HIGH COURT OF GUJARAT

NARENDRABHAI REVABHAI PATEL

Versus

STATE OF GUJARAT

Date of Decision: 02 July 2015

Citation: 2015 LawSuit(Guj) 1330

Hon'ble Judges: S G Shah

Case Type: Criminal Appeal

Case No: 1061 of 2010

Subject: Civil, Electricity

Acts Referred:
Electricity Act, 2003 Sec 135(1)(b), Sec 2(1A), Sec 135

Final Decision: Appeal allowed

Advocates: R C Jani, Reeta P Chandarana

Cases Referred in (+): 4

S.G. Shah, J.

[1] Heard Mr. R.C. Jani, learned advocate for the appellant, whereas, learned APP Ms. Reeta P. Chandarana for the respondent-State.

[2] The appellant herein has challenged his conviction under Section 135(1)(B) of the Indian Electricity Act, 2003 by the Special Judge (Electricity), Mehsana in Special Electricity Case No. 26 of 2008. By such impugned judgment dated 23.6.2010, the appellant has been awarded the conviction and sentence of one year SI with fine of Rs.25,000/- and in default of payment of fine, he has to undergo additional three months imprisonment of SI for committing alleged theft of electricity.

[3] I have perused the R & P in the form of paper-book as well as original record received from the trial Court and considered the rival submissions.

[4] The sum and substance of the prosecution case is to the effect that the appellant herein is holding an electricity connection for agricultural purpose with customer

No.AG-1466 and meter for recording electricity consumption for such connection was, when examined on 11.6.2007, in presence of the appellant, it was found that there is tampering of the seals with the metal box of the meter, body of the meter and counter of the meter and thereby theft of electricity was committed by following irregularities in recording the actual and correct consumption of the electricity through such meter. For such testing and alleged irregularities and theft of electricity, an additional average penalty bill of Rs.8,338.80 was also issued and connection of electricity was ordered to be disconnected. For all such irregularities and theft of electricity, complaint was filed under Section 135(1)(B) at Sabarmati GEB Police Station, which is registered as 2nd CR No.458 of 2007, wherein, after investigation, chargesheet was filed, which was registered in the special case as referred hereinabove.

[5] Since this is a case of theft of electricity under the Special Act, it requires to be dealt with in the manner as provided under the Act. For the purpose, if we refer the provisions of Section 135 of the Act, it becomes clear that the definition of theft has been widened by amending the Act in the year 2007 after its enactment in the year 2003 and commencing enforcement in the year 2004. Thereby, now tampering with the meter or its seals, use of electricity, by such tampered meter or usage of electricity for purpose other than sanctioned was authorized and even damage or destruction to any material use for electricity supply shall be treated as a theft of electricity supply and the prescribed punishment is upto three years or with fine or with both. So far as fine is concerned, the load abstracted, consumed, or used is to be taken into consideration and there is distinction between the theft below 10 Kilowatt and above 10 Kilowatt so far as imposing of fine is concerned. So also, there is strict condition for punishment in case of second and subsequent conviction of the person, wherein, he may be debarred from getting any supply of electricity minimum for three months and which may extend to two years. Irrespective of facts and issue involve in this Appeal, I could not resist to observe that the later part of such proviso which debarred such person from getting supply of electricity from any other source or generation stations seems to be improper even if it is not settled since it has never been challenged before. It cannot be ignored that now a days, electricity is next to basic requirement and, therefore, such condition certainly needs to be reconsidered by appropriate authority.

[6] However, at present, we are concerned with the proviso to Section 2(1A), wherein, it is provided that upon detection of theft of electricity, though licensee or supplier may discontinue the supply of electricity, but such discontinuation is permissible only by an authorized officer by the appropriate commission or any other Officer or licensee of the same rank than the rank of so authorized person and similarly, it is further provided that such Officer of the licensee shall lodge complaint in writing relating to commission

of such offence in police station having jurisdiction within twenty four hours from time of such disconnection.

