

CRR No.4405 of 2016

Date of decision : March 11, 2019

Salil Khana

....Petitioner

Versus

State of U.T., Chandigarh

....Respondent

CORAM: HON'BLE MR. JUSTICE ARVIND SINGH SANGWAN

Present: Mr. Jatin Salwan, Advocate
for the petitioner.

**Mr. Rajiv Sharma, AAP
for U.T., Chandigarh.**

ARVIND SINGH SANGWAN J. (Oral)

Prayer made in the instant petition is for setting aside the judgment and order of sentence dated 19.5.2006 passed by the trial Court vide which the petitioner was directed to pay a fine of Rs.1,000/- and in default of payment of fine, to undergo simple imprisonment for one month as well as the judgment dated 24.5.2016 passed by the lower appellate Court vide which the appeal filed by the petitioner was dismissed.

Brief facts of the case are that on 2.6.2004 Sub Divisional Officer (OP), Sub Division No.10, Sector 40-A, Chandigarh informed the Investigating Officer to reach at the spot, i.e. House No.295, Sector 40-A, Chandigarh. On reaching at the spot, the Sub Divisional Officer (Electricity Operation), Sub Division No.10 lodged a complaint against the residents of House No.295, Sector 40-A, Chandgiarh with the allegations that they are using electricity supply by using unfair means, i.e. steeling the electricity by

by-passing the metering equipment. On receiving the said complaint, SI Amarjit Singh visited the house and found that the petitioner Salil Khanna was consuming the electricity by installing PVC cable-wire connected with direct supply to the meter. Thereafter, the FIR was registered and during the investigation, the cable-wire and other things, which were installed by the petitioner, were taken into possession and challan under Section 379 IPC read with Section 39 of the Electricity Act was submitted.

The the trial Court recorded the statement of PW1 Dharam Singh, SDO-complainant who supported the prosecution version and deposed that he has given the complaint to the police Ex.PW1/A and vide memo Ex.PW1/C, the electric wire was taken in possession as well as the electric wire was produced as Ex.PW1/X. This witness, denied that no theft was committed by the petitioner or an FIR was registered due to personal enmity.

PW2 Amarjit Singh, Investigating Officer of the case also proved the complaint Ex.PW1/A made by the complainant, his endorsement Ex.PW2/A made on the said complaint, further endorsement Ex.PW2/B of SI Hari Kumar, who recorded the FIR Ex.PW@/C on the basis of complaint, memo Ex.PW1/C vide which the electricity wire was taken into possession from the spot, rough site plan Ex.PW2/D of the place of occurrence, memo. Ex.PW2/E vide which the accused was arrested and personally searched, complaint Ex.PW/1B made under the Electricity Act. He further deposed that during investigation he recorded the statements of witnesses and after completion of investigation challan was prepared by Inspector Hardev Singh. This witness was also cross examined at length,

but the too could not force the Court to disbelieve the case of the prosecution. He remain affirm to his stand taken in the examination-in-chief. He denied the suggestion that he has registered the present FIR at the instance of SDO as he was having personal enmity with the accused. He also denied the suggestion that he was deposing falsely. He also stated that the illegal connection was disconnected in his presence.

PW3 Gurpreet Singh also deposed on the same lines as stated by PW1 and proved the version in the FIR.

The trial Court, thereafter, held the petitioner guilty and offence punishable under Section 379 IPC read with Section 39 of the Electricity Act vide judgment dated 19.5.2006 and order of sentence dated 19.5.2006 imposed a penalty of Rs.500/- each under Section 379 IPC and Section 39 of the Electricity Act with default clause that if the petitioner failed to deposit the fine, he will undergo simple imprisonment for one month. The petitioner paid the fine and, thereafter, preferred the appeal. The learned appellate Court, vide its judgment dated 24.5.2016 dismissed the appeal primarily observing that there is a delay of 07 years and 10 months in filing of the appeal and the same cannot be condoned.

Counsel for the petitioner submitted that the petitioner was under a *bonafide* belief as informed by his counsel that the was acquitted, whereas the petitioner is working in an electronic media and is now facing the consequence of the impugned judgment of conviction 14.5.2006 and is being treated as a convict and certain amenities are denied to him which he is otherwise entitled to being working in the electronic media. It is further submitted that the petitioner is an educated person and before he filed the appeal before the lower appellate Court, in intervening period of about

seven years, he was under the impression that he stands acquitted. However, when he was denied permission in certain functions, he came to know about the said order.

