

(2016) 04 PAT CK 0039

In the Patna High Court

Case No : Criminal Miscellaneous No. 24081 of 2015

S.D.E. Surendra Choudhary and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 05-04-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173, Section 173(2), Section 482
Electricity Act, 1910 — Section 39, Section 44
Electricity Act, 2003 — Section 135, Section 135, Section 135, Section 135(1-A),
Section 136, Section 136, S

Citation : (2016) 04 PAT CK 0039

Hon'ble Judges : Ashwani Kumar Singh, J.

Bench : Single Bench

Advocate : Dharmendra Kumar Singh, Advocate, for the Appellant;

Final Decision : Allowed

Judgement

Ashwani Kumar Singh, J.—1. By way of the present application preferred under Section 482 of the Code of Criminal Procedure, the petitioners seek quashing of the order dated 24.10.2013 passed by the learned Chief Judicial Magistrate, Kaimur at Bhabhua in Mohania P.S. Case No. 5 of 2011 whereby cognizance has been taken of the offences punishable under Sections 135 and 138 of the Electricity Act, 2003 as also Sections 379 and 120B of the Indian Penal Code (For short "IPC") and summonses have been issued against the petitioners to face trial.

2. The prosecution case, in brief, according to the informant, Bajrang Bali Singh, a political activist is that one Puranmashi Sah and one Kaishnath Sah were operating a rice mill situated by the side of G.T. Road at Mohania by illegally abstracting electrical energy in connivance with the petitioners, who are officers and employees of South Bihar Power Distribution Company Limited.

3. On the basis of the aforesaid written statement given by the informant, Mohania P.S. Case No. 5 of 2011 was registered under Sections 379 IPC, 135 and

138 of the Electricity Act against the petitioners and the two rice mill owners Puranmashi Sah and Kaishnath Sah and investigation was taken up.

4. On completion of investigation, the investigation officer submitted his report under Section 173(2) of the CrPC against the accused persons whereafter, vide order dated 24.10.2013, the learned Chief Judicial Magistrate took cognizance of the offence.

5. Challenging the said order dated 24.10.2013, Mr. Dharmendra Kumar Singh, learned counsel for the petitioners has submitted that the petitioners are employees of the supplier company, namely, South Bihar Power Distribution Company Ltd. At the relevant time, the petitioner No. 1 Surendra Chaudhary and the petitioner No. 4 Pankaj Parsun were posted as Sub-Divisional Electrical Engineer and Junior Electrical Engineer respectively and the other two petitioners were posted as Switch Board Operators at Mohania.

6. Mr. Singh has submitted that Section 151 of the Electricity Act, 2003 puts a bar in taking cognizance by court of an offence punishable under the Act except upon a complaint in writing made by the Appropriate Government or Appropriate Commission or any of their officer authorized by them. He has contended that the informant of the present case on whose written statement, the FIR has been instituted was not an authorized person to institute an FIR under the Electricity Act, 2003 and the offences alleged in the FIR under the IPC are not attracted in the facts and circumstances of the case.

7. Learned counsel appearing for the respondent-South Bihar Power Distribution Company Ltd. concedes to the submissions made by the learned counsel for the petitioners. He has submitted that the impugned order passed by the learned Chief Judicial Magistrate whereby he has taken cognizance of the offences punishable under the IPC and under the Electricity Act, 2003 is bad in view of the FIR having been lodged on the complaint of a private person who was not authorized to set law into motion in terms of section 151 of the Electricity Act, 2003.

8. I have heard respective counsel for the parties and perused the record.

9. In order to appreciate the submissions made at the Bar, it is essential to first take note of the relevant provisions of the Electricity Act, 2003 which are Sections 135, 138 and 151 as it existed before the amendment and they read as follows:--

"135. Theft of Electricity.--(1) Whoever, dishonestly,-

(a) taps, makes or causes to be made any connection with overhead, underground or under water lines or cables, or service wires, or service facilities of a licensee; or

(b) tampers a meter, installs or uses a tampered meter, current reversing transformer, loop connection or any other device or method which interferes with

accurate or proper registration, calibration or metering of electric current or otherwise results in a manner whereby electricity is stolen or wasted; or

(c) damages or destroys an electric meter, apparatus, equipment, or wire or causes or allows any of them to be so damaged or destroyed as to interfere with the proper or accurate metering of electricity,

so as to abstract or consume or use electricity shall be punishable with imprisonment for a term which may extend to three years or with fine or with both:

