

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

+ CRL.A. 438/2012 & CrI.M.B. 754/2012 (suspension)

% Reserved on: 14th February, 2013
Decided on: 14th May, 2013

MANOJ KUMAR

..... Appellant

Through: Mr. Fanish K. Jain with Mr. Vikas B.
Pakhiddey, Advocates.

versus

BSES RAJDHANI POWER LTD & ANR

..... Respondents

Through: Mr. Sunil Fernandis, Standing
Counsel with Mr. Deepak Pathak,
Advocate for Respondent No. 1.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By the present petition the Appellant impugns the judgment dated 18th February, 2012 whereby the Appellant was convicted for offence under Section 135 of Electricity Act, 2003 (in short the Act) and the order dated 6th March, 2012 whereby he was directed to undergo Rigorous Imprisonment for a period of three years and to pay a fine of Rs.6,30,43,524/- and in default of payment of fine to undergo simple imprisonment for a period of nine months. In terms of proviso to sub-Section (1) to Section 35 of the Act the Appellant was debarred from getting any supply of electricity for a period of one year and further directed to pay civil liability assessed at Rs.2,10,14,509/- which was to be payable with interest at the rate of 6% per annum from the due date of bill, that is, 7th January, 2008 till its realization.

2. Learned counsel for the Appellant contends that the Appellant along with the two other accused was prosecuted and on the same evidence they have been acquitted however, the Appellant has been convicted. Admittedly

it is not the case of the Respondent that the Respondent was supplying electricity to the Appellant and thus to cover the Appellant in the definition of 'consumer', the Respondent has to prove beyond reasonable doubt that the premises which was allegedly connected for the purpose of receiving electricity belonged to the Appellant. There is no material evidence adduced by the Respondent to prove that the premises in question belonged to the Appellant. The Respondent has neither proved the ownership nor possession of the Appellant for the said premises. The Appellant suggested to the witnesses that the name of the user of the premises was Man Singh and the Videography also showed name of Man Singh affixed. Despite the same, the plea of the Appellant was not considered. Admittedly, the Appellant was in judicial custody from 27th May, 2007 to 19th December, 2007, which fact has been proved by the Appellant by examining DW2, warden of the Central jail, Rohini and the report of the Jail Superintendent Ex.DW2/A. The alleged inspection was conducted on 20th December, 2007 and the Appellant being in custody for nearly seven months prior thereto cannot be held guilty for using artificial means of extraction of energy. Further even on 20th December, 2007 the Appellant was present before the Court of J.R. Aryan, the learned Additional Sessions Judge in Complaint Case No. 235/2006 titled as BSES vs. Jai Kishan and others and cross-examination of one witness was recorded and thus the Appellant remained in the court upto 4.00 p.m. which fact has been proved by DW1 the record clerk. Thus the version of the prosecution witnesses that they saw the Appellant at the spot is false and liable to be rejected. The finding of the learned Trial Court that PW1, PW2 and PW3 identified the accused is contrary to the evidence on record. It is well settled that when two views are possible then the view in favour of

the accused has to be accepted. (*Kali Ram vs. State of H.P.*, AIR 1973 SC 2773). The presence of Appellant is also not proved by the videography as the Appellant has not been seen in the videography. Further PW3 admitted in the cross-examination that the lock of the premises was broken and nobody was found during inspection. Even assuming from the statement of the witnesses that the presence of the Appellant is proved at the spot, the same would not prove that the premises belong to the Appellant herein and thus he would not fall within the definition of 'consumer' as defined in the Act. Further the version of PW5 that they made inquiries from the persons who disclosed that Manoj was the user of the inspected premises is not admissible in evidence as the same is hearsay evidence. The said witnesses have not been examined before the Court.

3. The allegation of existence of alleged load of 540.215 KW by direct theft of electricity is wholly incorrect. The approximate capacity of the transformer and the electricity line in the colony itself was 250 KVA and thus the same was not in a position to bear the huge load of 540 KW, that is, 635 KVA which was allegedly only used by the Appellant. In view of this excess consumption from the house of the Appellant itself the transformer would have burnt. Further the cable allegedly being used for committing the direct theft of electricity was neither seized nor produced before the learned trial court hence the contention that the alleged cable was being used is not proved before the learned Trial Court. There are material contradictions in the statements of PW1, PW2 and PW3 with regard to number of machines working at the time of inspection. The alleged inspection report was not prepared at the site. No public witness was joined with the search and seizure as is mandatory under Section 135 of the Act. In the alternative, it is

submitted that even if this Court comes to the conclusion that the Appellant is guilty of offence under Section 135 of the Act, the civil liability and the fine as computed by the learned Trial Court is wholly unjustified. The bill relied upon by the learned Trial Court for quantifying the amount of civil liability was not tendered in evidence by the Respondent and thus the same has not been proved. Since the Appellant was in custody from 27th May, 2007 to 19th December, 2007, he should not be asked to pay the fine or civil liability for the said period. The formula given in the Delhi Electricity Supply Code and Performance Standard Regulation, 2007 for raising of theft bill is not a guiding principle. There is no provision of law available to the special court to follow for the purpose of determination of civil liability under Section 154 (5) of the Act. The fine under Section 135 of the Act has to be determined on the basis of financial gain by the consumer on account of alleged theft. Since the Appellant was in custody, there was no financial gain to him. Further the financial gain has not been proved before the learned trial court. Thus a lenient view be taken in the matter.

