

B.S.E.S. Rajdhani Power Ltd. Vs. Hasibuddin and Anr.

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Court : Delhi

Decided On : Dec-10-2014

Judge : S. Muralidhar

Appellant : B.S.E.S. Rajdhani Power Ltd.

Respondent : Hasibuddin and Anr.

Advocate for Pet/Ap. : Mr. Sunil Fernandes, Mr. Deepak Pathak, Mr. Aditya Sharma, Mr. S. Satyanarayana, Mr. Vijay Gupta, Mr. Mukul Dhawan

Judgement :

IN THE HIGH COURT OF DELHI AT NEW DELHI CRL.A. 1051 of 2008 B.S.E.S. RAJDHANI POWER LTD. Appellant Through: Mr. Sunil Fernandes, Standing Counsel with Mr. Deepak Pathak, Advocate. versus JAGAT RAM & ANR. Through: Respondents Mr. Aditya Sharma proxy for Mr. S. Satyanarayana, Advocate. WITH CRL.A. 1052 of 2008 B.S.E.S. RAJDHANI POWER LTD. Appellant Through: Mr. Sunil Fernandes, Standing Counsel with Mr. Deepak Pathak, Advocate versus R.K. GUPTA & ANR. Through: Respondents Mr. Vijay Gupta, Advocate WITH CRL.A. 1053 of 2008 B.S.E.S. RAJDHANI POWER LTD. Appellant Through: Mr. Sunil Fernandes, Standing Counsel with Mr. Deepak Pathak, Advocate versus P.P. SINGH & ANR. Through: Respondents None. WITH CRL.A. 1054 of 2008 B.S.E.S. RAJDHANI POWER LTD. Appellant Through: Mr. Sunil Fernandes, standing counsel with Mr. Deepak Pathak, Advocate. versus RAJIV BHASIN & ANR. Through: Respondents Mr.

Mukul Dhawan, Advocate WITH CRL.A. 1055 of 2008 B.S.E.S. RAJDHANI POWER LTD. Appellant Through: Mr. Sunil Fernandes, Standing Counsel with Mr. Deepak Pathak, Advocate. versus HASIBUDDIN & ANR. Through: Respondents None. WITH CRL.A. 1056 of 2008 B.S.E.S. RAJDHANI POWER LTD. Appellant Through: Mr. Sunil Fernandes, Standing Counsel with Mr. Deepak Pathak, Advocate versus GROVER RESTAURANT & CATERERS &Respondents Through: None. CORAM: JUSTICE S. MURALIDHAR

ORDER

1012.2014 The issue for consideration 1. These appeals raise an interesting but substantial question of law regarding the powers and jurisdiction of special electricity courts in the context of compounding of offence of theft of electricity under Section 152 of the Electricity Act, 2003 (Act). The question raised by the Appellant, B.S.E.S. Rajdhani Power Limited (BRPL) in all these cases is that, whether, notwithstanding the compounding of the criminal liability of a consumer under Section 152 of the Act, the special court can nevertheless proceed to determine the civil liability in exercise of its powers under Section 154(5) of the Act?. Resultantly, it is sought to be urged that the consequences of compounding in terms of Section 152(3) of the Act, i.e., a deemed acquittal within the meaning of Section 300 of the Criminal Procedure Code, 1973 (Cr PC) will not extinguish the civil liability of such consumer which can be proceeded to be determined by the special court under Section 154(5) of the Act. Background facts 2. The facts in all these appeals are more or less similar and, therefore, illustratively the Court refers to the facts in Crl. A. No.1051 of 2008 (B.S.E.S. Rajdhani Power Ltd. v. Jagat Ram & Anr.). The case of BRPL is that its inspection team undertook an inspection at house No.375, Badarpur of Respondent No.1 on 22nd September 2005 and found that Respondent No.1, who was the user and occupier, had indulged in direct theft of electricity by illegally tapping the BSES LV Mains and proceeded to raise a supplementary theft bill for a sum of Rs. 6,94,412. When that bill was not paid, BRPL filed a criminal complaint No.244 of 2006 in the Special Electricity Court, Patiala House Courts, New Delhi under Section 135 as well as Section 154(5) of the Act for determination of both the criminal and civil liability respectively of the consumer.