Provided that in a case where the load abstracted, consumed, or used or attempted abstraction or attempted consumption or attempted use-

(i) does not exceed 10 kilowatt, the fine imposed on first conviction shall not be less than three times the financial gain on account of such theft of electricity and in the event of second or subsequent conviction the fine imposed shall not be less than six times the financial gain on account of such theft of electricity;

(ii) exceeds 10 kilowatt, the fine imposed on first conviction shall not be less than three times the financial gain on account of such theft of electricity and in the event of second or subsequent conviction, the sentence shall be imprisonment for a term not less than six times the financial gain on account of such theft of electricity:

Provided further that if it is proved that any artificial means or means not authorized by the Board or licensee exist for the abstraction, consumption or use of electricity by the consumer, it shall be presumed, until the contrary is proved, that any abstraction, consumption or use of electricity has been dishonestly caused by such consumer.

(2) Any officer authorized in this behalf by the State Government may-

(a) enter, inspect, break open and search any place or premises in which he has reason to believe that electricity has been or is being used unauthorisedly;

(b) search, seize and remove all such devices, instruments, wires and any other facilitator or article which has been or is being used for unauthorized use of electricity;

(c) examine or seize any books of account or documents which in his opinion shall be useful for or relevant to, any proceedings in respect of the offence under sub-section (1) and allow the person from whose custody such books of account or documents are seized to make copies thereof or take extracts therefrom in his presence.

(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.

(4) The provisions of the Code of Criminal Procedure, 1973 (2 of 1974), relating to search and seizure shall apply, as far as may be, to searches and seizure under this Act.

138. Interference with meters or works of licensee.--(1) Whoever,-

(a) unauthorisedly connects any meter, indicator or apparatus with any electric line through which electricity is supplied by a licensee or disconnects the same from any such electric line; or

(b) unauthorisedly reconnects any meter, indicator or apparatus with any electric line or other works being the property of a licensee when the said electric line or other works has or have been cut or disconnected; or

(c) lays or causes to be laid, or connects up any works for the purpose of communicating with any other works belonging to a licensee; or

(d) maliciously injures any meter, indicator, or apparatus belonging to a licensee or willfully or fraudulently alters the index of any such meter, indicator or apparatus or prevents any such meter, indicator or apparatus from duly registering;

shall be punishable with imprisonment for a term which may extend to three years, or with fine which may extend to ten thousand rupees, or with both, and, in the case of a continuing offence, with a daily fine which may extend to five hundred rupees; and if it is proved that any means exist for making such connection as is referred to in clause (a) or such re-connection as is referred to in clause (b), or such communication as is referred to in clause (c), for causing such alteration or prevention 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, that such connection, reconnection, communication, alteration, prevention or improper use, as the case may be, has been knowingly and wilfully caused by such consumer.

151. Cognizance of offences.--No court shall take cognizance of an offence punishable under this Act except upon a complaint in writing made by Appropriate Government or Appropriate Commission or any of their officer authorized by them or a Chief Electrical Inspector or an Electrical Inspector or licensee or the generating company, as the case may be, for this purpose."

10. The Electricity Act, 2003 was further amended by the Electricity (Amendment) Act, 2007 with effect from 15.06.2007. In Section 135 of the Electricity Act, 2003 following amendments were made:--

"(A) for sub-section (1), the following sub-sections shall be substituted, namely:--

(1) Whoever, dishonestly,-

(a) taps, makes or causes to be made any connection with overhead, underground or under water lines or cables, or service wires, or service facilities of a licensee or supplier, as the case may be; or

(b) tampers a meter, installs or uses a tampered meter, current reversing transformer, loop connection or any other device or method which interferes with accurate or proper registration, calibration or metering of electric current or otherwise results in a manner whereby electricity is stolen or wasted; or

(c) damages or destroys an electric meter, apparatus, equipment, or wire or causes or allows any of them to be so damaged or destroyed as to interfere with the proper or accurate metering of electricity; or

(d) uses electricity through a tampered meter; or

(e) uses electricity for the purpose other than for which the usage of electricity was authorized, so as to abstract or consume or use electricity shall be punishable with imprisonment for a term which may extend to three years or with fine or with both:

Provided that in a case where the load abstracted, consumed, or used or attempted abstraction or attempted consumption or attempted use-