4. Learned counsel for the Respondent on the other hand contends that the statutory inspection was conducted under Section 135 of the Act on 20th December, 2007 at 12.30 p.m. which revealed that industrial activity of manufacturing of PVC goods was going on and a total load of 540.215 KW was found to be connected and some machines were found to be in hot condition meaning thereby that the factory was in operation just before the inspection and was stopped at the time of inspection. Further four unauthorized meters were installed inside to deceive the inspection team of the Respondent. During the investigation, the Appellant visited the site and left. The workers working at the site revealed that the Appellant was the

owner/user of the premises. PW1 in his testimony has stated that the premises was used by the Appellant and his two brothers Ishwar Singh and Rajbir Singh, who were the co-accused, who caused hindrance in the inspection. PW2 also testified that the Appellant was the user of the premises along with the two other persons at the time of inspection. PW3 also stated about the Appellant using the premises at the time of inspection. Further this fact was also deposed by PW5. Thus all the four witnesses PW1, PW2, PW3 and PW5 stated about the Appellant being the user of the premises. So the Respondent has proved beyond reasonable doubt that the Appellant was a consumer using the premises in question. The plea of alibi taken by the Appellant that on the particular date he was in the Court is unsubstantiated as in the order sheet of the Court, no time is recorded as to when he reached the Court and at what time he left. The Respondent and the complainant has discharged the initial burden of proof under the proviso to Section 135 of the Act and thereafter the burden shifts on the Appellant to prove that he was not using the electricity dishonestly which onus has not been discharged by the Appellant. Reliance is placed on *Sushil Sharma vs. BSES Rajdhani Power Ltd. and another*, 2011 (1) JCC 665. Further the Appellant could not have been arrested from the spot as the offence committed by the Appellant was a non-cognizable offence. The raising of the issue of wrong calculation of the bills/tariff itself shows that the Appellant was the user of the premises and he was aware of the connected load etc. Further the Appellant led no defence evidence to disprove the finding on the theft bill and the method of calculating the same. The Appellant has already been convicted twice for theft of electricity in

complaint case Nos. 432/2006 and 434/2011 and thus no lenient view is required to be taken against the Appellant.

5. I have heard learned counsel for the parties and perused the record.

6. The moot question in this appeal is whether the Respondent/ Complainant has been able to prove beyond reasonable doubt that the Appellant was the consumer. Section 2 (15) of the Electricity Act defines consumer as:

“2 (15) "consumer" means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be;”

7. Thus a consumer would be even a person whose premises are for the time being connected for the purpose of receiving electricity with a work of licensee. The four witness examined by the Respondent in this regard are PW1, PW2, PW3 and PW5.

8. PW1 Ajay Sharma, Manager BSES, RPL in his examination-in-chief has stated that during investigation of the premises it was being used by the accused persons Manoj Kumar and two unknown persons who did not disclose their name. He further stated that accused Manoj Kumar and other two persons who are present in the Court were present at the site during inspection and accused Manoj Kumar left the site after seeing the raiding team.

9. PW2 Shri Sunil Bisht, A.M., Enforcement, Hari Nagar, BSES RPL has also stated in his examination that during inspection the premises were

used by the accused persons named Manoj Kumar and two unknown persons who did not disclose their names. He further stated that he could not identify the accused Manoj Kumar in the Court as to whether he was present at the site at the time of inspection or not. PW3 Shri Sanjeev Kumar, Assistant Manager, Enforcement, BSES, RPL, Hari Nagar has stated that the premises were being used by Shri Manoj Kumar and during inspection two unknown persons opposed the inspection. Further PW5 Shri V.P. Yadav, Division Chief, BSES Division, Mundka has also stated in his examination-in-chief that the said premises was being used by accused Manoj Kumar and he did not remember if accused Manoj Kumar was present at the spot or not during inspection. However, it would be relevant to note that in cross-examination these four witnesses did not say as to how they found out that the Appellant was the user of the premises. PW1 in his cross-examination has admitted that no document was found at the site which showed the ownership or user of the premises in question is of the accused Manoj Kumar s/o Attar Singh. He further admitted that the meters which were found installed were also not in the name of accused Manoj Kumar and that the Appellant was not covered in the videography. Further PW2 in his examination-in-chief itself has admitted that he could not identify the accused Manoj Kumar present in Court as being the person present at the site at the time of inspection. PW3 though in his examination-in-chief has stated that the premises are being used for commercial purpose however in his cross-examination admitted that during the course of inspection they could not find any documentary proof that the Appellant Manoj Kumar was the user and owner of the premises in question. He volunteered that they asked for the document but he could not even say if the asking of the documents was covered in the videography or

not. This witness has further admitted that on the date of inspection he did not have the knowledge if the premises in question belonged to the accused Manoj Shokeen or that he was the user of the same. He admitted that the locks of the premises were broken open and no-one was found inside. Further PW5 admitted that there was no documentary proof like bill book, electricity bill to show that the Appellant was user/owner of the premises.

