

(2008) 11 MP CK 0047
In the Madhya Pradesh High Court

Bapupuri

APPELLANT

Vs

Madhya Pradesh Vidyut Vitran Company Ltd.

RESPONDENT

Date of Decision : 06-11-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Criminal Procedure Code, 1973 (CrPC) — Section 100, 135, 136, 137, 138
Electricity Act, 2003 — Section 156
Evidence Act, 1872 — Section 114
Penal Code, 1860 (IPC) — Section 187

Citation : (2009) 2 JLJ 168 : (2009) 2 MPHT 88

Hon'ble Judges : S.L. Kochar, J

Bench : Single Bench

Final Decision : Allowed

Judgement

S.L. Kochar, J.—The appellant has preferred this appeal u/s 156 of the Electricity Act 2003 (For short "the Act") read with Section 374 of the Code of Criminal Procedure (For short "the Code") against the judgment dated 15-12-07 passed by the learned Addl. Sessions Judge (Special Judge, Biaora District Rajgarh) in Special Case No. 267/06, thereby holding the appellant guilty for the offence u/s 135 of the Act, convicted and sentenced him to pay Rs. 8,445/- fine and in default of payment of fine to suffer additional S.I. for six months and also fixed civil liability as per provision u/s 154(5) of the Act.

2. On inspection by the Junior Engineer Shri D.L. Koshtha (CW-1) of M.P. Electricity Supply Company accompanied by helper Motilal on 16-02-06, found that near the bank of Parvati river in village Kanarkhedi, the accused was irrigating his field by 5 HP Motor Pump by taking electricity directly from Lower Tension line. Appellant had not taken any regular electric connection. His regular electricity connection was disconnected due to non-payment of electricity bill on 19-01-2006. Shri Koshtha prepared a Panchnama Exh. P/1. Appellant did not sign on the Panchnama, therefore, he filed a complaint in the Court after assessing loss/theft of electricity.

3. Appellant denied the allegations levelled against him and claimed trial.
4. Learned Trial Court, after examining the witnesses for the Department and hearing both the parties, held the appellant guilty, convicted and sentenced him as indicated herein-above.
5. Having heard learned Counsel for the parties and after perusing the entire record carefully, this Court is of the view that the impugned judgment passed by the Trial Court is not sustainable.
6. u/s 135, Sub-section (1-A) of the Act, theft of electricity is defined and penalty is prescribed. Under Sub-section (2) powers of officer or licensee or supplier as the case may be provided for the purposes of entering, inspect, break-open and search any place or premises, search, seizure and removal of all such devises, instructions wires and any other facilitator, articles which are used for unathorized use of electricity. Sub-section (3) is for presence of occupant of the place at the time of search and authorized officer shall prepare the list of all things seized in course of such search and shall deliver to such occupant or person who shall sign the list. Proviso to Sub-section (3) says that between the Sun set and Sun rise, inspection, search and seizure of any domestic place or premises shall not be carried out without presence of any adult male member occupying such premises. Sub-section (4) reads as under:
 7. "The provisions of Code of Criminal Procedure 1973 relating to search and seizure shall apply as far as may be practical to searches and seizure under this Act."
 8. Now it is to be seen whether the authorized officer has followed the provisions for search and seizure prescribed u/s 135 (2) (3) and (4) of the Act or not.?
 9. u/s 154 of the Act, procedure and power of Special Court are prescribed. According to Sub-section (3) of this section the Special Court may try the offences referred to in Sections 135 - 140 and 150 of the Act in a summary way in accordance with the procedure prescribed in the Code and the provisions of Sections 263 - 265 and the said Code shall, as the case may be, apply to such trial. The Special Court has also been given power in this section to try the case as a warrant trial and recall a witness for rehearing of the case. u/s 155 of the Act, the Special Court is clothed with the power of Court of Session.
 10. u/s 151 of the Act, Special Court can take cognizance of an offence under this Act on the basis of the complaint in writing made by the appropriate Government or appropriate Commission or any of their officers authorized by them or a Chief Electrical Inspector or an Electric Inspector or licensee or the Generating Company, as the case may be, for this purpose. Under proviso to this section, the Court can also take cognizance on the basis of charge-sheet filed by the police as per provision u/s 173 of the Code and Special Court is competent to take cognizance of an offence for the accused being committed to it for trial.
 11. In the instant case, the complainant Junior Engineer Shri D.L. Koshtha of M.P.

