM as to make the said two Appellants criminally responsible, nor loss to public interest. In this context, it was submitted that often public servants, including officers and ministers, are called upon to take decisions which are not popular, or are Crl.A.Nos. 482/02, 509/02 and 536/02 Page 21 unpalatable. Such decisions cannot ipso facto result in prosecution, unless the mental element of dishonesty, to cause advantage (of an unwarranted variety) to another, and loss to the public interest is proved. Counsel relied on the following observations of the Supreme Court in Tarlochan Dev Sharma v. State of Punjab, (2001) 6 SCC 260: An honest though erroneous exercise of power or an indecision is not an abuse of power. A decision, action or instruction may be inconvenient or unpalatable to the person affected but it would not be an abuse of power. It must be such an abuse of power which would render a Councillor unworthy of holding the office of President..

31. It was argued on behalf of all the Appellants that the Trial Court fell into grave error in holding that DoT specifications mandated purchase of the synthesized version of the tendered product. It was pointed out that the procurement of the initial 500 pieces of the said product was in respect of the crystal version. At the time, only ARM had type approval for the product (in that version). No other manufacturer had type approval for any version of the product. It was argued that this undermines the finding that the crystal version of the VHF hand receivers were inferior and lower priced. The placing of three purchase orders in December 1992, upon ARM and the other two vendors in fact showed that the crystal version was acceptable, and answered the technical as well as commercial specifications published, for the item, by the DoT. All the counsel for Appellants argued that prosecution witnesses did not, despite searching and pointed cross examination, deny that the crystal version, in all respects as regards functionality and technical specifications, measured up to the Tender requirements, and that no objections or questions were asked from those who had recommended its purchase..

32. It was submitted that ARMs offer to reduce the price for the future supplies, (through Ex. PW-3/K14) made after the budget announcement for 1993-94 and the resulting customs duty reduction, triggered the second round of consultations. Counsel submitted that the relevant file notings, dated 26.04.1993 (Ex.PW-31 K-15) Ex. PW- 3/K-19 dated 25-05-1993 (Ex.PW-3/K-19) and note of the DDG (PF) (Ex. PW-3/K- 20) expressing difficulty in fixing the reduction in price as it depended on the quantum of imported items, and therefore suggesting, that it would be prudent to order only 300 systems on M/s ARM, all had to be seen in perspective. The same note suggested that CrI.A.Nos. 482/02, 509/02 and 536/02 Page 22 if there was a fresh open competitive tender there could be a further reduction of more than ` 9500/- offered by M/s. ARM. On the other hand, PW-3 proposed (Ex. PW-3/K- 21, dated 31.05.1993) that the price should be negotiated with the lowest among the bidders who had type approval as on that date, and constitution of a PNC. These revealed extensive consultations in the light of new developments and the possibility of favourably using them to benefit the procuring department. It was pointed out that the letter to the bidders was issued on 07.06.1993 (Ext. PW3/K-26). PW-4 N.C. Gupta stated in his cross-examination that the PNC met once before actual negotiation; however that is not borne out by

the record. The decision on the file by higher authorities was to negotiate only with M/s ARM who was the lowest bidder. The decision to call 3 bidders was taken only by Sri N.C. Gupta and Sri Ujjagar Singh. It was further argued that there was no discussion about crystal and synthesized versions in the PNC (which was indeed outside their terms of reference) as pointed out in Ms. Ghosh's penciled note sent to Sri N.C. Gupta. At no stage, in the file was this observation contradicted by Sri. N.C. Gupta, or PW-3 Sri Ujjagar Singh. It was urged that the PNC was not competent to say which version was better - in fact that was outside their terms of reference..

33. Counsel for Mr. Sukh Ram and Ms. Runu Ghosh argued that the T.E.C had drawn up specifications and issued type approval for both crystal and synthesized versions, and that without type approval no one could supply any equipment to the DoT. Further, submitted counsel, the extensive cross examination of prosecution witnesses PW-4 and PW-15 established that in crucial material particulars, there was no difference between the crystal and synthesized versions so far as specifications and functioning of the two products were concerned except that one used crystal Oscillators and the other synthesized Oscillators. As the DoT was still operating against the same tender (which said that the synthesized version was preferable, but against which orders for both versions were placed at the same rate) any arbitrary distinction between the two might have triggered court cases against the Government. Even the synthesized version did not match up to all the specifications. The letter of Sri Rakesh Aggarwal dated 26.07.1993, in reply to Ms. Ghosh's letter dated 20th July CrI.A.Nos. 482/02, 509/02 and 536/02 Page 23 1993) also stated that it would be improper to compare different versions of the same equipment when they all meet the specifications but had optional features. It was submitted that the PNC should have confined itself to price reduction on account of reduction of import duty on foreign components. Any change in the technical specifications was not within their purview but within that of T.E.C. (Telecom Engineering Centre). In these circumstances, Ms. Runu Ghosh acted within her rights in noting this, in the file on 18.06.1993 (Ex. PW-3/K-36)..

34. Counsel for Mr. Sukh Ram and Ms. Runu Ghosh argued that the so-called superiority of the synthesized version was an unverified assertion which the Trial

Court accepted without proper independent evidence. In this regard, the findings of the Trial Court based largely on the testimony of PW-4 Sri N.C. Gupta, were untenable. Counsel emphasized that the witness had never worked with the TEC, and was unaware about the nuances of the equipment sought to be procured. He admitted that the reports about the performance of the crystal system were available; yet the prosecution did not produce them; the so called limitations he deposed about, though documented were not brought on record. Having no experience about the working of either of the two systems, PW-4 could not claim that the synthesized version was superior, especially when the record established that both the crystal and the synthesized version were procured together, in the first lot, under the same tender. It was highlighted that when the orders for the first lot were placed, no deficiency or defect, or variation between the conditions of NIT was noticed or felt, and everyone in the DoT - including PW-3 Sri Ujjagar Singh, as well as PW-4 Sri N.C. Gupta - were satisfied on due consideration of all materials that the order for the crystal version complied with the requirements. In the light of these facts, there was no occasion for anyone to re-visit the issue, and the only reason for fresh thinking was because of the price reduction offered by ARM on account of customs duty relief announced in the new Budget..

35. It was also urged that neither the PNC terms, nor the intimation to manufacturers, inviting them to meet the PNC, in June, 1993, indicated that the members would consider the relative technical merits or even the pricing of the two products. No prosecution witness indicated that there was any discussion about the CrI.A.Nos. 482/02, 509/02 and 536/02 Page 24 technical reasons for superiority of the synthesized technology, as compared with the crystal version. On the other hand, submitted counsel, Sri Rakesh Agarwal and Sri Muthuswamy were not examined, to establish the superiority of the synthesized version over the crystal version. What the court had before it, was the evidence of DW-2, who categorically asserted that the two technologies were comparable. Counsel also highlighted that the record further proved - contrary to findings and the prosecution version- that the crystal version units supplied by ARM had been working satisfactorily (Ex.PW-4/DB of Sri. Biswas). It was further argued that all the alleged of superiority in the technology were based on assertions made by manufacturers who were ARMs rivals, and admitted to in terms of PW-4s deposition, during

cross- examination. The prosecution did not lead any independent experts evidence on this score..

36. It was contended that apart from the lack of evidence to prove that the crystal version was technically inferior to the synthesized version, the Trial Court also erred in holding that the price difference sought to be obliterated through Ms. Runu Ghosh's recommendation, and Mr. Sukh Ram's directions were not justified. It was submitted that the DoT had placed an order for 500 out of the 3000 pieces which were the subject matter of the same tender, and for both technologies, at the same rate, in December, 1992, the change in pricing was not justified. Though Ms. Runu Ghosh had brought out this aspect, and insisted that fresh costing was not the domain of the PNC, and for such exercise, the concerned agencies including the TEC had to be involved, no such action was taken. PW-3, Sri Ujjagar Singh, the concerned DDG (MM) took upon himself unilaterally the task of recommending the move, which was performed by Sri N. C. Gupta. The latter, who testified as PW-4 conducted the whole exercise without any consultations, and without authorization or approval of the competent authorities. In this context, the letter of Sri Rakesh Agarwal (Ex. PW- 4/DZ-2) dated 26th July 1993 proved that both technologies were not comparable, and costing was a complex task, not to be lightly undertaken. The prosecution did not establish that the costing exercise undertaken by PW-4 was based on established procedure, and after applying known and tested methodology. In fact PW-4 admitted to not possessing any special knowledge of accounts to be able to claim expertise in CrI.A.Nos. 482/02, 509/02 and 536/02 Page 25 costing..

37. Impeaching the credibility of PW-4 on other issues, it was submitted that his experience was limited to seeing the crystal version at few places. He could only mention, generally about some alleged design limitations of the crystal version. If that were really the position, he could not explain why the crystal version passed muster, when the first order was placed on ARM in December 1992, for 500 pieces. Furthermore, argued counsel, the witness admitted ignorance about the procedures and manuals governing the question of equipment testing and procurement procedures applicable to the DoT..

38. Counsel urged that after ARM offered reduction in price, and the file was sent to Ms. Runu Ghosh, she proposed award of contract for 1500 units to the concern (by note 37/N, Ex. PW-3/K-19, on 25.05.1993). When the file went to PW-3, Sri Ujjagar Singh, he merely mentioned about the need to have a PNC, and nowhere discussed the so called inferiority of the crystal technology or the need for further price reduction of that product, in Ex. PW-3/K-21. The understanding at that stage was to award the bulk of the order to ARM, as reflected in the note of Sri U.S. Naik, (Ex. PW-3/K-24) that 1000 units should be procured from that concern. In the light of these, the potential vendors, i.e ARM, Punwire and Shyam, were given letters/ notices to make their offers, which were produced during the trial as Ex. PW-3/K-26, Ex. PW-3/K-27 and Ex. PW-3/K-28..

39. The Trial Courts findings were faulted by Sri Satish Tamta, (for Ms. Runu Ghosh) who argued that she was under no obligation to suggest some other method to calculate the price difference. It was urged that since TEC was the technical authority which had issued type approval for both equipments, it would have been as wrong on her part to act as PW-4, in calculating a new price for any version on her own on the basis of technical aspects. It was submitted that she did not oppose the reduction of price for the crystal version, but merely stated that the best course would be to wait for the TEC report regarding justification for Sri N.C.Guptas price reduction. It was also urged that the Trial Court held that she should not have written to an officer of another department i.e., Sr. DDG TEC. But Telecom Engineering Centre was very much part of Telecom Directorate (it still is) and while examining a case in her capacity as Crl.A.Nos. 482/02, 509/02 and 536/02 Page 26 finance officer she was within her rights to gather relevant inputs from any branch in the Directorate or even field units before putting up the case to her superior. This was the common practice in DoT and still is in BSNL. It was also argued that Ms. Runu Ghoshs note of 23.07.1993, therefore, reflected her bona fide and honest opinion regarding the advisability of pricing the crystal version lower than the synthesized version..

40. It is urged that the Trial Courts finding that Ms. Runu Ghosh held on to the file for two days till it was submitted by her to MOS (C) on 05.08.1993, since she did not want to take the risk of her superior overruling her, is not justified. It is urged

that if she sent it directly to MOS(C), the Minister could not have taken a decision based only on that note without involving her superiors i.e., not only the DDG(PF) but also member (F), Member (P) and Chairman Telecom Commission. In fact, Mr. Sukh Ram took no cognizance of her note at all. Similarly, it was argued that the Trial Court held that there was no explanation how ARM, (a Hyderabad based firm) would have known within one or two days that the file was with Ms. Runu Ghosh and therefore, addressed a letter to her, without communication from her, by speed post. But all firms based outside Delhi had local officers in Delhi who used to chase the file. In this context, it was urged that PW-3s note of 17.8.1993 proposed for orders on Natelco saying they had the synthesized version, whereas Natelcos letter to MOS (C) informing the DoT regarding type approval has been marked by M(P) to DDG (1) on 16.08.1993. It, was therefore, not possible for the letter to have reached Mr. Ujjagar Singh on 17.08.1993 when he wrote the note. Therefore, urged counsel, the letter must have been hand delivered or faxed, as was apparently the practice. In the circumstances, the Court ought not to have held that Ms. Ghosh wrote notes unilaterally based on letters written directly to her, by ARM..

41. Ms. Runu Ghosh challenged the Trial Courts finding that it is not borne out that the synthesized version of ARM had some additional features since Rakesh Aggarwal did not specifically say so. He deposed that each system (including ARMs Synthesized version) might have additional features not covered by specifications; in her letter to TEC. Ms. Ghosh had asked about additional features in synthesized Crl.A.Nos. 482/02, 509/02 and 536/02 Page 27 versions of all bidders, not only of ARM. There was no independent assertion by her that M/s ARMs synthesized version had additional features; she repeated the information given by TEC. The issue she discussed was whether price reduction was justified on account of additional features in equipment supplied by any bidder..

42. It was argued that the mere fact that M/s Punwires letter claimed that special features existed, in their version, as in the case of Shyam, could not mean that these features proved superiority of those products. These aspects were not gone into by the Trial Court and on the other hand, without any factual material, it held that these aspects were discussed in the PNC. It was submitted that Ms. Ghoshs

note 37/N (Ex. PW-3/ K-42) was well reasoned that the 1500 systems (recommended for ARM) was on account of (a) Sales Tax which is 2% and (b) M/s ARMs capacity. She did not recommend on the basis of M/s ARMs offer to bear Liquidated Damages, for supplies made beyond the stipulated or agreed date. She recommended that the saving in the event of ARM being given the quantity of 1500 units, was to the extent of `10.17 crores..

43. It was urged that so far as Mr. Sukh Ram was concerned, he assumed charge as Minister only on 18.01.1993, after the decision to award the first lot of 500 units (out of the originally tendered 3000 units) had been taken, and after even orders were placed in December, 1992. Being in charge of the department, and concerned with the issue of expanding communications and telephone connectivity, he was anxious that bureaucratic delays and tangles were resolved, and the vast masses of the rural population had access to telephones. Since the issue of 3000 systems had been hanging fire for a long time, he had called for the file sometime in July; due to other pre-occupations, he could not look into it and apply his mind; the file therefore was returned. On his directions, the file was requisitioned in early August, and he saw the previous notes and discussions and approved the decision of the other officials to place orders, based on the differential pricing initially proposed by Sri. N.C. Gupta. The anguish expressed by Mr. Sukh Ram and his direction calling for speedy action led to the file being put up before him on 25.08.1993 by Member (P) indicating the quantities between various suppliers and the price proposed for crystal/ synthesized Crl.A.Nos. 482/02, 509/02 and 536/02 Page 28 version. By his note (Ex.PW-3/K-60) dated 31.08.1993 Mr. Sukh Ram concurred with the prices suggested in the preceding note. Some minor changes were made by him by way of deducting 200 systems from PUNWIRE and allotting 100 each to M/s Shyam and M/s ARM. Significantly 100 systems were given to ARM of the synthesized version. It was argued that if he had been in conspiracy with ARM, or wanted to confer pecuniary advantage to that firm, he would have allotted all the 200 systems to ARM for the crystal version. He had occasion to consider the file and other documents, after the orders were placed, and in the context of ARMs representation to do away with the discriminatory pricing vis--vis their crystal versions. At the time, Mr. Sukh Ram was unaware and was kept in the dark about the circumstance that the firm had

accepted the offer, and furnished the bank guarantee. Counsel for Mr. Sukh Ram submitted that the handwritten portions in Sri Ujjagar Singhs note of 04.10.1993 Ex.PW-3/K-79 were inserted later, contrary to previous practice. That the learned Judge ought to have appreciated that each circumstance must be established fully and it can be nobodys case that the minister had the knowledge about the factum of bank guarantee through hastily scribbled handwritten lines in a note which was actually never put up to him directly. In fact the note which was finally put up by Sri Ujjagar Singh before Mr. Sukh Ram on 15.11.1993 (65/N, Ex. PW-3/K-85) failed to mention about the fact that ARM furnished the bank guarantee and its acceptance of the reduced price. In this context, exception was taken to the Trial Court finding on the question of the Purchase Order being on record, based on the assumption that Director (MMC) would not have omitted enclosing it Mr. Sukh Rams counsel also argued that the Trial Court erred in relying upon the evidence of Mr. N.Vittal (PW-17) to the effect that he was aware of the furnishing of bank guarantee by ARM. This, it was argued was an improvement over the witnesses statement under Section 161 Cr.P.C. It is also urged that PW-17 did not record in his note dated 28.12.1993 about the fact that the Minister was aware of ARMs bank guarantee. The Court also overlooked the circumstance that in Section 313, Mr. Sukh Ram had stated that Mr. Vittal had deposed against him because he had got Mr. Vittal shifted from the Ministry of Communication on account of his differences. Crl.A.Nos. 482/02, 509/02 and 536/02 Page 29.

44. It was argued that the finding about Mr. Sukh Ram overruling the suggestion by DDG(PF) (68/N - Ex. PW-3/K-87) to request Secretary (Expenditure) to determine the cost of the two versions, was an incriminating circumstance. It was urged that the Telecom Commission enjoyed all financial powers and never before such a reference/request had been made to the Ministry of Finance from the Ministry of Communications. The learned Judge also failed to take note of the fact that 2500 systems had to be inducted in 1993-94 and the suggestion of DDG(PF) to refer the matter to Finance would have resulted in further delay in achieving targets. Much earlier, on 15.08.1993, he (Mr. Sukh Ram) by his note (Ex. PW-3/K-60) expressed anguish over the abnormal delay and had directed that the matter be decided within a weeks time. It was also urged that the Trial Court overlooked an important previous circumstance that while overruling DDG(PF), Mr. Sukh Ram

had noted that DDG(PF) himself had agreed with his observations in the note dated 19.11.1993. DDG(PF) observed in para 6 of his note Ex. PW-3/K-87 as follows: "in case, maintenance of price parity is not considered discriminatory and adjustment on account of difference in performance, etc. is necessary, the question of cost determination would come. As rightly mentioned by Hon'ble MOS (C), the TEC has clearly mentioned that hand-held VHF trans-receivers are completely different from our 2/15 MARR systems in respect of design, concept and even application. Reduction worked out on the basis of difference in the price of crystal and synthesized version of hand held VHF trans- receivers may not, therefore, be correct. However, in view of the observations of Member (Services) and member (Technology) as mentioned in para 4 above, suitable adjustment in the prices on account of the perceived inferiority of the crystal version would appear to be necessary even though crystal controlled 2/15 systems of M/s ARM are stated to fully meet DoT specifications and these systems are working satisfactorily in the field..

45. Sri Nigam urged that Mr. Sukh Ram, while deciding that the crystal version should be purchased at a rate on par with the synthesized version was guided by the report of TEC dated 26.07.1993. The latter was the apex body on matters concerning technology. Mr. Sukh Ram was justified in relying on it for his decision than the opinion of one officer namely N.C. Gupta. It was urged that the opinion of N.C. Gupta in regard to the inferiority of the crystal version was never endorsed by any higher Technical Officer and other officers like Member (P) and Member (F) simply CrI.A.Nos. 482/02, 509/02 and 536/02 Page 30 decided to go along with his view. In fact Mr U.S.Prasad in his cross-examination says that he had to agree with the differential price worked out by Mr. N.C.Gupta in the absence of advice from the Telecom Engineering Centre or any other technical officer as he had no alternative..

46. It was argued that the finding regarding Mr. Sukh Ram having abused his position in conspiracy with the other co-accused, was not even prima facie borne out from a perusal of the record. Being the Minister in charge of communications, Mr. Sukh Ram was responsible for ensuring speedy policy implementation so that rural telephony was assured to the people of the country, as he was accountable

to the Council of Ministers, and Parliament. The decision taken by him, particularly his previous note of 15th August, 1993, directing all in the Department to take speedy action, underlined the urgency that he attached to the task. It was urged that, had he really wished to favor ARM, as was held by the Trial Court, nothing would have been simpler for him, than to have decided on the issue at that stage, since the materials were on record. A great deal of emphasis was placed upon the fact that Mr. Sukh Ram on 31st August 1993, recorded a detailed note (Ex. PW-3/K-60) and directed that an order for 900 systems be placed on Shyam, 900 (300 crystal+600 synthesized) on M/s. ARM, 250 on M/s Punwire and 450 on M/s Natelco. Counsel urged that the note in fact gave a lie to the argument of conspiracy between the three Appellants, i.e. Mr. Sukh Ram, Ms. Runu Ghosh, and Mr. Rama Rao, because it accepted the recommendations in regard to all material details, including the price differential, between the two versions of the product..

47. It was argued that when someone as senior as Sri Vittal, the Chairman of the Telecom Commission (who went on, post-retirement, to head the Central Vigilance Commission) could acknowledge, as he did on 29.12.1993 in the note (Ex. PW-3/K- 91) -after discussing the technical aspects with Sri. Muthuswamy, that in respect of performance output, the two versions were comparable, no exception could be taken if Mr. Sukh Ram in fact decided that ARM could supply crystal versions of the quantity mentioned, for the same price as the synthesized version. It was submitted that the later note dated 12.01.1994 (Ex. PW-3/K-93) of Sri Vittal after he again discussed the matter with Mr. Sukh Ram did not in any way differ from the earlier view. Crl.A.Nos. 482/02, 509/02 and 536/02 Page 31.

48. Counsel for Mr. Sukh Ram argued that the conviction of conspiracy as far as the Appellant is concerned, is totally unjustified. The record and findings reveal that ARM made its representation on 11.09.1993, which he was bound to consider and dispose of. He was unaware, at that stage, that the firm had been asked to furnish the bank guarantee for 5% of the Purchase Order amount; he was also not made aware of it in any specific file noting in that regard. The Trial Courts findings (that Ujjagar Singhs note of 04.10.1993, with the handwritten interpolation pointed to this fact, was not correct; the interpolation was apparently especially for the

purpose of this case) in this regard were unjustified. It was urged that to establish conspiracy, for the purpose of drawing inferences based on Section 10 Evidence Act, the mere circumstance that the act by one would have led to another's benefit (in the context of this case) is insufficient. The prosecution had to establish beyond reasonable doubt that the accused had acted in concert, either through overt or covert acts, in furtherance of a common objective. Counsel relied on the judgment of the Supreme Court reported as *Bhagwan Swarup Lal Bishan Lal v. State of Maharashtra*, (1964) 2 SCR 378 to the effect that there should be prima facie evidence disclosing a reasonable ground for the court to believe that two or more persons were members of a conspiracy; (2) anything said, done or written by any one of them in reference to their common intention could be evidence against the other; (3) anything said, done or written by one should have been said, done or written by him after the intention was formed by any one of them; (4) relevance of the statement implicating one accused, as to whether it was said, done or written before he entered the conspiracy or after he left it; and (5) it can only be used against a co-conspirator and not in his favour. It was argued that even to constitute prima facie material for the court to infer the existence of an agreement between two or more persons, to further a common objective or purpose, the prosecution should provide materials on record which can lead to a strong inference. The theory of agency, which is the underlying principle which ascribes criminality to one for the acts of another, could be inferred either on the basis of unimpeachable direct or circumstantial evidence. Though direct evidence might be hard to come by in most cases, the circumstances should reasonably point to the existence of such prior concert of minds. Counsel relied on the judgments reported as *Crl.A.Nos. 482/02, 509/02 and 536/02* Page 32 *CBI v V.C. Shukla* 1998 (3) SCC 410 and *Firozuddin Basheeruddin v State of Kerala* 2001 (7) SCC 596, to say that the attribution of common objective has to be based on its objective manifestation through acts or omissions. In this case, Ms. Runu Ghosh did no more than anyone else, in placing a note further to the letter written by ARM; the other officers too had received similar letters from other vendors. Counsel submitted that in the noting of 13.05.1993, (Ex. PW-3/K-19) Ms. Runu Ghosh was adopting the established practice of loading the established supplier with the order; here, ARM was the established supplier. Each one of the notes written by her was based on

some rationale, and in the exercise of her responsibilities as Director Finance. Furthermore, nothing was shown during the course of the trial to prove that she flouted established procedures in insisting on TEC evaluation of the merits of the two technologies either for comparison, or for the purpose of price determination. The last time she made any noting or recommendation was on 23.07.1993. The hierarchy had three levels of senior officers, who took the ultimate decision. In these circumstances, there was no reasonable basis even to assume, or charge her for the crime of conspiracy..

49. Mr. Nigam, on behalf of Mr. Sukh Ram, argued that there was no prima facie evidence to reasonably conclude that he acted in furtherance of any conspiracy or common objective with either Ms. Runu Ghosh or Mr. Rama Rao. Counsel argued that the check period in this case, covered March 1993 onwards, when Mr. Sukh Ram was not even in the know of the file. It was submitted that his note of 31.08.1993 established that on the other hand, he concurred with all other officers, on the basis of which the price differential was worked out; in fact his decision formed the basis of the purchase order issued to various vendors. Counsel contested the Trial Courts findings and stated that there was a difference in facts, after that date, through a new development, whereby Mr. Sukh Rams notice was brought for the first time to the price differential, without the requisite awareness that ARM had furnished its bank guarantee, unconditionally accepting the DoT offer. As far as the subsequent decision was concerned, it was urged that the prosecution nowhere proved that the decision did not lie within the domain of Mr. Sukh Rams decision making; it was contended that even the Chairman of the Telecom Commission acknowledged that the question of CrI.A.Nos. 482/02, 509/02 and 536/02 Page 33 price differential and technological superiority there could be two views. Furthermore, there was no material to connect Mr. Sukh Ram with any common objective vis--vis Mr. Rama Rao. Even the letters written to him, were in the official capacity; no meeting between the two co-accused was proved to have taken place, nor was there any other material for the court to reasonably infer existence of a conspiracy. It was urged that if on the basis of such slender material, conviction were to be sustained by this court, it would be well nigh impossible for public officers to act on the basis of their initiative, and fulfil larger social goals. Moreover, every bona fide decision, based on application of mind to

the objective facts, would become the subject of intense criminal investigation, if the decision turns out to be an error of judgment. That would be adverse to the larger public interest. The court would also be lacking in any appropriate standard to judge criminality, if liability were to be attributed to the accused, in the absence of mens rea..

