

U.P.Power Corporation Ltd. & Ors vs Anis Ahmad on 1 July, 2013

Equivalent citations: AIR 2013 SUPREME COURT 2766, 2013 (8) SCC 491, 2013 AIR SCW 4342, 2013 (5) ABR 494, (2013) 6 MAD LJ 80, AIR 2013 SC (CIV) 2117, (2014) 2 MPHT 390, (2013) 4 MAD LW 813, (2014) 1 ORISSA LR 68, (2013) 130 ALLINDCAS 195 (SC), (2013) 2 WLC(SC)CVL 272, (2013) 2 CLR 365 (SC), (2013) 5 ALL WC 5238, (2013) 5 CAL HN 95, (2014) 117 CUT LT 750, (2014) 1 ICC 614, (2013) 2 CPR 654, (2013) 9 SCALE 334, (2013) 100 ALL LR 736, (2013) 3 CPJ 1, 2013 (3) KLT CN 31 (SC), (2013) 5 BOM CR 76

Bench: Sudhansu Jyoti Mukhopadhaya, G.S. Singhvi

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5466 OF 2012
(arising out of SLP(C)No.35906 of 2011)

U.P. POWER CORPORATION LTD. & ORS. ... APPELLANTS

Versus

ANIS AHMAD ... RESPONDENT

With

C.A.No. 5467-5468 of 2012 (@ SLP(C) No. 18284-18285 of 2008)

C.A.No. 5469 of 2012 (@ SLP(C) No.14306 of 2009)

C.A.No. 5470 of 2012 (@ SLP(C) No.33557 of 2011)

C.A.No. 5471 of 2012 (@ SLP(C) No.33558 of 2011)

C.A.No. 5472 of 2012 (@ SLP(C) No.33559 of 2011)

C.A.No. 5473 of 2012 (@ SLP(C) No.33560 of 2011)

C.A.No. 5474 of 2012(@ SLP(C) No.33561 of 2011)

C.A.No. 5475 of 2012 (@ SLP(C) No.33562 of 2011)

J U D G M E N T

iv) Section 145 of the Electricity Act specifically bars the jurisdiction of the Civil Court to entertain any suit or proceedings in respect of any matter which an assessing officer referred to in Section 126 or an Appellate Authority referred to in Section 127 of the Electricity Act or the Adjudicating Officer appointed under the Electricity Act, is empowered to determine.

Second part of Section 145 provides that no jurisdiction shall be granted by any Court or Authority in respect of any action taken or to be taken in pursuance of any power conferred by or under the Act. For this purpose, if we refer to Sections 173 and 174 and apply the principle laid down there-under, it would mean that qua the consumer fora there is inconsistency and, therefore, 'other authority' would not include consumer fora.

v) Consumer of electrical energy provided by the Electricity Board or other Private Company, is a consumer as defined under Section 2(1)(o) of the Consumer Protection Act and a complaint alleging any deficiency on the part of the Board or other private company including any fault, imperfection, shortcoming or inadequacy in quality, nature and manner of performance which is required to be maintained by or under any law or in pursuance of any contract in relation to service, is maintainable under the Consumer Protection Act.

Against the Assessment Order passed under Section 126 of the Electricity Act, a consumer has option either to file Appeal under Section 127 of the Electricity Act or to approach the Consumer Fora by filing complaint. He has to select either of the remedy. However, before entertaining the complaint, the Consumer Fora would direct the Consumer to deposit an amount equal to one- third of the assessed amount with the licensee [similar to Section 127(2) of the Electricity Act].

vi) Consumer Fora have no jurisdiction to interfere with the initiation of criminal proceedings or the final order passed by any Special Court constituted under Section 153 or the civil liability determined under Section 154 of the Electricity Act.”

3. The judicial Member having not agreed with the majority finding, by his minority judgment dated 16th April, 2008 held as follows:

“14. In the result I hold as under:

i) The provisions contained in Section 126 and 127 of Part XII of the Electricity Act, 2003 are not inconsistent with the provisions of Consumer Protection Act, 1986 and consequently there is no need to have resort to the provisions of Section 173 and 174 of the Electricity Act. The provisions of the Consumer Protection Act and Electricity Act can be given their full meaning and effect on the ground (ii) Consumer fora constituted under the Consumer Protection Act would have jurisdiction to entertain only the complaints filed by a consumer of electricity alleging any defect or deficiency in the supply of electricity or alleging adoption of any unfair trade practice by the supplier of electricity. (iii) The consumer fora established under the Consumer Protection Act have no jurisdiction over the matter relating to the assessment of charges for unauthorized use of electricity, tampering of meters etc. as also over the

matters which fall under the domain of special Courts constituted under the Electricity Act, 2003.” Following the aforesaid majority decision dated 10th April, 2008, other cases were disposed of by the National Commission in similar terms by impugned orders dated 13th March, 2009, 29th March, 2011 and 7th July, 2011. By impugned order dated 13th March, 2009, giving reference to the aforesaid judgment dated 10th April, 2008, the matter was remitted to the State Consumers Disputes Redressal Commission (hereinafter referred to as the “State Commission”) for fresh decision.

