IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.12276 of 2016

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M/s. Dina Metals Limited, a Company incorporated under the provisions of the Companies Act, 1956 having its registered office at Abdul Rahmanpur Road, Didarganj, Patna City Patna-800009, through its Managing Director, Anand Kumar Sinha, son of Late Sharda Nand Prasad, resident of N.T.P.C. Colony, Ramkrishna Nagar P.O. New Jaganpura, P.S Ramkrishna Nagar, District- Patna.

.... Petitioner/s

Versus

1. The South Bihar Power Distribution Company Limited, Vidyut Bhawan, Bailey Road, Patna, through its Managing Director.
2. The Chief Engineer (Commercial), South Bihar Power Distribution Company Limited, Vidyut Bhawan, Bailey Road, Patna.
3. The Electrical Superintending Engineer, South Bihar Power Distribution Company Limited PESU (East), Shivalaya Market, Ashok Rajpath, Patna.
4. The Electrical Executive Engineer, Electric Supply Division, South Bihar, Power Distribution Company Limited, PESU (East), Patna City, Patna.

.... Respondent/s

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Appearance:

For the Petitioner/s : Mr. Suraj Samdarshi, Advocate

For the Respondent/s : Mr. Vinay Kirti Singh, Sr. Advocate
Mr. Vijay Kumar Verma, Advocate
Mr. Akhileshwar Singh, Advocate

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CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN

CAV JUDGMENT

Date: 12-01-2017

The petitioner prays for following reliefs:

(i) For quashing of the letter no. 719 dated 20.7.2016 issued by the respondent no. 4, whereby and whereunder a case of excess load falling within the purview of Clause 7.4 (j) of the Bihar Electricity Supply Code, 2007 (hereinafter referred to as the 'Supply code') has been treated as a case of unauthorized use of energy under Section 126 of the Electricity Act, 2003, without there being any unauthorized use even as per the inspection report and the energy bills.

(ii) For a declaration that the Supply Code issued under Section 50 of the Electricity Act, 2003 is binding upon the respondent authorities and the respondents cannot act contrary to the same, particularly wherein there is no ambiguity with regard to the provision governing the subject matter of the dispute.

(iii) For a direction to the respondent authorities and in particular respondent no. 4, not to take any action or decision in furtherance to the letter no. 719 dated 20.7.2016, till final adjudication of the present application.

(iv) For a direction to the respondent authorities and in particular the respondent no. 4, not to disconnect the electric supply of the petitioner till final adjudication of the present case; and for any other relief or reliefs to which the petitioner is found entitled.

It is during the pendency of the writ petition that final assessment order has been passed by the assessing authority under Section 126 of the Electricity Act, 2003 (hereinafter referred to as 'the Act') communicated vide letter no. 904 dated 16.8.2016 which has been placed on record vide Annexure-1 to I.A. No. 6726 of 2016 with a prayer for amending the reliefs prayed in paragraph-1 of the writ petition to include the following reliefs:

1(v). For quashing of the order dated 16.8.2016 passed by the respondent no. 4 as being wholly illegal and arbitrary and not to take any coercive step in furtherance to the order dated 16.08.2016.

1(v). For a declaration that in the given set of facts a proceeding u/s 126 of the Electricity Act, 2003 cannot be initiated.

