

TAMIL NADU ELECTRICITY BOARD

v.

M/S RASIPURAM TEXTILE (P) LTD. & ORS.

(Criminal Appeal No. 1962 of 2008)

NOVEMBER 25, 2008

[S.B. SINHA AND CYRIAC JOSEPH, JJ.]

ELECTRICITY ACT, 1910:

ss. 39(1) and 44(1)(c) r/w s.49-A(1) – Theft of energy – Prosecution of Company and its Directors – Conviction of Directors by trial court – Set aside by appellate court – Revision petition of complainant dismissed by High Court – HELD: It is only if an averment is made in the complaint that accused Director was in-charge and/or responsible for conduct of affairs of the Company when offence was committed, and sufficient and cogent evidence is brought on record to prove the said allegation, that proviso to s.49-A would be attracted and burden would shift on the accused-Director to establish that offence was committed without his knowledge or that he exercised all due diligence to prevent commission of such offence – In the instant case, there being neither any averment made in the complaint nor any evidence brought on record by complainant to satisfy the requirement of s.49-A, the appellate court and the High Court in revision petition rightly held that the Directors could not have been convicted – Order of acquittal not interfered with – Criminal Law – Burden of proof.

S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla & Anr. (2005) 8 SCC 89; K. Srikanth Singh Vs. North East Securities Ltd. and Anr. (2007) 12 SCC 788; Saroj Kumar Poddar Vs. State (NCT of Delhi) (2007) 3 SCC 693 and Average Advertising Pvt. Ltd. Vs. State, Govt. of N.C.T. & Ors. (2007) 5 SCC 54, relied on.

A Case Law Reference

(2005) 8 SCC 89 relied on para 17

(2007) 12 SCC 788 relied on para 17

B (2007) 3 SCC 693 relied on para 17

(2007) 5 SCC 54 relied on para 17

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
No. 1962 of 2008.

C From the final Judgment and Order dated 6.4.2004 of the
High Court of Judicature at Madras in Crl. R.C. No. 691 of
2003.

R. Nedumaran and T. Harish Kumar for the Appellant.

D Jayant Muthraj, C.K. Sasi and Aribam Guneshwar Sharma
for the Respondents.

The following Order of the Court was delivered:

E ORDER

Leave granted.

F 1. One Executive Engineer of the Tamil Nadu State
Electricity Board made a surprise inspection of the premises
of first respondent -Rasipuram Textile Mills. Allegedly, theft of
electrical energy was detected.

G 2. A criminal prosecution was lodged not only against the
company but also against its Managing Director and other
Directors purported to under Section 39(1) and 44(1)(c) of the
Indian Electricity Act, 1910.

H 3. Learned trial Judge, recorded a judgment of conviction
against the accused. So far as the Directors of the Company
are concerned, the learned trial Judge convicted despite

noticing the provisions contained in Section 49A of the Indian Electricity Act, 1910, observing: A

"From the above, it is clear that, all the persons responsible for the administration of a company are liable for the offence committed by the Company. If anybody disowns the liability and claims it has happened without his knowledge or despite the sincere efforts the offence has been committed, then it is for the concerned accused to prove the same. On this basis, the Managing Director and the other Directors A2 to A 10 were also included being the responsible persons of A1 Mill. A 11 was included as Electrical Supervisor and A 12 as Spinning Master and A 13 as Electrical Helper were included by P.W.8 Thiru Jayachandran in the final report". B C

4. Indisputably, the Managing Director of the company – R. Nainamalai as also another Director of the company R. Palanivel Goundar expired during pendency of the said proceedings. D

5. Learned Additional District and Sessions Judge, while setting aside judgment of the trial Court, categorically, held as under: E

"13. That the petitioner 2 to 8 only Directors of the Mill and the prosecution has not alleged that the petitioner is in charge of and was responsible to the accused No.1 Mill for the conduct of the business of the Mill and the records of Investigation also did not show that the petitioner was or had been participating in the day to day affairs of the Mill and the mere fact that the petitioner was the Director of the accused No.1 Mill would not be sufficient to fasten criminal liability on him and the he relies on the decision of this Court in P. Jeyanthi V. State, rep. by Sub-Inspector of Police (Crimes), Maduravoyal Police Station, Chingleput District 1990 law Weekly Criminal 398. Under Section 49A of the Act, the onus is on the F G H

A prosecution to establish that every person, who at the time
of the offence was committed, was in charge of and was
responsible to the company for the conduct of the business
of the Company, before liability could be fastened. Once
B the initial onus of the prosecution is discharged, then the
burden shifts to the other person to prove that the offence
was committed without his knowledge or that he had
exercised due diligence for prevention of commission of
the offence.

C 14. The service connection 89 stands in the name
of the Managing Director Ninamalai. In the final report it
has been stated that 2 to 8 accused are directors of the
No.1 Mill. The facts stated earlier clearly show that as far
as accused is concerned, there is no even a whisper nor
any shred of evidence nor anything to show that there was
D any act committed by the accused, from which a
reasonable inference can be drawn that they should also
be vicariously liable.

E 15. In the absence of any allegation or material in the
records to disclose that the petitioners were participating
in the day to day affairs of the Mill the prosecution cannot
be allowed to continue in so far as the petitioners are
concerned."

