

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

Date of Decision: 10th February, 2016

+ **CRL.A. 871/2012**

UDAI VEER SINGH

..... Appellant

Through
versus

Mr Shyam Moorjani, Adv.

BSES RAJDHANI POWER LTD. & ORS.

..... Respondents

Through

Mr Sunil Fernandes, SC for the respondent
no.1 – BSES RPL
Mr Hirein Sharma, Additional Public
Prosecutor for the State

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CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. The challenge in this appeal under Section 156 of the Electricity Act, 2003 hereinafter, 'the Act') read with Section 374 Cr.P.C is to the judgment dated 29.05.2012 and order on sentence and civil liability dated 03.07.2012 passed by learned Special Judge (Electricity), Saket Courts, New Delhi vide which the appellant – Udai Veer Singh was convicted and held guilty for offence under Section 135 of the Act and was sentenced to undergo rigorous imprisonment for a period of two years and was also directed to pay fine of Rs.35,53,641/-, out of which a sum of Rs.23,69,094/- was to be paid to the respondent no.1 company towards its loss. The civil liability was assessed at Rs.23,69,094/-.

2. The facts giving rise to filing of the present appeal, in nutshell, are that a complaint under Section 151 of the Act was filed by BSES RPL (hereinafter referred to as 'the company') against Apollo Foods and Udai Veer Singh (the appellant herein) inter alia on the allegations that on 18.07.2007, a joint inspection team inspected the premises number 407/1, Khasra No.460/1, Neb Sarai, near IGNOU, New Delhi. The Apollo Foods was found to be the user while Udai Veer Singh was found to be the registered consumer of the electricity bearing K. No.2520G 3060601 and meter number 22374133. At the time of inspection, the meter was found disconnected and hanging in

idle condition. It was averred that the complainant company was not aware of the constitution of accused number 1 and, therefore, reserved its right to implead the person responsible for day-to-day affairs of the accused number 1. It was also alleged that both the accused, in collusion with each other, were indulging in direct theft of electricity by illegal tapping from BSES LV Lines and the unit was found to be in operation. On seeing the enforcement team, the premises were locked and the users fled away. Illegal wires were used for committing theft and the electric meter and sub meter was seized by the inspecting team. The inspection report, meter detail report, load report and seizure memo were prepared at site. Videography was also carried out. The connected load of 68.534 KW for non-domestic purpose was assessed. On the basis of load applicable tariff, a theft bill of Rs.25,06,307/- was raised. Since the accused persons failed to pay the same, the complaint was filed.

3. After recording pre-summoning evidence, the accused persons were summoned to face the trial. Accused No.2 – Udai Veer Singh entered appearance and submitted that the accused number 1 was a tenant and had vacated the premises. The accused number 1 was dropped due to non-availability of complete details about its identity. The notice of accusation of offence punishable under Section 135 of the Act was served upon the accused number 2 who pleaded not guilty and claimed trial. It was alleged that the meter was in his name which was disconnected by the complainant on 20.10.2004 and he was not using the electricity in any manner and as such was not liable to pay any amount to the complainant.

4. In order to substantiate its case, the complainant examined four witnesses. The entire incriminating evidence was put to the accused while recording his statement under Section 313 Cr.P.C wherein he admitted his ownership of the inspected premises. However, he stated that he had rented out the premises to Apollo Foods for being used as a godown. One Vinod Kumar S/o Sh. Om Prakash was the user and theft of electricity was without his knowledge. He denied his knowledge of gazettes and machines connected to the load and denied the load report for want of knowledge. He also denied that the documents were prepared at site. Removal of wires, meters and sub meter were also denied. He further stated that the premises were rented out to be used only as a godown with no provisions of electricity with a clear understanding that the tenant shall not consume any electricity and use generators for lighting load.

5. Accused examined himself as DW1 and deposed that electricity connection bearing No. 2520G3060601 was installed in the premises, which was disconnected due to non payment on 20.10.2004. The premises were rented out in 2005 to Apollo Foods at a rent of Rs.5,000/ p.m., to be used as a godown without electricity. He further deposed that the owner of Apollo Foods wanted to grab the property using muscle power. He, therefore, filed a complaint against Apollo Foods to the police but no action was taken. However, after inspection, the owners of Apollo Foods vacated the premises with the help of neighbours, as well as, police. According to him one Vimal Pawar was owner of Apollo Foods as per the address of Apollo Foods Bakery. In cross examination, he admitted that no rent agreement or lease deed with Apollo Foods or rent receipts has been placed on record. He also admitted that he also did not place on record copy of any complaint made by him to the police against Apollo Foods.