4. For determination of the issue involved in these appeals, it is necessary to discuss the relevant facts as were pleaded by the parties before the Consumer Fora. The same is mentioned hereunder:

5. Case of Anis Ahmad, Anis Ahmed filed a complaint before the District Consumer Protection Forum, Moradabad and claimed that he is a consumer of electricity having connection No.104427 with sanctioned load of 6.5 horse power. He alleged that the authorities of the U.P. Power Corporation Ltd. prepared a fictitious checking report dated 17th July, 2003 and falsely implicated the complainant that he had used more than sanctioned load of 10 H.P. in his factory and on the basis of fictitious report a proceeding was initiated on 15th April, 2004 followed by a bill No.5004369 dated 15th June, 2004 demanding a sum of Rs.2,11,451/-. He prayed to direct the appellant to correct the bill, withdraw the demand notice and to pay the costs.

The appellant, U.P. State Corporation Ltd. filed the objections regarding maintainability of the above said petition. It was alleged that the complainant had industrial connection which was disconnected earlier due to the arrears of electricity dues. On a checking held on 17th March, 2004 by Sub-Divisional Officer-II and Junior Engineer, it was found that the L.T. line of three phases passing from the other side of the premises of the complainant was tapped with the cables attached with the meter though they were disconnected earlier and the complainant was using full 10 horse power load by committing theft of electricity by bye-passing the meter.

6. Case of Rakhi Ghosh Rakhi Ghosh claimed before the District Consumer Disputes Redressal Forum, at Suri, Birbhum, West Bengal, that he is a consumer of electricity having Connection No.1/7884 with connected load of 20 H.P. He is running his husking mill through connected load. He challenged the bill for Rs.3,73,935/- raised by the West Bengal State Electricity Board which was raised on the ground of unauthorized extension of load of 8 H.P. The appellant, West Bengal Electricity Board filed the objections and raised the question of maintainability of the application. It was stated that consumer was enjoying Industrial connection and, therefore, does not fall within the definition of "consumer" under the Consumer Protection Act, 1986. It was further alleged that a police case being No.19/2005 dated 26th February, 2005 has already been lodged against Rakhi Ghosh for theft of electricity, therefore, the consumer forum has no jurisdiction to entertain the application.

7. Case of Prithvi Pal Singh Prithvi Pal Singh filed a complaint before the District Consumer Protection Forum-II, Moradabad that he is a consumer having connection No.0102/102474 with a sanctioned load of 6 KW. It was alleged that the U.P. Power Corporation Ltd. got his premises

inspected by its team and subsequently sent a notice to him on 1st December, 2005. In the said notice it was alleged that the Enforcement team on inspection made on 25th November, 2004 found that the complainant was committing theft of electricity by making a cut at the cable prior to meter and was using excess load. He challenged the bill raised by the Corporation for Rs.1,45,546/- and prayed for compensation of 10,000/- for harassment.

The appellant, U.P. Power Corporation Ltd. filed objections and raised the question of maintainability of the petition. It was alleged that on checking, a cut mark on three phase cable before the meter was detected by which the complainant was committing theft of electricity of 13 KW by bye-passing the meter. A bill for Rs. 1,99,805/- was raised for theft of the electricity.

8. Case of Zulfikar Zulfikar filed a complaint before the District Consumer Protect Forum- II, Moradabad, challenging a notice of assessment. He stated that he is a consumer of commercial electricity connection bearing No.3293/115275, the sanctioned load of which is 3 KW. According to him on receipt of notice he enquired about the same to the appellant and came to know that on the basis of checking report they have issued the bill. It was alleged that the said checking report dated 22nd July, 2004 is false and fabricated and no checking was done on the premises of the complainant.

The appellant, U.P. Power Corporation Ltd. filed objections raising the question of maintainability of the complaint on the ground that the complainant Zulfikar had commercial connection and hence does not fall within the definition of 'Consumer'. It was alleged that Enforcement Squad and Assistant Engineer (Raids) on 22nd July, 2004 raided the premises of the complainant and during the inspection found that 4 leads of the PVC cable of electricity line leading to the meter had been cut and bye-passing the same, 5.76 KW load was being used by the complainant illegally. They alleged theft of electricity against the complainant for which an assessment notice was issued. It was contended that theft of electricity does not amount to deficiency in service, therefore, the Consumer Forum does not have the jurisdiction to entertain the petition regarding the theft of the electricity under the Consumer Protection Act.

9. Case of Shahzadey Alam Shahzadey Alam filed a complaint case before the District Consumer Protection Forum-II, Moradabad challenging the revenue assessment notice dated 9th February, 2005 and requested to pay the compensation for mental and physical agony. In his petition Shahzadey Alam stated that he was consumer of electricity connection No.0832782700, having a sanctioned load of 2 KW. On 20th October, 1986, the officials of the U.P. Power Corporation Ltd. disconnected the aforesaid electricity connection for non-payment of Suvidh Shulka. As the said electricity connection was not required for the complainant, he did not get the same restored. It is alleged that in spite of the same, the complainant received a notice of assessment on 16th February, 2005.

