IN THE HIGH COURT FOR THE STATES OF PUNJAB AND HARYANA AT CHANDIGARH

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CWP No.21579 of 2013
Date of Decision: 24.01.2018

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M/s Motia Constructions Ltd.

. . . . Petitioner

Vs.

Sub Divisional Magistrate, Derabassi and others

. . . .Respondents

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CORAM: - HON'BLE MR. JUSTICE RAKESH KUMAR JAIN

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Present: Mr.Pankaj Jain, Advocate,
for the petitioner.

Mr.H.S. Sitta, AAG, Punjab.

Mr.Vinod S. Bhardwaj, Advocate,
for respondents No.2 to 4.

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RAKESH KUMAR JAIN, J. (ORAL)

Before I delve into the facts of this case it would be apt to refer to the provisions of the Electricity Act, 2003 [for short 'the Act'] which are invoked by both the sides. The Act envisages penalty upon a consumer in two circumstances, namely, unauthorized use of electricity [for short 'the UUE'] and theft of electricity. Part XII of the Act deals with the 'Investigation and Enforcement' which also includes the provisions regarding UUE and Part XIV of the Act deals with the 'Offences and Penalties' in respect of theft of electricity.

In the case of UUE, provisions of Sections 126 & 127 of the Act are invoked both by the licensee and the consumer and in case of theft of electricity Sections 135 & 151 of the Act are invoked. Part XV of the Act deals with the 'Special Courts' providing a remedy to the consumer, who is saddled with the liability of having committed a criminal offence of committing theft of electricity, to approach the Special Court constituted under Section 153 of the Act for which the procedure is provided under Section 154 of the Act. The relevant provisions of the Act for the decision of this case are reproduced as under:-

> *"**Section 126: (Assessment)**: ---*
>
> *(1) If on an inspection of any place or premises or after inspection of the equipments, gadgets, machines, devices found connected or used, or after inspection of records maintained by any person, the assessing officer comes to the conclusion that such person is indulging in unauthorized use of electricity, he shall provisionally assess to the best of his judgement the electricity charges payable by such person or by any other person benefited by such use.*
>
> *(2) The order of provisional assessment shall be served upon the person in*

occupation or possession or in charge of the place or premises in such manner as may be prescribed.

(3) The person, on whom an order has been served under sub- section (2) shall be entitled to file objections, if any, against the provisional assessment before the assessing officer, who shall, after affording a reasonable opportunity of hearing to such person, pass a final order of assessment within thirty days from the date of service of such order of provisional assessment of the electricity charges payable by such person.

(4) Any person served with the order of provisional assessment, may, accept such assessment and deposit the assessed amount with the licensee within seven days of service of such provisional assessment order upon him.

(5) If the assessing officer reaches to the conclusion that unauthorised use of electricity has taken place, the

assessment shall be made for the entire period during which such unauthorized use of electricity has taken place and if, however, the period during which such unauthorised use of electricity has taken place cannot be ascertained, such period shall be limited to a period of twelve months immediately preceding the date of inspection.

(6) The assessment under this section shall be made at a rate equal to twice the tariff rates applicable for the relevant category of services specified in sub-section (5).

Explanation.- For the purposes of this section,-

(a) "assessing officer" means an officer of a State Government or Board or licensee, as the case may be, designated as such by the State Government;

(b) "unauthorised use of electricity" means the usage of electricity –

(i) by any artificial means; or

(ii) by a means not authorised by the concerned person or authority or licensee; or

(iii) through a tampered meter; or

(iv) for the purpose other than for which the usage of electricity was authorised; or

(v) for the premises or areas other than those for which the supply of electricity was authorized."

Section 127. (Appeal to Appellate Authority): ---

(1) Any person aggrieved by the final order made under section 126 may, within thirty days of the said order, prefer an appeal in such form, verified in such manner and be accompanied by such fee as may be specified by the State Commission, to an appellate authority as may be prescribed.

(2) No appeal against an order of assessment under sub-section (1) shall be entertained unless an amount equal to half of the assessed amount is deposited in cash or by way of bank

draft with the licensee and documentary evidence of such deposit has been enclosed along with the appeal.