3. Respondent No.1 was summoned by the Special Electricity Court. At that stage, Respondent No.1 approached the Deputy Commissioner (DC), who was the authorised officer appointed by the Government of National Capital Territory of Delhi, for compounding of the criminal liability under Section 152 of the Act.

4. It appears that in the said proceedings before the DC, BRPL participated and raised objections to the prayer for compounding of the offence under Section 135 of the Act. It was specifically urged that unless the theft bills were paid by the consumer, there should be no compounding of the offence. It was further urged that unless there is a mutual agreement between the person proceeded against for theft and the person from whom the theft was committed (BRPL) there cannot be any compounding of the offence.

It was urged that any other interpretation of the Act would defeat the object and scheme of the Act. The order of the Deputy Commissioner 5. A detailed order was passed by the DC on 31 st January 2007 in the said application and in several other similar applications holding that Section 152 of the Act gives relief only from criminal liability and that as regards civil liability it has to be separately dealt with under Section 154 (5) of the Act. The relevant portion of the said order reads as under:

Section 152 read with Section 154(5) makes it clear that the criminal liability and civil liability are two separate matters. Section 152 gives relief from the criminal liability subject to payment of compounding fee decided by the appropriate government or authorized officer in this behalf. Section 154(5) separately deals with the civil liabilities including that of theft of electricity with provisions of penalty. In view of these legal provisions, in my considered opinion, this notified authority has an obligation to give the benefits of Section 152 to Petitioners by accepting compounding fee. The theft bill and any other charges due to the Respondent have to be dealt separately under the appropriate law. Accordingly, the objections raised by the respondent are overruled and the Petitioners may deposit the compounding fee in Government Treasury, calculated on the basis of Section 152(1) and details given in the copy of theft bill raised by the respondent against the petitioners. The compounding fee payable by Petitioners is detailed below.

6. When the complaint case was sought to be proceeded with in the Special Court, learned counsel for the Respondents submitted that in view of the compounding of the offence in terms of Section 152 of the Act, there was a deemed acquittal and, therefore, no further proceedings could be continued against the Respondents in any criminal court. The impugned order of the Special Court 7. By the impugned order dated 7th November 2008, the special court accepted the submission of the Respondents by holding that this court being criminal court, the proceedings comes to an end after offence is compounded by the accused before the Appropriate Government.

It was further held that the word shall used in Section 154(5) of the Act would not be read as mandatory for the criminal court/special court/sessions court to decide the civil liability independently if there was a deemed acquittal under Section 152 of the Act. It was held that the determination of the civil liability was dependent on theft of electricity and since the theft of electricity stands compounded, no proceedings could continue for determining the civil liability.

8. Aggrieved by the above order, the present appeals have been filed by BRPL. Submissions of learned counsel for the Appellant 9. Mr. Sunil Fernandes, learned counsel for the Appellants, submitted that the wording of Section 152 of the Act is such that what was intended by the legislature was to extinguish only the criminal liability as a result of the compounding of the offence. This was evident from the fact that the provision envisaged no further proceedings continue in any criminal court.

He submitted that the Special Court in the impugned order erred in observing that since it was a criminal court, it could not continue to determine the civil liability. He submitted that the very scheme of the Act was to combine in the Special Court both the criminal and civil jurisdictions and the mandate to determine civil liability under Section 154 (5) of the Act was unambiguous.

10. Referring to the decision of the Division Bench (DB) of this Court in B.L. Kantroo v. BSES Rajdhani Power Ltd. 154(2008) DLT56 Mr. Fernandes submitted that the jurisdiction of the Special Court to exclusively determine the civil liability and issues arising out of exercise of such jurisdiction was expressly recognised by

this Court. He pointed out that in the appeals before this Court and, in particular, Crl. A. No.1051 of 2008, the compounding fee was restricted to the amount envisaged under Section 152 (1) of the Act which was less than 20% of the fine amount if convicted, and definitely far less than the civil liability. For instance, it was pointed out that in Crl. A. No.1051 of 2008, the compounding fee determined by the DC was Rs. 1,00,000, whereas, if it there had been conviction at the end of a criminal trial, the fine amount would imprisonment) and have been Rs. 20,83,236 (apart from the civil liability Rs. 6,94,412. Effectively, therefore, by opting for compounding, the consumer had avoided the substantial civil liability of nearly Rs. 7,00,000, imprisonment and a fine amount of over Rs. 20,00,000. He submitted that this could never have been the intention of the legislature when it provided for compounding of the criminal offence under Section 152 of the Act.

