

HIGH COURT OF UTTARAKHAND
AT NAINITAL

C482 Application No. 1849 of 2023

Dr. Swetabh Suman

... Applicant

Vs.

State of Uttarakhand through its
Principal Secretary (Home), Secretariat
Complex, Dehradun

... Respondent

Advocate: Mr. S.K. Srivastava learned counsel along with Mr. Ashish Kumar and Mr. Priyanshu Gairola, learned counsel for the applicant.
Mr. V.K. Jemini, learned Deputy Advocate General, for the State.

Hon'ble Sharad Kumar Sharma, J.

The applicant, in the instant C482 Application has put a challenge to the judgment/order dated 04.07.2023, which is said to have been passed in Criminal Revision No. 70 of 2023, Dr. Swetabh Suman Vs. State of Uttarakhand, as it has been rendered by the Court of Additional Chief Judicial Magistrate, II, Dehradun in Criminal Case No. 2724 of 2022, State Vs. Swetabh Suman, which were the proceedings, being carried against the present applicant, for trying him for the offences under Sections 13(1)(e), Section 13(2) and Section 11 of the Prevention of Corruption Act, 1998, as well as Section 109 of IPC, which, at present, is pending trial before the Court of Additional Chief Judicial Magistrate, II, Dehradun.

2. By virtue of the impugned order, which has been put to challenge, the Court of Additional Chief Judicial Magistrate, II, Dehradun, had proceeded to permit the State to lead its evidence by way of secondary evidence by taking on record the photocopies of certain documents, which were required

to be taken into consideration for the purposes of an effective adjudication of the aforesaid Sessions Trial.

3. Brief facts of the case are, the applicant has contended that at the relevant point of time, when he was inducted into the services as back as in 2004, he had been appointed in the Indian Revenue Services and he contended that during his tenure of service, he had worked efficiently and diligently and according to his argument, his service records were clean and unblemished. But, however, later on a complaint which was filed by the office of the Chief Commissioner of the Income Tax Department on 17.01.2004, the allegations were leveled in the said complaint, which pertained to the set of acts which were said to be conducted between 23.12.2004 to 07.01.2005, when in the complaint of 17.01.2004, it was observed by the complainant Chief Commissioner of Income Tax Department, that 15 official files, which related to the service conditions of the applicant himself, were found to be stolen from the records of the department of the Income Tax and according to the general diary entry, made on 21.01.2005 since those documents, which were found to be missing, were having a vital bearing over the manner in which the services have been performed by the present applicant, all of it, had been deliberately stolen and were not found in the records of the department. Consequent to which, the FIR was registered, being FIR No. 18 of 2005 on 18.01.2005 with regard to the set of allegations, that the applicant was found to be instrumental in stealing those files, which were not found with the department having an effect on his departmental credibility.

4. On the basis of the FIR, the investigation was carried and necessary investigation was completed on 04.04.2005, it is contended by the applicant that the SHO, Police Station, Dalanwala, Dehradun, had initially filed a final report under Section 169 of the CrPC before the Court of competent jurisdiction, praying for closer of the case, as the investigation, as carried by the Investigating Officer didn't find iled any credible material with regard to the allegations leveled in the FIR No. 18 of 2005, as against the present applicant, because the act of theft of the official records were not proved beyond doubt.

5. But, however, later on, on 02.08.2005, the Central Bureau of Investigation, had registered a Criminal Case against the present applicant i.e Case No. RC 51 12005 A 0016, being the proceedings registered under Section 13(1)(e), Section 13(2) and Section 11 of the Prevention of Corruption Act to be read with Section 109 of IPC.

6. In accordance with the provisions of the Code of Criminal Procedure, it is contended by the respondent that the process of search and seizure was conducted by the respondent in the office and the residential premises of the applicant and the CBI department has claimed to recover five files of the total 15 missing files, which were found missing from the Income Tax Department, Dehradun, which were said to have been stolen from various offices of the department at Jamshedpur and Jharkhand and based upon the said recovery of the five stolen files, the CBI wrote a letter to the DGP, State of Uttarakhand, praying for, that owing to the report of the CBI in pursuance to the case registered on 02.08.2005, and the recovery of missing files,

the proceedings of the investigation, as conducted to the FIR No. 18 of 2005 by the SHO, P.S. Dalanwala, District Dehradun, the same may be reopened and the investigation may be permitted to be further carried against the set of allegations levelled against the present applicant.