The appellant, U.P. Power Corporation Ltd. on appearance challenged the maintainability of the petition before the Consumer Forum. It was stated that the complainant had himself admitted that his electricity connection was disconnected on 20th October, 1986, therefore, the petition was not maintainable. It was further alleged that the complainant has a factory which was raided and

checked by the enforcement squad on 24th January, 2005 at 4.10 hours and that it was found that the complainant was committing theft of electricity by cutting three phase cable going near his premises to the connection No.2783/116398 of L.M.V.-II category of Shri Javed and by connecting it with 15 meters cable and using 4.70 K.W. load and that no valid connection was found in the premises of the complainant. Therefore, the complainant was asked to deposit compounding fee of Rs.1,02,400/-, but he has not deposited it. On the basis of the report a notice was issued to the complainant.

10. Case of Atul Kumar Gupta Atul Kumar Gupta filed a complaint before the District Consumer Protection Forum-II, Moradabad, stating that he is a consumer of electricity connection No.1034/117269, having sanctioned load of 7.5 KW. It is alleged that the electricity connection of the complainant has been disconnected on 29th February, 2003 on the ground of outstanding electricity charges. Later on, the appellant informed that a case in connection with checking is under consideration and, therefore, the connection of the complainant cannot be restored. The complainant alleged that on 13th March, 2004 he received Revenue assessment notice alongwith a checking report No.164 dated 1st March, 2004, though no checking was conducted at the premises of the complainant on 1st March, 2004. He prayed for cancellation of the assessment notice dated 10th March, 2004 and claimed compensation of Rs.5,000/- towards mental agony and financial loss.

The appellant, U.P. Power Corporation Ltd., in their reply raised the question of maintainability of the petition in view of the fact that the complainant's connection was disconnected on 28th February, 2003 and that on inspection it was found that he was committing theft of electricity by pilferage of electricity.

11. Case of Tauseef Ahmed Tauseef Ahmed moved before the District Consumer Protection Forum-II, Moradabad and stated that he is a consumer of electricity having connection No.115694 with sanctioned load of 2 KW. He alleged that three employees of the U.P. Power Corporation Ltd. visited his premises. Out of them one represented himself to be the Junior Engineer and demanded bribe of Rs.6,000/- illegally. As he refused to pay the amount, a notice was served on him on 8th September, 2004 along with a report dated 11th August, 2004 and a bill for Rs.1,94,382/- was raised. He challenged the bill before the District Forum.

The U.P. Power Corporation Ltd. on appearance raised the question of maintainability of the petition, one of the grounds taken was that the complainant has already filed an Original Suit No.391 of 2004 (Tauseef Ahmed vs. Uttar Pradesh Power Corporation) for the same relief before the Court of Civil Judge (Junior Division), Moradabad in which summons has already been issued and the matter is pending. It was alleged that the premises of the claimant was checked on 11th August, 2004 in the presence of the complainant and on checking it was found that 6.945 KW of electricity had been illegally used instead of sanctioned load of 2 KW. It was brought to the notice of the Forum that use of excess load than the sanctioned electric load for any other purpose for which connection has been granted, comes within the meaning of "pilferage of electricity" as defined under U.P. Electricity (Consumers) Regulation, 1984 for which notice of assessment was sent to the complainant for recovery of sum of Rs.1,94,382/- which on hearing the parties was finalized to be

Rs.1,07,985/- vide order dated 1st October, 2004.

12. Case of Mohd. Yunus Mohd. Yunus filed a complaint before the District Consumer Protection Forum-II, Moradabad claiming to be a consumer of commercial electricity having connection No.2701/0-98494, with sanctioned load of 5 KW. It was alleged that on the basis of a checking report dated 17th November, 2004 revenue assessment notice dated 1st February, 2005 was served on him. He sought for a copy of the report and came to know that Junior Engineer had sent a false checking report to the Divisional Office because of non- payment of monthly "Suvidha Sulk" by the complainant. He challenged the revenue assessment notice dated 1st February, 2005 and claimed compensation of Rs.10,000/- for mental suffering and financial loss.

The U.P. Power Corporation Ltd. on appearance raised the question of maintainability of the petition. It was stated that the complainant is a consumer of L.M.V.-II category using electricity for commercial purposes, therefore, he does not fall under the definition of "consumer", as defined under Section 2(1)(d) of the Consumer Protection Act. It was further alleged that on 17th November, 2004 on checking of the premises of the complainant by Sub-Divisional Officer-II, Moradabad and Junior Engineer it was found that the complainant was using the connection for industrial purposes under L.M.V.-6 category without any prior consent of the U.P. Power Corporation Ltd. He was using electrical energy for the purposes other than the purpose for which it was sanctioned. Therefore, the complainant was found to be guilty of pilferage of electricity.

13. All the cases against the U.P. Power Corporation Ltd. were filed before the District Consumer Protection Forum-II, Moradabad. The decision having given in favour of the complainants, U.P. Power Corporation Ltd moved before the State Consumer Disputes Redressal Commission, Uttar Pradesh, Lucknow which by its common judgment dated 31st January, 2007/1st February, 2007 dismissed all the revision petitions filed by the U.P. Power Corporation Ltd.

