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

+ CRL.REV.P. 544/2011 & CrI.M.A.No.18752/2011(Stay)

% Judgment reserved on :1st February,2012
Judgment delivered on: 10th April,2012

AJAY GUPTA Petitioner
Through : Mr.Ashish Middha, Adv.

versus

BSES RAJDHANI POWER LTD Respondent
Through : Mr.A.B.Pandey, Adv.

CORAM:
HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J.

1 The instant petition is being filed against the impugned order dated 16.08.2011, whereby, notice under Section 251 Cr.P.C. has been framed against the petitioner.

2 Vide the instant petition, the petitioner has sought to set aside the Notice dated 16.08.2011 and consequent proceedings thereof for the offences punishable under Section 135 of the Electricity Act.

3 Ld. counsel for the petitioner has submitted that in the complaint, the petitioner and Deepika Mittal (Registered Consumer) were made respondent/ accused. In the said complaint the allegations made against the

petitioner in para 3 is reproduced as under:-

“3 That there is no other electricity connection installed at the said property of the petitioner, but the complainant has been wrongly alleging and sending bills in respect of the connection having ‘K. No. 2541C3240137’, when at the time of the purchase of the said property the petitioner did not find any such connection working at the said property.”

4 Ld. counsel for the petitioner submits that the petitioner/accused’s wife had purchased the property bearing No.D-819, New Friends colony, New Delhi, in July, 2003 and the petitioner found installed only one electricity connecting having ‘K.No.2541C0080042’ at the said property, which is for a sanctioned load of ‘37KW’. There was no other electricity connection installed at the said property of the petitioner, but the complainant has been wrongly alleging and sending bills in respect of the connection having ‘K.No.25413240137’.

5 Further submits that the respondent’s officials in a clandestine and illegal manner carried out an inspection at the premises of the respondent on 21.02.2005. However, no irregularity was found during the course of the said inspection. The respondent wrongly and falsely implicated the petitioner in the DAE case on the basis of the said inspection. Inspection Report dated 21.02.2005 is attached with as Annexure-B at page 30-33.

6 The inspection team could not detect the case of DAE or FAE but the reporting team had simply stated in its report that “*Consumption patter reveals that there is some tempering in monitoring equipments. According CT Meter got tested and found 69.49% slow. Total connected load—35.240 KW/DX. Sanctioned load 37.00KW/DX*”.

7 As per the inspection report, the connected load was found to be 9KW which is well within the sanctioned load of 37 KW. The meter seals and half seals were found intact and O.K. with their numbers. The respondents officials remarked in the meter testing report dated 21.02.2005 (Annexure C of petition at pages 34 and 35) that the IR No. 318092 dated 30.03.2001 pasted by the then DVB on meter box found torn out, while infact in the report dated 14.04.2001 by the DESU/DVB it is remarked at the IR was torn for proper sealing, hence there is no question of torn off the said IR seal by the petitioner.

8 The inspection report further stated ‘seals found O.K./genuinely doubtful’. In the column for any other remarks the report had the remarks **“Digital Meter—found upset”**.

9 The respondents officials prepared the Meter testing report dated 21.02.2005 and the same was of ‘**K.No. 2542C0080042**’. In the report it was remarked as ‘IR No. dated 30.03.2001 then DVB, was pasted on meter box but found torn’. Thereafter in the said report there were the details of the seals and their numbers were given. It was stated in the said report that ‘seals genuinely doubtful’.

10 The respondents further filed the Seizure memo and as per the same “Meter Seal Box (4Nos.), F-96479, F-96480, F-96481, F96482’ were seized. The complainant’s officials further alleged in the said inspection report that the digit counter of the meter was found upset. The upsetting of the digit counter is a technical fault in the meter and the respondent is responsible for the same as it is charging the meter rent in the bills.

11 The department issued the personal hearing for dishonest abstraction of energy dated 24.03.2005 and in the said Show cause notice, the 'K.No. was stated as 2541C3240137. The petitioner made representation against the said illegal action of the respondent and also given a written representation dated 30.03.2005 to the Deputy Manager (Enforcement), Enforcement Cell, but the same were not considered by the respondent while passing the alleged speaking order dated 01.04.2005 passed by Enforcement Assessment Cell.

12 The speaking order does not give any justification to the said illegal action of the respondent's official, nor even gave any proper consideration to the representations and queries of the petition. The speaking order is totally biased and made at the behest of the respondent just to cover up the formality of affording opportunity to the consumer/petitioner. In the said speaking order the respondent had stated about the K.Nos. as '2541C3240137/2541C0080042'.

