

GAHC010123602011



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.A./211/2011

ZAIN UDDIN CHOUDHURY
S/O LT. TOWAHIR ALI CHOUDHURY.

2: ABDUL LATIF

S/O MOKBUL ALI
BOTH ARE RESIDENTS OF VILL. KANISHAIL
P.S. and DIST. KARIMGANJ
ASSAM

VERSUS

STATE OF ASSAM

Advocate for the Petitioner : MR.F K R AHMED

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MRS. JUSTICE MALASRI NANDI

JUDGEMENT AND ORDER (CAV)

Date : 28-06-2023

Heard Mr. A.K. Talukdar, learned counsel for the accused-appellant. Also heard Mr. D. Das, learned Additional Public Prosecutor for the State/respondent.

2. This appeal is directed against the judgment and order dated 22.12.2010 passed by the learned Special Judge-cum-Additional Sessions Judge (FTC), Karimganj in Special Case No. 02/2008, convicting the appellants/accused Nos. 1 and 2 under Section 135(1)(a) of the Electricity Act, 2003 and sentenced them to undergo simple imprisonment for 3(three) months each with fine of Rs.52,000/- and Rs.18,000/- respectively, in default 2(two) months and 1(one) month simple imprisonment respectively.

3. The brief facts of the case is that on 09.04.2008, an inspection was conducted at East Kanishail, Charakuri and Bethail(Umapati) by the Assam State Electricity Board(ASEB) officials and were found that the appellant and three other were utilizing power by unauthorizedly hooking from the L.T. distribution line. Then the electric wires and hooks were seized. On the following day, Sri Niranjan Paul, SDE, Karimganj Electric Division lodged an FIR at Karimganj Police Station against Zain Uddin Choudhury, Abdul Latif and four others who were found utilizing power unauthorizedly. Accordingly, a case was registered vide Karimganj Police Station Case No. 162/2008 under Section 39 of Indian Electricity Act read with Section 379 IPC. Thereafter, charge-sheet has been submitted against 5(five) accused persons including the appellants. As the offence is exclusively triable by the special court, on appearance of the accused/appellants, charge was framed under Section 135(1)(e) of Electricity Act, 2003 and after completion of trial, both the appellants were convicted as aforesaid.

4. It is pertinent to mention here that during pendency of appeal, the appellant Abdul Latif has been expired. Hence, the case against appellant No.2 Abdul Latif was abated. As such, I have discussed the case against the appellant No. 1 Zain Uddin Choudhury only.

5. The learned counsel for the petitioner has argued that the learned trial court has failed to appreciate that the inspection conducted by the ASEB Officials at night at about 9.45 P.M. on 09.04.2008 and without presence of any adult male member in the house of the appellant which is a case of direct violation of the mandatory provision of Section 135(3) of the Electricity Act, 2003. As such, the conviction of the appellant is not sustainable in law and the same is liable to be set aside.

6. Another contention raised by the learned counsel for the appellant is that the seizure list prepared by the ASEB officials was never handed over to the accused/appellant which is required as per Section 100(4) Cr.P.C. There is no evidence on record to show that any such copy of alleged seizure list was ever handed over to the appellant or any attempt was made to do so by the ASEB officials. As such, the conviction passed by the learned trial court is not sustainable in law.

7. It is also submitted by the learned counsel for the appellant that the appellant No.1 i.e. Zain Uddin Choudhury is more than 70 years of age. The offence is compoundable in nature. The alternative argument of the learned counsel is that if conviction is sustained, fine may be imposed.

8. In response, learned Additional Public Prosecutor has argued that since the officers and staff of ASEB, who had inspected premises and prepared seizure list, are not police officers and therefore, their report, oral evidence and documents prepared stands proved and are admissible under Sections 91 and 92 of the Evidence Act and the said evidence need not be further corroborated. Situated thus, the judgment and order passed by the learned trial court does not call for any interference by this court.

9. I have considered the submissions made by learned counsel for the parties. It appears from the record that the other persons named in the FIR settled the matter by paying the amount of theft of energy to ASEB.

10. P.W.1 is Dipankar Nath, the then Senior Manager of Electrical Division of Karimganj. He deposed in his evidence that on 09.04.2008, he along with other staff namely Thambal Singh, vigilance, Indrajit Dutta, Jr, Mangar, Niranjana Paul, SDE and line man Babu Routh went to Kanishail area of Karimganj to apprehend the culprits who committed theft of electric power by hooking. During inspection, they detected Abdur Rahim, Gita Kuri, Rakhi Dey, Zain Uddin Choudhury, Abdul Latif and Kamala Ghosh who were found committing theft of electric energy by way of hooking from electric post and PVC were seized from them. According to

P.W.1, accused Abdul Latif committed theft of energy to the value of Rs.5,526/- and accused Zain Uddin Choudhury committed theft of electric energy to the value of Rs.17,504/-.