7. The said case was permitted to be opened by the orders which were passed by the DGP, State of Uttarakhand and in pursuance to which, the SHO, P.S. Dalanwala, District Dehradun, is said to have filed a Chargesheet on 09.02.2006, while exercising powers under Section 380 and based on the investigation report and the recovery of the official files which were recovered from the residence of the present applicant, the trial for the alleged act of stealing the official five files of the Income Tax Department was reopened.

8. The SHO, P.S. Dalanwala, District Dehradun, who was the Investigating Officer, took in custody the original document filed with the Chargesheet, which were inclusive of the five recovered files, which were recovered, but entirely based upon the photocopies which, according to the applicant, were never lawfully the acceptable documents by the SHO to be taken into consideration for the purposes of initiation of the criminal proceedings. It was contended that it was rather a mischief which was played by the CBI department for opening the investigation as against the present applicant.

9. The learned Chief Judicial Magistrate, Dehradun, upon submission of the Chargesheet to the FIR No. 18 of 2005 permitted the prosecution to lead their evidence as per law.

But, however, the learned Chief Judicial Magistrate, is said to have discharged the present applicant under Section 239 of the Code of Criminal Procedure vide its order dated 03.06.2010, thereby it was observed by the Court of Chief Judicial Magistrate, that there was no sufficient material and evidence available against the set of allegation which had been leveled by the CBI and the prosecution against the present applicant to necessitate to proceed with further trial, which would be otherwise according to the observations made by the learned Chief Judicial Magistrate, be a malicious and a criminal proceedings to be drawn against the present applicant were said to be procedurally bad.

10. The order of discharge dated 03.06.2010, as it was passed by the Court of Chief Judicial Magistrate, Dehradun, while exercising powers under Section 239 of CrPC, was put to challenge in a Criminal Revision by the Central Bureau of Investigation, as well as the State, which was allowed and as a consequence of allowing of the Revision, the order of discharge dated 03.6.2010 was set aside and the trial as against the present applicant was once again resumed to be conducted.

11. The controversy, in the instant case emerges from this stage when at the stage of cross examination of the prosecution witness i.e. on 15.12.2022, Mr. Ravinder Kumar, the then Inspector, Central Bureau of Investigation, for the purposes of admissibility of certain documents to be read in evidence, it was contended by the applicant that since those documents were the xerox copies and since they not being in conformity with the provisions contained under

Sections 63, 64 and 65 of the Indian Evidence Act, the learned counsel for the applicant and the applicant himself has raised a plea before the learned Trial Court to exclude those documents, to be permitted to be read in evidence, as they would not be admissible as per the aforesaid provisions of the Indian Evidence Act.

12. The learned trial Court though recording an objection raised on behalf of the applicant with regard to the issue of admissibility of the xerox copies of the documents relied by the prosecution, to be taken on record, the Trial Court had permitted those photocopies to be exhibited and were given exhibit numbers with the remarks that those documents which were relied by the prosecution would be taken to be admissible and they would be considered by the learned trial Court and would be read as an evidence at the time of final argument.

13. The applicant's case was that this direction of the Trial Court to take the xerox copies on record and marking it as an exhibit to be read in evidence, is rather a curtailment of available valuable right of the applicant to contest the proceedings after the inclusion of those documents to be read in evidence against him, for the first place that it cannot be relied by the prosecution for the substantiation of the Trial Court proceedings.

14. It is contended by the applicant that the order passed by the learned Trial Court stood covered by the provisions contained under Section 362 of CrPC and the applicant has invoked the jurisdiction of the learned Revisional Court, praying for that the order of the learned Trial Court to the

extent it had allowed the xerox copies to be admissible document and to be read in evidence during the course of trial is bad and has prayed for to set aside the same.

15. The Criminal Revision thus preferred by the applicant was numbered as Criminal Revision No. 70 of 2023, Dr. Swetabh Suman Vs. State of Uttarakhand. The Revision was contested and the same too had been decided by the impugned order dated 04.07.2023 by the Revisional Court, holding thereof, that reading of the xerox copies of the documents, relied by the prosecution could be permitted to be read in evidence and be marked as an exhibit. It's being aggrieved against the said order, the present C482 Application has been preferred by the applicant.

16. The basic contention of the applicant's counsel is, that the Revisional Court, while making its observations in para 15 of the impugned order under challenge, has accepted the theory as far as the admissibility of the photocopy of the documents are concerned, being in violation of Sections 63 and 65 of the Indian Evidence Act, but, still had dismissed the Revision holding that reading of the xerox copy of the documents since is not prejudicial to the interest of the applicant, the same can still be taken on record by the learned trial Court to be considered as an exhibit during the course of the trial.

