

IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL.M.C. 3618/2008 & CrI M A 13493/08

Reserved on: March 27, 2009

Decision on: April 6, 2009

B.S.E.S.RAJDHANI POWER LTD. Petitioner

Through: Mr.Sunil Fernandes with
Mr. Rajat Jariwal, Advocates.

versus

VIJAY KUMAR GUPTA & ANR. Respondents

Through: Mr.S.K. Bhaduri with Mr. Vikas Sharma,
Advocate for R-1.
Mr. Pawan Behl and Mr. Jaideep Malik, APPs for State.

WITH

CRL.M.C. 421/2009 & CrI M A 1577/09

B.S.E.S.RAJDHANI POWER LTD. Petitioner

Through: Mr.Sunil Fernandes with
Mr. Rajat Jariwal, Advocates.

versus

KALAWATI & ORS. Respondents

Through: Mr.Deepak Pathak, Advocate.
Mr. Pawan Behl and Mr. Jaideep Malik, APPs for State.

WITH

CRL.M.C. 496/2009 & CrI M A 1858/09

B.S.E.S.RAJDHANI POWER LTD. Petitioner

Through: Mr.Sunil Fernandes with
Mr. Rajat Jariwal, Advocates.

versus

VIJAY PAL SINGH & ORS. Respondents

Through: Mr. Pawan Behl and
Mr. Jaideep Malik, APPs for State.
Respondent No.1 in person.

WITH

CRL.M.C. 422/2009 & CrI M A 1579/09

B.S.E.S.RAJDHANI POWER LTD. Petitioner
Through: Mr.Sunil Fernandes with
Mr. Rajat Jariwal, Advocates.

versus

MANU DEVI & ORS. Respondents
Through: Mr. Pawan Behl and
Mr. Jaideep Malik, APPs for State.
Mr. L.D. Adlakha, Advocate for R-1 & R-2.

WITH
CRL.M.C. 423/2009 & CrI M A 1581/09

B.S.E.S.RAJDHANI POWER LTD. Petitioner
Through: Mr.Sunil Fernandes with
Mr. Rajat Jariwal, Advocates.

versus

S.M.AZIJUDDIN HASAN & ANR. Respondents
Through: Mr. Pawan Behl and
Mr. Jaideep Malik, APPs for State.
Mr. S. Qamar, Advocate for R-1.

CRL.M.C. 424/2009 & CrI M A 1583/09

B.S.E.S.RAJDHANI POWER LTD. Petitioner
Through: Mr.Sunil Fernandes with
Mr. Rajat Jariwal, Advocates.

versus

VEERENDER YADAV & ANR. Respondents
Through: Mr. Pawan Behl and
Mr. Jaideep Malik, APPs for State.
Mr. Kishan Nautiyal with
Mr. Dinesh Kumar, Advocates for R-1.

AND
CRL.M.C. 430/2009 & CrI M A 1621/09

B.S.E.S.RAJDHANI POWER LTD. Petitioner
Through: Mr.Sunil Fernandes with
Mr. Rajat Jariwal, Advocates.

versus

SARITA ARORA & ANR. Respondents

Through: Mr. Pawan Behl and
Mr. Jaideep Malik, APPs for State.
Mr. Puneet Parihar, Advocate for R-1.

CORAM:
HON'BLE DR. JUSTICE S. MURALIDHAR

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| 1. | Whether Reporters of local papers may be allowed to see the judgment? | No |
| 2. | To be referred to the Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in Digest? | Yes |

J U D G M E N T
06.04.2009

1. In each of these petitions by the BSES Rajdhani Power Ltd. ('BRPL') the challenge is to two sets of orders passed by the Special Court (Additional Sessions Judge) under the Electricity Act 2003 ('Act'). These orders were passed in the criminal complaints filed by the BRPL consequent upon inspections carried out in various premises which according to it revealed the commission of direct theft of electricity. While by the impugned order dated 23rd January 2008 in Complaint Case No. 269 of 2008 titled "***BRPL v. Vijay Kumar & Anr***", the learned Special Court has dismissed the complaint, in the impugned orders passed in each of the other cases while rejecting the contention of the BRPL that it cannot be asked to admit or deny the document produced by the respondent accused at the stage prior to even framing of notice, the learned Special Court has fixed a date for that exercise. In each of these petitions (other than Crl.MC No. 3618 of 2008), this Court has while directing notice to issue, stayed the impugned orders of the learned Special Court.