14. For the said reason all the cases in which the question of jurisdiction of the Consumer Forum were raised, they were heard and decided by the National Commission initially by the impugned judgment dated 10th April, 2008/16th April, 2008, followed by other orders. Submissions:

15. Learned counsel for the appellants contended as under:

(a) The proceedings under Sections 126, 127, 135 etc. of the Electricity Act, 2003 initiated by the service providers are not related to deficiency of service in the supply of electricity by the service providers under the Electricity Act, 2003. Therefore, the complaints against the proceedings under Section 126, 127, 135 etc. of the Electricity Act, 2003 are not maintainable before the Forum constituted under the Consumer Protection Act, 1986.

(b) In absence of any inconsistency between Sections 126, 127, 135 etc. of the Electricity Act, 2003 and the provisions of Consumer Protection Act, 1986, Sections 173 and 174 of the Electricity Act, 2003 are not attracted.

16. Per contra, according to the respondents, a complaint under the Consumer Protection Act, 1986 against the final assessment order passed under Section 126 of the Electricity Act, 2003 is maintainable before the Consumer Forum.

17. To determine the question, it would be appropriate to refer to the Statement of Objects and Reasons and relevant provisions of the Consumer Protection Act, 1986, as quoted below:

“STATEMENT OF OBJECTS AND REASONS The Consumer Protection Bill, 1986 seeks to provide for better protection of the interests of consumers and for the purpose, to make provision for the establishment of Consumer councils and other authorities for the settlement of consumer disputes and for matter connected therewith.

2. It seeks, inter alia, to promote and protect the rights of consumers such as-

a) the right to be protected against marketing of goods which are hazardous to life and property;

b) the right to be informed about the quality, quantity, potency, purity, standard and price of goods to protect the consumer against unfair trade practices;

c) the right to be assured, wherever possible, access to an authority of goods at competitive prices;

d) the right to be heard and to be assured that consumers interests will receive due consideration at appropriate forums;

e) the right to seek redressal against unfair trade practices or unscrupulous exploitation of consumers; and

f) right to consumer education.

3. These objects are sought to be promoted and protected by the Consumer Protection Council to be established at the Central and State level.

4. To provide speedy and simple redressal to consumer disputes, a quasi-judicial machinery is sought to be setup at the district, State and Central levels. These quasi-judicial bodies will observe the principles of natural justice and have been empowered to give relief of a specific nature and to award, wherever appropriate, compensation to consumers. Penalties for noncompliance of the orders given by the quasi-judicial bodies have also been provided.” Scope of consumer complaint

18. “Consumer dispute” is defined under Section 2(e) of the Consumer Protection Act, 1986 in the following manner:

"2(e) "consumer dispute" means a dispute where the person against whom a complaint has been made, denies or disputes the allegations contained in the complaint." Therefore, for a valid consumer dispute an assertion and denial of a valid complaint is must.

19. "Complaint" is defined under Section 2(1) (c) of the Consumer Protection Act,1986 in the following manner:

"2(1)(c) "complaint" means any allegation in writing made by a complainant that-

i) an unfair trade practice or a restrictive trade practice has been adopted by (any trader or service provider ;

ii) the goods bought by him or agreed to be bought by him suffer from one or more defects;

iii) the services hired or availed of or agreed to be hired or availed of by him suffer from deficiency in any respect;

iv) a trader or the service provider, as the case may be, has charged for the goods or for the services mentioned in the complaint, a price in excess of the price-

a) fixed by or under any law for the time being in force;

b) displayed on the goods or any package containing such goods;

c) displayed on the price list exhibited by him by or under any law for the time being inforce;

d) agreed between the parties;

(v) goods which will be hazardous to life and safety when used, are being-offered for sale to the public-

a) in contravention of any standard relating to safety of such goods as required to be complied with, by or under any law for the time being in force;

b) if the trader could have known with due diligence that the goods so offered are unsafe to the public;

(vi) services which are hazardous or likely to be hazardous to life and safety of the public when used, are being offered by the service provider which such person could have known with due diligence to be injurious to life and safety;

with a view to obtaining any relief provided by or under this Act;"

Therefore, it is only in respect to aforementioned aspects that a consumer complaint can be filed viz.

* Unfair trade practice or restrictive trade practice. * When there is a defective goods.

* Deficiency in services * Hazardous goods * Hazardous services * a price in excess of the price fixed under any law etc.

20. Deficiency of service is defined under Section 2(g) of the Consumer Protection Act, 1986 in the following manner:

"2(g) "deficiency" means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service."

Therefore, it is clear that nature of transaction under Section 126 does not come within the ambit of "complaint".

21. Section 2(1)(b) of the Consumer Protection Act, 1986 defines "complainant" as follows:

"2(1)(b) "complainant" means-

i) a consumer; or

ii) any voluntary consumer association registered under the Companies Act, 1956 (10 of 1956) or under any other law for the time being in force; or

iii) the Central Government or any State Government; or

iv) one or more consumers, where there are numerous consumers having the same interest;

v) in case of death of a consumer, his legal heir or representative; who or which makes a complaint;"

22. Whereas "consumer" is defined under Section 2(1)(d) of the Consumer Protection Act, 1986 in the following manner:

"2(1)(d) "consumer" means any person who-

(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment, when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or

(ii) [hires or avails of] any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who [hires or avails of] the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person; (but does not include a person who avails of such services for any commercial purpose;) Explanation.-For the purposes of this clause, "commercial purpose" does not include use by a person of goods bought and used by him and services availed by him exclusively for the purposes of earning his livelihood by means of self-employment;"

From a bare reading of the section aforesaid it is clear that person(s) availing services for 'commercial purpose' do not fall within the meaning of "consumer" and cannot be a "complainant" for the purpose of filing a "complaint" before the Consumer Forum.

