

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

Civil Writ Petition No.4554 of 2014 (O&M)

Date of decision:27.02.2015.

Ram Kishan Fauji son of Shri Dharam Pal, Chief Parliamentary
Secretary, resident of House No.748-A, Sector 12-A, Panchkula.
.... Petitioner

versus

State of Haryana through Chief Secretary, Government of Haryana,
Main Civil Secretariat, Haryana at Chandigarh, and others.
... Respondents

CORAM: HON'BLE MR. JUSTICE K. KANNAN

Present: Mr. Rajiv Atma Ram, Senior Advocate,
with Mr. Arjun Pratap Atma Ram, Advocate,
for the petitioner.

Mr. Keshav Gupta, Assistant Advocate General,
Haryana.

Mr. Jitender K. Sehrawat, Advocate,
for Mr. N.S. Shekhawat, Advocate,
for respondents 3 and 4.

1. Whether reporters of local papers may be allowed to see the judgment ? **Yes.**
2. To be referred to the reporters or not ? **Yes.**
3. Whether the judgment should be reported in the digest ? **Yes.**

K.Kannan, J. (Oral)

I. The subject of lis

1. The petitioner challenges the order passed on 20.01.2014 (Annexure P10) and order dated 11.02.2014 (Annexure P13) on the review application, while communicating his finding on reference which was brought to him from the Government that the allegations

for “taking bribery by exchanging the hands of money and granting of CLU/Licence in lieu thereof have not been established” (sic). However, he (Lokayukta) also stated that on the basis of a CD submitted along with the affidavits of two persons and examining the audio version and after going through the affidavits, he found that there prima facie appeared a case of commission of cognizable offence punishable under the Prevention of Corruption Act, 1988. The Lokayukta, therefore, recommended to the competent authority that a criminal case for commission of offence punishable under the Prevention of Corruption Act of 1988 be immediately registered against the petitioner and thereafter, a senior competent Police Officer enjoying the reputation of having impeccable integrity be deputed to investigate the entire case expeditiously on all counts of allegations of corruption as narrated in the CD and give a report as set down under Section 17(2) of the Haryana Lokayukta Act, 2002.

II. Facts that led to complaint before Lokayukta

2. The circumstance that culminated in the order of the Lokayukta was a reference sought by the State on being apprised of the fact that there had been a VCD in circulation that conveyed irregularities involving the Members and relatives of Members of State Legislature in connection with the grant of tills and it was imperative that the authenticity of the allegations were to be enquired that damages the reputation of the Members of State

Legislature. The reference made a particular reference to CDs and the media reports casting serious aspersions of Members of the State Assembly and, therefore, two points raised: “(i) *Whether the alleged allegations of bribery levelled in the alleged are correct? (sic); (ii) Whether the CLU/licence was granted in pursuance of these allegations?. If yes, whether any illegality committed?*”

III. Lokayukta's publication and response-No credible information regarding bribery

3. The Lokayukta caused a publication to be issued inviting members of the public to offer any evidence that they might have in relation to the subjects which were brought before it and made reference to an alleged Sting Operation containing details of a demand of bribery of ₹5 crores by the petitioner. “The Tribune, Chandigarh” responded that one Abhey Chautala had shown a CD at a Press Conference and it was the news report. The second news was only with regard to the proceedings in the Haryana Vidhan Sabha but they had no material to offer to the Lokayukta. The Chief Secretary had forwarded a copy of the communication received from the Governor of Haryana accompanied with the representations filed by the MLAs of INLD that contained the allegations of demand of bribe. The Department of Town and Country Planning replied that they had no information about any irregularity. With literally no credible information from any quarters, the Lokayukta had with him a CD that had been sent to him from the Government and in

response to the public advertisement, two persons, namely, Dharmender Kuhar and Parveen Malik were reported to have given their affidavits. The Lokayukta had no credible information regarding the demand of bribe and answered the reference that there was no material to find any merit in the imputation that the bribery by exchange of hands of money and granting of CLU/licence in lieu thereof had been established. There was however a direction for registering a complaint under the Prevention of Corruption Act.

4. The application for review had been filed by both-the Government and the petitioner, but they were dealt with laconically as not requiring any cause for undertaking such an exercise on the ground that he has no power to review the proceedings under Section 17 of the Act.

IV. High Court's initial endeavour to gather details of authenticity of CD

5. After the writ petition was filed, this court, while ordering notice of motion on 14.03.2014, directed the Government to enquiry into the authenticity of the CD and file a status report. Along with the reply, the State produced the examination report which recorded its opinion as follows:-

“The view file 'rkf.avi' under reference was thoroughly examined using auto-video analysis tools and techniques available in the laboratory. On frame by frame examination of the video contents and the auditory,

spectrographic and waveform examination of the audio contents of the video file 'rkf.avi' under reference, no tampering could be detected.”

