THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

CRIMINAL APPLICATION NO. 3689 OF 2007

Ajay Rameshwar Agarawal,
Age: 41 yrs, Occ. Business,
R/of: 702, Sumit Sadan, B. K. Road
Mahim (W), Mumbai – 16. ... **APPLICANT**
(Ori. Accused No.1)

V E R S U S

1. The State of Maharashtra.
(In C.R. No.26/96 registered with
MIDC, Police Station, Jalgaon,
Copy to be served through G. P. Office
At Aurangabad Bench, Bombay High Court)

2. MSEB @ Maharashtra State
Electricity Distribution Co. Ltd,
Through Supt. MSEB, Jalgaon
Copy to be served through
Standing Counsel, Aurangabad
Bench, Bombay High Court) ... **RESPONDENTS**

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Mr. Javed R. Shaikh, Advocate for Applicant.
Mr. M. B. Bharaswadkar, APP for Respondent No.1 / State.
Mr. H. M. Karwa, Advocate for Respondent No.2 / MSEB.

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CORAM : **V. K. JADHAV, J.**
DATE : 09th December, 2016.

ORAL JUDGMENT:

. Being aggrieved by the order below Exhibit – 31 in

R.C.C.No.127 of 1997 dated 25th February, 2002 by the Chief Judicial Magistrate, Jalgaon and the judgment and order dated 14th March, 2007 passed by the Additional Sessions Judge-2, Jalgaon in Criminal Revision Application No.132 of 2002 confirming thereby the order passed by the Magistrate as stated above, the original Accused No.1 has approached to this Court by filing the present criminal application.

2 Brief facts giving rise to the present criminal application are as follows:

a. The Applicant herein is arraigned as Accused No.1 in Regular Criminal Case No.127 of 1997 pending at the file of the learned Chief Judicial Magistrate, Jalgaon for the offences punishable under Sections 39 and 44(c) of the Indian Electricity Act, 1910 (hereinafter referred to as "the Electricity Act") and Section 379 of the Indian Penal Code. On the basis of complaint lodged by one Mr. Raghunath, Deputy Executive Engineer, Flying Squad, Maharashtra State Electricity Board, Crime No.26 of 1996 came to be registered at MIDC, Police Station, Jalgaon, against the present Applicant and Trident

Steels Limited for having committed the offences punishable under Sections 39 and 44(c) of the Electricity Act and Section 379 of the Indian Penal Code. It has alleged in the complaint that the aforesaid Trident Company is a consumer of the Complainant / MSEB and in between January 1996 to December 1996, the Accused persons tempered the electricity meter box by installing one DC operator switch of yellow colour below the meter box in the premises of the Company by using 'Y' Phase and 'B' Phase remote switch, committed the theft of the electricity causing loss of Rs.68,82,457/- to the Maharashtra State Electricity Board. After due investigation, the concerned police station has submitted the charge-sheet against present Applicant and the said Trident Steels Limited before the Chief Judicial Magistrate, Jalgaon vide R.C.C No.127 of 1997. The Applicant / Accused No.1 had filed an application under Section 239 of the Code of Criminal Procedure seeking discharge. The learned Chief Judicial Magistrate, Jalgaon by impugned order dated 25th February, 2002 rejected the said application and the learned Additional Sessions Judge-2, Jalgaon by judgment and order dated 14th March, 2007 in Criminal Revision Application No.132 of 2002, confirmed the order passed by the Chief Judicial Magistrate, Jalgaon below Exhibit – 31 in aforesaid Regular Criminal Case No.127 of 1997. Hence this criminal application.

3 The learned counsel for Applicant / original Accused No.1 submits that the Applicant is being prosecuted only because he being the director of the said Company. FIR is devoid of any statement, displaying that the Applicant being a director is responsible for day to day conduct of the business. In absence of these basic averments, the impugned proceedings are not maintainable as against the present Applicant. The learned counsel submits that the Applicant is merely a joint managing director and therefore, in any case his liability is second. Further, nature of duty and powers conferred by the prospectus and articles of memorandum, strictly restraint the domain of activity of the Applicant to financial aspect. Actual production is conferred with vice president and production manager. The supply of

electricity pertains to production with which Applicant has no concern whatsoever. In the instant case, the Company is run by the board of directors, consisting of responsible and experienced persons from various fields. Therefore, the Applicant could not have been prosecuted and the said illegality vitiates the entire trial. The learned counsel submits that in terms of the provisions of Section 49-A of the Electricity Act, it was obligatory on the part of the complainant to make requisite averments in the complaint that the Applicant was in-charge and/or was responsible for the conduct of the business of the Company.

