

v K Gupta Vs. State

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Court : Delhi

Decided On : Dec-24-2014

Judge : Indermeet Kaur

Appellant : v K Gupta

Respondent : State

Judgement :

\$~ * IN THE HIGH COURT OF DELHI AT NEW DELHI % + Judgment reserved on
:

19. 12.2014 Judgment delivered on :

24. 12.2014. CRL.REV.P. 558/2014 & Crl.M.A.No.14160/2014 V K GUPTA
Petitioner Through: Mr. Mukesh Anand with Mr. Shailesh Tiwary, Advocates
versus STATE Respondent Through: + Ms. Fizani Husain, APP with SI Suresh
Chand, PS EOW CRL.REV.P. 559/2014 & Crl.M.A.No.14163/2014 YOGENDRA
PAL SINGH Through: Petitioner Mr. Mukesh Anand with Mr. Shailesh Tiwary,
Advocates. versus STATE Respondent Through: Ms. Fizani Husain, APP with
SI Suresh Chand, PS EOW + CRL.REV.P. 560/2014 & Crl.M.A.No.14166/2014
PANKAJ GOEL Petitioner Through: Mr. Mukesh Anand with Mr. Shailesh
Tiwary, Advocates. versus STATE Respondent Through: + Ms. Fizani Husain,
APP with SI Suresh Chand, PS EOW CRL.REV.P. 562/2014,
Crl.M.A.No.14175/2014 & Crl.M.A.No.14176/2014 PRAVEEN CHOWDHARY

Through: Petitioner Mr. Mukesh Anand with Mr. Shailesh Tiwary, Advocates. versus STATE Respondent Through: + Ms. Fizani Husain, APP with SI Suresh Chand, PS EOW CRL. REV. 563/2014 ..Petitioner MOHD.ASIF Through: Mr.Mukesh Anand and Mr.Sahilesh Tiwari, Advocates. vs. STATE .Respondent Through: + Ms.Fizani Hussain, APP. CRL.REV.P. 564/2014 & Crl.M.A.No.14179/2014 R K CHAHAL Petitioner Through: Mr. Mukesh Anand with Mr. Shailesh Tiwary, Advocates. versus STATE Respondent Through: Ms. Fizani Husain, APP with SI Suresh Chand, PS EOW CORAM: HON'BLE MS. JUSTICE INDERMEET KAUR INDERMEET KAUR, J.

1 These are six revision petitions directed against the impugned order dated 16.7.2014 wherein the Sessions judge had reversed the order passed by the CMM and had directed that the matter be remanded back to the CMM with directions to him to decide as to what offence was made out against the respondent/accused and after framing charge, to expedite the trial. Vide order dated 22.6.2013, the CMM had discharged the accused persons. 2 Record shows that the charge sheet under Section 173 Cr.P.C. had been filed against 24 persons under Sections 420/406/409/120B/411 of the IPC, Section 63 of the Copyright Act, 1957 and Sections 78/69 of the Trademark and Merchandise Act, 1950. This was on 13.02.2002 on the complaint of Ajay Srivastava, the authorized signatory of M/s Ambuja Cement. Per averments in the complaint and thereafter pursuant to the investigation ordered after the registration of the FIR, the averments in the charge sheet were that the complainant company which was carrying on the business of manufacture and sale of cement under the name of Ambuja had changed their trademark in the year 1990. This trademark having had a long, continuous, extensive and established use, and having acquired and retained an exclusive right to use this trademark of Ambuja with its artistic work pertaining to the bags for packaging their cement having a unique get-up, lay out, colour combination had made them the owner of this copyright. 3 Both the trademark and the copyright were being misused by unknown persons. Manufacture/mixing and sale of spurious cement by some unscrupulous manufacturers and traders in Delhi had also formed a part of the complaint against accused persons. These acts of the falsification of their trademark and infringement of their copyright were intentional. The inferior quality, adulterated and spurious cement being on sale in cement