17. In the C482 Application, it is contended by the learned counsel for the applicant, that the Revisional Court's order has failed to consider that the documents which were thus permitted to be taken on record before the learned trial Court and on the question of admitting the same as an

exhibit without assigning reasons has wrongfully concluded at the first stage of admitting the documents in evidence merely because of the fact that the Revisional Court has observed that even if the document is taken on record and marked as an exhibit, the applicant will not be prejudiced because he would still be getting chance to contest the same at the time of considering the contents of the said documents i.e. during the course of trial.

18. It is contended by the learned counsel for the applicant that this observation which had been made by the Revisional Court in para 15 of the judgment, it would be contrary to the very basic covenants contained under Sections 63, 64 and 65 of the Indian Evidence Act with regard to the scope of taking the secondary evidence on record to be read in evidence during the course of trial.

19. The reference may be had to the provisions contained under Section 65 clause (c) of the Indian Evidence Act, where admission of a document as a secondary evidence, is not absolutely barred, but may be given and taken as exhibit, when it is proved, that the original document has been destroyed or lost and when the party to the proceedings offering the evidence of its contents cannot for any other reason, not arising from its own default or neglect produces the same within the reasonable time before the learned Trial Court by way of xerox copy to be read in evidence. Meaning thereby, in view of the provisions contained under Section 65 of the Indian Evidence Act, the secondary evidence relating to the documents having an effective bearing on the trial, merely giving an evidence subject to satisfying the conditions provided under Section

65 of the Indian Evidence Act, and there is no absolute bar, that the xerox copy cannot at all be read as a secondary evidence as provided under Section 63 of the Indian Evidence Act.

20. For the said purpose about the scope of entertaining the secondary evidence to be read during the course of trial, the provisions contained under Section 65 of the Indian Evidence Act becomes relevant for its consideration, which is extracted hereunder:-

“65. Cases in which secondary evidence relating to documents may be given - Secondary evidence may be given of the existence, condition or contents of a document in the following cases:--

(a) when the original is shown or appears to be in the possession or power--

of the person against whom the document is sought to be proved, of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in 1[India] to be given in evidence;

(g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

21. The learned counsel for the applicant, during the course of the defense, as raised with regard to the objection about the admissibility of the xerox copy had relied upon the judgment as reported in **AIR 2007 SC 1721, J. Yashoda Vs. K. Sobha Rani**, and has interpreted the spirit of the provisions contained under Section 65 of the Indian Evidence Act and it had provided that the secondary evidence may only be given where the primary evidence is in possession of adverse party or when it is proved to have been lost. Acceptance of the secondary evidence without compliance of the provisions contained under Sections 63 and 65 of the Indian Evidence Act, was held to be not admissible and the photocopy of a document cannot be given as an exhibit number.

22. The learned counsel for the applicant has further placed reliance on a judgment as reported in **2010 (8) SCC 423, Shalimar Chemical Works Ltd. v. Surendra Oil & Dal Mills** as well as the judgment as reported in **2012 (8) SCC 148, Union of India v. Ibrahim Uddin and another**, wherein the Court has observed that the xerox copy cannot be marked as an exhibit, where an objection is raised with regard to the same being taken on record as a secondary evidence, the Trial Court should decline the same to mark a document as an exhibit on such copy. But, however, while concluding the judgment, it has been observed that the said issue of admissibility of the secondary evidence would be an issue which is still left open

to be decided by the learned trial Court. This authority will not be a *ratio decidendi*.

23. In the said judgment, the basic principle which has been laid down is that the prosecution will have to prove its basis of filing the secondary evidence and as per the provisions contained under Section 65 of the Indian Evidence Act, which is a precondition required to be complied with in order to present the xerox copy to be accepted on record to be read as secondary evidence and thus the photocopy can be taken into consideration if the conditions as it has been provided under Section 65 of the Indian Evidence Act is satisfied by the prosecution which would be a precondition for accepting secondary evidence to be marked as an exhibit.

