

West Bengal State Electricity ... vs M/S Orion Metal Pvt. Ltd. on 21 August, 2019

Equivalent citations: AIR ONLINE 2019 SC 982, (2019) 11 SCALE 230, (2019) 4 JCR 101 (SC), (2019) 4 PAT LJR 222

Author: R. Subhash Reddy

Bench: R. Subhash Reddy, R. Banumathi

C.A.@S.L.P(c) No.22207/2018

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REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No.6547 OF 2019
[Arising out of S.L.P.(C) No.22207 of 2018]

West Bengal State Electricity
Distribution Company Ltd. & Ors.

... Appellants

Versus

M/s. Orion Metal Pvt. Ltd. & Anr.

... Respondents

J U D G M E N T

R. Subhash Reddy, J.

1. Leave granted.

2. This civil appeal is filed by the appellant- West Bengal State Electricity Distribution Company Limited and others, aggrieved by the judgment and order dated 18.12.2017 passed by the High Court

of Calcutta in F.M.A. No.520 of 2017 and the corrected order dated 07.02.2018. By the impugned order, the intra Court 17:18:24 IST Reason:

appeal preferred by the respondent company was allowed by the Division Bench of High Court.

3. Necessary facts, in brief, are as under:

(a) The 1st respondent herein is the consumer of electricity from the appellant- West Bengal State Electricity Distribution Company Limited & Ors. There is a supply agreement entered into between the parties on 22.12.2004. The officials of the appellant company served a notice dated 28.10.2016 upon the 1st respondent, in exercise of power under Class IV of the West Bengal Electricity Regulatory Commission Electricity Supply Code, 2007 for conducting an inspection in the metering system of the respondent.

The respondent-company is a centralized bulk high voltage consumer of electricity in the Hooghly region, with a contracted load of 1450 KVA. After service of notice on the 1st respondent on 28.10.2016, inspection was made by the Superintending Engineer, Divisional Engineer, Divisional Engineer (Manager), Assistant Engineer of Chandanangore Division, in the premises of the respondent herein.

(b) During the inspection, it was noticed by the inspecting team that input current is abnormally high from output current at TTB end in respect of the R & B Phase of PT secondary wires. The inspecting team on breaking open the TTB has also found some foreign material inside. In view of such discrepancies found during the inspection, the inspection team was of the view that there was a theft of energy by tampering the meter by the respondent-company. The three-phase meter and the metering equipment was seized by the inspecting team by preparing a seizure list. In view of such discrepancies noticed during inspection, in exercise of power under Section 126(1) of the Electricity Act, 2003 (for short 'the Act'), provisional assessment for loss of energy by un-metered consumption was made by one Mr. B. Saha, Superintending Engineer/Assessing Officer of the appellant-company. The provisional assessment was made assessing the value of energy which was consumed on account of un-metered consumption at Rs.13,41,17,482-30 paise (Rupees thirteen crores forty one lakhs seventeen thousand four hundred and eighty two only).

(c) After inspection, a criminal complaint was also lodged before the local police by the Superintending Engineer (Commercial), Hooghly region, of the appellant company, complaining theft of energy by the respondent. In the complaint made by the appellant, it was alleged that by inserting a foreign material into the meter, the respondent-company has indulged in theft of energy.

(d) On the basis of criminal complaint made by the Superintending Engineer (Commercial), a criminal case has been registered against the respondent-company and the police have submitted a charge-sheet in the criminal case.

(e) Aggrieved by the provisional assessment and the consequential demand, the respondents have filed writ petition in W.P. No.30449(W) of 2016 before the High Court, questioning the jurisdiction of the Assessing Officer in issuing the provisional assessment and the consequential demand for a sum of Rs.13,41,17,482-30 paise. In the writ petition, one of the grounds was that the Assessing Officer, who prepared the provisional assessment, not being a party to the inspection team, had no authority to make the provisional assessment under Section 126(1) of the Act. In the writ petition, it was alleged that provisional assessment made was not in accordance with Section 126(1) of the Act, as such, such assessment cannot be given effect to.