bags of their company being a wrong act was damaging the reputation of the company and thereby causing a huge financial loss to the company, public at large as also to the Government exchequer. 4 Oral and documentary evidence was perused by the Magistrate. At the stage of framing of charges he was of the opinion that a prima facie case had not been made out by the prosecution against any of the aforementioned accused persons. The Magistrate vide his order dated 22.6.2013 had discharged all the aforementioned accused persons. The Sessions Judge, as noted supra, had reversed this order. 5 On behalf of the petitioners (six in number) all of whom are Junior Engineers working with the Municipal Corporation of Delhi (MCD) their counsel has explained the details and the procedure of a contract. It is pointed out that at the time when a contract is awarded by the MCD to a contractor, it is pursuant to a work order which is issued. The work order contains the tender amount, the estimated cost and time, and the number of cement bags which are to be given to the contractor (in the tender in question the Ambuja cement bags were mentioned). Thereafter a Letter of Indent is issued by the Divisional Officer of the MCD for procuring the cement bags from the store of the MCD. On the basis of this Letter of Indent cement bags are issued to the contractor by the Executive Engineer against a gate pass which is required to be returned to the MCD after the cement bags are unloaded at the site. The role of Junior Engineers (petitioners herein) is to verify the cement bags at the site and to make the entry in the register on day to day consumption basis. Bills of the contractor are thereafter processed and the value of the cement bags is adjusted as sold to the contractor while disbursing the amount of the bills. It is pointed out that this detailed procedure shows that once the cement bags are sold to the contractor and payment is received by the MCD qua the cement bags as was in this case, there is no question of the cement bags still being the property of the MCD or the MCD having been entrusted with this property. Even otherwise, there is no complaint made by the department. None of the charges as leveled in the charge sheet has been leveled against the petitioners. Learned counsel for the petitioners to support this submission has placed reliance upon a judgment of the Supreme Court reported as AIR1968(SC) 700 State of Gujarat Vs. Jaswantlal Nathalal. Submission being that in that case also the question arose about the entrustment of the cement bags by the department to Bharat Sewak Samaj (BSS);

the Court had noted that sale having being effected of the cement in question the Government did not have any proprietary right left over the same. The question of entrustment and the subsequent charge of breach of trust as contained in Section 406 of the IPC was clearly not made out. Submission of the learned counsel for the petitioners being reiterated that his case also falls within the same parameters. There has been no entrustment of property and the Magistrate had rightly noted these facts in the right perspective. The impugned order passed by the Sessions Judge interfering with the order of the Magistrate suffers from an infirmity. Reliance has also been placed upon a judgment of a Co-ordinate Bench of this Court reported as 129 (2003) DLT403R.Natarajan & Ors. Vs. State to support his submission that at the time of framing of charges unless and until there is a prima facie evidence collected by the prosecution no case for a charge is made out. 6 The State has refuted these submissions. It is pointed out that the impugned order suffers from no infirmity. A status report has also been filed by the State. 7 Arguments have been heard and record has been perused. 8 Record discloses that the present FIR had been registered on a complaint made by Ajay Srivastva, the authorized signatory of M/s Ambuja Cement. The FIR was registered under Sections 420/406/409/120B/411 of the IPC, Section 63 of the Copyright Act and Sections 78/99 of the Trademark and Merchandise Act. In the complaint it was disclosed that Nawab Khan was engaged in the manufacture and sale of spurious cement in cement bags of Ambuja Cement carrying a false trademark and trade description. A list of traders who were indulging in the manufacture and supply and sale of spurious cement in these bags were also disclosed. Contention in the complaint being that ingredients of the offence under Section 420 of the IPC as also violations of Trademark and Copyright Act were made out. 9 A raid was carried out on 13.02.2002 at Northern Basti, Lal Kuan. Ashok Sultania acted as a decoy customer. He purchased four bags of Ambuja Cement of 53 grade from the shop of Nawab Khan. On the signal given by the shadow witness Sanjeev Vaid, the other persons of the raiding party also entered the scene. Nawab Khan, Mehboob Ali, Ombir Singh, Muhim Khan and Shamsheer Khan were present there. The decoy customer disclosed that he had purchased these four bags of cement from Nawab Khan @ Rs.125/- per bag and had paid him Rs.500/-. The currency note of Rs.500/- was recovered from Nawab Khan and the four cement bags were

