

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CRIMINAL APPELLATE JURISDICTION  
CRIMINAL APPEAL NO.1139 OF 2003**

The State of Maharashtra )  
(Through PI, Malegaon City Police Station, )  
Malegaon, District – Nashik ) ....Appellant/Complainant

V/s.

1. Girish Shankarlal Ostawal )  
Age about : 42 years, Occ.: Business )  
R/a. Islampura, S.No.47-B, )  
Malegaon, District – Nashik )  
2. Dilip Shankarlal Ostawal )  
Age about : 35 years, Occ.: Business )  
R/a. Islampura, S.No.47-B, )  
Malegaon, District – Nashik ) ....Respondents/Accused

----

Ms. Anamika Malhotra, APP for appellant.

Mr. Rashmin Khandekar, Advocate, appointed as Amicus Curiae.

Mr. Ashutosh Gavnekar i/b. Mr. C.G. Gavnekar for respondent nos.1 and 2.

----

**CORAM : K.R.SHRIRAM, J.  
DATE : 7<sup>th</sup> JANUARY 2020**

**ORAL JUDGMENT :**

1           At the outset, I have to note that on 3<sup>rd</sup> January 2020 as the accused were not represented, this Court appointed Mr. Rashmin Khandekar, an Advocate practicing in this Court, as Amicus Curiae. I have to note that Mr. Khandekar's contribution has been immense and he also submitted a very precise note on the matter for the Court's benefit. Today accused were represented by Mr. Gavnekar, who simply adopted the submissions made by Mr. Khandekar.

2           This is an appeal impugning an order and judgment of acquittal passed by Judicial Magistrate First Class, Malegaon, on 23<sup>rd</sup> April 2003

acquitting two accused of offence punishable under Section 39 (*Theft of energy*) and Section 44 (*Penalty for interference with meters or licensee's works and for improper use of energy*) of the Indian Electricity Act, 1910 ("the said Act").

3           The prosecution's case in brief is that in view of Special Drive of Vigilance and Security Directorate of M.S.E.B. Head Office, Mumbai, for checking of electrical installment at Malegaon, complainant, Deputy Executive Engineer – Sudhakar Kashinath Mane, attached with flying squad, Thane, came to Malegaon on 16<sup>th</sup> October 2001 and 17<sup>th</sup> October 2001 to detect the theft of energy. He, alongwith A.V.O. Shri Ashok Gopalrao Dhoke attached with flying squad, Thane and Shri Chandrakant Vishwanath Haldankar, Assistant A.V.O. attached with flying squad, Bhandup, went to a plastic pipe factory of consumer Shri Girish Shankarlal Ostawal, bearing Consumer No.065510432171 at Survey No.47-B, Islampura, Malegaon. At that time, the proprietor of said factory - Shri Dilip Shankarlal Ostawal was present. Complainant disclosed his identity and reasons of visit to the factory owner and started inspection of the electric meter of the said plastic pipe factory. The sanction load was 40 H.P. The nature of work carried out was manufacturing of plastic pipe. The meter number was 1919906. The meter body was having yellow coloured P.V.C. plastic seals at the right side of the meter body bearing no.061190 and 061191 and sticker paper seal bearing no.020759 and also having yellow coloured P.V.C. plastic seal at the left side of meter body bearing no.061192 and 061193. The paper seal was

having number 20750. Therefore, complainant prepared the spot inspection report. Complainant enquired with the local MSEB office about the seals. Accordingly, the local office sent him a sample sticker seal and while comparing with the meter body seals, complainant realised that the sticker type paper seals and the other yellow coloured four seals were all fictitious. The connected load found was 56.38 H.P. and the sanctioned load was 40 H.P. It means the consumer has connected excessive load of 16.38 H.P. The meter was found intermittently working. The meter was found without meter terminal cover. The billed units for month are found very less as compared to connected load. The whole current meter was found installed instead of city operated meter. The unauthorised load was found for 16.38 H.P. Therefore, both accused have replaced the four yellow coloured P.V.C. plastic seals and two sticker type paper seals on the body cover of meter and by opening body cover, they interfered with meter reading by tampering with the meter and thereafter, refitted the fictitious seals and thereby accused have committed theft of energy by tampering with the electric meter of 257766 units worth Rs.13,59,591/-. Complainant has prepared the joint inspection report. Complainant also prepared assessment sheet. Alongwith the complaint, complainant filed a spot inspection report, joint inspection report, assessment sheet, copy of the bill of the consumer for the month of September 2001 and letter of the Executive Engineer, Malegaon City, MSEB and letter of Director of V & S and then he filed the complaint, which came to be registered as C.R. No.II 3053/2001 for the offence

punishable under Sections 39 and 44 of the said Act.

4           The issue involved in the present case is whether the State, i.e., appellant, has made out a case for conviction of accused nos.1 and 2 under the aforesaid Sections. In my view, no case whatsoever has been made out by appellant against the accused either under Section 39 or Section 44 of the said Act.

