

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 74 OF 2007

1. Pandit S/o Muktaji Pokharkar,
Age : 32 years, Occu. Agri.
R/o : Math Jalgaon, Tq. Ambad,
District Jalna.

(The appeal is abated against appellant
No.1 as per Hon'ble Court's order
dated 07-02-2019.)

2. Bhausahab S/o Ambadas Karke
Age : 30 years, Occu. Agri.
R/o : Math Jalgaon, Tq. Ambad,
District Jalna.

..APPELLANTS

VERSUS

The State of Maharashtra

..RESPONDENT

...

Appeal abated against appellant No. 1
Mr. Y.B. Bolkar, Advocate for Appellant No. 2
Mr. D.R. Kale, APP for Respondent- State

CORAM : K.K. SONAWANE, J.

RESERVED ON : 28th MARCH, 2019

PRONOUNCED ON : 04th APRIL, 2019

JUDGMENT :-

1. This appeal is directed against the impugned Judgment and order of conviction and resultant sentence passed by the learned Additional Sessions Judge, Jalna, in Special Case (Elec.) No.11 of 2006 for the offence punishable under Section 135 of the Electricity Act, 2003 (for short "Act of 2003"). The appellants are convicted for the offence punishable under Section 135 of the Act

of 2003 and they are sentenced to suffer simple imprisonment for six months and to pay a fine of Rs. 5000/- i/d to suffer simple imprisonment for one and half months.

2. Being dissatisfied by the impugned findings of conviction and resultant sentence, the appellants taking recourse of Section 374 of the Code of Criminal Procedure (for short "Cr.P.C.") preferred the present appeal. It is worth to mention that, pending the appeal, appellant No. 1-Pandit Muktaji Pokharkar, passed away. Therefore, present proceedings of appeal came to be abated to the extent of appellant No. 1, following his death pending appeal. Now, the present appeal came to be entertained to the extent of grievance propounded on behalf of appellant No. 2- Bhausahab Ambadas Karke only.

3. It has been alleged on behalf of prosecution that, on 26-10-2005 in the noon hours at about 3.15 p.m., the members of flying squad of Maharashtra State Electricity Distribution Company Ltd. (for short "MSEDCL") Ambad Rural visited to the village namely Math Jalgaon, Tq. Ambad, District Jalna to detect activities of mischief of theft of electricity. It has been alleged that members of flying squad spotted the mischief of theft of electricity by the appellant for domestic purpose by putting the hook on the live cable of MSEDCL. Thereafter, the members of flying squad inspected the residential house of

appellant and calculated the cost of electric energy stolen by the appellant. It was revealed that appellant - Bhausahab Karke committed theft of electrical energy worth Rs. 2592/- by putting hook on live cable of MSEDCL. The members of flying squad seized the hook and cable used for theft of the electricity. The panchnama was drawn in presence of panchas.

4. Thereafter, the complainant Junior Engineer Mr. Anand Chandrakant Pathak approached to the Police of Ambad Police Station and lodged the report. The concerned PSO registered the Crime No. 3077 of 2005 under Sections 135 and 139 of the Act of 2003 and set the penal law in motion. The investigation was entrusted to the Police Head Constable Shri Kakad. He recorded the statements of witnesses acquainted with the facts of the case. He collected the relevant documents. He apprehended the appellants/accused for the sake of investigation. After completion of investigation, he preferred the charge-sheet against both the appellants. It was revealed that the charges levelled against the appellants are triable by the Special Court, therefore, the learned Magistrate transmitted the proceedings of RCC No. 32 of 2006 to the concerned Special Court for trial of the accused within the ambit of law.