also seized. The samples taken out from these four bags were also seized and sealed. Further search was conducted in the godown. Besides cement bags of Ambuja Cement, other bags of cement i.e. Shree Cement, Vikram Cement, Birla Chetak Cement, Laxmi Cement and bags containing the inscription MCD Supply-Not for Sale were also recovered. Besides these bags of cement one funnel like device was also recovered. Empty plastic bags were also recovered. On physical examination it was found that the empty bags when compared with the filled bags were different in size, quality and colour which was visible to the naked eye. 10 Subsequent raids were also conducted. In the second raid again not only bags of other companies i.e. Laxmi Cement and Vikram Premium Cement but also bags having the print MCD Supply- Not for Sale were recovered. Out of the total of 2692 bags which were recovered, 2206 cement bags bore the inscription MCD Supply-Not for Sale. 11 The samples which were seized from these bags were sent for chemical examination to Bureau of Indian Standard (BIS). As per the report of the BIS relating to the measure of the strength of the samples they were below the required strength. The samples taken from 53 grade cement bags had a grade ranging between 28 and 47 i.e. below the requirement. Further investigation revealed that 200 bags which bore the print MCD Supply- Not for Sale were issued from the MCD godowns of Nand Nagri, Janak Puri and Khayala. 12 V.K.Gupta (JE) (petitioner in Cr.R.P.No.558/2014) posted at Janak Puri was looking after the site of Rajpura Gur Mandi Delhi which was within the jurisdiction of Janak Puri. 178 bags of cement had been issued from Janak Puri for the site at Rajpura Gur Mandi. Allegations in the charge-sheet being that out of these 178 bags only 100 were unloaded at the site at Rajpura Gur Mandi and the balance 78 bags were unloaded at the godown of Nawab Khan etc. 13 Yogender Pal Singh (JE) (petitioner in Cr.R.P.No.559/2014) issued cement from Janak Puri and Khayala godowns. In the case of 200 cement bags which were issued from Janak Puri godown and received in the presence of the contractor, 100 cement bags were unloaded at the site in the presence of the JE and the contractor and the remaining 100 bags were unloaded at the godown of Nawab Khan. Though Yogender Pal Singh and the contractor had shown that all the aforementioned 200 cement bags had been used, however, 42 bags of the same lot were part of the recovery during the raid (carried out on 13.2.2002) and identified during inspection

(carried out on 17.2.2002). 14 200 bags of Vikram Cement were received from cement godown Janak Puri and received by Pankaj Goel (JE), petitioner in Cr.R.P.No.560/2014, at the MCD site at Jahangirpuri Colony. cement was shown to be consumed in the work. The However, per inspection carried out on 17.2.2002, 12 cement bags of the same brand, lot number and date were identified from the cement recovered during the raid on 13.2.2002. 15 Praveen Chowdhary (JE) (petitioner in Cr.R.P.No.562/2014) posted at Nand Nagri was looking after the site at A-31 Saral Extension which was within the jurisdiction of Nand Nagri. 200 bags of cement had been issued from Nand Nagri for the site at Saral Extension. Allegations in the charge sheet being that out of these 200 bags only 100 bags were unloaded at the Saral Extension site and the balance 100 bags were unloaded at the godown of co-accused Nawab Khan of which 11 bags were recovered during the raid on 13.02.2002 and identified as per the inspection carried out on 17.02.2002. 16 Mohd. Asif (JE) (petitioner in Cr.R.P.No.563/2014) posted at Nand Nagri was looking after the site of Dilshad Garden which was within the jurisdiction of Nand Nagri. 200 bags of cement had been issued from Nand Nagri for a site at Dilshad Garden. Allegations in the charge sheet being that out of these 200 bags only 100 bags were unloaded at the site of Dilshad Garden in the presence of the JE and the balance 100 bags were unloaded at the godown of co-accused Nawab Khan. 17 R.K.Chahal (JE) (petitioner in Cr.R.P.No.564/2014) was posted at Janak Puri and was looking after the site of Dhaka Village. 200 bags of Birla Cement had been issued from MCD godown Janak Puri for a site at Dhaka Village. Allegations in the charge sheet being that out of these 200 bags only 100 bags were unloaded at the site of Dhaka Village in the presence of the JE and balance 100 bags were unloaded at the godown of co-accused Nawab Khan. Though the JE had shown the utilization of the cement bags, 54 bags of this lot were recovered during the raid carried out on 13.2.2002. 18 Statements of the witnesses recorded under Section 161 Cr.P.C. have been perused. Ashok Sultania who was the decoy customer in his statement under Section 161 Cr.P.C. had disclosed that he had purchased these four bags of cement from Nawab Khan in a sealed condition in the presence of Sanjeev Vaid (shadow witness). Samples were taken which were than seized and sealed. The statement of Sanjeev Vaid was also to the effect that the samples were taken after