V. Petitioner submits contradictory report from private labs

6. The petitioners produced his own report from a scientific lab called, “Truth Labs, Bangalore”. The purpose of examination was to determine whether the recording contained in the CD was genuine or had been tampered or not. After recording the observations and findings by undertaking the technical specifications of audio and video codings regarding the wave form and spectrographic analysis, it made an inference that there were abrupt changes appearing to be pause signature in the wave form and spectrogram. In the audio recording, discrepancy was found with respect to the date-time stamp seen in the detail. The report contained graphic waveform and spectrogram graphic analysis, as also the discrepancy with reference to the date-time stamp seen in the video. The ultimate opinion was as follows:-

“1. The audio and video in the recording 'Q' contained edit signatures indicating that the recording is not continuous.

2. Hence it is concluded that the recording 'Q' is not authentic.”

VI. Fresh report from CFSL to quell contradiction

7. Since the report of the Truth Labs was contradicted to what was brought through CFSL, Chandigarh and since the Truth Labs itself was stated to be an ISO certified company and even recommended by several government organizations, I sought to quell any further doubts to refer the matter to CFSL at Hyderabad and passed an order on 19.12.2014 directing that the CD, that had been entrusted with the Additional Director General of Police handed over to him from the Lokayukta, shall be dispatched along with the memory chip in the camera as well as the camera to CFSL at Hyderabad. The attempt was, therefore, to secure a foolproof method for what the two earlier reports could have failed to notice in the absence of the memory chip and the camera. The authenticity of CD could be best illustrated only through production of the memory chip itself which facility was not available when the petitioner himself obtained report from the Truth Labs. It was not brought out in the report of the CFSL, Chandigarh where they had no opportunity to elicit the data as recorded in the memory chip and whether the CD was an exact reproduction of what was contained in the memory chip.

VII. Evidence through electronic record-law restated

8. CD is an electronic record as defined under the Information Technology Act. Section 65 of the Evidence Act which

refers to the manner of admissibility of electronic records sets out a procedure for securing authenticity in the manner of assuring that it is a genuine reproduction of what was contained in the original through the following provisions:-

65-B. Admissibility of electronic records.—

(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

(2), (3)

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say,—

(a) identifying the electronic record containing the

statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

The same way as Section 62 that defines a secondary evidence to be a copy which becomes authentic when it is compared with the original, the amended provisions also make it clear that the authenticity of the CD could be best secured only by verifying it in the manner set forth in Section 65-B(4). A memory chip that lies embedded in a memory of camera but detachable also makes inference possible of what camera was in operation.

VIII. Supreme Court's pronouncements on the subject

9. In **R.K. Anand Versus Registrar, Delhi High Court-2009 (8) SCC 106**, the court was considering the admissibility of recordings on some microchips and CDs. The court found in that case that the authenticity and integrity of the Sting Operation had never been doubted or disputed. It was a case where the microchip was preserved by a popular TV channel studio and the court believed that it could not have been tampered with. In the manner of how in this case we have a specific defence taken that the video recording was fabricated, the manner of how the CD could be admitted in evidence has been considered in **Ramlila Maidan Incident reported in 2012 (5) SCC 1216**. In that case, the CD containing the recording along with an affidavit in the manner required under Section 65-B was directed to be filed in court and the court had taken on record an affirmation by the Trust on affidavit that the CD had not been tampered with. In a still recent judgment in **Anvar P.V. Versus P.V. Basheer and others-(2014) 10 Supreme Court Cases 473**, a 3-Member Bench of the Supreme Court laid down the manner of how the secondary evidence of electronic record could be received. The court held, while referring to Section 65-B(4), that a certificate must accompany electronic record like CD, VCD, Pen Drive etc. which contains a statement which is sought to be given as secondary evidence, when the same is

produced in court and in the absence of such certificate, secondary evidence of record cannot be admitted in evidence.