(3) The appellate authority referred to in sub-section (1) shall dispose of the appeal after hearing the parties and pass appropriate order and send copy of the order to the assessing officer and the appellant.

(4) The order of the appellate authority referred to in sub-section (1) passed under sub-section (3) shall be final.

(5) No appeal shall lie to the appellate authority referred to in sub-section (1) against the final order made with the consent of the parties.

(6) When a person defaults in making payment of assessed amount, he, in addition to the assessed amount shall be liable to pay, on the expiry of thirty days from the date of order of assessment, an amount of interest at the rate of sixteen per cent, per annum compounded every six months.

Section 135. (Theft of Electricity): ---

(1) Whoever, dishonestly, --

(a) taps, makes or causes to be made any connection with overhead, underground or under water lines or cables, or service wires, or service facilities of a licensee or supplier as the case may be; or

(b) tampers a meter, installs or uses a tampered meter, current reversing transformer, loop connection or any other device or method which interferes with accurate or proper registration, calibration or metering of electric current or otherwise results in a manner whereby electricity is stolen or wasted; or

(c) damages or destroys an electric meter, apparatus, equipment, or wire or causes or allows any of them to be so damaged or destroyed as to interfere with the proper or accurate metering of electricity, or

(d) uses electricity through a tampered meter; or

(e) uses electricity for the purpose other than for which the usage of electricity was authorised,

so as to abstract or consume or use electricity shall be punishable with imprisonment for a term which may extend to three years or with fine or with both:

Provided that in a case where the load abstracted, consumed, or used or attempted abstraction or attempted consumption or attempted use -

(i) does not exceed 10 kilowatt, the fine imposed on first conviction shall not be less than three times the financial gain on account of such theft of electricity and in the event of second or subsequent conviction the fine imposed shall not be less than six times the financial gain on account of such theft of electricity;

(ii) exceeds 10 kilowatt, the fine imposed on first conviction

shall not be less than three times the financial gain on account of such theft of electricity and in the event of second or subsequent conviction, the sentence shall be imprisonment for a term not less than six months, but which may extend to five years and with fine not less than six times the financial gain on account of such theft of electricity:

Provided further that in the event of second and subsequent conviction of a person where the load abstracted, consumed, or used or attempted abstraction or attempted consumption or attempted use exceeds 10 kilowatt, such person shall also be debarred from getting any supply of electricity for a period which shall not be less than three months but may extend to two years and shall also be *debarred from getting supply of electricity for that period from any other source or generating station:*

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

(1A) Without prejudice to the provisions of this Act, the licensee or supplier, as the case may be, may, upon detection of such theft of electricity, immediately disconnect the supply of electricity:

Provided that only such officer of the licensee or supplier, as authorized for the purpose by the Appropriate Commission or any other officer of the licensee or supplier, as the case may be, of the rank higher than the rank so authorised shall disconnect the supply line of electricity:

Provided further that such officer of the licensee or supplier, as the case may be, shall lodge a complaint in writing relating to the commission of such offence in police station having jurisdiction within twenty four hours from the time of such 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 unauthorized use of electricity;

(c) examine or seize any books of account or documents which in his opinion shall be useful for or

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

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

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

(4) The provisions of the Code of Criminal Procedure, 1973, relating to search and seizure shall apply, as far

as may be, to searches and seizure under this Act.

Section 151. (Cognizance of offences):

No court shall take cognizance of an offence punishable under this Act except upon a complaint in writing made by Appropriate Government or Appropriate Commission or any of their officer authorized by them or a Chief Electrical Inspector or an Electrical Inspector or licensee or the generating company, as the case may be, for this purpose.

Provided that the court may also take cognizance of an offence punishable under this Act upon a report of a police officer filed under section 173 of the Code of Criminal Procedure, 1973:

Provided further that a special court constituted under section 153 shall be competent to take cognizance of an offence without the accused being committed to it for trial.

Section 154. (Procedure and power of Special Court): ---

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, every offence punishable under sections 135 to 140 and section 150 shall be triable only by the Special Court within whose jurisdiction such offence has been committed.

