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

% Reserved on: 24th January, 2017
Decided on: 21st March, 2017

\+ **CRL.M.C. 2317/2016**

VIJAY DIXIT ..... Petitioner
Represented by: Mr. Manoj Ohri, Sr. Advocate with Mr. Arun Srivastava and Mr. Abhimanyu Singh, Advs.

versus

STATE ..... Respondent
Represented by: Mr. Hirein Sharma, APP for State with Insp. Satya Prakash PS EOW Cell.
Mr. Nishant Datta and Mr. Mayank Datta, Advs. for the complainant

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

1. FIR No.82/2011 was registered for offences punishable under Sections 409/420/120B IPC on the complaint of Lt. Col. Surender Pal Singh Aurora. In the complaint against the petitioner Vijay Dixit, Kalpana Dixit promoters of M/s. Senior Mall regd. office at 1/1, Shanti Niketan, New Delhi and other unknown persons it was alleged that Vijay Dixit and Kalpana Dixit representing themselves to be the promoters of M/s. Senior Builders Limited offered lucrative schemes for the purpose of investment in their Shopping Mall namely Senior Mall, Sector-32, Noida, U.P. The complainant approached them at New Delhi where they projected the credibility of the company and assured that their company was in a sound economic condition and maintained a good reputation. They represented that the company had a collaboration agreement for developing a Multiplex-cum-Shopping complex

on land bearing plot No. BW-55, Sector-32, City Centre, Noida, U.P. admeasuring 4332 sq. mtrs. allotted to M/s. MMT Amusement Park Pvt. Ltd. and construction of the Shopping Mall would be completed before March 31, 2016. Believing their representation, the complainant signed a Builder-Buyer Agreement on 3rd October, 2005 as per which he was allotted space No.F-11 on the first floor of Multiplex-cum-shopping complex admeasuring approximately 913.12 sq. ft. for a total consideration of ₹30 lakhs. The said ₹30 lakhs was paid in installments to the accused persons.

2. Since despite assurance possession of the space allotted was not given, the complainant repeatedly visited when one more person K.K. Shukla was present in office who assured all the investors that the construction of the Mall would be completed soon. A letter dated 31st October, 2008 was sent to the complainant stating that the Mall was ready for fit outs and the complainant should take possession of his shop within 10 days. The complainant personally visited the site to inspect the shopping Mall and found that the Senior Mall was not ready for possession and lot of finishing work was yet to be completed. Allegation of the complainant is that even on the date of filing of the complaint, the Mall was not ready for occupation. During this period he met number of investors who had all also paid the amount and had not been handed over possession of the allotted space.

3. Later it was revealed that on 12th July, 2005 the Noida Authority had already cancelled the allotment of M/s. MMT Amusement Park Pvt. Ltd. for non-payment of almost 4 crores and a case in this regard was pending in the High Court of Allahabad. Despite the fact that the allotment in favour of M/s. MMT Amusement Park had been cancelled, the accused continued to take money from the investors and executed agreement of sale. Later the

complainant also got to know that a sale notice dated 21st September, 2010 in the newspapers had been issued by United Bank of India, Nehru Place Branch, New Delhi wherein it was mentioned that on account of non-payment of loan by the accused company, the property named Senior Mall had been put to public auction. After investigation a charge-sheet was filed for offences punishable under Sections 409/420/120B IPC.

4. Vide the order dated 3rd January, 2015 learned CMM ordered directing framing of charge against the petitioner for offences punishable under Sections 409/420/120B IPC. Challenging the said order the petitioner filed a revision petition before the learned ASJ which was dismissed vide the impugned order dated 16th April, 2015. Hence the present petition.

5. When this petition came up for hearing on 26th October, 2016, learned counsel for the petitioner stated that he was not pressing the petition to the extent of challenge to the order directing framing of charge for offence punishable under Section 420 IPC but only to the extent of charge for offence punishable under Section 409 IPC. Contention of learned senior counsel for the petitioner is that the only allegations against the petitioner are for offence allegedly punishable under Section 420 IPC. As regards offence punishable under Section 409 IPC as a part of sentence it has been mentioned that "*the accused siphoned away funds from accounts of company leaving behind meager amounts*". No document has been collected during the course of investigation nor filed with the charge-sheet till date despite the fact that material witnesses have already been examined. Thus in the absence of any material evidence on record showing that the petitioner committed misappropriation of funds, entrusted to him charge under Section 409 IPC is not maintainable.