2. The Special Court has in the impugned orders held that it has the power under Section 157 of the Act to recall the summoning order. It has further held that since the complaint is before the Sessions Court, the accused has a right of seeking discharge in terms of Section 227 of the Code of Criminal Procedure 1973 ('CrPC') which applies to a case triable before the Sessions Judge. The Special Court has further held that the complainant BRPL can, in terms of Section 294 CrPC, be asked to admit or deny the documents produced by the accused even before the framing of notice and that the refusal by the BRPL to do so can lead to an adverse inference being drawn against it, including the acquittal/discharge of the accused .

3. The submission of Mr. Sunil Fernandes, learned counsel appearing for the Petitioner is as follows:

(i) In terms of Section 153 to 157 of the Act, the Special Court exercises the powers of a criminal court to which the provisions of the CrPC apply except to the extent that an exception has been made in the Act itself. Under Section 151 of the Act, as amended in 2007, the Special Court can take cognizance of the offence under Section 135 read with 150 of the Act without the accused being committed to it for trial.

(ii) Although under Section 153 (3) no person shall be qualified for appointment as a judge of a Special Court unless he was, immediately before such appointment an Additional District & Sessions Judge, the

power exercised by the Special Court under Section 154 is that of a Magistrate dealing with a complaint under section 190 CrPC. In fact under Section 154 (3) the Special Court may, notwithstanding anything contained in Section 260 (1) or Section 262 CrPC, try the offence under Section 135 to 139 in a summary way in accordance with the procedure prescribed in the CrPC and the provisions of Sections 263 to 265 CrPC, shall, so far as may be, apply to such trial. If, in the course of the summary trial, the Special Court is of the view that it is undesirable to try such case in summary way, it shall then proceed with a case as a warrant case.

(iii) Although under Section 155 the Special Court exercises the power of Court of Sessions, such powers are to be exercised in a manner not inconsistent with the provisions of the Act, and therefore the case under the Act shall still have to be tried either as a summary trial or as a warrant case. The Special Court cannot invoke the powers available to it when trying a sessions case and this includes Section 227 CrPC.

(iv) The power of review under Section 157 is limited to the orders passed in the trial under Section 154 of the Act. In the light of the fact that the provisions in the CrPC applies and there is no provision therein permitting the Magistrate to recall a summoning order, the power under Section 157 cannot be invoked to recall the summoning

order passed by the Special Court. Reference is made in this regard to the decision in *Adalat Prasad v. Rooplal Jindal* 113(2004) DLT 356 (SC). It is submitted that in any event under Section 151 cognizance is taken of the offence and therefore the proceedings are at the post-cognisance stage when the Special Court proceeds in terms of Sections 154 (3). At this stage the accused has no right to be heard and cannot produce documents in his defence.

(iv) The stage at which the powers under Section 294 CrPC can be invoked is the stage of trial after the stage of framing of notice. It does not apply to a stage prior to the framing of notice as explained by this Court in *Dr. P. Das Gupta v. The State* 2006 (3) JCC 1592. It is only after the prosecution evidence has closed that the accused is asked to produce the defence evidence. The accused can seek to produce documents in his defence at that stage and the Court can then ask the prosecution to admit or deny such documents.

(v) Finally it is submitted that the complainant would be willing to abide by any timed schedule fixed by this Court on remand of the cases to the Special Court so that the trial is completed at an early date.

4. Learned counsel for the respondents on the other hand submitted that the power under Section 157 of the Act is an exception to the provisions of

CrPC that govern a criminal court dealing with complaints under Section 190 CrPC. The judgment of the Supreme Court in *Adalat Prasad* is to no avail since that would apply where the Court was exercising its powers under the CrPC. It is submitted that the power under Section 157 is wide to include the power to recall a summoning order particularly when the Special Court finds there has been a deliberate suppression of material facts or documents by the complainant. It is submitted that in all these cases the BRPL has suppressed the fact that the respondent has been regularly paying the electricity bills raised from time to time.