(f) Learned single Judge of the High Court, on the ground that the appellant-Distribution Company has not produced any material to show that the Assessing Officer was part of the inspection team, has held that assessment and consequential demand made in the provisional assessment proceedings was not in accordance with Section 126(1) of the Act and quashed the same. While allowing the writ petition, the learned single Judge has directed the State Government to appoint any member of the inspection team as an Assessing Officer to make fresh assessment.

(g) Aggrieved by the order of the learned single Judge dated 15.12.2016, the respondent-writ petitioners have filed intra Court appeal before the High Court. Following the directions, as contained in the order passed by the learned single Judge, it appears, a Member of the inspection team was appointed as an Assessing Officer by the State Government and the said officer has provisionally assessed the value of un-metered consumption of electricity and also made final assessment after giving opportunity for filing objections.

(h) The fresh assessment order, which is made in compliance of directions issued by the learned single Judge, is also questioned in the pending appeal by filing an interlocutory application by the respondents. In view of the said interlocutory application, the Division Bench of the High Court has allowed such application permitting the respondents to challenge the fresh assessment made pursuant to directions issued by the learned single Judge, and passed the impugned order allowing the appeal preferred by the respondents.

(i) In the intra Court appeal, before the Division Bench, the respondents have raised a ground that two parallel proceedings i.e. the criminal complaint before the Competent Court and also assessment proceedings under Section 126(1) of the Act cannot go simultaneously. Precisely, it was the case of the respondents that once a complaint is filed, alleging theft of energy under Section 135(1)(a) of the Act, no assessment is permissible under Section 126(1) of the Act.

(j) Before the High Court, it appears that respondents have also pleaded that the civil liability, if any, of the respondents can be determined only under sub-section (5) of Section 154 of the Act. While considering the scope of Sections 154, 135(1)(a) and 126 of the Act, the High Court has held that when a criminal complaint is lodged alleging theft of energy by the consumer and when supply of electricity is disconnected on account of such offence alleged, only in cases where restoration of supply is sought by the consumer, agreeing to deposit the assessed amount of un-metered consumption, provisional assessment can be made under Section 126 of the Act. The High Court has drawn a distinction to exercise power under Section 126(1) of the Act, in cases where consumer

seeks restoration of supply after disconnection and in cases where restoration of supply is not sought for. The High Court has held that only in cases where restoration is sought after disconnection, authorities can resort to make assessment under Section 126(1) of the Act, otherwise, the civil liability can be determined by Special Court only by following the procedure under sub-section (5) of Section 154 of the Act.

4. We have heard Mr. Jaideep Gupta, learned Senior counsel appearing for the appellants and Mr. Gaurav Jain, learned counsel for the respondents.

5. Having heard the learned counsels on both sides, we have perused the impugned order and other materials placed on record.

6. The learned Senior counsel appearing for the appellants has submitted that the High Court has misconstrued the provisions under Sections 126, 135 and 154 of the Act and erroneously allowed the appeal and quashed the assessment order made by the appellants under Section 126(1) of the Act. It is submitted by learned Senior counsel that, whenever there is an allegation of theft of energy by the consumer, even after lodging a complaint for commission of such offence before the police, it is always open for the appellants to make provisional and final assessment to recover loss of energy in exercise of power under Section 126(1) of the Act. Precisely, it is submitted that in all cases covered by Section 135 of the Act, it is open for the authorities to make provisional assessment under Section 126 of the Act. It is submitted that the power conferred under Section 126(1) of the Act to make provisional assessment, will not depend, whether consumer seeks restoration of supply or not, after disconnection of supply.

(a) It is submitted that to prove theft of energy before the Special Court, case has to be proved beyond reasonable doubt and further the element of mens rea is a sine qua non to prove the guilt of the accused. It is submitted that such degree of proof is not required for the purpose of assessing loss of energy under Section 126(1) of the Act. Learned Senior counsel has also placed reliance on the judgment in the case of Executive Engineer Southern Electricity Supply Company of Orissa Limited (SOUTHCO) & Another v. Shi. Seetaram Rice Mill¹.

