

THE STATE OF GUJARAT

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V.

JASWANTLAL NATHALAL

November 23, 1967

[S. M. SIKRI, J. M. SHELAT AND K. S. HEGDE. JJ.]

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Indian Penal Code, 1860, s. 409—Government selling cement to contractor against allotment for specific construction work—respondent taking delivery on behalf of contractor and diverting some quantity—whether there was entrustment to him—if breach of trust committed.

The appellant State Government gave on a contract to a contractor the work of construction of a building. The contractor in turn gave that work on sub-contract to a firm K & Co. and the respondent was looking after the construction work on behalf of the firm. Upon an application made to the Deputy Engineer, Ahmedabad, the contractor was allotted 100 bags of cement for construction work. This cement was sold by the Government to the contractor and delivered to the respondent for and on behalf of the contractor. After taking delivery of the cement, the respondent delivered only part of it to the construction site and the balance was diverted and stocked on account of K & Co. On these facts and the appellant's complaint, the respondent was prosecuted for breach of trust under s. 409 of the Indian Penal Code. The respondent's case was that in anticipation of allotment of cement to the contractor, K & Co. had utilized some of their own cement and therefore the cement diverted to them was on account of a quantity already used by them for the contractor. The Trial Court disbelieved this version and convicted the respondent. The High Court, however, allowed an appeal and acquitted the respondent.

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On appeal to this Court :

HELD : Dismissing the appeal : The prosecution had failed to prove entrustment to the respondent.

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. [411 B—C]

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Although the Government had sold the cement in question to the contractor solely for the purpose of being used in connection with the construction work, that circumstance did not make the transaction in question anything other than a sale. After the delivery of the cement, the Government had neither any right nor dominion over it. If the purchaser or its representative had failed to comply with the requirements of any law relating to the cement control, he should have been prosecuted for the same. It could not be held that there was any breach of trust. [411 C—D]

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Velji Raghvaji Patel v. State of Maharashtra, [1965] 2 S.C.R. 429; *Jaswantrai Manilal Akhaney v. State of Bombay*, [1956] S.C.R. 483, 498-500; *Satyendra Nath Mukherji v. Emperor*, I.L.R. [1947] 1 Cal. 97, referred to.

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A *The King v. Grubb*, [1915] 2 K.B. 683, held in applicable.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 93 of 1965.

Appeal by special leave from the judgment and order dated June 19, 1964 of the Gujarat High Court in Criminal Appeal No. 759 of 1963.

B *R. H. Dhebar*, for the appellant.

N. N. Keswani, for the respondent.

The Judgment of the Court was delivered by

C **Hegde, J.** The State of Gujarat has filed this appeal, by special leave against the order of acquittal made by the High Court of Gujarat in Criminal Appeal No. 759/63 on its file. The respondent herein was convicted for an offence under s. 409 IPC by the city magistrate, 7th court, Ahmedabad, and sentenced to suffer rigorous imprisonment for one year and to pay a fine of Rs. 500. in default to suffer rigorous imprisonment for four months more.

D The facts of the case lie within a narrow compass. The Government of Gujarat gave on contract to Bharat Sewak Samaj (Gujarat) the work of construction of a building for the government litho-printing press. From Exh. 20 it appears that the BSS in its turn gave that work on sub-contract to a firm known as M/s. Kaushik & Co., though it was sought to make out that M/s. Kaushik & Co. were merely appointed to supervise the work. The firm Kaushik & Co. consisted of two partners. The respondent who is the brother of one of the partners was looking after the construction work. On 9-4-62, BSS applied to the Deputy Engineer (construction sub-division, Ahmedabad) for allotment of ten tons of cement for the construction work in question. In response to that application, the Deputy Engineer allotted five tons (100 bags) of cement and the same was delivered to the respondent for and on behalf of BSS on 10-4-62. All these facts are admitted.

G The further case of the prosecution is that after taking delivery of the aforementioned 100 bags of cement, the respondent delivered at the work site sixty bags of cement and the remaining forty bags he sent to the godown of PW2 Tayabali Jiwaji. About these facts also there is no dispute.