5           Section 39 of the said Act reads as under:

*"39. Theft of energy. - Whoever dishonestly abstracts, consumes or uses any energy shall be punishable with imprisonment for a term, which may extend to three years, or with fine, which shall not be less than one thousand rupees. or with both: and if it is proved that any artificial means not authorised by the licensee exist for the abstraction, consumption or use of energy by the consumer, it shall be presumed, until the contrary is proved, that any abstraction, consumption or use of energy has been dishonestly caused by such consumer."*

It is clear that the said Section is in two parts. The operative or the substantive part of the Section, which defines the offence requires "dishonest abstraction and/or consumption and/or use of energy". The second part of the Section makes it clear that the "existence of artificial means or means not authorized by the authorities for abstraction, consumption or use of the energy by the consumer" shall create a presumption, until the contrary is proved, that any abstraction, consumption, or use of energy has been dishonestly caused by the consumer.

6           In the present case, admittedly the second part does not apply as there is no material on record to show the existence of any artificial means or means that were not authorized by the licensee. This is in fact

borne out by the deposition of PW-7 and PW-8. PW-7, who is also complainant, in his cross examination, has stated “it is true to say that at the time of raid we have not find out any artificial means to abstract the electrical energy”. PW-8, who was also part of the flying squad, in his cross examination, says “it is true to say that we have not seized any foreign means which was used by accused for abstracting the electric energy by tampering the electric meter”. That being the case, appellant was required to aliunde prove the factum of dishonest abstraction and/or consumption and/or use of electricity.

7           It is trite that since there is no presumption in the present case created by the second part of Section 39, the onus is on appellant to prove beyond all reasonable doubt the offence defined under the first part, i.e., the dishonest abstraction and/or consumption and/or use of energy. It is also settled that for an offence to be made under Section 39, not only the factum of dishonest abstraction and/or consumption and/or use of energy is required to be made out, it is also required to be proved that it was the consumer who was actually responsible for the tampering with and/or of the meter. Mere tampering of the seals by itself and/or per se is not good enough to make out an offence under the said Section. The aforesaid is also borne out by judgments of the Apex Court as also the other Courts. The Apex Court in *Jagannath Singh alias Jainath Singh V/s. B.S. Ramaswamy and Anr.*<sup>1</sup> in paragraphs 5 to 10 has held as under :

---

1. (1966) 1 SCR 885

5. The High Court also convicted the appellants of the offence under [Section 39](#). It held that the exposure of the stud hole was an artificial means of abstraction of energy and was prima facie evidence of dishonest abstraction by the consumer. Section 39 reads :

*"Whoever dishonestly abstracts consumes or uses any energy shall be deemed to have committed theft within the meaning of the Indian Penal Code and the existence of artificial means for such abstraction shall be prima facie evidence of such dishonest abstraction."*

*Whoever abstracts or consumes or uses electrical energy, dishonestly commits a statutory theft. The theft may be proved by direct or circumstantial evidence. Direct evidence of the theft is rarely forthcoming. To facilitate, proof of the theft, the section provides that the existence of artificial means for such abstraction is prima facie evidence of such dishonest abstraction. We think that the word "abstraction" should be construed liberally and in the context of s.39 it means taking or appropriation. Energy may be dishonestly abstracted by artificial means or unauthorised devices. For instance, energy before it passes through a consumer's meter may be abstracted from the main of the electric company by an unauthorised wire connecting the main with a private terminal; the connecting wire is the artificial means for abstraction. Again, by tampering with the meter and causing it to record less than the units actually passing through it, the consumer may take the unrecorded energy without paying for it. The tampering of the meter and the taking of the unrecorded energy are unauthorised by the contract with the electrical company, the unauthorised taking is an abstraction and the crippled meter is a artificial means for abstraction.*

6. The effect of the last part of Section 39 is that the existence of the unauthorised means for abstraction is prima facie evidence of dishonest abstraction by some person. The special rule of evidence goes no further. The prosecution must prove aliunde that the accused made the abstraction. The fact that the accused is in possession and control of the artificial means for abstraction coupled with other circumstances showing that he alone is responsible for the abstraction may lead to the inference that he is guilty of the dishonest abstraction.

7. An exposure of a stud hole on the meter cover is an artificial means for preventing the meter from duly registering. For the purposes of Section 44, the existence of this artificial means gives rise to the presumption that the meter was prevented from duly registering, but this presumption cannot be imported into Section 39. A meter with an exposed stud hole, without more, is not a perfected instrument for unauthorised taking of energy, and cannot be regarded as an artificial means for its abstraction. To make it such an artificial means, the tampering must go further, and the meter must be converted into an instrument for recording less than the units actually passing through it. A check meter affords an easy method of proving that the consumer's meter is recording less than the units consumed and is being used as an artificial means for abstraction of the unrecorded energy. To bring home the charge under Section 39, the prosecution must also prove that the consumer is responsible for the tampering. The evidence adduced by the prosecution must establish beyond

*doubt that the consumer is guilty of dishonest abstraction of energy.*

*8. In the cases under appeal, the High Court was in error in holding that the exposure of a stud hole on the meter cover without more was an artificial means of abstraction and was prima facie evidence of dishonest abstraction by the appellants. The question still remains whether the conviction of the appellants under Section 39 can be sustained upon the materials on the record.*