Madhya Kshetra Vidyut Vitaran Company Ltd. Gramin Kshetra, Rajgarh (for short, "the Company") had filed the complaint before the Trial Court on 23-06-06. This complaint was filed by filling up the blanks in a printed proforma. In the printed proforma of the complaint in Para 1, it is printed that the complainant is authorized by the Company, but no authorization letter has been filed along with the complaint and Junior Engineer CW-1, Koshtha in his statement on oath in Court has nowhere stated that he was authorized to file the complaint as per provision u/s 151 of the Act. Learned Special Judge has failed to see the provision of taking cognizance of offence which was his duty to see whether the complaint was filed by an authorized person as per provision u/s 151 of the Act,. Therefore, in the opinion of this Court, cognizance of the offence taken by the learned Trial Court, itself is illegal and whole trial was without jurisdiction. It is also pertinent to mention here that the contents of the complaint can be used only for contradiction and corroboration to the statement of the complainant given in Court. There is no substantive evidence adduced by the complainant to establish that he was authorized to file the complaint.

12. It is clear from the provision of Section 135(4) of the Act that the provision of Code of Criminal Procedure, 1973 relating to search and seizure shall apply. In Chapter VII-B, C and D provision of search and seizures in the Code are prescribed. In the instant case, provision u/s 100 of the Code are applicable which reads as under:

13. "100. Persons in charge of closed place to allow search.-

(1) Whenever any place liable to search or inspection under this chapter is closed, any person residing in, or being in charge of such place, shall, on demand of the officer or other person executing the warrant, and on production of the warrant, allow him free ingress thereto, and afford all reasonable facilities for a search thereon.

(2) If ingress into such place cannot be so obtained, the officer or other person executing the warrant may proceed in the manner; provided by Sub-section (2) of Section 47.

(3) Where any person in or about such place is reasonably suspected of concealing about his person any article for which search should be made, such person may be searched and if such person is a woman, the search shall be made by another woman with strict regard to decency.

(4) Therefore, making a search under this Chapter, the officer or other person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them so to do.

(5) The search shall be made in their presence, and a list of all things seized in

the course of such search and of the place in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses; but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it.

(6) The occupant of the place searched, or some person in his behalf, shall, in every instance, be permitted to attend during the search, and a copy of the list prepared under this section, signed by the said witnesses, shall be delivered to such occupant or person.

(7) When any person is searched under Sub-section (3), a list of all things taken of shall be prepared, and a copy thereof shall be delivered to such person.

(8) Any person, who without cause, refuses or neglects to attend and witness a search this section, when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an offence u/s 187 of the Indian Penal Code (45 of 1860).

14. According to Sub-section (4) of Section 100 of the Code Officer or other person who was making the search shall call upon two or more independent and respectable inhabitants of the locality in which the place of search was situated, who have been called and if no inhabitant of said locality was available or was willing to be a witness the search, the authorized officer may issue an order in writing to them, or any of them. CW-1, D.L. Koshtha has not called two independent witnesses of the said locality at the time of inspection and search of the field owned by the appellant. He has not seized any article which was used for theft of electricity and no reason has been assigned as to why the seizure of 5 HP motor pump, electric wire was not effected by which direct connection was taken from the L.T. line. In this view of the matter, proceeding of inspection and search suffer from serious defect. It appears that CW-1, Shri Koshtha was not acquainted with the provisions of Section 135 of the Act read with Section 100(4) of the Code. u/s 100 Sub-section (8) of the Code, serious consequences are prescribed, if without reasonable cause the person or persons called upon to witness the search by an order in writing delivered or tendered to them refuses or neglects to attend, shall be deemed to have committed the offence u/s 187 of the Indian Penal Code.

15. It is crystal clear from the contents of the complaint and the statement of Shri Koshtha (CW-1) that he had not tried to secure independent witnesses and also failed to assign any reason for not complying with the provision in this regard. In cross-examination Shri Koshtha has stated that the witnesses refused to sign on the seizure memo or Panchnama Ex. P/1. But, nothing is mentioned in this regard on Panchnama Ex.P/1 and the complaint is also silent on this aspect. It is also not mentioned in the complaint as well as in Court statement as to who were these witnesses and whether he ordered them in writing. Therefore, in the considered opinion of this Court, the statement in cross-examination Para 9 that witnesses refused to sign on panchnama was an after thought and not supported

by any documentary evidence. In Para 2 of the complaint, it is printed about seizure of PVC wire, its colour, other electrical equipments were seized in presence of witnesses. Spot map was prepared on the spot, accused was present who was asked to sign on seizure memo and map and he refused to sign. Para 2 of the printed complaint is showing that the inspecting officer must seize the electric wire which was used for committing theft of electricity by taking direct connection from LT Line as also the electric equipments. In the instant case, nothing was seized though alleged that the appellant had taken connection from LT Line for running 5 HP electric motor pump.

16. Shri Koshtha has stated that inspection memo Ex.P/1 was prepared by him on the spot on which the appellant refused to sign. In the complaint Para 2, it is printed that the accused signed on the Panchnama, seizure memo and map etc. and/or refused to sign. If appellant refused to sign the printed portion "signed on the document" should have been scored out. The contents in this regard are contrary to the statement of Shri Koshtha.