5. It is urged by Mr. Pawan Behl, learned APP that under Section 294 CrPC the accused is entitled to produce the paid bill on the first date of appearance and the failure to deny such document by the BRPL can be fatal to the complaint itself. It can lead to an adverse inference being drawn against the BRPL and consequent the discharge or acquittal of the accused. Reliance is placed on the judgment of the learned Single Judge of this Court in *Madan Lal Singhal v. State (Delhi Administration) 1996 JCC 129* and the observations of the Supreme Court in *Ruckmini Narvekar v. Vijaya Salardekar 2009 (1) C.C. Cass (SC) 74*. Mr. Jaideep Malik, learned APP further submitted that the impugned orders of the learned Special Court could also be justified with reference to Section 258 CrPC in terms of which the criminal Court can for sufficient reasons drop the proceedings and discharge the accused at any stage of the proceedings.

6. Mr. Adlakha, learned Counsel for one of the Respondents referred to Section 44 of the Evidence Act and submitted that if the Court found that the material evidence has been suppressed from the court, then without anything more the Court can use its extraordinary powers to dismiss the criminal complaint.

7. At this stage, it may be noted that Mr. Fernandes the learned counsel for the petitioner BRPL expressed surprise at the vehement opposition to these petitions by both the learned APPs, virtually supporting the case of the accused. Both APPs however, submitted that they were only assisting the court as law officers placing, what according to them was the correct legal position. This court is not inclined to comment on this aspect since in any event all the submissions have been considered by this court hereafter on merits.

8. The principal question that arises is whether in a complaint case for the offence under Section 135 of the Act the Special Court can, a stage even prior to the framing of notice, require the complainant to admit or deny the documents produced by the accused who appears pursuant to the summons issued by the Special Court. The further question is whether upon refusal by the complainant to undertake that exercise, an adverse inference can be drawn against it.

9. In the first place, this Court wishes to examine the scope of the powers

of the Special Court under the Act. Under Section 153 (1) the Special Court has to be presided over by a judge holding whose rank is not lower than that of an Additional District and Sessions Judge. While under Section 155 of the Act the Special Court has all the powers available to a Sessions Court, the said provision additionally uses the words “insofar as they are not inconsistent with the provisions of this Act.”

10. There are certain express departures in the Act from the provisions of the CrPC. Section 151 of the Act, as amended in 2007, enables the Special Court to take cognizance of any offence thereunder without the case being committed to it. This is an exception because for the offence under certain special statutes the complaint cannot be filed directly before the special court without there being an order by the regular court committing the case to it. Also, the offence under Section 135 of the Act is punishable with imprisonment for a term which may extend to three years. Therefore, but for the Act, the case would have to be tried as a warrant case. Under Section 154 (3) of the Act, the Special Court proceeds with the case initially as a summary trial and has the discretion at a subsequent stage to convert it to a warrant case.

11. The Special Court takes cognizance of the offence under Section 151 of the Act and proceeds to summon the accused. By the time the Special court exercises its powers under Section 154 (3) of the Act to commence the trial it is already at the post cognizance and post summoning stage. Section 154

(3) of the Act is an exception to CrPC as is evident from the non-obstante clause at the beginning of that provision. However, only Section 260 (1) and Section 262 CrPC are exempted. Sections 263 to 265 CrPC are applicable. Section 262 deals with summary trial and states that in the trial under that Chapter the procedure for the trial of summons case shall be followed. Section 260 confers the power to try only petty cases involving offences punishable with a term not exceeding two years. It was necessary for the legislature to say that Section 260 would not apply to the trials under Section 154 (3) because the offence under Section 135 is punishable with imprisonment for a term up to three years. Under the first proviso to Section 154 (3) it is possible for the Special Court from deviate such summary procedure. It is expected to initially proceed with the case as a summary trial. This explains why it has been stated that Sections 263 to 265 CrPC are in any way applicable. Later if the Special Court is of the view that it is undesirable to try the case in a summary way, it can adopt the procedure applicable to a warrant case. Thus Section 154 (3) of the Act gives the Special Court some flexibility to adopt a hybrid procedure of a summary trial and a warrant case under the CrPC.