50. Mr. Gandhi, learned counsel for Mr. Rama Rao, urged that there was absolutely no credible material to connect him with any conspiracy, or a crime punishable under Section 13 (1) of the Prevention of Corruption Act. ARM was an established supplier to the DoT; at the relevant time, it was the only concern that had type approval to manufacture and sell the concerned goods. In fact it was ARM which had offered to lower the prices, as a result of the reduction in customs duty after the budget proposals in 1993. Till then, the DoT had placed a composite order for 500 systems, which included the crystal version, on the basis of the same price. The subsequent constitution of the PNC, was pursuant to internal decision making processes of the Government; all vendors who had offered their products, and fulfilled certain criteria, were called for price negotiation. In the price negotiation, held in June, 1993 none of the firms were in fact queried on the superiority of one technology over the other; nor were they told that the entire process would be followed by the DoTs fresh determination of prices, based on perceived comparative merits. Thus, when the Purchase Order was issued in early September, 1993, ARM, for the first time, became aware of this aspect. The Governments insistence that if it did not accept the offer, and furnish a bank guarantee, would result in cancellation of order, and a claim for liquidated damages, left it with no option but to comply. Yet, in exercise of its Crl.A.Nos. 482/02, 509/02 and 536/02 Page 34 legitimate entitlement to seek internal justice, ARM represented to the appropriate authorities and the Minister, eliciting his second look into the matter, and review of the original decision, on 19.11.1993. None of these pointed to any reasonable basis to even lead to suspicion of conspiracy, let alone strong suspicion. Thus, prosecution and conviction of Mr. Rama Rao were contrary to law, and contrary to established principles governing the law of criminal conspiracy, underlying Section 120-B, IPC. Contentions of CBI.

51. The learned ASG, submitted that in contrast to the tenor and language used in Section 11, Sections 13 (1) (a) to (d) and (d) (i), the phraseology used in Section 13 (1) (d) (ii) and (iii) significantly do not mandate mens rea, or criminal intent, for the act to be an offence. It was submitted that these species of criminal misconduct, depended on the proof of the essential ingredient; in the case of Section 13 (1) (d) (ii) it was "abuse" of office; in the case of Section 13 (1) (d) (iii) it was causing loss contrary to public interest; in both cases, it is not necessary to prove that the offender had anything to gain. So long as it was proved that the abuse, or loss to public was to the benefit of someone else, the necessary requirements of the law stand fulfilled. Counsel urged that the plain meaning of the statute has to be given effect to, rather than reading into words that do not exist. Urging that the specific mention of words, indicating intent, or mental state, in the other offences, and their omission in these two provisions, was a pointer to Parliaments awareness that in not all kinds of misbehavior, was it possible to prove such mental state. Yet, the deviant behavior, which these provisions sought to deal with, by criminalizing them, and prescribing punishment, carried with it the odium of prejudice to public interest. Contending that the prosecution is under no obligation to prove what it is not required by law to, the ASG relied on the Constitution Bench judgment in *Ranjit Udeshi v State of Maharashtra* 1965 (1) SCR 65, as well as *State of Maharashtra v Meyer Hans George* 1965 (1) SCR 123, particularly the latter judgment, where the Supreme Court had ruled that though mens rea would be generally understood as a necessary ingredient which the prosecution would have to prove, yet it (mens rea or a mind at fault being the basis of a crime) CrI.A.Nos. 482/02, 509/02 and 536/02 Page 35 ...is not an inflexible rule, and a statute may relate to such a subject matter and may be so framed as to make an act criminal whether there has been any intention to break the law or otherwise to do wrong, or not....

52. Being an enactment meant to stamp out corruption, containing several stringent provisions, including presumptions which the court can draw, as well as curtailing normally available remedies, during the trial, to ensure that the guilty are brought to book, the Act had to be necessarily given a purpose or objective based interpretation, having regard to its express words. The courts cannot adopt a doctrinaire approach, by insisting that proof of intent, where the law does not

mandate it, is required, as that would result in limiting the scope, of the concerned provision, if not altogether defeating it. In a similar vein, reliance was placed on the judgments reported as *Dineshchandra Jamnadas Gandhi v State of Gujarat* 1989 (1) SCC 420 and *Radhey Shyam Khemka v State of Bihar* 1993 (3) SCC 54, *Y.S. Parmar v Sri. Hira Sikkh Paul* 1959 Supp (1) SCR 213 and *Gopaldas Udhavdas Ahuja v Union of India* 2004 (7) SCC.

33. The learned ASG submitted that the statute in the case, at least of a corrupt practice of the kind in hand, does not concern itself with any question of intention..

53. Dealing with the submission about omission to frame charges, it was argued that by virtue of Section 464, Cr.PC, unless the Appellant, or Revisionist, before a higher court, proves that the conviction would result in failure of justice, any irregularity in the framing of charge would not vitiate the trial, so long as the necessary ingredients for the particular offence have been proved, and the accused is in a position to deal with incriminating circumstances. For this proposition, the ASG relied on the judgments reported as *Radha Mohan v State of UP* 2006 (2) SCC 450; *Anil @ Raju v Administration of Daman and Diu* 2006 (13) SCC 36; *Balraje v State of Maharashtra* 2010 (6) SCC 673; *State of Punjab v Harjagdev Singh* 2009 (16) SCC 91 and *Narvinder Singh v State of Punjab* 2011 (1) Supreme.

129. 54. Dealing with the contentions of the Appellant Ms. Runu Ghosh, it was argued that she made every attempt to somehow favour ARM. Counsel pointed out that the two blank signed letterheads of ARM, recovered from her drawer, could not elicit any convincing explanation as to why she had such articles. As regards the synthesized CrI.A.Nos. 482/02, 509/02 and 536/02 Page 36 version of the tendered item, it was highlighted that this was the preferred product of procurement, a fact which no one could quarrel with, in view of Clause 1.1.0 of the Tender Specifications. These specifications were framed by the TEC. The note of Sri D.P. Srivastava, (Ex. PW-4/A) recommending purchase only of the synthesized version, as the crystal version was not favoured, due to its inherent limitations of flexibility in re-using, on introduction of other technologies, such as CDMA, TDMA, etc, was highlighted. In spite of this, Ms. Runu Ghosh recommended procurement

of 1500 systems from ARM, 500 from SHYAM, and 200 from PUNWIRE. This was despite ARM not possessing type approval for manufacture of the synthesized version; the record concededly revealed that Shyam had secured type approval for that version, which was the reason for splitting the order for procurement of the initial 500 units. This note, according to the CBI counsel, was crucial, since it revealed Ms. Runu Ghosh's insistence to somehow ensure that ARM's interests were accommodated, and despite the fact that the firm had offered to sell, saying that it would bear liquidated damages to the tune of 23% if the supplies were not made by 15-2-1994, on condition that the order was placed on it latest by 10.07.1993. This latter part was suppressed, or significantly omitted by Ms. Runu Ghosh, in her note..

55. It was argued that Ms. Runu Ghosh's noting, dated 23rd of July, 1993 was marked to DDG (DF) who was her immediate senior; yet, deliberately the file was not sent to DDG (DF). The file containing this note was directly sent to MoS the same day. The note of PS to MoS regarding return of file to Ms. Runu Ghosh as he was preoccupied and could not see the file, along with the file was received by Ms. Runu Ghosh on 3rd August, 1993. The file was intentionally kept by her for two days which were working days, i.e. 3rd and 4th August, 1993 so that her senior could not see the note made by her. The file was resubmitted as desired by MoS on 5th August, 1993. PW 16 Sri US Prasad, DDG (PF) who was Ms. Runu Ghosh's immediate senior deposed that the movement of file was that the junior would submit the file to his next superior and on return the file would be marked to his immediate junior. It was also urged that the noting of 23rd July, 1993 mentioning additional features in the ARM's synthesized version, also showed Ms. Runu Ghosh's intention to favour that concern, because by then, no such additional features had been claimed by ARM. CrI.A.Nos. 482/02, 509/02 and 536/02 Page 37.

56. The ASG urged that Ujjagar Singh, Director (MMC) recorded a typed note dated 19th of July, 1993 and sent it to Dilip Sahay, DDG (MMI). He sent the file to DDG (PF) on the same day. The file was sent to Ms. Runu Ghosh by his endorsement dated 19.07.1993. Therefore, the file would have been received by Ms. Runu Ghosh towards the evening of 19th July or on 20th of July, 1993. A letter

dated 21st of July, 1993 was written by ARM to Ms. Runu Ghosh; stating that it was sent by speed post. The point emphasized in this letter finds mention in the note of accused Ms. Runu Ghosh dated 23rd of July, 1993, i.e., the sales tax reduction. The improbability was evident because ARM had its office in Hyderabad and would not have known within one or two days that the file was lying with Ms. Runu Ghosh. No official intimation was given to ARM that the file was with Ms. Runu Ghosh. This, therefore, showed collusion between Ms. Runu Ghosh and ARM. Counsel urged that on 05.08.1993 an unsigned note was received in Mr. Sukh Rams office. The note stated that an order for 450 crystal version at cost equivalent to the synthesized version and also 800 synthesized version systems be placed on ARM. Mr. Sukh Ram made a note Pl. examine and discuss on this unsigned note on 05.08.1993 itself..

57. Subsequent to the PNC negotiations and order of MOS (C) dated 31.08.1993, an advance purchase order was issued to ARM on 02.09.93. Thereafter ARM made a representation for increase in quantity as well as price for its crystal version on 11.09.93. After the department rejected its representation of 09.09.1993 - protesting against furnishing bank guarantee for the lower price of the crystal version, by its letter dated 17.09.93, ARM accepted the offer on 20.09.93 and submitted the requisite bank guarantee. Meanwhile ARM had represented on 11.09.93 directly to MOS (C) and the same saw the light of the day only on 27.09.1993. The MOS (C) marked on the representation asking why different rates were offered against the same tender and questioned whether TEC had examined the issue. The price which was mentioned in the letter dated 02.09.93 was agreed to and was accepted by furnishing a bank guarantee. It is urged, in this context, that on 17.09.93 the Central Government had written to ARM that if the price were not acceptable to it, another order would be placed elsewhere. It is in this backdrop that the action and conduct of the accused, particularly Mr. Sukh Ram and Mr. Rama Rao had to be seen. The Trial Court Crl.A.Nos. 482/02, 509/02 and 536/02 Page 38 according to counsel, correctly dealt with this issue in its judgment. It is urged that in fact there was no new material before Mr. Sukh Ram to change his previous views, contained in the note dated 31st August, 1993, (by which he had accepted the price differential for the two products) as it was clear that the letter of Rakesh Aggarwal dated 26th of July,

1993 was on the file, prior to note dated 31st of August, 1993 as well as an unsigned note which talked about the said TEC letter and was seen by Mr. Sukh Ram in August, 1993 itself..

58. It was next argued that pursuant to the note of Mr. Sukh Ram, dated 19th of November, 1993, U.S. Prasad, DDG (PF) proposed an alternative (note dated 09.12.1993, Ex. PW-3/K-87) to work out the reduction of cost of the crystal version, which could be fair to the firm as well as the department. He proposed to seek assistance from Secretary (Expenditure) to direct Chief/ Sr. Cost Accounts Officer of the Main Ministry of the Finance assisted by the representative of the member (Services) and/or Member (Technology) to undertake a quick study of the relative merits of the two sets as well as their costs. In view of the huge financial implications amounting to ` 1.62 crores, the MoS (C) was requested to reconsider the matter to avoid audit objections. However, Mr. Sukh Ram, by his note dated 13th of December, 1993, (Ex. PW-3/K-89) stood by his earlier position and did not agree for reconsideration. This note, Ex. PW-3/K-89, was marked to R.C. Rastogi, Member (F). He minuted that I have nothing further to say. Chairman may also kindly see. (Ex. PW-17/1) and marked the file to Mr. N. Vittal, Chairman (TC). The latter, in his noting dated 12th of January, 1994 (Ex. PW-3/K-93) mentioned that he discussed with the MoS that there has to be price differential, which did not find acceptance (with the MoS) who directed implementation of the orders given earlier, by his note dated 13th December, 1993. These argued the ASG, showed that Mr. Sukh Ram wanted to favour ARM despite the contrary opinions of the high officials in the Department..

59. Counsel urged that the Appellants could not impeach the credibility of the two primary witnesses, Sri N.C. Gupta and Sri Ujjagar Singh, particularly the former. Though he was not a member of the highest Telecom body, he had sufficient experience in the field of electronics and communications to carry out the exercise of Crl.A.Nos. 482/02, 509/02 and 536/02 Page 39 costing the two products. Urging that the procurement of the first 500 pieces was at a time when the capacities of the manufacturers to produce and supply the synthesized version were not convincingly established, the ASG urged that by the time the order was placed for those initial units, Shyam had obtained type approval for production of the

synthesized version. Therefore, subsequent proposals necessarily had to accommodate that aspect, in view of the Tender condition, giving preference to that technology. There was no question of the decision of the buyer, i.e. the DoT being called into question; as the one interested in purchase of latest equipment, which had unequivocally spelt out the preferred technology, it was not open to the accused to claim superiority of some other version, and try to ensure its purchase. This undermined the whole objective of procuring the latest product, with its features and improvements..

60. It was argued that Sri. N.C. Guptas note Ex.PW 3/K39, dated 13th July, 1993, which elaborately indicated the costing of the crystal version, was approved by the Advisor Planning, Sri M.G. Kulkarni (by Ex.PW 3/K40). Sri Ujjagar Singh therefore, acted within his rights in accepting this costing, by Ex.PW 3/K-41. It was argued that the notings of Sri M.G. Kulkarni, Sri R.G. Bansal, and Sri Rastogi, on separate occasions (by Ex.PW 3/K-50, by Ex.PW 3/K51, by Ex.PW 3/K-52 and by Ex.PW 3/K-59) made it amply clear that these high ranking technical officers, holding positions of Members of the Telecom Commission, concurred with the price differential proposed by Sri N.C. Gupta, in Ex.PW 3/K-39. Mr. Sukh Ram had occasion to see this not once, but three separate times; after due deliberation and application of mind, he approved the price differential, on 31.08.1993, by Ex.PW 3/K-.

60. The deliberation and application of mind, was apparent, from the specific quantities, pertaining to ARM- his note said clearly that the firm was to receive order to supply 300 crystal systems, and 600 synthesized systems. He could also not be said to be unaware about the price differential, since he said that he had "perused the preceding note. The note further said that two firms, Natelco and Punwire had to be proven in the field. These clarified that the Minister was aware of all aspects, including the debate vis a vis the claims of superiority of the synthesized version, and Crl.A.Nos. 482/02, 509/02 and 536/02 Page 40 the price differential proposed. In view of these facts, it was idle for him to contend that he was in the dark about the price differential..

61. It was argued that so far as conspiracy between the Appellants was concerned, there could be no two opinions about the fact that in such cases, it is impossible to secure direct evidence. The materials predominantly are documentary; they provide a window to the mind of those who act in concert, and to further a criminal intent and illegitimate objective. The notings made by Ms. Runu Ghosh, consistently pointed to her anxiety to favour ARM; the CBI had produced blank letterheads of ARM, recovered from her premises, and exhibited them in court. Furthermore, she went to the extent of questioning the overwhelming view of all high-ranking officers, who had unanimously recommended the procurement of only the synthesized version, and approved the placement of minimum orders for the crystal version, on ARM. Her direct correspondence with ARM established beyond doubt that the exhaustive note prepared by her on 23.07.1993, questioning the costing exercise, and also strongly recommending the procurement of the crystal system, was with the whole idea of favouring ARM. Similarly, the timing of the letter by ARM, showed that there was a direct and open channel of communication by it with Ms. Runu Ghosh, and the firm was in a position to know exactly what to do, and when. This enabled it to make representations, such as the one offering to pay 23% liquidated damages, in case the order was placed within a time frame, as well as incentivizing the department by saying that it would be charging 2% Sales tax. As regards Mr. Sukh Ram, it was emphasized that he had carefully seen all the documents and notings, and issued his orders dated 31.08.1993. There was nothing new in the representation of ARM; it merely sought for price equalization-an aspect which had been extensively debated for nearly 2 months within the department which the Minister was well aware. His explanation that this was not within his knowledge, could not be accepted because of his express notings on the file. Furthermore, Mr. Sukh Ram could also not take refuge of ignorance because his official order dated 16.07.1993 had made it clear that all developments after purchase orders were issued, were to be made known to him. In this case, the party had furnished bank guarantees, thus accepting the offer unconditionally. The alteration of the price, post acceptance of the offer, was to the CrI.A.Nos. 482/02, 509/02 and 536/02 Page 41 detriment of the Government, which had to shell out huge amounts to ARM. This reversal of the previous decision was completely

unreasonable, and not justified by any reason, except to favour ARM, at its behest. Therefore, Mr. Sukh Ram too was a conspirator, and equally culpable. Analysis of the provisions.

62. It would be, necessary, before proceeding to analyze and record the findings, to discuss two legal issues which arise for consideration. The first pertains to whether the failure of the Trial Court, in not specifically mentioning certain details in the charges framed, against each accused, (as it did not advert to the offence under Section 13 (1) (d) (iii)), or the ingredients of the offence, i.e. obtaining by someone of a valuable thing, contrary to public interest, vitiated the trial. The second pertains to the true interpretation of Section 13 (1) (d) (iii) of the Act and whether for recording a conviction, it is necessary to prove mens rea, or criminal intent, on the part of the accused. Effect of failure to mention provisions and precise amounts in the charges framed.

63. All three accused were charged under Section 120B, IPC read with Section 13(1) (d) of the 1988 Act. Section 13(1)(d) of Prevention of Corruption Act 1988, had been extracted in a previous portion of this judgment. Learned Counsel for the Appellants had submitted that a specific charge under any of the sub-clauses of Section 13(1) (d) of PC Act 1988 had not been framed and the absence of any mention about securing pecuniary advantage without public interest, as well as the amount in question and consequently, the conviction under either Section 13 (1) (d) (ii) or (iii) could not have been rendered. It was urged that this omission resulted in grave prejudice to the Appellants, since they could not answer which offence they were made to stand trial for. The ASG had relied on Sections 215 and Section 464 (of the Cr.P.C) to say that the omission, if any, could not be treated as fatal to the prosecution, and that the conviction could be sustained, as the Appellants were made aware all the necessary facts at the charge framing stage. Failure to specify the head CrI.A.Nos. 482/02, 509/02 and 536/02 Page 42 under which the conviction was ultimately recorded, did not vitiate the trial. The said provisions, relied on by the prosecution, read as follows: 215. Effect of errors.- No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact

misled by such error or omission, and it has occasioned a failure of justice..

464. Effect of omission to frame, or absence of, or error in, charge.- (1) No finding sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby. (2) If the Court.....

64. A close reading of the two provisions clarifies that an error in framing of charge must be material and it should have occasioned a failure of justice for it to vitiate a trial. An irregularity is not regarded as fatal unless it results in substantial prejudice to the accused. This was stated in Willie (William) Slaney V. The State of Madhya Pradesh AIR 1956 SC 116, by the Supreme Court, which stated that: If he does, if he is tried by a competent court, if he is told and clearly understands the nature of the offence for which he is being tried, if the case against him is fully and fairly explained to him and he is afforded a full and fair opportunity of defending himself, then, provided there is substantial compliance with the outward forms of the law, mere mistakes in procedure, mere inconsequential errors and omissions in the trial are regarded as venial by the Code and the trial is not vitiated unless the accused can show substantial prejudice. xxxxxxxxxx xxxxxxxxxx xxxxxxxxxx But when all is said and done, what we are concerned to see is whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself. If all these elements are there and no prejudice is shown the conviction must stand whatever the irregularities whether traceable to the charge or to a want of one. It is immaterial whether the charge was framed properly or not; what matters is whether the error, omission or irregularity occasioned substantial prejudice. This view CrI.A.Nos. 482/02, 509/02 and 536/02 Page 43 was also aired in the State of West Bengal and Anr. v Laisal Haque and Ors. AIR 1989 SC 129 while quoting the Willie (William) Slaney case (supra.), the Supreme Court said that:, "In the celebrated case of Willie (William) Slaney v. State of Madhya Pradesh, 1956 CriLJ291 , Vivian Bose, J. speaking for the Court after an elaborate discussion observed that in judging a question of prejudice, as of guilt, the Courts must act with a broad

vision and look to the substance and not to the technicalities, and their main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly, and whether he was given a full and fair chance to defend himself. That test is clearly fulfilled in the facts and circumstances of the present case. The principles laid down by that very eminent Judge in Slaney's case have throughout been followed by this Court. See: K.C. Mathew and Ors. v. State of Travancore-Cochin 1956 Cri LJ 444 , Gurbachan Singh v. State of Punjab 1957 CriLJ1009 , Eirichh Bhutan and Ors. v. State of Bihar [1963] Supp.

2. SCR 328 and State of Maharashtra v. Ramdas Shrinivas Nayak and Anr. 1982 CriLJ1581 ..

65. In the present case a charge under Section 13(1) (d) of the 1988 Act was framed. The specific sub-clauses, i.e. neither (i), (ii) or (iii) were mentioned. This is not a fatal irregularity and has not caused any prejudice to the Appellants, as all the particulars regarding the charge were given. The accused understood the case against them and there has been no failure of justice by the omission of the sub-clauses. Each of them, i.e. clauses (i), (ii) and (iii) are all a part of the Section 13(1) (d) and the Appellants were aware of the case; the facts essential for them to defend during the trial, were outlined in the charges. This view was taken was in the case of M.M. Gandhi V. State of Mysore AIR 1960 Kant 111, where, the court had to consider the effect of omission of the specific sub clause of Section 5 of the (old) 1947 Act. The Mysore High Court, held that: All the particulars necessary to make the accused understand that he was being tried for the offence of criminal misconduct in the discharge of his official duties on grounds failing under clauses (a) and (d) of sub- s.(1) of S. 5, have been set out in the charge. We are satisfied that there has been no prejudice to the accused, by the mere non-mention of the specific clauses of sub-s.(1) of S.

5. in the charge. Crl.A.Nos. 482/02, 509/02 and 536/02 Page 44 For these reasons, this Court is of opinion that the omission to mention certain details, or omission to mention the ingredients of the offence or some of the words in the

provisions, or omission to outline the provision cannot be considered fatal; there was a reference to Section 13 (1) (d), and the general facts relating to the charges were narrated. This question is therefore, answered in the negative; there was no failure of justice, or prejudice to the Appellants flowing from omission in the framing of charges. Interpretation of Section 13 (1) (d) (ii) and (iii).

66. This question lies at the core of the reference to this Division Bench. The material portion of the reference, while adverting to Sections 13 (1) (d) and then dealing with the phraseology of Section 13 (1) (d) (iii) and other preceding sub-clauses, reads thus: Whether the absence of adverbs like wilfully, fraudulently, dishonestly, corrupt or illegal means to qualify the verb obtains in this clause would mean that a public servant commits criminal misconduct if he while holding such office obtains for any person (and not for himself) any pecuniary advantage which is without any public interest? The statute appears to offer no guidance as to what can be said to be a decision or act that is without public interest. Though the reference order elaborately lists out the salient facts in the Appeals, notes rival contentions, and even notices relevant case law, it is necessary to recapitulate the pre-existing law, i.e. Section 5 (1) (d) of the 1947 Act, and juxtapose it with the 1988 Act. The controlling clauses, in both provisions, are in pari materia (a public servant is said to commit the offence of criminal misconduct if he...). Section 5 (1) (d) reads as follows: (d) if he, by corrupt or illegal means or by otherwise abusing his position as public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage... Section 13 (1) (d) (i), (ii) and (iii), on the other hand, read thus: (i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or CrI.A.Nos. 482/02, 509/02 and 536/02 Page 45 (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 servant, obtains for any person any valuable thing or pecuniary advantage without any public interest... It is clear from the above comparison that in clause (i), the reference to "corrupt or illegal" means, (of a public servant obtaining -for himself, or someone else- any valuable thing or pecuniary advantage) has been retained. However, the reference to doing of such an act "otherwise" (which was there in the previous law, i.e. Section 5 (1) (d)) has been omitted. The latter parts of Section 5 (1) (d), i.e. the public servant obtaining

for himself or for any one else any valuable thing or pecuniary advantage, by abusing his position as a public servant has been retained, in Section 13 (1) (d) (ii). A new offence (or sub-species, of the existing offence) has been carved out, in Section 13 (1) (d) (iii) which criminalizes, as "criminal misconduct" the act of a public servant, holding office, which results in someone else (any person) benefitting by getting a valuable thing or pecuniary advantage, without any public interest. There is no doubt that Parliament created this new offence of criminal misconduct, where abuse of office, or use of corrupt or illegal means by a public officer, is inessential to prove the crime. What the prosecution has to establish, in accordance with law, is that the public officer, obtained for someone else - not necessarily by abusing his office, or using corrupt or illegal means - pecuniary advantage or a valuable thing - without public interest..

67. It is not as if Parliament had changed the law, for the first time. The legislative history of Section 5 would reveal that it was amended repeatedly. The first amendment, in 1952, introduced Section 5 (4) which clarified that the provision was in addition to, and not in derogation of any other existing law; the second amendment substituted Section 5(2) which provided for a minimum sentence; it also introduced sub-section (2-A). The third amendment, brought about in 1964, introduced a significant change; the controlling expression, or the opening phrase defining criminal misconduct, under Section 5 when the Act was introduced, and till its amendment in 1964, was a public servant is said to commit the offence of criminal misconduct if he CrI.A.Nos. 482/02, 509/02 and 536/02 Page 46 in the discharge of his duty.... The third amendment omitted the expression in the discharge of his duty. Thus, whether or not a public servant acted in discharge of his duty, if his conduct fell into the questionable categories specified in Section 5, he became an offender. The intention was clear: to cast the net and draw all manner of behavior which was deleterious and injurious to public functioning, whether the public servant acted in the discharge of his duty, or otherwise..