6. He examined one Arun Chaudhary (DW2), a resident of Neb Sarai, where the inspected premises were situated. He deposed on the lines of DW1 by stating that the premises were rented out to Apollo Foods as a godown. Vimal Pawar was the owner of the Apollo Foods and resided on the first floor of the premises. The accused did not provide any electricity to Apollo Foods. In cross examination, he admitted that he had not seen any rent agreement or lease deed between accused and Apollo Foods. He, however, admitted that the premises was owned by accused Udai Veer Singh. He denied the suggestion that accused was running a bakery unit under the name & style of Apollo Foods at the premises in question at the time of inspection.

7. Learned Special Judge posed two questions for determination:

- (i) Whether theft of electricity was being committed at the premises bearing no.-407/1, Khasra no.-460/1, Neb Sarai, Near IGNOU, New Delhi?
- (ii) Whether the accused was responsible for theft of electricity?

8. As regards question number 1, it was observed that PW1 - Lallan Kumar Diploma Engineer (PW1) has deposed that one electricity meter bearing No.22374133 pertaining to connection No.2520G3060601 was found installed at the premises in question. The meter was in idle condition. The meter was found hanging at the premises. Inspection of the premises further revealed that ovens were found hot and

freezers were found cold. Videography was also done by PW4 Rajesh which revealed that path of one illegal wire had been duly traced leading to the premises in question. The electronic meter bearing no.22374133 is also covered which was hanging disconnected. Wire leading to the premises was tested with a 'clip on' meter, which recorded a reading of 12.8 amperes showing that current was flowing through the wire. Videography also covers a generator set which was covered with tarpaulin sheet and was nonfunctional. Bakery unit inside the premises was found stocked with raw material as well as finished goods. Machines were switched on and were found running. All these facts were sufficient to prove that theft of electricity was being committed and the bakery unit was running at direct theft.

9. As regards question number 2, it was observed that it is the case of the complainant that accused Udai Veer Singh was the registered consumer. As regards the identity of proprietor of Apollo Foods in the complaint itself, it was alleged that details were not available and shall be furnished as and when available. Due to non-availability of complete details about accused number 1, Apollo Foods was dropped. The said order was challenged by the complainant before this Court, however, without success. According to accused Udai Veer Singh, the premises were let out to Apollo Foods. However, at no point of time he came forward and furnished the details of the proprietor of Apollo Foods. He was the best person to disclose complete details of the proprietor of Apollo Foods which he kept close to his chest till the fag end of the trial when he made a vague attempt to implicate one Vinod Kumar S/o Sh. Om Prakash as proprietor of Apollo Foods. The said attempt was repelled by the court vide order dated 19.04.2012 when the application moved by the accused under Section 319 Cr.P.C was dismissed. The said order was never challenged by the accused. It was also observed by learned Special Judge that the trial of the case took almost four and a half years. During this period at no point of time accused disclosed the name of the proprietor of Apollo Foods. Admittedly, no rent agreement or rent receipts were placed on record by the accused to indicate that Apollo Foods was a tenant in the inspected premises. Similarly, the plea of accused that proprietor of Apollo Foods wanted to grab the property and had used muscle power to throw out the landlord which resulted in filing a complaint by Udai Veer Singh to the police was also not proved as even the copy of such complaint was never placed on record nor any person from police department was summoned to prove the same. Mr Udai Veer Singh, being the owner of the premises and registered

consumer of the electricity connection was the best person to disclose the identity of accused number 1 as he was in possession of special knowledge of this fact. His silence in disclosing the details and identity of the accused no.1 draws adverse inference against him. Under the circumstances, learned Special Judge convicted the accused for offence punishable under Section 135 of the Act and sentenced as mentioned hereinbefore.

