

IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL.M.C. 2889 of 2004 & Crl. M. No. 9760 of 2004(stay)

Date of decision: February 12, 2008

R.C.GUPTA AND OTHERS PETITIONERS
Through Mr. Ashok Chhabra, Advocate.

versus

STATE AND ANOTHER RESPONDENTS
Through

CORAM:
HON'BLE DR. JUSTICE S. MURALIDHAR

ORDER

1. Whether Reporters of local papers may be
allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in
Digest? Yes

Dr. S. Muralidhar, J. (open court)

1. This petition under Section 482 of the Code of Criminal Procedure, 1973 ('CrPC') challenges an order dated 31st March, 2004 passed by the learned Metropolitan Magistrate ('MM') in Complaint Case No. 21 of 1997 titled as "*Shri Ujagar Mal Gupta v. The Manager, M/s Neer Shree Cement*" under Sections 420 and 406 IPC.

2. Alleging that the Manager of M/s. Neer Shree Cement ('NSC') had not supplied cement to the complainant despite receiving Rs.51,000/-, a complaint was filed by the Respondent complainant, being Complaint No. 21 of 1997, in the court of the learned Additional Chief Metropolitan Magistrate ('ACMM'), Delhi under Sections 420/406 IPC.

3. On 29th July, 1997 the statement of CW 1 Shri B.L. Khanna, Asst. Manager of the Bank was recorded to the effect that the amount of Rs.51,000/- paid by way of a pay order No. 798206 dated 21st September, 1994 had been cleared in the account of Neer Shree Cement.

4. The statement of CW 2 Parveen Rekhi, Accounts Officer NSC was recorded on 13th July 1998. His statement reads as under:

“The pay order No. 0898206 dated 21.9.94 of amount 51,000/- drawn on UCO Bank and the same pay order was cleared by the bankers on 1.10.94. Against this pay order we had supplied the cement as per the orders. We had supplied 500 bags of cement copy of RR is mark A with which we had supplied the cement. This order was booked with us by our dealer M/s Manoj Brothers copy of which is Mark B at present I do not have any acknowledgement to this effect whether the goods were received by the buyer or not volunteers our dealer M/s Manoj Brothers must have received the acknowledgement. It is correct that we have received the pay order of Rs.51,000/- from M/s Ujagarmal. We had received the order for supply of goods of M/s Ujagarmal through our dealer M/s Manoj Brothers. We did not receive any representation from M/s Ujagarmal that they have not received the goods as per the orders. The application Mark C for supply of goods for M/s Ujagarmal was received by us through our dealers M/s Manoj Brothers.”

5. The statement of the complainant was recorded on 10th February, 1999.

6. It appears that through all this period the only accused shown in the complaint was as under:

“The Manager
M/s Neer Shree Cement,
28, Adchini,
New Delhi-110017”

7. An application was thereafter filed on 20th July, 2002 by the complainant for summoning certain other persons as accused. This is what was stated in para 2 of the said complaint:

“That during the course of recording of pre-summoning

evidence of CW-5 and as per Ex. CW-5/B, it has come on record that 4 persons have been authorized by the account holder of accused company in question to withdraw the money from his account namely:-

- i) Shri S.P.Nagarath, Chief General Manager.
- ii) Shri R.C.Gupta, General Manager, Finance to Company Secretary.
- iii) Anil Mandot, Sr. Dy. Manager, Accounts.
- iv) Shri G.S.Chandok, Dy. Manager Accounts and Taxation.

as it is clear from the evidence and material on record that all the four persons mentioned above are responsible for the day to day activity and proceedings of the accused company/firm namely Shree Cement and has committed offence under section 420/406/34 IPC.”

8. On 31st March, 2004 the learned MM passed the following order:

“Present: Complainant in person with counsel.