68. Before embarking on a discussion of the case law cited, and the submissions regarding the interpretation of Section 13 (1) (d), it would be essential, at this stage to notice the Statement of Objects and Reasons for the 1988 Act. They are extracted below: The Bill is intended to make the existing anti-corruption laws

more effective by widening their coverage and by strengthening the provisions..

2. The Prevention of Corruption Act, 1947, was amended in 1964 based on the recommendations of the Santhanam Committee. There are provisions in Chapter IX of the Indian Penal Code to deal with public servants and those who abet them by way of criminal misconduct. There are also provisions in the Criminal Law Amendment Ordinance, 1944, to enable attachment of ill-gotten wealth obtained through corrupt means, including from transferees of such wealth. The Bill seeks to incorporate all these provisions with modifications so as to make the provisions more effective in combating corruption among public servants..

3. The Bill, inter alia, envisages widening the scope of the definition of the expression public servant, incorporation of offences under Sections 161 to 165- A of the Indian Penal Code, enhancement of penalties provided for these offences and incorporation of a provision that the order of the trial court upholding the grant of sanction for prosecution would be final if it has not already been challenged and the trial has commenced. In order to expedite the proceedings, provisions for day-to-day trial of cases and prohibitory provisions with regard to grant of stay and exercise of powers of revision on interlocutory orders have also been included..

4. Since the provisions of Sections 161 to 165-A are incorporated in the proposed legislation with an enhanced punishment, it is not necessary to retain those sections in the Indian Penal Code. Consequently, it is proposed to delete those sections with the necessary saving provision..

5. The notes on clauses explain in detail the provisions of the Bill..

69. The reference order relies on various materials, such as G.P.Singhs Principles of Interpretation of Statutes, (9th edition, pp.779-780). The passage extracted referred to the judgment of Lord Goddard, in *Brend v Wood* (1946) 62 T.L.R.

462. to the effect Crl.A.Nos. 482/02, 509/02 and 536/02 Page 47 that mens rea must be inferred in every penal statute if it does not expressly provide it, unless it is ruled out by necessary implication. The passage is as follows: "It is in my opinion the utmost importance for the protection of the liberty of the subject that a

court should always bear in mind that, unless the statute, either clearly or by necessary implication, rules out mens rea as a constituent part of a crime, a defendant should not be found guilty of an offence against the criminal law unless he has got a guilty mind." Counsel for the Appellants had relied on the decisions in *M. Narayanan Nambiar v. State of Kerala*, 1963 Supp (2) SCR 724; *Soma Chakravarthy v State* 2007 (5) SCC 403; *Ram Krishan v. State of Delhi*, 1956 SCR 182; *Major S.K. Kale v. State of Maharashtra*, (1977) 2 SCC 394; *S.P. Bhatnagar v. State of Maharashtra*, (1979) 1 SCC 535; *Abdulla Mohammed Pagarkar v State* 1980 (3) SCC 110; *A. Wati Ao v State of Manipur* 1995 (6) SCC 488; *C.K. Damodaran Nair v Govt of India* 1996 (9) SCC 477; *M. Mohiuddin v State of Maharastra* 1995 (3) SCC 567 and *R. Balakrishna Pillai v State of Kerala* 2003 (9) SCC 700 to say that mens rea or criminal intent is an essential ingredient which the prosecution has to prove in every case. It was urged, in this context, that Section 13 (1) (d) (iii) cannot be divorced from its setting and context and that there was nothing in the Act to say that criminal intent ought not to be read into. On the other hand, the ASG had relied on the decisions reported as *Ranjit Udeshi v State of Maharastra* 1965 (1) SCR 65, *State of Maharastra v Meyer Hans George* 1965 (1) SCR 123, *Dineshchandra Jamnadas Gandhi v State of Gujarat* 1989 (1) SCC 420 and *Radhey Shyam Khemka v State of Bihar* 1993 (3) SCC 54, *Y.S. Parmar v Shri. Hira Siknggh Paul* 1959 Supp (1) SCR 213 and *Gopaldas Udhavdas Ahuja v Union of India* 2004 (7) SCC 33 for the argument that mens rea cannot be read into a statute, on the application of any rigid thumb rule..

70. There is no doubt that Section 13 (1) (d) (iii) differs from other parts of the Act, not only in structure, but also in substance. The use of terms such as habitually accepts agrees to accept attempts consideration which he knows to be inadequate dishonestly or fraudulently misappropriates.. (property entrusted to him or allows any other person so to do); corrupt or illegal abusing his position are clear pointers to Parliamentary intention that mens rea is essential to be CrI.A.Nos. 482/02, 509/02 and 536/02 Page 48 proved in relation to the offences provided for under Section 13 (1) (a) to (d) (i) and (ii). Section 13 (1) (d) (iii) contains no such words, which point to criminal intent. There is substance in the Appellants arguments that the Supreme Court had previously interpreted Section 5 (1) (d) so as to mean the existence of criminal motive (dishonest intent). This was stated in *Narayanan*

Nambyar's case (supra) as follows: The gist of the offence under this clause is, that a public officer abusing his position as a public servant obtains for himself or for any other person any valuable thing or pecuniary advantage. Abuse means misuse i.e. using his position for something for which it is not intended. That abuse may be by corrupt or illegal means or otherwise than those means. The word otherwise has wide connotation and if no limitation is placed on it, the words corrupt, illegal, and otherwise mentioned in the clause become surplusage, for on that construction every abuse of position is gathered by the clause. So some limitation will have to be put on that word and that limitation is that it takes colour from the preceding words along with which it appears in the clause, that is to say something savouring of dishonest act on his part.... Similarly, the other cases cited, i.e. S.P. Bhatnagar (whether the accused abused their position and acted dishonestly or with a corrupt or oblique motive) Abdulla Mohammed (supra); A. Wati Ao; C.K. Damodaran Nair; M. Mohiuddin and R. Balakrishna Pillai (supra) support this view. In the last decision, it was held that the offence requires intention, and the offence comprehended an element of mental state would be necessary to do a conscious act to get the required result of pecuniary advantage or to obtain any valuable thing, even if it is for someone else...

71. The question is, whether this setting compels the court to hold that mens rea is, like the other provisions, a necessary pre-requisite or pre-condition which the prosecution has to establish, from the conduct of a public servant. It would also be relevant here to mention that Section 13 (1) (e) appears to be in line with Section 13 (1) (d) (iii) in as much as there is no pointer to criminal intent. That provision declares that a public servant in possession of pecuniary resources or property which he cannot satisfactorily account, or which are disproportionate to his known sources of income is guilty of criminal misconduct. Here, the sources of income may or may not be connected with the public servant's duties; the emphasis is on inability to satisfactorily account, or that the wealth or assets held are disproportionate to the servant's known sources of income. If the ingredients of the provision are satisfied, it is not necessary to prove mens rea. Section 13 (1) (e) enacts that a public servant is guilty of criminal misconduct: (e) if he or any person on his behalf, is in possession or has, at any time during the period of his office, been in possession for which the

public servant cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income. The ingredients which the prosecution has to prove in relation to this offence, (which is in *pari materia* with Section 5 (1) (e) of the 1947 Act, were spelt out in *M. Krishna Reddy v State Deputy Superintendent of Police* 1992 (4) SCC 45 as follows: To substantiate a charge under Section 5(1)(e) of the Act, the prosecution must prove the following ingredients, namely, (1) the prosecution must establish that the accused is a public servant, (2) the nature and extent of the pecuniary resources or property which were found in his possession (3) it must be proved as to what were his known sources of income, i.e. known to the prosecution and (4) it must prove, quite objectively, that such resources or property found in possession of the accused were disproportionate to his known sources of income... It is clear therefore, that *mens rea* or criminal intent does not have to be proved in the case of a charge under Section 13 (1) (e); it is enough for the prosecution to establish the four ingredients of the offence. As noticed earlier, the setting of this provision too needs to be taken into account, along with the legislative history (of Section 5 of the earlier Act, with its amendments, and the new Section 13 (1) (d) re-cast in a totally different manner) -it appears immediately after another offence of criminal misconduct (Section 13 (1) (d) (iii)) that does not textually allude to or require intent, or *mens rea*..

72. A multitude of precedents was relied upon by Counsel on either side, to deal with the question. The Supreme Court, noticing most of the earlier decisions, on the issue, and also the approach adopted by Courts in England, said, in *Nathulal v. State of M.P.*, AIR 1966 SC 43 that:it is a sound rule of construction adopted in England and also accepted in India to construe a statutory provision creating an offence in conformity with the common law rather than against it unless the statute expressly or by necessary implication excluded *mens rea*. The mere fact that the object of the statute is to promote welfare activities or to eradicate a grave social evil is by itself not decisive of the question whether the element of guilty mind is excluded. *Crl.A.Nos. 482/02, 509/02 and 536/02* Page 50 from the ingredients of an offence. *Mens rea* by necessary implication may be excluded from a statute only where it is absolutely clear that the implementation of the object of the statute would otherwise be defeated. The nature of the *mens rea* that would be implied in

a statute creating an offence depends on the object of the Act and the provisions thereof: see *Srinivas Mall Bairoliya v. King-Emperor* 1947 ILR (26) Pat 460 (PC), *Ravula Hariprasada Rao v. State* 1951 SCR 322 and *Sarjoo Prasad v. State of Uttar Pradesh* 1961 (3) SCR.

324. Most of the relevant English decisions on the subject were referred to in the judgment of this Court in *State of Maharashtra v. Mayer Hans George* AIR 1965 SC.

722. How to disprove mens rea has been succinctly stated in Halsbury's Laws of England, 3rd Edn., Vol. 10, at p. 283, thus: When the existence of a particular intent or state of mind is a necessary ingredient of the offence, and prima facie proof of the existence of the intent or state of mind has been given by the prosecution, the defendant may excuse himself by disproving the existence in him of any guilty intent or state of mind, for example, by showing that he was justified in doing the act with which he is charged, or that he did it accidentally, or in ignorance, or that he had an honest belief in the existence of facts which, if they had really existed would have made the act an innocent one. The existence of reasonable grounds for a belief is evidence of the honesty of that belief. One key element to construing a statute is the object it wishes to advance, and the mischief it wishes to address itself to. In this regard, it would be useful to recollect the five judge decision in *R.S. Nayak v. A.R. Antulay* 1984 (2) SCC 183 where the Supreme Court commented on the object of the 1947 Act: The 1947 Act was enacted, as its long title shows, to make more effective provision for the prevention of bribery and corruption. Indisputably, therefore, the provisions of the Act must receive such construction at the hands of the court as would advance the object and purpose underlying the Act and at any rate not defeat it. If the words of the statute are clear and unambiguous, it is the plainest duty of the court to give effect to the natural meaning of the words used in the provision... Now, the absence of any words or terms in Section 13 (1) (d) (iii) cannot drive the Court to hold that proof of criminal intention is a sine qua non for conviction of an accused. This is one instance where the object of the enactment, the purpose which it seeks to achieve, and the prevailing social evil which is sought to be erased become important. In this context, the need for such purposive approach, rather than

adopting a "liberal" approach, based on the doctrine that every offence carries within it the presumption that mens rea is a necessary ingredient, was emphasized in his inimitable Crl.A.Nos. 482/02, 509/02 and 536/02 Page 51 style by Krishna Iyer, J, in *Murlidhar Meghraj Loya v. State of Maharashtra*, (1976) 3 SCC 684: the Supreme Court observed: "It is trite that the social mission of Food Laws should inform the interpretative process so that the legal blow may fall on every adulterator. Any narrow and pedantic, literal and lexical construction likely to leave loopholes for this dangerous criminal tribe to sneak out of the meshes of law should be discouraged. For the new criminal jurisprudence must depart from the old canons, which make indulgent presumptions and favoured constructions benefiting accused persons and defeating criminal statutes calculated to protect the public health and the nation's wealth." More than a decade later, similar views were echoed - this time by Venkatachalaiah, J in *Dineshchandra Jamnadas Gandhi v. State of Gujarat*, (1989) 1 SCC 420: In *Criminal Law* by J.C. Smith and Brian Hogan, (5th Edn.), referring to offences in their social context the authors say: The courts are greatly influenced in their construction of the statute by the degree of social danger which they believe to be involved in the offence in question. They take judicial notice of the problems with which the country is confronted. The greater the degree of social danger, the more likely is the offence to be interpreted as one of strict liability. Inflation, drugs, road accidents and pollution are constantly brought to our attention as pressing evils; and in each case the Judges have at times invoked strict liability as a protection for society. The view found favour - (in a slightly different context, when the Supreme Court was deciding whether a juristic personality could be charged with all manner of crimes, and not merely strict liability crimes) - in *Standard Chartered Bank v. Directorate of Enforcement*, (2005) 4 SCC 530 again by a five judge Bench decision of the court: 23... It is true that all penal statutes are to be strictly construed in the sense that the court must see that the thing charged as an offence is within the plain meaning of the words used and must not strain the words on any notion that there has been a slip that the thing is so clearly within the mischief that it must have been intended to be included and would have been included if thought of. All penal provisions like all other statutes are to be fairly construed according to the legislative intent as expressed in the enactment. Here,

the legislative intent to prosecute corporate bodies for the offence committed by them is clear and explicit and the statute never intended to exonerate them from being prosecuted. It is sheer violence to common sense that the legislature intended to punish the corporate bodies for minor and silly offences and extended immunity of prosecution to major and grave economic crimes. Crl.A.Nos. 482/02, 509/02 and 536/02 Page 52.

24. The distinction between a strict construction and a more free one has disappeared in modern times and now mostly the question is what is true construction of the statute? A passage in Craies on Statute Law, 7th Edn. reads to the following effect: The distinction between a strict and a liberal construction has almost disappeared with regard to all classes of statutes, so that all statutes, whether penal or not, are now construed by substantially the same rules. ... They are construed now with reference to the true meaning and real intention of the legislature. At p.

532. of the same book, observations of Sedgwick are quoted as under: The more correct version of the doctrine appears to be that statutes of this class are to be fairly construed and faithfully applied according to the intent of the legislature, without unwarrantable severity on the one hand or unjustifiable lenity on the other, in cases of doubt the courts inclining to mercy..

73. Having regard to the previous history of the statute, the amendments to the 1947 Act, its avowed objects and the distinctive structure which Parliament adopted consciously, under the 1988 Act, despite being aware of the pre-existing law, as well as the decisions of the Court- the conclusion which this Court draws is that mens rea is inessential to convict an accused for the offence under Section 13 (1) (d) (iii). It would be sufficient if the prosecution proves that the public servant "obtains" by his act, pecuniary advantage or valuable thing, to another, without public interest. The inclusion of public interest, in the opinion of the Court, tips the scale in favour of a construction which does not require proof of mens rea. There can be many acts of a public servant, which result in pecuniary advantage, or obtaining of a valuable thing to someone else; typically these may relate to payment of royalty, grant of license or concessions, issuance of permits,

authorizations, etc. Yet, such grants, concessions, or other forms of advantages to third parties would not criminalize the public servants actions, so long as they have an element of public interest. They (acts of the public servant) are outlawed, and become punishable, if they are "without public interest"..

74. Having now settled the true interpretation of whether the offence under Section 13 (1) (d) (iii) requires proof of mens rea, it would now be vital to settle what really the prosecution would have to establish to say that the public servants actions or decisions, which result in a third party obtaining a pecuniary advantage or valuable thing, without public interest. The expression "public interest" is known to law; at the same time its meaning is not rigid, and takes colour from the particular statute or CrI.A.Nos. 482/02, 509/02 and 536/02 Page 53 policy (Ref. Srinivasa Co-operative House Building Society v Madam Gurumurthy Sastry 1994 (4) SCC 675). It might be useful to consider the following formulation of what is public interest, in relation to actions by public officials or agencies or instrumentalities of state, in every sphere of government functioning, given in Shrilekha Vidyarthi (Kumari) v. State of U.P., (1991) 1 SCC 212: There is an obvious difference in the contracts between private parties and contracts to which the State is a party. Private parties are concerned only with their personal interest whereas the State while exercising its powers and discharging its functions, acts indubitably, as is expected of it, for public good and in public interest. The impact of every State action is also on public interest. This factor alone is sufficient to import at least the minimal requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality. It is a different matter that the scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes...To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the guarantee under Article 14 of non- arbitrariness at the hands of the State in any of its actions. In a later decision, LIC of India v. Consumer Education and Research Centre, (1995) 5 SCC 482, it was held that: public authorities or those whose acts bear insignia of public element, action to public

duty or obligation are enjoined to act in a manner i.e. fair, just and equitable, after taking objectively all the relevant options into consideration and in a manner that is reasonable, relevant and germane to effectuate the purpose for public good and in general public interest and it must not take any irrelevant or irrational factors into consideration or appear arbitrary in its decision. A recent judgment, has examined the concept, in NOIDA Entrepreneurs Association v. NOIDA, (2011) 6 SCC 508, in the light of provisions of Section 13 (1) (d), though the context of the courts judgment were directions issued to investigate into action of public servants. The court held that: The State or the public authority which holds the property for the public or which has been assigned the duty of grant of largesse, etc. acts as a trustee and, therefore, has to act fairly and reasonably. Every holder of a public office by CrI.A.Nos. 482/02, 509/02 and 536/02 Page 54 virtue of which he acts on behalf of the State or public body is ultimately accountable to the people in whom the sovereignty vests. As such, all powers so vested in him are meant to be exercised for public good and promoting the public interest. Every holder of a public office is a trustee. xxxxxxxxxxxxxxx xxxxxxxxxxxxxxx.

41. Power vested by the State in a public authority should be viewed as a trust coupled with duty to be exercised in larger public and social interest. Power is to be exercised strictly adhering to the statutory provisions and fact situation of a case. Public authorities cannot play fast and loose with the powers vested in them. A decision taken in an arbitrary manner contradicts the principle of legitimate expectation. An authority is under a legal obligation to exercise the power reasonably and in good faith to effectuate the purpose for which power stood conferred..

75. It would be profitable to emphasize that public servants are an entirely different class, and the level of trust reposed in them by the society is reflected in the high standards of behaviour and rectitude expected of them, both in the discharge of their duties, and otherwise. In the case of ministers - who are members of the council of Ministers (the Cabinet) in the Union and State Governments, as well as holders of other constitutional offices there is a requirement that before their appointment, each of them has to subscribe to an oath of office and secrecy according to the form set out in the Schedule, to the Constitution of India by which

holders of such offices are required to take oath that he or she would discharge her or his duties in accordance with the Constitution and the law without fear or favour, affection or ill will. This requirement is a constant reminder to the holder of that office that she or he is a trustee and custodian of public interest, and all decisions taken in that capacity are to be based on that factor alone. Holders of other public offices, under the State (a compendious term) are equally bound by such a condition. To ensure that they are afforded the amulet protection and immunity, the Constitution has mandated some safeguards (in the case of members of a service or holders of office under a State or the Union, the protection from arbitrary loss of employment, under Article 311, and the protection of status accorded by virtue of rules or enactments made, pursuant to Article 309 of the Constitution of India). There is an added layer of immunity in the form of requirement of sanction under Section 197 or other similar provisions, to protect public servants from needless harassment. However, when the public servant Crl.A.Nos. 482/02, 509/02 and 536/02 Page 55 acts in a manner that is devoid of public interest, not only would the action become suspect, then, having regard to the nature of his action, and the heightened degree of blameworthiness, he is said to have transgressed the bounds of protection afforded to his decisions, and is then exposed to prosecution..

76. From a different perspective, all public office and all State power - even in the contractual sphere (Articles 298 and 300 of the Constitution) should be exercised for the peoples benefit. A public servant, or minister is a trustee (of the power conferred) and an agent of the Government. In the case of the Minister, he acts as the ultimate head of his department, and depending on the extent of delegation of responsibilities, he acts on behalf of the Cabinet, and the Government. Where his acts are to be ratified by the Council of Ministers, the ultimate responsibility for the decision - or the action, is that of that collective body, headed by the Prime Minister or the Chief Minister, as the case may be. If the delegation of powers arrangement empowers a Minister to take the final decision, he is responsible for it, being the ultimate repository of State power; if it is with the Council, that body, or such of its members who take the decision, and are empowered to do so, - including the head of the Council, are responsible for the decision or action. It was remarked by the Supreme Court, in Jaipur Development Authority v. Daulat Mal

Jain 1997 (1) SCC 35, while examining allotment of lands by the Minister and the Committee headed him that: 11. The Minister holds public office though he gets constitutional status and performs functions under the Constitution, law or executive policy. The acts done and duties performed are public acts or duties as the holder of public office. Therefore, he owes certain accountability for the acts done or duties performed. In a democratic society governed by the rule of law, power is conferred on the holder of the public office or the authority concerned by the Constitution by virtue of appointment. The holder of the office, therefore, gets opportunity to abuse or misuse the office. The politician who holds public office must perform public duties with the sense of purpose, and a sense of direction, under rules or sense of priorities. The purpose must be genuine in a free democratic society governed by the rule of law to further socio-economic democracy.

12. ... If the Minister, in fact, is responsible for all the detailed workings of his department, then clearly ministerial responsibility must cover a wider spectrum than mere moral responsibility: for no Minister can possibly get acquainted with all the detailed decisions involved in the working of his department... Crl.A.Nos. 482/02, 509/02 and 536/02 Page 56.

77. The court, as a consequence has to determine the objective criteria by which acts (of public servants) without public interest, are to be judged, if mens rea (to obtain pecuniary advantage or valuable thing to another) is not a necessary ingredient. This exercise is essential because in the absence of mens rea (which has been ruled out) the court has to say what "acts" resulting in someone obtaining pecuniary advantage or valuable thing are "without public interest". Obviously the mere fact that a third party obtains pecuniary advantage, or a valuable thing, is insufficient; a supplier of equipment to public servants or offices, a travel agent who makes bookings for a public agency, a businessman or corporate group granted licenses or clearances, by departments or agencies of the Government, would all stand to benefit. Many of these decisions are in fact, and all are, expected to be in public interest. Therefore, the kind of behaviour which amounts to an "act" resulting in someone "obtaining pecuniary advantage" or "valuable thing" "without public interest" needs to be spelt out..

78. In a previous part of this judgment, what constitutes "public interest" and the trust element, which informs every decision of a public servant or agency, was discussed and emphasized. The State in its myriad functions enters into contracts, of various kinds, involves itself in regulation, awards or grants largesse, and holds property. Each action of the State must further the social or economic goals sought to be achieved by the policy. Therefore, when a public servant's decision exhibits complete and manifest disregard to public interest with the corresponding result of a third party obtaining pecuniary advantage or valuable thing, he is fastened with responsibility for "criminal misconduct" under Section 13 (1) (d) (iii). There is nothing reprehensible in this interpretation, because the "act" being "without public interest" is the key, the controlling expression, to this offence. If one contrasts this with "abuse" of office resulting in someone "obtaining" "pecuniary advantage or valuable thing", it is evident that Section 13 (1)(d) (ii) may or may not entail the act being without public interest. This offence- under Section 13 (1) (d) (iii) advisedly does not require proof of intent, or mens rea, because what Parliament intended was to punish public servants for acts which were without public interest. This kind of CrI.A.Nos. 482/02, 509/02 and 536/02 Page 57 offence is similar to those intended to deal with other social evils, such as food and drug adulteration, (offences under Prevention of Food Adulteration Act, Section 13 (1), Drugs and Cosmetics Act.; Section 7 (1) Essential Commodities Act, 1955, Section 25, Arms Act, 1959), possession of explosives, air and water pollution, etc..

79. What then is the behaviour or act which attracts such opprobrium as to result in criminal responsibility? It is not every act which results in loss of public interest, or that is contrary to public interest, that is a prosecutable offence. There can be no doubt that all acts prejudicial to public interest, can be the subject matter of judicial review. In those cases, courts consider whether the decision maker transgressed the zone of reasonableness, or breached the law, in his action. However, it is only those acts done with complete and manifest disregard to the norms, and manifestly injurious to public interest, which were avoidable, but for the public servant overlooking or disregarding precautions and not heeding the safeguards he or she was expected to, and which result in pecuniary advantage to another that are prosecutable under Section 13(1) (d) (iii). In other words, if the

public servant is able to show that he followed all the safeguards, and exercised all reasonable precautions having regard to the circumstances, despite which there was loss of public interest, he would not be guilty of the offence. The provision aims at ensuring efficiency, and responsible behaviour, as much as it seeks to outlaw irresponsibility in public servants functioning which would otherwise go unpunished. The blameworthiness for a completely indefensible act of a public servant, is to be of such degree that it is something that no reasonable man would have done, if he were placed in that position, having regard to all the circumstances. It is not merely a case of making a wrong choice; the decision should be one such as no one would have taken..

80. In this context, it would be useful to notice the following passage from the work *Errors, Medicine and the Law* by Alan Merry and Alexander McCall Smith: Criminal punishment carries substantial moral overtones. The doctrine of strict liability allows for criminal conviction in the absence of moral blameworthiness only in very limited circumstances. Conviction of any substantial criminal offence requires that the accused person should have acted with a morally blameworthy state of mind. Recklessness and deliberate wrongdoing, levels four and five are classification of blame, are normally CrI.A.Nos. 482/02, 509/02 and 536/02 Page 58 blameworthy but any conduct falling short of that should not be the subject of criminal liability. Common-law systems have traditionally only made negligence the subject of criminal sanction when the level of negligence has been high -- a standard traditionally described as gross negligence. * * * Blame is a powerful weapon. When used appropriately and according to morally defensible criteria, it has an indispensable role in human affairs. Its inappropriate use, however, distorts tolerant and constructive relations between people. Some of life's misfortunes are accidents for which nobody is morally responsible. Others are wrongs for which responsibility is diffuse. Yet others are instances of culpable conduct, and constitute grounds for compensation and at times, for punishment. Distinguishing between these various categories requires careful, morally sensitive and scientifically informed analysis..