(2) Where it appears to any court in the course of any inquiry or trial that an offence punishable under sections 135 to 140 and Section 150 in respect of any offence that the case is one which is triable by a Special Court constituted under this Act for the area in which such case has arisen, it shall transfer such case to such Special Court, and thereupon such case shall be tried and disposed of by such Special Court in accordance with the provisions of this Act :

Provided that it shall be lawful for such Special Court to act on the evidence, if any, recorded by any court *in the case of presence of the accused before the transfer of the case to any Special Court :*

Provided further that if such Special Court is of opinion that further examination, cross-examination and re-examination of any of the witnesses whose evidence has already been recorded, is required in the interest of justice, it may re-summon any such witness and after such further examination, cross-examination or re-examination, if any, as it may permit, the witness shall be discharged.

(3) The Special Court may, notwithstanding anything contained in sub-section (1) of section 260 or section 262 of the Code of Criminal Procedure, 1973, try the offence referred to in sections 135 to 140 and Section 150 in a summary way in accordance with the procedure prescribed in the said Code and the provisions of sections 263 to 265 of

the said Code shall, so far as may be, apply to such trial :

Provided that where in the course of a summary trial under this sub-section, it appears to the Special Court that the nature of the case is such that it is undesirable to try such case in summary way, the Special Court shall recall any witness who may have been examined and proceed to re-hear the case in the manner provided by the provisions of the said Code for the trial of such offence:

Provided further that in the case of any conviction in a summary trial under this section, it shall be lawful for a Special Court to pass a sentence of imprisonment for a term not exceeding five years.

(4) A Special Court may, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to, any offence tender pardon to such person on condition of his making a full and

true disclosure of the circumstances within his knowledge relating to the offence and to every other person concerned whether as principal or abettor in the commission thereof, and any pardon so tendered shall, for the purposes of section 308 of the Code of Criminal Procedure,1973, be deemed to have been tendered under section 307 thereof.

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

(6) In case the civil liability so determined finally by the Special Court is less

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

Explanation. - For the purposes of this section, "civil liability" means loss or damage incurred by the Board or licensee or the concerned person, as the case may be, due to the commission of an offence referred to in sections 135 to 140 and Section 150".

The brief facts of the case are that the petitioner is a builder/developer at Zirakpur, Tehsil Derabassi, SAS Nagar, District

Mohali. It applied for one point supply in terms of the provisions of the Electricity Supply Construction Manual [for short 'the Electricity Manual']. Clause 36.1 of the Electricity Manual deals with the one point supply to the residential colonies/building complexes, which is also reproduced as under: -

> ***"36.1 One point Supply to Residential Colonies/Building complexes.***
>
> *i) The PSPCL will supply electricity at one point for residential purposes including common services on receipt of an application from a developer/ owner/association formed by the residents of a colony/building complex for providing electricity to the residents and for common services.*
>
> *ii) A developer/owner/association formed by the residents of the colony/building complex will obtain a separate one point connection under NRS category for supplying electricity for commercial purposes.*
>
> *iii) A developer/owner/association formed by the residents of the colony/building complex will at their cost install and maintain all infrastructure, including step down sub station, required for*

supply of electricity within the premises.

iv) A developer/owner/association formed by the residents of the complex will install transformer(s), Sub Station(s) and meter(s)/ metering equipment for supply of electricity at a convenient and easily accessible place.

v) A developer/owner/association formed by the residents will not charge for electricity supply at a tariff higher than that approved by the Commission for the respective category of consumers. However the additional expenses in the event of supplying back up electricity may be recovered from the ultimate users of such electricity. Compatible meters may be installed by the owner/developer/association of residents/users for separately measuring back up electricity consumption.

vi) A developer/owner/association formed by the residents of the colony/building complex will provide meters to all the *residents and will also be responsible for all liabilities and obligations including individual metering, billing, collection of charges from individual users and payment of electricity bills to the PSPCL.*

vii) The total consumption of electricity recorded at the point of supply will be billed at the highest slab rate of Domestic Supply when it is provided for residential purposes including common services. NRS rates will be applicable when the supply is effected for commercial purposes. However a rebate of 12% in case of Domestic Supply and 10% in case of NRS will be allowed in addition to any other rebate on electricity consumption charges as admissible under the General Conditions of Tariff.