11. In his cross-examination, P.W.1 replied that the police also accompanied them, the SDE Nirranjan Paul seized the articles. From the local people, they came to know about the house of Zain Uddin Choudhury. He did not know whether any title suit is pending between Zain uddin Choduruy and ASEB.

12. P.W.2 Nirranjan Paul, SDE, Karimganj Electrical Sub-Division, deposed in his evidence that on 09.04.2008, he along with T. Singh, vigilance officer, Dipankar Nath, Sr. Manager, Indrajit Dutta, Babu Routh and others went to Kanishail, Betail and Charakuri. They detected Kamala Ghosh, Gita Kuri, Rakhi Dey, Haji Abdur Rahim, Zain Uddin Choudhury and Abdul Latif committing theft of eclectic power in their respective houses by way of hooking. Haji Abdur Rahim, later on died and the rest of the accused persons except Zain Uddin Choudhury and Abdul Latif made payment of the value of energy imposed upon them. At Kanishail, they found accused Zain Uddin Choudury and Abdul Latif committed theft of eclectic power in their respective house illegally by hooking from the main eclectic line of the road. They seized 15 meters of PVC wires from the possession of accused Zain Uddin Choudhury which was used for committing theft of power. As per their estimate, the value of the electric power illegally taken by accused Zain Uddin Choudhury to his house was approximately Rs. 17,504/-. P.W.2 also stated that on 09.04.2008 at about 9.30 P.M. they went to the house of accused Zain Uddin Chodhury and 9.45 P.M., they visited the house of accused Abdul Latif and found lighting electric light etc. in their houses by way of committing theft of power.

13. In his cross-examination, P.W.2 replied that there was a title suit pending between the Zain Uddin Choudhury and ASEB vide T.S. No. 228/2005 in the court of Munsiff No.1, Karimganj. Subsequently, on 07.03.2003, the said title suit was withdrawn and their legal advisor informed them that electric service connection might be provided to the premise of Zain Uddin Choudhury but due to the objection made by his brother and other family members, service of connection was not provided to accused Zain Uddin Choudhury.

14. It also appears from cross-examination of P.W. 2 that the local people and the witnesses identified the house of accused Zain Uddin Choudhury. At that time, Zain Uddin Choudhury was not present in his house and the house was open. Except 15 meters of PVC wires with hooks, they did not seize any other thing from the house of accused Zain Uddin Choudhury. The employees of ASEB disconnected the line. They found an electric motor on the *baranda* in the house of Zain Uddin Choudhury. Considering all, they calculated the value of energy stolen. The motor was not seized by them.

15. The allegation against the present appellant Zain Uddin Choudhury is that he had stolen the electric energy by hooking from the main electric line of the road. According to P.W. 2 vide Ext.1(seizure list), 15 meters of PVC wires with hook was seized from the house of appellant Zain Uddin Choudhury in presence of other witnesses. But P.W.3 did not support the seizure of PVC wires from the house of Zain Uddin Chudhury. According to him, one day when he was returning to his house from the market, he saw some ASEB officials in front of the house of accused Abdul Latif and they took his signature in Ext. 1(seizure list). But in his cross-examination P.W. 3 replied that he did not see the ASEB officials removing the PVC wire and hook from the houses of Zain Uddin Choudhury and Abdul Latif. The witness was declared hostile as he did not support the case of prosecution. According to P.W.1 and P.W.2, the accused Zain Uddin Choudhury committed theft of electric power to the value of Rs.17,504/- but it cannot be ascertained on what basis they had calculated the value of energy stolen. It also appears from the evidence on record that at the time of inspection, accused Zain Uddin Choudhury was not present in his house.

16. If we peruse the provisions of the Electricity Act, 2003, it is evidently clear that Section 135 deals with the theft of electricity offences and penalties therein. After report of the theft of electricity, cognizance of the offence under the Electricity Act is taken as per the provision of Section 151 of the said Act which deals as to how cognizance of an offence has to be taken. For ready reference, the provision of Section 151 is reproduced:-

“151. Cognizance of offences- No court shall take cognizance of an offence

punishable under this Act except upon a complaint in writing made by Appropriate Government or Appropriate Commission or any of their officer authorized by them or a Chief Electrical Inspector or an Electrical Inspector or licensee or the generating company, as the case may be, for this purpose:

[Provided that the court may also take cognizance of an offence punishable under this Act upon a report of a police officer filed under section 173 of the Code of Criminal Procedure, 1973:

Provided further that a special court constituted under section 153 shall be competent to take cognizance of an offence without the accused being committed to it for trial.]"