81. As noticed previously, the silence in the statute, about the state of mind, rules out applicability of the mens rea or intent standard, (i.e. the prosecution does not

have to prove that the accused intended the consequence, which occurred or was likely to occur). Having regard to the existing law Section 13 (1) (e) (which does not require proof of criminal intent) as well as the strict liability standards prevailing in our system of law, therefore, a decision is said to be without public interest, (if the other requirements of the provision, i.e. Section 13 (1) (d) (iii) are fulfilled) if that action of the public servant is the consequence of his or her manifest failure to observe those reasonable safeguards against detriment to the public interest, which having regard to all circumstances, it was his or her duty to have adopted..

82. It would be useful to in this context, take recourse to certain examples. For instance, in not adopting any discernable criteria, in awarding supply contracts, based on advertisements calling for responses, published in newspapers having very little circulation, two days before the last date of submission of tenders, which result in a majority of suppliers being left out of the process, and the resultant award of permits to an unknown and untested supplier, would result in advantage to that individual, and also be without public interest, as the potential benefit from competitive bids would be eliminated. Likewise, tweaking tender criteria, to ensure that only a few applicants are eligible, and ensure that competition (to them) is severely curtailed, or eliminated altogether, thus stifling other lines of equipment supply, or banking on only one life saving drug supplier, who with known inefficient record, and who has a history of CrI.A.Nos. 482/02, 509/02 and 536/02 Page 59 supplying sub-standard drugs, would be acts contrary to public interest. In all cases, it can be said that the public servant who took the decision, did so by manifestly failing to exercise reasonable proper care and precaution to guard against injury to public interest, which he was bound, at all times to do. The intention or desire to cause the consequence may or may not be present; indeed it is irrelevant; as long as the decision was taken, which could not be termed by any yardstick, a reasonable one, but based on a complete or disregard of the consequence, the act would be culpable..

83. The test this Court has indicated is neither doctrinaire, nor vague; it is rooted in the Indian legal system. A public servant acts without public interest, when his decision or action is so unreasonable that no reasonable man, having regard to the entirety of circumstances, would have so acted; it may also be that while

deciding or acting as he does, he may not intend the consequence, which ensues, or is likely to ensue, but would surely have reasonable foresight that it is a likely one, and should be avoided. To put it differently, the public servant acts without public interest, if his action or decision, is by manifestly failing to exercise reasonable precautions to guard against injury to public interest, which he was bound, at all times to do, resulting in injury to public interest. The application of this test has to necessarily be based on the facts of each case; the standard however, is objective. Here, one recollects the following passage of Justice Holmes in *United States v. Wurzbach* 1930 (280) US 396: Wherever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk. Findings.

84. In the preceding portions of this judgment, the Court has discussed the facts, the findings of the Trial Court, the parties contentions, as well as the analysis of the legal provisions, in the light of the submissions made. It is now necessary to consider the facts, in the light of these submissions..

85. The DoT had tendered for purchase of 3000 2/15 MARR Shared Radio systems; clause 1.1.0 of the NIT stated that the equipments with local oscillators, having synthesized frequency control and capability of withstanding wide variation of Crl.A.Nos. 482/02, 509/02 and 536/02 Page 60 input DC voltage would be preferred.

35. Tenders were received, in response. A tender Evaluation Committee, constituted for the purpose, opened tenders on 18.03.1992. M/s Indotronix Computer Pvt. Ltd offered the lower price - ` 3,54,500/- per unit. ARMs quoted price was higher; yet it was the only concern which had type approval for the equipments being supplied. Such type approvals were necessary, to make supplies to the DoT. After some discussion, within the department, about imposition of conditions vis--vis orders for pending supplies, DoT decided to place an order on 500 units of the crystal version which ARM manufactured, for which it had type approval; this was at the rate offered by Indotronix, i.e. ` 3,54,500/- per

unit. This decision was taken on 27.11.1992. By then, M/s Shyam Telecom obtained type approval for the, i.e., the synthesized version, on 25.11.1992. This was taken into consideration, and the decision to place an order for 500 units was changed; ARM was asked to supply 300 units (of its crystal version) and Shyam was given the order to supply 200 units of its synthesized version. The price at which both concerns were given the orders was the same, i.e. ` 3,54,500/- per unit. On 16.04.1993, through its letter Ex. PW-3/K14 ARM, as a result of Union Budget concessions, offered to lower the unit price of the product from ` 3,54,500 to ` 3,45,000/-. This offer led to some internal discussion. Mr.Ujjagar Singh, prepared a note on 26.04.1993 for procuring 2500 systems from the vendors having type approval at the rate of ` 3,45,000 per system (Ex. PW-3/K-15). On 25.05.1993, Ms. Runu Ghosh, who had received the note as Financial Advisor wrote a note (Ex. PW-3/K-19) suggesting that an order for 1500 systems should be placed on M/s.ARM which was the only established supplier and that an order for 500 systems be placed on M/s. Shyam; for 200 systems on M/s. Punwire at the revised unit rate of ` 3,45,000 per system. The DDG (PF) commented (Ex. PW-3/K-20) about difficulty to mention the reduced price "as it depended on the quantum of imported inputs. The officer, Sri U.S. Prasad suggested that it would be prudent to order 300 systems from M/s ARM. It was said that a fresh open competitive tender could lead to reduction of more than ` 9500/- (per unit) offered by M/s. ARM. Sri Ujjagar Singh proposed by a note, Ex. PW-3/K-21, dated 31.05.1993 that the price should be negotiated with the lowest bidders who had type approval as on that date. He suggested the constitution of a Price Negotiation Crl.A.Nos. 482/02, 509/02 and 536/02 Page 61 Committee (PNC), which was set up on 04.06.1993, with Sri N.C. Gupta DDG (RN), (as Chairman), Sri Ujjagar Singh Director (MMC), and Ms. Runu Ghosh Director (FA-V), as members..

86. It is from this point onwards that the real controversy begins. It is a fact, borne out from the records that the manufacturers were called by the DoTs letters dated 07.06.1993 (Ex. PW-3/K-26 to Ex. PW-3/K-28). All manufacturers were asked at the time of price negotiation, to bring along with them: ...the break-up of prices in the form of import component, indigenous component, labour, overhead and financial charges, etc. You may also work out the revised prices acceptable to you and present them before the price Negotiation Committee. The PNC meeting with

manufacturers was held on 10-06-1993; there is no controversy about this, as well as the rival offers made by PUNWIRE, ARM and Shyam. It is not in dispute that the unit price for the system was to be ` 3,42,700/- and a similar offer should be extended to PUNWIRE for its response. The Minutes of meeting (Ex. PW-3/K-35) recorded the crystal based frequency system was inferior to the synthesized version designed by PUNWIRE and Shyam and that the equipments supplied by ARM and MACE Ltd suffered from serious limitation of delay in dial tone during installation and entailed many visits between the RSU and BSU, a feature absent in the synthesized versions offered by PUNWIRE and Shyam. This part of the minutes, and the penultimate paragraph, proposing a costing exercise to work out the discounted cost of the crystal version, was objected to by Ms. Runu Ghosh, in her note Ex. PW-3/K-36 of 18.06.1993. She made some penciled notes on the margin; there is some dispute about what these notes were. However, what is of importance is that she refused to sign the Minutes, and made her separate noting, (Ex. PW-3/K-36) outlining the points of disagreement on 18.06.1993. These were that ARM had offered to pay liquidated damages @ 23% in case of delayed supply (by it) beyond a particular date, if the order was placed within a date specified. The other disagreement was with regard to the enumeration of advantages and disadvantages of the crystal version; the last two paras of the report were not acceptable by her, for this reason. She added that supporting documents from TEC were necessary, if these parts in the report were to remain on record. Crl.A.Nos. 482/02, 509/02 and 536/02 Page 62.

87. It is at this stage that the Court needs to analyze the materials on record in the light of the submissions made, on two crucial aspects i.e. whether the synthesized version of the 2/15 MARR system was superior to the crystal version, (as found by the Trial Court); and secondly whether the costing exercise undertaken was justified. This analysis becomes necessary as it goes to the root of the Trial Courts findings that Ms. Runu Ghosh and Mr. Sukh Ram acted without public interest, which resulted in pecuniary advantage to ARM, in placing the final decision to procure 600 crystal based systems for a cost equivalent to the synthesized versions cost..

88. The genesis of the DoTs examination about the rival merits of technologies and the costing, lies in the PNC Report, which was concededly not signed by Ms. Runu Ghosh. The other two members Sri N.C. Gupta and Sri Ujjagar Singh signed it; the crucial part of the report stated that the 2/15 MARR System based on crystal frequency were inferior to the synthesized version and suffered from serious limitations. The report of PNC- exhibited as PW-3/K-35 placed on file, contain the pencil portions on the margin, by Ms. Runu Ghosh. It was produced as Ex. PW-4/H. The note of Dilip Sahay dated 06.07.1993 referred to said entry/note Ex. PW-4/H but stated that the reduced price was acceptable. This note Ex. PW-3/K-38 requested the concerned officer DDG (RN) N.C. Gupta to decide the price for the 2/15 MARR system. Dilip Sahais note Ex. PW-3/K-38 was endorsed to the Member (Production) who in turn marked it for necessary action. That noting by the Member (Production) is Ex. PW-4/I and was signed by the concerned Member (P) M.G. Kulkarni. The most important note of N.C. Gupta dated 13.07.1993 i.e. PW-3/K-37 and K-39 listed out limitations in the crystal version of 2/15 MARR systems and having regarding to the lowest price of the system quoted by Shyam Telecom i.e. ` 3,40,750/-, proposed a price reduction for the crystal version in the following terms: The price of Crystal Version MARR System was not worked out also as further purchase of such systems was not envisaged during the current year owing to the decision having been taken already in File No.80-143/92-MMC(Pt) for purchasing only Versatile Synthesised Version MARR Systems with improved facilities which are not available in the market to meet the CrI.A.Nos. 482/02, 509/02 and 536/02 Page 63 requirements. However, the reduction in the price of Crystal Version 2/15 MARR System may be summed up as follows, if still required:.

1. Reduction in actual price of equipment A copy of DGS and D Rate Contract No.EI-6/RC-2773/Transreceivers/92- 93/COAD/1070 dated -9-1992 is placed in the file at Sl.172/c. It would be seen from the prices given in Schedule II under items (1) and (1)(a) that a Crystal Version Transreceiver in VHF range with 2 Switchable radio channels is cheaper by Rs.2010.00 [11250-(10380-4x

285.)] 2/15 MARR System comprises of 17 such Transreceivers and the price reduction works out to be Rs.2010x

17. = Rs.34170.00 per system..

89. This price reduction proposal was acceptable to the Advisor (P) as is evident from Ex. PW-3/K-40. Sri Ujjagar Singh by his note Ex. PW-3/K-41 dated 19.07.1993, in the light of this development proposed that the revised price for the crystal version would work out to ` 3,03,750/- per unit and accordingly further suggested that the revised financial implications, turned out to be ` 84,06,75,000/- plus taxes. This note proposed that 300 crystal based systems were to be sourced from ARM and orders for 500 and 700 synthesized version systems were to be placed on Punwire and Shyam Telecom. It was further suggested that the balance 1000 systems of the synthesized version were to be procured from vendors who obtained type approval, after issue of the purchase order on the concerned firms M/s Punwire and Shyam Telecom. In this background Ms. Runu Ghosh wrote a detailed note Ex. PW-3/K-42 on 23.07.1993, it would be necessary at this stage to extract material portions of that note which are as follows : M/s. ARM had volunteered (in writing) to accept 23% LD charges for non- delivered system in case he failed to supply 1500 systems by 15th Feb.,

94. However, in the draft minutes the synthesized version supplied by M/s. Shyam was stated to be superior to the crystal controlled version supplied by M/s. ARM on account of needing less maintenance spares. Since these issues were not discussed in the PNC meeting among the members themselves or with any of the vendors and these were technical issues and needed supporting documents from TEC/CA if they were to be included, the under-signed asked the last four paras of the report to be deleted. Thereafter, DDG (RN) has suggested a price reduction of Rs.37,000 per system for the crystal controlled Crl.A.Nos. 482/02, 509/02 and 536/02 Page 64 version supplied by M/s. ARM on the basis of difference in prices between the crystal-controlled and synthesized version of hand-held VHF FM trans- receivers of a commercial make as given in the DGS and D rate contract of 92-93, which seems to have been obtained after the PNC meeting. Based on this, MM branch has suggested procurement of 300 systems of crystal controlled version from M/s. ARM at the rate of 3,03,750 and 1200 synthesized version from M/s. Shyam and M/s. Punwire at the rate of Rs.3,40,750 and keeping the balance quantity of 1000 in reserve for vendors who get type approval later in the year. On

a scrutiny of this proposal the following points emerge: It does not appear, by any means, certain that the 1W/4W switchable hand-held VHF FM trans-receivers used mostly by the organizations like police, air-port authorities are comparable, regarding manufacture and design technology with the 2/15 MARR equipment used by DoT for our specialized requirement. The matter was discussed with Sr. DDG (TEC) over phone and he also confirmed that these two are not comparable at all. It would not be in order to work out a higher price for the synthesized versions of M/s Shyam, vis- -vis the crystal version of M/s. ARM on the basis of DGS and D rate contract without seeking clarification on the matter from TEC who is issuing the type approval for both systems and accordingly a letter (copy placed at flag Z') has been addressed to Sr.DDG (TEC). Till the reply is received from TEC, the price reduction of Rs.34,170 per system worked out on the basis of the rate contract cannot be accepted. A further reduction in prices for the crystal controlled versions of Rs.3000 per system (in addition to Rs.34,170) has been suggested by DDG (RN) on account of the fact that some additional facilities like orderwire and traffic measurement are available in the synthesized version supplied by M/s. Shyam but absent in the crystal version of M/s. ARM. Since the crystal version supplied by M/s. ARM conform to all the specifications given in the tender of 92-93 based on which the case is being processed, it will be incorrect to reduce the price of this systems on account of some additional features which are optional and provided by one bidder. It is understood from TEC that the synthesized version of M/s ARM has also been given the type approval now and this contains some additional features which are not available in the systems supplied by M/s Shyam or Punwire. If we reduce the price of crystal version which are acceptable as per our tender specifications on the basis of optional features of the product of any one bidder the logical thing to do would be to reduce the price of synthesized version supplied by M/s. Shyam or M/s. Punwire on account of the better additional facilities lacking in their systems but provided in the synthesized version of M/s. ARM. It has been provided in Crl.A.Nos. 482/02, 509/02 and 536/02 Page 65 the synthesized version of M/s ARM. It has been mentioned in page 46/N that M/s Natelco whose system is under field trial was the lowest bidder in the tender. This is factually incorrect since, as already mentioned, the lowest bidder in the tender was M/s. Indotronics Computer Systems who have not so far

been able to produce the systems. Since for the present procurement we are operating on last year's tender it will be totally incorrect to operate on two rates for the same tender and fixing a higher price arbitrarily for synthesized versions, as opposed to crystal version, which are acceptable as per the tender specifications (in 92-93 M/s. ARM supplied a total 1050 numbers of 2/15 MARR Systems which are stated to be satisfactorily working in the field as per reports from the field units). Such a course of action, if adopted, will amount to discrimination against one vendor and favours to another vendor and can result in court case where our stand will be difficult to defend. If at all a lower price is to be given for 2/15 MARR System then that price is to be offered uniformly to all the vendors provided the systems supplied by them are meeting the tender specifications. Under the circumstances the best course appears to wait for the TEC report before any decision is taken regarding the price at which orders are to be placed. Incidentally it may be pointed out here that M/s. ARM as per their letter dt. 21/7/93 (Flag Y') has intimated that they are charging ST at 2% instead of 4% being charged by other vendors so that an additional cost benefit of Rs.7837 per system will be available to DoT on account of this. Hence at the ordering stage this has to be kept in mind and this vendor should be loaded to full of his capacity which, as per his offer is 1500 systems, which will result in a benefit of about Rs.10.17 crores..

90. The Trial Courts findings were sought to be attacked by counsel. The main grounds urged here were that the crystal version of which 522 units were been supplied earlier, before the orders were placed pursuant to the NIT, were tried and tested. There was ample documentary evidence suggestive of its being used in the field satisfactorily. Counsel highlighted that first batch of orders placed i.e.

500. units of crystal version, were pursuant to the same NIT. At that stage, no difference in quality was perceived; in fact the entire lot was to be awarded to ARM; however since Shyam Telecom claimed that it had received type approval, the order was split. In Crl.A.Nos. 482/02, 509/02 and 536/02 Page 66 these circumstances, it was unfair at a much advanced stage for the officials at the lower and middle levels to start a campaign that the crystal version was inferior to the synthesized version. It was further urged that the PNC had no mandate to examine technology aspects and that Ms. Runu Ghosh's note emphasized this as

well as the fact that such technology issues were never put to the vendors and suppliers when they were called for negotiations on 10.06.1993. The only person competent to comment on this aspect is Shi Rakesh Aggarwal (of TEC) who by his letter dated 26.07.1993 (PW-4/DZ/2) said that it was not proper to compare the two technologies or even attempt to differentiate in the manner suggested..

91. Learned counsel had argued that at best the difference in the two technologies was a matter of perspective, an aspect highlighted by Mr. Sukh Ram and borne out by the notes of Ms. Runu Ghosh as well as from the letter of Mr. Rakesh Aggarwal. Even the Chairman of Telecom Commission N. Vittal stated this in his noting. Furthermore the so called draw backs were not objectively proved; evidence about the limitations and alleged failures of the crystal version was not produced during the trial..

92. The other aspect emphasized during the hearing was that the only material witness who justified about the synthesized version being the alleged superior technology was PW-4, N.C. Gupta who admitted to not having worked in the TEC or dealt with the concerned technologies. Counsel stated that this witness agreed that a document on the record i.e. note of J.N. Biswas had mentioned about satisfactory working of the crystal based system in AP, MP, Haryana and Orissa (PW D/B). This witnesses department had nothing to do with type approval. His best evidence was that some equipments, used in AP went bad for which he had to make certain visits. Counsel submitted that PW-4 did not mention any details nor care to produce documentary evidence in this regard. No inspection notes of the equipment which were made according to PW-4, were exhibited. Since the Chairman of Telecom Commission headed the TEC, which was manned by two other high-ranking technical officers, their word had to be considered as the last one, in the matter. TEC consisted of Sri Muthuswamy, DDG (Transmission), and D.B. Sehgal, DDG(ML). Ms. Runu CrI.A.Nos. 482/02, 509/02 and 536/02 Page 67 Ghosh's note established that according to Muthuswamy there was no difference in the technologies. Furthermore the noting of Chairman, Telecom Commission N. Vittal underlined that there could be two views about the efficacy of the synthesized version. Having regard to these, the Trial Court was not justified on the basis of sketchy and vague evidence in concluding that the crystal version was

inferior to the synthesized version. The existence of two views in this regard meant that the Appellants Ms. Runu Ghosh and Mr. Sukh Ram could not be convicted..

93. The prosecutions case is that the synthesized version of 2/15 MARR was superior to its crystal version. The Appellants urge that there was no such superiority. The admitted fact is that DoT tendered for supply of 3000 2/15 Shared Radio VHF systems. Clause 1.1.10 of the specifications, (Ex.PW 3/D) prescribed that equipment with local oscillators and synthesized frequency control capable of withstanding wide variations of DC input were preferred. No plea that any accused was unaware of this condition (clause 1.1.10) was advanced. PW4 N.C. Gupta is a Telecom Engineer who joined as Deputy Director General (Rural Network), of DoT in 1990. His job was to ensure public rural telephony. His department was responsible for providing 2/15 MARR systems for rural telephony. The witness deposed about certain limitations in the crystal version developed by ARM and another vendor; but DoT had no alternative except to purchase such systems till indigenous development of the synthesized version (which was considered more flexible and versatile) took place. The limitations of the system were pointed out by PW-3, in his notings (in the file) as well as in the report of PNC; he deposed about these limitations, in Court. He testified that the tender indicated use of the synthesized oscillator instead of the crystal oscillator, to overcome these limitations. PW-4 deposed to receiving reports regarding limitations of the crystal version, when he visited some sites. These limitations impelled the agency to requisition equipment with oscillators fitted with synthesized frequency control..

94. A significant fact worth noting here is that on 03.05.1993, - after ARMs offer dated 16th April, 1993, (but much earlier to the PNC meeting, or even its composition,) to reduce its unit prices on account of customs duty concessions, the Director (GP) D.P. Srivastav proposed (in note Ex. PW-4/A) that for the year 1993-94 CrI.A.Nos. 482/02, 509/02 and 536/02 Page 68 only the synthesized version with improved modern features, should be purchased and that use of the crystal based system was to be discontinued due to inherent limitations of flexibility in reusing, and difficulties in substitution of available spare units in the event of a fault of its recurrence. This note was forwarded by PW-20 Mr. M.G. Kulkarni, then Advisor (P) to the Member (P) for approval (by note Ex.PW4/C). Mr.

Kulkarni deposed that this note was approved by then Member (P) Mr. U.V. Nayak, PW-15. PW 15, testified that by note dated 06.05.93, (Ex.PW 4/E), he had approved purchase of only the synthesized version. He had added that as all vendors may not have been ready, this aspect ought to be examined further. These show that the then Advisor (P), PW-20, and the Member (P) - PW-15 endorsed the view taken on 06.05.1993 to purchase only 2/15 synthesized version of MARR..

95. An important aspect which the Court has to keep in mind is that M/s Shyam had already received type approval for its synthesized version - a fact communicated to DoT on 25.11.1992 (Ex. PW-3/K-9). This event in fact altered the previous decision to award the first order for 500 units, and Shyam was included as a supplier for that lot. The file noting Ex. PW-3/K-9 reveals that M/s Punwire had also secured type approval. PW-4 N.C. Gupta alone noted this development i.e that only the synthesized version should be purchased in the year 1993-94. N.C. Gupta, as PW-4 pointed out limitations of crystal version. He also enumerated the additional features of the synthesized version. The Chairman of Shyam Telecom, Rajiv Malhotra deposed, as PW 9 and elaborated about such additional features..

96. The deposition of PW-4 as regards various features of the synthesized version, are now discussed. The first of these is regarding the change of frequency. PW-4 stated that the function of an oscillator is to generate the frequency in which a particular system is to operate. The synthesized version provided for frequency control through a synthesizer. The crystal version depended on frequency control through a crystal. The important limitation of the crystal based technology version was that it could operate only on a fixed frequency. The DoT used to supply frequencies to the manufacturers and the system used to conform to that frequency. However, in case of the synthesized version, the frequency could be changed with a dipswitch. Such change of frequency, in the case of the crystal version, needed replacement of crystals, Crl.A.Nos. 482/02, 509/02 and 536/02 Page 69 which in turn meant that the equipments for changing crystals had to be taken to the field. PW-4 deposed that if the base unit or the subscriber unit went out of order and required replacement, a unit with the same

frequency was necessary, for replacement. The frequency in the case of the synthesized version could be changed by a dipswitch, in the system. Also, any spare unit could be used as replacement by change of frequency. In the case of the crystal based version, the frequency could not be changed in the field. Moreover, taking the spare unit to the workshop for crystal change, (to change system frequency) entailed substantial time, resulting in system unavailability to the unit subscriber concerned. If the dysfunctional unit was a base unit, the entire system would stop, till its replacement by another unit operating in the same frequency. No suggestion was given to PW-4 that tuning the amplifier and the receiver to the new frequency was not required after change of crystal. However, there was no such problem in the case of the synthesized version where any spare unit, (irrespective of frequency on which it operated), could be used as replacement, by changing its frequency with a dip switch in the system subject to the condition that the change of frequency was within the same band. In case of the crystal version, the department would either have to purchase at least one spare unit operating on each frequency, or also the replacement would not be possible so long as the spare unit were not taken to the workshop and its crystal replaced or changed there..

97. DW-2, a witness for Mr. Rama Rao, stated that the department used to purchase one spare base unit and one spare subscriber unit operating on each frequency. He admitted that if more than one unit in the same frequency were to malfunction, the department would have a problem as it has purchased only one spare unit operating in that frequency. It had to change the crystal of some other unit, to operate it in that frequency. This entailed loss of time. The Trial Court noticed that this witness started working as a consultant for ARM after retirement and was paid as much as `7,00,000/- by ARM in a span of about 2 years whereas his gross salary at the time of retirement was `25,000/- per month. He became a consultant for ARM soon after retirement, despite his conflict, as he had previous official dealings with ARM. DW-2 admitted that change of frequency entailed not only crystal replacement but also needed amplifier and receiver tuning. He admitted that in case of the CrI.A.Nos. 482/02, 509/02 and 536/02 Page 70 synthesized version, frequency change through dipswitch was possible. DW-2s evidence also establishes that change of location required frequency change

because generally different frequencies are allotted locations. Shift of unit from one locale to another, was not possible for the crystal version, without first transporting the unit to the workshop, changing its crystal and tuning the amplifier and transmitter to the new frequency. DoT had planned induction of new technologies, such as CDMA. That would have meant redundancy of such units wherever new technology had to be installed. However, the advantage for the synthesized version, was that the surplus unit could be used at some other locale, where the new technology was not inducted. The frequency change mechanism posed serious limitations in the crystal version; such restrictions did not apply for the synthesized version. This was a distinct advantage or technological improvement, benefitting the DoT..

98. PW-4s evidence further reveals that the synthesized version had a duplicate power supply and duplicate Low Noise amplifier (LNA). N.C. Gupta deposed that the crystal version was equipped with only one LNA/receiver and one power supply (unit). The benefit of a dual LNA and power supply was that in case of failure of one, the other would automatically take over. This too was a distinct technological edge for the synthesized version..