The learned counsel for the Applicant submits that the FIR and the investigation papers, even if accepted on its face value, do not spell out commission of any offence much less the offence of theft of electricity against the present Applicant. The Applicant was not present at the scene of the offence nor it is the case of the prosecution that the Applicant had abated or instigated the commission of offence. The Applicant looks only after the financial aspect of the Company and therefore, he has no concern with the production side of the Company. The learned counsel without prejudice to the rights of the Applicant submits that the final figure of said electricity bill comes to Rs.43.29 lacs, which the said Trident Company has already paid and even Respondent No.2 / Complainant acknowledged the same. Both the Courts below have not appreciated this legal position and erroneously rejected the application Exhibit – 31 filed by the Applicant seeking discharge.

4 The learned counsel for the Applicant in order to substantiate his contentions placed reliance on the following cases:

a. ***Tamil Nadu Electricity Board Vs. Rasipuram Textile Private Limited and others***, reported in, ***(2008) 17 Supreme Court Cases 285***.

b. ***D. B. Mehta and others Vs. Ramesh Rikhavdas Shah and another***, reported in, ***2005 Cri. L. J. 403***.

c. ***Rukmini Narvekar Vs. Vijaya Satardekar and others***, reported in, ***AIR 2009 Supreme Court 1013***.

d. ***State of Tamil Nadu by Ins. of Police, Vigilance and Anti Corruption Vs. N. Suresh Rajan and others***, reported in, ***AIR 2014 (SC (Supp) 1982***

e. ***S. Muruganandan Vs. State by Inspector of Police***, reported in, ***1998 Cri. L. J. 3722***.

f. ***Sunil Bharti Mittal Vs. Central Bureau of Investigation***, reported in, ***AIR 2015 Supreme Court 923***.

5 The learned APP submits that the Applicant / Accused No.1 being the managing director of the Company looking after the day to day conduct of the business of the Company alongwith other directors and in terms of the provisions of Section 49-A of the Electricity Act, the burden will shift on the Applicant / Accused No.1 to prove that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence. During the course of investigation, certain documents came to be seized and those documents unmistakenly point out that Applicant / Accused No.1 was looking after the day to day affairs of original Accused No.2 / Company. The learned APP submits that the Applicant / Accused No.1 relied upon the prospectus and articles of memorandum produced before the Court by him, however, such

material cannot be taken into consideration by the learned Magistrate in view of the provisions of Section 239 of the Code of Criminal Procedure. The learned APP submits that even if the said material is considered, it is clear that Accused No.2 / Company is managed by the board of directors and Applicant / Accused No.1 is a joint managing director of the Company looking after the various functional areas. In terms of the proviso to Section 49-A of the Electricity Act, during the course of trial, the Applicant / Accused No.1 may raise a defence that the act complained is without his knowledge or that he exercised all due diligence to prevent the commission of such offence. The learned APP submits that mere depositing the amount by Accused No.2 / Company would not absolve the Applicant / Accused No.1 from the liability to face the criminal prosecution. The learned APP submits that during inspection, it was found that electricity meter box was tempered by installation of one additional switch being operated by remote control and as such, the theft of the electricity has been committed causing loss of Rs.68,82,457/- to the Maharashtra State Electricity Board. It is thus difficult to accept that even as per prospectus, the Applicant / Accused No.1 is looking after the financial aspect of the Company, had no knowledge about the aforesaid affairs. The learned APP submits that both the Courts below have therefore, rightly rejected the application Exhibit – 31 seeking discharge.