Fact of the case lies in a very narrow compass. The petitioner, a company incorporated under the Companies Act, 1956, is a consumer of the South Bihar Power Distribution Company under the High Tension Specified Service Category (HTSS for the sake of brevity), having a contract demand of 9600 KVA since 01.9.1990. The petitioner claims to have undertaken expansion and modernization of the unit which led to scrapping of old induction furnaces which were replaced by new furnaces, installed phase wise. The Senior Electrical Inspector vide his letters placed at Annexure-1 series, has certified energisation of new transformers in phases i.e. 09.7.2013, 03.2.2014 and lastly on 15.3.2016. The production and expansion commenced on 27.5.2016 which was approved by the Department of Industries vide Memo No. 720 dated 09.6.2016 present at Annexure-7 to the rejoinder filed on 19.8.2016. It is in furtherance of the request made by the petitioner that a committee was constituted to inspect the premises of the petitioner consisting of the Assistant Electrical Engineer, Supply, Katra, the Executive Electrical Engineer, Supply, Kankarbagh, the Electrical Executive Engineer, Supply, Patna City and the Electrical Executive Engineer, MRT. The Committee submitted its report on 02.7.2016 placed at Annexure-2 confirming the position and recommending for revision of contract demand in consideration of the developments relating to the replacement/energisation of furnaces and transformers on different dates and upon certification by the Electrical Inspector. The Committee included the assessing authority as well i.e. the Electrical Executive Engineer, Electrical Supply Division, Patna City. A provisional assessment order was passed on 20.7.2016 vide Annexure-3 by the Electrical Executive Engineer, Electrical Supply Division, Patna City provisionally assessing the demand charge at Rs. 1,01,42,244/- under Section 126 of 'the Act' and quantified the penal demand at twice the assessed demand amount at Rs. 20284488/-. The petitioner was charged with non-compliance with the provisions underlying Clause 7.10 and 7.11 of the Bihar Electricity Supply Code, 2007 (hereinafter referred to as 'the Supply Code'). The petitioner was asked to file his explanation for the default under a threat of disconnection and on failure of the petitioner in entering into a fresh agreement within 30 days next. The petitioner filed his reply to the provisional assessment present at Annexure-4 and whereafter final assessment orders has been passed by the assessing authority which has been placed on record vide Annexure-1 to the Interlocutory Application bearing I.A. No. 6726 of 2016. The petitioner feeling aggrieved by the impugned action is before this Court. Since the final assessment order was passed during the pendency of the writ petition, the same is sought to be questioned through I.A. No. 6726 of 2016.

Having heard learned counsel for the parties the prayer made in I.A. No. 6726 of 2016 is allowed and the petitioner is permitted to question the final assessment order in the present proceedings itself.

This matter was heard on 02.9.2016 and this Court taking note of the matter in contest directed for maintenance of status quo by the parties as existing on the date with a further direction to the respondents to restrain from taking coercive measures against the petitioner.

Mr. Suraj Samdarshi has appeared for the petitioner while the respondent Distribution Company and its authorities are represented by Mr. Vinay Kirti Singh, learned senior counsel assisted by Mr. Vijay Kumar Verma and Mr. Akhileshwar Singh.

A preliminary objection is raised by Mr. Singh, learned senior counsel as to the maintainability of the writ petition. According to Mr. Singh the final assessment order having been passed by the assessing authority on examination of the objections raised by the petitioner, which has been placed on record vide Annexure-1 to the interlocutory application, the remedy for the petitioner would now lie before the appellate authority under Section 127 of 'the Act' and the writ petition be disposed of accordingly.

In my opinion, in the nature of contest at hands, the issue as to the maintainability of the writ petition is debatable and since an existence of alternative remedy is not an absolute bar to maintaining a writ petition, hence the parties were heard on their respective stand(s) on merits as well, with a view to a final disposal at the stage of admission itself.

The facts discussed above is not in dispute. The dispute is whether the petitioner has duly informed the respondents regarding enhancement of load and if the answer is in negative then whether the phase wise replacement of the induction furnaces cumulatively enhancing the load exceeding the contract demand, would be a case of unauthorized usage of electricity under Section 126 of 'the Act' or would be an irregularity requiring its rectification in terms of the 'Supply Code' and the 'Tariff Order'.

The sum and substance of argument of Mr. Samdarshi is that the petitioner coming under the 'HTSS category', is regulated under the 'demand based tariff' and thus a mere instance of the furnaces being found connected, in absence of the meter reflecting a higher load consumed by the petitioner, than the sanctioned load, there was no case of unauthorized usage. It is also the case of Mr.

Samdarshi that consumers coming under the demand based tariff, are beyond the purview of Section 126 of 'the Act' rather are regulated by the 'Tariff Order' and the 'Supply Code'.

The argument of Mr. Samdarshi is, that in absence of any report by the Inspection Team regarding unauthorized use of electricity by the petitioner, the assessing authority, himself being a member of the inspecting team, cannot record a different opinion while discharging the role of the assessing authority.