*9. In Criminal Appeal No.76 of 1963, the prosecution proved that a seal on the meter cover was broken and a sealing nut was loosened exposing a stud hole on the meter cover. But the prosecution proved nothing else. No foreign material was found inside the meter. No attempt was made to verify that the meter was recording less than the units actually consumed. The prosecution failed to prove that the appellant abstracted, consumed or used any energy without paying for it. The appellant was charged with throwing acid on the meter and attempted to remove the evidence of tampering, but this charge was not pressed in the High Court. In this state of the evidence, the appellant is entitled to the benefit of the doubt and the conviction under Section 39 cannot be sustained.*

*10. In the result, Criminal Appeal No. 76 of 1963 is partly allowed, and the conviction and sentence under Section 39 of the Indian Electricity Act read with Section 379 of the Indian Penal Code are set aside. The convictions and sentences under Section 44 of the Indian Electricity Act and r. 138(b) of the Indian Electricity Rules are affirmed.*

Therefore, it is clear that the prosecution must prove aliunde that the accused made the abstraction. It could be proved with instruments such as a check meter actually recording the units consumed, and that merely because the seals are tampered with by themselves do not make out a case under Section 39.

The Apex Court in ***Ram Chander Prasad Sharma V/s. State of Bihar and Anr.***<sup>2</sup> in paragraphs 7, 8 and 12 has held as under :

*7. In our opinion, the conviction of the offenses under Section 39 is unsustainable. It is no doubt true that the meter had been tampered with. But there is nothing to show that there was any perfected artificial means in existence so as to raise the presumption of dishonest abstraction under Section 39 prior to the stopping of the meter. The mere fact that the consumption of energy between June 28 and July 1, 1958 was a 300 units per day whereas it was much less*

---

2. 1966 (3) SCR 517

*prior to that date does not necessarily lead to the inference that in the past there was dishonest abstraction of electric energy. The rise in consumption between June 28 and July 1, could be accounted for by circumstances such as longer working hours user of current in a wasteful manner, user of current for more appliances and so on. In the circumstances, therefore, we do not think that the High Court was right in convicting the appellants under 39 of the Act. We, therefore, set aside their convictions and sentences in respect of the offence under Section 39.*

*8. Criminal Appeal No. 50 of 1963 This appeal concerns the tampering of seats of three power meters installed in the mill belong into the appellant Krishna Prasad Sao. Accepting the evidence of N. Ghosh, a meter inspector,' the High Court has held the prosecution case to be established. the assessing the evidence of Ghosh the prosecution has referred to the evidence of Ramaswami who had inspected the meters in question three days after Ghosh had inspected them and also to the, evidence of the Mains Superintendent Bhattacharya and meter reader Sen who accompanied him. The High Court has also accepted the prosecution case that at the inspection by Ramaswami it was found that the terminal covers of two of the meters were dislodged from their normal positions and were actually hanging by the wires. It was also found that the cover seals of all the meters had been tampered with. Indeed, according to Ramaswami the seals had- been so cut and placed that despite what had been done they gave a deceptive appearance of being in tact. It was further found that there were no seals on two of the cut-outs that the seals on the terminal covers of all the three meters were not genuine and that one of the meters had registered no advance whatsoever subsequent to Ghosh's visit on the 19th while the other two had F registered only 49 and 50 units respectively between that date and the 22nd July.*

*.....*

*12. In so far as the conviction under Section 39 concerned the matter stands on a different footing. It is not sufficient to say that a meter had been tampered with a and that it was under the control of the accused person. It is further necessary to show that there was dishonest abstraction, consumption or use of electrical energy by the accused person. Before raising a presumption thereunder that there was dishonest abstraction the presence of an artificial means which would render abstraction of energy possible has to be established. Here we have three-phase meters and, therefore, unless all are tampered with abstraction of energy without fear of detection is not possible. It is difficult to presume that the appellant would have knowingly done something to the meter which would not have escaped detection of a meter reader and facilitated the abstraction of electric energy. In fact what he had said in his confession was that Jai Narain, a meter reader of the company had done something to the meter. That may or may not be so. Jai Narain who was co-accused with the appellant was acquitted by the trial court and his acquittal was not challenged by the State. There is no material on the bar is of which it could be held that there was either a perfected artificial means of abstraction or there was in fact any abstraction of electrical energy. In the circumstances the presumption permissible under Section 39 can not be raised in favour of the prosecution. It follow,*

therefore, that the appellant's conviction under Section 39 is unsustainable. We accordingly set it aside as also the sentences passed upon him in respect of that offence.

The Apex Court in *Swaran Dhawan V/s. The State (NCT of Delhi)*<sup>3</sup> in paragraphs 6, 7, 8 and 10 has held as under :

6. Section 39 of the Act is in two parts. Under the first part offence of theft of electrical energy is committed when someone "dishonestly abstracts, consumes or uses any energy. The second part raises a presumption of the dishonest abstraction, consumption and use of electricity in case any artificial mean or means not authorised by the licensee i.e. DVB found existed for the abstraction, consumption and use of energy by the consumer. The word "dishonestly" in both these parts is significant. Unless there is mensrea, a dishonest intention to take out or draw electricity from the electrical works or electricity meters of the DVB or consumption or use of the electrical energy it cannot be held that the consumer had committed theft. The burden is on the licensee i.e. DVB to prove (1) that the electricity was being abstracted, consumed and used by the consumer; and (2) the consumer had dishonest intention to do that. But in the event an artificial means or device is found which is used or facilitates the abstraction, consumption of energy, which is not authorised by the DVB for drawing electricity, the burden of proof shifts on the consumer to prove to the contrary.

