

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

Decided on: 7th July, 2011

+ (1) CRL.REV.P. 685/2007

NORTH DELHI POWER LTD. Petitioner
Through: Mr. Vikram Nandrajog and Mr. Sushil
Jaswal, Advocates

versus

SURENDER KUMAR Respondent
Through: Mr. Ankur Sharma, Advocate

AND

+ (2) CRL.REV.P. 563/2007

NORTH DELHI POWER LTD. Petitioner
Through: Mr. Vikram Nandrajog and Mr. Sushil
Jaswal, Advocates

versus

ROSHAN LAL GOEL & ANR Respondents
Through: Mr. A.Maitri with Ms. Radhika
Chandersekher and Ms. Shaily
Malhotra, Advocates.

AND

+ (3) CRL.REV.P. 564/2007

NORTH DELHI POWER LTD. Petitioner
Through: Mr. Vikram Nandrajog and Mr. Sushil
Jaswal, Advocates

Versus

JINDAL INDUSTRIES & ANR Respondents
Through: Mr. V.K.Goel, Advocate

AND

+ (4) CRL.REV.P. 306/2007

NORTH DELHI POWER LTD.

..... Petitioner

Through: Mr. Vikram Nandrajog and Mr. Sushil
Jaswal, Advocates

versus

AMAR INDUSTRIES & ANR.

..... Respondents

Through: Mr. Ujjawal K. Jha and Mr. B.P.
Aggarwal, Advocates

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

- | | |
|--|---------------|
| 1. Whether the Reporters of local papers may be allowed to see the judgment? | Not necessary |
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

MUKTA GUPTA, J.

1. The short issue which arises in the present petition is whether a prosecution case can be thrown out at the stage of charge itself on the ground that there was no notification authorizing the concerned officer to carry out the inspection on the date when the inspection was carried out.

2. In these petitions complaints were filed against the Respondents for committing the offence under Section 135 of the Electricity Act, 2003(in short

‘the Act’) on the basis of raids allegedly conducted by the inspection teams in the premises of the Respondents on 25th September, 2003, 26th February, 2004, 12th March, 2004 and 8th January 2004 respectively. All these inspections were carried out prior to 31st March, 2004 when the notification of the Government of NCT of Delhi (Department of Power) was issued empowering the technical officers of the rank of managers/executive engineers and above in the departments dealing with distribution, commercial and enforcement functions as authorized officers for the purpose of Section 135 of the Act. The learned trial court came to the conclusion that the officers of the complainant could not derive any power under Regulation 25(i) to conduct a raid on the premises in question on the relevant date under Section 135 of the Act. Since it was held that the inspection in the premises was not made by the authorized officers so all consequential proceedings initiated against the accused persons for the offence punishable under Section 135 of the Act were illegal and the Respondents were discharged.

3. Learned counsel on behalf of the Petitioner contends that theft of electricity is an offence. The power to inspect a premises is inherent in the distribution licensee that is the Petitioner. Prior to the notification dated 31st March, 2004 there was no requirement for a statutory notification regarding designation of officers authorized to inspect premises. The procedure was

that the inspection teams authorized by the department used to conduct inspections and office orders dated 11th July, 1996 and 24th December, 1996 have been placed on record in this regard. It is contended that under Section 135(2) of the Act, the power of inspection and prosecution is with the licensee/supplier of the electricity that is the Petitioner. It is stated that though the notification authorizing a person of the rank of manager and above to conduct inspection in the present case had been issued on 25th September, 2003, 26th February, 2004, 12th March, 2004 and 8th January, 2009 respectively and till such time the requisite notification was issued by the State Government on 31st March, 2004 it cannot be said that no inspection to detect theft of electricity or pilferage of energy could be carried out by the distribution licensee. According to learned counsel for the Petitioner the learned trial court failed to appreciate that there cannot be any vacuum in law. Reliance is placed on *Rajeev Anand and others v. Union of India and others*, (1998) 72 DLT 355 to contend that the statutory provision cannot be held to remain a dead letter till such time the procedure is prescribed and in the absence of procedure being prescribed the authority would be required to follow and apply such procedure which is just, fair and reasonable and in consonance with the principles of natural justice.