viii) A developer/owner/association formed by the residents of the residential colony/building complex will also be liable to pay monthly minimum charges on the basis of sanctioned *load/Contract Demand where applicable at rates specified in the Tariff Order for the relevant year.*

ix) *For setting up a Cluster Sub-Station the provisions of Condition no. 5.3 of COS will be applicable. The electricity lost in transformation difference of consumption measured on high voltage side of Cluster Sub Station and total consumption recorded by meters installed for connections at (i) & (ii) above] will also be billed for each connection on a proportionate basis.*

It is alleged that the premises of the petitioner was inspected by the staff of the respondents on 21.4.2010. According to the respondents, the petitioner was found indulging in committing theft of the electricity. On 29.4.2010, respondents served bill/show cause notice to the petitioner under Section 135 of the Act for theft of electricity. They asked the petitioner to pay a sum of ₹59,31,074/-. The said notice further provided that "*you are requested to deposit this amount within 7 days from the receipt of this notice. In case you do not agree with this provisional order of assessment, you can file appeal within 15 days before the designated authority. The concerned officer shall after giving you an opportunity of hearing pass final order of assessment within 7 days. You can file an appeal in the Court of Hon'ble Addl. Sessions Judge, constituted as Special Court vide notification* *dated 03.12.2008 issued by Deputy Secretary Home in Nov,. 2007. An FIR is also being lodged against you with Police under Section 135 of 2003 Act. If you desire you can avoid criminal proceedings by depositing compounding charges @ ₹3000/- per KW. You are required to seek permission for depositing compounding charges from Deputy Chief Engineer."*

Thereafter, it is alleged that the respondents made a complaint for the purpose of lodging the FIR on 20.5.2010, which is reproduced as under: -

> *"It is humbly submitted that one Letter No.69 dated 04.05.2010 from Assistant Executive Engineer, Punjab Power Corporation Limited, Sub Division Zirakpur has been received. Contents of which are as, "From Assistant Executive Engineer, Punjab State Power Corporation Limited, Sub Division Zirakpur to Inspector, Anti Power Thief Police, PSPCL, Patiala memo No.69 dated 04.05.2010. Subject regarding electricity theft. In the aforesaid subject it is informed that on 21.04.2010 that there is a colony of M/s Motia Construction Limited, Zirakpur, Distt. Mohali. Its connection No.SPC -42 was checked. The name of the consumer of*

> *the aforesaid connection is Pawan Bansal. The aforesaid consumer was supplying electricity to flats to direct kundi and was found committing theft thereof. The aforesaid consumer has been given notice of penalty of electricity theft amounting to ₹59,31,074/- and compounding fee vide Memo No.49 dated 29.04.2010. An FIR be registered under Section 135 of Electricity Act, 2003 against the aforesaid consumer. Copy of checking report and notice is appended herewith."*

Accordingly, FIR No.31 dated 20.5.2010 was registered under Section 135 of the Act at Police Station, Anti Power Theft, Patiala against the petitioner. Since it was mentioned in the notice dated 29.4.2010 that it was a provisional order of assessment and the petitioner was allowed to file appeal before the designated authority, therefore, the petitioner filed objection to the notice because under Section 135 of the Act no provisional assessment is provided as it is provided only under Section 126 of the Act. The said notice was allegedly considered by the respondents and they passed the final order of assessment for the unauthorized use of electricity under Section 126 of the Act on 20.5.2010 reducing the liability of the petitioner from ₹59,31,074/- to ₹34,43,850/- and also intimated the petitioner that if it still feel aggrieved by the final order of assessment made under Section 126 of the Act then it may file appeal within a period of 30 days to the Appellate

Authority, notified by the Government of Punjab i.e. SDM (indicated here the appellate authority such as DC, ADC, SDM etc.). Accordingly, the petitioner filed appeal under Section 127 of the Act. The said appeal was dismissed by order dated 19.9.2012 which is impugned herein. Similarly since the FIR against the petitioner was registered on account of theft of electricity, therefore, the petitioner applied for anticipatory bail in the Court of Additional Sessions Judge, SAS Nagar, Mohali, which was allowed on 10.4.2013. The petitioner also filed CRM-M No.16189 of 2010 for quashing of the FIR registered against it which was, however, withdrawn on 28.5.2010. With this background of the case, the petitioner has approached this Court to challenge the impugned order of final assessment as well as the order dismissing its appeal filed under Section 127 of the Act on the ground that the respondents did not consider its objection objectively and the appellate authority even did not look into the bare provisions of Clause 36.1 of the Electricity Manual.

