

* IN THE HIGH COURT OF DELHI AT NEW DELHI
R-5
+ CRIMINAL APPEAL No. 720 of 2007

VIJAY SUNAR Appellant
Through: Mr. O.S. Soran, Advocate.

versus

NORTH DELHI POWER LIMITED Respondent
Through: Mr. Vikram Nandrajog with
Mr. Sushil Jaswal and Mr. Sheetesh
Khanna, Advocates.

And

R-8
+ CRIMINAL APPEAL No. 23 of 2008

NORTH DELHI POWER LIMITED Appellant
Through: Mr. Vikram Nandrajog with
Mr. Sushil Jaswal and Mr. Sheetesh
Khanna, Advocates.

versus

VIJAY SUNAR Respondent
Through: Mr. O.S. Soran, Advocate.

CORAM: JUSTICE S. MURALIDHAR

% **ORDER**
09.01.2014

1. Criminal Appeal No. 720 of 2007 filed by Mr. Vijay Sunar is directed against the impugned judgment dated 11th October 2007 and the order of sentence dated 17th October 2007 passed by the learned Additional Sessions Judge ('ASJ') [Electricity] in Complaint Case No. 34 of 2006 convicting the Appellant of the offence under Section 135 of the *Criminal Appeal Nos. 720 of 2007 & 23 of 2008*

Electricity Act, 2003 ('EA'), sentencing him to undergo rigorous imprisonment for three years and determining the civil liability to Rs. 6,57,770.

2. Criminal Appeal No. 23 of 2008 by North Delhi Power Limited ('NDPL') is directed against the impugned judgement dated 11th October 2007 to the extent that it limits civil liability of Mr. Vijay Sunar to Rs. 6,55,770 under Section 154 (5) of the EA.

3. The complaint by NDPL against Mr. Vijay Sunar was that on 6th January 2005 a raiding party consisting of Mr. Narender Kumar, Junior Engineer (Enforcement) NW, Mr. Bharat Singh, Junior Engineer (Enforcement) NW, Mr. Mukesh Kumar, Assistant Manager (Enforcement) NW, Mr. Krishan Kumar, Officer (Enforcement) NW and Mr. S. Zaidi, Officer (Enforcement) NW was formed and a raid was conducted at Plot No. 1/59, Budh Vihar, Phase-I, Delhi. The case is that Mr. Vijay Sunar was found indulging in direct theft of electricity by using 1 No. two core PVC cable and 2 Nos. single core PVC wires of different colours directly from the NDPL LV mains. No meter was found at the site. The complaint states that "it was stated at the site that the accused is the user of the said load illegally."

4. During the trial, Mr. V.P. Sharma, Manager (Enforcement), NDPL was examined as PW-1, Mr. Mukesh Kumar Gupta, Assistant Manager

(Enforcement), NDPL as PW-2, Mr. Ashok Kumar Gupta, authorized representative of NDPL as PW-3. Mr. Vijay Sunar himself was examined as DW-1.

5. The case of NDPL against Mr. Vijay Sunar is that at the premises No. 1/59, Budh Vihar, Phase-I, the raiding party found that the plastic dana was being manufactured by using extruders (gullas) by using power by tapping directly from NDPL LV mains. PW-1 in his evidence stated as under:

“One Surender met us at the site. He told us that the said factory belonged to Vijay Sunar. We prepared inspection report Ex.PW-1/1, removed the illegal wires and prepared seizure memo. We asked Surender to sign the inspection report but he refused. We pasted a copy of inspection report on the wall of the premises.”

6. In his cross-examination he stated:

“When the said Surender had refused to sign the inspection report, I did not lodge a police report against him. He had refused to disclose his address. We had asked Surender to give some document to show that the factory belonged to Vijay Sunar but he told us that Vijay Sunar was not present (in the factory and that he (Surender) did not have any such document in his possession. We did not verify from any local body such as DDA and/or MCD that the premises in question were owned by Vijay Sunar.”

7. The significant aspect of the matter is that Mr. Surender was not

examined as a witness.

8. As regards PW-2, Mr. Mukesh Kumar Gupta, he too confirmed that Mr. Surender refused to sign the inspection when asked. He stated:

“We had asked Surender to give some document to show that the premises belonged to Vijay Sunar. We did not give any written notice to him. We did not conduct investigation to show that the premises belonged to Vijay Sunar.”

9. Importantly he stated:

“It is correct that in the photographs nowhere it has been shown that the premises belonged to Vijay Sunar.”

10. In his evidence, DW-1, Mr. Vijay Sunar, stated that he resides at House No. 340, VPO Pooth Kalan, New Delhi and used to run a plastic dana factory from his house. He had an electric meter installed at his house in the year 1999. However, pursuant to a raid conducted by the Delhi Vidyut Board (‘DVB’) officials, a bill for an amount of Rs. 3,78,000 was raised and in a Permanent Lok Adalat the said bill was revised to Rs. 2,71,000. He thereafter filed a civil suit. In terms of the order of the Civil Court, he deposited Rs. 1,35,000 and the said suit was still pending. He further stated that NDPL again raised a further bill of Rs. 2,93,000 after including the unpaid amount of the earlier bill. Thereafter, the electricity connection was disconnected by NDPL on account of the non-payment of the bill amount.