4. It is further contended that the Respondents cannot be discharged on the ground that the inspection was invalid. This finding has to be arrived at after the evidence is adduced in the trial and after consideration of the entire evidence on record by the learned trial court. Reliance is placed on *Mukesh Rastogi v. North Delhi Power Limited*, 2007 (99) DRJ 108. This Court in the said decision held that even if the inspection was not a valid inspection, the complainant has a right to prove the theft irrespective of the said status of inspection. There is no provision under the DERC (Metering and Billing) Regulations, 2002 stipulating that inspections have to be carried out by officials authorized by the State Government. The power to inspect was vested with the licensee that is the Petitioner. It is next contended that it is well settled law of legal jurisprudence that even an illegal inspection will not detract from the relevancy of the evidence and the material collected during such inspection and search. Illegality of search does not vitiate the evidence collected during such search. The Petitioner have every right to prove the theft of electricity by independent testimony of complainant's witnesses de hors the inspection report which ought to be considered by the Court and no case for discharge of the accused is made out.

5. Learned counsel for the Respondent, on the other hand, contends that unless the officers are authorized by a notification of the State Government in

this behalf an inspection under the Act is invalid and any action taken on the basis of such an invalid raid is a nullity. The alleged inspections were carried out unauthorizedly by officials of the Petitioner and they were not carrying the authorization, identification or any other proof that they were the authorized officers. It is contended that earlier under the Indian Electricity Act, 1910 on the theft being detected a complaint was lodged to the police under Section 39 as the same was a cognizable offence and the case proceeded as a State case. However, now as per Section 135(2) of the Act, powers have been given to the authorized officer to conduct search and seizure as per the procedure prescribed under sub section (3) and (4) and a complaint case procedure has to be followed. Since these are special powers addressed to particular persons the same cannot be delegated. It is contended that the judgments sought to be relied upon by learned counsel for the Petitioner are not applicable to the facts of the present case. The offence of theft is required to be proved by the prosecution through cogent evidence. The concept of vacuum in law is misconceived. The authorities could have acted fast immediately on coming into force of the Act and the officers authorized in this regard. Reliance is placed on *Roy V.D. v. State of Kerala, AIR 2001 SC 137* to contend that as under the NDPS Act a search which is inherently illegal and lacks sanction of

law cannot be the basis of proceedings in relation to the offence similarly in the present case of illegal search cannot be the basis of a conviction.

6. I have given my anxious consideration to the various provisions involved. Before starting with a discussion thereon it would be relevant to reproduce certain provisions of the Electricity Act, 2003 which are as under:-

“OFFENCES AND PENALTIES

135. Theft of electricity.—(1) Whoever, dishonestly,—

(a) taps, makes or causes to be made any connection with overhead, underground or underwater lines or cables, or service wires, or service facilities of a licensee; or

(b) tampers a meter, installs or uses a tampered meter, current reversing transformer, loop connection or any other device or method which interferes with accurate or proper registration, calibration or metering of electric current or otherwise results in a manner whereby electricity is stolen or wasted; or

(c) damages or destroys an electric meter, apparatus, equipment, or wire or causes or allows any of them to be so damaged or destroyed as to interfere with the proper or accurate metering of electricity; or

so as to abstract or consume or use electricity shall be punishable with imprisonment for a term which may extend to three years or with fine or with both:

Provided that in a case where the load abstracted, consumed, or used or attempted abstraction or attempted consumption or attempted use—

- (i) does not exceed 10 kilowatt, the fine imposed on first conviction shall not be less than three times the financial gain on account of such theft of electricity and in the event of second or subsequent conviction the fine imposed shall not be less than six times the financial gain on account of such theft of electricity;
- (ii) exceeds 10 kilowatt, the fine imposed on first conviction shall not be less than three times the financial gain on account of such theft of electricity and in the event of second or subsequent conviction, the sentence shall be imprisonment for a term not less than six months, but which may extend to five years and with fine not less than six times the financial gain on account of such theft of electricity:

Provided further that if it is proved that any artificial means or means not authorised by the Board or licensee exist for the abstraction, consumption or use of electricity by the consumer, it shall be presumed, until the contrary is proved, that any abstraction, consumption or use of electricity has been dishonestly caused by such consumer.

- (2) Any officer authorised in this behalf by the State Government may —
 - (a) enter, inspect, break open and search any place or premises in which he has reason to believe that electricity (has been or is being), used unauthorisedly;
 - (b) search, seize and remove all such devices, instruments, wires and any other facilitator or article which has been, is being used for unauthorised use of electricity;
 - (c) examine or seize any books of account or documents which in his opinion shall be useful for or relevant to, any proceedings in respect of the offence under sub-

section (1) and allow the person from whose custody such books of account or documents are seized to make copies thereof or take extracts therefrom in his presence.