10. Feeling aggrieved, the present appeal has been preferred.

11. Assailing the findings of learned Trial Court, learned counsel for the appellant submitted that the appellant was not the consumer of electricity as the connection taken by him was disconnected in the year 2004 and thereafter the premises were let out to Apollo Foods for storage of goods. The respondent was fully aware at the time of inspection that Apollo Foods is the sole user and in occupation of the premises in question and the appellant is only the owner of the property. However, the respondent deliberately ignored the address of accused number 1 which was available in video footage made by the respondent's inspection team. The Trial Court ignored the improvements made by the respondent's witnesses during pre-summoning and post summoning evidence. The Trial Court also failed to appreciate the non-compliance of Regulation 57, Clauses VII and VIII of Delhi Electricity Supply Code and Performance Standards Regulations, 2007 by the respondent. The appellant had filed an application under Section 319 Cr.P.C for re-summoning the accused number 1 which was dismissed. The application for review under Section 157 of Electricity Act was also dismissed. The Trial Court had convicted the appellant on the ground that he was the owner of accused number 1 which was not the case of the respondent as such the impugned judgment deserves to be set aside.

12. Repelling the contentions of learned counsel for the appellant, the counsel for the respondent / BSES submits that the Trial Court did not convict the appellant as the proprietor of Apollo Foods but being the registered consumer of the electricity connection. It is an undisputed case of the parties that the appellant is the owner of the premises and registered consumer of the meter which was disconnected about four years ago for non-payment of dues. In order to prove that the premises were let out to Apollo Foods and it was using the premises and consuming the electricity, no rent receipt or rent agreement have been placed on record to prove tenancy of Apollo Foods. Moreover, the appellant has not placed on record any documents to show that there

were any hostile relations between him and Apollo Foods. If there were indeed such relations, a man of reasonable prudence would initiate legal action for eviction of such tenant but the appellant did not initiate any legal action and not even a notice was issued. Further, no complaint was made to the police or BSES regarding indulgence of Apollo Foods for direct theft of electricity. It was alleged that the owner of Apollo Foods wanted to grab his property. If that was so, the appellant being the owner ought to have been more vigilant since as per his own admission, the supply of premises was disconnected before the said premises was given on rent. In the absence of a legal connection, there is more likelihood of indulgence in direct theft of electricity and the appellant ought to have inspected and inform BSES. Counsel further submits that in terms of Third Proviso to Section 135 of the Act, once it was proved that there exists material of abstraction / theft of electricity, it is presumed that the appellant had indulged in theft of electricity unless rebutted and thus the onus to prove that the appellant was not indulging into theft of electricity was upon the appellant. However, the appellant failed to discharge the onus and was rightly convicted by the Trial Court. As such, the impugned order does not call for any interference and the appeal is liable to be dismissed.

13. I have given my considerable thoughts to the respective submissions of learned counsel for the parties and have also perused the written submissions filed by them.

14. As far as theft of electricity is concerned, same stands proved from the testimony of PW1 and PW4. The electricity meter bearing number 22374133 pertaining to K. No.2520G 3060601 installed at the premises was found in an idle condition. It is the case of the appellant himself that the meter was lying disconnected. However, on inspection of the premises it was found that one illegal wire was leading to premises in question and on testing it recorded reading of 12.8 amperes showing that the current was flowing through the wire. Ovens were found hot and the freezer was found cold. Apollo Foods unit inside the premises was found stocked with raw materials as well as finished goods. Machines were found to be running. Under the circumstances, since the electricity connection was disconnected due to non-payment of dues and the bakery unit was found to be in running condition, the factum of theft of electricity was duly proved.

15. Section 135 of the Act provides for theft of electricity. The third proviso to Section 135 of the Act is relevant for adjudication of present controversy. It reads as under:

“Provided also that if it is proved that any artificial means or means not authorised 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.”

16. A bare reading of this proviso goes to show that once it is proved that there exists abstraction / theft of electricity, it is presumed that the consumer had indulged in theft of electricity. The presumption, however, is rebuttable but this onus is upon the appellant who was the registered consumer of the electricity connection to prove that there was no theft of electricity in the premises. The appellant has pleaded that the premises were rented out to Apollo Foods, however, such a plea was neither taken in reply to the notice under Section 251 Cr.P.C served upon him or thereafter. In fact, in reply to notice under Section 251 Cr.P.C, the appellant took the following plea:

“I plead not guilty and claim trial as there was a meter in my name which got disconnected by the complainant on 20.10.2004 and afterwards being a registered consumer, I cannot be held liable for the theft of electricity and further I was not using the electricity in any manner whatsoever and was not present at the site when inspection was conducted and I have been wrongly implicated in the case of theft of electricity and a false case has been made out against me and I was not using the premises in question. I am not liable to pay any damage and loss to the complainant company.”