11. In his cross-examination, Mr. Sunar admitted that there were three

theft cases of electricity pending against him. The following question and the answer thereto by Mr. Sunar are relevant:

“Q. I suggest it to you that the officers of NDPL had conducted a raid at premises No. O-1/59, Budh Vihar, Delhi on 6th January 2005, 24th March 2005 and 26th May 2005 and you were found indulging in direct theft of electricity?

Ans. I even do not know about the location of Budh Vihar. It is wrong to suggest that after the disconnection of the electricity at my residence, I shifted my plastic dana factory at premises bearing No. O-1/59, Budh Vihar, Delhi and started running the same by committing direct theft of electricity. There is distance of about two kilometres between Village Pooth Kalan and Budh Vihar. It is wrong to suggest that Budh Vihar is at the boundary of Village Pooth Kalan. It is wrong to suggest that I am deposing falsely.”

12. In the impugned judgment, the learned ASJ posed the issue as under:

“Whether the Complainant has been able to prove that it was the accused and the accused alone and nobody else who was found running a plastic dana factory in the premises in question at the time of the raid on 6th January 2005.”

13. On an analysis of the evidence, the learned ASJ observed that Mr. Vijay Sunar had tried “to hide a very important fact from this Court” by making contradictory statements by stating at one instance that there was a distance of two kilometres between Village Pooth Kalan and Budh Vihar and at another instance stating that he did not know about the

location of Budh Vihar.

14. In the considered view of this Court, the burden was on NDPL to show that Mr. Sunar was connected with the premises which were raided. The fact of the matter is that the only way to connect Mr. Sunar to the premises was the evidence of Mr. Surender who supposedly was present in the premises when the raid took place. However, for reasons best known to NDPL, Mr. Surender was not examined as a witness. There is no document on record to show Mr. Sunar either owned the premises or was at any time in possession thereof. The photographs taken at the time of the raid do not show his presence in the premises. Merely because Mr. Sunar was running the factory for manufacturing the plastic dana at his residence in Village Pooth Kalan and the same activity was found to be taking place in the premises in Budh Vihar where the raid was conducted cannot *ipso facto* mean that it was Mr. Sunar who was running the said plastic dana factory at Budh Vihar.

15. The learned ASJ erred in basing his conclusions on the statement of Mr. Sunar under Section 313 CrPC and in his evidence as DW-1. The complaint was by NDPL. The burden was on NDPL to show that the site which was raided either belonged to or was in the possession of Mr. Sunar and that he was the person committing the theft of electricity.

16. The learned ASJ has in the impugned order made the following

observations, which are in the nature of surmises and conjectures: “persons indulging in illegal acts including theft of electricity always try their best to hide/conceal their identity and do not leave any document in the premises. They always work in a clandestine manner. They do not give any name to their business. They do not enter into rent agreement. If the premises are not allotted by any government agency including MCD and DDA, it becomes very difficult to collect ownership documents or tenancy documents.” It is not for the Court to supply the missing links in the case of the complainant in a criminal case. Further, the following reasoning of the learned ASJ to the excuse of the non-examination of Mr. Surender, in the considered view of the Court, is untenable in law:

“It is not the case of the accused that no such Surender was found present at the site or that the said Surender is an imaginary person or is the creation of the mind of the members of the raiding party themselves. Therefore, in the facts and circumstances of the case discussed above, the non-examination of the said Surender in the court is not fatal to the case of the Complainant.”

17. The Court is unable to agree with the learned ASJ that failure to examine Mr. Surender as witness was not fatal to the case of NDPL. He was the person who supposedly informed the officials of NDPL that the premises belonged to Mr. Sunar. None of the members of the raiding party had any personal knowledge of that fact. They also did not gather any documents to corroborate that statement. The circumstantial evidence

that the learned ASJ speaks about in the impugned judgment as emerging from the evidence of PW-1 and PW-2, does not prove beyond reasonable doubt that it was Mr. Sunar who either owned or possessed the premises which was raided and, importantly, that he was seen committing the theft of electricity.

18. Mr. Vikram Nandrajog, learned counsel for NDPL, submitted that since Mr. Sunar was unable to make good the case put forth by him as DW-1 to the effect that he had a metered connection at his premises in Village Pooth Kalan premises, an adverse inference that he was setting up a false case should be drawn against him. In the considered view of the Court, the above submission is without merit. NDPL will have to lead positive evidence to prove the guilt of Mr. Sunar for the offence under Section 135 of the EA. It will not suffice to show that Mr. Sunar was unable to prove his defence. Even assuming that Mr. Sunar was not able to establish his case on a preponderance of probabilities, the burden on NDPL to prove his guilt for the offence of direct theft of electricity beyond reasonable doubt remained and was required to be discharged.

19. For the above reasons, the impugned judgment dated 11th October 2007 of the learned ASJ is hereby set aside. The order determining the civil liability, as well as the order on sentence dated 17th October 2007 are also set aside. The personal bond is hereby discharged.

20. Criminal Appeal No. 720 of 2007 is allowed in the above terms.

Criminal Appeal No. 23 of 2008 is dismissed as infructuous.

S. MURALIDHAR, J

JANUARY 9, 2014

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