5. The learned Additional Sessions Judge framed the charges against both the accused and proceeded for trial. In order to

bring home guilt of the accused, prosecution examined in all six witnesses in this matter. The learned Sessions Judge also recorded the statements of appellants under section 313 of the Cr.P.C. However, after appreciating oral and circumstantial evidence adduced on behalf of prosecution on record, the learned Sessions Judge arrived at the conclusion that both the appellants/accused are guilty of the charges under Section 135 of the Act of 2003. Therefore, learned Sessions Judge awarded sentence of simple imprisonment for six months and to pay a fine of Rs. 5000/- i/d to suffer simple imprisonment for one and half months. The learned Sessions Judge acquitted both the accused for the charges under Section 139 of the Act of 2003 and passed the impugned Judgment and order, which is the subject-matter of the present appeal.

6. The evidence of prosecution witnesses, P.W.1- Sayaji Gadekar, P.W.2- Shaikh Musthak Shaikh Imam, P.W.3-first informant Mr. Anand Pathak, P.W.4- Vijay Suradkar and P.W.5- Dnyanoba Kedare are available on record. It is to be noted that all these witnesses are employees of MSEDCL and at the relevant time were members of flying squad constituted for detecting activities of theft of electricity. P.W.1-Sayaji was line helper and P.W. 2 Shaikh Mustak was Assistant Lineman. They deposed that on the date of incident i.e. on 26-10-2005 in the noon hours, they had been to Math Jalgaon accompanied with Junior Engineer

P.W.3 - Shri. Pathak and others for the purpose of raid to detect theft of electricity. They both added that in the village they saw that the villagers used to commit theft of electricity by putting hook on the live cable for domestic purpose. They visited to the house of appellant for inspection. P.W.2 Musthak also acted as Panch for panchnama of the inspection carried out at the house of deceased appellant No. 1 – Pandit Pokarkar. It is to be noted that P.W.2-Shaikh Musthak was not panch witness for panchnama of inspection drawn at the house of appellant No. 2- Bhausahab Karke.

7. P.W.3-Anand Pathak, Junior Engineer, deposed in the similar fashion being member of flying squad. He stated about mischief of theft of electricity by putting hook on the live cable of MSEDCL in the village. He testified about panchnama drawn at the house of appellant No. 2 - Bhausahab Karke marked as (Exhibit-28). Thereafter, he filed FIR (Exhibit-29) for penal action against the appellants for allegation of theft of electricity. The prosecution also examined P.W. 4-Junior Engineer Suradkar and P.W.5-Kedare Assistant Lineman, who was also present at the time of raid for detection of theft of electricity by appellants.

8. Learned counsel for appellant-Bhausahab Karke scathingly assailed that the entire evidence adduced on behalf of prosecution on record is incredulous, doubtful and do not inspire

confidence. All the prosecution witnesses are interested and partisan witnesses. They all were employees of MSEDCL and members of the flying squad. He described the evidence of prosecution witnesses and criticized that there were villagers thronged at the spot of incident, but no any single resident of locality or person from village came forward to favour the prosecution. Learned counsel also harped on the circumstances that in absence of evidence of any independent witness, the evidence of interested witness could not be considered for adverse inference against the appellants. He has also drawn attention towards the provisions of Section 135 (3) of the Act of 2003, in which it was incumbent for the members of the flying squad to take search of the domestic place in presence of occupants of that premise or in presence of any person on his behalf. In the matter in hand, there was no compliance of the provision of Section 135(3) of the Act of 2003. The learned counsel also raised doubt about identification of the house of appellants being place of offence for theft of electricity. He described the circumstances in detail and consequently urged to exonerate the appellant - Bhausahab Karke for the charges pitted against him.

9. The perusal of entire oral and circumstantial evidence adduced on record on behalf of prosecution adumbrates that arguments advanced on behalf of appellant - Bhausahab Karke

appears much more sustainable and considerable one. Admittedly, all prosecution witnesses are the employees of MSEDCL and at the relevant time they all were members of flying squad constituted to detect theft of electricity. The evidence of prosecution witnesses are sufficient to establish that there was theft of electricity by putting hook on the live cable of MSEDCL for domestic purpose. But, the evidence of these all the prosecution witnesses did not point out needle of suspicion towards appellant-Bhausahab Karke that he was the only person, who put hook on the live cable of MSEDCL with intention to commit theft of electrical energy.