mixing the cement and transferring them from one bag to the other with the help of a funnel. Statements of Narender Dutt, Rajender Kumar and Teja Singh which have been highlighted by the learned counsel for the petitioners have also been perused. Both Rajender Kumar and Teja Singh were working as drivers in the trucks. In their statements recorded under Section 161 Cr.P.C. they stated that Ravinder Kumar (co-accused) was a transporter of the MCD Cement Store and he was doing this business in Nand Nagri along with his brother Satish and his father Om Prakash. Under instructions of Ravinder Kumar, cement was being transported from cement store at Nand Nagri. 200 bags were issued from store at Nand Nagri. He had delivered 100 bags of cement at the site where it was received by the JE and the remaining 100 bags were delivered by him to the godown of Nawab Khan. This statement of Rajender Kumar is in support of the stand of the prosecution that out of 200 bags which had been issued from the depot at Nand Nagri only 100 bags were delivered at the site which were received by the JE and balance 100 bags of cement were taken to the godown of Nawab Khan. Statements of Nihal Singh and Mahipal Singh (J/Es) were to the effect that the seized bags were identified by them as having the inspection MCD Supply-Not for Sale and belonged to the Khayala and Janakpuri godowns. Other witnesses deposing to the same effect have also been examined by the Investigating Officer. The submission of the learned counsel for the petitioners that the JEs had no role to play in this is farfetched as it is his own submission and an admitted fact that the cement bags were taken out from the godown of the MCD on a gate pass being presented by the contractor and thereafter taken to the site of the contractor where receipt of these cement bags were verified by the JE. Statement of witness Rajender Kumar clearly shows that out of 200 bags which were issued from the Nand Nagri site only 100 bags were delivered and verified by the JE at the site and 100 bags were taken by him at the instructions of his contractor to the godown of Nawab Khan. 19 The legal position on conspiracy and the complicity of one with the other is settled. A conspiracy is hatched in darkness; it is not open and visible to the open eye. A conspiracy by and large would be established by linking all the chains in the circumstances to build up the whole picture. The submission of the learned counsel for the petitioners that the JEs are innocent and had no role to play in the unloading of the cement bags which were admittedly recovered in the

godown of Nawab Khan and others appears to be incorrect. It was the bounden duty and responsibility of the JE to check and verify that the cement which had been released from the MCD godowns had reached the site of the contractor. This was obviously not done and that is why such innumerable bags containing inscription MCD Supply- Not for Sale were recovered from the godowns of Nawab Khan and others. All the bags obviously were not reaching their intended site; they were being diverted to the godown of unauthorized persons and thereafter sold in the open market. The factum of this unauthorized diversion is evident from the recovery of 2206 bags of cement from these godowns. The fact that they were sold in the open market is evident from the sale of four bags to the decoy customer Ashok Srivastva for Rs.500/- by Nawab Khan. The fact that the cement found in these bags was spurious and low grade is also prima facie been established by the report of the BIS. 20 The order of the Magistrate was rightly set aside. It appears that the Magistrate had decided the case on that date itself. He had noted that the numbers of the bags given by the witnesses Ashok Sultania and Sanjeev Vaid were varying; he had drawn the conclusion that the samples did not appear to be fastidiously taken, and could not rule out tampering, this was a wrong finding as the categorical version of both the witnesses Ashok Srivastva and Sanjeev Vaid is that samples were taken after proper mixing and were seized and sealed in their presence. The Magistrate had also returned a finding that the empty bags as compared to the filled bags could not be deciphered to be different on appearance as no expert opinion on this was taken; the Magistrate had also noted that a case of discharge was made out as the person who had filed the complaint was not really authorized to do so. These cumulative factors which had weighed in the mind of the Magistrate to discharge the accused persons at the nascent stage appears to be wholly illegal. The Sessions Judge had rightly reversed the order. 21 The Sessions Judge had rightly held that there was prima facie sufficient material to show the complicity of the traders, transporters as also JEs in this recovery of unauthorized bags of cement from the godowns of persons who were not authorized to keep them. The cement recovered from these bags was spurious and of low grade. The fact that a large chunk of these bags belonged to the MCD Supply- Not for Sale established the complicity of the Junior Engineers who were to ensure the receipt of the cement bags at the authorized sites; they

had to be accounted for but this was obviously not done. 22 The Sessions Judge had thus rightly held that there was sufficient material to frame charge against the accused persons and had accordingly remanded the matter back to the Magistrate to decide which offence is made out against the accused persons. This order calls for no interference. 23 Reliance by the learned counsel for the petitioners on the judgment of Jaswantlal (supra) is of no use as this judgment relates to the offence of breach of trust and entrustment as contained in Section 405 of the IPC which is not the subject matter in issue. On no count does the impugned order call for any interference. 24 Dismissed. **INDERMEET KAUR**, J DECEMBER 24 2014 ndn

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