The contents of the complainant are that the complainant gave Rs.51,000/- to the accused by way of bank draft No.898206 dated 21.9.94 drawn on UCO Bank, Krishna Nagar, Delhi for supply of 500 bags of cement which he did not supply nor he returned the amount and as such the intention of the accused became malafide after receiving the amount from the complainant and as such action under Section 420 IPC be taken against the accused. In support of this complaint the complainant had examined 5 Cws including CW2 Praveen Rekhi, Accounts Officer of the accused persons who admitted that cheque has been received by the accused firm. However, it has also come on record that the cement have already been supplied to the complainant. He stated that the order for supply of cement was received from the complainant through their dealer M/s Manoj Brothers to whom goods have been supplied. The other witnesses have also supported the complaint with respect to that an amount of Rs.51,000/- was given to the accused. The court had enquired from Ld. Counsel for the complaint that as to how the complaint is maintainable ones, the witness of the complainant himself stated that the good have already been supplied. The counsel for the complainant has clarified that it has come in the evidence of CW2 that goods have been supplied to M/s Manoj Brothers. Therefore, the court is of the opinion that the accused persons to come and explain as to why and under what circumstances the goods were supplied to M/s Manoj Brothers whereas the cheque was given by the

complainant. The court is therefore of the opinion that prima facie case is made out against the accused persons. Accused persons be summoned for 31.5.2004 through its manager/director for offence under Section 420 IPC on PF.”

9. The contention of learned counsel for the Petitioners is that summons could not be issued to the three Petitioners, i.e. Shri R.C.Gupta, Joint President, Mangalam Cement Ltd., Shri G.S.Chandok, General Manager (Sales), M/s Mangalam Cement Ltd. and Shri Anil Mandot, General Manager (Accounts), M/s Mangalam Cement Ltd. when in fact they were not named in the complaint originally and no averment is contained therein concerning the role played by each of them in the alleged failure to supply cement to the complainant. Secondly, that the order dated 31st March 2004 passed by the learned MM itself shows that goods had in fact been supplied to M/s. Manoj Brothers who were the dealers of the complainant. The order of the learned MM records that CW2 Parveen Rekhi had stated that the cement had already been supplied to the complainant. Therefore on the face of it the summoning order was bad in law.

10. Learned counsel for the Respondent No.2 on the other hand tried to explain that the failure to implead the Petitioners here as accused in the complaint was perhaps a mistake and that later on when it transpired that the Petitioners were to be summoned, an application was filed in the court of the learned MM. Learned counsel was unable to explain under what provision of law such an application could have been filed particularly where there is no specific averment in the complaint regarding such accused persons.

11. The complaint in question has been filed against “The Manager, M/s Neer Shree Cement” without naming the Manager and without indicating whether Neer

Shree Cement is a proprietorship or firm or any known legal entity. On the face of it, therefore, the complaint is defective. There is no concept of vicarious liability under the Indian Penal Code as has been explained recently by the Supreme Court in *Maksud Saiyed v. State of Gujarat 2007 (11) SCALE 318*. Therefore, a complaint under Sections 420 and 406 IPC would have to specifically indicate to the role of the named accused in the commission of the offence. A Magistrate before whom a complaint is presented has to satisfy himself that it contains the necessary averments. The complainant would have to bring on record material to justify the Court taking cognizance of the offence and summoning a particular accused.

12. The seriousness of the task entrusted to the learned MM in this regard has been explained by the Supreme Court in *Pepsi Foods Limited v. Special Judicial Magistrate (1998) 5 SCC 749* in the following words:

“Summoning of an accused in a criminal cases is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. **It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or**

any of the accused.” (emphasis supplied)

13. As far as the present case is concerned not only does the complaint completely lack the necessary averments concerning the description of the accused but it has been drafted casually. As already noticed, the Manager is not even named and “M/s. Neer Shree Cement” is also not described as being a legal entity that can be sued. The statement of CW 2 as extracted above far from supporting the case of the complainant contradicts it. That is no known procedure where without naming the accused and without describing their specific roles, a summoning order could be sought against those accused. The role of the Petitioners has also not come out in the pre-summoning evidence.

14. For all of the above reasons, the impugned order dated 31st March 2004 summoning the accused cannot be sustained in law and is hereby set aside. The Petitioners cannot be summoned as accused in the Complaint Case No. 21 of 1997 titled as “*Shri Ujagar Mal Gupta v. The Manager, M/s Neer Shree Cement*” under Sections 420 and 406 IPC. The Petition is accordingly allowed with no orders as to costs.

S. MURALIDHAR, J.

FEBRUARY 12, 2008
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