13 Accordingly, the respondents had raised a demand of Rs.2,79,171/- on the basis of the said inspection dated 21.02.2005 with due date 26.04.2005. In the said bill, the sanctioned load was given as 2KW.

14 The respondent filed a case against the petitioner and another under section 135 of Indian Electricity Act in the month of March 2007. The same came up for hearing before Special court under Electricity Act, ADJ, New Delhi and the said court after hearing the arguments on charge, discharged the petitioner vide orders dated 07.01.2009.

15 The respondents filed the petition vide Crl. L.P. 70/2009 before this

court on the ground that after passing orders on summoning of the accused, the court does not have powers to review its own orders on summoning. The petition of the respondents was admitted and vide order dated 20.01.2010, the complaint was remanded back with the directions to frame the notice u/s 251 Cr.P.C.

16 In pursuance of aforesaid directions, the notice was framed against the petitioner. Being aggrieved, the petitioner has filed the present petition for discharge.

17 In the said petition, the respondents only ground was that the court summoning the accused has no powers to review its order. No other ground was raised by them nor the case was heard on merits except on the said law point.

18 Ld. counsel for the petitioner has relied upon a judgment of this court, in a case of **Bhasin Motors [I] P Ltd. Vs. NDPL**, wherein, it was observed as under :-

“12 The first issue to be considered is whether there is conclusive evidence to show that the petitioner was indulging in DAE. It is not in dispute that the inspection report indicates the following three features :-

- 1 Upper seal of meter box found tampered.*
- 2 Scratches observed on dial plate.*
- 3 Cover seals found missing.*

However, as the DERC Regulations themselves acknowledge, these signs are at best, helpful to ‘suspect’ DAE. They cannot be taken to be ‘conclusive evidence’. This Court

has already explained in several decisions (Jagdish Narayan v. NDPL judgment dated 18.04.2008 in W.P.C. 10287/2005) that something more would have to be shown to enable the Court to conclude that there has been DAE.

15. What appears to have been happening in some of these cases is that the suspicion of the DAE is leading to the Respondent immediately to work out the assessed/computed consumption by using the LDHF formula without first conclusively establishing that there is DAE. The stage for applying the LDHF formula is after it is conclusively established that there is DAE. The LDHF formula is only for determining the quantum of penalty that is required to be levied in terms of Regulation 26(ii) of the DERC Regulations. It would be page 1955 erroneous for the respondent to begin by applying the penalty formula comparing the recorded units with the computed units and then concluding that there is DAE on the basis of the percentage, i.e. worked out. The purpose of Regulation 26(ii) is not for determining DAE but for determining the penalty once the DAE has been established.

17. In Jagdish Narayan v. NDPL(Supra) and Udham Singh V. BSES Rajdhani Power Ltd. 136 (2007) DLT 500, this court has interpreted the provisions of Section 135 of the Electricity Act, 2003 read with the DERC Regulations. The relevant passages of the last mentioned judgment in Jagdish Narayan reads as under :-

23. What is central to the definition of theft under Section 135 of the Act, which according to the respondent covers DAE as well is the element of 'dishonesty'. Therefore the means read or the intention of the consumer to dishonestly abstract electricity must be proved "conclusively" to bring home the charge of DAE. Therefore the requirement of "conclusive evidence" in terms of Regulation 25 (iii) is consistent with the statutory mandate of Section 135(1). That can be established only by showing that the consumer was responsible for tampering the meter by some visible

means. The external manifestations of tampering, as has been found in the inspections conducted in the present cases, can only raise a suspicion of DAE. That suspicion will have to be made good by some tangible evidence of physical means of tampering before the presumption can be drawn that it was the consumer who tampered the meter.

24. The decision of the Hon'ble Supreme Court in Jagannath Singh v. B.S. Ramaswamy is illustrative although there the Court was concerned with a criminal conviction for the offence of theft of electricity under Sections 39 and 44 of the Indian Electricity Act, 1910. The approach to the requirement of proof of dishonest abstraction of energy is nevertheless relevant for the present case. The Hon'ble Supreme Court held that the existence of artificial means for abstracting energy can only give rise to a presumption that there had been a dishonest abstraction. The supplier would still have to show that the consumer is responsible for such tampering. In the said case, it was contended that the existence of an open stud hole on the meter was Page 1956 sufficient proof that dishonest abstraction of energy had taken place. In answer to that contention, the Hon'ble Supreme Court observed as under:

A meter with an exposed stud hole, without more, is not a perfected instrument for unauthorized taking of energy, and cannot be regarded as an artificial means of its abstraction. To make it such an artificial means, the tampering must go further, and the meter must be converted into an instrument for recording less than the units actually passing through it. A check meter affords an easy method of proving that the consumer's meter is recording less than the units consumed and is being used as an artificial means for abstraction of the unrecorded energy. To bring home the charge under Section 39, the prosecution must also prove that the consumer is responsible for the tampering. The evidence

adduced by the prosecution must establish beyond doubt that the consumer is guilty of dishonest abstraction of energy.