7. Section 44 has provided penalty for interference with the meter or the electrical works of the licensee, i.e., DVB or improper use of the energy. The section prohibits punishment for the acts which have been embodied in Clauses (a) to (d) of the said section. Clause (a) provides punishment for connection of any meter, indicator or any apparatus as referred to under Section 26 with the electric supply line of licensee i.e. DVB or disconnection of the same from the said electricity supply line. Clause (aa) provides punishment for unauthorised re-connection of any meter, indicator or apparatus referred to in Section 26 with the electricity supply line or other works of the licensee i.e. DVB after the said electricity line and works has been disconnected under Section 24. Laying or causing to be laid or connecting up any works for the purposes of communicating with any other work belonging to the DVB would be punishable under Clause (b). Maliciously injuring any meter referred to in Sub-section (1) of Section 26, meter indicator or apparatus referred to in Sub-section 7 of Section 26 or willfully or fraudulently alters the index of any such meter, indicator, or apparatus or preventing any such meter, indicator or apparatus from duly registering the electricity connection would be punishable in accordance with Clause (e). Clause (d) on the other hand provides punishment for improper use of energy of the licensee i.e. DVB. Reference in this section is to the meter, indicator, apparatus as referred to in Sub-section (1) and Sub-section (7) of Section 26. Section 26 (1) relates to the electricity meter. If there is no agreement

---

3. 2002 (DRJ) 57

*between the consumer of the electricity and the DVB the electricity which the consumer uses would be as per registered in the electricity meter. The consumer may ask the licensee i.e. DVB to install a meter. Sub-section (7) gives power to the licensee (DVB) to install in addition to the electricity meter, other meters, maximum demand Indicator or other apparatus as it deemed fit for the purpose of ascertaining or regulating the amount of energy supplied to the consumer or the number of hours during which the supply is given or the rate per unit of time at which energy is supplied to the consumer or any other quantity or time connected with the supply. None of the Clauses (a) to (d) of Section 44 provided punishment in cases where the half seal of the meter is found fictitious or broken. Breaking half seal or fixing a fictitious seal will not invite punishment under Section 44. The clause relating to the punishment for various acts contemplated under Clauses (a) to (d), as reproduced above, explicitly exclude breaking of the half seals of the meter from the punishment provided in the clauses.*

*8. In the instant case apart from the allegation that half seal of the meter in question was found fictitious at the premises of the petitioner by the joint raiding party of the DVB, there is no further allegation in the FIR, in the charge-sheet or any other material to show that there was a dishonest abstraction, consumption or use of the electricity by the petitioner or any artificial means or device was found for drawing or taking out the energy from the meter which was not being registered in the said meter. Therefore, if the facts stated in the FIR and the charge-sheet coupled with the report of the staff of the DVB and the material placed Along with the charge-sheet like photographs etc. are admitted to be true and proved at their face value it would not be possible to hold that offence under Section 39 or 44 of the Act has been committed by the petitioners.*

.....

*10. This Court in Ramesh chander & Others (supra) was dealing with a similar case. The enforcement staff of DESU has found half seals of the electricity meters and both the revit seals tampered with. This Court following the judgments in the case of Ram Chandra Prasad Sharma and Ors. v. State of Bihar and Anr., and Jagarnath Singh v. Krishna Murthy and Anr., AIR 1967 SC held that there must be material on record to show dishonest abstraction, consumption and use of the electricity in addition to the tampering of the seals for holding that the dishonest Intention for abstraction, consumption and use of the electricity energy or its theft existed within the ambit of Section 39 and 44. The court quashed the charges framed under Section 39 and 44 of the Act. This Court has followed this judgment In Harbhajan Singh (supra) where inspection of the premises of the consumer showed that the electricity meter was tampered with. It was held that there was no presumption of dishonest abstraction, consumption and use of electricity energy on the basis of a tampered meters.*

The Apex Court in ***TNEB V/s. A. Mani & Ors.***<sup>4</sup> in paragraph 11 has held as under :

*11. The burden is, only upon the prosecution to show that there was theft of energy by using artificial means. As adverted to, except the tampering of seal, nothing has been stated by the prosecution witnesses. On the other hand they admitted that the meter was running at the time of the inspection. They did not notice any foreign material in the meter and as they did not state anything about the existence of any artificial means by which abstraction of energy was made, I am of the view that the presumption under Section 39 and 44 of the Act would not come to the rescue. Only if the prosecution was able to establish about the existence of any foreign material or artificial means found in the meter, then alone presumption can be drawn and later the burden will shift on the consumer to establish that he had not committed theft of electric energy. Under the circumstances, I am of the view that the evidence has been properly analysed by the Court below and in the absence of any foreign material or any artificial means, the Court below is proper and correct in passing an order of acquittal. There is no illegality or infirmity in the order passed by the Court below calling for interference. Hence, the points are answered accordingly.*