[7] Therefore, the provision of Section 2(1A) specifically debarred the filing of complaint by unauthorized Officer and time limit is prescribed for filing such complaint which is only twenty four hours from the time of disconnection. When the word "shall" is used in such proviso for filing a complaint, it becomes clear that it is mandatory provision and, thereby, complaint must be filed within twenty four hours of disconnection of supply and, thereby, if it is not filed within twenty four hours certainly, it will go in favour of the accused and against the prosecution to proceed further in such a complaint. Similarly, when there is a specific provision regarding disconnection and filing of complaint by authorized Officer alone, it is the basic requirement of the prosecution to prove the authorization by the Officer who has ordered to discontinue the power and the Officer who has lodged the complaint. If it is not properly proved on record, then also, the prosecution and thereby, conviction of the appellant would result into nullity and in such situation, in absence of proper evidence regarding authorization, the acquittal is required to be confirmed in favour of the accused.

[8] In background of above settled legal position, now if we peruse the available evidence on record, without reproducing the factual details since it is well described in the impugned judgment, whereas material fact and story is being taken care of while discussing evidence hereinafter, in nut shell, it can be said that prosecution has failed to prove its case beyond reasonable doubt and, therefore, the impugned judgment of conviction needs to be interfered by setting aside the conviction and, thereby, acquitting the accused.

[9] It cannot be ignored that by filing an application Exh.7, in-fact accused has sought permission to compromise the issue since he has already deposited the supplementary bill of Rs.8338.80. However, such application was resisted by the prosecution and the trial Court has also considered it in the same manner as alleged by the prosecution that this is a second offence and, therefore, such application was dismissed by order dated 5.2.2009. Since such issue is raised in the Appeal, the fact remains that irrespective of illegality of such order and concept by the prosecution regarding second offence, the fact remains that if prosecution does not want to compromise the dispute, Court cannot press the complainant to settle the dispute.

However, the factual details and discussion on such issue makes it clear that the prosecution is keen to disturb the accused and the trial Court has failed to consider the evidence and law which specifically confirms that if there is any bar to compromise, it is in subsequent conviction.

It is admitted position that there was no conviction of the appellant for the similar offence before this impugned judgment.

[10] For the purpose of deciding the Appeal on its merits, let us examine the available evidence on record;

[10.1] The prosecution has examined one Mansangbhai Bhupatbhai Chaudhary at Exh.15 as PW-1, who was Deputy Engineer at the relevant place and time. It is his case that since they have received an application dated 7.6.2007 by the appellant contending that his meter might have been tampered and, therefore requesting to check his meter, he had been to the connection of the appellant on 9.6.2007 with his Junior Engineer Mr.M.R. Parmar and at that place they found that seal on meter box was tampered with so also body of the seal was suspected to be tampered with and, therefore, they have taken the meter to their Divisional Office where it was checked on 11.6.2007 in presence of the appellant and thereupon supplementary bill of Rs.8338.80 was issued and complaint was filed. So there is categorical admission that after checking the meter, the complaint was filed after two days i.e. not within twenty four hours. It is clear and obvious that the consumer has to pay the amount immediately to avoid disconnection and, therefore, practically issuance of supplementary bill for theft with demand of that amount against disconnection certainly amount to disconnection irrespective of actual and physical disconnection, more particularly, when amount of bill is immediately recovered under the threat of disconnection. However, the most surprising fact was disclosed by the witness that previously on 25.4.2007, they have tested the meter of the appellant and taken it to their laboratory but result of laboratory test was disclosed only on 6.6.2007 i.e. after six weeks and at that time also they found the case of theft of electricity and, therefore, a bill of Rs.1,62,116/- was issued. However, though such bill was paid by the appellant with compound charges, the witness treats this incident as a second complaint. He proves the complaint by identifying the signature on it which is at Exh.16, whereas, laboratory report of incident is at Exh.17 and supplementary report is at Exh.18. At Exh.19, he proves the test report dated 9.6.2007 and at Exh.20, laboratory report dated 11.6.2007. He also produced calculation sheet at Exh.21, supplementary bill at Exh.22 and forwarding letter of supplementary letter at Exh.23. When this witness produced all such documents during his deposition, he must be aware of the facts and details as well as correctness of such document so also his statement on oath before the Court when he is not a layman but a Senior Officer of the Electricity Supplying Company. Perusal of the documentary evidence proved by this witness at Exh.16 complaint, makes it clear that the witness complainant has in categorical terms disclosed in the complaint that meter was tested in laboratory on 11.6.2007 and they found theft of electricity and,