11. Mr. Fernandes submitted that when this issue was argued before the DC, the BRPL did not have the benefit of the decision of this Court in Radhey Shyam Bansal v. B.S.E.S. Rajdhani Power Ltd. 2008 (148) DLT462 where it was emphasised that there could be no compounding of the offence without the consent of BRPL. This was also perhaps the reason why the order of the DC was not challenged by BRPL since that order has kept open the question of determination of civil liability and had, in fact, expressly stated that the matter will proceed before the Special Court for that purpose. He submitted that in the present case, not only has the criminal liability been extinguished without the consent of BRPL, but it has also lost out on the civil liability because of the impugned order of the Special Court. Referring to the order passed by this Court on 13th February 2008 in Crl. M.C. No.482 of 2008, he submitted that the object of the Act was to deter theft of electricity, but at the same time, encourage settlements where the revenue aspect stands satisfied.

He urged that a distinction should be drawn between the cases where acquittal results at the end of a full-fledged trial and where there was a deemed acquittal as a result of acquittal under Section 152 of the Act for the purpose of determination of the consequential civil liability. Submissions of learned counsel for the Respondents 12. In reply, it is submitted by Mr. Vijay Gupta, learned counsel appearing for the Respondents in Crl. A. No.1052 of 2008 and Mr. Mukul Dhawan,

learned counsel appearing for the Respondents in Crl. A. No.1054 of 2008 that the determination of the civil liability under Section 154(5) of the Act was intrinsically linked with the determination of the criminal liability. Attention of the Court was drawn to Explanation to Section 154(5) of the Act which defines civil liability to be the loss or damage incurred due to the commission of an offence referred to in Section 135 to 140 and Section 150 of the Act. It was argued that if there was no commission of an offence in the first place, as a result of the deemed acquittal under Section 152(3) of the Act, then the question of further determining the civil liability did not arise.

13. It was submitted that while the question of the Special Court having exclusive jurisdiction to determine the civil liability, as explained in *B.L. Kantroo v. BSES Rajdhani Power Ltd.*, was not in issue, as far as BRPL was concerned, it could not seek to enforce civil liability through the Special Court if the criminal liability of a consumer stood extinguished. It was submitted that there could not be any distinction between acquittal at the end of a full-fledged trial and acquittal as a result of the compounding under Section 152 of the Act. In either case, the further civil liability would also stand extinguished. Decision of the Court 14. Among the changes brought out by the Act, which came into force on 5th June 2003, a significant one was the constitution of the Special Court and combining in it both criminal and civil jurisdictions. Under Section 153 (3), a person shall not be qualified for appointment as a Judge of a Special Court unless he was, immediately before such appointment, an Additional District and Sessions Judge. The other unique feature of the Special Court was provided in Section 154 of the Act which dealt with its procedures and powers. What was envisaged, as far as criminal liability was concerned, was a summary procedure in the first place with flexibility to the Special Court, depending on the nature of the case, to try it in a regular manner as provided by the Cr PC.

15. The scheme of Section 154 of the Act is that a Special Court will proceed to determine the criminal liability as regards the offences that have been described in Sections 135 to 140 and Section 150 of the Act. It will also determine the civil liability. The third aspect of the matter is that the Special Court will also proceed to recover the amount determined as civil liability as if it were a decree of civil court.

16. Section 154(5) of the Act has to be read together with the Explanation provided thereunder and it reads as under:

154. Procedure and power of Special Court.- (5) The Special Court shall determine the civil liability against a consumer or a person in terms of money for theft of energy which shall not be less than an amount equivalent to two times of the tariff rate applicable for a period of twelve months preceding the date of detection of theft of energy or the exact period of theft if determined whichever is less and the amount of civil liability so determined shall be recovered as if it were a decree of civil court. Explanation.-For the purposes of this section, civil liability means loss or damage incurred by the Board of licensee or the concerned person, as the case may be, due to the commission of an offence referred to in sections 135 to 140 and section 150.

17. The Explanation in Section 154 provides the link between the exercise of the two jurisdictions of the Special Court, i.e., the criminal jurisdiction and the civil jurisdiction. The definition of civil liability in terms of Explanation is exclusive. It means loss or damage that is incurred due to commission of an offence.