6 On careful perusal of entire charge-sheet, it appears that the investigating officer has collected one document pertains to power of attorney executed on 11th day of January, 1996 in consonance with the resolution passed at the meeting of board of directors of the Company held on 23rd December, 1995 at Bombay. In terms of the said resolution, the board decided to give power of attorney to Mr.A.S.Bhardwaj to represent the Company in the matter and for such acts and deeds as are embodied in the draft power of attorney and the said resolution has been communicated by the present Applicant / Accused No.1 as a managing director authorizing thereby one of the director of the Company to execute the power of attorney on behalf of the Company. On the basis of the aforesaid document, *prima-facie*, it appears that the Applicant / Accused No.1 was in-charge and responsible for the conduct of the business of the Company.

7 Chapter XIX of the Code of Criminal Procedure deals with the trial of warrant cases by the Magistrates and if case instituted on

the police report, as in the present case, Section 239 provides as to when the accused shall be discharged. Section 239 of the Code of Criminal Procedure reads as under:

> "**239. When accused shall be discharged.**– If, upon considering the police report and the documents sent with it under section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing."

8 Provisions of Section 239 are identical to the provisions of Section 227 of the Code of Criminal Procedure, which deals with discharge of accused in a trial before the Court of Sessions. The learned APP has vehemently submitted that no provision in the Code gives the Accused right to file any material or document at the stage of framing of charge and the right is only granted at the stage of trial.

9 In a case, *Rukmini Narvekar Vs. Vijaya Satardekar and others* (supra) relied upon by the learned counsel for Applicant, the Supreme Court while referring three-Judge Bench decision of the Supreme Court in the case of ***State of Orissa Vs. Debendra Nath***

Padhi, reported in, ***(2005) 1 SCC 568***, in paragraph No.9, (Altamas Kabir, J.) has made the following observations:

> "**9.** In my view, therefore, there is no scope for the accused to produce any evidence in support of the submissions made on his behalf at the stage of framing of charge and only such material as are indicated in Section 227, Cr.P.C. can be taken into consideration by the learned magistrate at that stage. However, in a proceeding taken therefrom under Section 482, Cr.P.C. the Court is free to consider material that may be produced on behalf of the accused to arrive at a decision whether the charge as framed could be maintained. This, in my view, appears to be the intention of the legislature in wording Sections 227 and 228 the way in which they have been worded and as explained in Debendra Nath Padhi's case (supra) by the larger Bench to which the very same question had been referred."

10 In paragraph No.29 in the aforesaid case, (Markanday Katju, J.) has made the following observations:

> "**29.** In our opinion, therefore, it cannot be said as an absolute proposition that under no circumstances can the Court look into the material produced by the defence at the time of framing of the charges, though this should be done in very rare cases, i.e. where the defence produces some

> material which convincingly demonstrates that the whole prosecution case is totally absurd or totally concocted. We agree with Shri Lalit that in some very rare cases the Court is justified in looking into the material produced by the defence at the time of framing of the charges, if such material convincingly establishes that the whole prosecution version is totally absurd, preposterous or concocted."

11 In light of the above ratio laid down by the Supreme Court, it is necessary to be seen whether the prospectus produced before this Court by the Applicant / Accused establishes convincingly that the prosecution case is totally absurd or preposterous.

12 Section 49-A of the Electricity Act reads as under:

> "**49-A. Offences by companies.**—(1) If the person committing an offence under this Act is a company, every person who at the time the offence was committed was in charge of, and was responsible to the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:
>
> Provided that nothing contained in this sub-section shall render any such person liable to any punishment, if

he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director or manager, secretary or other officer of the company such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.— For the purposes of this section,—

(*a*) "company" means any body corporate and includes a firm or other association of individuals; and

(*b*) "director", in relation to a firm, means a partner in the firm."

13 I have carefully perused the prospectus and the articles of association of Accused No.2 / Company and it appears that the directors may from time to time appoint one or more of their body to be a managing director or managing directors. It has further mentioned in the said articles of association that the members of the Company in their 7th annual general meeting held on 15th June, 1993 appointed Mr. Suresh R. Agarwal as a managing director and Mr. Ajay

R. Agarwal (present Applicant) as a joint managing director for a period of five years from 1st April, 1993. The learned counsel for the Applicant has brought my attention to the aforesaid documents wherein under the head of "Management" it is stated that Mr. Ajay Agarwal (present Applicant) is Bombay based and takes care of marketing and financial aspects of the company and he is assisted by some other persons, who are also the financial managers. The learned counsel has also brought my attention towards the said head of "Management" wherein it is stated that Mr. Suresh Agarwal looks after the affairs of the factory and assisted by administrative managers.

