THE HONOURABLE SRI JUSTICE M.S. RAMACHANDRA RAO

WP.No.36491 of 2015

ORDER:

In this Writ Petition, the petitioner assails proceedings Lr.No.ADE/OSD/AKVD/F-TE/MPD.No.1223/15 dt.15.10.2015 **(for short, 'the impugned notice')**; and the consequential dis-connection of supply of electricity to petitioner's service connection No.1531490112001912 under Category LT-2 Non-domestic and Commercial of Kalla District in Kalla Section, West Godavari District for theft of electricity.

2. The petitioner has a Category LT-2 Non-domestic and Commercial service connection No.1531490112001912. The petitioner also has three other service connections, viz., S.C.Nos.01121912, 0112000784 and 0112001270.

3. On 08.10.2015, there was an inspection of petitioner's premises at 23:35 hrs. by the AEDPE SD-DPE2VISAKHAPATNAM, and it was observed as under :

> *"2. Two numbers of fuse-carriers were found fixed in second floor water process room secretly behind the water-filter tank on the back wall of the room. The incoming phase and neutral wires were first done to this pair cutouts and then from this cutouts supply were is done to the meter. At the time of inspection, it is found that the consumer as removed the fuse carriers from the cutouts and dishonestly tapped the incoming phase and neutral wires from the source end of the cutouts and by means of 35 Sq.mm. aluminium standed Electrical wire and connected to the Main switch before the load panel supply has been extended to entire load in the building. The consumer has removed the fuse carriers of the outgoing cutouts available at the energy meter pertaining to SC No.01121912, 0112000784 and 0112001270. Thus consumer is dishonestly pilferage of*

Electricity energy by unauthorized installing a pair of fuse carriers in the service wire before the energy meter of S.C.No.0112001912 and middling with the outgoing fuse cutouts of 3 services namely S.C.No.01121912, 011200784 and 01121270 existing in the same building. Theft of energy-Metered."

4. Alleging that petitioner has indulged in theft of electricity which is punishable under Section 135 of the Electricity Act, 2003 **(for short, 'the Act')**, the impugned notice was issued by 2nd respondent to petitioner. In the said impugned notice it was further mentioned that there would be a determination of civil liability by the appropriate court under Section 154 (5) of the Act, but pending such determination there was a provisional assessment of the liability of the petitioner at Rs.13,99,256.88 ps based on the assessment Rules contained in Appendix XII and provisions of Clause (10) of the General Terms and Conditions of Supply approved by the Andhra Pradesh Electricity Regulatory Commission, and if the petitioner wishes to obtain a re-connection he should pay 50% of the assessed amount. It was further stated that amount paid by petitioner pursuant to this provisional assessment would be adjusted against the other liability to be determined by the appropriate court as provided under Section 154 (6) of the Act. It further stated that a criminal case on account of theft of energy was registered against petitioner in Vigilance and APTS Police Station, and he may approach the said Police Station and pay compounding fee of Rs.72,000.00 for closure of the criminal case as a first offence as per Section 154 of the Act. To the said notice was enclosed a calculation of provisional assessment. Consequently, the petitioner's service connection was disconnected.

5. Sri M.R.K. Chowdary, learned Senior Counsel appearing for Sri

P.V. Mahesh, counsel for petitioner denied that petitioner had committed any malpractice at all and stated that petitioner was running a water purifying plant as a Small Scale Industry unit, producing purified water and was selling them to local consumers and obtained electricity supply for the said purpose. He contended that the petitioner was only a Small Scale Industry and cannot be said to have been running the plant on commercial basis.

6. According to him, the Rules framed under the Act did not permit any inspection after sunset and before sunrise in the morning, and since the alleged inspection of petitioner's premises took place just before midnight, the very inspection is illegal

7. He contended that the impugned notice did not mention the final reading and the date on which the service connections were disconnected, that copy of inspection report was not furnished to petitioner, and the person who inspected the petitioner's premises was not shown to have the authority to conduct inspection since he belonged to Visakhapatnam area whereas the service connection is at Kalla village, West Godavari District. He contended that the provisional assessment order is made without authority and not on the basis of proper material and was made without notice to petitioner. He further contended that no appeal is provided under Section 127 of the Act against the provisional assessment order, and therefore petitioner has no remedy to question the provisional assessment order.