10. Moreover, P.W.3 -first informant Anand Pathak produced and proved panchnama (Exhibit-28) about inspection carried out at the house of appellant-Bhausahab Karke for alleged theft of electricity. Undisputedly, P.W.3-Anant Pathak was head of the flying squad. It remains a conundrum that for what reason the document – panchanama (Exhibit-28) was not produced and proved by adducing evidence of independent panch witnesses, in whose presence it was drawn during the relevant period. Moreover, there is no any positive evidence on record to arrive at the conclusion that alleged domestic place where inspection was carried out for allegation of committing theft by putting hook on live cable, was the dwelling house of appellant. It has also not made clear that the house was in possession of sole appellant-

Bhausahab Karke only. The IO did not take any efforts to record the statement of any other neighbours or residents of the locality to establish the circumstances that the appellant-Bhausahab Karke was residing in the alleged house at the relevant time and he was in conscious possession of spot of occurrence.

11. At this juncture, it is essential to take into consideration, the mandatory provision as prescribed under section 135 (3) of the Act of 2003, which reads as under:-

"135: Theft of electricity (1) Whoever, dishonestly-

(2) xxxx

(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."

12. In the matter in hand, the entire evidence of the prosecution witnesses is silent on this material aspect of search of the domestic place in presence of the appellant or any person on his behalf. Moreover, there are no whispers in the alleged panchnama in regard to the same. In such circumstances, also non-compliance of mandatory provision creates serious flaw in the prosecution case.

13. In the above premise, I am of the considered opinion that the impugned findings of conviction and resultant sentence expressed by the learned trial Court are perverse, imperfect and not within purview of law. All the prosecution witnesses are interested and partisan witnesses in this case. There were no endeavour on the part of prosecution to adduce evidence of any independent witness to fortify the evidence of MSEDCL Personnel. Moreover, evidence of MSEDCL Personnel is not sufficient to prove that the appellant-Bhausahab Karke was the occupant of alleged domestic place where the theft of electrical energy was detected. There was also no positive evidence to prove the overtact of the appellants for committing theft of electricity by putting hook on the live cable of MSEDCL. The evidence of employees of the MSEDCL office appears to be cryptic and slender in nature. Therefore, their versions do not inspire confidence for any adverse inference against the appellant-accused.

14. It was incumbent on the part of prosecution to prove the conscious possession of appellant – Bhausahab Karke over the alleged premise of theft. Moreover, there was no endeavour to collect documentary evidence from the concerned Grampanchayat or Civil Authority etc. to show that the appellant was occupant of the premise and he consumed electrical energy by mischief of stealing it, after putting hook on the live cable of

MSEDCL. In view of these circumstances, there is no alternative but to set aside and quash the impugned Judgment and order of conviction and resultant sentence passed by the learned trial Court and to absolve the appellant - Bhausahab Karke for the charges pitted against him.

15. In view of above discussion, the appeal stands allowed. The impugned Judgment and order of conviction and resultant sentence passed by learned *Ad-hoc Additional Sessions Judge-4, Jalna*, in Special Case (Elec.) No. 11 of 2006, dated 03-02-2007 is hereby quashed and set aside. The appellant Bhausahab Ambadas Karke is hereby acquitted for the offence punishable under Section 135 of the Electricity Act, 2003. His bail bonds stand cancelled. Fine amount of Rs.5000/-(Rupees Five Thousand) deposited by the appellant - Bhausahab Ambadas Karke be refunded to him, after expiry of appeal period. The rest of fine amount of Rs.5000/-(Rupees Five Thousand) deposited on behalf of deceased appellant - Pandit Muktaji Pokharkar be forfeited to the State. Muddemal property being worthless be destroyed after appeal period is over.

16. Accordingly, the appeal stands disposed of in above terms. No order as to costs.

[K. K. SONAWANE]
JUDGE