17. The prosecution has examined the only witness Shri D.L. Koshtha though on the Panchnama Ex.P/1 at the place of witnesses, signature of Motilal Line Helper is available and in the complaint he was cited as a witness No. 2. No explanation has been given for non-examination of said Motilal in Court as a witness.

18. Learned Counsel for the appellant has argued that on 16-02-06, all the seven cases including the instant case were prepared by Shri Koshtha and the learned Trial Court recorded his statement only in one case i.e. in Special Case No. 267/06 and carbon copies whereof were placed in other six cases. Cross-examination of Shri Koshtha was permitted only in the instant case. This Court has perused the record of this case and found that the original typed statement, examination-in-chief and cross-examination are available, therefore, in this case, this Court cannot take cognizance of this fact. Thus, this argument is not helpful to the appellant.

19. Learned Counsel for the respondent has placed reliance on the Supreme Court Judgment passed in the case of Jagmodhan Mehatabsing Gujaral and Others Vs. State of Maharashtra, , and submitted that the Supreme Court has opined for taking serious steps to curb the theft of electricity. This Court has gone through the entire judgment carefully. There is no dispute that stern action must be taken against the guilty person. The Supreme Court judgment was relating to the Electricity Act, 1910 and in this judgment the Supreme Court has drawn adverse inference against the appellant for not producing the relevant record for inspection by Court. In the case at hand, an adverse inference can be drawn against the complainant/respondent as per provision u/s 114(g) of the Indian Evidence Act for not securing the independent witnesses, seizure of wire and electric motor and non-examination of Motilal cited as a witness accompanied with complainant Shri D.L. Koshtha. Shri Koshtha's statement in Court is not supported by any document and/or oral statement that the appellant and witnesses refused to sign on panchnama Ex.P/1. He has not disclosed the

names of the witnesses to whom he asked to sign. He could have taken with him the Sarpanch, Upsarpanch, Panch or Panchas and Secretary of Gram Panchayat, Patel, Kotwar and Chowkidar of village appointed under the M.P. Land Revenue Code. He could have made a complaint in the nearest Police Station to this effect, and if any Govt, hospital or Primary Health Centre was situated near the said village, he could have asked any employee thereof to witness the inspection. He had not inspected only one place, but he had inspected, according to his version seven places of the agriculturists and He had gone for the purposes of inspection of irrigation pumps used in the fields situated at the bank of Parvati river in village Kanarkhedi along with the helper Motilal. Therefore, he could have secured presence of independent witnesses or the official witnesses. It is made clear that the Electricity Act, 2003 (No. 36 of 2003) has been framed and implemented to curb the offences of theft of power/electricity and commission of other offences relating thereto and stringent provisions for punishment are prescribed therein. Old Electricity Act has been repealed in the case of Jagmohan (supra) the facts are clearly showing that the respondent inspected the premises and followed all the provisions of inspection, seizure of articles used for theft of electricity and matter was reported to the police. Raiding party took photographs of actual position of spot for the purposes of proving the offence against the accused, sufficient evidence was adduced by the respondent which was relied upon by the Trial Court, High Court and the Supreme Court has confirmed the concurrent finding of fact. In the instant case, barring the bald statement of CW-1, D.L. Koshtha, no other evidence is available and there is number of serious infirmities as have been discussed herein-above, are found.

20. Learned Counsel for the respondent has also pointed out the third proviso to Section 135 of the Act i.e. regarding presumption in case of abstraction, consumption or use of electricity, dishonestly by the consumer. In the opinion of this Court, this provision will be applicable only when the respondent would not be able to prove that any artificial means, not authorized by the Board or Licensee or Supplier, as the case may be, existed for extraction, consumption or use of electricity by the consumer. On failure to prove this, the proviso would not apply. The Supreme Court in the case of NoorAga v. State of Punjab and Anr. JT 2008 (7) SC 409 has discussed the issue of presumption or reverse burden, and held that inspite of provision of presumption or reverse burden, the prosecution has to prove foundational facts beyond reasonable doubt. Thereafter, the provision of presumption or reverse burden to prove innocence, would lie upon the accused and accused need not prove the same beyond reasonable doubt, but only by preponderance of probability. Looking the dicta of Supreme Court in Noor Aga's case (supra), in the case at hand, the presumption would apply only when the prosecution is able to prove the foundational facts beyond reasonable doubt which it has failed.

Ex consequenti this appeal stands allowed and the impugned judgment of the Trial Court is hereby set aside. Fine amount if already deposited, and civil liability imposed by the Trial Court, shall be refunded to him.