F 6. A revision application filed by the appellant herein
thereagainst before the High Court has been dismissed by
reason of the impugned judgment.

G 7. Learned counsel appearing on behalf of the appellant
would contend that in terms of Section 49A of the Indian
Electricity Act, 1910, the burden of proof was on the accused
to show that despite the fact that they were the Directors of the
company, they had no knowledge about the commission of the
offence. The learned counsel would, furthermore, contend that
they had made no effort far less any sincere effort to show that
H they were not aware of the commission of the offence by

another person.

8. It was, furthermore, urged keeping in view the fact that eight witnesses had been examined and several documents have been brought on record for the purpose of proving the prosecution case, it was obligatory on part of the learned Additional Sessions Judge as also the High Court to consider the merit of the matter for the purpose of finding out as to whether the private respondents and/or any of them was incharge and/or responsible for the conduct of the business of the company or not.

9. Learned counsel appearing on behalf of the respondents, however, supported the impugned judgment.

10. Indian Electricity Act, 1910 was enacted to amend the law relating to the supply and use of electrical energy. Section 39 of the Act provides for penalty if an offence of theft of energy is committed. Section 44 provides for penalty for interference with meters or licensee's works and for improper use of energy.

11. The said provisions read thus:

"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 or 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.

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), of any meter, indicator or apparatus

A referred to in Section 26, sub-section (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

B (aa) unauthorisedly re-connects any meter referred to in sub-section (1) of section 26, or any meter, indicator or apparatus referred to in sub-section (7) of Section 26, with any electric supply line or other works, being the property of the licensee, through which energy may be supplied, when the said electric supply line or other works has or have been cut or disconnected under sub-section C (1) of section 24; or

(b) 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

(c) maliciously injures any meter referred to in section 26, sub-section(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 E

(d) improperly uses the energy of a licensee.

F [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[if it is proved that any artificial means exists] for making such connection as is referred to in clause(a) (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, G H

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 willfully caused by such consumer."

12. Section 49A which was inserted by Act 32 of 1959 provides for offence by companies. It reads as under:

"49A Offence by companies- (1) If the person committing an offence under this Act is a company, every person who at the time the offence was committed was in charge of, and was responsible to the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

PROVIDED that nothing contained in this sub-section shall render any such person liable to any punishment, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director or manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation- For the purposes of this section-

(a) "company" means any body corporate and includes a firm or other association of individuals; and

A (b) "director" in relation to a firm, means a partner
in the firm.

B 13. In terms of the aforesaid provision, therefore, it was
obligatory on the part of the complainant not only to make
requisite averments in the complaint petition but also to prove
that any of the Directors who had been prosecuted for alleged
commission of the aforementioned offence was in charge of and
was otherwise responsible for the conduct or the affairs of the
Company.

C 14. We have noticed hereinbefore that how the learned trial
Judge has dealt with the entire aspect. Learned trial Judge has
misconstrued and misinterpreted the provisions of Section 49A
of the Act.

D 15. In terms of Sub-section (1) of Section 49A, it is for the
complainant to prove that the Director of the Company at the
time when the theft was committed was in charge of and/or was
responsible for the conduct of its business. Only in the event
such an averment is made and sufficient and cogent evidence
is brought on record to prove the said allegations, the proviso
appended to Section 49 A would be attracted; meaning thereby
only in the event it is proved that a Director or a Group of
Directors of the Company were in charge of and/or were
responsible for the conduct of the business of the company, the
burden would shift on the accused to establish the ingredients
contained in the proviso appended to Section 49A of the Act.

G 16. Learned Additional Sessions Judge as well as the
High Court, in our opinion, therefore, were right in holding that
in the absence of any averment made in the complaint petition
as also in the absence of any evidence brought on record by
the complainant to satisfy the requirements of Section 49A of
the Act, the respondents could not have been convicted.

H 17. This aspect of the matter has been considered by a
series of decisions of this Court including S.M.S.

Pharmaceuticals Ltd. Vs. Neeta Bhalla & Anr. (2005) 8 SCC 89. Following the said decision this Court in *K. Srikanth Singh Vs. North East Securities Ltd. and Anr.* (2007) 12 SCC 788 in a case arising under Section 138 of the Negotiable Instrument Act, held as under:

"4. It is not in dispute that for showing a vicarious liability of a Director of a company upon the complaint it is incumbent to plead that the accused was responsible to the company for the conduct of the business of the company. No such allegation having been made in the complaint petition, in our opinion, the High Court was not correct in passing the impugned judgment. The allegation contained in the complaint petition was that all the accused Directors, participated in the negotiations for obtaining financial help for Accused 1, which in our opinion, would not give rise to an inference that the appellant was responsible for day-today affairs of the company....."

See: *Saroj Kumar Poddar Vs. State (NCT of Delhi)*- (2007)3 SCC 693

Average Advertising Pvt. Ltd. Vs. State, Govt. of N.C.T. & Ors. (2007) 5 SCC 54

18. For the reasons aforementioned, there is no merit in this appeal. It is dismissed accordingly.

R.P.

Appeal dismissed.