17. After taking cognizance of the offence, the matter is placed before the Special Court constituted for this purpose by the State Government as per the provision of 153 of the Electricity Act. Further, if we see the provision of Section 135 of the Electricity Act, 2003, Section 135(2) and Section 135(3) deal with entry, search and seizure in respect of the unauthorized use and theft of electricity, which is reproduced below:-

“S.135(2)- Any officer of the licensee or supplier as the case may be, authorized 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 or is being, used for unauthorized 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.

S.135(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.”

18. In the present case, it is alleged by the learned counsel for the appellant that when the search was made, the accused/appellant was not present in his house and the seizure list was also not handed over to the appellant. It is also admitted by P.W.2 that appellant Zain Uddin Choudhury was not present at the time of inspection in his house. Ext. 6 shows seizing of original seizure list in connection with theft of electricity, electric line and other materials dated 09.04.2008 seized by Shri Niranjana Paul, SDE from the house/premises of Zain Uddin Choudhury vide PVC wires 15 meters with hook. The original seizure list is not available in the record. The investigating officer seized the original seizure list from Niranjana Paul. From Ext.6, it cannot be ascertained who were the other persons present at the time of seizing of PVC wires from the house of Zain Uddin Choudhury.

19. The learned counsel for the appellant also argued that in the instant case, the cognizance was not taken as per provision of law.

20. After going through the record, it reveals that the FIR was lodged by P.W.1 who at the relevant time was SDE(Sub-divisional Engineer), Karimganj and accordingly a case was registered. No complaint was lodged against the present appellant by any other government

officials and there is also no authorization available in the record that any Chief Electrical Inspector or Electrical Inspector has authorized P.W.1 to lodge the FIR. It also appears that no any report was received from a police station by the special court against the appellant to commit theft of energy for taking cognizance of the case.

21. In addition, in the entire case of the prosecution, there was no independent witness to support the case of the prosecution which also is a procedure well contrary to the provisions of law and that even the inspecting team had not called for any of the neighbours residing in the vicinity of the appellant as required under Section 100(4) of Cr.P.C. Though P.W.3 was examined in the case stating to be present at the relevant time of inspection and seizure from the house of Zain Uddin Choudhury but he did not support the case of prosecution.

22. As regards the seizure of the electric wire etc. is concerned, the appellant Zain Uddain was not served with any seizure list so prepared. Further, the appellant Zain Uddin Choudhury was not issued with any notice by the officers of ASEB prior to the entry made by the officer for search and seizure. This amounts to violation of Section 135(3) of Electricity Act, 2003. Similarly, from the seizure list, it also reflects that the appellant Zain Unddin Choudhury has not used any additional wire but the wire which was disconnected from the electric post has not been exhibited before the trial court as material exhibit. Thus, the case of the prosecution in respect of committing the offence of theft of electric energy by direct hooking is not materially proved. It also appears from the evidence of P.W.2 that the appellant Zain Uddin Choudhury applied before the ASEB for electric connection in his house and he has also paid money for installation of electric connection in his house.

23. After going through the record and the documents available therein, it is evidently clear that on the date of inspection i.e. on 09.04.2008 when the inspecting team inspected the premises of appellant Zain Uddin Choudhury, the inspecting squad had not given intimation to the appellant as is required under the provision nor had the inspecting squad intimated the appellant or his family members about the purpose of inspecting their premises which is a mandatory requirement under the provision of Electricity Act 2003.

24. Similarly, the provisional assessment of the loss and damages caused to the ASEB as assessed by the inquiring officer was also not furnished or provided to the appellant within the prescribed period as per rules which also amounts to violation of the Act. Further, in view of the fact that there was no independent witness to the prosecution and the fact that there is a clear non-compliance of the mandatory compliance of the provisions of the Act, the entire proceedings allegedly initiated by the officers of ASEB give rise to a great element of doubt.

25. It is always a settled position of law that whenever a doubt is created on the prosecution story or on the evidence of the prosecution witnesses, the benefit of doubt is always to be given to the accused person. Thus, in the instant case, there being no independent witness to the prosecution and that there being clear non-compliance and violation of the mandatory requirement of the provisions of the Act, it cannot be said that the prosecution has been able to prove its case beyond reasonable doubt against the appellant Zain Uddin Choudhury for the alleged offence punishable under Section 135 of Electricity Act.

26. On due consideration of the evidences available on the record and the grounds put forth by the accused/appellant before this Court, it is evidently clear that the prosecution has failed to give any justifiable reason for non-compliance of the provisions of the Electricity Act which otherwise are mandatorily required.

27. In the result, the appeal is allowed. The conviction and sentence recorded by the learned Special Judge-cum Additional Sessions Judge, FTC, Karimganj, Assam on 22.12.2010 in Special Case No. 02/2008 is hereby set aside. The accused/appellant Zain Uddin Choudhury is acquitted on benefit of doubt.

28. Send back the LCR.

JUDGE

Comparing Assistant