therefore, he filed a complaint under Section 135(1)(B) of the Act. However, it was, initially, stated that in-fact meter was received by them on 9.6.2007. Thereby, the witness has hide material information. It is also not disclosed in the complaint that such testing was carried out because of a letter dated 7.6.2007 by the appellant himself and when existence of such letter is disclosed by the witness in his deposition, he did not bother or care to produce it on record though he was keen to produce or prove documents which are referred hereinabove. It is his statement in the complaint that seals of the meter were tampered with, whereas if we peruse the testing report dated 9.6.2007, though there is a statement in Exh.19 that seals of the meter were suspected to be tampered with.

Thereby, there is no specific observation regarding tampering with the seal. So far as functioning of the meter is concerned, it is specifically stated in such report that meter is running properly on prescribed load of power / electricity. The brand of the meter is recorded as Elymer. It is necessary to recollect here that in oral evidence, it was disclosed that seal on meter which was checked in laboratory was of intek brand.

[11] As against that, if we peruse the laboratory report dated 11.6.2007, though there is an allegation of tampering with the meter and its seal, it is also admitted position that in such report, the Officers of the Board has to endorse that glass of the meter and terminal block of the meter are intact and proper and there was no hole on body of the meter, and that series test of meter was proper. However, with a statement that seal of meter seems to be tampered with, it was concluded that this is a case of theft of electricity and, therefore, supplementary bill was issued on the same day.

[12] If we peruse the cross-examination of this witness, he has to admit that for filing the complaint, they have to obtain a permission from the Deputy Engineer and also admits that in the present case, they have not taken the permission from the Executive Engineer though it is his case that according to him, even Assistant Engineer can file a complaint.

However, when such issue has arisen during the evidence before the Court, it was a duty of the prosecution to prove the authorization of the complainant to file such complaint either by direct evidence or by some documentary evidence. The most surprising admission in cross examination is with reference to the condition of meter and its seal when witness though tried to say that seals of the body were tampered with, he has no option but to admit that on examination, meter was found in proper condition, even wiring of meter was in proper condition and that they have not drawn Panchnama of recovery, such meter from the field of the appellant and similarly no Panchnama was drawn while dealing with the meter in

the laboratory. Therefore, when it comes in the evidence that brand of the seal on the meter seized from the field of the appellant and decided in the laboratory are different then in absence of Panchnama, there is every possibility that the same meter was not examined in the laboratory which was removed from the connection of the appellant. This goes to the root of the prosecution. It is admitted by him that meter reader has not given any report regarding tampering of meter. It is also admitted position that when such meter was installed, they were sealed by the laboratory in addition to the original seal by the company and that it is true that if seal by the company was not tampered with.

It is also admitted position that in absence of tampering with both the seals, meter cannot be opened. Therefore, out of two sets of seals, if one set was found intact and that too original seal by the company, then there is least chance to disturb the reading of electricity consumption by the appellant.

It is also admitted by the witness that when meter was tested before him, no foreign articles were found from the meter which negativate the allegation of tampering the meter so as to record different consumption than actual consumption. It is also admitted by the witness that there was no damage to the meter and its parts, since meter was running properly. Rest of the crossexamination is with reference to calculation with which at present we are not concerned.

