

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

+ **Crl. Appeal No. 940/2011**

Date of Decision : 19.03.2012

D.D. A. Appellant
Through: Mr. Rajesh Mahajan, Adv.

versus

VIP MARBLE EMPORIUM & ORS. Respondents
Through: Mr. Vikram Singh, Adv.

CORAM :

HON'BLE MR. JUSTICE V.K. SHALI

V.K. SHALI, J.

1. This is an appeal filed by the appellant against the judgment dated 07.04.2007 passed by Sh. A. K. Chaturvedi, the learned Metropolitan Magistrate, New Delhi in complaint case titled **M/s DDA Vs. VIP Marble Emporium & Ors.** acquitting the accused company and its partners for an offence under Section 14 read with Section 29(2) of the Delhi Development Act, 1957 for misusing the premises contrary to the Master Plan/Zonal Development Plan.
2. Briefly stated the facts of the case are that on 02.08.2001, an inspection was conducted by Mr. S. C. Saxena, Junior Engineer,

DDA whereupon accused Fayaz Ahmed and Shahdat Ali, allegedly partners, were found putting to use the premises no. 372, Sultanpur, Main Mehrauli Gurgaon Road, Village Ghitorni, New Delhi, for running a shop of marble emporium at the ground floor under the name and style of M/s VIP Marble Emporium in an area of about 500 sq. ft. The said premises according to the appellant could have been used only for agricultural purpose or as water body as per the Master Plan or Zonal Development Plan. The appellant, in support of his case had examined two witness, namely, Sh. S. C. Saxena, Junior Engineer, DDA as CW1, who proved the Zonal Map as Exhibit CW1/B, Lay Out Plan as Exhibit CW1/C, Show Cause Notice as Exhibit CW1/D, Sanctioned Plan as Exhibit CW1/E, and Complaint as Exhibit CW 1/F, copy of the Resolution as Exhibit CW1/G-F1 and Gazette Notification as Exhibit CW1/H-H1.

3. The second witness examined on behalf of the appellant was Mr. S. K. Sharma, UDC, Sales Tax Department, New Delhi who testified that the application dated 11.06.1999 for change of address from 428/3, Swatantar Senani Market, Ghitorni to 372, Sultanpur, Main Mehrauli Gurgaon Road, Village Ghitorni, New Delhi was applied for by the respondent. Documents proved in

this regard are Exhibit as CW2/A and copy of assessment order as Exhibit CW 2/B-D. Thereafter, the appellant moved an application under Section 311 Cr.P.C., CW-3 Sh. M.L. Ahuja, STO was examined and he proved his earlier statement and verification report dated 11.05.2004 Exhibit CW-3/DY. The inspection was done on 11.05.2004 by the officials of the DDA whereupon it was found that no business was being run at 372, Sultanpur, Main Mehrauli Gurgaon Road, Village Ghitorni, New Delhi. The statement of the accused was recorded and thereafter the respondent-accused examined two witnesses DW1/Kamaludin who stated that the shop of the respondent/accused no. 1 was also at 372, Sultanpur, Main Mehrauli Gurgaon Road, Village Ghitorni, New Delhi and the said shop was functioning till about 3-4 months ago and it had been lying sealed for the last four months. The witness was examined on 05.02.2007. Similarly, DW-2/Fayaz Ahmed was also examined by the accused persons to prove their defence that they were not functioning from 372, Sultanpur, Main Mehrauli Gurgaon Road, Village Ghitorni, New Delhi.

4. After hearing the arguments, the learned Magistrate acquitted the respondents/accused persons by observing that the

petitioner has failed to prove the guilt of the respondents/accused beyond reasonable doubt. In this regard, it referred to the testimony of CW-3/Mr. M. L. Ahuja, STO who proved verification report as Exhibit CW-3/DY, which was an inspection report by the DDA conducted on 11.05.2004 indicating that no marble shop was functioning on that date at 372, Sultanpur, Main Mehrauli Gurgaon Road, Village Ghitorni, New Delhi. The learned Magistrate observed that CW-2 was only a clerk while as CW-3 was a Sales Tax Officer, and thus, a person of much higher rank, and accordingly, his testimony carries more weight so as to make him believe that no marble shop was functioning at the address given in question.