12. Section 155 of the Act nevertheless stresses that the CrPC provisions will apply to the functioning of the Special Court. However this is qualified by the words “insofar as they are not inconsistent with the provisions of this Act.” Therefore even while it exercises the powers available to a Court of Sessions, the Special Court has to still proceed with the case initially in a

summary way and later, if it so decides, as a warrant case, in terms of Section 154 (3) of the Act. From the point of the accused he still is placed in the same position as an accused in a summons trial or a warrant case. He does not get to avail of the right available to an accused facing a Sessions trial. In other words, the provision of Section 227 is not available to him to be invoked. Even an accused facing a Sessions trial cannot produce documents in his defence at the stage of charge as explained by the decision of the three-judge bench of the Supreme Court in *State of Orissa v. Debendra Nath Padhi* (2005) 1 SCC 568.

13. A perusal of Sections 245 read with Section 247 (which pertains to a warrant case instituted otherwise than on a police report, and Section 254 (which pertains to the trial of a summons case), shows that the accused gets a right to lead evidence only after the evidence for the prosecution, after commencement of trial, has been completed. Section 254 (1) in fact talks of the Magistrate at that stage hearing the accused and taking “all such evidence as he produces in his defence.” Section 294 can come into play only at that stage as far as the documents produced by the accused are concerned. Section 294 cannot be read independent of the above provisions. The judgment of this Court in *P. Das Gupta* explains this position.

14. The position as to the stage at which the accused can be heard in his defence has been settled by the three-judge bench of the Supreme Court in

Adalat Prasad v. Rooplal Jindal, (2004) 7 SCC 338. The question that arose for consideration was whether in a summons case, after cognisance was taken by the trial court of the offence, the accused could go before the trial court with an application and seek recall of the summoning order by producing materials in his defence. This was answered in the negative by the Supreme Court. It was held (SCC, p. 343):

“But after taking cognizance of the complaint and examining the complainant and the witnesses if he is satisfied that there is sufficient ground to proceed with the complaint he can issue process by way of summons under Section 204 of the Code. Therefore, what is necessary or a condition precedent for issuing process under Section 204 is the satisfaction of the Magistrate either by examination of the complainant and the witnesses or by the inquiry contemplated under Section 202 that there is sufficient ground for proceeding with the complaint hence issue the process under Section 204 of the Code. In none of these stages the Code has provided for hearing the summoned accused, for obvious reasons because this is only a preliminary stage and the stage of hearing of the accused would only arise at a subsequent stage provided for in the latter provision in the Code. It is true as held by this Court in *K.K.Mathew v. State of Kerala* (1992) 1 SCC 117 that before issuance of summons the Magistrate should be satisfied that there is sufficient ground for proceeding with the complaint but that satisfaction is to be arrived at by the inquiry conducted by him as contemplated under Sections 200 and 202, and **the only stage of dismissal of the complaint arises under Section 203 of the Code at which stage the accused has no role to play, therefore, the question of the accused on receipt of summons approaching the court and making an application for dismissal of the complaint under Section 203 of the Code on a reconsideration of the material available on record is impermissible because by**

then Section 203 is already over and the Magistrate has proceeded further to Section 204 stage.” (emphasis supplied)

15. In the considered view of this Court the above decision is a complete answer to two issues. First, it is an answer to the question whether the power under Section 157 of the Act to recall an order passed under Section 154 of the Act includes the power to recall a summoning order. As already noticed, the Special Court takes cognisance of the offence in terms of Section 151 of the Act and usually the summoning of the accused happens simultaneously. There is no question of the Special Court beginning to exercise its powers in the course of the trial in terms of Section 154 (3) of the Act without the accused appearing before the Court in response to the summons. Therefore the case before the Special Court is at the post cognisance and post-summoning stage when the accused appears before it in response to the summons and the Special Court has to invoke its powers under Section 154 to proceed with the case initially as a summary trial. The power under Section 157 of the Act is limited to permitting recall of an order passed by the Special Court under Section 154 Act and not to the order taking cognisance and issuing summons. This is in conformity with the law explained by the Supreme Court in *Adalat Prasad*. This Court too has in *Vardhman Properties Limited v. BSES Rajdhani Power Limited (decided on 17th February 2009)* held that the power under Section 157 cannot be invoked to recall an order taking cognisance of the offence under Section 135 of the Act and issuing summons.