8. Alternatively he contended that once a provisional assessment order is made under Section 126 of the Act, final assessment of liability ought to have been done by 2nd respondent within thirty

(30) days from the date of service of provisional assessment order on petitioner, and since such final assessment is not done, even the provisional assessment order lapses. He contended that it was not open to respondents to treat the petitioner as having committed theft of the electricity under Section 135 of the Act and prosecute him, and seek compounding of the offence under the Act, that provisions of Sections 126 and 135 of the Act operate in different spheres and Section 126 is a complete code by itself and so there is no question of any assessment of civil liability under Section 154 (5) by special court at all.. He relied upon the decision of the Supreme Court in **Executive Engineer, Southern Electricity Supply Company of Orissa Limited (SOUTHCO) and another v. Sri Seetaram Rice Mill** in this regard.

9. He contended that since it was the 2nd respondent who made the provisional assessment and since the 2nd respondent did not conduct the inspection (which was done by somebody else, i.e., AEDPE) on this ground also, the impugned order has to be set aside.

10. He however admitted that petitioner had paid the compounding amount of Rs.72,000/- before the Additional District and Sessions Court, Eluru in connection with the criminal case registered against petitioner.

11. Counter-affidavit has been filed 2nd respondent refuting the above contentions.

12. The 2nd respondent reiterated the circumstances leading to the issuance of the impugned proceeding and reiterated that

petitioner was dishonestly committing pilferage of electric energy and once this was conducted by the AEDPE, the service connections were immediately dis-connected on 08.10.2015; that basing on the inspection note of the AEDPE, the impugned order was issued by 2nd respondent, and this was in conformity with the General Terms And Conditions of Supply, and that the said impugned order was acknowledged by petitioner on 16.10.2015. He stated that this impugned order was served on petitioner pending determination of civil liability by the appropriate court under Section 154 (5) of the Act, and the provisional assessment was based on the assessment rules contained in Appendix XII of the provisions of Clause (10) of the General Terms and Conditions of Supply approved by the Andhra Pradesh Electricity Regulatory Commission. He contended that since petitioner has committed theft of electricity, Sections 126 and 127 of the Act have no application, and only Section 135 of the Act would apply; that determination of civil liability in case of theft of electrical energy would be done by the Special Court as per Section 154 (5) of the Act, and the petitioner therefore cannot question the impugned order.

13. I have noted the submissions of both sides.

14. Section 126 of the Act states :

> *"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 unauthorised 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 a notice 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 unauthorised 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)."

15. Section 135 of the Act states :

"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 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 hours from the time of such disconnection:*

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 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."

16. From the facts narrated above, it is clear that the inspection made on 08.10.2015 by the AEDPE revealed tampering of the meter by petitioner. This undoubtedly attracts Clause (b) of Sub-Section (1) of Section 135 of the Act.

17. In **Sri Seetaram Rice Mill** (1 supra), the Supreme Court held that Sections 126 and 127 of the Act together constitute a complete code covering all relevant considerations for passing an order of

assessment *in cases which do not fall* under Section 135 of the Act. This is clear from the following passages :

"24. Upon their plain reading, the marked 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.

25. 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 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 (1-A) 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 authorised 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.

26. 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 malpractices which may squarely fall within the expression "unauthorised 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 "unauthorised 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." (emphasis supplied)

18. It further drew a distinction between the unauthorised use of electricity under Section 126 of the Act and cases of theft which would fall under Section 135 of the Act and explained the same in para no.29 as under :

> *"29. Thus, it would be clear that the expression "unauthorised use of electricity" under Section 126 of the 2003 Act deals with cases of unauthorised 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 authorisation, like providing for a direct connection bypassing the installed meter, the case would fall under Section 135 of the Act."*

19. It clarified that *mens rea* would not apply to an assessment under Section 126 of the Act and opined that consumption of electricity in excess of sanctioned and connected load would be unauthorized use of electricity in terms of Section 126 of the Act. It held that cases of consumption in excess of sanctioned load or involving change of user or category of customer or involving pilferage *not amounting to theft* would fall under Section 126 of the Act, and the assessing officer has to pass the final order of assessment in terms of Section 126 (3) to 126 (6) of the Act.