10. In the manner of analysis undertaken by the CFSL, Hyderabad, the CD has been examined and the forensic image was seen to have been authenticated by MD5 Hash (#) value. Hash value is stated to be a result of a calculation (hash algorithm) that could be performed on a string of text, electronic file or entire hard drive's contents. Each hashing algorithm uses a specific number of bytes to store a thumbprint of the contents. The most common hash value, it would appear to be MD5. # MD5 has a particular value which if picked up from a CD, its authenticity is best illustrated by the fact that the memory chip also contains the thumbprint, namely, the hash value MD5. The report from the CFSL, Hyderabad reveals that there were two reports of Read Errors at Sector 7 at Start Sector 320 and Start Sector 30,649. Another important aspect, which it has noted, is that there was no link possible between the digital evidence storage media, namely, the CD and the memory chip that was said to have been the source for the replication of data in the CD. In the manner of explaining the Read Errors, although the report does not say what the Read Errors were, the report from the Truth Labs indicates what exactly they were that there had been a discontinuity in the Pitch contour at 53 seconds and 56 seconds of the recordings.

1st conclusion: CFSL report nails down any prospect of attaching value to authenticity of CD

11. After securing the report from the CFSL, Hyderabad, there is hardly anything left to assess the authenticity of the CD. If the CD cannot stand the test of authenticity by its comparison with its hash value with the source, then the transcript of what has been obtained through its audio footage or what it purports to capture cannot be taken as of any value.

2nd conclusion: If there is no credible information for bribery, direction for registering a complaint by Lokayukta is incompetent.

12. The learned senior counsel appearing on behalf of the petitioner argued that the Lokayukta had no power to make any direction for registering a complaint when he was having no material to return a reference of the truth of imputations regarding taking of bribe. The Haryana Lokayukta Act of 2002 sets out under Section 8 the matter that could be enquired into by the Lokayukta. Section 8 (1) is, therefore, the starting point for the Lokayukta to enquire into the allegations on the grievances made against public servant on receipt of a reference from the Government. If a reference is made, the manner of how such complaint will be enquired into is brought through Sections 10 to 16. The procedure for inquiry is contained under Section 12. Section 12 is reproduced as follows:-

“12. Procedure in respect of inquiry:-(1) Subject to the provisions contained in sub-section (2), the Lokayukta

shall devise his own procedure for conducting inquiry or investigation but in so doing shall ensure that the principles of natural justice are satisfied.

(2) The Lokayukta shall complete the inquiry within one year.

(3) Every inquiry under the Act shall, unless the Lokayukta for reasons to be recorded in writing determines otherwise, be conducted in camera.”

Section 17 deals with the report which shall be after exercising his power to summon records and to gather evidence secured through Sections 13 and 14 respectively. The report which is impugned is one issued under Section 17 and, therefore, the relevant provision would require to be reproduced:-

“17. Reports of Lokayukta

(1) If, after inquiry in respect, of a complaint, the Lokayukta is satisfied-

(a) that no allegation or grievance has been substantiated, he shall close the case and intimate the competent authority concerned accordingly;

(b) that all or any of the allegations or grievances have or has been substantiated either wholly or partly, he shall, by report in writing, communicate his findings, appropriate recommendations and suggestions to the

competent authority and intimate the complainant and the public servant concerned about his having made the report.”

13. These provisions would reveal that an enquiry which the Lokayukta will undertake shall be for the purpose of returning a reference to what is submitted to it. If the reference were to be returned, it shall be only after undertaking an enquiry. In this case, an enquiry has been held and if we must assume that the enquiry conformed to all the requirements of law, then such an enquiry must yield to a result that shall answer the reference of what is brought before it. If the answer to such reference was that there was no case made to substantiate the imputations, the matter must abate there in terms of Section 17(1)(a). It is inexplicable as to how the Lokayukta could have decided to add a large postscript that the matter would require to be investigated and a case to be registered, if he was answering a reference that the imputation had not been corroborated through adequate evidence. The impugned order is seriously flawed by the manner of how the order has been made. There is no halfway job that is possible for a Lokayukta to hold that there was no material to substantiate the charge but would make such an answer of reference to be inconsequential by a contradictory direction to the competent authority to register a complaint of offence under the Provisions of Corruption Act.

3rd conclusion: Without confirming authenticity of CD, finding of prima facie proof as available was wrong

14. If the prima facie material, according to the Lokayukta, was that the CD which had been sent to the Government afforded such material, then without entering a finding on the authenticity of the CD and the reliability of the contents, he could never have made a finding that there was prima facie material available. It is the authenticity of the document that can feed the plausibility of what the CD contained. If he had even the modicum of doubt about the authenticity, he could not have drawn any inference that there was prima facie material available.