According to Mr. Samdarshi, the petitioner undertook expansion under the Industrial Policy, 2011, in phases and which was to conclude before 2.5.2016 which is supported by Annexure-7 to the rejoinder which is the approval granted by the District Industries Centre, Patna on 09.6.2016 and the resolution of the Industries Department at Annexure-7A to the rejoinder. He submits that vide Annexure-1 series the Electrical Inspector certified the expansion and thus there was nothing surreptitious in the expansion carried out by the petitioner. He submits that the problems for the petitioner arose when he approached the authorities for grant of incentive under the Industrial Policy, 2011 from payment of electricity dues prior to the final installment of the transformers and the induction furnaces on 16.12.2015 vide Annexure-A to the counter affidavit. It is submitted that it is following the request that an inspection was carried out on

02.7.2016 by a team of four officers three in the rank of Electrical Executive Engineer and one in the rank of Assistant Electrical Engineer which included the assessing authority as well. According to Mr. Samdarshi, the assessing authority mistreating the petitioner to be a consumer, based on connected load tariff, has charged him with unauthorised usage of 3622.23 KVA in excess of his sanctioned load of 9600 KVA. According to the inspection team the total installed load at the premises was found at 13222.23 KVA. According to Mr. Samdarshi the bills on record would show that never has the petitioner exceeded 8270 KVA, which is within the sanctioned load and thus even if the installations were reflecting a higher load but since they were in use simultaneously and not collectively, the total consumption never exceeded the contract demand.

Mr. Samdarshi has referred to the amendments incorporated in 'the Supply Code' through gazette notification dated 25.2.2016 vide Bihar Electricity Supply Code (5^{th} Amendment, 2016). He has referred to Clause-4 of the Amendment which deals with the amendment incorporated in Chapter-7 and with particular reference to the newly added clause-7.4(i) and 7.4(j), he submits that the two clauses were added under the amendment to deal with the consumers under demand based tariff and connected load based tariff respectively, whose actual recorded demand exceeded the contracted demand. He submits that while in the case of consumers regulated under the demand based tariff are to be proceeded on the basis of the meter recording in the Maximum Demand Indicator showing the demand of the consumer, in the case of consumer under the connected load based tariff, such conclusion is to be drawn on the basis of inspection. He submits that the consequences are present in the amendment itself and in which view of the matter, there was no occasion for the assessing authority to take recourse to the proceedings under Section 126 of ‘the Act’ which was wholly unwarranted and illegal.

Learned counsel has next referred to clause 2.1(j) of ‘the Supply Code’ which defines ‘connected load’ and clause 2.1(m) of ‘the Supply Code’ which defines ‘contract demand’ to submit that while in the case of consumers under a connected load based tariff, the load is to be determined on the basis of the aggregate of the manufacture rating present in the energy consuming device found installed in the consumers premises, on the other hand, it is the demand recorded in the Maximum Demand Indicator which would govern the demand of the consumer under the demand based tariff.

Reverting back to the Chapter-7 of ‘the Supply Code’, it is submitted by Mr. Samdarshi that the distinction between the demand based tariff and connected load based tariff is explained in clause 7.1

and 7.2 of ‘the Supply Code’. As per Mr. Samdarshi the consumers regulated under the demand based tariff, is governed by the Maximum Demand Indicator and there is no application of Section 126 on them unless the charge against them, is other than based on connected load. He submits that the provisions of ‘the Supply Code’ has an over riding effect on the provisions of ‘the tariff order’ in force. It is the argument of Mr. Samdarshi that in absence of any evidence confirming excess drawal, no proceeding under Section 126 of ‘the Act’, could be initiated even if the total load present in the premises exceeded the contracted load.

