IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No. 21 of 2013

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1. The Bihar State Electricity Board through its Chairman, Bailey Road, Patna
2. The Assistant Electrical Engineer, Electric Supply Sub-Division, Maurya Lok, PESU West, Patna
3. The Electrical Executive Engineer, Electric Supply Division, Patna Gaya Road, Patna

.... Petitioners

Versus

1. The State of Bihar through Energy Secretary, Energy Department, Government of Bihar, Patna
2. The Electrical Inspector, Bihar Patna-cum-Appellate Authority under Section 127 of the Electricity Act 2003
3. Sunil Kumar Son of Bageshwar Prasad Rai, Shop No. 143, C-Block, Maurya Lok Complex, P.S. Kotwali, District - Patna

.... Respondents

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Appearance:

For the Petitioners : Mr. Vinay Kirti Singh, Sr. Advocate
Mr. Vijay Kr. Verma,
Mr. Akhileshwar Singh, Advocates

For the State : Mr. P.K. Singh, AC to GA 10

For Respondent No.3: Mr. Suraj Samdarshi,
Mr. Indrajesh Kumar, Advocates

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CORAM: HONOURABLE MR. JUSTICE VIKASH JAIN

ORAL JUDGMENT

Date: 19.09.2018

Heard learned Senior Counsel for the petitioners and learned counsel for the respondent no. 3.

2. The present writ petition has been filed against the orders dated 25.02.2010 and 30.08.2011 passed by the Electrical Inspector, Bihar, Patna-cum-Appellate Authority (Respondent No. 2) in Appeal No. 8 of 2010.

3. The short facts of the case according to the petitioner are

that the officers of the Bihar State Electricity Board (succeeded by Bihar State Power Holding Company Ltd., hereinafter referred to as 'the Board') inspected the premises of the consumer Sri Sunil Kumar (Respondent No. 3) on 19.11.2009 and found that theft of electrical energy was committed by tapping one of the three phase wires and bypassing the meter. An FIR was lodged under Section 135 of the Electricity Act, 1910 (hereinafter referred to as 'the Act') and the meter seized, removed and sealed along with the wire used for bypassing the meter. A provisional assessment order was passed on 23.11.2009, assessing the loss amount of Rs. 3,81,568/- caused to the Board. The very next day on 24.11.2009, the private respondent no. 3 deposited the loss amount by cheque and further also deposited the required amount of Rs. 1,00,000/- by way of compounding charge for the offence in terms of Section 152 of the Act. Such amount was duly accepted on 24.11.2009 and the provisional assessment attained finality as no objection against the same was made by the respondent no. 3. Accordingly the final assessment was made by order dated 08.01.2010 (Annexure-9) reiterating the provisional assessment. The respondent no. 3 then wrote to the Assistant Electrical Engineer (Rev.) requesting for correction of the bill for the month of December, 2009 raised for Rs. 3,85,808.48 as the petitioner had already made payment of Rs. 3,81,568/- on 24.11.2009 along with Rs. 1,00,000/- towards compounding the offence. Besides, respondent no. 3 preferred Appeal No. 08 of 2010 before the appellate authority (respondent no. 2) contending that the amount of loss calculated at Rs. 3,81,568/- and the allegation of theft of electrical energy was incorrect. The provisional assessment had been made without grant of opportunity of hearing which had then been treated as the final assessment, contrary to the provisions of Section 126(3) of the Act. The appellate authority passed the impugned order dated 25.02.2010 opining that respondent no. 3 ought to be given a further opportunity of hearing. He thus remanded the matter for passing the final assessment order afresh after hearing. Pursuant thereto the final assessment order was passed on 29.05.2010 (Annexure-15) once again reiterating the fact of theft committed by the respondent no. 3 and also the amount provisionally assessed. The appellate authority (respondent no. 2) by the impugned order dated 30.08.2011 allowed the appeal of the respondent no. 3 and directed the petitioner to recalculate the fine payable by the respondent no. 3.