20. On the facts of that case, the Supreme Court set aside the order of the High Court, which, while entertaining a Writ Petition against an order of provisional assessment in a case where the consumer consumed electricity in excess of the maximum connected load, had not granted him any relief. It remitted the matter back to the assessing officer to pass a final order of assessment after providing opportunity to the consumer to file objections, if any, to the provisional assessment order as contemplated under Section 126 (3) of the Act.

21. Having regard to the above decision of the Supreme Court of India, since the allegations against the petitioner in the present case specifically relate to theft of electricity, I am of the opinion that Section 126 has no application and only Section 135 would apply.

22. Now, if Section 135 applies, apart from the prosecution of the petitioner, Section 154 contemplates an assessment of the civil liability by a Special Court constituted under Section 153 of the Act. The relevant clauses of Section 154 are as under :

> ***"154. Procedure and power of Special Court.-*** *.........*
>
> *(5) The Special Court shall determine the civil liability against a consumer or a person in terms of money for theft of energy which shall not be less than an amount equivalent to two times of the tariff rate applicable for a period of twelve months preceding the date of detection of theft of energy or the exact period of theft if determined whichever is less and the amount of civil liability so determined shall be recovered as if it were a decree of civil court.*
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> *(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."*

23. Therefore, the contention of petitioner that once a provisional assessment order is issued, there cannot be an assessment of civil liability by the Special Court, is untenable.

24. The further contention of the counsel for petitioner that in the above decision of the Supreme Court since the provisional assessment order was challenged in the High Court and it

remanded the matter to the assessing officer to pass a final assessment order under Section 126 (5), in the present case also such a course of action has to be adopted by this Court, cannot be accepted. This is because in the case decided by the Supreme Court there was only unauthorized use of electricity, but not theft of electricity. The above decision itself states that if there is theft of electricity, then only Section 135 would be attracted and not Section 126. Therefore, the contention of petitioner that there ought to have been a final assessment under Section 126 (5) of the Act and since there is no such final assessment even the impugned order becomes illegal, is clearly without any merit.

25. Moreover, the Counsel for petitioner himself had admitted that petitioner paid compounding fee of Rs.72,000/- and compounded the offence in the criminal case filed against him by 2^{nd} respondent. Therefore, the petitioner is *estopped* from contending that Section 135 or 154 are not attracted at all, and there was no malpractice or pilferage of energy by petitioner.

26. The further contention of petitioner that the inspection itself is illegal because it was made at 23:35 hrs. by the AEDPE is also untenable inasmuch as Section 135 (3) proviso permits such inspection even between sunset and sunrise, provided an adult male member is present and occupying the premises. It is not the contention of petitioner that there was no adult male member present at the time of the inspection. Even according to petitioner he was made to write a letter under the dictation of the AEDPE at the time of the inspection by him which clearly indicates that petitioner was present at the time of the alleged inspection.

27. The 2nd respondent has categorically stated that basing on the inspection report of AEDPE, the impugned order has been passed, and the provisional assessment order was made as per General Terms and Conditions of supply and in accordance with Appendix XII.

28. The plea of petitioner that only the inspecting officer can do assessment and that no assessment can be done by the assessing officer who did not make the inspection, is not based upon any rule, and there is no bar in the Act for making of an assessment under Section 126 by a person who did not make the inspection of the consumer's premises.

29. It appears that to facilitate a consumer, in a situation where there is disconnection on the ground of theft of electricity, the respondents are making a provisional assessment of the loss caused to respondents, provide reconnection of power supply and are adjusting the same against the Civil Liability assessed by Special Court under Sec.154(6).

30. It is undoubtedly open to petitioner to dispute the provisional assessment made by 2nd respondent but, in such an event, the petitioner has to await the determination of civil liability by the Special Court and he cannot also seek re-connection of power supply till such time.

31. Therefore, a designated officer of the respondents is directed to initiate proceedings before the competent Special Court against the petitioner for determination of civil liability under Section 154 of the Act within a period of four (04) weeks from the date of receipt of a copy of this order; and only if petitioner complies with

the amount determined by the Special Court under Section 154(5), the petitioner shall be provided re-connection of electricity supply to his service connections.

32. Subject to the above directions, the Writ Petition is dismissed. No order as to costs.

33. As a sequel, miscellaneous petitions pending if any in this Writ Petition, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 04-02-2016

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