

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: January 14, 2011
Judgment delivered on: January 17, 2011

+ **CRIMINAL M.C. No.4303/2009**

ARVINDER SINGH PAHWA

....PETITIONER

Through: Mr. Alok Bhachawat, Advocate

Versus

THE STATE (NCT) OF DELHI

.....RESPONDENT

Through: Mr. Jaideep Malik, APP

CORAM:

HON'BLE MR. JUSTICE AJIT BHARIHOKE

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

AJIT BHARIHOKE, J.

1. Arvinder Singh Pahwa, the petitioner herein vide instant petition under Section 482 Cr.P.C. has prayed for quashing of the order dated 30.04.2009 of the learned M.M. directing framing of charge under Section 406 IPC against the petitioner as also the quashing of order dated 30.07.2009 passed by the learned Additional Sessions Judge in revision.

2. Briefly stated, facts relevant for disposal of this petition are that the petitioner's firm M/s Pahwa Builders was awarded contract to grit wash the boundary wall of the park and construction of room for jet pump in K-Block, Mahavir Nagar, C-22, West Zone, Delhi vide the work order No.VII/TC/WZ/94-95/18/42/408 dated 02.08.1994. As per clause 8 of the work order, 171 bags of cement were to be issued by the MCD to the petitioner's firm at the rate of ₹115/- plus 2% surcharge per bag. It is the case of the prosecution that cement bags were to be released for the construction work awarded to the petitioner and pursuant to the aforesaid work order, 170 bags of cement bags were released to the petitioner from the MCD store. The petitioner, instead of unloading those bags at construction site K-Block Park, Mahavir Nagar, diverted those bags to Tagore Garden Extension. It is alleged that Rajender Nishal, Deputy Director Vigilance, MCD More Sarai, Delhi received a secret information that the petitioner intended to divert those cement bags to some other place for sale. On this, a raid was conducted. The labour of the petitioner was found unloading those cement bags at D-751, Tagore Garden Extension, instead of the construction site at Mahavir Nagar Park. On these allegations, prosecution is claiming that the petitioner, by diverting the cement bags to a different site for being used for a purpose other than the work under contract, has committed an offence of criminal misappropriation punishable under Section 406 IPC.

3. Learned M.M. vide order dated 30.04.2009 found that a prima facie case of criminal breach of trust was disclosed and charged the petitioner under Section 406 IPC.

4. Feeling aggrieved by the order of learned M.M., the petitioner filed a revision in the court of Sessions, but the learned Sessions Judge dismissed the revision petition vide order dated 30.07.2007.

5. Learned counsel for the petitioner, assailing the impugned orders, has submitted that both the courts below have failed to appreciate that there is no evidence on record to, prima facie, disclose the entrustment of cement bags by MCD to the petitioner or misappropriation of those bags as alleged. Thus, there was no occasion for framing charge under Section 406 IPC against the petitioner. Dilating on the argument, learned counsel for the petitioner submitted that perusal of the work order dated 02.08.1994, particularly clause 8, reveals that as per the agreement, 171 cement bags were to be issued to the petitioner at the cost of ₹115/- plus 2% surcharge per bag. He has also referred to the copy of the store indent vide which 170 bags of cement were released to the petitioner and in columns No.7, 8 and 9, it is mentioned that rate per bag was ₹115.00 and amount to be paid as price of those bags by the petitioner was ₹19,941/- and it was to be credited to H.O. account XL-VIII-D. From this, learned counsel for the petitioner submitted, it is evident that those cement bags were actually sold to the petitioner and once the

ownership of the bags had passed to the petitioner, there was no question of entrustment of cement bags by MCD to the petitioner and in absence of entrustment, there could not have been an offence under Section 406 IPC.

6. Learned APP, on the other hand, has canvassed in favour of the impugned orders. He argued that the bags in question were given to the petitioner at a concessional rate for specific purpose of construction of pump house in the park at K-Block, Mahavir Nagar. Therefore, prima facie, it is clear that the bags were entrusted to him for using subsidized cement for construction at K-Block, Mahavir Nagar Park and by diverting the same to Tagore Garden Extension, the petitioner has, prima facie, violated the trust of the MCD and committed misappropriation of the entrusted cement bags, constituting offence under Section 406 IPC.

7. I have considered the rival contentions and perused the material on record. The petitioner has been charged in terms of the impugned orders for the offence punishable under Section 406 IPC, which deals with the punishment for the offence of criminal breach of trust, which is defined under Section 405 IPC as under:

“S.405. Criminal Breach of Trust

Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made

touching the discharge of such trust, or wilfully suffers any other person so as to do, commits “criminal breach of trust.”