23. "Service" as defined under Section 2(1)(o) of the Consumer Protection Act, 1986 includes supply of electrical or other energy and reads as follows:

"2(1)(o)"service" means service of any description which is made available to potential (users and includes, but not limited to, the provision of) facilities in connection with banking, financing insurance, transport, processing, supply of electrical or other energy, board or lodging or both, (housing construction,) entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service." Therefore, a consumer within the meaning under Section 2(1) (d) may file a valid complaint in respect of supply of electrical or other energy, if the complaint contains allegation of unfair trade practice or restrictive trade practice; or there is a defective goods; deficiency in services; hazardous services or a price in excess of the price fixed by or under any law etc. Maintainability of complaint filed by the respondents.

24. From the facts narrated in the preceding paragraph it is clear that Anis Ahmed, Rakhi Ghosh, Prithvi Pal Singh, Zulfikar, Shahzadey Alam, Atul Kumar Gupta, Tauseef Ahmed and Mohd. Yunus had electrical connections for industrial/commercial purpose and, therefore, they do not come within the meaning of "consumer" as defined under Section 2(1)(d) of the Consumer Protection Act, 1986; they cannot be treated as "complainant" nor they are entitled to file any "complaint" before the Consumer Forum.

25. Admittedly, the complainants made their grievance against final order of assessment passed under Section 126 of the Electricity Act, 2003. None of the respondents alleged that the appellant(s) used unfair trade practice or a restrictive trade practice or there is deficiency in service(s) or hazardous service(s) or price fixed by the appellant(s) is excess to the price fixed under any law etc. In absence of any allegation as stipulated under Section 2(1)(c) of the Consumer Protection Act, 1986, their complaints were not maintainable.

26. Therefore, we hold that the complaint filed by the respondents were not maintainable before the Consumer Forum.

Maintainability of a complaint before the Consumer Forum against final order of assessment made under Section 126 of the Electricity Act, 2003 or action taken under Sections 135 to 140 of the Electricity Act, 2003

27. Section 2(15) of the Electricity Act, 2003 defines 'consumer' in the following manner:

"2(15). "consumer" means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be;"

28. From a bare reading of section aforesaid we find that the "consumer" as defined under Section 2(15) includes any person who is supplied with electricity for his own use by a licensee and also includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, irrespective of the fact whether such person is supplied with electricity for his own use or not. Per contra under Section 2(1)(d) of the Consumer Protection Act, 1986 those who were supplied with electricity for commercial purpose and those who do not avail services for consideration, irrespective of electricity connection in their premises do not come within the meaning of "consumer".

29. Section 126 of the Electricity Act, 2003 empowers the assessing officer to make assessment in case of "unauthorized use of electricity". It provides that if on an inspection of any place or premises or after inspection of the equipments, gadgets, machines, devices found connected or used, or after inspection of records maintained by any person, the assessing officer comes to the conclusion that such person is indulging in "unauthorized use of electricity", he shall assess the electricity charges payable by such person or by any other person benefitted by such use, the Section reads as under:

"126.Assessment.- (1) If on an inspection of any place or premises or after inspection of the equipments, gadgets, machines, devices found connected or used, or after inspection of records maintained by any person, the assessing officer comes to the conclusion that such person is indulging in unauthorized use of electricity, he shall provisionally assess to the best of his judgement the electricity charges payable by

such person or by any other person benefited by such use.

(2) The order of provisional assessment shall be served upon the person in occupation or possession or in charge of the place or premises in such manner as may be prescribed.

(3) The person, on whom an order has been served under subsection (2) shall be entitled to file objections, if any, against the provisional assessment before the assessing officer, who shall, after affording a reasonable opportunity of hearing to such person, pass a final order of assessment within thirty days from the date of service of such order of provisional assessment, of the electricity charges payable by such person.

(4) Any person served with the order of provisional assessment, may, accept such assessment and deposit the assessed amount with the licensee within seven days of service of such provisional assessment order upon him.

(5) If the assessing officer reaches to the conclusion that unauthorized use of electricity has taken place, the assessment shall be made for the entire period during which such unauthorized use of electricity has taken place and if, however, the period during which such unauthorized use of electricity has taken place cannot be ascertained, such period shall be limited to a period of twelve months immediately preceding the date of inspection.

(6) The assessment under this section shall be made at a rate equal to (twice) the tariff applicable for the relevant category of services specified in sub-section (5).

Explanation.- For the purposes of this section,-

(a) “ assessing officer” means an officer of a State Government or Board or licensee, as the case may be, designated as such by the State Government;

(b) “ unauthorised use of electricity” means the usage of electricity –

i) by any artificial means; or

ii) by a means not authorised by the concerned person or authority or licensee; or

iii) through a tampered meter; or

iv) for the purpose other than for which the usage of electricity was authorized; or

v) for the premises or areas other than those for which the supply of electricity was authorized.”