24. If the impugned Revisional Court's order is taken into consideration and read in league with the order dated 15.12.2022, as passed by the Court of 2nd Additional Chief Judicial Magistrate/Sub Judicial, Dehradun, as it was rendered in Criminal Case No. 2724 of 2022, State Vs. Swetabh Suman, the Revisional Court, in its para 6 has specifically permitted the secondary evidence to be read for the purposes of conducting of the trial in the light of the provisions contained under Section 65 of the Indian Evidence Act, because as per the judgment of J. Yashoda (*supra*), the Hon'ble Apex Court, while dealing with the interplay of Section 63 to be read with Section 65 of the Indian Evidence Act, has observed that the dictum of Hon'ble Apex Court or even the legislature doesn't create an absolute bar in the said ratio, that the document cannot be read in evidence when it is the xerox copy, but there are

only covenants required to be satisfied is the conditions provided under Section 65 of the Indian Evidence Act, where the prosecution has been able to prove that the document is in possession of the adverse party or it has been lost.

25. Almost similar views have been taken in the matters of Shalimar Chemical Works (*supra*), where the scope of denial to mark a document as an exhibit has been observed subject to riders provided to Section 65 of the Indian Evidence Act. The Revisional Court has considered the stand taken by the learned counsel, who appears on behalf of the State, wherein it was observed, that in accordance with the seizure memo, which has been given as an exhibit by the learned trial Court, but the learned trial Court, while accepting the said documents to be read in evidence and marking it as an exhibit the learned trial Court noted the objection and has made an observation that the issue relating to the admissibility of the document though it could be decided at an appropriate stage while delivering of the judgment, it has observed that since at the stage of conduct of seizure since the original document was not found, the admissibility of a document to be read in evidence could be taken into consideration in the light of the provisions contained under Section 65 of the Indian Evidence Act which is permissible under law.

26. The aforesaid observation has had to be read in the context of the statement of PW5 i.e. Ravinder Kumar, the Director of CFPB, who in his statement recorded has submitted, that in the records before the learned trial Court, it shows that the original records have been lost and they

have to be reconstituted and for the said purpose an exhibit number was required to be marked as to be missing or lost documents, the prayer for which was made by the prosecution and which has been permitted by the learned trial Court after recording the statements of Mr. Ravinder Kumar, because in accordance with the order dated 15.12.2022, which was subject matter of challenge in the Revision, the reconstitution of the record and taking it as to be marked as an exhibit would be an issue which could be decided by the trial Court at an appropriate stage.

27. In fact, at the stage when the C482 Application has been preferred as against the concurrent orders passed by the Court in the light of the provisions contained under Sections 63 and 65 of the Indian Evidence Act, in fact, at that stage, the admissibility of the document was yet a question to be considered at the stage when the same was required to be marked as an exhibit by the learned trial Court and merely taking the said document on record, because the specific plea taken by PW-5, that the said document at the stage when seizure memo was prepared it was found to have been lost, have been simpliciter taken on record. Thus at this stage, no prejudice as such has been caused to the applicant by taking the xerox copy of the document on record because acceptance of the same to be read as an exhibit has had to be yet satisfied in the light of the provisions contained under Section 65 of the Indian Evidence Act.

28. In support of his contention, the learned counsel for the respondent has referred to a judgment as reported in **1995 SCC Online Delhi 251, Sudhir Engineering**

Company Vs. Nitco Roadways Ltd., where the Hon'ble Delhi High Court has observed, that merely marking a document as an exhibit number doesn't make it admitted and a proved document. Marking it as an exhibit number on the photocopy of the seizure memo it has a very limited effect of identification, that the document has been shown to the witness on his oral testimony before the Court and he has endorsed the same, the trial Court has not passed any order as such as on today on the said photocopy, which has been admitted.

29. Because the original document has been lost, the foundational evidence and the non existence of the primary evidence was tendered and noted by the Court, since as the precondition of Section 65 of the Indian Evidence Act, was that a secondary evidence has to be made admissible, it's the prosecution which has to show and submit, that the same has been lost and destroyed and is not in existence. It's only upon the establishment of the said proof, the document could be taken on record. Merely by exhibiting a document, the accused has not been prejudice, because he has ample of opportunities to raise objection regarding the admissibility, as well as the genuineness of the documents taken on record by way of secondary evidence. But if the Court is satisfied for the reasons given by the prosecution for its inability to produce the original document and particularly in the instant C482 Application when the seizure memo was prepared the original document was not found, taking of the secondary evidence on record would still be an issue to be decided by the learned trial Court.

30. Since its not causing any prejudice to the applicant as such at this stage, the C482 Application is declined to be ventured since it lacks merit. Accordingly, the C482 Application is hereby dismissed.

(Sharad Kumar Sharma, J.)

22.09.2023

Mahinder/