The Apex Court in ***Jagdish Narayan V/s. North Delhi Power Ltd. and Anr.***<sup>5</sup> in paragraph 24, 25 and 32 has held as under :

*24. The decision of the Hon'ble Supreme Court in Jagannath Singh v. B.S. Ramaswamy is illustrative although there the Court was concerned with a criminal conviction for the offence of theft of electricity under Section 39 and 44 of the Indian Electricity Act, 1910. The approach to the requirement of proof of dishonest abstraction of energy is nevertheless relevant for the present case. The Hon'ble Supreme Court held that the existence of artificial means for abstracting energy can only give rise to a presumption that there had been a dishonest abstraction. The supplier would still have to show that the consumer is responsible for such tampering. In the said case, it was contended that the existence of an open stud hole on the meter was sufficient proof that dishonest abstraction of energy had taken place. In answer to that contention, the Hon'ble Supreme Court observed as under :*

*A meter with an exposed stud hole, without more, is not a perfected instrument for unauthorized taking of energy, and cannot be regarded as an artificial means of its abstraction. To make it such an artificial means, the tampering must go further, and the meter must be converted into an instrument for recording less than the units actually passing through it. A check meter affords an easy method of proving that the consumer's meter is*

---

4. 2001 (2) ALT CRI 39

5. ILR (2007) II Delhi 957

*recording less than the units consumed and is being used as an artificial means for abstraction of the unrecorded energy. To bring home the charge under Section 39, the prosecution must also prove that the consumer is responsible for the tampering. The evidence adduced by the prosecution must establish beyond doubt that the consumer is guilty of dishonest abstraction of energy.*

*25. Applying the above test, it has to be held that an automatic presumption of DAE on the basis of the external symptoms of tampering together with the analysis of the consumption pattern would not be a safe and error free method. Some other tangible evidence must be shown to exist. An accu check meter can be deployed to find out if the meter is in fact recording lesser units. The analysis of the consumption pattern in terms of the Regulation 26 (ii) is merely corroborative and not by itself substantive evidence of DAE. The decision of this Court in *Udham Singh v. BSES Rajdhani Power Ltd.* 136 (2007) DLT 500 is to the same effect. In fact, the formula is applied in terms of Regulation 25 (iv) read with 26 (ii) only for determining the penalty payable by the consumer once a case of either direct theft or DAE has been made out. The penalty formula cannot itself supply the proof of DAE or theft.*

*.....*

*32. While on the aspect of external evidence of "tampering" in the form of broken seals or tampered seals, this Court would like to observe that an inference of DAE should not be permitted to be drawn on the mere fact that a meter had been found with broken seals. It would be impermissible for the respondent to treat all categories of consumers on the same footing when it proceeds to take action on a suspicion of DAE. Right now there is no secure measure to ensure that the electricity meters installed either in the basement of the building or on the ground floor near the stair case, are tamper-proof and outside the reach of any mischievous third party. It is one thing to require the consumer to ensure that the meter is safe and secure. It is perhaps also necessary to ask if the supplier of electricity draws the attention of the consumer to such responsibility and insists that the consumer secures the meter with a lock with one duplicate key being handed over to the supplier. In an environment where it is not possible for a domestic consumer living in an apartment where the meter is installed in the basement or ground floor to constantly keep a watch on his meter, it would not be reasonable to draw inference of DAE merely on the discovery of some signs of 'tampering'. Regulation 25 (iv) only goes a part of the way but does not fully appreciate the predicament of the consumer in such situations. Hopefully, the DERC and the supplier companies will work at improving the requirements for the consumers in this direction.*

The Apex Court in ***Ramesh Chander V/s. State***<sup>6</sup> in paragraphs 6,

7 and 8 has held as under :

---

6. 1997 (42) DRJ

(6) Thus it appears to me that for framing a charge under the above section, the prosecution must, *prima facie*, establish dishonest abstraction, consumption or use of the energy. In the instant case, the charge talks of discovery of tampered seals of electric meters by the Enforcement Staff on inspection of the petitioners' factory. The mere existence of the tampered meters is not enough to attract the provisions of Section 39 of the Act. There is no presumption of dishonest abstraction, consumption or use of electric energy on discovery of tampered meters. The presumption under Section 39 will arise if artificial means were employed to abstract, consume or use energy. The Supreme Court in the case of *Ram Chandra Prasad Sharma and others v. State of Bihar and another*,<sup>7</sup> held that the presence of a perfected artificial means which will render abstraction of energy possible has to be established by the prosecuting agency. Taking cue from this decision of the Supreme Court, it must be held that simply saying that the meter has been tampered with and that it was under the control of the accused, would not be enough for the purposes of framing a charge under Section 39 of the Act.

(7) In *Jagarnath Singh v. Krishna Murthy and another*, Air 1967 Sc 947, the Supreme Court held that existence of a tampered meter, does not amount to 'such an artificial means for the abstraction of electricity' as would make it an offence under Section 39 of the Act.

(8) Reverting to the case in hand, the charge does not even say that the abstraction was dishonest. In order to frame a charge under Section 39 of the Act, there must be material on record to, *prima facie*, show dishonest abstraction, consumption or use of energy. Learned counsel for the respondents has not been able to point out any circumstance coupled with the tampered seals indicating dishonest intention of the petitioners as contemplated by Section 39 of the Act.