[13] As against that, if we peruse PW-2 at Exh.24, Deputy Engineer namely; Vasantbhai Ambalal Patel, though he has audacity to support the prosecution case, he has no option but to admit that seals on meter body were original seals of the laboratory and denied the suggestion that there are seals by the Company also. This part of evidence negativate the story by the complainant and, therefore, now it is for the prosecution to either explain or to clarify such contradiction on record, else it certainly goes to prove that both the witnesses are chance witnesses and in-fact they are not knowing anything. It cannot be ignored that both are higher Officers of the Board and, therefore, they cannot plead ignorance of any fact which is otherwise proved on record.

However, he has no option but to admit that there was no foreign particles were found with the meter and that wiring of the meter is to be decided by multi meter continuity check, but it was not disclosed in the report. It is also admitted position that he has not disclosed in the report that meter is defective.

[14] PW-3 at Exh.25 is Junior Engineer namely; Mukundbhai Ranjitbhai Parmar whose presence was admitted by PW-1. He has also, being Officer of the Board, tried to

support the prosecution case. It is his say that this a second offence of the appellant and now he came with a letter of the appellant dated 7.6.2007 and produced and proved it on record at Exh.26. He admits that they had been to the place of the appellant to check the meter pursuant to such letter. Now, it is his admission that when meter was changed on 25.4.2006 i.e. in a prior case of alleged theft, the report was disclosing only seal proof and that those seals were of Satyam Company. Therefore, now, there is contradiction and non-clarity so far as actual nature of meter and seal are concerned when they were installed during prior inspection. As discussed earlier the seal was already disclosed as Elmyer brand in report and of intek brand by previous witness. Now PW-3 says that it is of Satyam Company. It is also admitted by him that while installing new meter on 25.4.2006, signature of appellant was not taken to confirm that body of seal was proper. It is also admitted by him that there is no clarity in their report that seals were in similar position even on 9.6.2007 and, therefore, there is lacuna in the evidence of the prosecution so as to confirm that seals of the meter were tampered with by the appellant and appellant alone and thereby there is no other reason for the different nature of the seal, if at all, it is in different nature. So far as disconnection of electric supply is concerned, this witness has just in next breath, after admitting that electricity supply was discontinued has audacity to say that it was not discontinued. These are no cases of personal incident between illiterate or a common man but these are technical offences for which documentary evidence are available and, therefore, there is no reason for the prosecution to avoid to disclose the correct fact regarding disconnection of electricity by proving it properly that it was never disconnected; else it would certainly go in favour of the accused, inasmuch as, in all such cases of theft, though there is provision of presumption against the accused, absence of proper evidence would certainly result into presumption against the prosecution also. It cannot be ignored that presumption against the accused may be only after a prima-facie evidence against him but when specific documentary evidence is available and if such evidence is not coming forth on the record during trial, then in absence of evidence, there cannot be a presumption against the accused but, then, it would certainly be against the prosecution. This witness was cross examined at length. He has to admit that in Exh.23, there is no disclosure about the tampering of the seal. It is his admission that even his test report does not state that seal of the meter were tampered with and that those seals were broken by them for testing the meter. It is also admitted by the witness that while collecting the meter, they have not taken the signature of the appellant. It is his admission that he has no knowledge about theft of electricity by such meter.

[15] In background of above evidence, prosecution is relying upon the letter at Exh.26, wherein, appellant has stated that since the connection is being used by his partners also, he would like to get the meter tested again when they have admitted the

previous incident since according to him meter is being tampered with. Therefore, he has requested the Board to verify that whether it amounts to theft of electricity or not.

[16] There are two different concepts so far as such letter is concerned;

> [1] it is a document alleged to be signed and submitted by the appellant, in that case, it was duty of the prosecution to disclose such evidence on record at the earliest rather than after adducing all other necessary evidence so as to avoid any complication as being raised during this Appeal and to prove its authenticity by referring the same to the accused. If such letter was not referred to the accused at the relevant time of recording his Further Statement, then it cannot be interpreted in the manner in which it is interpreted by the prosecution for the simple reason that if at all appellant was involved in the commission of offence of theft of electricity, he would never address such a letter and that too just within two days after previous checking i.e. 7.6.2007. In further statement, this letter was referred to the appellant but he denied the same.
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> Therefore, when there is no proper endorsement on such letter regarding its existence in the record of the prosecution and when it was not disclosed either in the FIR or not produced before deposition of 4th witness though referred by previous witness, only because of such letter, it cannot be said that appellant has admitted his guilt or that there is evidence which confirms his guilt.