15. If the CD itself ought to be discarded, the question to be seen is whether there are sufficient averments in the affidavits on the basis of which he could have made such a prima facie inference. The affidavits were of two persons, one of Dharmender Kuhar whose averment was to the effect that on 28.04.2011 at about 2:30 PM, he went with Parveen Malik to the official residence of the petitioner. He has stated that during the course of his talks, some papers were shown to him and requested him to get the file of the change of land use (CLU) cleared from the government. Then he makes reference about the fact that the CD was prepared by using a camera. There is no averment anywhere in the affidavit about a demand for money for his offer of favourable intercession for CLU.

Yet another person Parveen Malik has also referred to the fact that

he accompanied Dharmender Kuhar and he had prepared the CD. His affidavit also does not whisper of even a word about the demand of bribe. In fact it is a verbatim copy in its form to what Dharmender Kuhar has stated. If the CD was unauthentic and the affidavits do not contain any reference to demand for bribe, then there had been nothing available for the Lokayukta to make a recommendation for registering a complaint. The direction was, therefore, wholly inappropriate and not justified at all.

Conclusion 4: Contention of petitioner that reference to Lokayukta was wrong- plea rejected

16. The learned senior counsel also points out to the fact that the Lokayukta has no power to enquire into any matter set down under three circumstances mentioned under Section 9. The three circumstances are as follows:-

“9. Matters not subject to inquiry -

(a) in respect of which an inquiry has been ordered under the Public Servants (Inquiries) Act, 1850; or

(b) which is not connected with the discharge of functions as public servant of the person against whom allegation is made; or

(c) relating to “grievance of mal-administration”, any administrative act involving the exercise of discretion except where he is satisfied that the elements involved in the exercise of discretion were absent to

such an extent that discretion would not be regarded as having been properly exercised or was exercised for corruption.”

17. This section would show that the enquiry cannot be with reference to an activity which is not connected with the particular function which he is assigned to. The attempt of the petitioner was to state that he was the Chief Parliamentary Secretary, who had no connection whatever with approvals or sanctions of CLU. The question of enquiry of demand of bribe by such a person cannot therefore, arise. When there is an imputation of corrupt practice against a public servant, we do not understand that the bribery is connected with the public office. What the section prohibits is that an enquiry shall not be with reference to an issue not connected with the discharge of functions as public servant. It must be understood not being connected in any way to the activities of a public servant. He may not be immediately a person who would issue sanction to CLU, but I will not extend the non-applicability of Section 9 to such a situation where a person, who is otherwise a government servant offered to do some job, if not by himself but through somebody else. An enactment, which is intended to quell a serious malady of corruption and creating a credible institution to make appropriate enquiries against public officers ought not to be read as containing a fetter of investigation to be restricted by raising

a bogey that the corrupt act was not connected with the particular function which he was assigned to. If he was a public servant and the act promised was capable of being performed by a public servant that ought to be sufficient to invoke the jurisdiction for a Lokayukta to enquire into the matter, I will, therefore, discard the argument of the petitioner that because the petitioner had no power to sanction CLU, an enquiry regarding an alleged corrupt practice for issuing CLU could not be made. The corrupt practice of a public servant ought to be a matter for investigation whether the act promised could be done by himself or could be done by him through another. So long as he was a public servant and he could have caused such a influence to be made, it would be good enough ground to trigger an enquiry through a Lokayukta. I will not, therefore, find any reference made to the Lokayukta on that subject to be not possible.

18. I have undertaken this examination only to conclude all the issues which were urged before me. The observations as regards the untenability invoking the provision of Section 9 does not obtain relevance to us, for, we have already found the report to be seriously flawed in every respect both as regards the competence of the Lokayukta to order a registration of a complaint after he found the reference in the negative that there was no case made for allegations of corruption and that also the evidence of CD which was taken to be the basis for a further investigation itself could not be relied on,

for, it lacks the basic element of authenticity.

IX. FIR registered pursuant to Lokayukta's complaint quashed

19. The learned counsel for the State would submit that the investigation has proceeded subsequent to the impugned order passed. A FIR has been registered on 04.12.2014, that is, after the writ petition was filed, when the issue of the authenticity of the CD was very much open for consideration. Indeed, I had stayed the further proceedings when I passed an order on 19.12.2014 directing the CD to be sent along with the memory chip to the CFSL, Hyderabad. If the investigation is purported to be taken by lodging a FIR, consequent on the directions given by the order which is now quashed, it shall also be quashed.

X. Disposition

20. The impugned order of the Lokayukta passed on 20.01.2014 and the subsequent order passed on the review application on 11.02.2014 confirming its earlier orders are quashed. If there is any other material or information of corrupt practice against the petitioner, the State shall be at liberty to carry out the investigation as per law.

21. The writ petition is allowed on the above terms.

(K.KANNAN)
JUDGE

27.02.2015
sanjeev