

**IN THE HIGH COURT OF HIMACHAL PRADESH,
SHIMLA**

Cr. Appeal No. 493 of 2001.

Reserved on : 29-7-2008.

Date of decision:31 -7-2008.

State of H P.

Appellant.

Versus

Abhi Ram Kaushal.

Respondent.

Coram

Hon'ble Mr. Justice Surinder Singh, J.

Whether approved for reporting¹? No.

For the appellant

: Sh. J.S. Guleria, Law Officer.

For respondent.

:Shri Ramesh Sharma, Advocate, vice

Shri N.K. Thakur, Advocate.

Surinder Singh, J .

The respondent was tried and acquitted of the offence under Section 408 of the Indian Penal Code and his acquittal has been assailed in this appeal on the ground that the learned trial Court did not appreciate the evidence on record in the right perspective.

In brief, the allegations against the respondent on which he was put on trial are that he was posted as Salesman-cum- Incharge in the year 1984 in 'Shivalik Khadi Ashram Bhandar', Daulatpur. In his capacity as salesman-cum-Incharge, he was responsible for maintenance of the sale proceeds and record and to submit his report to the Head Office. It is alleged that on 1.4.1994, he locked the Khadi-Bhandar and deserted the office. He also took away with him the record of the weaver's compensation register, weavers dealing register, cash vouchers and cash credit books. Kamal

Whether reporters of the Local papers are allowed to see the judgment? Yes.

Kishore the Secretary of the Khadi Ashram and Area Manager Shri Narinder Kumar reported the matter to the Police. The respondent was found missing from his house. The record whatever was available in the office was checked and it was found that the respondent had embezzled the amount of rupees 25, 488.55 paise as having received the amount vide various cash memos. On this complaint, FIR was lodged. Police took into possession the record of the Khadi-Ashram supplied by its Secretary Kamal Kaushal complainant. Thereafter, an application was alleged to have been sent by Kamal Kishore, Brij Nandan Pandey, Narinder Kumar and Kala Nath to the Incharge, Police Post to compromise the matter. In that application, they admitted certain irregularities committed by the respondent. During the investigation, Kamal Nath PW3 conducted the audit and fixed the liability on the respondent. It came to his notice that various entries made on the basis of cash memos were in the name of Phoolwale Babaji. The police recorded the statements of various witnesses. After completing the investigation, challan it was presented in the Court for the trial of the respondent.

The respondent was charge-sheeted for the offence aforesaid. He pleaded not guilty and claimed trial.

The prosecution examined its witnesses and the respondent was also examined under Section 313 of the Code of Criminal Procedure. The circumstances which were found attendant upon him were put to him which were denied. He alleged his false implication in the case. An opportunity was afforded to him to lead defense but no defense was led.

At the end of the trial, on the basis of the evidence put-forth, the respondent was acquitted on the ground that the entrustment

was not proved and at the most, it was a civil liability. It was also observed that there was a delay of more than a year in filing the F.I.R. created a doubt in the genuineness of the prosecution case.

Shri J.S. Guleria, learned Law Officer for the State has vehemently argued that the case of the prosecution stands proved by PW6 Brij Nandan Pandey, PW12 Narinder Kumar and PW3 Kala Nath who had conducted the audit.

Contra, learned counsel for the respondent has supported the impugned judgment of acquittal.

I have given my thoughtful consideration to the rival contentions of the parties and have carefully gone through the record. PW3 Kala Nath Auditor has stated that with effect from 29.1.1996 to 1.2.1996, he had conducted the audit for the year 1993-94. During the aforesaid year of audit, the respondent was the Incharge of Shivalik Khadi Ashram Daulatpur and during the audit, he found that a cash memo Exhibit PW3/2 was issued on 19.4.1994 for rupees 120/- and this entry was made in the register Exhibit-P9 and another cash memo of the same date for rupees 190/- was issued but this entry was made to the tune of rupees 19/- and for the balance amount of Rs. 171/-, the respondent was held liable the entry of which is in Exhibit-P13. The respondent had also caused loss to the tune of rupees 7/- for which he was also made liable and further, during the audit, he also found that the respondent had sold the articles on the lesser price details of which was given by him in the audit report. On compilation of the record, he found difference of rupees 633.25 paise which was shown against the name of the respondent. In this way, the respondent was held responsible for the amount of rupees 25, 488.55 paise for which he took time to deposit. In his cross-examination, he has