With reference to a Bench decision of this Court reported in **AIR 2016 Patna page 2 (M/s. Sri Ram Industries, District-Vaishali vs. State of Bihar)**, it is submitted by Mr. Samdarshi that the opinion expressed by the Bench in the said case, was in connection with the connected load based tariff and where it is the aggregate of the connected load which is a determining factor whereas in the present case the petitioner is governed by the demand based tariff, whose demand is recorded in the Maximum Demand Indicator. Mr. Samdarshi has also referred to the judgment of the Supreme Court rendered in **Southern Electricity supply Company vs. Sri Seetaram Rice Mill** reported in **(2012)2 SCC 108** and with reference to paragraph 23 of the judgment he submits that there has to be a purposeful construction of a statutory provision which is not to be mechanically applied. He submits that the perusal of the amendments incorporated in 'the Supply Code' at clause 7.4 (i), it is manifest that an option is available with the consumer either to enhance his load and enter into a fresh agreement if the load recorded in the Maximum Demand Indicator exceeds the contract demand or to reduce his load to bring it within the limit of the contract demand.

Responding to the argument advanced by Mr. Samdarshi and while raising preliminary objections on the maintainability of the writ petition, it is submitted by Mr. Vinay Kirti Singh, learned senior counsel for the respondents that the writ petition is not maintainable because once a final order of assessment has been passed by the assessing authority under Section 126 of 'the Act', whatsoever be the reasons for its invalidity, the proper forum for the petitioner is the appellate authority under Section 126 of 'the Act'. He submits that the petitioner cannot bypass the statutory remedy.

On merits it is the contention of Mr. Singh that the petitioner is a consumer since 1990 under the 'HTSS' category. He submits that although the petitioner undertook expansion which resulted in enhancement of his load but the petitioner did not follow the procedure for such enhancement of the load as provided under clause 7.11 of 'the Supply Code'. It is stated that there is a procedure provided at clause 7.11 of 'the Supply Code' for enhancement of the contract demand as well as for reduction of contract demand at clause-7.12 and which can be revised by the authorities and though the petitioner initiated the replacement of his induction furnaces and transformers in the year 2013 but no such application was filed by the petitioner in this regard. With reference to clause 4.11 of 'the Supply Code' it is submitted that an application is required to be filed for enhancement or reduction of load and the procedure is provided at clause 7.11 and 7.12 respectively but which has been ignored by the petitioner. He submits that an application for enhancement is not an empty formality rather it is followed by a formal agreement to be entered in between the parties otherwise it is impermissible. Learned counsel has referred to clause 6.24 of 'the Supply Code' to submit that no wiring or apparatus can be installed without the licensee's approval. Learned counsel has next referred to clause 6.30 and 6.31 of 'the Supply Code' in support of his submission that no installation can be carried out without the permission of the licensee. Referring to 'the Tariff order' enclosed at Annexure-6 at page 65 he submits that even as per clause 7.5 of 'the Tariff order' issued for the financial year 2016-17, the contract demand is to be based on the total capacity of the furnace and equipments in the 'HTSS category'. He submits that in these circumstances, the petitioner cannot escape the liability as there is no dispute that the total capacity of the replaced furnaces is 13222 KVA +1000 KVA for auxiliary load which is far above the contracted load of the petitioner at 9600 KVA. It is submitted that the certification of the Electrical Inspector as to the furnaces has got nothing to do with the obligation of the petitioner under 'the Supply Code' to get the load enhanced and to enter into an agreement.

Learned counsel next referring to the provisions of Section 126 of 'the Act' has submitted that there is nothing in the provision which would restrict its applicability to consumers coming under the connected load category exclusively. Learned counsel with reference to the judgment of the Supreme Court rendered in the case of **Sri Seetaram Rice Mill** (supra) has submitted that a default in a contract demand by a consumer has been held to be a case of unauthorized use of electricity under Section 126 of 'the Act'.

Concluding his argument it is submitted by Mr. Singh that in the undisputed circumstances where the total load of the furnaces found connected in the premises of the petitioner exceeded the contract demand by the inspection team, no infirmity can be found in the proceedings initiated against the petitioner under Section 126 of 'the Act' nor the order impugned would require any interference.

Mr. Samdarshi in his short reply has again referred to clause 11.1(a) (iv) and (v) of 'the Supply Code' to submit that there has to be a conclusive evidence as regarding unauthorized use of electricity and insofar as the present case is concerned, Annexure-2 which is the inspection report suggests nothing which would constitute unauthorized use of electricity. He submits that since the inspection at Annexure-2 was on the own request of the petitioner, it is not a case of unauthorized usage because the respondents were well aware of the expansion undertaken by the petitioner.