4. Learned counsel for the petitioners submits that the appellate authority has acted wholly without jurisdiction in passing the impugned orders dated 25.02.2010 and 30.08.2011 inasmuch as remedy by way of appeal under Section 127 of the Act is available only in case of assessment made for unauthorised use of electricity under Section 126 of the Act. The instant case involves theft of electrical

energy covered under Section 135 of the Act and as such no appeal has been provided against the provisional assessment or final assessment. Moreover, the respondent no. 3 had himself accepted the provisional assessment and duly deposited the amount of loss of Rs. 3,81,568/- as well as the compounding fee of Rs. 1,00,000/- without demur. Having accepted the provisional assessment which was subsequently endorsed in the final assessment, no appeal lay against the same as evident from a bare reading of Section 127(5) of the Act which categorically bars any appeal against final order made with the consent of the parties. It is submitted that while an assessment made under Section 126 of the Act for unauthorized use of electricity is amenable to appeal under Section 127(1) of the Act, no such appeal is available in respect to assessments made under Bihar Electricity Supply Code, 2007 (hereinafter referred to as 'the Supply Code') in cases involving theft of electricity covered under Section 135 of the Act. Reference is invited to Clause 11.1 of the Supply Code dealing with the procedure for purposes of Section 126 of the Act. Clause 11.1(d) contemplates an appeal against final assessment made under Section 126 of the Act. On the other hand, Clause 11.2 of the Supply Code is concerned with the procedure in cases of theft of electricity as contemplated under Section 135 of the Act. Conspicuously, Clause 11.2.3 omits to provide for a right of appeal against final assessment made under Section 135 of the Act.

By necessary implication therefore it is evident that no right of appeal is conferred in matters involving theft of electricity.

5. Learned counsel for the respondent no. 3 on the other hand, submits that the contention of the petitioners suffers from fallacy inasmuch as no separate procedure for assessment has been provided for the purpose of Section 135 of the Act. It is submitted that even in cases of theft, a provisional assessment and a final assessment have to be made under Section 126 of the Act itself. In this regard reference is invited to Electricity (Removal of Difficulties) Order, 2005 which was necessitated to address the need for taking appropriate action in cases of theft and diversion of electricity and with a view to removal of difficulties which had arisen in giving effect to the provisions of the Act in controlling theft of electricity. It is evident from para 2 of the said Order, *inter alia*, that the Electricity Supply Code would provide measures to control theft by including the method of assessment of electricity charges payable in case of theft pending adjudication by the appropriate court. It is in that backdrop that the Bihar Electricity Supply Code 2007 was introduced. The scope of assessments provided therein must thus be understood in the background of para 2 of the aforesaid Order read with Annexure-7 of the Supply Code which is limited to providing for the methodology for assessment.

6. It is next submitted on behalf of the respondent no. 3 that

mere payment of compounding fee cannot lead to an inference that the provisional assessment had been consented to, thereby barring the valuable right of appeal granted under Section 127 of the Act. Payment of compounding fee was merely with a view to avoid the criminal trial. It is submitted that inspection was carried out on 19.11.2009 leading to the provisional assessment on 23.11.2009. The respondent no. 3 made payment of the amount of loss provisionally assessed together with the compounding fee the very next day vide his letter dated 24.11.2009 (Annexure-7) which itself clearly shows that the amount was paid only with a view to reconnection of electricity and not to consent to the amount of loss provisionally assessed. Moreover, the bar of appeal against a consented order in terms of Section 127(5) of the Act is with respect to consent to the final order and not the provisional order of assessment. In the present case, the petitioners had paid the amount on 24.11.2009 pursuant to the provisional assessment made on the previous day i.e. on 23.11.2009 and immediately filed appeal an against the provisional assessment vide Appeal No. 01 of 2009 even prior to the final assessment being made on 08.01.2010 (Annexure-9). The question of applying Section 127(5) of the Act does not therefore arise. It is further pointed out that the petitioners never challenged the earlier order dated 25.02.2010 (Annexure-14) passed by the appellate authority remanding the matter for grant of fresh opportunity at the relevant time and is sought to be impugned herein belatedly. On the contrary, the petitioners themselves gave effect to the said order and a final assessment order dated 29.05.2010 was passed. As such, the petitioners cannot be permitted to raise the issue of jurisdiction of the appellate authority allowing the appeal against such final assessment.

