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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.02.2024

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THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

W.P. No.2498 of 2021

and

W.M.P.Nos.2817 & 2818 of 2021

R.Elamaran

... Petitioner

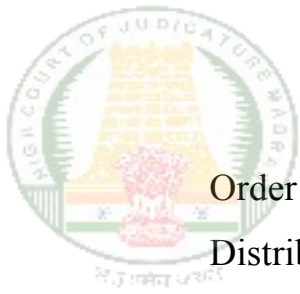
Vs.

1.Tamil Nadu Generation and Distribution
Corporation Limited (TANGEDCO),
Represented by its Chairman and Managing
Director,
144, Anna Salai, Chennai – 600 002.

2.The Assistant Executive Engineer,
Operation and Maintenance,
Udumalpettai,
Devanurpudur, Coimbatore.

... Respondents

Prayer: Writ Petition is filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus, calling for the records of the 2nd respondent in his impugned order Letter No.LR.NO.AEE/O&M/D.V.Puduri/F.Dkt/D.No.707/20-21 daed 18.11.2020 and quash the same as against the provisions of the Electricity Act, 2003, the Tamil Nadu Electricity Supply Code, 2004 and against TNERC/s Tariff



Order No.1 of 2017 'Determination of Tariff for Generation and Distribution' dated 11.08.2017 and consequently direct the 2nd respondent to refund of Rs.1,16,000/- which is illegal collected from the petitioner.

For Petitioner : Mr.M.Saravanakumar
For Respondents : Mrs.Keerthana Sheno
for L.Jai Venkatesh
Standing Counsel for TANGEDCO

ORDER

Learned Counsel for the petitioner made a submission that the issues raised in the present writ petition were adjudicated and settled by the Tamil Nadu Electricity Board and also made a submission that the issues in the present writ petition are covered under the order passed by the Tamil Nadu Electricity Regulatory Commission in M.P.No.28 of 2021.

2. The relevant portions of the order reads as under:

“5. *Findings of the Commission:-*

5.1 *Thiru.B.Balamurali, the Proprietor of M/s.Dhanu Enterprises of Pollachi represented his case through his counsel and prayed to direct the first respondent viz, the Superintending Engineer, Udumaplet EDC and the second respondent, The Asst.Executive Engineer/O&M/Pollachi to treat his service connection*



under LT III B. The petitioner prayed to pass an interim direction to treat the Petitioner's LT SC No.347003395 under LT Tariff IIIB as per Tariff Order No.1 of 2017 dated 11.08.2017 instead of LT Tariff V pending disposal of the petitioner and also prayed to punish the 1st and 2nd respondent under Section 142 of the Electricity Act, 2003 for contravening the Tariff Order No.1 of 2017 dated 11.08.2017, Tamil Electricity Supply code 2004 and for non-compliance of the directions issued by the Commission in its order dated 02.03.2021 in M.P.No.4 of 2021.

5.2 The petitioner has stated that the power supply drawn from the TANGEDCO is being used for manufacturing of Curled coirs and of coir fibre using 250 ton hydraulic baling press machines and other ancillary machineries. Their manufacturing process includes collection of Coconut husk are manually cleaned by removing all dust, sand, stones and materials like plastic wires, leaves, other particles. Subsequently the coconut fibres are dried, to maintained moisture below 15%. After quality control the shredded fibres are manually feed into the 250 Ton Hydraulic bailing press machines which compresses the loose fine coconut fibre into bales of fixed sizes and weights.

5.3 Initially, the petitioner obtained certificate



*from District Industries Centre for Entrepreneur memorandum number – Acknowledgement Part-II under “Manufacturing” for “Curled Coir and Bailing of coir fibre” on 13.4.2015; and then Udyog Aadhaar Registration certificate issued vide No.TN03B0018050 for manufacturing under Code 13119 – “Preparation and spinning of jute, mesta and other natural fibres including blended natural fibers n.e.c. *Blended year/fabrics means, yarn/fabrics containing more than 50% of one fiber” and code 13999 – “Manufacture of other textiles/textile products n.e.c.” on 03.07.2019. Further, stated that Coconut fibre is collected from Coconut husk in bundles and shredded by their labours and after cleaning process the shredded fibres are compressed as fibre bales.*

5.4 The “Coir industry” is listed as Manufacturing activity under the first schedule to the industries(Development and regulation) Act 1951. In fact, the coir manufacturing process consists of many stages of process like Husking, Retting, Extracting, Defibering, Drying, Hacking, Bundling, spinning, packing, etc., In the petitioner’s case, their process include collection of Coconut husk in bundles and shredded using the labour. The coconut fibre separated from the coconut husk are manually cleaned up by removing all dust, sand, stones and materials like plastic wires, leaves, other particles. Subsequently, the coconut fibres are dried, to maintain moisture below 15%



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and then the shredded fibres are manually fed into the 250 Ton Hydraulic baling press machines.