99. The third advantage was the order wire facility, in the synthesized version. PW- 4s deposition shows that the synthesized version had the "order wire" facility which enabled direct communication from the base to the subscriber unit, and vice versa without the help of a telephone instrument. Mr. N.C. Gupta stated that in some cases the subscriber unit could be installed even where telephone were unavailable and there it was not possible for the man at the base unit to speak to communicate with the one at the subscriber unit, in the crystal version. DW-2 admitted that in case the order wire facility, were not provided and a RSU instrument malfunctioned, the complainant had to look for another telephone instrument. If order wire facility were installed, the complainant did not need another instrument. This facility was extremely useful..

100. PW-4 also deposed that in addition, the synthesized version had a traffic measurement device; this was not installed in the crystal version. This aspect was not disputed in the cross-examination. He also deposed about delay in receiving

dial tone Crl.A.Nos. 482/02, 509/02 and 536/02 Page 71 in crystal versions, at the time of installation or replacement of RSU, which resulted in the impression, that the system had not been restored or connected, due to absence of dial tone. This involved avoidable trips between the base unit and RSU. There was no delay in receiving dial tone, in case of synthesized version, - a fact deposed to by PW-.

4. 101. The evidence also suggested that identification code could be changed in the synthesized version - a feature unavailable in case of the crystal version. This was spoken to by PW-4. The advantage was that if any subscriber felt that his unit was misused and wanted change of identification code, he could not have got it done in case of crystal version. DW-2 deposed that the DoT had specifically decided not to have this feature in the RSU as it was capable of being misused. At the same time, DW-2 admitted that the user would not know the identification code of his unit and it had to be opened to ascertain the (identity) code and that could have been done only by a technical man. However, no such suggestion was given to PW-4, in cross- examination. This too was an additional feature of some utility..

102. As far as documentary evidence goes, Ex. PW-4/A, dated 3rd May, 1993 stated that due to availability of the synthesized version, the use of crystal based MARR Systems is not favoured due to inherent limitation of flexibility in re-using on introduction of other technologies viz. TDMA, CDMA etc and difficulties in substitution of spare units in the event of a fault... Sri U.V. Naik, the Member (of the Telecom Commission) approved the note (by Ex. PW-4/E), however, sounding a note of caution that all vendors may not have been ready with the synthesized version. The Adviser (P) was asked to see this aspect; the latter asked DD (RN) to look into this aspect. DD (RN) by Ex. PW-4/F (07.05.1993) stated that ARM was likely to get type approval for the synthesized version in July, 1993, and Shyam as well as PUNWIRE had obtained it. The note of US Prasad (Ex. PW-3/K-20, dated 26.05.1993) stated, inter alia, that PUNWIRE and Shyam had obtained type approval for the technology. He stated that it would be prudent to source only 300 crystal based units from ARM. PW-3 Ujjagar Singh differed with this approach (of US Prasad, who wanted a fresh tender) and proposed price negotiation with the lowest bidders, in his note PW-3/K-.

21. The file had in the meanwhile gone to Ms. Runu Ghosh, and by her note, (PW-Crl.A.Nos. 482/02, 509/02 and 536/02 Page 72 3/K-21) while proposing to issue an order on ARM for 1500 units, (dated 31-05- 1993), it was observed that:The systems supplied by ARM are crystal controlled but this should not pose a problem in view of the fact that the firm has supplied about 1100 systems last year which are reported to be working satisfactorily in the field and further as per their letter dated 22-4-1993 (Flag-I) they have offered to change the frequency at site, free of cost; in case DoT decides to change operating frequency of any crystal controlled version asupplied by them.....

103. PW-4 N.C Guptas elaborate note (PW-3/K-39) was preceded by Dilip Sahays note PW-3/K-38, which required the costing exercise to be carried out. The note PW-3/K-39 pointed to three system inadequacies, or deficiencies in the crystal version, i.e. difficulty in re-use due to fixed frequency; need to maintain large number of spare parts, and difficulty in upgradation and maintenance. Elaborating on the re- use point, it was stressed that though ARM volunteered to change frequency, free of cost, yet that depended on the location of the equipment, and also the companys convenience. Therefore, the equipment disadvantage had to be offset by a price advantage, for the DoT. The note further added: It would be seen from the details placed at Sl.173/c that out of total 2402 Crystal Version MARR systems (2/15, 4/30, 8/60) provided in the DoT network, 1021 Nos. of 2/15 MARR systems have been supplied by M/s ARM (P) Ltd. Most of these Crystal Version MARR systems will be rendered spare at the existing locations during induction of TDMA and CDMA based systems starting from 1994-95 and their re-use at other locations will pose a serious problem due to frequency compatibility... This note also added that field trials were on for ARMs as well as NATELCOs synthesized version. The file reveals that the price differential proposed by PW-4 was acceptable, though the number of crystal version purchases to be made was unclear; different officers proposed different quantities. In this background, PW-3/K-42 dated 23.07.1993 was written by Ms. Runu Ghosh, stating that price reduction for the crystal version (of ARM) was not justified, and would be discriminatory. She also mentioned that ARM had volunteered to bear 23% liquidated damages if it could not supply the equipment in a timely manner, agreed by it, and further referred to the reduced sales tax burden if ARM were placed with

the order for the 1500 crystal based systems. She Crl.A.Nos. 482/02, 509/02 and 536/02 Page 73 proposed that the matter should await clarification by TEC. The letter, of Sri Rakesh Aggarwal, (TR) PW-4/DZ-2 dated 26.07.1993, apart from making comments about the price differential aspect, clarified that TEC issued type approval to only manufacturers whose products met with all specifications, and no two equipments were exactly same, in view of different manufacturers. All these materials were on record, when the approval for the price differentiation was given by Mr. Sukh Ram, in his note Ex. PW-3/K-60..

104. Apart from the above notings and oral testimony of witnesses, after the orders were placed on the vendors in September, 1993, ARM made representations for change of terms; the representation to Mr. Sukh Ram, dated 11.09.1993, sought cost equalization vis--vis the crystal and synthesized versions. This resulted in the entire matter being re-visited again. Here too, the file notings - pertaining to technological superiority of the synthesized version, (PW-8/6, dated 12.10.1993, by DDG (PF) and the noting of Member (F) by Ex. PW-8/4) reiterated that the said product was superior to the crystal version. The Member (S) had by his note PW-3/K-80 stated that ARMs request for supplying 300 crystal version units could be granted as a special case but the price variation or differentiation was to remain. The Member (Technical), in the file noting dated 13.10.1993 (Ex. PW-3/K-81) observed that the crystal versions limitation was that it was site specific, whereas the synthesized version could be used at any site. All these were considered by Mr. Sukh Ram, but in his note PW-3/K-86 he disagreed and said that the crystal version too was acceptable. Again, in the note PW- 2/K-87, DDG (PF) U.S. Prasad repeated that the opinion of all technical officers was that the synthesized version was superior to the crystal version. He suggested that if price differentiation was to be examined, it could be done. The note was approved by Member (F) in his note, Ex. PW-3/K-88..

105. The above contemporaneous record would show that barring the ambiguity injected by the letter of Rakesh Agarwal (Ex. PW-3/DZ-2) dated 26th July, 1993, there was an overwhelming opinion among the middle and senior level officers in the DoT that the synthesized version was superior. Several reasons appear on the record, Crl.A.Nos. 482/02, 509/02 and 536/02 Page 74 including file notings made

before the controversy (Ex. PW-3/4A which received approval by Ex. PW-4/E) in May, 1993 itself..

106. As far as the submission of the Appellants regarding the competence of PW-4 N.C. Gupta is concerned, it is a matter of record that he was a member of the technical group, which evaluated the tenders for procurement of the systems, in this case along with Rakesh Agarwal. No doubt, he was not a member of the TEC; yet he had experience. The Court cannot disregard his evidence merely because he did not furnish any material, regarding limitations or felt inadequacies in the crystal version. As noticed earlier, the limitations in the crystal version were repeated and recorded in several places and several file notings. There cannot be any doubt that such was the contemporaneous thinking. Equally, the fact that an order was placed on 300 crystal units in December, 1992 cannot be proof that the other technology was not superior. In fact the initial decision in end November 1992 was to purchase the entire first 500 lot of units (crystal based) from ARM; this was changed because Shyam received type approval and communicated DoT about this, on 25th November, 1993. As far as Mr. N. Vittal, PW-17, who was at that time the Chairman of the Telecom Commission is concerned, he noted, in PW-3/93 that Mr. Sukh Ram had been told that there is difference in technology which necessitated price differential, but also added that since the minister said that he had gone through all aspects, and decided that the same price was to be paid, that decision had to be implemented. In his deposition, he testified that the crystal version was inferior to the synthesized version, and that the Minister had the last word on all aspects relating to equipment procurement..

107. Having regard to all the above materials, this Court is of opinion that the Trial Courts finding about the superiority of the synthesized version, over the crystal version, cannot be faulted, and was based on sound reasoning. Price Differentiation between the crystal and synthesized versions.

108. This issue i.e. price differentiation overlap to a great extent with the question of superiority of the synthesized version. Nevertheless it is important to consider this and whether view taken by the Trial Court in this regard was sound or whether there Crl.A.Nos. 482/02, 509/02 and 536/02 Page 75 could be two opinions about

price differentiation in which event the decision of Mr. Sukh Ram and Ms. Runu Ghosh is not as honest and bona fide. The materials on record - discussed in the preceding portion of the judgment, clearly point out to distinct advantages of the synthesized version; which was also the preferred version in the concerned NIT. Considerable emphasis was given to the fact that the tender conditions did not make any price differentiation and more importantly the initial order for 500 units (which contained an order of Shyam Telecom for 200 synthesized version units, for which type approval had been given on 24.11.1992) were purchased at the same price. These are undisputed facts. However, one cannot lose site of the fact that the matrix of circumstances underwent a sea-change with the announcement of Union Budget proposals sometime in early 1993. Customs duty concessions were granted for imported components. ARM volunteered through its letter dated 16.04.1993 to make a price cut, in respect of 2/15 MARR Systems for which it had type approval. In Ex. PW-3/4A, it was observed that only the synthesized version ought to be procured; the superior officers including Member level officers endorsed it, the only concern expressed was that vendors might not be ready to supply them in large quantities. The notings of DoT including those of PW-3 and accused Ms. Runu Ghosh ultimately led to the constitution of PNC. Till that time various proposals were discussed including Ms. Runu Ghosh proposal that 1500 systems may be sourced from ARM and the balance distributed amongst other vendors. All the vendors - as noted earlier were asked to present themselves before the PNC, to enable discussion of their offers. It is also not disputed that the lowest offer received was ` 3,40,700/- and it was uniformly proposed to all vendors and apparently acceptable to them. It is at this stage that the price differential controversy arose along with the perceived inferiority of the crystal systems. N.C. Gupta, PW-4 in one of his notings stated that it was essential to work out the costing of the crystal systems having regard to the offer made (as exhibited by PNC) in principal for procuring systems at a reduced price of ` 3,40,700/- per unit. It has to be kept in mind that barring ARM the other vendors had type approval for synthesized version and not the crystal version. This proposal was approved and Sri N.C. Gupta went ahead with his costing exercise. During his cross-examination as well as in the arguments before the Court considerable attention CrI.A.Nos. 482/02, 509/02 and 536/02 Page 76 was given to the fact that Mr. N.C. Gupta

costing exercise besides being unilateral was contrary to the established procedure and also that it was not endorsed by the TEC and for which the Appellant relied upon Sri Rakesh Aggarwals letter dated 26.07.1993 (Ex. PW 3/DZ2)..

109. The Trial Court has noted that Sri N.C. Gupta, in aid of his costing exercise, went through the rate contract and produced Ex. PW4/X. The crystal controlled trans- receiver was priced at `10,380/-; the synthesized trans-receiver was on the other hand cost ` 11,250/-. In his deposition, PW- 4, N.C. Gupta tried to explain that a crystal based trans-receiver had six oscillators and six crystal sets, provided for DGS and D in its rate contract and that each set had two crystals. The Trial Court went on to record the costing exercise in the following terms: "47. Ex.PW 4/X is the Rate Contract relied upon by M/s. N.C. Gupta for calculating price difference between synthesized version and crystal version of 2/15 MARR system. It shows that rate of crystal controlled transreceiver was Rs.10380 whereas the rate of synthesized transreceiver was Rs.11250. Mr. N.C. Gupta came in the witness box as PW4 and explained that there are six oscillators and six sets of crystal in each crystal controlled VHF transreceiver, price of which has been given at page 10 of DGS and D Rate Contract and there are two pieces of crystal in each set. DGS and D Rate Contract provides with deducting Rs.285 for uncrystalled channel in case of crystal controlled transreceiver. Price of 285 given in DGS and D is for one uncrystalised channel meaning thereby that this is the price of one set (two pieces of crystal). According to Mr. N.C. Gupta there are two sets of oscillator and two sets of crystal in each unit of crystal version of MARR system. As there are 17 transreceiver sets in one 2/15 MARR system, it would mean that there are 34 sets of oscillator and 34 sets of crystal in each system. As there are six channels in hand held transreceiver and only two crystals in each 2/15 MARR transreceiver, Mr. N.C. Gupta calculated a notional price of hand held transreceiver sets for two crystal by deducting the price of four crystals, from the total price of Rs.10380 given in DGS and D Rate Contract for crystal controlled VHF transreceiver. By this calculation, the price of crystal controlled hand held transreceiver with only two crystal would come to Rs.9240. As the price of hand held synthesized transreceiver was Rs.11250 as per DGS and D Rate Contract, the differences between hand held transreceiver comes to Rs.2010. As there are

17 transreceiver in each 2/15 MARR system, the price difference for one system comes to Rs.34170 by multiplying the figure of Rs.2010 by.

17. Mr. N.C. Gupta added Rs.2000 for each system for order wire facility which was available in synthesized version of 2/15 MARR but was not available in its crystal version in synthesized version but was not available Crl.A.Nos. 482/02, 509/02 and 536/02 Page 77 in crystal version. According to Mr. N.C. Gupta order wire facility was for 16 hand -sets and no hand held set was available in less than Rs.200, but, taking a lower figure he valued order wire facility at Rs.2000 which included the cost of circuit. According to him synthesized version of 2/15 MARR was having 16 hand- sets in each system and those hand sets were part of order wire facility..

110. As noticed earlier in the discussion as regards the official view on the superiority on the synthesized version there was no disagreement with the costing undertaken by N.C. Gupta. The Trial Court noted that Advisor (P) Mr. M.G. Kulkarni (who went on to become Member Telecom Commission) in his deposition as PW-20 stated that synthesized version was superior to the crystal version and that the latter deserved a reduced price. The apprehensions expressed by Ms. Runu Ghosh that the costing exercise was unjustified and resulted in a charge of arbitrariness (and discrimination) on the ground that during price negotiations no such offer was made, was also considered by the other superior officers. This aspect was highlighted by her in the note (PW 3/K-42 dated 23.07.1993) appears to be an attractive submission, but at the same time the Court also has to take into consideration the fact that each of the manufacturer - who participated in the Price Negotiations Committee had made submissions and also brought letters with technical details which form part of the record (explaining all features and elaborating in the annexures to such documents the technical specifications) therefore, Ms. Runu Ghosh's reservations to the inclusion of the technical inputs, in the minutes of the PNC meeting, or its report cannot be believed. More so the other Members (of the PNC) had no axe to grind; nowhere was it suggested during the cross-examination of either PW-3 or PW-4 that they preferred any one kind of technology or manufacturer. This note is also important, because Ms. Runu Ghosh suggested that 450 units (of the crystal version) and 1050 synthesized version

units may be procured from ARM..

111. The reliance placed on Ex.PW 4/DZ-2 from Mr. Rakesh Aggarwal (of TEC) shows that he (Sri Agarwal) felt that the design concept and application of hand held VHF trans receivers was different from 2/15 MARR and it was not proper to compare them. He also intimated that TEC did not have any data on costing of the two versions and costing depended upon the design concepts and type of components used. This letter, in the opinion of this Court cannot be seen as a "different" view, as is CrI.A.Nos. 482/02, 509/02 and 536/02 Page 78 advocated by the Appellants in the present case. At best it was a non-committal (and, if can so term it, a "fence sitting") kind of view. It certainly does not say that the crystal version could not cost lower than the synthesized version; all that was said was that data was unavailable. An interesting detail worth noting here is that Ms. Runu Ghosh's letter, to the TEC, on 20th July, 1993 (Ex.P-13) (to which Rakesh Aggarwal replied by his letter of 26.07.1993) merely sought opinion in a general manner; it did not enclose the letters of ARM, Shyam and PUNWIRE, or even N.C. Gupta's note of 13th July, 1993. N.C. Gupta adopted, by his note of 13.07.1993, a transparent and seemingly reasonable approach to costing; it was based on component cost for prevailing DGS and D Rate contracts. Rakesh Aggarwal naturally did not and could not have commented on the methodology or the costing exercise undertaken by N.C. Gupta. In fact Rakesh Aggarwal acknowledged that the Technical evaluation committee (of which NC Gupta was a member) would be competent to state about the merits of the two technologies. For these reasons, this Court concludes that the costing of the synthesized version carried out by N.C. Gupta, and which was accepted by all, including Mr. Sukh Ram, by his note dated 31.08.1993, cannot be faulted. Issue of the Purchase order to ARM and Trial Court's findings regarding Mr. Sukh Ram's culpability in directing cost parity.

112. Ms. Runu Ghosh's note dated 23.07.93, (Ex. PW-3/K-42), points out that in the year 1992-93 the DoT had placed an order for 300 systems from ARM and 200 on Shyam and the price was ` 3,54,500 per system. She also noted that since for the present procurement they were operating on last year's tender, it would be incorrect to operate on two rates for the same tender and fixing a higher price for

synthesized version as opposed to crystal version..

113. The evidence on record would show that as on 13.07.1993 when N.C. Gupta made his noting Ex. PW-3/K-39, type approval for ARMs synthesized version had not been obtained. The file was apparently kept for consideration of the Minister Mr. Sukh Ram but due to pre-occupation was returned on 02.08.1993 (Ex. PW-3/K-44); subsequently it was re-submitted by the note of Ms. Runu Ghosh, -Ex. PW-3/K-45- on 05.08.1993. In his note (Ex. PW-3/K-46) Mr. Sukh Ram observed that the case had been abnormally delayed and that Gram Panchayat targets had been slipped. It was Crl.A.Nos. 482/02, 509/02 and 536/02 Page 79 also noticed that unless the equipments arrived fast the targets would slide further. He therefore directed that the case should be decided within a weeks time. Sri Dilip Sahays note of 17.08.1993, Ex. PW-3/K-47 reflected the ministers concern and also emphasized the need to stick to clause 1.1.1.1 of the Tender specifications vis--vis procurement of the synthesized version. By then M/s Natelco had obtained type approval for the synthesized version; similarly ARM had also obtained type approval. In these circumstances the note Ex. PW-3/K-48 proposed distribution of the order was that ARM was given an order for 800 systems (500 synthesized and 300 crystal); Shyam Telecom, Punwire and Natelco were to be placed with orders for 900, 500 and 200 units respectively. The note of Ujjagar Singh Ex. PW-3/K-45 dated 23.08.1993, in the light of notings by R.S. Bansal and U.S. Prasad, made a fresh proposal where the distribution of the orders was retained in respect of ARMs proposal (300 crystal version and 500 synthesized version) the order placed on Shyam Telecom was proposed to be reduced to 800 units; the orders for Punwire and Natelco were sought to be increased to 450 each. The subsequent note Sri U.S. Prasad, DDG (PF), Ex. PW-3/K-58 (of 25.08.1993) took into account the new price of the synthesized version in view of 1.5% discount offered by Natelco. He proposed the synthesized version unit costs to be Rs.3,35,639/- plus E.D. Sri U.S. Prasad, Ex. PW- 3/K-58 took these development into consideration and stated that "as regards the crystal version, it has been suggested on pre page that prices may be same as indicated in page 47/N and the reduction suggested by DDG (RN) was Rs.34,170 Plus Rs.3000 i.e. Rs.37,170/-. The price of the crystal version accordingly should be Rs.3,35,639 minus Rs.37,170 = Rs.2,98,469/- per system... . This proposal in Ex. PW-3/K-58 was approved by

Member (Production) R.S. Bansal on 25.08.1993; the distribution of the order was also approved by the same note. It was in this background Mr. Sukh Ram approved the distribution of the order after stating in his note Ex. Pw-3/K-60 on 31.07.1999 that "I have perused the preceding note This note of Mr. Sukh Ram observed that Natelco and Punwire had not proved themselves in the field and therefore he doubted whether they could complete the large supplies of the systems. In these circumstances his final decision was to increase the order for Shyam Telecom and ARM to 900 each; (in the case of ARM the CrI.A.Nos. 482/02, 509/02 and 536/02 Page 80 order was to be split into 300 crystal systems and 600 synthesized based systems); M/s Punwire was to be given an order for 250 units and M/s Natelco, was to be an order for 450 units. He also recorded "rest as proposed. It was in the light of these facts that the APO was issued to ARM on 02.09.1993. The order (Ex. PW-3/K-67) indicated in the terms and conditions annexed that the synthesized version was to be supplied at a total price inclusive of sales tax, of. ` 3,35,639/- and the 300 crystal version units were to be supplied for a total price of ` 2,98,469/- inclusive of sales tax. The terms and conditions also clearly stated that performance bank guarantee was to be kept valid till the expiry of the warranty period..

114. On 9th September 1993 ARM wrote a letter to DoT (Ex. PW-3/K-98) forwarding the bank guarantee for supply of 600 synthesized version systems and assured that the supply of those systems would be completed by the end of December 1993. But in regard to the crystal systems, M/s. ARM protested, saying that: price agreed upon during the PNC meeting, held on, 10.06.93 has not been given and, on the contrary, we have been asked to supply Tx/Rx cards and one subscriber radio equipment, worth about Rs. 30,000/- as additional spare units. The DoT, however, did not agree. By its letter dated 17th September 1993 (Ex. PW- 3/K-102) the DoT informed M/s. ARM that it should give a clear acceptance of the APO within the time frame indicated otherwise it would reserve the right to procure the item of the synthesised version from any of the sources available to DoT. On 20th September 1993 M/s. ARM wrote to the DoT (Ex. PW-3/K-100) furnishing a bank guarantee for 300 crystal systems for the reduced price..

105. On 11-09- 1993 M/s. ARM made a detailed representation to the MoS(C) (Ex. PW-3/K-76) requesting amendments to the APO on three aspects, i.e. increase of the order from 300 crystal systems to 450 systems; price equalization for crystal systems (i.e both crystal based and the synthesized based systems to be paid the same purchase price); deletion of the requirement for spares as it was not mentioned in the Tender Enquiry; and sales Tax, to be excluded from the basic price of the system and be treated extra as other statutory levies like excise duty. This representation (of Crl.A.Nos. 482/02, 509/02 and 536/02 Page 81 11.9.1993) was sent for comments to PW-3, Ujjagar Singh, by note dated 30.09.1993 (Ex.- 3/K-78). He prepared a detailed note, Ex.PW-3/79. This note highlighted ARMs four demands. The detailed note PW-3/K-79 pointed out that the Minister himself had decided to issue the order for 300 crystal based systems and 600 synthesized based systems and that there was no further commitment by the DoT. The note also highlighted that the prices of the crystal and synthesized versions had been revised as compared to the December, 1992 price. This note contained certain handwritten additions. Mr. Sukh Ram denied these, particularly the one marked as PW-5/8 which stated that the Purchase order was accepted by ARM and bank guarantee had been issued. This note (Ex. PW-3/K-79) was sent by Member (P) to Member (F) by his note Ex.PW-8/5 of 9.10.1993. Mr. M.G. Kulkarni by his note after considering the observations in the other notes, Ex.PW-8/3, Ex.PW-8/5, Ex.PW-8/6 and Ex.PW-8/7 (which had marked, the note of Ujjagar Singh for consideration), observed that:- as mentioned notes at p.54/n when I was Adviser (P), a large number of crystal version MARR equipments were working in the field as the firm had already produced 450 systems as per their letter, we may accept 450 systems as a special case, instead of 300 systems mentioned earlier. Other price conditions may remain same..

115. This note Ex.PW-3/A-18 dated 13.10.1993 and was by Mr. S.M. Prasad as Member (P). Mr. S.M. Prasad, Member (T) by his note Ex.PW-3/K-81 on 13.10.1993 reiterated the overwhelming view of the department that the synthesized versions had serious limitations in that it was site specific which inhibited its redeployment to other stations whereas no such restrictions applied in the case of the synthesized version. For the price, he left it to be decided by Production Cell. On this, Mr. R.S. Bansal, Member (P) stated (in his note PW-3/K-

82 dated 13.10.1993) that para-wise comments may be prepared on the representation for the firm so that it could be considered by the Minister. The subsequent notes Ex.PW-3/K-83 and Ex.PW-3/84 did not make any separate comment and in fact one of them referred to the previous note, PW-3/K-79 (dated 4.10.1993 of Ujjagar Singh). In these circumstances, Ujjagar Singh prepared his note Ex.PW-3/K-85. That note (letter put up to the Minister by Ex.PW-5/9 on 15.11.1993 reads as follows:- Crl.A.Nos. 482/02, 509/02 and 536/02 Page 82 PUC placed at 199-204/C is a letter from M/s. ARM, Hyderabad to the Hon'ble MOS(C) regarding procurement of 2/15 MARR systems. The point-wise comments are discussed at 61-62/N. Summarily these are as below:- - The distribution of quantity is made by Hon'ble MOS(C) at 58/N. The firm is given an order for total of 900 systems out of which 300 crystal versions and the balance 600 of Synthesized version. In view of the notes of M(S), M(T) and M(P) at 63/N the quantities can be adjusted within a total order of 900 systems. The quantity of Crystal version can be adjusted for 450 systems and quantity of Synthesized versions be adjusted to 450 systems. (ii) The price of crystal version and synthesized versions had been revised downwards as compared to concessions in customs duty and other taxes by the Govt. of India during the budget for 1993-94. Regarding difference in prices and lower price of crystal version note of DDG(RN) at 44-46/N may be seen wherein price of crystal version is suggested and worked out. The Finance had agreed to this price at 53/N. (iii) The firm has indicated that no spares were asked for in the previous order for crystal version of 2/15 systems. Hence supply of spares to be deleted from the purchase order. Regarding spares the earlier purchase order did not include the spare modules. The inclusion of spares in the recent procurement is as per Telecom Commission approval (44/N from RN Cell and 57/N). As the spares were not included in the earlier purchase order the case for deletion in this P.O. may be considered. (iv) Sales tax to be excluded from the basic price, of the system and treated extra as other statutory levies. - The prices fixed are the minimum prices to be paid by the Department. Sales tax indicated is minimum among the vendors approval for order. Submitted please. (Ujjagar Singh) Director (MMC) 15-11-1993.