10. A combined reading of the statements of the witnesses along with the cross-examination shows that though the witnesses in their examination have stated the Appellant to be the user of the premises however, neither they found any documentary proof thereon nor the Appellant was covered under the videography. Moreover the premises was locked when it was raided and on opening, certain machines were found to be hot and thus they were found to be in running condition. The case of the Respondent/Complainant itself is that the Appellant came in between and left on seeing the raiding party. Thus there is no material placed on record to show that the Appellant was the user/consumer of the premises.

11. Learned counsel for the Respondent contends that the Respondent has discharged the initial burden of proof under the proviso to Section 135 (1) of the Act and thereafter the burden shifts to the Appellant to prove that he was not using the electricity dishonestly which onus has not been discharged by the Appellant. Proviso to Section 135 (1) reads as under:

“Provided also that if it is proved that any artificial means or means not authorized by the Board or licensee or supplier, as the case may be, 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.”

12. Thus a bare reading of the proviso itself would show that if the Complainant proves that artificial means or means not authorized by the Board or licensee or supplier are being used for abstraction, consumption or use of electricity by the consumer then it will be presumed until the contrary is proved that the abstraction, consumption or use of electricity has been dishonestly caused by the consumer. This proviso however, does not discharge the burden of the Complainant to prove that the person charged is the consumer. A perusal of the statements of the witnesses shows that though all the witnesses have stated that the Appellant was the user of the premises however, they had no material on record to prove either in the form of documentary evidence or from the owner of the premises who stated that he had sub-let the premises to the Appellant or by examining any independent person of the locality who states that the Appellant was in possession of the premises or by way of statements and videography that the Appellant was present at the spot and getting the work done in the factory. Further despite the Complainant having not discharged its initial burden to prove beyond reasonable doubt that the Appellant was in possession/user of the premises, a reasonable doubt has been created by the Appellant by leading specific evidence of his presence in the Court on the said date. The Appellant has examined DW1 Shri Rakesh Kumar, LDC, Record Room, Dwarka Courts, New Delhi of case file No. 235/2006 titled as BSES vs. Daya Kishan and others having goshwara No. 30 wherein Daya Kishan and Manoj Shokeen were accused and on 20th December, 2007 accused Manoj Shokeen was present in the Court with his counsel Shri J.K. Sharma and cross-examination of PW2 I.D. Rathore was recorded on the said date. Though this witness cannot tell the time as to how long he had stayed in the

Court but be that as it may during the proceedings that were going on, the Appellant was bound to stay. The case of the prosecution is that the raid was conducted at 12.30 noon and seeing the raiding team the Appellant left. The raid was conducted at Kamruddin Nagar in Nangloi. Thus some travel time would have also been required for the Appellant to reach the Court at Dwarka. Considering all these facts it creates doubt as to whether the Appellant was present at the time of inspection.

13. There is yet another aspect to the matter. The case of the prosecution is that the Appellant was running the factory wherein there was an illegal abstraction of energy. The Appellant has examined DW2 Udaibir, Warden, Central Jail, Rohini who has proved on record the report of the Superintendent, Tihar Jail Ex. DW2/A which shows that the Appellant was in judicial custody from 27th May, 2007 to 19th December, 2007. Thus the Appellant had been released only the day prior to the alleged inspection conducted and by no means while being in custody, the Appellant could have run the alleged factory for the past nearly 7 months by illegally abstracting energy.

14. Learned counsel for the Respondent has strenuously relied upon the decision of this Court in *Sushil Sharma* (supra) contending that in similar facts this Court upheld the judgment of conviction and sentence undergone. In the said case this Court in view of the evidence of the witness who stated about his presence at the spot, his commanding the work and besides the oral testimony of the witness, summons on the Appellant therein were served on the said premises and he submitted the bail bond in the Court with the same address, held that the possession of the Appellant therein was proved. In the present case it may be noted that though the presence of the two co-accused

were established by the videography they have been acquitted and there is no appeal filed by the Respondent against the said acquittal. No doubt there is material on record to suggest that the Appellant is involved in a number of cases of electricity theft and in two such complaint cases he has already been convicted however, that does not raise a presumption that even in the present case the Appellant was the consumer and it was the duty of the prosecution to prove that the Appellant was the consumer.

15. The impugned judgment of conviction and the order of sentence are set aside. The bail bond and surety bond are discharged.

16. Appeal and application are disposed of.

(MUKTA GUPTA)
JUDGE

MAY 14, 2013
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