5.5 The Respondent has contended that no manufacturing activity or production of goods in the premises of the petitioner and only packing of Coconut husk and baling them into packages are carried out. Hence the activity was considered as misuse of Tariff under Section 135(1)(e) of the Electricity Act, 2003.

5.6 But, we cannot set aside the documents and evidences produced by the petitioner claiming for having manufacturing process in its premises as defined under the Industries (Development and Regulation) Act, 1951 and the Factories Act, 1948. Moreover, the Respondent has not produced any evidence or document to establish their side to prove that there was only packing activity. It is the onus of the Respondent that to substantiate the fault in activity/misuse in consumption of electricity by the consumer in violation of the Electricity Act, 2003 or any other Order/Regulation of the Commission, or otherwise the Respondent will lose its side of argument. The statement of the Distribution Licensee must be unambiguous and confident, so that the consumer may not be unnecessarily punished by 'Disconnection of service' or subjected to face any legal consequences.



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5.7 .Moreover, the reference of the Commission's Order in M.P.4 of 2021 dated 02.03.2021 also to be taken into account, which reads as below-

“4.Findings of the Commission.

4.1. TANGEDCO has filed this petition seeking Tariff clarification in respect of the following establishments where there is no manufacturing activity being carried out and charged under HT Tariff I A based on registered factories licenses and under L T Tariff III B without any certificate for manufacturing of goods as required in clause 6.2.11.3 of the Tariff order dated 11.8.2017.

a.Packaging units

In all packaging units, such as oil, larger quantity of materials are packed into smaller units and distributed.

b. Tamil Nadu State Transport Corporation repair and Workshop and maintenance In Tamil Nadu State Transport Corporation workshops, mostly the buses 7 repaired and maintenance works are being carried out. In some places only tyres are being retreaded and body building works are being carried out.

C.Pumping of oil and Gas Units

Oil Nature Gas company is using service connection for pumping of Oil and Gas, while transmitting from one place to another.

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4.4. *The Commission after careful consideration of the submissions of both the side would like to refer the Commissions views in clause 5.2.2.15 in the Tariff Order in TP no 1 of 2017 dt 11.8.2017 wherein it is mentioned that, The commission is of the view.....In case TANGEDCO identifies the need for specifically excluding any other activity, then TANGEDCO should submit the necessary proposal for the same, along with necessary justification in its next tariff Petition". Any mid-course clarification to classify any type/group of activities, after 4 years from the issue of the Tariff Order may result in retrospective revision of tariff for that category.*

4.5. *As the Commission has already directed the TANGEDCO to file the ARR, True up and the Tariff petition, TANGEDCO is directed to include the above tariff clarification items in their tariff petition to be filed so as to get the views of the stakeholders and to decide the matter. Until such time the present Tariff Order has to be followed.."*

As above, the Commission was not inclined for any reclassification / clarification in respect of the above categories from the existing one, as per the Order of the Commission in T.P.1 of 2017 dated 11.08.2017. Moreover the TANGEDCO was directed to file a comprehensive Tariff petition incorporating all its clarification for deciding the matter in ensuring tariff order after getting the comments of the stakeholders.

5.8. *Having any doubt in its mind on applicability of tariff, the respondent cannot punish any consumer to the extreme level of disconnection of supply / compounding under Section 135 of the Electricity Act, 2003. Thus no clarification issued by the Commission as above, the applicability of the order in M.P.4 of 2021 cannot be interpreted as ex post facto or ex ante. The petitioner has*



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clearly shown its activities carried out in its premises with the pictorial evidences (photos), whereas the respondent failed to do so. From these evidences, we have our opinion that the activities can be said to be as per the major activity defined under the EM / UdyogAadhaar Registration certificate. In view of this the change of tariff to LT-V will not arise in the case of the petitioner.

5.9. In this circumstances, the action of the Respondent for charging of the petitioner under LT-V instead of LT-IIIB is no way warrants under Section 135 of the Electricity Act 2003. If there any misuse of tariff be so, the Respondent could have issued a notice in this regard when they are not clear in the correct applicability of tariff. Moreover such action is not appreciated in the consumer oriented organization like TANGEDCO.

5.10. Though the issue is settled with the above decision of applicability of tariff, the Commission intends to set right the growing misinterpretation of provisions under section 126 and 135 of the Electricity Act, as may be seen in this case.

5.11. Though the unauthorized use other than the theft of electricity falls within in the scope of section 126, it is often dealt under section 135 which is exclusively meant for theft of electricity.

