

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 07.03.2019

Pronounced on: 08.04.2019

Coram

THE HONOURABLE Mr.JUSTICE M.VENUGOPAL
AND

THE HONOURABLE Mr.JUSTICE S.VAIDYANATHAN

W.A.Nos.1808 and 1811 of 2009, W.P.Nos.29882 of 2004
and 3013 of 2014 and W.P.(MD) Nos.2360 and 2361 of 2008
and other connected Miscellaneous Petitions

W.A.No.1808 of 2009 :-

M/S.EMKAY ALLOYS (P) LTD.,
S.F.NO.645/1, KALINGIYAM VILLAGE,
KAMARAJ NAGAR, KOLAPPALUR POST,
GOBI TALUK, ERODE DISTRICT.

..APPELLANT/PETITIONER

-Vs.-

1. THE EXECUTIVE ENGINEER,
TAMIL NADU ELECTRICITY BOARD (O&M),
GOBICHETTIPALAYAM,
ERODE DISTRICT.

2. THE SUPERINTENDING ENGINEER,
GOBI ELECTRICITY DISTRIBUTION CIRCLE,
TAMIL NADU ELECTRICITY BOARD,
GOBICHETTIPALAYAM-638 452,
ERODE DISTRICT.

3. THE CHAIRMAN,
TAMIL NADU ELECTRICITY BOARD,
144, ANNA SALAI,
CHENNAI-600 002.

.... RESPONDENTS/RESPONDENTS

Prayer: Writ Appeal filed under Clause 15 of Letters Patent,
praying for setting aside the order dated 11.11.2009 in
W.P.No.2078 of 2004.

Prayer in WP.No.2078 of 2004 : Writ Petition filed under Article
226 of the Constitution of India praying to issue a Writ of
Certiorarifi to call for the records of the second respondent in
his Lr.No.SE/GEDC/AEE.G1/TA/F.EmkayT/R710/2003, dated 23.12.2003
and to quash the same as illegal, arbitrary, violative of the

principal of Natural justice and contrary to the provisions of the terms and conditions of supply of Electricity.

WA.No.1811 of 2009 :

L.VIJAYAKUMAR

..PETITIONER

Vs.

- 1 THE CHAIRMAN
TAMILNADU ELECTRICITY BOARD, 144 ANNA SALI
CHENNAI 600 002
 - 2 THE EXECUTIVE ENGINEER/O&M
MYLAPORE CHENNI ELECTRICITY DISTRIBUTION
CIRCLE/CENTRAL ROYAPETTAH CHENNAI 600 014
 - 3 THE ASSISTANT EXECUTIVE
ENGINEER/O&M SANTHOME TAMIL NADU ELECTRICTY
BOARD CHENNAI 600 004
- ..RESPONDENTS

Prayer: Writ Appeal filed under Clause 15 of Letters Patent, praying for setting aside the order dated 11.11.2009 in W.P.No.6940 of 2006.

Prayer in WP.No.6940 of 2006 : Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarifi to call for the records of the second respondent in his Lr.No. EE/O&M/Myl/AE/CAUP/F.TOE/D-3141/2006, dated 02.03.2006 and to quash the same as illegal, arbitrary and against the provisions of the Electricity Act, 2003.

WP.NO.29882 of 2014 :

R.VIJAYAKUMAR
PETITIONER

..

Vs.

- 1 THE ASSISTANT EXECUTIVE
ENGINEER/O&M TNEB ESPLANADE, CHENNAI
ELECTRICITY DISTRIBUTION CIRCLE
CH 104
- 2 THE EXECUTIVE ENGINEER/O&M
TNEB ANNA SALAI CHENNAI
ELECTRICITY DISTRIBUTION CIRCLE
CHENNAI

3 THE CHAIRMAN TNEB
800 ANNA SALAI CHENNAI 2

..RESPONDENTS

Prayer in WP.No.29882 of 2004 : Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarifi to call for the records of the second respondent in his Lr.No. **EE/O&M/My1/AS/AE/CAUP/F.TOE/D.No.2172/2004**, dated 27.09.2004 and to quash the same as illegal, arbitrary and contrary to the provisions of Electricity Act, 2003.

WP.No.3013 of 2014 :

M.SUBRAMANIAN

..PETITIONER

Vs.