5. I have heard the learned counsel for the appellant as well as the learned counsel for the respondent-accused and have also gone through the record.
6. Mr. Rajesh Mahajan, the learned counsel for the appellant has stated that the learned Magistrate has failed to appreciate the fact that the verification report Exhibit as CW-3/DY approved by CW-3 was a report with reference to the inspection dated 11.05.2004, while as the inspection, on the basis of which, the respondents/accused were prosecuted was dated 02.08.2001. It

was also contended by him that the learned Magistrate has grossly erred by observing that since CW-3 is a Sales Tax Officer is much superior in rank than that of DW-2, therefore, his testimony carries more weightage. The learned counsel for the respondents/accused could not refute this contention in any manner, except it was contended that as on date no marble shop is functioning at the address in question.

7. I have considered the submissions, made by the learned counsel for the appellant and have gone through the record.
8. The learned Magistrate seems to have fallen into an error in appreciating the evidence by observing that the verification report exhibit as CW-3/DY was an inspection report conducted on 11.05.2004 on which date admittedly no marble shop was functioning at the address in question. That cannot make any reasonable person to conclude that the shop was not in existence on 02.08.2001. CW-1 is the Junior Engineer who has specifically stated that on 02.08.2001, he had conducted the inspection along with his team, of the premises in question and a marble shop was found to be functioning from the said address. This testimony has remained unshaken and there is absolutely no reason as to why the government servant would

testify falsely against the respondent/accused. It has also not been the case of the respondent/accused that CW-1 had any enmity to testify against them. The learned Magistrate seems to have fallen into an error by observing that the testimony of CW-3 is that of a Sales Tax Officer (hereinafter referred to as 'STO') while as the testimony of DW-1 is a junior level officer and much below in rank to STO, and therefore, credence could not be given to the same. The credence to the testimony of a witness is not to be based on the post which he holds, a poor person may be truthful as compared to a rich person or holder of a higher post. There cannot be a generalization in this regard. The reasoning adopted by the learned Magistrate is totally erroneous. The truthfulness and the credence of the witness has to be assessed by reading the entire testimony and the examination-in-chief as well as the cross-examination of the witness and then arrive at a conclusion as to whether his testimony inspires confidence so as to believe in what he says. In the instant case, I have gone through the testimony of CW-1 and I do not find any infirmity which will make me disbelieve that he is deposing falsely against the respondents/accused that they were running a marble shop. It is a different thing that in

that area, there may have been other marble shops, but only one marble shop has been booked for the purpose of being prosecuted. But even then, this is not brought about in the cross-examination, and consequently, the Court cannot venture into conjecture and surmises in this regard. It was also inappropriate on the part of the learned Magistrate to observe that there is no independent corroboration to the testimony of CW-1, and therefore, his testimony cannot be relied upon. Admittedly, CW-1, is an official of a public body and there was no reason to disbelieve the testimony of this person and although having an independent corroboration would always have been better, but in the absence of the same, it could not be said that the testimony of CW-1 cannot be relied upon. I do not subscribe to this kind of conclusion arrived at by the learned Magistrate, and therefore, I feel that it is not in dispute that the area in question can be used only for agricultural purpose or for water body. In this regard, the appellant has proved necessary plans to which the area can be put to use, therefore, the judgment acquitting the respondents/accused, in my view, is liable to be set aside being erroneous.

9. I, accordingly, set aside the judgment dated 07.04.2007 and hold the respondents/accused guilty of having violated Section 14 read with Section 29(2) of the Delhi Development Act, 1957. Now comes the question of imposing sentence, I feel that the matter is old one and the respondents/accused, admittedly, have closed the marble shop w.e.f. 11.05.2005 which is proved by the documents, exhibited as CW-3/DY by the appellant themselves and a lenient view deserves to be taken to release all the respondents/accused persons except the company after admonition. So far as the company is concerned, though it cannot be admonished, it is visited with a token fine of Rs.100/- which shall be deposited with the learned Trial Court within 15 days failing which, it shall be realized by resorting to processes of law. Accordingly, the appeal stands allowed as herein above.

V.K. SHALI, J

MARCH 19th, 2012
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