I have heard learned counsel for the parties and I have perused the records.

Although extensive arguments have been advanced by learned counsel for the parties but the area of contest is very limited. The only issue which requires a determination is whether the circumstances existing in the premises of the petitioner as reported by the inspection team in their report at Annexure-2, where the load of the furnaces found connected admittedly was 13222.23 KVA, which was in excess of the contract demand of 9600 KVA by 3622.23 KVA, it is a case of unauthorized use of electricity.

The following issues have been raised by Mr. Samdarshi to question the impugned action, namely:-

(a) The petitioner falls under the 'HTSS' category and is regulated by the demand based tariff, which category of consumers are beyond the purview of Section 126 of 'the Act';

(b) A mere existence of connected load at the premises of a consumer under the demand based tariff *ipso facto* would not bring him within a category of unauthorized use until such time that the Maximum Demand Indicator installed would register a demand exceeding the contract demand; and

(c) There is no evidence reported by the inspection team reporting unauthorized usage of electricity by the petitioner.

While the issue relating to applicability of Section 126 of 'the Act' on 'HTSS' category consumers who is regulated by the demand based tariff is an issue to be considered independently, the other two issues are inter related. I would thus be considering the issues accordingly.

The argument of Mr. Samdarshi, learned petitioner's counsel, regarding inapplicability of Section 126 of 'the Act' on 'HTSS' category consumers regulated by the demand based tariff, in my opinion, is fallacious. 'The Supply Code' as well as 'the Tariff order' framed in exercise of powers vested in the appropriate authority under the provisions of 'the Act' though bear statutory character but they cannot have an over riding effect over the statutory provisions of 'the Act'. Section 126 of 'the Act' reads thus:-

> **"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.

20[(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:

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[***]

22[(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 23 [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

24[(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."]

There is nothing in the provision underlying Section 126 of 'the Act' which would restrict its applicability only to 'connected load based tariff' consumers. In fact all that it mentions is that if on an inspection of any place or any premises of a consumer or any person, the assessing authority comes to a conclusion that such person has indulged in unauthorized use of electricity, he shall provisionally assess to the best of his judgment, the electricity charges payable by such person or any other person benefited by such use. The word 'person' used in Section 126 of 'the Act' would not only include a consumer under the 'connected load based tariff' but also the consumers regulated under 'the demand based tariff'. In my considered opinion in absence of any exceptions present in the provision underlying Section 126 of 'the Act', the provision cannot have a restrictive application. In fact in view of the legal position settled by the Supreme Court at paragraph 13 to 35 of the judgment rendered in the case of **Sri Seetaram Rice Mill** (supra), such argument on the inapplicability of the provision on 'demand based tariff' consumers, is no more available to the petitioner and is accordingly rejected.

This would bring this Court to the other issue contested by the parties and whether in the undisputed position where the connected load found in the premises of the petitioner exceeded the contract load, it would automatically bring the petitioner within the category of unauthorized use of electricity or there has to be conclusive evidence to such effect.

There is no dispute that the load of the four furnaces found connected in the premises of the petitioner cumulatively accounted for 13222.23 KVA which was in excess of the contracted load of 9600 KVA by 3622.23 KVA. Section 126 of 'the Act' casts an obligation on the assessing officer to come to a conclusion whether the consumer is indulging in unauthorized use of electricity, on the basis of an inspection at his premises. Meaning thereby, the inspection team which also includes the assessing officer, has to record its opinion whether the consumer concerned is indulging in unauthorized use of electricity. This is a mandatory requirement and cannot be bye passed nor can be presumed.

Chapter 11 of 'the Supply Code' deals with unauthorized use of electricity and theft of electricity. Clause-11 of 'the Supply Code' is practically a reproduction of Section 126 of 'the Act' and clause 11.1 thereof deals with the procedure for inspection and clause (iv) and (v) would be relevant for the purpose which reads as follows:

> 11.1 (a) **Inspection**
>
> **(iv)** A report shall be prepared at site giving details of connected load, condition and details of old seals and resealing done, working of meter, details of new seals, etc. <u>The report shall mention any irregularity noticed which may lead to an indulgence of</u>

unauthorized use of electricity in the format given in Annexure-6. The Inspecting Officer shall carry seals for this purpose.