The word due to necessarily requires the Special Court to first determine the criminal liability arising out of the commission of an offence punishable under Sections 135 to 140 and Section 150 of the Act.

18. If, in a given case, at the end of a trial, the Special Court comes to the conclusion that no offence is made out against the Respondents before it, the question of the Special Court thereafter determining the civil liability cannot arise. There is only one trial for determining both the criminal liability as well as the civil liability. It is on the same evidence that both liabilities have to be determined. In fact, it was fairly stated by Mr. Fernandes that the understanding of the provision by BRPL was such that in the event of a full-fledged trial resulting in acquittal of an accused, the question of requiring the Special Court to determine the civil liability does not arise. Indeed, in such cases, where the acquittal orders have attained finality, BRPL had promptly obeyed the consequential orders requiring it to refund the amounts that may have been deposited when the proceedings were pending.

19. The question that arises in the present cases is in the context of compounding of the criminal offence under Section 152 of the Act, which reads as under:

152. Compounding of offences.----(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the Appropriate Government or any officer authorised by it in this behalf may accept from any consumer or person who committed or who is reasonably suspected of having committed an offence of theft of electricity punishable under this Act, a sum of money by way of compounding of the offence as specified in the Table below: Nature of Service Crl. A. Nos.1051 to 1056 of 2008 TABLE Rate at which the sum of money for compounding to be collected per Kilowatt (KW)/Horse Power (HP) or part thereof for Low Tension (LT) Page 10 of 15 (1) 1. Industrial Service 2. Commercial Service 3. Agricultural Service 4. Other Services supply and per Kilo Volt Ampere (KVA) of contracted demand for High Tension (HT) (2) twenty thousand rupees; ten thousand rupees; two thousand rupees; four thousand rupees: Provided that the Appropriate Government may, by notification in the Official Gazette, amend the rates specified in the Table above. (2) On payment of the sum of money in accordance with sub-section (1), any person in custody in connection with that offence shall be set at liberty and no proceedings shall be instituted or continued against such consumer or person in any criminal court. (3) The acceptance of the sum of money for compounding an offence in accordance with sub-section (1) by the Appropriate Government or an officer empowered in this behalf shall be deemed to amount to an acquittal within the meaning of section 300 of the Code of Criminal Procedure, 1973 (2 of 1974). (4) The compounding of an offence under sub-section (1) shall be allowed only once for any person or consumer.

20. Section 152(1) begins with the non-obstante clause and vests power in the appropriate government or an officer authorised by it to compound an offence. In this respect, it is different from the scheme of Section 320(2) Cr PC where the compounding is with the permission of the Court before which the adjudication is in progress. However, the result of such compounding is no different from the result of compounding, as explained under Section 320 (8) Cr PC. Under Section 152(3), once the compounding of fee is accepted by the appropriate government or an officer empowered, it shall be deemed to amount to an acquittal within the

meaning of Section 300 Cr PC. Under Section 152 (4) of the Act, compounding of an offence can be allowed only once for a consumer.

21. This Court had in *Radhey Shyam Bansal v. B.S.E.S. Rajdhani Power Ltd.* (supra) occasion to examine Section 152 of the Act. The context there was a consumer approaching the Special Court with an application under Section 152 for compounding the offence and the BRPL insisting before the Special Court that without payment of the theft bill amount, it could not agree to the compounding. That plea of BRPL was accepted by the Special Court. The consumer then approached this Court, assailing the order of the Special Court, rejecting his application for compounding of the offence under Section 152 of the Act. After analysing Section 152 of the Act and drawing a distinction between the said provision and Section 200 of the Motor Vehicles Act, 1988, this Court observed as under:

9. The legislative intent as is evident from a plain reading of Section 152 shows that compounding of an offence has to be preceded by a bilateral agreement between the complainant which is BRPL and the accused. In sub-section (3) the words the acceptance of the sum of money for compounding an offence in accordance with sub-section (1) by the Appropriate Government or an officer empowered in this behalf .

indicate that the offer of the compounding fee by the accused has to be accepted by the authorized officer as designated by the Appropriate Government. Secondly, the words in sub-section (1) to the effect may accept from any consumer ..

indicate that this is a discretionary power and it is not in each and every case that the authorized officer is required to accept the compounding fee for compounding the offence. Sub-section (4) also indicates that this is a one-time measure vis--vis the consumer.