116. When the file was sent to the Minister, Mr. Sukh Ram, he stated that after having gone through the notings on the file as well as all the comments, it would

be appropriate to increase the quantity of the crystal versions to 450 systems as Crl.A.Nos. 482/02, 509/02 and 536/02 Page 83 recommended by Member (S) while adhering to the overall limit of procuring 900 systems (from ARM). He also stated that the policy on sales tax inclusion or exclusion should be uniform and since the purchase orders did not include spare modules as compulsory procurement, reference to that could be deleted from the Purchase Order. It was noted importantly that:- I have examined all the notings on the price issue. I find that the very premises on which the cost is based are incorrect. The basis of the reduction is the price difference between crystal and synthesised versions of hand-held VHF trans-receivers but TEC has clearly mentioned that these trans-receivers are completely different from our 2/15 MARR systems in respect of design, concept and even application. Further, earlier we have taken both crystal version of M/s ARM and synthesised version of M/s Shyam at the same price against the same tender; at that time no such price reduction was attempted and now that we are basically operating on the same tender offering a lower rate for crystal version is clearly discriminatory. The crystal controlled 2/15 systems of M/s ARM are stated to fully meet DoT specifications. The firm is also an established supplier and the system supplied by them are working satisfactorily in the field. It would therefore be manifestly unjust to arbitrarily reduce the price of crystal controlled systems of M/s ARM. A suitable amendment may therefore be issued, at the earliest, to the effect that the price of crystal version of

2. /15 systems should be equal to that of synthesised version, as in the earlier purchase orders. Necessary action on the above lines may be taken immediately. The file was referred back. U.S. Prasad DDG (PF) in his note dated 09-12-1993 (Ex. PW-3/K-87) agreed to abide by the decision of the Minister to increase the crystal version to be procured from ARM to 450 systems as recommended by Member (S) as a special case and also to apply the principles to be followed by the Department in the case of other suppliers for inclusion/exclusion of the sales tax etc. He went on to observe that: "4. The perception of the Technical Officers has all along been that the synthesised version is superior to the crystal version. The recommendation of Member (Services) is for acceptance of 450 systems as a special case. Member (Technology) has also stated that while the crystal version of MARR are specific to the site, there is no such limitation in case of synthesised

version..

5. However, we can get legal opinion to confirm that offering a lower rate for crystal version is discriminatory as minuted by Hon'ble MOS(C) in the circumstances in which the order has been placed. If legal opinion confirms CrI.A.Nos. 482/02, 509/02 and 536/02 Page 84 the position, we could, armed with this opinion in support, agree to the price parity..

6. In case, maintenance of price parity is not considered discriminatory and adjustment on account of difference in performance, etc. Is necessary the question of cost determination would come. As rightly mentioned by Hon'ble MOS(C), the TEC has clearly completely different from our 2/15 MARR systems in respect of design, concept and even application. Reduction worked out on the basis of difference in the price of crystal and synthesised version of hand-held VHF trans-receivers may not, therefore, be correct. However, in view of the observations of Member (Services) and Member (Technology) as mentioned in para 4 above, suitable adjustment in the prices on account of the perceived inferiority of the crystal version would appear to be necessary even though crystal controlled 2/15 systems of M/s ARM are stated to fully meet DoT specifications and these systems are working satisfactorily in the field. This note also recommended that the Secretary (Expenditure) could ask the Chief or Senior Cost Accountant of the main Ministry to be assisted by representative of Member (Services) or Member (Technology) to undertake a quick study of the merits of the two sets as well as their cost. He highlighted that this might be put up for reconsideration to avoid audit para since the financial implication is as large as nearly Rs.1.67 crores excluding ED..

117. This recommendation, however, was rejected by the Appellant, Mr. Sukh Ram on 15.12.1993 by Ex.PW-3/K-89. This decision reads as follows:- "That the basic premises for cost reduction for crystal version are wrong, is clearly proved by the observations of TEC. That being so, we should not persistently repeat that a crystal version is inferior and therefore its cost should be less than that of synthesised version. M(T) has stated that while crystal version is specific to the site, there is no such limitation in the synthesised version, but simultaneously he

has stated that the crystal version has 6 or 7 frequency pairs and can be used wherever such frequency pairs are operating which would put it at par with synthesised version which, I understand, can not be used for more than 6 or 7 stations depending upon whether the frequencies are in the low band or high band. The perceived inferiority thus appears to be merely a matter of opinion of one or two officers and is not substantiated by any comparative data on the actual working of crystal and synthesised version in the field. It has been mentioned that audit objection may arise if the price reduction is not given effect to. Audit objections normally arise when rates Crl.A.Nos. 482/02, 509/02 and 536/02 Page 85 higher than those obtained in the tender are being offered to the vendor. Here the situation is completely different. Offering same price for two versions of one equipment, which are equally acceptable as per our tender specifications and have been earlier accepted against the same tender at the same price, cannot invite any audit objections, all the more so when there is no basis for arbitrarily reducing the price of one version of the equipment since there are neither any price negative reports from the field about the working of that equipment nor any technical grounds, as established by the TEC letter. As a matter of fact, I understand there are improved versions available among the synthesised systems also and if we start reducing price merely on the basis of presumptions and assumptions, it can also be debated whether some price reduction should not be worked out for those equipments of synthesised version which have less facilities compared to their more sophisticated brethren supplied by other manufacturers, even though they all conform to the same DoT specifications, even as crystal versions do. Needless to say, in such a case, the risk of audit objection is even greater since the amount involved would be much higher. I therefore see no reason to reconsider my earlier decision and amendment, as ordered, should be issued at the earliest, as should have been done in the first place instead of putting up the file again with flimsy reason for not complying with my orders. In the light of the above, when the file was put up to other senior officers such as Member (F), Senior DDG (Tec), etc., none of them took the matter further. Mr. N. Vittal, PW-7, Chairman of the Telecom Commission by note Ex.PW-17/2 desired that the matter should be discussed urgently. By the note Ex.PW-3/K-91 dated 23.12.1993 he observed that both sets were comparable; yet he wished to see the file and

accordingly the same was sent to him. After considering the file, Sri Vittal apparently discussed the matter with the Minister Mr. Sukh Ram, evident from his noting Ex.PW-3/K-93 dated 12.1.1994. This note specifically stated that there can be difference of view because technically the crystal and synthesized versions were different and there had to be a price differential. The Minister told PW-17 that there has been certain degree of injustice done to ARM and in view of specific orders given in his note dated 13.12.1993 action to immediately implement his order was recommended by PW-17. It was in these circumstances that the amended Order was placed upon ARM for increase in the quantity of 450 sets of crystal versions, price parity of the crystal version with that of the synthesized version was agreed, requirement of spares supply was deleted, and sales tax was to be treated as extra. Crl.A.Nos. 482/02, 509/02 and 536/02 Page 86.

118. The above narration, though a repetition of the facts in the preceding discussion, was necessary to exactly discern the role of each party and consider whether Mr. Sukh Rams role pointed to his culpability in any manner. He apparently had occasion to go through the entire file; for the first time on 15.08.1993 when he observed that the decision has been unduly delayed; he desired that the decision should be speeded up and finalized within a week. After a further round of consultations and notings by various officers at the senior most level, the file was put up to him. At this stage, the view-point of Ms. Runu Ghosh as well as the letter of Sri Rakesh Aggarwal (Ex.PW-3/K-42) relied upon by her (Ex.PW-3/DZ-2) were on the record. Mr. Sukh Rams note of 31.08.1993 decided the quantities to be placed on various firms in their respective orders. When it came to ARM he directed that 900 units should be procured from that firm; he specifically stated that 300 of those were to be the crystal version. He also stated in the beginning of the note that he had gone through the entire file and the previous notings. After indicating his decision, he specifically and clearly stated that rest of the conditions recommended in the officers notings were to be the same. These aspects have to be emphasized because his plea in appeal now appears to be that he was unaware of the price differential. The noting of 31.08.1993, Ex.PW-3/K-42, falsifies that submission. Furthermore, Ms. Runu Ghosh in her note, Ex.PW-3/K-42 had highlighted why price parity was necessary; that was on 23.07.1993. Immediately on receipt of the letter from Sri Rakesh

Aggarwal, Ex.PW-3/DZ-2, she put up that note too along with the file to the Minister i.e. Ex.PW- 8/14 on 26.7.1993 asking that it should be submitted to the Minister. In view of these circumstances, this Court holds that his argument about being unaware of the price differential is without merit. 119-. The crucial question is whether the decision made by Mr. Sukh Ram on 19.11.1993, Ex.PW-3/K-86 and reiterated on 13.12.1993, Ex.PW-3/K-89 directing the same cost or price parity for the crystal and synthesized versions and also directing increase in quantity to be ordered from ARM, was a reasonable or bona fide one. The Trial Court concluded that the decision resulted in pecuniary advantage to ARM by abuse of Mr. Sukh Rams position as a public servant and also that it was an offence CrI.A.Nos. 482/02, 509/02 and 536/02 Page 87 under Section 13(1)(d)(iii) as it obtained pecuniary advantage to ARM without public interest..

120. Counsel for Mr. Sukh Ram had argued that since he took charge as Minister on 18.01.1993, his only concern was to speed up the decision making process - evidenced by his noting of 15.08.1993, stressing on urgency to meet the targets, which reflected his concern for quick follow up and delivery. When Mr. Sukh Ram had occasion to consider ARMs representation on 11.9.1993 at no stage was he made aware that the firm had submitted the bank guarantee pursuant to the DoTs insistence through its letter dated 17.9.1993. In this regard, it was emphasized that Ujjagar Singhs note, Ex.PW-3/K-79 in fact contained hand-written interpolations at the end which did not exist. These interpolations, it was urged, highlighted that the bank guarantee had been furnished and the Purchase Order accepted by ARM. Apart from this, there was no other material suggesting that ARM had accepted the offer and furnished the bank guarantee. The other main submission on behalf of Mr. Sukh Ram was that operating by the same tender, the crystal version had been accepted, along with the synthesized version parties were offered the same price. Having regard to this, since there was absolutely no change of circumstance, the view taken by Mr. Sukh Ram subsequent to his earlier decision on 31.08.1993 was a plausible and reasonable one. He was not only concerned with ensuring speedy rural tele-density but also avoiding the exposure of the Department to needless litigation which would have inevitably followed if the price disparity were persisted with. In this regard, it was submitted that all Department officials, including PW-3, and higher ranking officers such as Members and even

the Chairman of the Telecom Commission did not express such strong reservations against the crystal version as was sought to be made out and even agreed to increase the ordered quantities from ARM from 300 to.

450. 121. In the light of these submissions, it would be essential to consider each submission separately. The sequence of events after the APO was issued to ARM on 02.09.1993 was that it wrote a letter on 09.09.1993 protesting the decision in regard to the crystal system (Ex. PW-3/K-98); that letter forwarded a bank guarantee only in respect of 600 synthesized systems. The DoT did not agree and by its letter dated CrI.A.Nos. 482/02, 509/02 and 536/02 Page 88 17.09.1993, Ex.PW-3/K-102, required ARM to give clear acceptance of all the conditions within the time frame or else face the consequences. In these circumstances, ARM wrote the letter Ex.PW-3/K-100 on 20.9.1993 furnishing the bank guarantee for 300 crystal based systems for the reduced price of Rs.2,98469/- per unit inclusive of sales tax. In the meanwhile, it had made a representation to the Minister on 11.8.1993 requesting for amendments to the APO (Ex.PW-3/K-76). The Minister, Mr. Sukh Ram, made a noting (Ex.PW-3/K-77) by hand questioning how the two rates were offered against the same tender. Now there is no explanation why such a doubt crept in Mr. Sukh Rams mind for the first time. The decision taken by him on 31.08.1993 was after consideration of the entire materials on the record. This decision was after Ms. Runu Ghosh's reservation in her note dated 23.07.1993 as well as "opinion" of Sri Rakesh Aggarwal, Ex.PW-3/DZ-2, vis-a-vis the wisdom of price differential as well as the technological inferiority of the crystal based system. Despite this, Mr. Sukh Ram, in Ex.PW-3/K-77, expressed his ignorance about the issue. Mr. Sukh Rams note was referred again to Ujjagar Singh and other officers who, as noted in earlier, maintained their views about the inferiority of the crystal version vis-a-vis the synthesized version. Ujjagar Singh's note, Ex.PW-3/K-79 also mentioned that ARM had furnished the bank guarantee and accepted the purchase order. This part of the note was by hand. Mr. Sukh Rams counsel complained that the hand-written portions in fact did not exist on the file when he took the decision directing price parity. On this, the Trial Court noted that there were other portions in the entire file containing notings where Ujjagar Singh had written his comments by hand. This part of the discussion and findings may be found in para 53 of the impugned judgment. The Trial Court noted that Ujjagar

Singh had made handwritten insertions in his earlier note, Ex.PW-3/K-2 and also his note, Ex.PW-3/K-56 (dated 24.08.1993). It was also noticed that Ex.PW-3/K-79 started at one portion of a page on which the note had been written by another officer..

122. The Trial Court reasoned, in our opinion, perceptively that had Ujjagar Singh been inimical to ARM, his note, Ex.PW-3/K-79 he would have highlighted that there was no price or cost parity, to dissuade the Minister from accepting ARMs representation. The other circumstance which impressed the Trial Court to hold that CrI.A.Nos. 482/02, 509/02 and 536/02 Page 89 Mr. Sukh Ram knew that ARM accepted DoTs offer - containing the price differential -was that a Purchase order would be issued to a party after acceptance of the APO and furnishing of bank guarantee. In the statement recorded under Section 313, Mr. Sukh Ram had admitted to this practice. The Trial Court held that the typed portion of Ex.PW-3/K-79 itself indicated that a Purchase Order had been issued to ARM in which the basic price was indicated separately, as well as taxes. It was lastly observed that Mr. Sukh Ram directed by an office order (dated 16-07-1993) Ex./PW- 5/D-1 for speedy and timely implementation of decisions regarding procurements, all files where orders had been paced were to be put up before him. This aspect was admitted by him when questioned under Section 313 (Question No.212). Such being the position, his submission about being kept in the dark regarding the price differential or about ARM having accepted the offer on the basis of the two separate prices for the crystal and synthesized versions and nevertheless furnishing the bank guarantee is, therefore, meritless..

123. The prosecution evidence, produced in the form of notes of officers thus shows that accused Mr. Sukh Ram ignored the advice of Procurement and Finance departments as well as of Chairman of Telecom Commission, in proceeding to direct price parity of the crystal version with the synthesized version. These officials recommended ` 2,98,469/- per system for the crystal version as it suffered from serious limitations (discussed earlier). Mr. N.C. Gupta, who was chairman of Price Negotiation Committee, was heading the Planning Department (he was also member of the Technical unit of the Tender Evaluation committee for the same procurement, and NIT); he was asked to determine a suitable price for

the crystal version. He, arrived at a price reduction of ` 37,170/- for the crystal version (as compared to the synthesized version). The price differentiation so determined was not arbitrary; it was premised on adopting a notional value of order wire and traffic management facilities, which were not available in crystal version. Ex.PW-3/4A indicated that on 14.07.93 Advisor (P) suggested reduction in price of crystal version by ` 37,000 per system along with a condition that ARM should supply additional spares. On 25.08.1993 the Member (Finance) approved price the `2,98,469 worked out by Director (MMC) for Crl.A.Nos. 482/02, 509/02 and 536/02 Page 90 the crystal version. This price was approved by Mr. Sukh Ram on 31.08.93..

124. After Mr. Sukh Rams query pursuant to ARMs representation dated 11-09-1993, on 04.10.1993, Ujjagar Singhs note, (Ex. PW-3/79) observed that there were established advantages of the synthesized version as compared to the crystal version. It is a matter of record that unlike in December 1992 (when only ARM had type approval,- for the crystal version- and was the established supplier and Shyam had just received type approval for the crystal version) PUNWIRE and Natelco, apart from Shyam had type approval for the synthesized version. ARM had just obtained type approval for its synthesized version. Sri Ujjagar Singh justified the price differential and pointed out that it had been agreed to by the Finance Department. On 13.10.93 DDG (PF), noted that Finance had agreed with the recommendation of the Technical branch. DDG (PF)s note (this officer belonged to the Finance department) was approved by Member (Finance). The Member (S) agreed to increase the order (for ARMs crystal version from 300 to 450 systems). He recommended that price conditions should remain the same. On 14.10.93 the procurement department prepared Para-wise comments on the representations of ARM. Ujjagar Singh recorded yet another note on 15.11.93 (PW-3/K-85) and referred to the notes of DDG (RN), noting of Mr. N.C. Gupta regarding the price differential and also underlined that the Finance Department had agreed to this..

125. In this background, what is clear is that all officers - middle and senior ranking, right up to Member Telecom Commission level- unanimously felt that the crystal version was inferior to the synthesized version, and that procuring the

crystal version in large quantities posed problems for induction of newer technologies during later times. They also unanimously said - and reiterated that if crystal version of the equipment were to be procured, it ought to be priced lower, and the procurement must be minimal. Mr. Sukh Ram overruled this overwhelming opinion, (by his decision dated 19-11-1993, Ex. PW-3/K-89) and directed price parity for the two versions, and also directed increase in the crystal version quantities to be procured from ARM. Mr. Sukh Rams decision, however did not deter the U.S. Prasad DDG (PF) from injecting caution with the hope that the minister would reconsider the issue; in his note dated 09-12-1993 (Ex. PW-3/K-87 a last ditch attempt in this regard), it reiterated all senior CrI.A.Nos. 482/02, 509/02 and 536/02 Page 91 officers view that the synthesized version was superior to the crystal version. The note even suggested recourse to legal opinion if price differential was discriminatory, and recommended that to work out reduction in price, the Secretary (Expenditure) to ask his Chief/Senior Cost Accounts Officer of Ministry of Finance, assisted by the representative of Member (S)/Member (T) could be requested to undertake a quick study of relative merits of the two sets as well as their cost. The Member (F) as well as Member (P) agreed with this. The file was then marked to Mr. Sukh Ram. He stuck to his previous decision of 19-11-1993 and rejected all proposals, insisting that to call the crystal version "inferior" would not be correct..

126. An important argument on behalf of Mr. Sukh Ram was that when he directed price parity, and increase in the crystal version quantities for procurement from ARM, it was in legitimate exercise of his decision making power as Minister, in a bona fide manner, to avoid the odium of discrimination and possible litigation. As Minister of State of Communications, Mr. Sukh Ram unquestionably had authority to take an independent decision, and overrule other officials lower in the hierarchy. As long as any decision of a Minister or executive agency is based on reason, and is not arbitrary, or does not suffer from the odium of ulterior motives, or is not based on irrelevant considerations, courts will not question its wisdom. However, the test always in such cases is whether the decision was such as someone acting reasonably, on the basis of the materials available, would have taken. The test of public interest is paramount; if it appears that the decision is taken without public interest in mind, and unreasonably or manifest disregard to the consequence that

such act would be severe undermining of public interest, and that such decision would result in a third party obtaining pecuniary advantage, without public interest, the decision maker has to take responsibility for the consequences..

127. In the preceding discussion it was held that there were serious limitations in the crystal version of 2/15 MARR supplied by ARM. Those were offset in the synthesized version of the system. Technical Officials in the DoT unanimously advised about these serious limitations, in the crystal version and existence of additional features in the synthesized version. It is nobodys case that Mr. Sukh Ram had technical expertise, or the benefit of opinion of any independent experts opinion. Indeed, Crl.A.Nos. 482/02, 509/02 and 536/02 Page 92 during the trial no such plea was taken; no independent experts opinion, dispelling the apprehensions or contesting the view of various officials, was relied on. Therefore, he had no material, to base his decision that there were no additional features in the synthesized version, and direct price parity, as he did. In the note of 13.12.1993 (Ex. PW 3/K89) Mr. Sukh Ram reiterated his decision dated 19.11.93 and stated that the "perceived inferiority" of the crystal version appeared to be merely a matter of opinion of one or two officers unsubstantiated by any comparative data. Further, curiously, in Ex. PW-K/89 Mr. Sukh Ram, referring to a note of the Member (T) where it was noted that the crystal version had 6 or 7 frequency pairs which would be used wherever such frequencies operated, observed that the crystal version was at par with the synthesized version. This, in the opinion of the Court, was a gross misreading of the opinion expressed by all the officers, including the technical personnel. The notings in the file showed that if a crystal version unit, operating in a particular frequency were rendered surplus, it could not be used anywhere unless the system operated in that frequency. The system was rendered redundant in such case; that could be avoided only unless it were taken to the workshop, for changing crystals, and tuning transmitters and receivers to new changed frequency. The crystal versions could be used on 6-7 frequency pairs, but only after frequency change. The Member (T) noted that the synthesized version could be used anywhere whereas redeployment of the crystal version to different places was restricted and cumbersome. There were other additional features in the synthesized version, i.e. duplicate LNA and power supply, order wire facility and traffic measurement device. There was no delay in

dial tone and it had facility of changing the code of subscriber unit. The view of Mr. Sukh Ram, therefore, that there was no difference between the two versions, was not a mere difference of opinion or perception; in any case, such a view could not reasonably have been taken by him, on the basis of the existing materials. Therefore we agree with the Trial Courts finding that no reasonable person could have taken a view that the crystal version was at par with synthesized version..

128. As regards the criticism that the first batch of 500 units under the same NIT was procured with the same price for the two systems, which meant that the Minister, Mr. Sukh Ram, merely followed that principle of price parity, is concerned, ex-facie, Crl.A.Nos. 482/02, 509/02 and 536/02 Page 93 the argument seems attractive. Yet, the entire sequence shows that the synthesized version was the preferred product; some weight had to be given to this preference; indeed, several file notings support the view that the synthesized version had to be procured for its technical superiority, and its compatibility with emerging technologies. At the time when the 500 units were procured, - in fact when the order was finalized initially - it was only ARM which had type approval, and was an established supplier. Its approval was for the crystal version. Just before the order was placed, on 25th November, 1993, Shyams type approval for the synthesized version materialized; therefore, it secured a part -200 units- of the first order for 500 units. The circumstances changed, after the PNC report; PUNWIRE had also obtained type approval for the synthesized version; Natelco soon followed suit; ARMs type approval was also given in July, 1993. Therefore, when, in end July 1993 and August, of the same year, DoT had to decide on the procurement, there were four suppliers with type approvals for the synthesized version. ARM was the only manufacturer who also had the approval for the crystal version. Again, more than one officer emphasized that ARM could be given the order for supply of the 300 crystal version units, as a special case. The issue of pricing the two versions differently arose, as is evident, for the first time, sometime in June, 1993; N.C. Gupta was authorized to work out the costing of the crystal unit, having regard to the decision to accept the lowest offer, i.e ` 3,40,750/- per unit. All this would show that when the first batch of 500 units was procured, there was no occasion for the DoT to consider differential pricing. The Trial Court has noticed, on this aspect that: This is not a case where the department offered a particular price without

specifying the number of systems to be purchased and then placed order from time to time at that price. Here, the department offered price of Rs. 3,54,500 per system to ARM only for purchase of 300 crystal version in the year 1992-93. Therefore, the department was not bound to offer the same price for the year 1993-94, when it decided to make further purchase of these systems. Infact ARM itself reduced in price by Rs. 9500 per system vide its letter dated 16.4.93. Therefore, it was nobody's case that the department was bound to purchase crystal version even in the year 1993-94, at the price paid by it in the year 1992-93. The Trial Court also held that internal departmental guidelines - relied on by the CrI.A.Nos. 482/02, 509/02 and 536/02 Page 94 Appellants, could not be relied on to say that price parity was to be maintained, even if the systems were not the same, in the sense that one of them had additional facilities and features as compared to the other one. A system with additional features, and several utilitarian values, deserved better price as compared to one which did not have such additional features and facilities. Conversely a system with certain limitations, (absent in the other technology, as in the case of the crystal version) had to be priced lower..

129. The Trial Court has found that Mr. Sukh Ram is said to have abused his office, so that ARM could obtain pecuniary advantage (and was guilty of the offence punishable under Section 13 (1) (d) (ii); a finding that he was also guilty for the offence punishable under Section 13 (1) (d) (iii) has been recorded. The Court also recorded that all the accused acted in concert, and were guilty for the offence under Section 120-B read with the other provisions; Mr. Sukh Ram and Ms. Runu Ghosh were held guilty for the offence of conspiracy, of jointly acting together; Ms. Runu Ghosh was also held guilty of conspiracy with Mr. Rama Rao..

130. Now, the expression "abuse" of office by an accused is not new; it has been in the lexicon - in the context of corruption laws, for over six and a half decades. The best exposition of what action would be "abuse" is to be found in Narayana Nambiar (supra): The juxtaposition of the work otherwise' with the words corrupt or illegal means', and the dishonest implicit in the word abuse' indicate the necessity for a dishonest intention on his part to bring him within the meaning of the clause. Whether he abused his position or not depends upon the facts of each case..