30. Section 145 of the Electricity Act, 2003 bars the jurisdiction of Civil Court to entertain any suit or proceeding in respect of any matter which an assessing officer referred to in Section 126. A separate provision of appeal to the appellate authority has been prescribed under Section 127 so that any person aggrieved by the final order made under Section 126, may within thirty days of the said order, prefer an appeal, which reads as under:

127. Appeal to appellate authority.- (1) Any person aggrieved by the final order made under section 126 may, within thirty days of the said order, prefer an appeal in such form, verified in such manner and be accompanied by such fee as may be specified by the State Commission, to an appellate authority as may be prescribed.

(2) No appeal against an order of assessment under sub-section shall be entertained unless an amount equal to half of the assessed amount is deposited in cash or by way of bank draft with the licensee and documentary evidence of such deposit has been enclosed along with the appeal.

(3) The appellate authority referred to in sub-section (1) shall dispose of the appeal after hearing the parties and pass appropriate order and send copy of the order to the assessing officer and the appellant.

(4) The order of the appellate authority referred to in sub- section (1) passed under sub-section (3) shall be final.

(5) No appeal shall lie to the appellate authority referred to in sub –section (1) against the final order made with the consent of the parties.

(6) When a person defaults in making payment of assessed amount, he, in addition to the assessed amount, shall be liable to pay, on the expiry of thirty days from the date of order of assessment, an amount of interest at the rate of sixteen per cent per annum compounded every six months.” Therefore, it is clear that after notice of provisional assessment to the person indulged in unauthorized use of electricity, the final decision by an assessing officer, who is a public servant, on the assessment of "unauthorized use of electricity" is a “Quasi Judicial” decision and does not fall within the meaning of “consumer dispute” under Section 2(1) (e) of the Consumer Protection Act, 1986.

31. Part XIV of the Electricity Act, 2003 relates to “offences and penalties”. If Section 126 is read with Section 135 to 140 it will be clear that various acts of "unauthorized use of electricity” constitute “offences” mentioned under Sections 135 to 140 and attracts sentence and fine as prescribed therein.

32. For proper appreciation, we refer to Section 135 which relates to “theft of electricity”. Interference with meters or work of licensee, tapping of electricity, making or causing to be made any connection with overhead, underground or under water lines or cables, or service wires, or service facilities of a licensee; tampering of meter, installation or use of tampered meter, 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;

damaging or destroys of an electrical meter, apparatus, equipment, use of electricity through a tampered meter; use of electricity for the purpose other than for which the usage of electricity was authorized constitute "theft of electricity" and constitute "offence" under Section 135 of the Electricity Act, 2003, which reads 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 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 authorised, 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 provided that any artificial means or means not authorised 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.

1A) 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 authorised 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 authorised 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 hour from the time of such disconnect:

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;] (2) Any officer of the licensee or supplier as the case may be, authorised 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 unauthorised 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.”

33. "Theft of electric lines and materials" constitute offence under Section 136; whereas "receiving stolen property" constitute offence under Section 137. Interference with meters or works of licensee unauthorisedly connecting any meter, indicator or apparatus with any electric line; unauthorise reconnection of any meter, indicator or apparatus with electric line or other works; laying or causing to be laid, or connecting any works for the purpose of communicating with any other works belonging to a licensee; or injuring any meter, indicator, or apparatus belonging to a licensee maliciously etc. constitute "offences" which attracts punishment under Section 138 of the Electricity Act, 2003. Section 138 of the Electricity Act reads as follows:

“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 reconnection 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.”

34. Clause (b) of the Explanation below Section 126, defines "unauthorized use of electricity" as the usage of electricity by any artificial means; or by a means not authorized by the concerned person or authority or licensee; or through a tampered meter; or for the purpose other than for which the usage of electricity was authorized; or for the premises or areas other than those for which the supply of electricity was authorized.

All the aforesaid acts constitute “offences” under Section 135 to 140 of the Electricity Act, 2003, as noticed above.

35. From a bare reading of Section 126 and Sections 135 to 140, it is clear that while acts of "unauthorized use of electricity" attracts civil consequence of penal charge of electricity, twice the rate of electricity, for which assessment is made by assessing officer under Section 126; the very same acts of "unauthorized use of electricity", constitute "offences" under Section 135 to 140 for which sentence and fine has been prescribed.

36. As per Section 153 of the Electricity Act, 2003, Special Courts are to be constituted for speedy trial for the offences referred to in Sections 135 to 140. The said Section reads as follows:

“153. Constitution of Special Courts.- (1) The State Government may, for the purposes of providing speedy trial of offences referred to in [sections 135 to 140 and section 150], by notification in the Official Gazette, constitute as many Special Courts as may be necessary for such area or areas, as may be specified in the notification.

(2) A Special Court shall consist of a single Judge who shall be appointed by the State Government with the concurrence of the High Court.

(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.