- (3) The occupant of the place of search or any person on his behalf shall remain present during the search and a list of all things seized in the course of such search shall be prepared and delivered to such occupant or person who shall sign the list:

Provided that no inspection, search and seizure of any domestic places or domestic premises shall be carried out between sunset and sunrise except in the presence of an adult male member occupying such premises.

- (4) The provisions of the Code of Criminal Procedure, 1973, relating to search and seizure shall apply, as far as may be, to searches and seizure under this Act.”

185. Repeal and saving: ---(1) Save as otherwise provided in this Act, the Indian Electricity Act, 1910 (9 of 1910), the Electricity (Supply) Act, 1948 (54 of 1948) and the Electricity Regulatory Commissions Act, 1998 (14 of 1998) are hereby repealed.

- (2) Notwithstanding such repeal, -

(e) all directives issued, before the commencement of this Act, by a State Government under the enactments specified in the Schedule shall continue to apply for the period for which such directions were issued by the State Government.

- (3) The provisions of the enactments specified in the Schedule, not inconsistent with the provisions of this Act, shall apply to the States in which such enactments are applicable.

(5) Save as otherwise provided in sub-section (2), the mention of particular matters in that section, shall not be held to prejudice or affect the general application of section 6 of the General Clauses Act, 1897 (10 of 1897), with regard to the effect of repeals.”

7. It would be thus seen that by Section 135 (1) of the Act *inter alia* defines theft of electricity as dishonestly tapping or making any connection with overhead, underground of cables or service facilities of a licensee. The possession of the electricity vests with the licensee and by virtue of sub-Section 2 this power of the licensee to search and seize is required to be delegated to an officer authorized in this behalf by the State Government. The power to delegate the authority to search and seize in an officer does not take away the proprietary rights of the licensee. Moreover, in terms of Section 185(2)(a) all earlier directives and orders issued are saved till such time a new notification or office orders come into force. In this regard it may be noted that even prior to coming into force of the Act of 2003 there were office orders issued from time to time for inspection of the premises. Reference is made to the office order dated 11th July, 1996 whereby the authority was delegated to the AE zone for checking and inspection.

8. There is yet another ground on which the impugned order needs to be set aside. It is well settled law of criminal jurisprudence that an evidence even if illegally collected is admissible in evidence, though the reliability thereof

has to be tested at the time of trial. In *Pooran Mal v. The Director of Inspection (Investigation), New Delhi and others*, (1974) 1 SCC 345 their Lordships laid down that the Courts of India and England have consistently refused to exclude relevant evidence merely because it is obtained by illegal search or seizure. Even in the *State and others v. N.M.T. Joy Immaculate*, 2004(5) SCC 729 this principle was reiterated. This principle was distinguished in *Ali Mustaffa Abdul Rahman Moosa v. State of Kerala*, (1994) 6 SCC 569 which was a case under the NDPS Act, for the reason that under the NDPS Act the possession of the contraband itself is an offence. It was thus held that the result of illegal seizure could not be treated as evidence of possession of the contraband. The learned trial court failed to notice this distinction and applied the principle of law laid down in *Roy V.D. v. State of Kerala* (supra) which was a case of under the NDPS Act. It would be relevant to reproduce the relevant portion of *Pooran Mal* (supra) which is as under:-

“24. So far as India is concerned its law of evidence is modelled on the rules of evidence which prevailed in English law, and courts in India and in England have consistently refused to exclude relevant evidence merely on the ground that it is obtained by illegal search or seizure. In *Barindra Kumar Ghose and Ors. v. Emperor* I.L.R. 37 Cal 467 the learned Chief Justice Sir Lawrence Jenkins says at page 500 : "Mr. Das has attacked the searches and has urged that, even if there was jurisdiction to direct the issue of search warrants, as I hold there was, still the provisions of the Criminal Procedure Code