[17] PW-5 at Exh.32 is Police Constable, who has recorded the complaint and investigated the incident to collect the evidence and filed the chargesheet. However, he has admitted that he has conducted some part of the investigation and ultimately, chargesheet was filed by his successor Mr.Shaikh.

[18] I have considered rival submissions. The evidence discussed hereinabove certainly goes to show that there is no cogent reliable evidence to confirm that it was only accused who has committed such offence of theft of electricity and that too just within two days of previous case. I have also perused the impugned judgment. It seems that the learned Special Judge has heavily relied upon previous case wherein there was allegation of theft of electricity in past. However, there must be theft of electricity in present case also and hence trial Court has failed to appreciate that there are material contradictions in so far as position of meter in question is concerned.

[19] Though, there is provision of some presumption in favour of the prosecution, in absence of basic evidence, there cannot be a presumption, in their favour.

[20] Learned Advocate for the appellant is relying upon the decisions between Ramesh Chander v. State of Delhi, 1998 CrLJ 579 and Sahib Singh v. State of Punjab, 1997

AIR(SC) 2417 wherein, while dealing with the same issue under the said Act, it was held that mere existence of tampered seals, in absence of indication of dishonest abstraction, is not sufficient to attract the provision of theft of electricity. In this case also, though there is an allegation of tampering of the seal, there is no reliable and cogent evidence to confirm such position so also there is no evidence of dishonest abstraction. Though, it can be presumed under the new Act, presumption can be possible only after atleast prima-facie evidence for both, regarding theft and presumption.

Learned advocate for the appellant is also relying upon the case between Salim Akhtar v. State of Uttar Pradesh, 2003 AIR(SC) 4076 contending that if recovery of material was not proved by concluding witness from the locality, such recovery cannot be believed. It is with reference to recovery of meter from the place of appellant contending that in absence of recovery of Panchnama, the entire prosecution is bad in law.

[21] As against that, respondent - Prosecution is relying upon the judgment by the learned Single Judge of this High Court between Gopalbhai Chandubhai Rana v. State of Gujarat, 2008 3 GLR 2026, wherein, it is held that not following the provisions of Section of Code of Criminal Procedure, cannot be the ground to throw out such complaint and that even delay in lodging any complaint is not fatal to prosecution case. However, perusal of the judgment makes it clear that there was clear case of theft of electricity and, therefore, what is decided in that case is to be considered only because there is such specific evidence regarding theft of electricity, which was proved beyond doubt in such reported case and, therefore, Court has held that some irregularities or delay may not vitiate the proceedings. However, in our case, there is no specific and clear evidence to even prove basic requirement of theft of electricity and, therefore, the trial Court has committed not only error but it results into illegality since it amounts to confining a person behind the bar for no fault of his own. It cannot be ignored that irrespective of provisions for presumption regarding theft, some basic and prima-facie evidence is must while confirming conviction, which is a different proposition than issuing a supplementary bill. In any case, civil liability cannot be equated with criminal liability and, therefore, for criminal liability, there must be proper evidence beyond doubt.

[22] In view of above facts and circumstances, I am of the opinion that the impugned judgment cannot sustain in the eyes of law when it is convicting the appellant with fine of Rs.25,000/- (Rupees twenty-five thousand only).

[23] Therefore, the impugned judgment and order dated 23.6.2010 in Special Electricity Case No. 26 of 2008 by the Special Judge (Electricity), Mehsana is quashed

and set aside. Thereby, it results into acquittal of the appellant. If appellant has paid the amount of fine, it is to refunded to him since Appeal is allowed. The bail bond, if any, shall stand cancelled.

[24] Record and Proceedings be sent back to the concerned trial Court.