*25. Applying the above test, it has to be held that an automatic presumption of DAE on the basis of the external symptoms of tampering together with the analysis of the consumption pattern would not be a safe and error free method. Some other tangible evidence must be shown to exist. An accu check meter can be deployed to find out if the meter is in fact recording lesser units. The analysis of the consumption pattern in terms of the Regulation 26 (ii) is merely corroborative and not by itself substantive evidence of DAE. The decision of this Court in *Udham Singh v. BSES Rajdhani Power Ltd.* 136 (2007) DLT 500 is to the same effect. In fact, the formula is applied in terms of Regulation 25 (iv) read with 26 (ii) only for determining the penalty payable by the consumer once a case of either direct theft or DAE has been made out. The penalty formula cannot itself supply the proof of DAE or theft.*

19 Further refers to a case decided by this court in a case of **Col. R.K. Nayar Vs. BSES** reported in **MANU/DE/7685/2007**, wherein, it was observed as under:-

14. This Court is of the view that an inference of fraudulent abstraction of energy must be based on some conclusive evidence that the user has tampered with the meter in a manner that has enabled such user to either slow down the meter or make it record lesser units of consumption. There must be a link established between the physical evidence of tampering noticed on inspection and the consumer. An inference of FAE should not be permitted to be drawn on the mere fact that a meter had been found with broken seals. An electricity meter is admittedly not kept enclosed in a tamper proof environment under the lock and key, with one key retained by the consumer and the other

*by the supplier of the electricity. If a meter is kept in a location that permits any person intending to do mischief to have easy access to the meter, then to fasten the charge of FAE on the consumer in the event of the meter being found tampered, is not being reasonable or even realistic. Something more would have to be demonstrated to infer an intention by the consumer to "fraudulently" abstract electricity. In this context it is necessary to emphasize that the analysis of consumption pattern cannot constitute substantive proof of DAE in the absence of tangible physical evidence of DAE in the manner explained above. In other words, the analysis of consumption pattern can only corroborate what is found on physical inspection which can indicate whether the consumer has herself or himself employed a device or a method to dishonestly abstract electricity. It will not be open to the respondent, in the absence of any tangible evidence of DAE, to proceed on the basis of the consumption pattern to infer DAE. The decision of this Court in *Udham Singh v. BRPL 136 (2007) DLT 500* is to the same effect.*

15. To explain this further, where the respondent finds on inspection some evidence of 'tampering' like a missing or broken glass, a broken seal, a missing or tampered rivet, it usually notes that it is a case of 'suspected DAE'. It has to then proceed to investigate further to confirm this suspicion. The term 'dishonest abstraction' is not defined in the Electricity Act, 2003. It is defined only under Regulation 2 of the DERC Regulations. The relevant clauses read as under:

2(i) 'Direct theft' shall mean abstraction of electrical energy either through by passing the meter by some arrangement external to it or through unauthorized tapping of the supply from licensee's distribution network.

2(m) 'Dishonest Abstraction of Energy (DAE)' shall mean abstraction of electrical energy where accessibility to the internal mechanism of the metering equipment and some collateral evidence is found to support the conclusion that the meter has been caused to record less energy than actually passing through it. It shall also include any other means

adopted by consumer to cause the meter to stop or run slow (such as reversing the polarity of one phase of poly phase meters, changes in CT or PT, etc.).

The wording of this definition does not help drawing up presumption of DAE merely on the discovery of a tampered meter. Moreover, the shifting of the burden of proof to the consumer has to have a statutory basis. That necessarily takes us to Section 135(1) of the Electricity Act, 2003 which reads as under:

135. Theft of electricity - (1) Whoever, dishonestly, - (a) taps, makes or causes to be made any connection with overhead, underground or under water 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,

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 authorized 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.

The second proviso to Section 135(1) of the Act enables the shifting of the burden of proof only on the initial burden being discharged by the respondent. That initial burden is on the respondent to prove that "any artificial means or means not authorised by the Board or licensee exist". Unless it is so proved, the presumption of dishonest abstraction does not get attracted.