(4) Where the office of the Judge of a Special Court is vacant, or such Judge is absent from the ordinary place of sitting of such Special Court, or he is incapacitated by illness or otherwise for the performance of his duties, any urgent business in the Special Court shall be disposed of--

(a) by a Judge, if any, exercising jurisdiction in the Special Court;

(b) where there is no such other Judge available, in accordance with the direction of District and Sessions Judge having jurisdiction over the ordinary place of sitting of Special Court, as notified under sub-section (1).”

37. The Civil Court's jurisdiction to consider a suit with respect to the decision of assessing officer under Section 126, or decision of appellate authority under Section 127 is barred under Section 145 of the Electricity Act, 2003, which reads as under:

“145. Civil Court not to have jurisdiction.- No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which an assessing officer referred to in Section 126 or an Appellate Authority referred to in Section 127 or the adjudicating officer appointed under this Act is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.”

38. The National Commission placed much reliance on sub sections (5) and (6) of Section 42 of the Electricity Act, 2003 to derive power to adjudicate dispute arising out of Section 126, but it failed to notice that Section 42 of the Electricity Act, 2003 is not applicable in the case of licensee who is a trader or supplier of electricity but it relates to "distribution licensees".

39. Section 14 of the Electricity Act, 2003 empowers the Appropriate Commission to grant a licence to any person to "transmit electricity" or "to distribute electricity" or "to undertake trading in electricity", the relevant portion of Section 14 reads as follows:

“14. Grant of licence.- The Appropriate Commission may, on an application made to it under Section 15, grant a licence to any person –

a) to transmit electricity as a transmission licensee; or

b) to distribute electricity as a distribution licensee; or

c) to undertake trading in electricity as an electricity trader, in any area as may be specified in the licence.”

40. Amongst the three categories of licensee(s) viz. “transmission licensee”; “distribution licensee” and the “licensee to undertake trading in electricity”, the provisions with respect to “distribution licensees”

have been provided under Part VI of the Electricity Act, 2003 but not the two other licensees. Bare perusal of Part VI and Section 42 of the Electricity Act, 2003 makes it further clear. The same is quoted hereunder:

“Part VI DISTRIBUTION OF ELECTRICITY Provisions with respect to distribution licensees

42. Duties of distribution licensees and open access. -(1) It shall be the duty of a distribution licensee to develop and maintain an efficient, co-ordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act.

(2) The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operational constraints:

Provided that [such open access shall be allowed on payment of a surcharge] in addition to the charges for wheeling as may be determined by the State Commission:

Provided further that such surcharge shall be utilised to meet the requirements of current level of cross subsidy within the area of supply of the distribution licensee:

Provided also that such surcharge and cross subsidies shall be progressively reduced [***] in the manner as may be specified by the State Commission:

Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use:

[Provided also that the State Commission shall, not later than five years from the date of commencement of the Electricity (Amendment) Act, 2003 (57 of 2003) by regulations, provide such open access to all consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one megawatt.] (3) Where any person, whose premises are situated within the area of supply of a distribution licensee, (not being a local authority engaged in the business of distribution of electricity before the appointed date) requires a supply of electricity from a generating company or any licensee other than such distribution licensee, such person may, by notice, require the distribution licensee for wheeling such electricity in accordance with regulations made by the State Commission and the duties of the distribution licensee with respect to such supply shall be of a common carrier providing non-discriminatory open access.

(4) Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply. (5) Every distribution licensee shall, within six months from the appointed date or date of grant of licence,

whichever is earlier, establish a forum for redressal of grievances of the consumers in accordance with the guidelines as may be specified by the State Commission.

(6) Any consumer, who is aggrieved by non-redressal of his grievances under sub-section (5), may make a representation for the redressal of his grievance to an authority to be known as Ombudsman to be appointed or designated by the State Commission.

(7) The Ombudsman shall settle the grievance of the consumer within such time and in such manner as may be specified by the State Commission.

(8) The provisions of sub-sections (5), (6) and (7) shall be without prejudice to right which the consumer may have apart from the rights conferred upon him by those sub-sections.”

41. Section 50 of the Electricity Act, 2003 empowers the State Commission to specify an Electricity Supply Code to provide for recovery of electricity charges, intervals for billing of electricity charges, measures for preventing damage to electrical plant or electrical line or meter, entry of distribution licensee etc., and it reads as follows:

“50. The Electricity Supply Code.- The State Commission shall specify an Electricity Supply Code to provide for recovery of electricity charges, intervals for billing of electricity charges, disconnection of supply of electricity for non-payment thereof, restoration of supply of electricity, measures for preventing tampering, distress or damage to electrical plant or electrical line or meter, entry of distribution licensee or any person acting on his behalf for disconnecting supply and removing the meter, entry for replacing, altering or maintaining electric lines or electrical plants or meter and such other matters.” From reading Section 50, it is clear that under the Electricity Supply Code provisions are to be made for recovery of electricity charges, billing of electricity charges, disconnection etc. and measures for preventing tampering, distress or damage to the electrical plant or line or meter etc. But the said code need not provide provisions relating to it do not relate to assessment of charges for “unauthorized use of electricity” under Section 126 or action to be taken against those committing 'offences' under Sections 135 to 140 of the Electricity Act, 2003.