The Apex Court in *Harbhajan Singh V/s. State*<sup>7</sup> has held as under :

1. By this petition under Section 482 Cr.PC., the petitioner seeks quashing of the FIR No. 12/97 registered under Sections 39/44 of the Indian Electricity Act read with Section 379 of the Indian Penal Code at the Police Station Najafgarh, Delhi. On perusal of FIR in question, it appears that the petitioner's premises were inspected by the enforcement staff of DESU on 3.1.1997, when it was discovered that the electricity was being abstracted fraudulently by tampering the meter. In *Ramesh Chandra Vs. State of Delhi*, it was held that the mere existence of the tampered meter is not enough to attract the provisions of Section 39 of the Act and there is no presumption of dishonest abstraction, consumption or use of electric energy on discovery of tampered meters. The presumption under Section 39 will arise if artificial means were employed to abstract, consumer or use energy. In my opinion, the case is fully covered by the decision in the case of *Ramesh Chander Vs. State of Delhi (Supra)*. Consequently, I am of the opinion, that no *prima facie* case has been made out against

---

7. 1999 (50) DRJ 821

*the petitioner under Sections 39/44 of the Indian Electricity Act and 379 of the Indian Penal Code. Accordingly, the petition is allowed and the FIR No. 12/97 registered under Sections 39/44 of the Indian Electricity Act read with 379 of the Indian Penal Code at the Police Station Najafgarh, Delhi, is quashed.*

8           If the prosecution wanted to establish actual abstraction of energy, there were many ways in which the same could have been done, but it was not done. The manner in which unlawful abstraction of energy could be proved in a civil matter was discussed in the case of ***Shyam Bihari Singhal V/s. BSES Yamuna Power Ltd.***<sup>8</sup>. Paragraph 13 to 20 of the said judgment read as under :

*13. In order to prove the alleged unlawful abstraction of energy, it was not sufficient for the defendant to prove that the paper seals fixed by its officials were found removed by the consumer. The defendant was required to prove by some other evidence such as use of a check meter that the consumption being recorded by the meter was found to be less than the actual energy consumed by him. One possible method of theft of electricity can be by tampering with the meter or its mechanism so as to slow down the recording of consumption by it. Another method can be to use an external device, which enables abstraction of electricity, in such a manner that the supply is not routed through the meter. Yet another method can be abstracting energy directly from the main lines. Of course, these methods of unlawful abstraction of energy are only illustrative and not exhaustive the lawful abstraction of energy can in certain cases be also indicated by study and analysis of consumption pattern of the consumer. In a given case, it can be shown that the consumption found recorded by the meter was much less than what it ought to have been, considering the capacity of the equipments installed and being used by the plaintiff in his premises and the working days and working hours for which these equipments were used, provided that it is not a case of the meter being defective. No such attempt was however made by the officials of the defendant at the time of inspection on 14th July, 1999 or even thereafter.*

*14. In a case where no tampering with the meter or the seals affixed on it is found and no external device is found being used by the consumer, mere removal of the paper seal fixed on the meter box would not, in my view, be sufficient to prove unlawful abstraction of energy and in any case would not disclose the quantum of the energy actually stolen.*

*15. In Jagarnath Singh v. H. Krishna Murthy & Anr., AIR 1967 SC 947,*

---

8. CS (OS) No.1459/2006 pronounced on 16<sup>th</sup> March 2011, Delhi High Court

*which was a case of prosecution under Section 39, Indian Electricity Act, 1910, Supreme Court was considering a case where the meter was installed in a dark corner and passage to the meter had certain obstructions. It was also found that by inserting a wire through the stud hole, the movement of the meter which registers the consumption of electric energy could be affected in a way as to either totally prevent the rotating or slow down its movement, as a result of which, there could be consumption of electric energy without payment for the same. Supreme Court held that existence of such tampered meter does not amount to such artificial means for abstraction of electricity so as to make it an offence under [Section 39](#) of the Act. The Court also referred to its earlier decision in *Jagannath Singh v. Ramaswamy* AIR 1966 SC 849, wherein it was observed that a meter with an exposed stud hole was not a perfected instrument for unauthorized taking of energy and could not be regarded as an artificial means for its abstraction.*

*16. In the case before this Court, no artificial device for abstraction of energy was found installed at the time of inspection on 14th July, 1999 and no gap was found in the meter whereby a wire/some other device could be inserted inside, so as to obstruct the functioning of the rotator.*

*17. In *Ramesh Chander v. State*, 1997 (42) DRJ, which again was a case for prosecution under Section 39 of the Electricity Act, this Court observed that mere existence of tampered meter is not enough to attract the provisions of Section 39 of the Act and there was no presumption of dishonest abstraction, consumption or use of electric energy on discovery of tampered meters. The Court was of the view that the presumption under Section 39 will arise if artificial means were employed to abstract, consume or use energy. In taking this view, this Court relied upon the decision of the Supreme Court in *Ram Chandra Prasad Sharma and others v. State of Bihar* and another AIR 1967 SC 349, wherein it was held that the presence of a perfected artificial means which would render abstraction of energy possible has to be established by the prosecuting agency.*