16. The decision in *Adalat Prasad* is also unambiguous on the point that there is no question of the accused seeking to produce documents in his defence at the first hearing when he appears before the Special Court in response to the summons and to insist that an admission and denial of the said documents must be ordered even before the stage of framing of notice. The Special Court's attempt in the instant cases to distinguish *Adalat Prasad* on the ground that the Special Court is a Sessions Court exercising powers under Sections 227CrPC and therefore not bound by the limitation placed by the said decision, is clearly misconceived.

17. As already noticed the Special Court's powers as a Sessions Court is only to the extent that the exercise of such powers is not inconsistent with the Act. While trying a case for the offence under Section 135 of the Act, the Special Court has to perforce try it in a summary way to start with and later may decide to switch over to the procedure for a warrant case. Therefore the decision in *Adalat Prasad* squarely applies. Further, even Section 227 CrPC, which is unique to Sessions trials, does not permit the accused to produce documents in his defence at that stage. This legal position stands settled by the decision of the three-judge bench of the Supreme Court in *Debendra Nath Padhi*. Viewed from any angle therefore, the Special Court could not have, at the stage prior to framing of notice, invoked Section 294 CrPC to permit the accused to produce documents in his defence and compelled the complainant to undertake an admission and denial of such document.

18. It is surprising that the Special Court at one place holds that the decision in *Debendra Nath Padhi* does not apply since it pertained to a sessions trial and yet it also seeks to distinguish *Adalat Prasad* on the ground that the Special Court is a sessions court. For the reasons explained, it has erred in this aspect. Further, it is plain that the Special Court has completely misread the judgment of the Supreme Court in *Hem Chand v. State of Jharkhand (2008) 5 SCC 113* and has mistakenly proceeded on the footing that it supports the proposition that an accused in a summons case can produce documents in his defence even at the stage of charge. In fact, the said decision, which follows the decision of the three-judge bench in *Debendra Nath Padhi*, does the opposite. The appellant in *Hem Chand* was the accused who contended that the documents produced by him along with his application for discharge in a case under the Prevention of Corruption Act 1988 ought not to have been rejected by the Special Judge trying the case. This contention was negated by the Supreme Court and it was held (SCC, p.116):

“The learned counsel for CBI is, thus, correct in his submission that what has been refused to be looked into by the learned Special Judge related to the documents filed by the appellant along with his application for discharge. The court at the stage of framing charge exercises a limited jurisdiction. It would only have to see as to whether a prima facie case has been made out. Whether a case of probable conviction for commission of an offence has been made out on the basis of the materials found during investigation should be the concern of the court. It, at that stage, would not delve deep into the matter for the purpose of appreciation of evidence. It would ordinarily

not consider as to whether the accused would be able to establish his defence, if any.”

19. The decision of the learned Single Judge of this Court in *Madan Lal Singhal* was delivered at a time when the authoritative pronouncements of the Supreme Court had not been delivered. Not surprisingly therefore the said decision does not cite any Supreme Court decision that supports its conclusions and further seeks to distinguish the ones cited before that court. The decision in *Madan Lal Singhal* also does not deal with a case under the Act.

20. Reliance is placed by the counsel for the Respondents upon the judgment in *Rukmini Narvekar* is also not apposite. After considering the judgment of the three-Judge Bench in *State of Orissa v. Debendra Nath Padhi*, it was observed by the Supreme Court in *Rukmini Narvekar* that “some very rare and exceptional cases where some defence material when shown to the trial court would convincingly demonstrate that the prosecution version is totally absurd or preposterous, and in such very rare cases the defence material can be looked into by the Court at the time of framing of the charges or taking cognizance.” In the first place, the Court was not dealing with a complaint case. Further, the above observations by the two judge bench in *Rukmini Narvekar* are not consistent with the law explained by the three-Judge Bench in *State of Orissa v. Debendra Nath Padhi*. The Court in *Debendra Nath Padhi* in para 21 (SCC) of its judgment only talked of the High Court

while exercising powers of quashing under Section 482 CrPC being able in a “rare and exceptional case” to consider “unimpeachable evidence of sterling quality,” produced by the accused. Those observations clearly did not apply to the trial court as is evident from the observations in (SCC) paras 22 and 27 of the same judgment.