13. As regards the contention whether a condition in addition to what is evident from the statute can be imposed for accepting the compounding fee, it requires to be observed that the compounding is of the offence by the Petitioner and the fee is for compounding that offence. It would be inconceivable that the complainant can

be expected to accept the compounding fee without the theft bill being discharged. Viewed in this context, the insistence by the Respondent No.1 that the theft bill would have to be paid as a pre-condition to accept the compounding fee, cannot be said to be unreasonable or illegal.

22. The Court would like to reiterate that there cannot be any compounding of the offence without the consent of a complainant. This is evident from the scheme of not only Section 320 Cr PC, but even Section 152 of the Act. While Section 152 permits compounding order to be passed by the appropriate government, it does not dispense with the need to obtain the consent for such compounding by the Complainant, which in this case is BRPL. The decision in *Radhey Shyam Bansal* still holds the field and is required to be followed by the appropriate government under Section 152 of the Act. The order of the DC in the present cases was passed prior to the decision in *Radhey Shyam Bansal*. It is evident that to the extent the order of the DC overrides the objection of BRPL to the compounding where, again, it insisted on consumer paying the theft bill amount as a pre-condition to it agreeing to the compounding, the said decision of the DC is contrary to the law, as explained by this Court in *Radhey Shyam Bansal*.

23. BRPL could have challenged the order of the DC in the present cases, in light of the law explained in *Radhey Shyam Bansal*. However, it appears that in view of the DCs order permitting the question of civil liability to be determined by the Special Court, BRPL opted not to do so. The decision in *Radhey Shyam Bansal* was also not referred to before the Special Court when it passed the impugned order dated 7th November 2008. Therefore, as far as the present cases are concerned, BRPL cannot possibly be now permitted to urge that the question of criminal liability should be gone into afresh. However, it is made clear that in light of the law explained in *Radhey Shyam Bansal*, the appropriate government, while exercising powers under Section 152 of the Act, should ensure that there is consent of BRPL to the proposal for compounding put forth by a consumer.

24. As far as the question raised by BRPL in the present appeals is concerned, the Court accepts the submission put forth by learned counsel for the Respondents that the scheme of Section 154 of the Act is such that the criminal and civil liability

are intrinsically linked. In *B.L. Kantroo v. BSES Rajdhani Power Ltd.* the DB was considering the plea of a consumer who sought a declaration of invalidation of an electricity bill and in that context held that the exclusive jurisdiction to determine such question, in terms of Section 145 of the Act, vested in the Special Court. The DB was not dealing with a situation where there has been a compounding of the offence under Section 152 of the Act and whether in such eventuality, the Special Court could still determine the civil liability under Sections 154 (5) of the Act.

25. In view of the Explanation to Section 154 the submission of Mr. Fernandes that Section 154(5) is a stand-alone provision should fail. In other words, it is not possible to accept the submission that a Special Court can determine the civil liability against a consumer or a person in terms of money for theft of energy irrespective of there being a deemed acquittal of such consumer as a result of the compounding of the offence under Section 152 (3) of the Act. The Explanation is clear that determination of the civil liability has to necessarily be preceded by a positive determination of the commission of the offence. In terms of the Explanation, the quantum of the civil liability has necessarily to be loss or damage incurred due to the commission of an offence. If, in fact, there is no determination of commission of an offence, it is not possible for the Special Court to proceed to determine the civil liability. In other words, a collective reading of Section 152, Section 154(5) and the Explanation to Section 154 reveals that the legislature did not intend that a different set of consequences should follow where acquittal was not at the end of a full-fledged criminal trial but on account of a deemed acquittal as a result of the compounding of the offence under Section 152 of the Act.

26. The view expressed by the Special Court that since it is a criminal court, it cannot determine the civil liability, is incorrect in view of the scheme of Section 154 of the Act. However, the conclusion in the impugned order of the Special Court that there cannot be any determination of the civil liability in the face of an acquittal as a result of compounding of the offence under Section 152 of the Act cannot be faulted. It is clarified that the orders passed by DC under Section 152 which have already attained finality will not be affected by the present order.

27. The appeals are disposed of with the above clarification of the legal issues but, in the circumstances, with no order as to costs. S. MURALIDHAR, J.

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