(v) The report shall clearly indicate whether or not conclusive evidence substantiating the fact that UUE was found. The details of such evidence should be recorded in the report. The report shall be signed by each member of the inspection team and handed over to the person in occupation or possession or in charge of the place or premises at site immediately under proper receipt. In case of refusal by such person or his/her representative to either accept or give a receipt, a copy of inspection (74) report shall be pasted at a conspicuous place in/outside the premises and may be photographed. Simultaneously, the report shall be sent to such person under Registered Post / Speed post on the day or the next day of the inspection.

(Emphasis is mine)

A plain reading of the statutory provisions underlying Section 126 of 'the Act' when read alongside clause-11 and clause-11.1(a) (iv) and (v) of 'the Supply Code' leaves no confusion to hold that it is not simply a discovery of a load within the premises of the consumer which is found to be higher than the sanctioned load, which would bring him within the category of unauthorized use and subject him to a proceeding under Section 126 of 'the Act' rather there has to be a conclusive opinion of the assessing authority on the evidence recorded confirming unauthorized use of electricity, which would put the consumer concerned in the bracket of consumers indulging in the unauthorized use of electricity.

The Supreme Court has taken note of this distinction in the judgment rendered in the case of **Sri Seetaram Rice Mill** (supra) and I am tempted to reproduce certain paragraphs of the judgment which would lend support to my opinion that it is not merely on discovery of a higher load in the premises of a consumer than the sanctioned load which would subject him to a proceeding under Section 126 of 'the Act' by holding the consumption as an authorized use of electricity rather unless there is a conclusive opinion recorded by the assessing authority on the basis of evidence found that the consumer had indulged himself in authorized use of electricity, he cannot be subjected to the penal proceedings.

The Supreme Court in fact has discussed the circumstances which would lead to a proceeding under Section 126 of 'the Act' or under Section 135 of 'the Act' for theft of electricity.

> "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 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.

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 `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.

28. 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 mens rea 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 mens rea.

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 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, the case would fall under Section 135 of the Act.

30. Therefore, there is a clear distinction between the cases that would fall under 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.

1(c) The ambit and scope of Section 126 with reference to the construction of the words `unauthorised use' and `means'

36. Having dealt with the principle of interpretation of these provisions and the distinction between Sections 126 and 135 of the 2003 Act, we shall now discuss the ambit and scope of Section 126. <u>The provisions of Section 126 contemplate the following steps to be taken:</u>

(i) <u>An assessing officer is to conduct inspection of a place or premises and the equipments, gadgets, machines, devices found connected or used in such place.</u>

(ii) <u>The formation of a conclusion that such person has indulged in unauthorized use of electricity.</u>

(iii) <u>The assessing officer to provisionally assess, to the best of his judgment, the electricity charges payable by such person.</u>

(iv) The order of provisional assessment to be served upon the person concerned in the manner prescribed, giving him an opportunity to file objections, if any, against the provisional assessment.

(v) The assessing officer has to afford a reasonable opportunity of being heard to such person and pass a final order of assessment within 30 days from the date of service of such order of provisional assessment.

(vi) The person, upon whom the provisional order of assessment is served, is at liberty to pay the said amount within seven days of the receipt of such order and where he files such objections, final order of assessment shall be passed, against which such person has a right of appeal under Section 127 of the 2003 Act within the prescribed period of limitation.

61. Unauthorised 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 terms and conditions of supply and the regulations and provisions of the 2003 Act governing such supply. \`Unauthorised 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.

66. Regulation 106 of the Conditions of Supply reads as under :

"106. No consumer shall make use of power in excess of the approved contract demand or use power for a purpose other than the one for which agreement has been executed or shall dishonestly abstract power from the licensee's system."

67. On the cumulative reading of the terms and conditions of supply, the contract executed between the parties and the provisions of the 2003 Act, we have no hesitation in holding that consumption of electricity in excess of the sanctioned/ connected load shall be an \`unauthorised use' of electricity in terms of Section 126 of the 2003 Act. This, we also say for the reason that overdrawal of electricity

amounts to breach of the terms and conditions of the contract and the statutory conditions, besides such overdrawal being prejudicial to the public at large, as it is likely to throw out of gear the entire supply system, undermining its efficiency, efficacy and even increasing voltage fluctuations.