8. On reading of the aforesaid provision of law, it is clear that in order to make out a case of criminal breach of trust, following ingredients must be satisfied:

“(1) there should be an entrustment by one person to another of the property or with any dominion over property;

(2) such entrustment must be in trust;

(3) there must have been a misappropriation or conversion to his own use by the person who received the property in trust; and

(4) such conversion or retention of the property must be against or in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract made touching the discharge of such trust.”

9. The question is whether or not above ingredients are, prima facie, satisfied in this case. On perusal of the work order NO.VII/TC/WZ/94-95/18/42/408 dated 02.08.1994, it transpires that as per clause 3 of the order, the petitioner was required to start the work at once and as per clause 8, the MCD was supposed to release 171 bags of cement to the petitioner from its store at the rate of ₹115/- plus 2% surcharge per bag. There is nothing in this work order to show that there was any stipulation as to where the cement bags released from the store shall be kept. On perusal of the copy of the store indent annexed to the petition, it transpires that 170 bags of cement were released to the petitioner at the rate of ₹115/- per bag, total amount being ₹19,941/- to be credited in account Head XL-VIII-D. Even in this indent, there is no stipulation that the cement bags shall be stored at

the construction site and not anywhere else. As per the charge sheet, aforesaid cement bags were found being unloaded from a mini truck in a tin shed opposite D-751, Tagore Garden and the truck was seized at the time when 26 bags had already been unloaded in the tin shed. From this, the only inference that can be drawn is that the bags were being unloaded at the tin shed at a different site, but from this, it cannot be inferred that the petitioner would not have used that cement for the work awarded to him by the MCD. It is not the case of the prosecution that the petitioner had sold those bags to anyone. Further, from the terms of the work order as well as the facts referred in the store indent noted above, it is apparent that the MCD had sold those cement bags to the petitioner for some price. Therefore, prima facie, the ownership of those bags got transferred to the petitioner, as such it cannot be said that thereafter MCD had dominion over those cement bags or those bags were entrusted by MCD to the petitioner. In absence of the aforesaid essential ingredients of Section 405 IPC, in my considered view, no offence under Section 406 IPC is, prima facie, disclosed in this case. In my aforesaid view, I find support from finding of the Supreme Court in the matter of **State of Gujarat Vs. Jaswant Lal Natha Lal**, AIR 1968 SC 700, wherein it is observed thus:

“7. On the proved facts, it is difficult to accept the contention of the appellant that after the sale of the cement in question the Government had any proprietary right over the same. Nor can it be said that the transaction in question resulted in any fiduciary relationship either between the Government and BSS or between the Government and the respondent. It was a normal transaction of sale though the sale in question was effected by the Government on the representation that cement was required for a particular purpose.

8. The term “entrusted” found in Section 405 IPC governs not only the words “with the property” immediately following it but also the words “or with any dominion over the property” occurring thereafter — see *Velji Raghvaji Patel v. State of Maharashtra*. Before there can be any entrustment there must be a trust meaning thereby an obligation annexed to the ownership of property and a confidence reposed in and accepted by the owner or declared and accepted by him for the benefit of another or of another and the owner. But that does not mean that such an entrustment need conform to all the technicalities of the law of trust — see *Jaswantrao Manilal Akhaney v. State of Bombay*. The expression “entrustment” carries with it the implication that the person handing over any property or on whose behalf that property is handed over to another, continues to be its owner. Further the person handing over the property must have confidence in the person taking the property so as to create a fiduciary relationship between them. A mere transaction of sale cannot amount to an entrustment. It is true that the Government had sold the cement in question to BSS solely for the purpose of being used in connection with the construction work referred to earlier. But that circumstance does not make the transaction in question anything other than a sale. After delivery of the cement, the Government had neither any right nor dominion over it. If the purchaser or his representative had failed to comply with the requirements of any law relating to cement control, he should have been prosecuted for the same. But we are unable to hold that there was any breach of trust.”

10. In view of the above, the impugned order dated 30.04.2009 of learned M.M. and the order of Sessions Judge in revision dated 30.07.2009 are not sustainable. Accordingly, the charge under Section 406 IPC framed against the petitioner is quashed.

11. Petition is disposed of accordingly.

12. Copy of the order be sent to the trial court for information.

(AJIT BHARIHOKE)
JUDGE

JANUARY 17, 2010
pst