16. The applicability of Regulation 26 for determining the penalty arises only after there is a determination by conclusive proof that it is a case of DAE or theft as the case may be. In other words the calculation of the penalty is in the second stage. The Regulation 26 (ii) and (iv) read as under:

(ii) Before the personal hearing, the officer of the licensee, before whom personal hearing has to be given, shall analyze the case after carefully considering all the documents, submissions by the consumer, facts on record and the consumption pattern, wherever available. The licensee shall also assess the energy consumption for past six months as per the Tariff Order. In case of suspected DAE, if consumption

pattern for last one year is reasonably uniform and is not less than 75% of the assessed consumption where meter is less than 10 years old and not less than 65% of the assessed consumption where meter is more than 10 years old, no further proceedings shall be taken and the decision shall be communicated to the consumer under proper receipt within 3 working days and connection shall be restored through original meter.

(iv) Where it is established that there is a case of DAE, the licensee [may] lodge a report with the local police along with the material evidence including wires/cables, meter, service line, etc. seized from the site, which shall be handed over to police. The licensee shall also assess the energy consumption for past six months as per the Tariff Order and prepare final assessment bill on 5 times the rates as per applicable tariff. The consumer shall be required to make the payment within 2 working days of its proper receipt. The licensee may, taking into consideration the financial position and other conditions of the consumer, extend the last date of payment or approve the payment to be made in Installments. The amount, the extended last date and/or time schedule of payment/installments should be clearly stated in the speaking order. A copy of the speaking order shall be handed over to the consumer under proper receipt on the same day.

The determination of "computed units" or "assessed units" by using a formula in relation to the "connected load" or "billing load" as the case may be takes place after the determination of DAE. If after such computation the recorded consumption is found to be less than the 75% of the assessed or computed consumption, then a certain calculation of penalty ensues. The whole purpose of Regulation 26 is to calculate such a penalty consequent upon the determination of DAE. It is possible in a given case that the case of DAE is established and yet no penalty is attracted when applying the formula under Regulation 26. In these circumstances it can be seen that Regulation 26 is not intended to supply the proof of DAE. In other words the respondent cannot use Regulation 26 as the starting point by first determining the assessed consumption,

then applying the formula for determining if a penalty is attracted and then infer, on that basis that it is a case of DAE. The formula for determining penalty cannot itself be the proof of DAE. However, that is what appears to have been done in the present case as is evident from the reading of the Speaking Order.

17. The precursor to Section 135 of the Act was Section 39 of the Indian Electricity Act, 1910 which was similarly worded and which has been interpreted by the Courts. In Jagannath Singh v. Ramaswamy, the Hon'ble Supreme Court held that:

(8) An exposure of a stud hole on the meter cover is an artificial means for preventing the meter from duly registering. For the purposes of Section 44, the existence of this artificial means gives rise to the presumption that the meter was prevented from duly registering but this presumption cannot be imported into Section 39. A meter with an exposed stud hole, without more is not a perfected instrument for unauthorised taking of energy, and cannot be regarded as an artificial means for its abstraction. To make it such an artificial means, the tampering must go further, and the meter must be converted into an instrument for recording less than the units actually passing through it. A check meter affords an easy method of proving that the consumer's meter is recording less than the units consumed and is being used as an artificial means for abstraction of the unrecorded energy. To bring home the charge under Section 39, the prosecution must also prove that the consumer is responsible for the tampering. The evidence adduced by the prosecution must establish beyond doubt that the consumer is guilty of dishonest abstraction of energy.

18. This was reiterated in the subsequent decision in Ram Chandra v. State of Bihar. In that case a wire had actually been inserted which had the effect of preventing the rotation of a disc despite that it was held that in addition to the above evidence, it was important to demonstrate that "the appellant would have knowingly done something to the meter which would have escaped detection of a meter reader and facilitated

the abstraction of electricity." The Court set aside the conviction in that case.

20 Ld. counsel for the respondent on the other hand submitted that the petition is liable to be dismissed since all the grounds raised in the petition raised triable issues.

21 Further submits that the complaint case was remanded back and charges were framed in the matter subsequent to order dated 20.01.2010 passed in Crl. L.P. 70/2009.

22 During the inspection dated 21.02.2005, it was found that 'consumption pattern reveals that there is some tampering in metering equipments' further, upon testing of the CT Meter, it found running slow by -69.49%. This, besides the personal hearing granted to petitioner on 31.03.2005, the speaking order dated 01.04.2005 and the supplementary bill dated 20.04.2005, constitute sufficient evidence against the petitioner for being booked for Dishonest Abstraction of Energy.

23 The petitioner has also admitted to the factum of the inspection proceedings. The petitioner challenges the framing of charge on the basis that on the inspection report it is mentioned that the meter seals are Ok. However, the petitioner is merely trying to divert attention from the fact that in the Meter details report, it is diagrammatically stated that the Digit counter was found upset and has also been stated that 'Seals genuinely doubtful'.