*18. In *Swaran Dhawan v. State (NCT of Delhi)*, 99 (2002) DLT 416, which was also a case for prosecution under Section 39 of the Electricity Act, it was found that half seal on the meter was fictitious. It was held that this by itself does not lead to an inference that the electricity was being stolen from the meter. It was held that the burden was on the licensee i.e. Delhi Vidyut Board to prove that the electricity was being abstracted, consumed and used by the consumer and the consumer had dishonest intention to do so, though in the event an artificial means or device is found which is used or facilitates abstraction, consumption of energy which is not authorized by DVB for drawing electricity, the burden of proof shifts on the consumer to prove to the contrary.*

*19. In *Jagdish Narayan vs. North Delhi Power Ltd. & Anr.*, 140 (2007) DLT 307, this Court relying upon the decision of the Supreme Court in *Jagannath Singh* (supra) held that automatic presumption of DAE on the basis of the external symptoms of tampering together with the analysis of the consumption pattern would not be a safe and error free method and some other tangible evince must be shown to exist. This*

*Court was of the view that an accu check meter can be deployed to find out if the meter is in fact recording lesser units and that analysis of the consumption pattern being merely corroborative, would not by itself be substantive evidence.*

*In the case before this court, the defendant did not make an attempt even to study the consumption pattern of the plaintiff to find out whether consumption of electricity by him, after restoration of electricity pursuant to the interim order passed on 3rd August, 1999, had increased. Had that been done and had the consumption being found substantially higher, that could have given some indication that the meter was not correctly recording the consumption of electricity at the time of inspection on 14th July, 1999, though that by itself would not have been a clinching factor and would have only been one of the circumstances indicating possibility of unlawful abstraction of energy.*

*20. In Udham Singh v. BSES Rajdhani Power Ltd., 136 (2007) DLT 500, during the course of inspection, it was found that CT and meter box combined seals were found missing. On 6.10.2002, the petitioner's premises were inspected and it was found that the paper seals which were pasted on the Meter box were intact. It was endorsed that the paper seals which were pasted on the meter box had been removed and the fresh seals were duly signed. Those seals were removed by the staff of the licensee and were replaced by fresh seals. No irregularity was, however, found. Another inspection was carried out on 24 th March, 2004. At that time, the meter was running in the right direction, the meter half seals were observed to be unnumbered and it was reported that the meter was running fast by 5.30%. A third inspection was held on 1.12.2004. On this occasion, the inspection team stated that the CT and Meter Box combined seals were found missing. After giving show cause notice to the consumer, an order was passed by the AO of BSES on 17th December, 2004, referring to the inspection dated 1st December, 2004, the consumption pattern indicated that average recorded consumption to be 1119.84 units per month, which was found to be 19.95% of the assessed consumption. Holding the consumption to be low, dishonest abstract of energy was held to be established.*

The threshold in the present case will be much higher since abstraction in the present case is not a subject matter of a civil dispute but qua a criminal offence. However, even an attempt in that regard is not made by the prosecution.

9           It is also imperative to note that appellant has also not made out a case that it was in fact the accused who were responsible for the

alleged tampering. In this regard, the evidence of PW-5, viz., Vishwasrao Pawar (Jr. Engg.) is relevant where the deposition is to the effect that the accused "might have" tampered with the seals and/or the meter.

10 In view of the aforesaid, absolutely no case whatsoever is made out under Section 39 of the said Act.

11 Insofar as Section 44 of the said Act also is concerned, no case whatsoever is made out under that Section either. For convenience, Section 44 is reproduced hereunder :

*"44. Penalty for interference with meters or licensee's works and for improper use of energy. -Whoever-*

*(a) Connects any meter referred to in Section 26, sub-section (1), or any meter, indicator or apparatus referred to in Section 26, subsection (7), with any electric supply-line through which energy is supplied by a licensee, or disconnects the same from any such electric supply-line; or 3[(aa) Unauthorisedly reconnects any meter referred to in subsection (1) of Section 26, with any electric supply-line or other works, being the property of the licensee, through which energy in ay be supplied, when the said electric supply line or other works has or have been cut or disconnected under sub-section ( 1) of Section 24; or]*

*(b) Lays, or causes to be laid, or connects any works for the purpose of communicating with any other works belonging to a licensee.*

*(c) Maliciously injures any meter referred to in Section 26, subsection (1), or any meter. Indicator or apparatus referred to in Section 26, sub-section (7), or wilfully or fraudulently alters the index of any such meter, indicator or apparatus, or prevents any such meter, indicator or apparatus from duly registering; or*

*(d) Improperly uses the energy of a licensee,*

*1[shall be punishable with imprisonment for a term which may extend to three years. or with fine which may extend to five thousand rupees, or with both], and, in the case of a continuing offence, with a daily fine which may extend to fifty rupees; and 2[ if it is proved that any artificial means exist] for making such connection as is referred to in clause (a) 2 [or such re-connection as is referred to in clause (aa),] or such communication as is referred to in clause (b), or for causing such alteration or prevention as is referred to in clause (c), or for facilitating such improper use as is referred to in clause (d), and that the meter, indicator or apparatus is under the custody or control of the consumer, whether it is his property or not, it shall be presumed, until the contrary is proved 1[that such connection, reconnection,*

*communication,] alteration, prevention or improper use, as the case may be, has been knowingly and wilfully caused by such consumer."*

12           This Section stipulates penalty for interference with the meter or electrical works of the licensee. If a case under clauses (a) to (d) of the said Section is made out and the meter, indicator or apparatus is found to be under the custody or control of the consumer, whether it is his property or not, it shall be presumed, until the contrary is proved that such connection, reconnection, communication, alteration, prevention or improper use as the case may be has been knowingly and willfully caused by such consumer. In the present case, no case whatsoever has been made out to satisfy ingredients of Clauses (a) to (d) of Section 44.