7. Having heard the parties and on a consideration of the materials on record, this Court finds merit in the writ petition. The core issue that falls for consideration in the present case is whether the provisional assessment and final assessment made in cases involving theft of electricity covered under Section 135 of the Act are made under the Supply Code and are distinct and separate from assessments made for unauthorized use of electricity covered under Section 126 of the Act. The foundation of the entire case of the petitioners is that an assessment in a case of theft of electricity is made under the Supply Code, which has been formulated under Section 50 of the Act and is thus statutory in nature. It cannot be equated with an assessment made under Section 126 of the Act, orders whereunder are admittedly open to challenge in appeal under Section 127 of the Act.

8. The issue raised by the petitioners is no longer *res integra* and stands squarely covered by a decision of this Court in *Kamaljeet Singh vs. The Bihar State Electricity Board and Ors*., 2010(3) PLJR 514. The decision has since been approved by a Division Bench of this Court

in *Mosmat Swaran @ Swaran Manraw Vs. The State Of Bihar & Anr,* 2012(2) PLJR 229, leaving no manner of doubt that the only provision for making an assessment is provided under Section 126 of the Act, whether it be with respect to unauthorized use of electricity or to theft of electricity. It will be fruitful to take note of the observations in Kamaljeet Singh's case (supra) as follows –

> *"3. Be that as it may, in terms of Section 135(1-A) and in particular the third proviso thereof, it is provided that the assessment has to be done in accordance with the provisions of the Act. Section 135 itself does not provide the mode and manner of assessment. The mode and manner of assessment is provided under Sub-section (5) of Section 126 of the Act. It is those provisions that would apply. Thus, the assessment is made in terms of Section 126(5), which assessment is appealable in terms of Section 127 to the Appellate Authority. Section 127 does not restrict the appellate jurisdiction in any manner to exclude assessment in theft cases."*

9. In the above view of the matter, no infirmity can be found in the impugned appellate order dated 25.02.2010 passed in Appeal No. 08 of 2010 (Annexure-14) which was well within the jurisdiction of the appellate authority. As noticed above, the issue has already been conclusively decided in Kamaljeet Singh's case (supra) as approved by the Division Bench in Mosmat Swaran @ Swaran Manraw's case (supra). I do not find any merit in the submission of the

petitioners that assessment for the purpose of unauthorized use of electricity is controlled by Section 126 which is amenable to appeal under Section 127 of the Act, while assessment for theft of electricity covered under Section 135 of the Act is guided by the provisions of the Supply Code. This becomes further evident from the scope of the Supply Code which was notified in the backdrop of the Electricity (Removal of Difficulties) Order, 2005 as noticed above, which was only to provide for a methodology for assessment.

10. I am also not persuaded by the judgment of the learned Single Judge of the Punjab and Haryana High Court rendered in *Punjab State Power Corporation Limited Vs. State of Punjab, (2017) 4 Law Herald 2939* expressing the view that the proceeding under Section 127 of the Act cannot be initiated by the consumers in the case of theft. The issue has already considered and authoritatively decided in Kamaljeet Singh's case (supra) as approved by the Division Bench of this Court in *Mosmat Swaran @ Swaran Manraw's case* (supra).

11. As far as the bar of Section 127(5) of the Act against appeal is concerned, even if it be assumed for the moment that the petitioner had consented to the amount of loss provisionally assessed in terms of his letter dated 24.11.2009, the pre-conditions of Section 127(5) are not fulfilled inasmuch the petitioners have not been able to show that consent was given with reference to the final assessment

rather than the provisional assessment.

12. The writ petition stands dismissed.

(Vikash Jain, J)

Chandran/BT

AFR/NAFR	AFR
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