7. On the other hand, learned counsel appearing for the respondents, in support of the findings recorded by the High Court, has submitted that the (2012) 2 SCC 108 unauthorized use of energy and theft of energy are two different aspects covered under different provisions of the Act. It is submitted that the power conferred for provisional assessment under Section 126(1) of the Act, is confined to cases where there is an allegation of unauthorized use of energy and the allegation of theft of energy is to be prosecuted only under Section 135(1)(a) of the Act. It is submitted that only in cases where authorities prove the guilt of the accused, the Special Court is empowered to determine civil liability under sub- section (5) of Section 154 of the Act.

(a) It is further submitted that once power supply is disconnected, where there is a request by the consumer for restoration of power supply, the authorities can make assessment under Section 126(1) of the Act. In support of this plea, the learned counsel brought to our notice a judgment of the learned single Judge of Madhya Pradesh High Court in the case of The Hotel Adityaz Limited v.

Madhya Pradesh Kshetra Vidyut Vitran Company Limited, Bhopal & others² . In the aforesaid judgment, learned single Judge of the High Court has held that where there is AIR 2016 (NOC) 39 (M.P.) an allegation of theft of energy, such cases will fall only under Section 135 of the Act and Section 126 of the Act, as no application.

8. Before we proceed further, we have looked into the Objects and Reasons of the Electricity Act, 2003, and also the relevant provisions i.e Sections 126, 135(1)(a), 153 and 154 of the Act.

9. Prior to Electricity Act, 2003, generation and supply of electricity was governed by the provisions under Indian Electricity Act, 2010, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998. With the policy of the Government to encourage private sector participation in generation, transmission and distribution of energy and with the objective of distancing regulatory responsibilities from the Government to the Regulatory Commissions, it was felt that there is a need for harmonizing and rationalizing the provisions of the electricity by bringing a new legislation. That is how the Electricity Act, 2003, was enacted and brought into force. In the objects and reasons, a specific reference is made to incorporate provisions relating to theft of electricity, to have a revenue focus. Part XII of the Act deals with the provisions relating to investigation and enforcement and Part XIV of the Act deals with the provisions relating to offences and penalties. The Constitution of Special Courts and procedure and powers of the Special Courts are covered by Part XV of the Act.

10. The relevant sections for the disposal of this appeal reads as under:

“Section 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 judgment 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 sub- section (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 unauthorised 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 unauthorised 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 authorised; or

(v) for the premises or areas other than those for which the supply of electricity was authorized.”
The procedure for ‘theft of energy’ is covered by Section 135 of the Act under Part IX. Section 135 of the Act reads as under:

“Section 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 proved that any artificial means or means not authorized by the Board or licensee or supplier, as the case may be, exist for the abstraction, consumption or use of electricity by the consumer, it shall be presumed, until the contrary is proved, that any abstraction, consumption or use of electricity has been dishonestly caused by such consumer.

(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 authorized for the purpose by the Appropriate Commission or any other officer of the licensee or

supplier, as the case may be, of the rank higher than the rank so 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 hours 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, authorized in this behalf by the State Government may –

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

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

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

(3) The occupant of the place of search or any person on his behalf shall remain present during the search and a list of all things seized in the course of such search shall be prepared and delivered to such occupant or person who shall sign the list:

Provided that no inspection, search and seizure of any domestic places or domestic premises shall be carried out between sunset and sunrise except in the presence of an adult male member occupying such premises.

(4) The provisions of the Code of Criminal Procedure, 1973 (2 of 1974), relating to search and seizure shall apply, as far as may be, to searches and seizure under this Act.” The procedure to be followed by the Special Court constituted under Section 153 of the Act is prescribed under Section 154 of the Act.

Sub-sections (5) and (6) of Section 154 of the Act read as under:

“(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.