13           The prosecution has failed to make out that any tampering has been done by accused. The record militates against case sought to be propounded by the prosecution. The glaring loopholes in prosecution's case are PW-1 (Pancha for Spot panchanama), PW-2 (Pancha for seizure of electric meter), PW-3 (Pancha for seizure of electric meter) and PW-4 (Pancha for seizure of electric meter), who were independent witnesses, have not corroborated the story of the prosecution. They have stated that they were not even present when the alleged panchanama was made. In fact these witnesses, according to the prosecution, have turned hostile. The said witnesses have deposed that they are absolutely unaware of the contents of the panchanama. In fact, PW-3 and PW-4 have stated that they do not even know the Marathi language. There are material inconsistencies in respect of

the testimony of other prosecution witnesses. The said inconsistencies indicate that there was no inspection as sought to be contended by the prosecution. For example, PW-5 states that during the inspection, they found that "the meter disc was rotating slowly". PW-5 also states that the terminal cover of the meter was not found. However, PW-6 states that the meter was not in working condition and the sticker seal, which was fixed on the terminal cover, was fake. As such, PW-5 says that there was no terminal cover and PW-6 says that there was a sticker cover on the terminal cover which was fake implying that the terminal cover existed. Similarly, PW-5 said that meter disc was rotating slowly, whereas PW-6 says that meter was not in working condition. In this regard PW-7 has also made an inconsistent statement where he stated that "the meter was intermittently working". As such, there is absolute lack of clarity on what actually transpired at the alleged raid/inspection. PW-7 and PW-8 also state that it is possible that due to technical fault of the meter, the meter can intermittently work.

14           As stated above, PW-5 has only stated that "it might" be the accused who may have tampered with the electric meter". The cross examination of PW-7 bears out that no separate panchanama was prepared about the condition of the electric meter despite the fact that during the installation of the meter, seal numbers, sticker number, testing number, service wires are maintained in the register. However, the said details were not seen at the time of inspection/raid. The electrical meter was not shown to the Electric Inspector and there was no subsequent meter used to find out

the technical fault of the said meter. PW-6 has made a vague and contradictory statement to the effect that at one place he states that he did not participate in the activities of the flying squad at the spot and then changed his stance that he infact had participated at the time of inspection.

15 PW-9 appears to have not been there when the raid was conducted but went there subsequently. PW-9 also admits that despite maintaining details of the meter in their register at the time of installation of the meter, they had not taken the said record with them at the time of the raid for comparison. In the cross examination, suggestion is also put to the effect that there was a raid in the premises of the accused on 20<sup>th</sup> January 2000 and 23<sup>rd</sup> August 2001 by the flying squad and nothing was found about theft of electricity.

16 The aforesaid casts severe aspersion on the veracity of the raid allegedly conducted by the officers of MSEB. With this background, it is impossible to conclude that it was infact accused who had done any act as contemplated under clauses (a) to (d) of Section 44 of the said Act. Therefore, there is no question of presumption of commission of the offence within the meaning of the said Section. Swaran Dhawan (*Supra*) in paragraphs 7, 8 and 10, also makes it clear that an offence under Section 44 of the said Act is required to be proved beyond all reasonable doubt and that breaking of the seal and/or fixing of fictitious seal by itself will not invite a punishment under Section 44 of the said Act because clauses (a) to (d) do not provide for the same.

17           The Apex Court in *Chandrappa & Ors. V/s. State of Karnataka*<sup>9</sup> in paragraph 42 has laid down the general principles regarding powers of the Appellate Court while dealing with an appeal against an order of acquittal. Paragraph 42 reads as under :

*42. From the above decisions, in our considered view, the following general principles regarding powers of appellate Court while dealing with an appeal against an order of acquittal emerge;*

*(1) An appellate Court has full power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded;*

*(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law;*

*(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasize the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.*

*(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.*

*(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."*

18           There is an acquittal and therefore, there is double presumption in favour of the accused. Firstly, the presumption of innocence available to the accused under the fundamental principle of criminal jurisprudence that

---

9. (2007) 4 SCC 415

every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured acquittal, the presumption of their innocence is further reinforced, reaffirmed and strengthened by the Trial Court. For acquitting accused, the Trial Court observed that the prosecution had failed to prove its case.

19           In the circumstances, in my view, the opinion of the Trial Court cannot be held to be illegal or improper or contrary to law. The order of acquittal, in my view, cannot be interfered with. I cannot find any fault with the judgment of the Trial Court.

20           Appeal dismissed.

**(K.R. SHRIRAM, J.)**