H From the above facts, the appellant wants us to conclude that the respondent had committed breach of trust in respect of the forty bags of cement he sent to the godown of PW2. The case for the respondent is that in anticipation of allotment to BSS Kaushik & Co. had utilized for the construction work in question forty bags of cement belonging to them, and hence he sent forty

bags of cement to the godown of PW2 to be stocked for and on behalf of Kaushik & Co. The trial court disbelieved that version and convicted the respondent under s. 409 IPC. The High Court in a highly laconic judgment allowed the appeal and acquitted the respondent.

Before examining the correctness of the High Court's judgment it is necessary to mention that in this case the BSS had not made any complaint against the respondent. In other words, it is not the case of BSS that the respondent who took delivery of hundred bags of cement on their behalf had misappropriated forty bags out of the same. The case against the respondent proceeded on the basis that the government had entrusted to him 100 bags of cement for the purpose of being used in the construction of the building in question, but he misappropriated forty bags out of the same. Therefore, we have to see whether the prosecution has established the entrusment pleaded and the misappropriation alleged.

We were not made aware of the conditions under which the government gave the construction work to BSS. The written agreement between the government and the BSS, if there be any, has not been produced in this case. There is also no oral evidence in regard to the particulars of the agreement between the government and the BSS. Therefore we have to proceed on the basis that the contract given to the BSS is one of those usual contracts under which it was for the contractor to secure the necessary materials. Evidently because cement was a controlled commodity in 1963, BSS had to apply for its allotment. In the absence of any evidence to the contrary we have to proceed on the basis that BSS either paid for the cement in question or its price was adjusted towards the money due to it.

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.

The term "entrusted" found in s. 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*⁽¹⁾

(1) [1965] 2 S.C.R. 429.

- A 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—
- B see *Jaswantraji Manilal Akhaney v. State of Bombay*⁽¹⁾. 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
- C 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
- D 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.

- E A case somewhat similar to the one before us came up for consideration before a division bench of the Calcutta High Court in *Satyendra Nath Mukherji v. Emperor*⁽²⁾. These are the facts of that case. One Satya Sunder Mitra was a contractor. He was granted a permit by the Executive Engineer, A.R.P. (Shelters), construction division, to purchase seven tons of cement from Balmer Lawrie and Company. The permit was granted on the
- F condition that the cement was to be used in the work connected with the construction of shelters, which work he had contracted to do for the Executive Engineer. The finding in the case was that with the help of an employee of Mitra and Chaudhuri who were banians of Balmer Lawrie and Company, six tons of cement were diverted and disposed of for another purpose. The trial
- G court convicted Satya Sunder Mitra under s. 406 IPC and another for abetting the offence committed by Satya Sunder Mitra. The High Court allowed their appeal, holding that there was no entrustment of the cement in question within the meaning of the term as used in s. 405 of Indian Penal Code. In the course of the judgment it was observed :

- H "The permit was granted in accordance with the system of control established under the Defence of India

(1) [1956] S.C.R. 483, 498-500

(2) I.L.R. [1947] 1 Cal. 97.

Rules, under which an order has been issued by the Government of India preventing selling agents such as Balmer Lawrie and Company from delivering any cement except under instructions from the Government or from the Cement Adviser. The transaction, so far as the contractor is concerned, was one of purchase and the property in the cement clearly passed to him. No doubt he could not have obtained the permit through the Executive Engineer if it had not been intended that the cement should be used for the purpose directed by the Engineer, but, in our opinion, in no sense can it be said that there was any entrustment either of the property or of any dominion over the property."

We are of the opinion that the legal position is as explained in that decision.

The decision of the Kings Bench Division in *The King v. Grubb*⁽¹⁾ relied on by Mr. Dhebar learned counsel for the appellant does not bear on the question under consideration. Therein, the factum of entrustment was not in dispute. The only question of law that arose for decision in that case was whether when a property is entrusted to a company, and the person directing and controlling the company, by whose instructions the property had passed into the possession of the company, had converted the same fraudulently, that person can be said to have committed an offence under s. 1 of the Larceny Act 1901. The court answered that question in the affirmative.

In view of our conclusion that the prosecution has failed to prove the entrustment pleaded, it is unnecessary to consider whether on the material on record it can be concluded that the respondent had misappropriated 40 bags of cement referred to earlier.

In the result, this appeal fails and the same is dismissed.

R.K.P.S.

Appeal dismissed.

(1) [1915] 2 K.B. 683.