(6) In case the civil liability so determined finally by the Special Court is less than the amount deposited by the consumer or the person, the excess amount so deposited by the consumer or the person, to the Board or licensee or the concerned person, as the case may be, shall be refunded by the Board or licensee or the concerned person, as the case may be, within a fortnight from the date of communication of the order of the Special Court together with interest at the prevailing Reserve Bank of India prime lending rate for the period from the date of such deposit till the date of payment.

Explanation.- For the purposes of this section, “civil liability” means loss or damage incurred by the Board or 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.”

11. A perusal of the aforesaid provisions and on giving a conjoint reading of the same, it appears to us that after an inspection of any place or any premises of any consumer, when Assessing Officer comes to a conclusion that the consumer is indulging in unauthorized use of electricity, the provisional assessment to the best of his judgment is to be made in accordance with Section 126(1) of the Act and such provisional assessment shall be served upon the person in occupation of the premises. After giving an opportunity to file objections to the provisional assessment, the Assessing Officer is empowered to pass a final order of the assessment assessing the loss of energy, on account of unauthorized use of energy. The unauthorized use of electricity is defined under Section 126(6)(b) of the Act. It is clear from the aforesaid definition that unauthorized use of electricity means, 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.

12. It is clear from the reading of Section 126 (6)

(b)(iii) of the Act that instances of use of energy through a tampered meter is included in the definition of unauthorized use of electricity. If that is so, there is no reason, for excluding the power of the authorities for making assessment under Section 126(1) of the Act to assess the loss of energy, where electricity is used through a tampered meter. All instances of unauthorized use of energy may not amount to theft of electricity within the meaning of Section 135 of the Act, but at the same time, the theft of electricity which is covered by Section 135 of the Act, will fall within the definition of unauthorized use of electricity. As per Section 135(1A) of the Act, without prejudice to the other provisions of the Act, the licensee or supplier, as the case may be, upon detection of theft of electricity, is empowered to disconnect the power supply immediately. Further, as per the third proviso to Section 135(1A) of the Act, the licensee or supplier, as the case may be, on deposit or payment of assessed amount or electricity charges, without prejudice to the obligation to lodge a

complaint, can restore the power supply electricity within forty- eight(48) hours of deposit /payment of such amount. Thus, it is clear that the authorities under the Act are empowered to make a provisional and final assessment by invoking power under Section 126(1) of the Act, even in cases where electricity is unauthorisedly used by way of theft. When a consumer deposits the assessed amount, the licensee or the supplier has to restore the power supply. The assessed amount referred to in the aforesaid proviso, relates to assessment which is contemplated under Section 126(1) of the Act only. There is apparent distinction between Section 126 and Section 135 of the Act. Section 126 forms part of the scheme which authorizes electricity supplier to ascertain loss in terms of revenue caused to it by the consumer by his act of “unauthorized use of electricity” whereas Section 135 deals with offence of theft if he is found to have indulged himself in the acts mentioned in clauses (a) to (e) of sub-section (1) of Section 135 of Electricity Act. Further, it is also clear from Section 154 of the Act, which prescribes procedure and power of Special Court, that the Special Court is empowered to convict the consumer and impose a sentence of imprisonment. The Special Court, in cases, where a criminal complaint is lodged, is also empowered to determine civil liability under Section 154(5) of the Act. As per Section 154(6) of the Act, in case civil liability so determined by the Special Court is less than the amount deposited by the consumer or the person, the excess amount so deposited by the consumer or the person, shall be refunded by the licensee or the concerned person, as the case may be. Merely because the Special Court is empowered to determine civil liability under Section 154(5) of the Act, in cases where a complaint is lodged, it cannot be said that there is no power conferred on authorities to make provisional assessment/final assessment under Section 126 of the Act.