131. Counsel for the parties have referred to several decisions, which have been noticed and dealt with in an earlier part of this judgment. For an act to be "abuse" there is a need to prove an element of dishonesty. In this case, though counsel for Mr. Sukh Ram strenuously contended that there was no dishonest element, and that his previous decision of 31-08-1993 itself showed that his actions were bona fide, and that he redressed a genuinely felt grievance, on the honest belief that not restoring price parity to ARMs product would be discriminatory, at best, he acted on an honest notion. Such being the case, two views could be possibly taken on the evidence; that Crl.A.Nos. 482/02, 509/02 and 536/02 Page 95 favouring him, had to be accepted by the Court. Though this submission seems merited, a deeper reflection would show its fallacies. Mr. Sukh Ram cannot claim to have been in the dark, when he took the decision to agree to the price differentiation, through Ex. PW-3/K-60. He was aware, and had considered all the previous notings in this regard; he was also aware that ARM had accepted the offer, on 20-09-1993, and furnished the requisite bank guarantee. His explanation that he was not aware of this, is unacceptable, because various notes which he had occasion to consider, refer to a Purchase Order being issued to ARM (which was possible only if it had furnished the bank guarantee); also, his Office Order of 16th July, 1993 directed that all procurement related files, in matters concerning delay were to be placed before him to enable their monitoring. In spite of all these, he decided that there ought to be price parity between the crystal and the synthesized versions. However, his opinion changed thereafter, once ARM represented seeking price equalization. Despite notings and observations by several middle and senior level officers, including Member Telecom Commission level officers, (all of which have been dealt with at some length in the preceding portions of this judgment), without any change in circumstances, or without examining any new material as to the comparative technical merits of the two technologies, Mr. Sukh Ram concluded that the differences were only a matter of perception, and further directed that there ought to be price parity. He was fully aware that this would result in only ARM obtaining pecuniary advantage; indeed his decision was conscious about that aspect, and he wanted benefit to go to ARM. He therefore, clearly possessed the requisite dishonest intent, and "abused" his office, for that purpose. His decision could not also be explained in any manner other than to

"obtain" to ARM pecuniary advantage, without any public interest. Had he followed the predominant technical opinion that the crystal version was inferior to the synthesized version and had to be priced less, the DoT would have paid ` 37,170/- less per unit of (450) crystal based units which were procured. This decision cost the exchequer ` 1,67,26,500/-; and was without public interest. Correspondingly, ARM stood to gain pecuniary advantage to the extent of ` 1,67,26,500/-. Being the Minister, empowered to act on behalf of the Government, (since his word was the final one in this matter) and acting as a trustee of the people, it was his duty to follow all Crl.A.Nos. 482/02, 509/02 and 536/02 Page 96 safeguards in deciding such matters. His act, in completely disregarding all opinions, and acting without any discernable reason, and with no change in circumstance, solely benefitted ARM. For these reasons, we are of the opinion that the conviction under Section 13 (1) (d) (ii) and (iii) read with Section 13 (2) of the Prevention of Corruption Act, 1988 returned by the Trial Court, against Mr. Sukh Ram was justified; the same is accordingly affirmed..

132. As regards criminal conspiracy, that is one, under Section 120-B, IPC. The gist of what constitutes the offence was summed up pithily by the Supreme Court, in E.G. Barsay v. State of Bombay AIR 1961 SC 1762 (an enunciation that was affirmed and applied in several later decisions, such as Ajay Aggarwal v Union of India 1993 (3) SCC 609; Yashpal Mittal v State of Punjab 1977 (4) SCC 540; State of Maharastra v Som Nath Thapa 1996 (4) SCC 659; Firozuddin Basheeruddin v. State of Kerala, (2001) 7 SCC 596): The gist of the offence is an agreement to break the law. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done has not been done. So too, it is not an ingredient of the offence that all the parties should agree to do a single illegal act. It may comprise the commission of a number of acts. Under Section 43 of the Indian Penal Code, an act would be illegal if it is an offence or if it is prohibited by law. Under the first charge the accused are charged with having conspired to do three categories of illegal acts, and the mere fact that all of them could not be convicted separately in respect of each of the offences has no relevancy in considering the question whether the offence of conspiracy has been committed. They are all guilty of the offence of conspiracy to do illegal acts, though for individual offences all of them may not be liable..

133. There is no doubt that evidence of criminal conspiracy is hard to come by. When such agreements are made, people are not expected to commit themselves in writing; nor are all conspirators necessarily aware of the entire plan, which may be known only to a handful. However, for the Court to draw a conclusion that there was criminal intent, and meeting of minds, there has to be strong circumstantial evidence pointing to the conspiracy. Here, the only act which has any bearing is the representation of ARM dated 11-09-1993 (Ex. PW-3/K-76). Mr. Sukh Ram acted on it, and sought views. While there is no doubt that his subsequent actions in reviewing the price issue benefitted ARM and no one else, that factor alone is insufficient to conclude a concert, and meeting of minds, between Mr. Rama Rao, Mr. Sukh Ram, Crl.A.Nos. 482/02, 509/02 and 536/02 Page 97 and Ms. Runu Ghosh, as found by the Trial Court. While Ms. Runu Ghosh's note might have provided the grist, the ammunition, for reversal of the initial decision, regarding price parity, the fact remains that her role ended after the note dated 23-07- 1993. Mr. Sukh Ram had not acted on it; therefore, the finding his guilt under Section 120-B IPC with Ms. Runu Ghosh is not justified. Similarly, the evidence at best points to suspicion - maybe even strong suspicion, that there was prior concert, or conspiracy to benefit ARM. However, that suspicion is insufficient to amount to proof of criminal conspiracy. This Court therefore, sets aside the conviction of Mr. Sukh Ram, recorded by the impugned judgment, under Section 120-B IPC. Correctness of Findings in regard to Ms. Runu Ghosh.

134. The counsel for Ms. Runu Ghosh made two pronged attack on the impugned judgment. This Court has dealt with the findings regarding the superiority of the synthesized version as well as the justification for the price differential. The facts pertaining to those would not be repeated except to the extent that a discussion is necessary vis-a-vis Ms. Runu Ghosh's role. Her contentions were that her role was limited; as Director (Finance) with the DoT, she had to consider the financial implications and make her appraisal having regard to the overall objectives of the speedy installation of telephone systems in rural areas. Her involvement occurred for the first time, on 25.05.1993 when after considering the notings, (in the context of ARMs a fresh proposal dated 16.04.1993 [Ex. PW-3/K-14] to lower the unit cost) she sought to highlight that 1100 systems supplied by ARM were working satisfactorily according to its letter dated 22.04.1993. Further she noted that ARM

had offered to change the frequency at site free of cost in case DoT decided to change the operating frequency of any of the crystal controlled version. Having regard to these and the fact that the earlier order for both systems was priced identically, the recommendation by her for placing an order for 1500 systems on ARM, was reasonable and fair. So far as the Trial Court findings with regard to her alleged role in not confirming the minutes of the PNC meeting even though there was a discussion about the technical merits of the two systems were concerned, learned counsel submitted that the written record in the form of pencil notings on the original draft minutes as well as the separate note (Ex. PW-3/K-36) clearly reveal that Ms. Runu Ghosh had all along maintained that CrI.A.Nos. 482/02, 509/02 and 536/02 Page 98 such a discussion did not take place and that the differential pricing was not put to the manufacturers. Counsel also urged that Ms. Runu Ghosh was perfectly justified in seeking the opinion of the TEC by making a reference in this regard on 20.07.1993. Being aware of the materials on record she honestly and bonafide suggested that technical inferiority of the crystal system as made out, could be accepted. Her note Ex. PW-3/K-42 highlighted this and stated that further decision ought to await the report of TEC and that she also alluded to ARMs offer for charging lower sales tax which would result in substantial savings. This was based on ARMs letter dated 21.07.1993 i.e. Ex. P/A-16..

135. It was argued that with the note Ex. PW-3/K-42 Ms. Runu Ghosh's limited role ended and she did not pursue the matter any further; no other material was in fact relied upon by the prosecution or by the Trial Court. In fact the record even revealed that her view was not accepted, by Mr. Sukh Ram. As regards the recovery of ARMs blank signed letterheads and the Trial Court's conclusion that she acted in conspiracy to further the interests of ARM, learned counsel argued that when her recommendations were not accepted in the first instance, there was no question of any conspiracy either with Mr. Rama Rao or with Mr. Sukh Ram. It was further argued that in order to constitute a criminal conspiracy findings cannot be based on so called suspicious circumstances but there should be something more substantial for the Court to irresistibly hold that the accused conspired to achieve a common objective, with the other accused..

136. In this case after ARM offered to reduce unit price by its letter dated 16.04.1993 (Ex.PW-3/K-14), in view of customs duty concession, another letter was addressed to DDG (RN) by it, on 22.04.1993 (Ex. PW-3/D-2). This letter volunteered that in case the DoT decided to change the operating frequency of any crystal version within 3 years from the date of supply for any reason ARM undertook to do so in situ, free of cost. ARM requested that a purchase order for 500 numbers of crystal version therefore, ought to be released and that the order would be complied with and systems would be delivered by 30.06.1993. It was this letter which Ms. Runu Ghosh adverted to in her noting of 25.05.1993 (Ex. PW-3/K-10). ARMs anxiety appeared to be to CrI.A.Nos. 482/02, 509/02 and 536/02 Page 99 ensure that the systems which were lying with it, were procured by DoT. Therefore, it volunteered to package its offer by stating that in situ frequency change would be undertaken, free of cost for 3 years and that it could supply 500 crystal version systems by 30.06.1993. Ms. Runu Ghosh significantly suggested that an order for 1500 systems ought to be placed on ARM which was the only established supplier and order for 500 systems ought to be placed on Shyam Telecom and another 200 on PUNWIRE. She emphasized that ARMs synthesized version was already undergoing tests and that type approval was to be given in June 1993. Her further suggestion was that after ARM obtained its type approval it could supply synthesized version at the same cost as the crystal controlled ones as offered by them. It can be observed that this noting took into account Ex. PW-4/A, by D.P. Srivastava dated 03.05.1993 which clearly stated that use of crystal based system was not favoured. This view was confirmed by Sri U.V.Naik in his noting (Ex. PW-4/E) on 06.05.1993. Despite this Ms. Runu Ghosh went on to advocate that 1500 systems could be procured from ARM - even though it had not obtained type approval to manufacture the synthesized version. By this time Shyam Telecom had already obtained the type approval and apparently executed majority of the orders placed on it in December 1992. The type approval of Punwire also had been issued and Natelcos synthesized version was undergoing field testing. If one were to view Ms. Runu Ghosh notings in the background of these circumstances, it would be doubtful whether the view and noting recommending the case for ARM and procurement of 1500 systems of the crystal version was honest and prudent..

137. ARMs offer to reduce the price was considered further by various officers - by the DDG(PF), Ex. PW-3/K-20; by the Member (F) - Ex. PW-5/9 and the DDG(MMC) Ujjagar Singh, PW-K-3/K-21. His recommendation for constitution of a new PNC to negotiate with the eligible bidders was ultimately accepted and the PNC constituted. Ms. Runu Ghosh was the Member of this Committee..

138. Another aspect which assumes great significance - and which was highlighted was that before recording of this note, DoT had already placed order for purchase of 200 synthesized version from M/s Shyam; Ms. Runu Ghosh noting admits 114 CrI.A.Nos. 482/02, 509/02 and 536/02 Page 100 systems had been already supplied by M/s Shyam. No suggestion was made by her to negotiate with vendors so as to obtain a favorable price for the department. No suggestion was made by her to verify how much was the actual advantage derived by ARM on account of duty concessions announced in the budget. As regards the crystal versions limitations in the matter of frequency change, she noted that ARM had offered to change the frequency in situ, free of cost in case DoT decided to change operating frequency of any crystal controlled version supplied by them. The evidence on record shows that for frequency change, in case of the crystal version, the system had to be taken to the workshop or the equipment had to be taken to the field. Mere change of crystal would not have resulted in use of changed frequency, as transmitters and receivers too had to be tuned to the changed frequency. The crystal version was likely to be dysfunctional for some time, consequently, and could be operational after some period..

139. As discussed previously Ms. Runu Ghosh refused to sign the report of the PNC. The committees recommendation for the price of ` 3,40,750 per system with one duplicate unit each of LNA and power supply being applicable to the synthesized version on account of requirement of reduced spares and units along with the additional facility (in case of Shyam Telecom) and its observation that crystal based systems were inferior compared with the synthesized version, Ms. Runu Ghosh, in her pencilled remark, at point C, stated this had not been discussed.' The documents furnished with report of PNC however reveal that these technical details were considered; both N.C. Gupta (PW-4) and Mr. Ujjagar Singh (PW-3) deposed about it. The additional facilities of the synthesized version

were pointed out in Shyam Telecoms letter (Annexure 1 to Ex.PW3/K-29) handed over to the PNC. That letter also stated that the NIT had spelt out a preference for the synthesized version. These would show that Ms. Runu Ghosh's note, and her separate noting after the PNC, on 18th June, 1993, that these aspects were not discussed, cannot be believed..

140. The next circumstance, chronologically, is the letter received by Ms. Runu Ghosh from ARM, dated 21-07-1993, and the circumstances under which its contents were put up, in her note. The Trial Court observed, in this regard as follows: CrI.A.Nos. 482/02, 509/02 and 536/02 Page 101 A perusal of the file, Ex. PW3/A shows that on 19.7.93, Mr. Ujjagar Singh recorded a typed note at page 47N of this file and sent it to DDG (MMI). He sent the file to DDG (PF) on the same day. File was sent by DDG (PF) to accused Runu Ghosh vide his endorsement dated 19.7.93. Therefore, the file would have been received by accused Runu Ghosh towards the evening of 19.7.93 or on 20.7.93. Ex. PA 16 is a letter dated 21.7.93 written by ARM to accused Runu Ghosh and purporting to be sent by speed post. The point emphasized in this letter finds mention in the note of accused Runu Ghosh dated 23.7.93. There is no explanation as to how ARM, having its office in Hyderabad came to know within one or two days, that the file was lying with accused Runu Ghosh. No official intimation was given to ARM that the file was lying with accused Runu Ghosh. Therefore, without communication from accused Runu Ghosh, ARM could not have known that the file was lying with her and she was expected to record a note on it. Letter Ex. PA 16 does not have any diary number, which rules out its having been delivered by hand. It purports to have been sent by speed post. However, no envelope is available on the file. Keeping in view the fact that the file was received by accused Runu Ghosh either towards the evening of 19.7.93 or on 20.7.93 and the letter Ex. PA16 was written on 21.7.93, there was no intimation to ARM that the file was being examined by accused Runu Ghosh, it would be reasonable to infer that accused Runu Ghosh was in communication with ARM and it was she who intimated them that the file was lying with her and pursuant to that ARM wrote this letter highlighting that they were charging only Rs. 7837 per system towards sales tax as against normal tax amounting to Rs. 15675 and accordingly accused Runu Ghosh highlighted this point in her note dated 23.7.93. Ex. PW3/K-42 is Ms. Runu Ghosh's note of

23.7.93. She stressed that ARM had agreed to accept 23% liquidated damages for delay in delivery of the systems, in case it failed to supply 1500 them by 15.02.94. She further added that this offer was not reflected in the draft minutes of the PNC. ARMs letter dated 10.6.93 (Annexure 1 to Ex. PW-3/K-29), a four page document, partly handwritten, and signed by Mr. Rama Rao) shows that the firm agreed to accept liquidated damages conditional upon the DoT purchasing 450 crystal version and 1050 synthesized version from it and issuing the orders before 10.7.93 to it (ARM). This condition could not have been accepted, for the simple reason that ARM did not have the type approval then - or even in the first week of July, 1993. DoT would have acted in flagrant violation of all norms if such order had been issued, without the firm having the requisite type approval, and other firms - possessed of the type approval, being given order for lesser quantities. The recommendation to place an order for 1050 synthesized version systems, on Crl.A.Nos. 482/02, 509/02 and 536/02 Page 102 ARM, by 10.7.93 was therefore, completely unwarranted, and meant to benefit that concern, without any public interest and also to ensure it pecuniary advantage. Ms. Runu Ghosh's omission to point out in her note, Ex. PW-3/K-42 that ARM had agreed to accept liquidated purchases only if the order was placed on it by 10.7.93 and that such offer could not be accepted, without the type approval, points to her anxiety to aid ARM at all costs. Similarly, Ms. Runu Ghosh's note (of 23-07-1993) claimed that according to TEC, ARMs synthesized version too had some additional features, is not backed by any such material. TEC's Rakesh Aggarwal's letter Ex. PW4/DZ-2 did not indicate that the synthesized version manufactured by ARM had any such additional features. Most importantly, that letter (Ex. PW-4/DZ-2) was written on 26th July, 1993, and could not have been the basis for the assertion by Ms. Runu Ghosh that ARMs synthesized version had certain unique additional features - noted by her on 23rd July, 1993..

141. The Trial Court inferred that after recording her note on 23-07-1993, Ms. Runu Ghosh returned the file; it was sent back to her on 2.8.93 with a note that the Minister could not see it due to preoccupation. The impugned judgment held that the file was received by Ms. Runu Ghosh on 3.8.93, and that despite 3.8.93 and being 4.8.93 were working days, she did not submit the file DDG (PF), to whom her note was marked, and instead, on 5.8.93 sent the file directly to the Minister.

The Trial Court held that Ms. Runu Ghosh held on to the file without processing either on 3.8.93 or on 4.8.93, till it was submitted to MoS (C) on 5.8.93. She had signed her note dated 23.07.93 and had already marked it to DDG (PF), she did not have to do anything but merely send the file to DDG (PF); this could have been done on 3.8.93 itself. This conduct, was also held to be due to her anxiety to ensure that ARM was favoured, because if the file were forwarded earlier, there was a risk of other officers overruling her. This Court is of the opinion that such hypothesis at best amounts to suspicion; it cannot be considered a strong circumstance, and not one which amounts to the Appellants guilt..

142. The facts on record, in the form of the notes written by Ms. Runu Ghosh, on 25th May, 1993; her insistence that technical issues regarding the superiority of the synthesized version, were not discussed in the PNC deliberations (despite oral Crl.A.Nos. 482/02, 509/02 and 536/02 Page 103 testimony of witnesses to the contrary, and in spite of the vendors furnishing detailed letters containing technical particulars), her note Ex. PW-3/K-36, her dogged persistence in her file notings that the crystal version could not be priced lower than the synthesized version, and her recommendation (of 25th May, 1993) to purchase 1500 units, including the synthesized version, by emphasizing that ARM offered to pay liquidated damages (without pointing out the condition that the offer had to be given before 10-7-1993, and without highlighting that type approval for ARMs synthesized version had not been given) all clearly pointed to her holding ARMs brief, and batting for its products, within the establishment. She opposed reduction of price of the crystal version and recommended the same price for all the vendors irrespective of whether they were manufacturing the crystal version or synthesized version. ARM alone would have stood to benefit if this proposal were accepted; all other vendors had type approval for the preferred technology, i.e. the synthesized version. On receipt of the file, Ms. Runu Ghosh, with a view to oppose N.C. Guptas price reduction proposal in respect of the price of crystal version, wrote to Sri Rakesh Aggarwal. There was no hint even from senior technical officers - up to the level of Member (Technology) of the Telecom Commission, that such a second view or look at the technology or pricing aspect was necessary. In this view the reference made by Ms. Runu Ghosh to the Senior DDG (TEC), regarding comparability of VHF hand held trans receiver and 2/15 MARR was strange, if not entirely

unwarranted. Ordinarily, as noted by the Trial Court, such a proposal would have been mooted through the DDG (PF), her immediate superior; he would then have sought opinion of TEC, if he had agreed with the proposal. Though not prohibited - and not shown to be prohibited by the office procedure- such action cannot be regarded as normal, as it would lead to normal channels of official communication, and the system of decision making being by-passed, at the whim and humour of different officers..

143. The next incriminating circumstance is ARM's letter Ex. PA-16 (dated 21-07-1993). It apparently did not have any diary number, indicating the possibility of its hand delivery to Ms. Runu Ghosh. The file was received by Ms. Runu Ghosh sometime in the latter half of on 19.07.93 or on 20.07.93. The letter Ex. PA16 was written on 21.07.93. ARM was not informed that the file was being examined by Ms. CrI.A.Nos. 482/02, 509/02 and 536/02 Page 104 Runu Ghosh. The sales tax reduction indicated by ARM, in the letter, i.e 2 % instead of 4% for the orders placed on it, were reflected in Ms. Runu Ghosh's note, Ex. PW- 3/K-42 - she even calculated the benefit at ` 1.17 crores, if 1500 systems were procured. These circumstances can lead to a reasonable inference that Ms. Runu Ghosh was in active communication with ARM, and Mr. Rama Rao; her notes therefore, reflected that firm's concerns and its desire to push its product. The Trial Court considered yet another circumstance, i.e. recovery of blank, signed letter heads, from Ms. Runu Ghosh's office. During search of her office, the CBI found and seized two blank letter heads of ARM Ltd. signed by Mr. Rama Rao in her office table drawer. Ms. Runu Ghosh denied the recovery of these documents, in her statement under Section 313 of Cr.PC. PW-7 Sri R.P.S. Chauhan, Superintendent in the Income Tax Department, a public servant requisitioned by CBI through Commissioner (Income Tax) to accompany its officials to Ms. Runu Ghosh's for the search there on 16.8.96 deposed that Ms. Runu Ghosh's office, Room No.

304. was locked and was forced opened by an official of the Sanchar Bhawan. He deposed that the letter heads Ex. P1 and P-2 were found in the table drawer in that room. PW-7 signed as a witness, at point A on the letterheads. The seizure memo of the letter heads Ex. PW6/1 also bears signature of the witness at point B. PW-6 Sri Ganesh Verma was posted as DSP in CBI on 16.8.93. A warrant had

been issued by the Special Judge Delhi to conduct search in the Ms. Runu Ghosh's office, Room No. 304, Sanchar Bhawan. He joined two witnesses, i.e Mr. R.P. Chauhan and Mr. Manohar Lal. They were called to the CBI office from their department. PW-7 stated that he Ms. Runu Ghosh's office, i.e Room No.

304. on the third floor of Sanchar Bhawan was searched in the presence of witnesses and letter heads Ex. P1 and P2 were in the drawer of her table. According to him, Ms. Runu Ghosh was the sole occupant of that room and there was only one table there. During cross-examination he stated that the locked room was forced open by officers of the Sanchar Bhawan after they reached there. During cross-examination it was not suggested that the room was not occupied by Ms. Runu Ghosh or that she shared the room with some other person. She was therefore the sole occupant of Room No.

304. in Sanchar Bhawan; that room was locked when CBI officials reached on 16.08.93. The letter heads Ex. P1 and P2 were in the only Table in that room; it could CrI.A.Nos. 482/02, 509/02 and 536/02 Page 105 only be her table. Mr. Rama Rao in his statement under Section 313 Cr. PC explained that these letter heads bore his signatures, but had been given to one Mr. Tandon of Shyam Telecom in connection with a proposal to set up a Joint Venture Company with ARM; and that he had handed over the letterheads to CBI..

144. The evidence in the form of depositions of PW-6 and PW-7 (the latter being a public officer, of the Income Tax department) establish that Room No.

304. in Sanchar Bhawan was locked when the CBI, team with witnesses went there. There was no occasion for CBI officials to "plant" the letterheads in the drawer of Ms. Runu Ghosh's table. Therefore, these blank, but signed letter heads of ARM, (signed by Mr. Rama Rao) were proved to have been recovered from Ms. Runu Ghosh's possession. It was argued by Counsel for Mr. Rama Rao that ARM Ltd. came into existence much after December 1993 when the matter relating to purchase of 2/15 MARR system was finalized. PW-14 S. Hemlata, Vice President of ARM Ltd. in her deposition, stated that that the name of Advance Radio Masts Ltd. was changed to ARM Ltd. and Mr. Rama Rao continued as its Managing Director till he resigned on account of the company being blacklisted by BSNL.

These facts reveal the proximity or nexus between ARM and Ms. Runu Ghosh. Her conduct in highlighting ARMs offer (by its letter dated 21-07-1993, in her note of 23-07-1993) and not pointing out in her previous note that ARMs previous offer was conditional upon placement of order for the synthesized systems, even when it did not have type approval for it, can, therefore be explained by her acting virtually as a spokesperson for ARM. No doubt, the record does show that other concerns too were writing letters to various officers (including the letter written to DDG by ARM itself on 22-04-1993). Yet, there was no brazen endeavor on the part of anyone to favour any technology, or concern the way Runnu Ghosh sought to, for ARM. On the contrary, all file notings of various officers- such as Sri. D. P. Srivastava, Sri. N.C. Gupta, Sri. Ujjagar Singh, Sri U.S. Prasad, and Adviser and Member level officers, such as U.V. Naik, R.S. Rastogi, M.G. Kulkarni, etc consistently showed that the synthesized version was preferred, and all of them were conscious of the serious system limitations that beset the crystal based version. Crl.A.Nos. 482/02, 509/02 and 536/02 Page 106.

145. Ms. Runu Ghosh too had argued that DoT paid same price for both the crystal and synthesized versions in case of purchase the first lot of 500 units; the tender was the same. Notings in the file Ex. DW3/1, and the deposition of Mr. Vishwajeet, in this regard were relied. At that stage, there was nothing on record, in the form of official thinking, that the crystal version was inferior to the synthesized version. No reduced price was recommended and worked out for the crystal version. Therefore, purchase of the crystal and synthesized version for the same price, earlier, did not, by itself, justify the same price later. It would be useful to notice that the Trial Court observed that Ms. Runu Ghosh's note dated 27.4.94 (in the file Ex. DW4/1 relating to purchase of 4/30 MARR system), stated that the synthesized version was a better and improved version..