71. Consumption in excess of sanctioned load is violative of the terms and conditions of the agreement as well as of the statutory benefits. Under Explanation (b)(iv), `unauthorised use of electricity' means if the electricity was used for a purpose other than for which the usage of electricity was authorised. Explanation (b) (iv), thus, would also cover the cases where electricity is being consumed in excess of sanctioned load, particularly when it amounts to change of category and tariff. As is clear from the agreement deed, the electric connection was given to the respondent on a contractual stipulation that he would consume the electricity in excess of 22 KVA but not more than 110 KVA. The use of the negative language in the condition itself declares the intent of the parties that there was an implied prohibition in consuming electricity in excess of the maximum load as it would per se be also prejudiced. Not only this, the language of Regulations 82 and 106 also prescribe that the consumer is not expected to make use of power in excess of approved contract demand otherwise it would be change of user falling within the ambit of `unauthorised use of electricity'."

(Emphasis is mine)

The legal position settled by the Supreme Court in the case of **Sri Seetaram Rice Mill** (supra) practically settles the issue that the moment a consumer **consumes** electricity in excess of the sanctioned load, he would come under the category of unauthorized usage and if such unauthorized usage is backed by mens rea, then the default would be governed by Section 135 of ‘the Act’ coming under the category of dishonest abstraction of electricity.

Insofar as the case in hand is concerned, no doubt the connected load found in the premises of the petitioner was having an aggregate exceeding the contract load but then there is a three step exercise to be carried out before a consumer can be proceeded under Section 126 of ‘the Act’, namely;-

(a) A physical inspection of the gadgets and equipments installed in the premises of a consumer together with verification of their respective ratings, to be carried out in the premises of the consumer;

(b) A finding to be recorded that the aggregate of the load found connected in the premises, exceeded the contract load; and

(c) A finding also to be recorded by the Assessing Officer who is a member of the inspection team that there is conclusive evidence that the load found connected in the premises of the consumer was actually being consumed by him and which exceeded the contract demand;

Before I record my opinion on the three step exercise, I deem it necessary to refer to the amendments incorporated in the Bihar Electricity Supply Code viz clause 7.4(i) and clause 7.4(j).

7.4(i) If the actual recorded demand of a consumer having demand based tariff exceeds 110% of the contracted demand, consecutively for three months, the licensee shall issue a notice informing the consumer to get additional contract demand sanctioned as per the tariff or to limit their drawl as per their contract.

In case the consumer does not respond to the notice within 30 days of issue of notice to get additional demand sanctioned as per the tariff or limit their drawal as per the contract, the licensee may disconnect the supply to the consumer, after serving fifteen days notice. However, the distribution licensee may revise and enhance the contract demand as per the tariff of the consumer to the extent of highest demand recorded in the past three months of the violation, provided the consumer agrees for the same.

7.4(j) If on inspection of premises of a consumer having connected load based tariff, the connected load is found to be in excess over the contracted/sanctioned load, the licensee shall issue a notice and inform the consumer to get additional connected load sanctioned as per the tariff or limit the drawl as per sanctioned load.

In case the consumer does not respond to the notice within 30 days of issue of notice to get additional load sanctioned as per the tariff or limit drawl as per sanctioned load, the licensee may disconnect the supply to the consumer after serving fifteen days notice,

However the distribution licensee may revise and enhance the sanctioned load as per the tariff of the consumer to the extent of connected load found on inspection provided the consumer agrees for the same.