5.12. The provisions of Section 126 of the 2003 Act are self explanatory. They are intended to cover situations other than the situations specifically covered under Section 135 of the 2003 Act. Neither Section 126 nor Section 135 should be read in isolation. Each section should be read with the provisions of the other besides the regulations in force and they should be so interpreted as to achieve the aim of workability of the enactment comprehensively, while giving them a purposive interpretation in preference to



textual interpretation.

5.13. The clarification regarding the applicability of the provisions under Section 126 and 135 of the Electricity Act, 2003, was issued from ministry of Power / Government of India way back in 2007 as reproduced below:

"No. 42/2/2005-R&R

Government of India

Ministry of Power

Shram Shakti Bhawan, Rafi Marg,

New Delhi, the 12th November, 2007

To

The Pr. Secretary/Secretary (Energy) of all the States

The Secretary of all SERCS

Subject: Applicability of provisions of Section 126 and 135 of the Electricity Act

2003

Sir,

Subsequent to the enactment to the Electricity (Amendment) Act, 2007, references have been received from the M.P. Electricity Regulatory Commission and the UP Electricity Regulatory Commission seeking clarification regarding applicability of the provisions of Section 126 and 135 of the Electricity Act. The matter has been examined in consultation with the Deptt. of Legal Affairs and accordingly following is clarified:

(i) Key difference between the two provisions of sections 126 and 135 is that 'dishonest intention' as mentioned u/s 135 is the necessary ingredient for the offence of theft of



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electricity.

(ii) For prosecuting someone u/s 135, a complaint or a report by police to the court is necessary u/s 151.

(iii) Section 126 is for assessment of the charges for unauthorized use of electricity. This provision would also be applicable to those cases where action is taken for offences under section 135 and the situation of alleged commitment of offence is covered under the provisions of Section 126."

5.14. In regard to the interpretation of 'Dishonest intension' mentioned in the above clarification, it is pertinent to refer the order the Bench of the Hon'ble Supreme Court of India, dated 20.10.2011 in the case of Executive Engineer & Another Vs M/s. Sri Seetaram Rice Mill {Civil Appeal No.8859 of 2011 reported in (2012) 2 SCC 108}, from which the relevant portions are extracted as below:

"1(b) Distinction between Sections 126 and 135 of the 2003 Act

15. Upon their plain reading, the mark differences in the contents of Sections 126 and 135 of the 2003 Act are obvious. They are distinct and different provisions which operate in different fields and have no common premise in law. We have already noticed that Sections 126 and 127 of the 2003 Act read together constitute a complete code in themselves covering all relevant considerations for passing of an order of assessment in cases which do not fall under Section 135 of the 2003 Act. Section 135 of the 2003 Act falls under Part XIV relating to offences and penalties' and title of the Section is 'theft of electricity. The Section opens with the words 'whoever, dishonestly' does any or all of the acts specified under clauses (a) to (e) of Sub-section (1) of Section 135 of the 2003 Act so as to abstract or consume or use electricity shall be punishable for imprisonment for a



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term which may extend to three years or with fine or with both. Besides imposition of punishment as specified under these provisions or the proviso thereto, Sub-section (1A) of Section 135 of the 2003 Act provides that without prejudice to the provisions of the 2003 -Act, the licensee or supplier, as the case may be, through officer of rank authorized in this behalf by the appropriate commission, may immediately disconnect the supply of electricity and even take other measures enumerated under Sub- sections (2) to (4) of the said Section. The fine which may be imposed under Section 135 of the 2003 Act is directly proportional to the number of convictions and is also dependent on the extent of load abstracted. In contradistinction to these provisions, Section 126 of the 2003 Act would be applicable to the cases where there is no theft of electricity but the electricity is being consumed in violation of the terms and conditions of supply leading to mal practices which may squarely fall within the expression 'unauthorized use of electricity'. This assessment/proceedings would commence with the inspection of the premises by an assessing officer and recording of a finding that such consumer is indulging in an 'authorized use of electricity'. Then the assessing officer shall provisionally assess, to the best of his judgment, the electricity charges payable by such consumer, as well as pass a provisional assessment order in terms of - Section 126(2) of the 2003 Act. The officer is also under obligation to serve a notice in terms of Section 126(3) of the 2003 Act upon any such consumer requiring him to file his objections, if any, against the provisional assessment before a final order of assessment is passed within thirty days from the date of service of such order of provisional assessment. Thereafter, any person served with the order of provisional assessment may accept such assessment and deposit the amount with the licensee within seven days of service of such provisional assessment order upon him or prefer an



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appeal against the resultant final order under Section 127 of the 2003 Act. The order of assessment under Section 126 and the period for which such order would be passed has to be in terms of Sub-sections (5) and (6) of Section 126 of the 2003 Act. The Explanation to Section 126 is of some significance, which we shall deal with shortly hereinafter. Section 126 of the 2003 Act falls under Chapter XII and relates to investigation and enforcement and empowers the assessing officer to pass an order of assessment.