21. In each of these cases, the complaint is based essentially on the inspection report which according to the complainant discloses theft of electricity. As far as the complainant is concerned, the material document is the inspection report. What the accused have sought to do is to produce a receipt showing the payment of the electricity bills from time to time. The documents showing payment of the bills can hardly be said to explain away the inspection report which shows the occurrence of theft of electricity. Even the payment of theft bill will not obliterate the inspection report that discloses theft of electricity. In other words the offence under Section 135 of the Act would nevertheless remain notwithstanding the fact that the accused may have cleared the electricity bill. The accused may at a later stage be able to seek compounding of the offence, but this is not the same thing as being entitled, even before the framing of notice to produce a document in defence to seek complete acquittal/discharge. Certainly the Special Court could not possibly have dismissed a complaint only because the receipt showing payment of the electricity bill was not admitted or denied by the complainant. The inspection report was nevertheless still on record and could not have been overlooked by the Special Court. The invoking of

Section 294 CrPC was clearly misconceived.

22. This Court has in *Vardhman Properties Limited v. BSES Rajdhani Power Limited 157 (2009) DLT 636* observed that the power under Section 157 has to be used in exceptional cases. It cannot be invoked to recall the summoning order passed by the Special Court that would be inconsistent with the law as explained by the Supreme Court in *Adalat Prasad*. The submission made on the basis of Section 44 of the Evidence Act also appears to be misconceived. This Court is unable to appreciate how it can be said to be relevant in the present context.

23. For all the above reasons it is held that Special Court erred in passing the following impugned orders which accordingly are set aside in each of the aforesaid cases as under:

1. Crl.M.C.3618/2008 -- order dated 23rd January 2008 passed in Complaint Case No. 269/2008 titled “*BRPL v. Vijay Kumar*”.
2. Crl.M.C. 421/2009 -- order dated 29th January 2009 passed in Complaint No.171/2008 titled “*BSES Rajdhani Power Ltd. v. Kala Wati & Anr.*”
3. Crl.M.C.496/2009 -- order dated 10th February 2009, passed in Complaint No.469/2008 titled “*BSES Rajdhani Power Ltd. v. Vijay Pal Singh & Ors.*”
4. Crl.M.C.422/2009 -- order dated 5th February 2009, passed in Complaint No.480/2008 titled “*BSES Rajdhani Power Ltd. v. Manu Devi & Anr.*”
5. Crl.M.C.423/2009 -- order dated 4th February 2009, passed in Complaint No.436/2008 titled “*BSES Rajdhani Power Ltd. v. S.M. Azijuddin Hasan.*”
6. Crl.M.C.424/2009 -- order dated 29th January 2009, passed in Complaint

No.226/2008 titled “*BSES Rajdhani Power Ltd. v. Veerender Yadav.*”

7. Crl.M.C.430/2009 -- order dated 28th January 2009, passed in Complaint No.466/2008 titled “*BSES Rajdhani Power Ltd. v. Sarita Arora.*”

24. The aforesaid cases will now proceed before the trial court from the stage they were at prior to the passing of the impugned orders. The Special Court will strictly go by the procedure outlined under the Act, as explained in this judgment. It will proceed to the stage of framing of notice. That may be done within a period of four weeks from today and thereafter the prosecution will be asked to close its evidence within a further period of eight weeks. The accused can thereafter enter their defence and the matter will proceed in accordance with law. In each of the aforesaid cases the Special Court should endeavour to conclude and deliver a judgment within a period of six months from today.

25. The petitions and the pending applications are disposed of.

S. MURALIDHAR, J.

APRIL 6, 2009
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