It is further argued on behalf of the petitioners that the petitioner was not owner of the property and, therefore, he cannot be held as a consumer by the Board and he would not liable to commission of theft of energy. It is stated that the property was owned by one Bhawant Singh, landlord, who is rendered in which it to late Ruldu Khanna and in the absence of the arraying them as accused, petitioner is solely held guilty of the offence. It is further argued that the petitioner had shown *bonafide* ground for condoning the delay before the lower appellate Court and the lower appellate Court should have adjudicated upon the appeal on merits instead of dismissing it on a technical ground that the delay cannot be condoned.

During the course of arguments, the counsel for the petitioner has prayed that considering the long pendency of litigation against the petitioner as he is facing the criminal prosecution since long, the sentence awarded by the trial court, be converted into a probation of good conduct in terms of Section 3 and 12 of the Offenders Act, 1958.

Learned counsel appearing for U.T., Chandigarh has not disputed the factual position that the lower appellate Court has dismissed the appeal on a technical ground and has not adjudicated the same on merits.

After hearing counsel for the parties, I find merit in the present appeal.

As per Section 360 of the Code of Criminal Procedure, the trial Court is to record a finding that whether a convict is entitled to benefit of Probation of Offenders Act, 1958 before sentencing him the conviction. It is held by Hon'ble the Supreme Court in **Eliamma and another Vs. State of Karnataka**, 2009(2) RCR (Criminal) 47 that the Court is bound to examine whether the convict is entitled to benefit of probation.

For reference Sections 3 and 12 of the Probation of Offenders Act, 1958 is reproduced as under :-

“Section 3 – The Probation of Offenders Act, 1958-

Power of Court to release certain offenders after admonition:

When any person is found guilty of having committed an offence punishable under Section 379 or Section 380 or Section 381 or Section 404 or Section 420 of the Indian Penal Code (45 of 1860), or any offence punishable with imprisonment for not more than two years, or with fine, or with both, under the Indian Penal Code or any other law, and no previous conviction is proved against him and the Court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient so to do, then, notwithstanding anything contained in any other law for the time being in force, the Court may, instead of sentencing him to any punishment or releasing him on probation of good conduct under Section 4, release him after due admonition.

**Section 12 – The Probation of Offenders Act, 1958 -
Removal of disqualification attaching to conviction –**

Notwithstanding anything contained in any other law, a person found guilty of an offence and dealt with under the provisions of Section 3 or Section 4 shall not suffer disqualification, if any, attaching to a conviction of an offence under such law :

Provided that nothing in this Section shall apply to a person who, after his release under Section 4 is subsequently sentenced for the original offence.

Therefore, as provided under Section 360 Cr.P.C. read with Section 3 and 12 of the Probation of Offenders Act, the Court while convicting an accused must consider the age, character and antecedents of the offender and pass an order whether he is entitled to be released on probation of good conduct or not.

A perusal of the judgment passed by the trial Court as well as by the lower appellate Court would show that no such finding has been recorded that why the petitioner is not entitled to be released under Section 3 of the Probation of Offenders Act, 1958 after due admonition or upon such order, as per Section 12 of the Act he will incur no disqualification attached to his conviction, in case, his case is dealt with under Sections 3 and 4 of the Probation of Offenders Act.

Considering the fact that the FIR pertains to the year 2004 and there is no other case against the petitioner apart from this FIR, and also there is no complaint that from 2004 till date he is involved in any other

case, considering the nature of offence committed by him the petitioner is held entitled to benefit of Section 3 of the Probation of Offenders Act and, therefore, the order of sentence passed by the trial Court is liable to be set aside. Needless to say that the lower Appellate Court instead of decided the appeal on merits has dismissed it on technical ground of condoning the delay without examining the fact that the judgment of conviction and order of sentence passed by the trial Court would have an adverse consequences on the professional life of the petitioner.

Accordingly, this petition is allowed and the order of sentence dated 19.5.2006 passed by the trial Court is modified. It is directed that the petitioner be released on probation after due admonition and the order granting him probation would not effect his service carrier in view of Section 12 of the Probation of Offenders Act, 1958.

March 11, 2019
satish

(ARVIND SINGH SANGWAN)
JUDGE

Whether speaking/reasoned : YES / NO

Whether reportable : YES / NO