have been completely disregarded. On this assumption he has contended that the evidence discovered by the searches is not admissible, but to this view I cannot accede. For without in any way countenancing disregard of the provisions prescribed by the Code, I hold that what would otherwise be relevant does not become irrelevant because it was discovered in the course of a search in which those provisions were disregarded. As Jimutayahana with his shrewd commonsense observes-"a tact cannot be altered by 100 texts," and as his commentator quaintly remarks : "If a Brahmana be slain, the precept 'slay not a Brahmana' does not annul the murder." But the absence of the precautions designed by the legislature lends support to the argument that the alleged discovery should be carefully scrutinized." In *Emperor v. Allahdad Khan* 35 Allahabad, 358 the Superintendent of Police and a Sub-Inspector searched the house of a person suspected of being in illicit possession of excisable articles and such articles were found in the house searched. It was held that the conviction of the owner of the house under Section 63 of the United Provinces Excise Act, 1910, was not rendered invalid by the fact that no warrant had been issued for the search, although it was presumably the intention of the legislature that in a case under Section 63, where it was necessary to search a house, a search warrant should be obtained beforehand. In *Kuruma v. The Queen* [1955] A.C. 197 where the Privy Council had to consider the English Law of Evidence in its application to Eastern Africa, their Lordships propounded the rule thus : "The test to be applied, both in civil and in criminal cases, in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how it was obtained." Some American cases were also cited before the Privy Council. Their Lordships observed at p. 204 thus : "Certain decisions of the Supreme Court of the United States of America were also cited in argument. Their Lordships do not think it necessary to examine them in detail. Suffice it to say that there appears to be considerable difference of opinion among the judges both in the State and Federal courts as to whether or not the rejection of evidence obtained by illegal means depends on certain articles in the American Constitution. At any rate, in *Olmstead*

v. United State (1828) 277 U.S. 438, the majority of the Supreme Court were clearly of opinion that the common law did not reject relevant evidence on that ground." In Kuruma's case, Kuruma was searched by two Police Officers who were not authorised under the law to carry out a search and, in the search, some ammunition was found in the unlawful possession of Kuruma. The question was whether the evidence with regard to the finding of the ammunition on the person of Kuruma could be shut out on the ground that the evidence had been obtained by an unlawful search. It was held it could not be so shut out because the finding of ammunition was a relevant piece of evidence on a charge for unlawful possession. In a later case before the Privy Council in *Herman King v. The Queen* [1969] (1) A.C. 304 which came on appeal from a Court of Appeal of Jamaica, the law as laid down in Kuruma's case was applied although the Jamaican Constitution guaranteed the Constitutional right against search and seizure in the following provision of the Jamaica (Constitution) Order in Council 1962, Schedule 2, Section 19 "(1) Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises. "(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision which is reasonably required...for the purpose of preventing or detecting crime...." In other words, search and seizure for the purposes of preventing or detecting crime reasonably enforced was not inconsistent with the Constitutional guarantee against search and seizure. It was held in that case that the search of the appellant by a Police Officer was not justified by the warrant nor was it open to the Officer to search the person of the appellant without taking him before a Justice of the Peace. Nevertheless it was held that the Court had a discretion to admit the evidence obtained as a result of the illegal search and the Constitutional protection against search of person or property without consent did not take away the discretion of the court. Following *Kuruma v. The Queen* the court held that it was open to the court not to admit the evidence against the accused if the court was of the view that the evidence had been obtained by conduct of which

the prosecution ought not to take advantage. But that was not a rule of evidence but a rule of prudence and fair play. It would thus be seen that in India, as in England, where the test of admissibility of evidence lies in relevancy, unless there is an express Or necessarily implied prohibition in the Constitution or other law evidence obtained as a result of illegal search or seizure is not liable to be shut out.”

9. Learned counsel for the Respondent has pressed two more pleas. Firstly, that the show cause notices have been issued as per the provisions under Section 39 and 44 of the Indian Electricity Act, 1910 whereas the complaint has been filed under the Electricity Act, 2003 and thus such a complaint cannot be entertained, secondly, that even the old Regulation 25(i) which came into effect on 19th August, 2002 under the old enactment has not been followed. The said Regulation mandates the inspecting authority to carry alongwith it the written authority duly signed by a designated officer of the licensee at the time of inspection. No such averment has been made in the complaint, neither the said authorization has been proved nor it is a part of the record. I am not dealing with these two issues as the same were not dealt by the learned trial court which found fit to discharge the Respondents in view of the issue raised above in the preceeding paragraphs. The parties will be at liberty to raise these pleas or any other pleas which they deem fit during the trial as all these issues can be can be determined while appreciating the evidence brought on record during the trial by the parties.

10. In view of the reasons stated above the impugned orders are set aside. The learned trial court will now rehear the matter on the order of charge on the basis of the evidence on record and other contentions raised by the parties and pass orders thereon.
11. The revision petitions are accordingly allowed.

(MUKTA GUPTA)
JUDGE

JULY 07, 2011
mm