24 The petitioner then attempts to place reliance upon a previous record of inspection dated 14.04.2001 by Delhi Electric Supply Undertaking where it was stated that the seals were intact and ok and torn for the purpose of proper sealing. Using this, the petitioner seems to suggest that the seals were torn by the predecessor of the respondent and therefore he was not responsible for the same.

25 However, the petitioner refuses to explain why no action was taken by him to get the meter resealed and why he continued to use a meter with tampered seals which admittedly to benefit from it as is clear from the digit counter upset and the meter running slow by –69.49%.

26 The petitioner has also tried to divert the attention from the severity of his crime by creating a confusion between connection Nos. the K. Nos. are mentioned as 2451C0080042 at some places and 2541C3240137 at others. However, this issue is entirely stillborn. The K. No. 2541C3240137 pertains to an old single phase connection in the premises the status of which is permanently disconnected. The correct K. No. as printed on the meter box (bearing No. DVB/2000/CT/020186 or simply 020186) is 2541C0080042. This can be confirmed from the meter details report.

27 Ld. counsel for the respondent has relied upon a case decided by Hon'ble Supreme Court in **Jagannath Singh V. B.S. Ramaswamy [1966 AIR 849]**, wherein, it was observed as under :-

“ A meter with an exposed stud hole, without more, is not a perfected instrument for unauthorized taking of energy, and cannot be regarded as an artificial means of its abstraction. To make it such an artificial means, the tampering must go further,

and the meter must be converted into an instrument for recording less than the units actually passing through it. A check meter affords an easy method of proving that the consumer's meter is recording less than the units consumed and is being used as an artificial means for abstraction of the unrecorded energy."

28 The present case of the respondent/complainant is highly confused on facts, therefore, it leads to confused Inspection report. By considering all the facts on record, the learned Special court under Electricity Act vide detailed order dated 07.01.2009 discharged the petitioner/accused from all the charges lodged against him. Vide an order dated 20.01.2010, directions were issued by this court to frame notice under section 251 Cr.PC. on law point only not on merits of the case.

29 Therefore, I am of the considered opinion, the direction passed by this court for the aforesaid order was keeping in view the legal position, accordingly, the trial court framed notice under Section 251 Cr.P.C..

30 I note in Inspection Report dated 21.02.2005, the reporting team simply stated that "*Consumption patter reveals that there is some tempering in monitoring equipments. According CT Meter got tested and found 69.49% slow*".

31 It is further recorded in the report that, "the meter seals and half seals were found intact and O.K. with their numbers", whereas in the report dated 14.04.2001, it is recorded that IR was torn for proper sealing.

32 It is further stated ‘seals found O.K./genuinely doubtful’ and in the column for any other remarks of **“Digital Meter—found upset”**.

33 Thereafter, Meter Testing report dated 21.02.2005 was of **‘K.No.2541C0080042’**, in the report, it was remarks as IR No. 318092 dated 30.03.2001, the DVB was pasted on meter box.

34 The petitioner informed the court about the error and confusion therein, the respondent gave personal hearing to petitioner. The contents of the representation were not dealt with properly.

35 In my considered opinion, the external manifestations of tampering, as has been found in the inspections conducted in the present cases, can only raise a suspicion of DAE. The suspicion will have to be made good by some tangible evidence of physical means of tampering before the presumption can be drawn that it was the consumer who tampered the meter. That can be established only by showing that the consumer was responsible for tampering the meter by some visible means. To bring home the charges, against the accused, the prosecution must have brought conclusive evidence against the accused that the consumer is responsible for the same.

36 The evidence adduced by the prosecution must establish beyond doubts that consumer is guilty of dishonest abstraction of energy.

37 In the present case, there is utter confusing facts, therefore, it would be difficult for the petitioner to face the trial and take his defence as the

respondent/complainant itself is not sure about as to what exactly there case is.

38 Even the Ld. counsel for respondent has submitted that there is tampering in metering equipments and upon testing of the CT Meter, it found running slow by -69.49%.

39 On one hand, the case of respondent is that meter seals found ok on the other hand digital counter was found abstract and seal found 'genuinely doubtful'.

40 In the facts and circumstances of the case, instant petition is allowed and accordingly, the petitioner is discharged from the case mentioned above pending in the trial court against him.

41 According, the instant petition is allowed and disposed of.

42 The application for stay in the petition is disposed of being infructuous.

42 No order as to costs.

SURESH KAIT, J

APRIL 10th 2012

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