(i) does not exceed 10 kilowatt, the fine imposed on first conviction shall not be less than three times the financial gain on account of such theft of electricity and in the event of second or subsequent conviction the fine imposed shall not be less than six times the financial gain on account of such theft of electricity;

(ii) exceeds 10 kilowatt, the fine imposed on first conviction shall not be less than three times the financial gain on account of such theft of electricity and in the event of second or subsequent conviction, the sentence shall be imprisonment for a term not less than six months, but which may extend to five years and with fine not less than six times the financial gain on account of such theft of electricity:

Provided further that in the event of second and subsequent conviction of a person where the load abstracted, consumed, or used or attempted abstraction or attempted consumption or attempted use exceeds 10 kilowatt, such person shall also be debarred from getting any supply of electricity for a period which shall not be less than three months but may extend to two years and shall also be debarred from getting supply of electricity for that period from any other source or generating station:

Provided also that if it is proved that any artificial means or means not authorized by the Board or licensee or supplier, as the case may be, exist for the abstraction, consumption or use of electricity by the consumer, it shall be presumed, until the contrary is proved, that any abstraction, consumption or use of electricity has been dishonestly caused by such consumer. (1-A) Without

prejudice to the provisions of this Act, the licensee or supplier, as the case may be, may upon detection of such theft of electricity, immediately disconnect the supply of electricity:

Provided that only such officer of the licensee or supplier, as authorized for the purpose by the Appropriate Commission or any other officer of the licensee or supplier, as the case may be, of the rank higher than the rank so authorized shall disconnect the supply line of electricity:

Provided further that such officer of the licensee or supplier, as the case may be, shall lodge a complaint in writing relating to the commission of such offence in police station having jurisdiction within twenty-four hours from the time of such disconnection:

Provided also that the licensee or supplier, as the case may be, on deposit or payment of the assessed amount or electricity charges in accordance with the provisions of this Act, shall, without prejudice to the obligation to lodge the complaint as referred to in the second proviso to this clause, restore the supply line of electricity within forty-eight hours of such deposit or payment;

(B) in sub-section (2), for the words "Any officer authorized", the words "Any officer of the licensee or supplier as the case may be, authorized" shall be substituted;"

11. Similarly in Section 151 of the Electricity Act, 2003, the following provisos were inserted:--

"Provided that the Court may also take cognizance of an offence punishable under this Act upon a report of a police officer filed under Section 173 of the Code of Criminal Procedure, 1973 (2 of 1974):

Provided further that a Special court constituted under section 153 shall be competent to take cognizance of an offence without the accused being committed to it for trial."

12. Apart from other amendments, sections 151-A and 151-B were inserted vide Electricity (Amendment) Act, 2007, which read as under:--

"151-A. Power of police to investigate.--For the purposes of investigation of an offence punishable under this Act, the police officer shall have all the powers as provided in Chapter XII of the Code of Criminal Procedure, 1973 (2 of 1974).

151-B. Certain offences to be cognizable and non-bailable. -Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an offence punishable under sections 135 to 140 or section 150 shall be cognizable and non-bailable."

13. In exercise of powers conferred by Section 176 of the Electricity Act, 2003 the Central Government framed Electricity Rules, 2005 and 12 of the same reads as under:--

"12. Cognizance of the offence.--(1) The police shall take cognizance of the offence punishable under the Act on a complaint in writing made to the police by the Appropriate Government or the Appropriate Commission or any of their officer authorized by them in this regard or a Chief Electrical Inspector or an Electrical Inspector or an authorized officer of Licensee or a Generating Company, as the case may be.

(2) The police shall investigate the complaint in accordance with the general law applicable to the investigation of any complaint. For the purposes of investigation of the complaint the police shall have all the powers as available under the Code of Criminal Procedure, 1973 (2 of 1974).

(3) The police shall, after investigation, forward the report alongwith the complaint filed under sub-clause (1) to the Court for trial under the Act.

(4) Notwithstanding anything contained in sub-clauses (1), (2) and (3) above, the complaint for taking cognizance of an offence punishable under the Act may also be filed by the Appropriate Government or the Appropriate Commission or any of their officer authorized by them or a Chief Electrical Inspector or an Electrical Inspector or an authorized officer of Licensee or a Generating Company, as the case may be, directly in the appropriate Court.

(5) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every special Court may take cognizance of an offence referred to in sections 135 to 139 of the Act without the accused being committed to it for trial.