admitted that the founder of the Bhandar can sell the items of the shop on credit on his own responsibility only after getting the permission from the Head office but he could not produce any such instruction issued by the Head Office. He further stated that he had told the respondent to deposit the amount and assured him that the case would be withdrawn. Further according to him, many cash memos/bills were with respect to the articles given on credit and he did not enquire from any of the creditors about the repayment of the amount. He did not prepare the balance stock audit-sheet of the articles found in the store.

PW1 Nasib Chand has stated that he never took any articles in the name of Phoolwala Babaji. According to him, the bills mark A to I shown to him might have been purchased by the persons mentioned therein on credit. PW2 Parmodh Kumar had handed over the record to the Police.

PW4 Kamal Kaushal has proved the appointment and posting of the respondent as salesman in the said Khadi Ashram. He further stated that the respondent had absconded with the cash vouchers and cash receipt books. He had shown the forged transactions in the cash memos. In cross-examination, he has admitted that there is a Director of the Board and he did not obtain any permission to lodge the FIR against the respondent. Further, according to him, no bill/cash memo was issued in his presence. He further admitted that Khadi Ashram announces the same with the result the prices are reduced. According to him, he found irregularities during the enquiry conducted by him. However, he did not know that the respondent had repaid the amount of rupees 6000/- to the weavers. He admitted that during the business of the Khadi Ashram, the salesman can give the articles on credit up to

rupees 1500/- and if he gives more than that, it would be his own responsibility and is otherwise also recoverable from him.

PW6 Brij Nandan has stated that during the audit, he was also present. He has stated that the Police had brought the accused and produced him before the auditor.

PW7 Shri L.R. Sharma, the then Additional Chief Judicial Magistrate, Kangra in whose presence the specimen writings of the accused-respondent was sought to be taken has deposed that the respondent refused to give his specimen writings but by such denial, no adverse inference can be drawn against the respondent. Otherwise also, no such writings could have been taken by the Magistrate at that time as there was no such provision under the law.

PW12 Narinder Kumar was the Secretary of the Ashram in the year 1994. According to him, he conducted the inquiry of the respondent with respect to the irregularities committed by him in Shivalik Khadi Bhandar Daulatpur as salesman. In his cross-examination, he has stated that he did not call the persons to whom the respondent gave the articles on credit. Further, according to him, the respondent had shown the credit against the cash memos to the tune of rupees 25000/-.

On the critical examination of the evidence aforesaid, I do not find any evidence of entrustment. The whole case hinges upon the audit report which mainly focused on the point that the respondent had either sold the articles of Ashram on reduced price or on credit against the Bills/cash memos. The auditor also did not prepare the list with respect to the balance stock found in the Khadi Bhandar. The prosecution has failed to prove the entrustment or

dominion over the property which is alleged to be dishonesty, misappropriation by the respondent.

From the above evidence, it appears that it was a case of gross irregularities in maintaining the accounts and credits which was not properly reflected in the account books of the Khadi Ashram . Further, selling the articles of the Ashram on the lesser price will not come within the ambit of Section 408 of the Indian Penal Code. Since the evidence on record does not meet the essential requirements of the offence charged, therefore, the prosecution cannot be said to have proved its case beyond reasonable doubt. His admission/confession before the auditor in writing is not free from undue influence or coercion as highlighted above. Therefore, in these circumstances, when the prosecution has failed to prove the entrustment and criminal dishonest misappropriation, the offence charged cannot be said to have been proved against the respondent. Accordingly, I do not find anything worth interference in the judgment of acquittal recorded by the learned trial Court and the view taken by him is deducible from the evidence on record. Accordingly, the appeal is dismissed.

(Surinder Singh)
Judge.

July 31 , 2008.
(bm)