146. The above discussion would show that the prosecution was able to prove the following crucial incriminating circumstances against Ms. Runu Ghosh: (1) By her note of 25-05-1993, she advocated placing an order for 1500 units, on ARM, despite knowledge that by then, the thinking in the department was that the synthesized version was preferred, (Director (GP) D.P. Srivastava's proposal in Ex. PW-4/A its approval by note Ex.PW4/C; the Member (P) Mr. U.V. Nayak, by his

Ex.PW 4/E approved purchase of only the synthesized version). (2) She was aware that Shyam and Punwire had obtained type approval for the preferred technology, i.e. the synthesized version, whereas ARM did not have that approval in till July, 1993; (3) She advocated that ARM had volunteered to change the frequency of the crystal version, in situ, for a period of three years, free of cost. While this seems innocuous, the circumstance has to be viewed in the larger context of Ms. Ghoshs advocacy for ARMs products at all costs; (4) All vendors were called for negotiation by PNC on 10-06-1993. Ms. Ghosh was a member. Each one of the vendors brought detailed notes, and letters, advocating the technological features of their products; ARMs letter was Annexure 1 to Ex. PW-/K-29. In that, Mr. Rama Rao offered to bear 23% liquidated damages if an order for 1500 systems (450 crystal based and 1050 Crl.A.Nos. 482/02, 509/02 and 536/02 Page 107 synthesized version) was placed before 10-07-1993. Ms. Runu Ghosh was aware of this condition, since she was part of PNC; yet, she merely highlighted ARMs offer to pay 23% liquidated damages, as a positive aspect, on 23-07- 1993, (in Ex. PW-3/K-42) in case of delayed delivery by ARM - an offer which had not been acted on (since no order was placed before 10-07-1993) and had therefore lapsed; moreover, that offer, when made, could not have been acted upon, because ARM did not possess type approval for the synthesized version (in June, 1993). (5) Ms. Ghoshs insistence in her penciled comments, and in her subsequent note, of 18.06.1993 that technical aspects were not discussed, during the PNC meetings, is contradicted by the depositions of PW-3 and PW-.

4. Furthermore, the letters furnished by the vendors, including ARM, do contain technical data and features claimed by their products; (6) Ms. Runu Ghoshs attempt to advocate ARMs product is evident from its letter (Ex. PA-16 dated 21.07.1993) offering to lower sales tax. This was included in her note of 23.07.1993, to garner support for its product. (7) Her note dated 23.07.1993, claimed that according to TEC, ARMs crystal version had certain additional features, not present in the products of other concerns. However, Rakesh Agarwal (the TEC member who wrote to Ms. Runu Ghosh) replied to her letter (of 20th July, 1993) only on 26th July, 1993 (Ex. PW-3/DZ-2). Even that letter is silent about such unique or additional features. (8) Ms. Runu Ghoshs direct letter to Rakesh Agarwal -without bringing it to the knowledge of senior officers, was

irregular, and one more attempt to by pass procedures, and somehow gain support for ARMs product; (9) Though she advocated price parity, questioning the criteria adopted by NC Gupta, while costing the crystal version, she did not suggest any alternative method. Sri N.C. Gupta was a technical man, with field knowledge of the product, and was member of the technical unit of the Tender Evaluation Committee. The costing exercise undertaken by him, in his note of 13-07-1993 was transparent. Even Rakesh Agarwals letter merely said that the TEC did CrI.A.Nos. 482/02, 509/02 and 536/02 Page 108 not have the data to undertake such costing exercise..

147. Undoubtedly, all these attempts ended on 31.08.1993, when Mr. Sukh Ram agreed to the price disparity (for the two products). However, they ultimately provided the basis for his review, on 19th November, 1993, and 13th December, 1993. Furthermore, the ARM Ltd. blank letterheads (bearing Mr. Rama Raos signatures) recovered from Ms. Runu Ghoshs office, proved conclusively that she had a close nexus with ARM; that concern was able to actually discern the goings on in the DoT, and as a result, offer concessions (like in the case of the letter dated 21st July, 1993) to garner support for its product. Ms. Runu Ghosh acted as the mouthpiece of ARM, which in turn acted through the Appellant Mr. Rama Rao. She clearly abused her office as a public servant, to obtain pecuniary advantage to ARM. Though her acts seemingly did not benefit ARM, since Mr. Sukh Ram initially accepted the decision regarding price differentiation for the crystal and the synthesized version, ultimately her nexus with ARM, and her notes formed the basis of his deciding that price parity was essential. But for her acts, and her proximity with ARMs Mr. Rama Rao, it would not have been possible for the latter to sell the crystal version of the product at the same price as the synthesized version. Her action resulted in ARM obtaining pecuniary advantage, without public interest. Having regard to the totality of all these facts and circumstances, we are of the view that there is no infirmity in the Trial Courts findings, convicting the Appellant Ms. Runu Ghosh, for the offences under Section 13 (1) (d) (ii) and Section 13 (1) (d) (iii) read with Section 13 (2) of the Prevention of Corruption Act. Her conviction with Mr. Rama Rao, under Section 120- B, IPC, read with Section 13 (1) (d) (ii) of the Prevention of Corruption Act, 1988, is also upheld. Findings concerning Mr. Rama Rao.

148. As regards Mr. Rama Rao, the evidence on the record, in the form of the letter, by which ARM offered to revise the cost of the crystal version downwards, dated 16 th April, 1993, was written by him as ARMs Managing Director. He pursued ARMs interest with DoT. ARM also wrote the letter dated 22-04-1993, offering to make in situ change of frequency, free of cost, in respect of the crystal version, for three years, Crl.A.Nos. 482/02, 509/02 and 536/02 Page 109 if the order was placed on that company. He pursued ARMs interest before DoT, in respect of purchase of 2/15 MARR systems. He appeared before Price Negotiation Committee on behalf of ARM, and offered by its letter, (Annexure 1 to EX. PW-3/K - 29), to bear 23% liquidated damages, in case ARM did not complete supply of the equipment, on condition that the order were placed on it, before 10-7-1993. ARM also wrote the letter dated 21st July, 1993, after the PNC meeting of 10th July, 1993, (EX. P/A -16), highlighting that it would be charging 2% Sales tax, which would result in DoT benefitting and saving money. This aspect was highlighted by Ms. Runu Ghosh, in her detailed note dated 23rd July, 1993. Mr. Rama Rao represented in writing, directly to the Minister, Mr. Sukh Ram, by letter dated 11.09.1993 (Ex. PW-3/K-76) seeking price parity between the crystal system and the synthesized version. He also sought upward revision of the quantities (of the orders placed on ARM for supply of the crystal version system) from 300 to.

450. 149. This Court is conscious of the fact that the head or high-ranking officer of a private enterprise acts legitimately when he approaches the government or its functionaries, in the course of negotiations for entering into contracts. It would be considered legitimate that during even after parlays, letters are written to the government and its officers at various levels. These cannot be construed as objectionable behaviour. At the same time the Court has to take into consideration and other important reality which is that seldom does a criminal conspiracy between a businessman or a private enterprise reveal a smoking gun. In such cases necessarily, the Court has to often wade through mountains of files and documents and wherever necessary draw inferences about the conduct of the concerned individual. It is in the light of this understanding that the Appellant Mr. Rama Raos conduct has too been scrutinized..

150. Mr. Rama Raos counsel had contended that that despite the note of Ms. Runu Ghosh dated 23.07.1993, (EX. PW-3/K 42) Mr. Sukh Ram approved the reduced price for the crystal version (Ex. PW-3/K-60) on 31.07.1993, which disclosed that he (Mr. Rama Rao) was not a party to any criminal conspiracy as made out, and that the Trial Court fell into error in holding that the charge was established. The fact that Mr. Sukh Crl.A.Nos. 482/02, 509/02 and 536/02 Page 110 Ram was not a conspirator, would only mean that he was not a party to the agreement between the others. Yet, that is not conclusive as to whether there was a compact between Ms. Runu Ghosh and Mr. Rama Rao. The entire correspondence between various officials of the Central Government, DoT and Mr. Rama Rao, disclose that he was the spokesman for ARM, and its voice. He more than anyone else had a vital stake in seeing that the stocks of the crystal version of the tendered equipment that were with ARM (a fact evident from the letter written by that concern, on 22.04.1993; his partly signed, partly handwritten letter handed over to the PNC on 10.06.1993 - in which he offered to pay 23% L.D in case of late supply if the order were placed by 10.07.1993- and later, the representation dated 11.09.1993) were sold to the DoT. There is evidence in the form of Ms. Runu Ghoshs notes that ARM had supplied the crystal version earlier, which had been installed in the field. The handwritten note given to the PNC on 10th June, 1993, in fact holds out the sop that if the order for 1500 systems - of which clearly, 450 units were to be the crystal version, were to be placed on ARM, the latter would bear 23% liquidated damages in case of delay in supply of the equipment before 15.02.1994. However, no such order was placed. Yet, this offer was resuscitated - mysteriously in Ms. Runu Ghoshs note of 23.07.1993. The original offer to give such concession, only if the order were placed before 10.07.1993. Yet, Ms. Runu Ghosh made it out as if that was a positive feature, in her note (Ex. PW-3/K-42). That would have been possible only if it had the concurrence of Mr. Rama Rao, and ARM; in any case, if that suggestion were accepted, without any corresponding commitment by ARM, it was only the latter concern and no other which would have benefitted. Another strong indication which can be perceived from the record is that ARM addressed a letter directly to Ms. Runu Ghosh on 21st July, 1993. The Trial Court has discussed elaborately that there is no documentation whether this letter was indeed received through

speed post or mail; at any rate it was not diarized. This aspect in our opinion, was correctly analysed by the Trial Court because of the contents of the letter. ARM, for the first time highlighted that it was offering to supply the equipments in question and that the sales tax component would be 2% instead of 4% in the case of its competitors. This offer was seized upon and given prominence by Ms. Runu Ghosh in her note EX. PW-3/K.

42. This letter-of Crl.A.Nos. 482/02, 509/02 and 536/02 Page 111 21.07.1993 (seen together with the other evidence) constitutes strong circumstances which incriminate ARM, through P. Rama Rao, as well as Ms. Runu Ghosh. It points to nexus between the two and underscores the circumstance that Ms. Ghosh virtually acted as the spokesperson for ARM and took care of its interests at all times. This is clearly at the behest of that firm's managing director, the Appellant Mr. Rama Rao..

151. Each of the pieces of evidence discussed above are strong incriminating circumstances and pointers to the existence of an agreement between Ms. Runu Ghosh and Mr. Rama Rao, the object of which was to ensure that 450 units of the crystal version of ARMS equipment was procured by DoT, at price equal to the synthesized version. That this effort failed in the first instance when the price disparity was agreed to by Mr. Sukh Ram on 31st of August 1993, is of no consequence, because the essence of the crime of conspiracy lies in the agreement by two or more persons to do or cause to be done, an act which is not illegal, but by illegal means. As noted earlier in the portion dealing with Ms. Runu Ghosh's role, her file notings provided invaluable assistance to ARM when Mr. Sukh Ram had to consider the latter's representations, post 11.09.1993. ARM had a vital economic interest in ensuring that its products were somehow procured in the teeth of all opposition from middle and senior ranking officers in the DoT. Mr. Rama Rao relentlessly pursued its interests with the Department, primarily through Ms. Runu Ghosh. A very important piece of evidence produced by the CBI during the trial was in the nature of two blank letterheads signed by Mr. Rama Rao, which were found in the office of Ms. Runu Ghosh. PW-06 and PW-07 testified to having witnessed the recovery and seizure of these signed letterheads, of ARM, from Ms. Runu Ghosh's table (sic desk) in her office which was locked but had to be forced

open. Mr. Rama Rao acknowledged that the letterheads were that of ARM; his explanation however, was that they had been handed over to one Mr. Alok Tandon of Shyam Telecom at the latter's request and given in 1995 to enable to correspond between Tele-link India Ltd (a joint-venture of Shyam Telecom and ARM). Apart from there being no corroborative material in this regard - since the defence did not lead evidence, either oral or documentary to support such a statement - the explanation itself partially corroborates the allegation. If indeed there was some joint-venture between two erstwhile rivals, the question which still CrI.A.Nos. 482/02, 509/02 and 536/02 Page 112 remained unanswered was why did blank- but signed letterheads of ARM- find their way to Ms. Runu Ghosh's official desk. The other argument addressed during the appeal before this Court was that ARMs name had been changed from Advance Radio Mast Limited to ARM Ltd. in 1998 - for which testimony of PW-14 was sought to be relied upon. Now, the Court does not find any substance or merit in this argument. The documentary evidence, in the form of exhibits, before the Trial Court shows that Advance Radio Mast was known by the acronym ARM, in 1992 and 1993; all official file notings in Ex. PW-3/A refer to the concern as ARM. Even the letter EX. PW-3/K - 29, handed over by Mr. Rama Rao during price negotiations on 10.06.1993 is captioned as an offer by "ARM Ltd." in his handwriting. The said Appellant admitted to the letterhead as well as the signatures, at the foot of that document, which formed part of the file at Page 168/C. The inescapable conclusion therefore is that Mr. Rama Rao, in his conspiracy with Ms. Runu Ghosh had handed over ARMs letterheads to her, to be used when the occasion demanded to further their unlawful agreement, to wit somehow ensure that ARMs interests were always taken care of by Ms. Runu Ghosh. Halsbury's Laws of England (Fourth Edition, Volume 11, Para 58) states that: Conspiracy consists in the agreement of two or more persons to do an unlawful act, or to do at lawful act by unlawful means. It is an indictable offence at common law, the punishment for which is imprisonment or fine or both in the discretion of the court. The essence of the offence of conspiracy is the fact of combination by agreement. The agreement may be expressed or implied or in part express and in part implied. But the conspiracy arises and the offence is committed as soon as the agreement is made; and the offence continues to be committed so long as the combination

persists, that is until the conspiratorial Egremont is terminated by completion of its performance or by abandonment or frustration or however it may be. The actus reus in a conspiracy is the agreement to Exh. you to the illegal conduct, not the execution of its. It is not enough that two or more persons pursued the same unlawful object at the same time or in the same place; it is necessary to show a meeting of minds, a consensus to effect an unlawful purpose. It is not however, necessary that each conspirator should have been in communication with every other. CrI.A.Nos. 482/02, 509/02 and 536/02 Page 113.

152. Criminal conspiracy is likened to a march under a banner, with the conspirator as a participant, who may continue or choose to opt out of the march, at some stage, or join at another, without changing the words on the banner (Ajay Agarwal v Union of India AIR 1996 SC 1637). Similarly, in Bimbadhar Pradhan v State of Orissa AIR 1956 SC 469, the nature of the offence (of criminal conspiracy) was explained as follows: the offence of criminal conspiracy consists in the very agreement between two or more persons to commit a criminal offence irrespective of the further consideration whether or not those offences have actually been committed. The very fact of the conspiracy constitutes the offence and it is immaterial whether anything has been done in pursuance of the unlawful agreement. But in this case the finding is not that Government money had not been misappropriated or that the accounts had not been falsified... In State of Maharashtra v Som Nath Thapa 1996 (4) SCC 649, the Supreme Court stated as follows: ..to establish a charge of conspiracy knowledge about indulgence in either an illegal act or a legal act by illegal means is necessary. In some cases, intent of unlawful use being made of the goods or services in question may be inferred from the knowledge itself. This apart, the prosecution has not to establish that a particular unlawful use was intended, so long as the goods or service in question could not be put to any lawful use. Finally, when the ultimate offence consists of a chain of actions, it would not be necessary for the prosecution to establish, to bring home the charge of conspiracy, that each of the conspirators had the knowledge of what the collaborator would do....

153. Direct evidence is seldom forthcoming to establish conspiracy. Stealth privacy and secrecy are usually its hallmarks. More often than not, Courts have to

infer conspiracies on the basis of the facts and all the surrounding circumstances. The conduct of what the alleged conspirators do and the trail they leave in their wake is often determinative whether they commit the crime. It was held (Mohammed Usman Mohammed Hussain Maniyar v State of Maharashtra AIR 1981 SC 1062) that for an offence under Section 120B IPC, the prosecution need not necessarily prove that the perpetrators expressly agreed to do or cause to be done the illegal act, the agreement may be proved by necessary implication. Crl.A.Nos. 482/02, 509/02 and 536/02 Page 114.

154. In this case, there is no direct evidence to establish criminal conspiracy. It is in such cases that the Court considers the totality of circumstances. This Court is convinced that such charge is indeed proved if there is a clear link between the two, i.e. Ms. Runu Ghosh and Mr. Rama Rao to further the interests of ARM to the detriment and harm to public interest if the object of that unlawful agreement was to be achieved by Ms. Runu Ghosh's abuse of official position. The tone and tenor of each noting made by Ms. Runu Ghosh, stridently advocating the purchase of ARMs crystal-based equipment despite its not being the preferred technology in express terms of the advertised criteria; her deceptive notings in the file, in the form of strong recommendations to procure 1500 systems in May, 1993 from ARM (even type approval for the synthesized version had not been given to ARM by DoT); the noting dated 18.06.1993 expressing disagreement with the recorded minutes of meeting of the PNC; her disagreement with the costing exercise carried out by Mr. N.C. Gupta, by his detailed and reasoned note dated 13.07.1993, her writing directly to the TEC - without furnishing any particulars about the technology concerned or the costing exercise carried out by Sri. Gupta (in the letter dated 20.07.1993, i.e. Ex. P-13); her incorporation of the offer received from ARM in its letter dated 21-07-1993 in the note EX. PW-3/K-42; the mention of liquidated damages offered by ARM, in the same noting - suppressing the conditional nature of the offer - and the recovery of ARMs two blank letterheads containing Mr. Rama Raos signatures, are all irrefutable evidence to criminal conspiracy between the two of them, solely to advance that concerns interests. Having regard to the above discussion, it is held that the prosecution successfully proved through circumstantial evidence in the form of letters and office notings that Mr. Rama Rao and Ms. Runu Ghosh were guilty for committing the offences punishable under

Section 120-B, IPC, read with Section 13 (1) (d) (ii) and (iii) and Section 13 (2). The circumstances proved satisfy the test mandated by the Supreme Court in its judgments, notably Sharad Birdichand Sarda - vs.- State of Maharashtra AIR 1984 SC 1622, i.e. that each circumstance alleged by the prosecution must be proved conclusively; the links to each circumstance should be equally proved in a conclusive manner; every hypothesis of the accuseds innocence should be ruled out, and the circumstance so proved should point to only the accused CrI.A.Nos. 482/02, 509/02 and 536/02 Page 115 being the author of the crime, and none else. Mr. Rama Raos appeal, consequently has to fail. Conclusions.

155. It was said by Patrick Henry, the great and prescient American Constitutionalist, that: "The Constitution is not an instrument for the government to restrain the people; it is an instrument for the people to restrain the government - lest it come to dominate our lives and interests."

156. Ours is a democracy based on the rule of law; every organ of governance owes its existence to the Constitution, to which every power is accountable. And to see that holders of public office remain within bounds of their roles, the Constitution and the legal system has devised checks in the form of laws, which define the limits of those powers, and where the degree of deviance from those lines transgresses tolerable standards, ordains criminal indictment and sanction. The Prevention of Corruption Act, 1988 is one such enactment; its efficient implementation fosters and promotes probity in public life. Governance in a modern state like India is undoubtedly complex; the range of consultations and the kind of deliberations required of the legislative and executive branch need balancing of myriad choices, and accommodating several interests, even while taking into account future possibilities. And the added duty of taking decisions with the dispatch and expedience that the circumstance warrants. Legislators and executive decision makers are protected from needless attack, as long as their actions remain within the bounds of their power, and within the zones of reasonableness. When public officials (the term public servant is widely defined) step out of such limits, protection ceases. When the degree of injury is shown to harm society and also result in unwarranted private gain, the criminal law operates..

157. The previous Act was brought into force in the flush of the country's Independence; Parliament, after having the experience of working with that law for four decades, re-visited it, and enacted a more comprehensive law, in 1988. Crl.A.Nos. 482/02, 509/02 and 536/02 Page 116.

158. When talking of corruption in government or public life, generally, it is tempting to echo the usual clichés about moral squalor in general, and the amoral abyss reflected in public life. History tells us that corruption has been almost the alter ego, of public life; it afflicted ancient Rome, medieval Europe (and led to Reformation of the Church); was in medieval India, and also during colonial times. Democracy has, to our country meant a beacon of hope, where the people are in a continuous process of empowering themselves. The phenomenon of corruption has engaged debate and concern in International institutions, like the United Nations; on 31-10-2003, the General Assembly of that body adopted the United Nations Convention against Corruption. The Preamble to the Convention states, very pertinently that: Concerned about the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law, Concerned also about the links between corruption and other forms of crime, in particular organized crime and economic crime, including money laundering, Concerned further about cases of corruption that involve vast quantities of assets, which may constitute a substantial proportion of the resources of States, and that threaten the political stability and sustainable development of those State....

159. The link between distribution of largesse, including procurement of goods and services by the State, and corruption, was recognised, in Article 9, which provided, inter alia, that: Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption. Such systems, which may take into account appropriate threshold values in their application, shall address, inter alia: (a) The public distribution of information relating to procurement procedures and contracts, including information on

invitations to tender and relevant or pertinent information on the award of contracts, allowing potential tenderers sufficient time to prepare and submit their tenders; Crl.A.Nos. 482/02, 509/02 and 536/02 Page 117 (b) The establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication; (c) The use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures;.

160. The Convention was cited only to emphasize that grappling corruption in any society cannot be a one-time exercise; it is an ongoing one. The legislation in this country, in the form of the previous enactment and the 1988 Act, is comprehensive, and designed to tackle all manner of questionable behaviour of those holding public office. What is necessary is to strengthen the mechanisms for its effective and timely implementation. Closer attention to ways of injecting independence, professionalism and speed, in investigation, prosecution and decision making under the Act, are to be explored. Having regard to the wealth of experience gained by the courts and the executive, it may be worthwhile to explore the practicality and need to put in place a professionally trained prosecutorial cadre, and an investigative and enforcement wing, exclusively dedicated to dealing with cases relating to corruption, and possibly economic offences, in the lines of All India Services. It is of vital importance that these services are assured functional autonomy and independence, (including protection of tenure and conditions of service) without which their existence would be meaningless. A similar debate in regard to creation of an exclusive judicial cadre (by invoking Article 312 of the Constitution of India), consistent with appropriate control mechanisms existing under the Constitution (Articles 233, 235 and 227) may be undertaken. These are reflections; ultimately, it is for Parliament, and other institutions to consider and take appropriate measures..

161. This Appeal was received upon a reference to the Division Bench, as regards the true interpretation of Section 13 (1) (d) (iii). We have indicated the test applicable, - i.e. when the decision or an act of a public servant, (which results in another obtaining pecuniary advantage or valuable thing) be without public interest, namely, if that action of the public servant is the consequence of her or

his manifest failure to observe those reasonable safeguards against detriment to the public Crl.A.Nos. 482/02, 509/02 and 536/02 Page 118 interest, which having regard to all circumstances, it was his or her duty to have adopted..

162. This Court has indicated the reasons why the test indicated above, is the appropriate one; we have considered the history of the legislation, the previous law, the objectives which the 1988 Act seeks to achieve, and the statutory scheme. During the hearing, it was often said that holding mens rea as inapplicable to this species of offence, would render it a principle-less provision, and the courts would be applying a subjective test, in each case. This Court is of the opinion that the test and standard indicated are sufficiently objective, having regard to the kind of conduct, it seeks to target, and the objective it seeks to achieve, i.e. responsible action by every public servant. As regards the apprehension as to how future charges would be dealt with, we would quote Lord Lindley in answer to "where would you draw the line?" in *Attorney General v. Brighton and Hove Coop. Supply Assn.*, (1900) 1 Ch 276, that: Nothing is more common in life than to be unable to draw the line between two things. Who can draw the line between plants and animals? And yet, who has any difficulty in saying that an oak-tree is a plant and not an animal? Again, Lord Coleridge in *Mayor of Southport v. Morriss* 1893 (1) QB 359, said this: The Attorney General has asked where we are to draw the line. The answer is that it is not necessary to draw it at any precise point. It is enough for us to say that the present case is on the right side of any reasonable line that could be drawn..

163. In view of the above discussion, it is held that the prosecution successfully proved that Mr. Rama Rao and Ms. Runu Ghosh were guilty for committing the offences punishable under Section 120-B, IPC, read with Section 13 (1) (d) (ii) and (iii) and Section 13 (2). Mr. Rama Raos appeal, consequently has to fail..

164. The Court further holds that there is no infirmity in the Trial Courts findings, convicting the Appellant Ms. Runu Ghosh, for the offences under Section 13 (1) (d) (ii) and Section 13 (1) (d) (iii) read with Section 13 (2) of the Prevention of Corruption Act; her conviction for the offence punishable under Section 120-B is also upheld; Crl.A.Nos. 482/02, 509/02 and 536/02 Page 119.

165. The Court is of the opinion that the conviction under Section 13 (1) (d) (ii) and (iii) read with Section 13 (2) of the Prevention of Corruption Act, 1988 returned by the Trial Court, against Mr. Sukh Ram was justified; the same is accordingly affirmed. However, his conviction under Section 120-B IPC is not justified; the same is set aside..

166. The Appeals of Ms. Runu Ghosh and Mr. Rama Rao, accordingly fail and are dismissed; Mr.Sukh Rams appeal against the conviction for conspiracy, under Section 120-B IPC has to succeed, and is allowed. Mr. Sukh Rams appeal against his conviction under Sections 13 (1) (d) (ii) and (iii) read with Section 13 (2) fails and is dismissed. The orders on sentence impugned in all these appeals are, for the above reasons, affirmed, and left undisturbed. The Appellants shall surrender and serve their sentences; they shall appear before the Trial Court, for this purpose, on 5th January, 2012. (S.RAVINDRA BHAT) JUDGE (G.P. MITTAL) 21st December, 2011 JUDGE Crl.A.Nos. 482/02, 509/02 and 536/02 Page 120

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