(6) The cognizance of the offence under the Act shall not in any way prejudice the actions under the provisions of the Indian Penal Code (45 of 1860)."

14. From perusal of Section 135 of the Electricity Act, 2003 and Rule 12 of the Electricity Rules, 2005, it would be evident that it is the Officer authorized by the licensee or supplier, who has the power to inspect, seize and lodge complaint or FIR.

15. Section 151 of the Electricity Act, 2003 states that no Court shall take cognizance of an offence punishable under the Act, except upon a complaint in writing made by the Appropriate Government or Appropriate Commission or any of their officer authorized by them or a Chief Electrical Inspector or an Electrical Inspector or licensee or generating company, as the case may be, for this purpose.

16. Section 151 provides the manner of taking cognizance of an offence. It enables certain authorities/officers to become complainant before the Court and the amended Section 151-A confers power upon the police to investigate an offence under the Act.

17. On a bare perusal of Section 151 of the Electricity Act as on date it is manifest that it puts a bar in taking cognizance by a court of an offence punishable under the Act except upon a complaint or FIR made by the

authorities/officers authorized in law. The consequences of the offences under the Electricity Act are severe. Hence, the provision prescribed under Section 151 needs to be strictly complied with.

18. In the present case, the petitioners are officers and employees of the South Bihar Power Distribution Company Ltd. It is an admitted position that the FIR was instituted on the basis of a written report of a political activist, who was not authorized in law to do the same. It is well settled that where a power is required to be exercised by certain authority in a certain way, it should be exercised in that manner or not at all. The Supreme Court in the matter of *Hukam Chand Shyam Lal v. Union of India and Ors.* reported in , AIR 1976 SC 789, observed as under:--

"It is well settled that where a power is required to be exercised by a certain authority in a certain way, it should be exercised in that manner or not at all, and all other modes of performance are necessarily forbidden. It is all the more necessary to observe this rule where power is of a drastic nature"

19. Regard being had to the provisions discussed hereinabove, this Court is of the opinion that a private person cannot institute a case under the Electricity Act in police station as the proviso to Section 135(1-A) does not permit it and also because the cognizance is barred if the complaint/FIR for any offence under the Electricity Act is not made by the Appropriate Government or Appropriate Commission or any of their officer authorized by them or the licensee or the generating company.

20. Now, the only point to be considered by this Court is as to whether the ingredients of the offence punishable under Section 379 IPC are attracted in the present case.

21. In this regard, it would be pertinent to note here that in the matter of *Mosmat Swaran @ Swaran Manraw v. The State of Bihar & Another* reported in , (2012) 2 PLJR 229, Division Bench of this Court has explained the concept of "theft of electricity" as under:

"Earlier under the Indian Electricity Act, 1910, theft of electricity was dealt with under Section 39 and 44 thereof and for the purposes of punishment it was referable to Section 379 of the IPC. The reason was as explained by the Apex Court in the case of *Awtar Singh v. State of Punjab*, since reported in , AIR 1965 SC 666, that electricity being not considered to be a moveable property, there cannot be theft thereof within the meaning of Section 379 IPC. It is a theft as statutorily defined under Section 39/44 of the Electricity Act, 1910 and Section 379 IPC is referred only for the purpose of punishment that is to be awarded. It is not a substantive offence punishable under Section 379 of the I.P.C."

22. Considering the definition of "theft of electricity" in Section 135 of the Electricity Act, it is crystal clear that in the FIR, the theft as contemplated in

Section 135 of the Act was reported. It did not relate to a substantive offence under Section 379 of the IPC.

23. Thus, in view of the definition of theft as provided in Section 135 of the Electricity Act as also in view of the Division Bench judgment of this Court in the matter of Mosmat Swaran @ Swaran Manraw (supra), the dishonest abstraction of electrical energy cannot constitute an offence under Section 379 of the IPC.

24. In that view of the matter, this Court is of the opinion that even the offences under the IPC of which cognizance has been taken by the impugned order passed by the learned Chief Judicial Magistrate is vitiated in law.

25. Accordingly, the impugned order dated 24.10.2013 passed by the learned Chief Judicial Magistrate, Kaimur at Bhabhua in Mohania P.S. Case No. 5 of 2011 is hereby quashed. Consequently, the entire criminal proceeding arising out of Mohania P.S. Case No. 5 of 2011 is also quashed.

26. The application stands allowed.