The amended provisions underlying clause 7.4(i) and 7.4(j) of 'the Supply Code', Section 126 of 'the Act' and Section 135 of 'the Act' leaves three options at the disposal of the Distribution Company for proceeding against a defaulting consumer charged with unauthorized use of electricity and the circumstances stands explained in the provision itself. A plain reading of the three enabling provision(s) referred to above would confirm that where it is a case simplicitor where the connected load found in the premises of the consumer, in aggregate exceeded the contract load but with no evidence of its actual consumption, the case of such consumer would be guided by clause 7.4(i) or clause 7.4(j) of the amended 'Supply Code' as the case may be. My reasons for arriving at such conclusion, is the absence of any evidence that the load so found connected at the premises of the consumer, was actually being consumed. Now since there is no conclusive evidence of the actual consumption of the excess load found connected at the premises of a consumer, he is liable for a notice to correct himself in terms of the amended provision of clause 7.4(i) or 7.4(j) of 'the Supply Code'.

The second category of case is where the connected load found in the premises of a consumer in its aggregate exceeded the contract load and there is conclusive evidence available to confirm the consumption of the excess load by the consumer. Meaning thereby, if there was any evidence to confirm that the connected load found in the premises of a consumer, was being actually consumed by the consumer concerned, he would subject himself to a proceeding under Section 126 of 'the Act' and if such unauthorized use is backed by dishonest abstraction, he would also subject himself to a proceeding under Section 135 of 'the Act' which creates the third category.

Insofar as the case in hand is concerned, there is absolutely no evidence regarding the actual consumption of the excess load by the petitioner in excess of the contract load even though the connected load was found to be in excess of the contract demand. The petitioner has enclosed a number of bills at Annexure-5 series to show that even after the installation of the furnace(s) and transformer(s), the actual load consumed by the petitioner did not exceed the contracted load rather stayed within the sanctioned load of 9600 KVA. This specific contention of the petitioner has not been denied by the respondents. Even the inspection report present at Annexure-2 does not report any unauthorized usage by the petitioner, in excess of the contract demand rather the inspection team has consciously made a recommendation for revision of the contract demand of the petitioner.

In my opinion in absence of any conclusive finding by the inspection team which included the assessing authority himself, regarding unauthorized usage of electricity by the petitioner and in absence of any evidence to show that the petitioner was actually consuming electricity in excess of the contract demand, even if the installation of furnace(s) and transformer(s) was carried out without obtaining the permission of the licensee and may be termed an irregularity under clause 4.11 read alongside clause 7.11 of 'the Supply Code' which casts an obligation on the consumer to apply for enhancement of demand and also to enter into an agreement to such effect, and which may also have made the petitioner liable for proceedings under clause 7.4(i) or clause 7.4(j) of 'the Supply Code' but in my considered opinion, in absence of any conclusive opinion by the assessing authority that the petitioner was consuming electricity in excess of the contract load, certainly the initiation of the proceedings by the assessing authority under Section 126 of 'the Act', the issuance of the provisional assessment order impugned at Annexure-3 and the final assessment order impugned at Annexure-1 to I.A. No. 6726 of 2016 are without sanction, an afterthought, based on no evidence and thus unsustainable in law.

Having concluded thus, I also deem necessary to record that the act of the petitioner in carrying out the expansion programme by installation of furnaces and transformers, which in aggregate exceed the contract demand, even though has a certification of the Electrical Inspector and even though this act is supported by the State Investment Promotion Board of which the licensee is also a member but until such time that such installation is carried out in the manner prescribed under clause 4.11 read with clause 7.11 of 'the Supply Code' and a formal agreement is entered in between the parties as per clause 7.13 thereof, on the enhanced capacity, the petitioner definitely is at fault for being proceeded under the amended provision of clause 7.4(i) and clause 7.4(j) of 'the Supply Code', as the case may be.

For the reasons and discussions made hereinabove, the provisional assessment order dated 20.7.2016 passed by the Electrical

Executive Engineer, Electric Supply Division, Patna City impugned at Annexure-3 together with the final assessment order dated 16.8.2016 passed by him impugned at Annexure-1 to I.A. no. 6726 of 2016 cannot be upheld and are accordingly quashed and set aside. This order, however, would not preclude the authorities to proceed against the petitioner in accordance with law.

The writ petition is allowed.

Interlocutory Application bearing I.A. No. 6726 of 2016 stands disposed of.

S.Sb/- **(Jyoti Saran, J)**

AFR/NAFR	AFR
CAV DATE	01.12.2016
Uploading Date	13.01.2017
Transmission Date	