13. In the case of Executive Engineer Southern Electricity Supply Company of Orissa Limited (SOUTHCO) & Another v. Shi. Seetaram Rice Mill, reported in (2012)2 SCC 108, this Court has considered the scope of Explanation to Section 126(b)

(iv) of 2003 Act. In the aforesaid case, as there was no allegation of theft, this Court has held consumption in excess of sanctioned/contracted load, comes within the meaning of unauthorized use of electricity as per Explanation (b)(iv) of Section 126 of Electricity Act, 2003. Drawing a distinction between Section 126 to that of Section 135 of the Act, paragraphs 29 and 61 of the aforesaid judgment read as under:-

“29. Thus, it would be clear that the expression “unauthorized use of electricity” under Section 126 of the 2003 Act deals with cases of unauthorized use, even in the absence of intention. These cases would certainly be different from cases where there is dishonest abstraction of electricity by any of the methods enlisted under Section 135 of the 2003 Act. A clear example would be, where a consumer has used excessive load as against the installed load simpliciter and there is violation of the terms and conditions of supply, then, the case would fall under Section 126 of the 2003 Act. On the other hand, where a consumer, by any of the means and methods as specified under Sections 135(a) to 135(e) of the 2003 Act, has abstracted energy with dishonest intention and without authorization, like providing for a direct connection by passing the installed meter, the case would fall under Section 135 of the Act.

61. Unauthorized use of electricity cannot be restricted to the stated clauses under the Explanation but has to be given a wider meaning so as to cover cases of violation of the terms and conditions of supply and the Regulations and provisions of the 2003 Act governing such supply. "Unauthorized use of electricity" itself is an expression which would, on its plain reading, take within its scope all the misuse of the electricity or even malpractices adopted while using electricity. It is difficult to restrict this expression and limit its application by the categories stated in the explanation. It is indisputable that the electricity supply to a consumer is restricted and controlled by the terms and conditions of supply, the Regulations framed and the provisions of the 2003 Act."

14. We also do not find any valid reason for making a distinction as made by the High Court in applying Section 126 of the Act. From the scheme of the Act, it appears that after inspection team notices unauthorized use of energy by tampering the meter, the authorities can disconnect the power supply immediately and make immediate assessment for loss of energy, by invoking power under Section 126(1) of the Act. The term "unauthorized use of energy" is of wide connotation. There may be cases of unauthorized use of energy, not amounting to theft, which are cases viz. exceeding the sanctioned load or using the electricity in the premises where its use is not authorized etc. But at the same time, when there is an allegation of unauthorized use of energy by tampering the meter, such cases of unauthorized use of energy include 'theft' as defined under Section 135 of the Act. The power conferred on authorities for making assessment under Section 126(1) of the Act and power to determine civil liability under Section 154(5) of the Act, cannot be said to be parallel to each other. In this regard, we are of the view that the High Court has committed an error in recording a finding, that both proceedings cannot operate parallelly. In a given case where there is no theft of energy, amounting to unauthorized use of energy, in such cases no complaint of theft can be lodged as contemplated under Section 135 of the Act. In such cases for loss of energy, on account of unauthorized use of energy not amounting to theft, it is always open for the authorities to assess the loss of energy by resorting to power under Section 126(1) of the Act. In cases where allegation is of unauthorized use of energy amounting to theft, in such cases, apart from assessing the proceedings under Section 126(1) of the Act, a complaint also can be lodged alleging theft of energy as defined under Section 135(1) of the Act. In such cases, the Special Court is empowered to determine civil liability under Section 154(5) of the Act. On such determination of civil liability by the Special Court, the excess amount, if any, deposited by the petitioner, is to be refunded to the consumer. It is a settled principle that to prove the guilt of the accused in a criminal proceeding, authorities have to prove the case beyond reasonable doubt and the element of mens rea is also to be established. On the other hand, such a strict proof is not necessary for assessing the liability under Section 126(1) of the Act.

15. For the aforesaid reasons, this civil appeal is allowed and the judgment and order dated 18.12.2017 passed by the High Court of Calcutta in F.M.A. No.520 of 2017 and the corrected order dated 07.02.2018, are set aside. No order as to costs.

..... J.

[R. Banumathi] J.

[R. Subhash Reddy] NEW DELHI, August 21, 2019