6. The conclusion of the allegation against the accused in the charge-sheet is as under:

> *"As per investigation carried out so far, scrutiny of documents and examination of the concerned persons the following facts have emerged:*
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> *The allotment of the plot in question in favour of M/s. MMT Amusement Park Pvt. Ltd. company was cancelled vide letter dt. 12.7.05 and stay order was obtained by them from Hon'ble Allahabad High Court on 24.8.05. However, in the documents executed by alleged company M/s. Senior Builders Ltd. in favour of complainants/ investors after the allotment was cancelled on 12.07.05 there is no mentioning of this fact that the allotment stands cancelled and litigation is pending the Court. In fact in the documents of some of the investors it is mentioned that the space is free from all charges liens, taxes and encumbrances and litigations of any type in any court of law and also that all the levies till date of signing of agreement have been paid.*
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> *A loan of ₹10.72 crores was availed from United Bank of India against the mortgage of the property and as per terms of loan the accused company had to incorporate a specific clause with regard to term loan in the Buyer-Allottee Agreement. However, this fact has not been mentioned in the agreements of some of the investors.*
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> *NOIDA authority has informed that Plot No.BW-55, Sector-32, Noida was allotted to M/s. MMT Amusement Parks Pvt. Ltd. and M/s. Senior Builders Ltd. has no status in this plot as per record. Only lessee i.e. M/s. MMT Amusement Park Pvt. Ltd. can sub-lease the built up premises subject to their complying clause No.11 (1) of Lease Deed.*
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> *The investors/ complainants were induced by passing on the project as good investment opportunity and assuring the time bound delivery of possession of the constructed shops as well as*

the assured return of the interest on the invested amount, however, the accused deliberately failed on both counts.

The accused after collecting money from the investors misled them by giving false assurances about the development work on the projects sites and closed down the company office and siphoned away the funds from the accounts of the company leaving behind meager amounts.

There are sufficient material evidences against accused persons namely Vijay Dixit, Ms. Kalpana Dixit, Dayal Dass, Vinod Sharma and M/s. Senior Builders Ltd. for offences u/s 406/409/420/120B IPC. Accordingly, the present charge sheet against the above named accused persons has been prepared. The same is submitted for kind consideration with prayer to take cognizance of the offences, as mentioned above and start further proceedings related to trial. The witnesses may be called through summons. The list of witnesses and documents relied upon is attached herewith for kind perusal. Accused Vijay Dixit is running in judicial custody. In the event of receipt of further complaints, supplementary charge sheet will be filed as and when expedient to do so in the interest of justice."

7. On instructions learned APP for the State does not dispute that in the charge-sheet filed pursuant to investigation in case FIR No.82/2011 no statement of accounts have been filed showing that funds have been siphoned off from the accounts of the company leaving behind meager amounts. It is contended that the statement of account is filed in another FIR and that the same can always be filed with supplementary charge-sheets as statement of further witnesses are being recorded.

8. Sections 405 and 409 IPC provide as under:

"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 to do, commits "criminal breach of trust"

409. Criminal breach of trust by public servant, or by banker, merchant or agent.— Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

9. It is well settled that the allegation in the charge-sheet should be supported by statement of witnesses or material collected during the course of investigation. However, the issue at this stage is that in the absence of any statement of account being filed to show misappropriation of the funds, can a charge for offence punishable under Section 409 IPC be framed against the petitioner.

10. In the decision reported as *(2003) 10 SCC 521 Anwar Chand Sab Nanadikar Vs. State of Karnataka* it was held that to bring home the accusations under Section 405 the requirements to prove conjointly are (i) entrustment, and (ii) whether the accused was actuated by the dishonest intention or not, misappropriated it or converted it to his own use to the detriment of the persons who entrusted it. It was further held that '*as the question of intention is not a matter of direct proof, certain broad tests are envisaged which would generally afford useful guidance in deciding whether*

in a particular case the accused had mens rea for the crime'. Referring to its earlier decision in *Jaikrishnadas Manohardas Desai Vs. State of Bombay AIR 1960 SC 889* the Supreme Court held:

> *"11. In Jaikrishnadas Manohardas Desai v. State of Bombay [AIR 1960 SC 889 : 1960 Cri LJ 1250] it was held as follows: (AIR p. 891, para 4)*
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> > *"[T]o establish a charge of criminal breach of trust, the prosecution is not obliged to prove the precise mode of conversion, misappropriation or misapplication by the accused of the property entrusted to him or over which he has dominion. The principal ingredient of the offence being dishonest misappropriation or conversion which may not ordinarily be a matter of direct proof, entrustment of property and failure in breach of an obligation to account for the property entrusted, if proved, may in the light of other circumstances, justifiably lead to an inference of dishonest misappropriation or conversion. Conviction of a person for the offence of criminal breach of trust may not, in all cases, be founded merely on his failure to account for the property entrusted to him, or over which he has dominion, even when a duty to account is imposed upon him, but where he is unable to account or renders an explanation for his failure to account which is untrue, an inference of misappropriation with dishonest intent may readily be made."*

11. Thus once entrustment of the property is proved by the prosecution it would be the obligation of the accused to account for the property entrusted, this being a fact specially within his knowledge. As noted above in the present case the complainant has clearly stated about entrustment of the property to the petitioner and other accused. Thus even if in the course of investigation police has not been able to collect any accounts showing

misappropriation, it will be for the petitioner/accused to discharge the burden during the course of trial.

12. Learned counsel for the petitioner further presses that since according to the prosecution case the intention of the petitioner was dishonest at the very inception and charge for offence punishable under Section 420 IPC has been framed, charge for offence punishable under Section 409 IPC could not be framed as the two charges cannot co-exist.

13. Repelling this contention Supreme Court in the decision reported as *(1974) 4 SCC 230 Superintendent & Remembrancer of Legal Affairs, West Bengal Vs. S.K. Roy* held:

> *"12. To constitute an offence under Section 409 IPC, it is not required that misappropriation must necessarily take place after the creation of a legally correct entrustment or dominion over property. The entrustment may arise in "any manner whatsoever". That manner may or may not involve fraudulent conduct of the accused. Section 409 IPC, covers dishonest misappropriation in both types of cases; that is to say, those where the receipt of property is itself fraudulent or improper and those where the public servant misappropriates what may have been quite properly and innocently received. All that is required is what may be described as "entrustment" or acquisition of dominion over property in the capacity of a public, servant who, as a result of it, becomes charged with a duty to act in a particular way, or, atleast honestly.*
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> *13. A case cited before us, to support the contention that acquisition of dominion or possession and control over property by an accused would, even if wrongful, be an "entrustment" or create an obligation the violation of which, by misappropriation, would be punishable under Section 409 IPC, if the accused used his official capacity to obtain the property, was: State of U.P. v. Babu Ram Upadhya [AIR 1961 SC 751: (1961) 2 SCR 679: 1961 (1) Cri LJ 773].*

> *14. Again, in Som Nath Puri v. State of Rajasthan [(1972) 1 SCC 630 : (1972) 3 SCR 467 : 1972 SCC (Cri) 359] this Court, after referring to decisions of different High Courts on the subject, held, that :*
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> > *"the expression 'entrusted' is used in Section 409 IPC, in a wide sense and includes all cases in which property is voluntarily handed over for a specific purpose and is dishonestly disposed of contrary to the terms on which possession has been handed over.""*

14. Learned senior counsel relying upon the decision in Jaswantlal Nathalal Vs. State of Gujarat AIR 1968 SC 700 contends that a mere transaction of sale cannot amount to an entrustment. The decision relied upon has no application to the facts of the present case. In Jaswantlal Nathalal (supra) Supreme Court was dealing with a case where Government of Gujarat gave on contract to Bharat Sewak Samaj (BSS) the work of construction. BSS in turn gave that work on sub contract to a firm known as M/s Kaushik & Co. though according to prosecution M/s Kaushik & Co. were only supervisors. BSS was allotted five tons (100 bags) of cement for construction work which was delivered to BSS, however, out of the 100 bags delivered 40 bags were sent to the godown of M/s Kaushik & Co. It is on these facts that Supreme Court held:

> *"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 [[1965] 2 SCR 429] . 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 Jaswantrai Manilal Akhaney v. State of Bombay [[1956] SCR 483, 498-500] . 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."

15. In view of the discussion aforesaid, this Court finds no merit in the petition and the same is dismissed.

(MUKTA GUPTA)
JUDGE

MARCH 21, 2017
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