The respondents in their reply have averred that the proceedings against the petitioner were initiated under Section 135 of the Act instead of Section 126 of the Act as the petitioner was involved in the theft of electricity. In this regard, learned counsel for the respondents has referred to the notice dated 29.4.2010 which has already been referred to in the earlier part of this order and also the final assessment order of theft dated 13.5.2010 which is attached as Annexure P-9 with this petition, to contend that the proceedings initiated against the petitioner were regarding the theft of electricity and not of the unauthorized use of electricity, therefore, the petitioner had wrongly filed the appeal before the appellate authority under

Section 127 of the Act and did not initiate the proceedings in terms of Section 151 read with Section 154 of the Act by filing the petition before the Additional Sessions Judge against the final order of assessment of the theft of electricity.

In the aforesaid facts and circumstances, learned counsel for the petitioner has submitted that the question cropped up for adjudication is as to whether the respondents have followed the correct procedure of law for initiating proceedings against the petitioner as *show cause notice* dated 29.4.2010 was regarding theft of electricity and the final notice of assessment was regarding of unauthorized use of electricity?

The other question which has been raised is that if the proceedings initiated by the respondents against the petitioner under Section 126 of the Act then whether the petitioner has rightly adopted the procedure of filing appeal and whether the appellate authority has passed a non-speaking order?

As I have already observed that there are two aspects, namely, unauthorized use of electricity and theft of electricity provided in the Act. The 'unauthorized use of electricity' is specifically defined in Explanation (b) to Section 126 of the Act whereas 'theft of electricity' is defined itself under Section 135(1)(a) to (e) of the Act. There is a procedure provided in a case of unauthorized use of electricity in which opportunity of hearing is provided by the respondents themselves to the consumer before passing the final assessment order. The consumer is issued a notice with the provisional assessment regarding electricity charges payable and after taking objection if any and affording opportunity of hearing, the licensee would pass the final assessment order within the prescribed period and against the said final assessment order appeal is provided to the consumer whereas, under Section 135 of the Act there is no such procedure of issuing a provisional notice for affording an opportunity of hearing.

Thus, from the aforesaid facts and circumstances, it is clear that the proceedings initiated against the petitioner was basically under Section 126 of the Act because the provisional assessment was made but at the same time the language of the notice suggests that the respondents had adopted the procedure under Section 135 of the Act as well because the petitioner was asked to file appeal before the Additional Sessions Judge constituted as Special Court whereas against the order of the provisional assessment the petitioner had to file objection and after the final assessment order the appeal would lie to the designated authority. This is what the procedure has been followed by the respondents ultimately because after accepting objection and considering the same the final assessment order was passed on 13.5.2010 by virtue of which the amount assessed in the provisional assessment order was drastically reduced from ₹59,31,074/- to ₹34,43,850 /-. The petitioner had rightly filed the appeal before the appellate authority under Section 127 of the Act. Thus the case set up by the respondents that it was a case of theft of electricity cannot be accepted.

Now the question would arise as to whether the appeal filed by the petitioner has rightly been decided by the appellate authority, in accordance with law.

The arguments raised by learned counsel for the petitioner that the appellate authority has only looked into the checking report dated

21.4.2010 while passing the impugned order and not looked into the various issues raised by the petitioner much less Clause 36.1 of the Electricity Manual which would be sufficient to hold that the order passed by the appellate authority is totally non-speaking.

Accordingly, the present petition is allowed and the impugned order dated 19.9.2012 (Annexure P-12) is hereby set aside and the matter is remanded back to the appellate authority to decide the same afresh after passing a speaking order, taking into consideration the issues raised by the petitioner before it either in the grounds of appeal or argued before it.

The parties shall appear before the appellate authority on 26.2.2018.

(RAKESH KUMAR JAIN)
JUDGE

24.01.2018
Vivek

Whether speaking/reasoned *Yes/No*
Whether reportable *Yes/No*