16. Section 135 of the 2003 Act deals with an offence of theft of electricity and the penalty that can be imposed for such theft. This squarely falls within the dimensions of Criminal Jurisprudence and mensrea is one of the relevant factors for finding a case of theft. On the contrary, Section 126 of the 2003 Act does not speak of any criminal intendment and is primarily an action and remedy available under the civil law. It does not have features or elements which are traceable to the criminal concept of mensrea.

17. 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 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 bypassing the installed meter. Therefore, there is a clear distinction between the cases that would fall under



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Section 126 of the 2003 Act on the one hand and Section 135 of the 2003 Act on the other. There is no commonality between them in law. They operate in different and distinct fields. The assessing officer has been vested with the powers to pass provisional and final order of assessment in cases of unauthorized use of electricity and cases of consumption of electricity beyond contracted load will squarely fall under such power. The legislative intention is to cover the cases of malpractices and unauthorized use of electricity and then theft which is governed by the provisions of Section 135 of the 2003 Act.

18. Section 135 of the 2003 Act significantly uses the words 'whoever, dishonestly' does any of the listed actions so as to abstract or consume electricity would be punished in accordance with the provisions of the 2003 Act. Dishonesty' is a state of mind which has to be shown to exist before a person can be punished under the provisions of that Section."

5.15. The combined reading of the above crucial references make it clear that there should be a dishonest intension on the part of the consumer to steal electricity as the necessary ingredient to decide the offence of theft of energy to deal with under section 135.

5.16. The dishonest intension can be inferred from the act of abstracting the energy in an unlawful ways like tapping the electricity from overhead line or underground or facilities of distribution system, tampering / meddling/damaging / destroying the meter, usage of any foreign material to meddle the recording of energy in the meter or any other ways and means by which meter recording is impeded or stopped either intermittently or permanently.



5.17. *In all these cases, the energy is prevented from being recorded in the meter either partially or fully, lending the direct meaning to the expression, 'theft of energy', to be dealt under section 135. When energy is fully recorded in the meter and such energy so recorded is used for the purpose other than the purpose authorized, there cannot be dishonest intension to steal the energy simply because the energy is fully recorded and metered. Such cases categorically fall under section 126 and to be dealt accordingly.*

5.18. *Through the expression 'use of electricity for the purpose other than electricity for the purpose other than for which the usage of electricity was authorized' appears both under section 126 and 135 there exists no commonality between them in terms nature of unauthorized use meant by each section. A careful conjoint reading of section 135 and Explanation to section 126 would show that some of the unauthorized usage of electricity (with a dishonest intension to steal electricity with partial or no recording of energy in the meter as explained above) also amount to theft of electricity, because the theft itself amounts to unauthorized electricity. But all other unauthorized usage of electricity (without a dishonest intension to steal electricity, with the consumed energy fully recorded in the meter) fall only under section 126 and cannot constitute the meaning of theft to fall under section 135.*

5.19. *This commission has rendered several judgments on similar issue viz., Suo-motu proceedings No.3 of 2012 dated 11.7.2013, SMP No.4 of 2013 dated 6.8.2019 and SMP No.4 of 2014 dated 19.1.2015 and given its findings. These may also be complied with, without any deviations.*

5.20. *Summarization of entire discussion culminates that the clinching factor that separates the section 126 and*



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135 with clear demarcation is the consideration of whether energy consumed is fully recorded in the meter or not. Once the consumed energy is fully recorded in the meter, there can be no inference of theft of electricity to its meaning and Section 135 has no role to play therein.

5.21. As there is no misuse of tariff, the amount collected towards Compounding charges and the Extra levy charges to be refunded to the petitioner within 30 days time along with 12% interest.

5.22. The respondent Licensee is directed to communicate this order with due instructions to all levels of the officers and staff concerned (including Anti-Power Theft squad & other squad) for strict adherence. And in future, if any such complaint/petition received, the Commission will not hesitate to initiate action under section 142 of the Electricity Act 2003.

Ordered accordingly.

3. Accordingly, the Writ Petition stands disposed of, on the same line with reference to the decision of the Tamil Nadu Electricity Regulatory Commission cited *Supra*. No costs. Consequently, connected miscellaneous petitions are closed.

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Index : yes/no

Speaking order/Non-speaking order

Neutral Citation : yes/no

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1. Tamil Nadu Generation and Distribution
Corporation Limited (TANGEDCO),
Represented by its Chairman and Managing
Director,
144, Anna Salai, Chennai – 600 002.

2. The Assistant Executive Engineer,
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Udumalpettai,
Devanurpudur, Coimbatore.

S.M.SUBRAMANIAM, J.



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