14 During the course of investigation, the investigating officer has collected one document, which indicates that on 11th January, 1996 in terms of the resolution passed at the meeting of the board of directors of the Company, present Applicant has communicated said resolution as a managing director and thereby authorized one of the director to execute the power of attorney on behalf of the Company in favour of one Mr. A. S. Bhardwaj. As referred in the forgoing paragraphs, the members of the Company in their 7th annual general meeting held on 15th June, 1993 appointed Mr. Suresh R. Agarwal as

a managing director and the present Applicant as a joint managing director for a period of five years. It is also mentioned in the said head of “Managing Director” that the directors may from time to time appoint one or more of their body to be a managing director or managing directors and may from time to time remove or dismiss any of such director from office and appoint another or others in his or their place or places. In the year 1996, if the Applicant / Accused No.1 has signed the aforesaid communication, as collected by the investigating officer during the course of the investigation, posing himself as a managing director and the aforesaid communication *prima-facie* does not appear to be a communication by the Applicant / Accused No.1 in the capacity as a joint director looking after the marketing and financial aspect of the Company exclusively, in the light of Section 49-A of the Electricity Act, the burden shifts on the Applicant / Accused No.1 to prove during the course of trial that the alleged offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of the said offence.

15 In a case *Tamil Nadu Electricity Board Vs. Rasipuram Textile Private Limited and others* (supra) relied upon by the learned

counsel for Applicant, in paragraph No.14 of the judgment, the Supreme Court has made the following observations:

> "**14.** In terms of sub-section (1) of Section 49-A, it is for the complainant to prove that the Director of the Company at the time when the theft was committed was in charge of and/or was responsible for the conduct of its business. Only in the event such an averment is made and sufficient and cogent evidence is brought on record to prove the said allegations, the proviso appended to Section 49-A would be attracted; meaning thereby that only in the event it is proved that a Director or a group of Directors of the Company were in charge of and/or where responsible for the conduce of the business of the Company, the burden would shift on the accused to establish the ingredients contained in the proviso appended to Section 49-A of the Act."

16 In the instant case, on the basis of complaint lodged by Respondent No.2, the crime was registered and after due investigation charge-sheet came to be submitted against original Accused No.2 / Company and the present Applicant / Accused No.1. In the case *Tamil Nadu Electricity Board Vs. Rasipuram Textile Private Limited and others* (supra), a criminal prosecution was lodged not only against the Company, but also against its managing director

and other directors. In the instant case, the other directors have not arraigned as Accused alongwith Applicant / Accused No.1 and on the basis of material collected during the course of investigation, which *prima-facie* discloses that Applicant / Accused No.1 was in-charge and looking after the day to day affairs of the Company, the charge-sheet came to be submitted against him. Thus, the facts and circumstances of the instant case are altogether different.

17 In a case *D. B. Mehta and others Vs. Ramesh Rikhavdas Shah and another* (supra), relied upon by the learned counsel for the Applicant, it is held that if the factum of resignation of a particular director is accepted by the Court on the basis of an entry in a Form No.32, issued under Section 303(2) of the Companies Act, it should accept it in case of all the directors whose names appear in the same Form No.32. In other words, a Court, after recording a finding that a particular director had resigned on a particular day pursuant to the entry in Form No.32 and discharges him by recalling the process, the other directors claiming discharge on the basis of the entry in the very Form No.32 are entitled for discharge. The facts of this case are altogether different and cannot be made applicable to the facts and circumstances of the present case.

18 In the instant case, there are serious allegations about theft of electricity worth of Rs.68,82,457/-. Both the Courts below have therefore, rightly rejected the application at Exhibit – 31 filed by the present Applicant seeking discharge. I do no find any substance in the criminal application. Hence, the following order:

ORDER

I. The criminal application is hereby dismissed.

II. Rule discharged.

III. Criminal application is accordingly disposed of.

[V. K. JADHAV, J.]

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