42. Limitation under Section 173,174 and 175 of the Electricity Act, 2003 is only qua the scope of Consumer Protection Act, which read as under:

“ 173. Inconsistency in laws.- Nothing contained in this Act or any rule or regulation made thereunder or any instrument having effect by virtue of this Act, rule or regulation shall have effect insofar as it is inconsistent with any other provisions of the Consumer Protection Act, 1986 (68 of 1986) or the Atomic Energy Act, 1962 (33 of 1962) or the Railways Act, 1989 (24 of 1989).”

174. Act to have overriding effect. - Save as otherwise provided in section 173, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

175. Provisions of this Act to be in addition to and not in derogation of other laws. - The provisions of this Act are in addition to and not in derogation of any other law for the time being in force.”

43. The inconsistency would arise only if the provisions of the Electricity Act, 2003 run counter to the provisions of the Consumer Protection Act, 1986 or if while enforcing provision on one statute, provisions of other statute is violated. We find that the entire object and reasons of Consumer Protection Act is not crossed over by the Electricity Act, 2003 and whenever such situation arise the Electricity Act, 2003 has left the option open for the consumer to take recourse under other Laws.

44. The National Commission by its majority decision dated 10th April, 2008 referring to Section 3 of the Consumer Protection Act, 1986 and Sections 173, 174 and 175 of the Electricity Act, 2003 held as follows:

“A bare reading of the aforesaid Sections makes it abundantly clear that –

i) The intention of the Parliament is not to bar the jurisdiction of the consumer fora under the CP Act. The Electricity Act also impliedly does not bar the jurisdiction of the consumer fora;

ii) On the contrary, it saves the provisions of Consumer Protection Act, 1986, Atomic Energy Act, 1962 and the Railways Act, 1989;

iii) By non-obstante clause, it has been provided that if anything in the Electricity Act, Rules or Regulations is inconsistent with any provisions of the Consumer Protection Act, it shall have no effect;

and

iv) Provisions of the Electricity Act are in addition to and not in derogation of any other law for the time being in force. The act supplements the existing redressal forum, namely, the Consumer Fora.”

45. The National Commission though held that the intention of the Parliament is not to bar the jurisdiction of the Consumer Forum under the Consumer Protection Act and have saved the provisions of the Consumer Protection Act, failed to notice that by virtue of Section 3 of the Consumer Protection Act, 1986 or Sections 173,174 and 175 of the Electricity Act, 2003, the Consumer Forum cannot derive power to adjudicate a dispute in relation to assessment made under Section 126 or offences under Sections 135 to 140 of the Electricity Act, as the acts of indulging in

"unauthorized use of electricity" as defined under Section 126 or committing offence under Sections 135 to 140 do not fall within the meaning of "complaint" as defined under Section 2(1)(c) of the Consumer Protection Act, 1986.

46. The acts of indulgence in "unauthorized use of electricity" by a person, as defined in clause (b) of the Explanation below Section 126 of the Electricity Act, 2003 neither has any relationship with "unfair trade practice" or "restrictive trade practice" or "deficiency in service" nor does it amounts to hazardous services by the licensee. Such acts of "unauthorized use of electricity" has nothing to do with charging price in excess of the price. Therefore, acts of person in indulging in 'unauthorized use of electricity', do not fall within the meaning of "complaint", as we have noticed above and, therefore, the "complaint" against assessment under Section 126 is not maintainable before the Consumer Forum. The Commission has already noticed that the offences referred to in Sections 135 to 140 can be tried only by a Special Court constituted under Section 153 of the Electricity Act, 2003. In that view of the matter also the complaint against any action taken under Sections 135 to 140 of the Electricity Act, 2003 is not maintainable before the Consumer Forum.

47. In view of the observation made above, we hold that:

(i) In case of inconsistency between the Electricity Act, 2003 and the Consumer Protection Act, 1986, the provisions of Consumer Protection Act will prevail, but ipso facto it will not vest the Consumer Forum with the power to redress any dispute with regard to the matters which do not come within the meaning of "service" as defined under Section 2(1)(o) or "complaint" as defined under Section 2(1)(c) of the Consumer Protection Act, 1986.

(ii) A "complaint" against the assessment made by assessing officer under Section 126 or against the offences committed under Sections 135 to 140 of the Electricity Act, 2003 is not maintainable before a Consumer Forum.

(iii) The Electricity Act, 2003 and the Consumer Protection Act, 1986 runs parallel for giving redressal to any person, who falls within the meaning of "consumer" under Section 2(1)(d) of the Consumer Protection Act, 1986 or the Central Government or the State Government or association of consumers but it is limited to the dispute relating to "unfair trade practice" or a "restrictive trade practice adopted by the service provider"; or "if the consumer suffers from deficiency in service"; or "hazardous service"; or "the service provider has charged a price in excess of the price fixed by or under any law".

48. For the reasons as mentioned above, we have no hesitation in setting aside the orders passed by the National Commission. They are accordingly set aside. All the appeals filed by the service provider-licensee are allowed, however, no order as to costs.

.....J. (G.S. SINGHVI)J.
(SUDHANSU JYOTI MUKHOPADHAYA) NEW DELHI, JULY 1, 2013.