17. Further it has come in the deposition of PW1 Lallan Kumar and PW3 Maneesh Arora that the inquiries from the workers present at the spot and neighbours revealed that the owner and user of the premises is Udai Veer Singh and he is also the owner of Apollo Foods. Pertinently, this portion of their testimony was not challenged in cross examination. Even no suggestion was given to any of the complainant's witnesses that the premises were let out to Apollo Foods or who was the proprietor / partner of this company. The factum of letting out the premises to Apollo Foods had seen the light of

the day for the first time when statement of accused under Section 313 Cr.PC was recorded and when he examined himself as DW1 and examined DW2. Even at that time, he did not place on record any rent agreement or rent receipt. Moreover, he took the plea that muscle men of Apollo Foods were trying to grab the property for which he lodged a complaint with the police but even copy of any such complaint was not placed on record. He was in possession of best evidence which he withheld as such learned Special Judge rightly held that for non-production of relevant documents and non-disclosure of material facts, an adverse inference was liable to be drawn against him.

18. This is not the end of the matter. In the complaint itself, it was alleged by the complainant that it was not aware of the composition of Apollo Foods and therefore as and when it will come to know about its composition, the court will be informed. However, since the company could not furnish the details of Apollo Foods, which was initially impeaded as respondent no.1, it was deleted from the array of parties. The said order was challenged by the company before this Court but without any success. Even at that time, the complaint was being contested by the appellant and nothing prevented him from providing the address of the person to whom the premises were let out but he maintained complete silence. It was only at the fag end of the trial when the matter was listed for final arguments that an application under Section 319 of the Code of Criminal Procedure was moved by him stating that Mr Vinod Kumar son of Om Prakash was the proprietor of Apollo Foods. By a detailed order, the application was dismissed vide order dated 19.04.2012. The appellant did not choose to challenge this order. Under the circumstances, after taking note of the entire evidence which was brought on record, learned Special Judge rightly observed that the appellant being the owner of the premises was the best person to disclose the identity of Apollo Foods but his failure to disclose the same, leads to an adverse inference against him. Moreover, as per the proviso to Section 135 of the Act, although the initial burden was on the complainant to establish abstraction / theft of electricity but after the complainant succeeded in establishing the said fact, it was to be presumed that the appellant being the owner of the premises and registered consumer of electricity connection was indulging in theft of electricity. The onus to rebut this presumption was upon the appellant. However, he miserably failed to discharge the same.

19. The submissions of learned counsel for the appellant that the address of accused number 1 was available in video footage made by the respondent's inspection team and on that address he was never served, is not now available to the appellant since, as stated above, it was in the presence of the appellant that accused number 1 was deleted from the array of parties and the appeal against that order was also dismissed. Even at that juncture, the appellant did not make any effort to disclose the address of Apollo Foods.

20. As regards non-compliance of Regulation 15 Clauses VI and VII, Delhi Electricity Supply Code, it seems that such a plea is being taken for the first time and no such plea was taken before the Trial Court. As such, same is not available to him.

21. After passing the impugned order, a review application under Section 157 of the Act was filed by the appellant which was dismissed on 24.07.2012. However, even this order was never challenged by the appellant.

22. The net result of the aforesaid discussion is that the findings of the learned Special Judge is based on the evidence on record and a well-reasoned order has been passed which does not call for any interference as such the appeal is dismissed. Pending applications, if any, stand dismissed.

23. As per record, the sentence of the appellant was suspended on i.e. 31.07.2012, the very first date of filing of the appeal and the matter was referred to Delhi High Court Mediation & Conciliation Centre for settlement. However, the matter could not be settled. The order granting suspension of sentence was continued thereafter. The appellant has also not deposited the fine imposed by the learned Special Judge. Since the appeal of the appellant has been dismissed, he is directed to surrender before the learned Special Judge on 15.02.2016 to serve the sentence failing which learned Special Judge will take necessary steps to get him arrested and serve the sentence.

Trial Court record be sent back forthwith along with a copy of this judgment.

(SUNITA GUPTA)

JUDGE

FEBRUARY 10, 2016/rd