1 THE SUPERINTENDING ENGINEER
TIRUPUR ELECTRICITY DISTRIBUTION CIRCLE
TAMILNADU GENERATION & DISTRIBUTION CORPN.
LTD. (TANGEDCO) TIRUPUR

2 THE ASSISTANT EXECUTIVE
ENGINEER O & M /TEDC TAMILNADU GENERATION
AND DISTRIBUTION CORPN. LTD. (TANGEDCO)
TOWN/SOUTH/ TIRUPUR

..RESPONDENTS

Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarifi to calling for the records of the 2nd respondent culminating in his impugned proceedings bearing Letter No.AEE/Town/South/Tpr/CI/F.Theft/D.No.039/2014 dated 24.1.2014 issued for the petitioners SC No.206-008-933 TF IIIB quash the same and forbearing the respondents their men agents officers and/or anyone claiming through or under them to proceed to levy demand and/or collect the sum of Rs.36 94 479/- from the petitioner for his SC No.206-008-933 without following the procedure prescribed by the Tamil Nadu Electricity Regulatory Commission in its order dated 08.9.2009 in MPM No.41/3 The Tamil Nadu Electricity Supply Code and the Central Electricity Authority (Installation and Operation of Meters) Regulations 2006.

WP.No.2360 of 2008 :

DHAVAMANI

..PETITIONER

Vs.

THE CHAIRMAN,
TAMIL NADU ELECTRICITY BOARD,
800 ANNA SALAI,
CHENNAI - 600 002

2 THE SECRETARY,
TAMIL NADU ELECTRICITY REGULATORY COMMISSION,
17, 3rd MAIN ROAD, SEETHAMAL COLONY, ALWARPET,
CHENNAI - 600 018.

..RESPONDENTS

Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Declaration declaring the Tamil Nadu Electricity Supply (Amendment) code 2007 in notification No.TNERC/SC/7-4, dated 13.06.2007 issued by the second respondent as unconstitutional and ultra vires the Electricity Act 2003.

WP.No.2361 of 2008 :

DHAVAMANI

..PETITIONER

Vs.

1. THE CHAIRMAN,
TAMIL NADU ELECTRICITY BOARD,
800 ANNA SALAI,
CHENNAI - 600 002

2 THE ASSISTANT EXECUTIVE ENGINEER,
DISTRIBUTION/URBAN/NORTH,
TAMIL NADU ELECTRICITY BOARD, TUTICORIN.

..RESPONDENTS

Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari or any other appropriate writ, order or direction in the nature of a Writ of Certiorari calling for the proceedings of the second respondent comprised in Lr.No.AEE/D/U/N/TTN/F/Theft/D.No.240/08, dated 04.03.2008 and quash the same.

For Appellants/Petitioners: Mr.AR.L.Sundaresan,
Senior Counsel

For Mr.K.Seshadri

(in W.A.Nos.1808 & 1811/2009 and

WP.No.29882/2004)

Mr.AR.L.Sundaresan, Senior Counsel

For Mr.R.S.Pandiyaraj

(in W.P.No.3013 of 2014)

Mr.Satish Parasaran, Senior Counsel

For Mr.C.S.Krishnamoorthy

(in W.P.(MD) Nos.2360 & 2361/2008)

For Respondents : Mr.Vijay Narayan, Advocate General

For Mr.S.K.Raameshuwar

(in W.A.No.1808/2009 & W.P.3013/2014)

Mr.S.K.Raameshuwar
 (in W.A.No.1811/2009)
 Mr.P.R.Dhilipkumar
 (in W.P.No.29882 of 2004)
 Mr.P.R.Dhilipkumar for R1
 Mr.Abdul Saleem for R2
 (in W.P.Nos.2360 & 2361 of 2008)

COMMON JUDGMENT

M.VENUGOPAL, J.,
 AND
 S.VAIDYANATHAN, J.,

These matters were grouped together and posted before this Bench for hearing on the orders of the Hon'ble Chief Justice under the caption "Specially Ordered Cases" in the light of the fact that the issues involved in all these matters are one and the same.

2. Heard Mr.AR.L.Sundaresan, learned Senior Counsel for Mr.K.Seshadri, learned counsel appearing for the Petitioners in W.A.Nos.1808, 1811 of 2009 and 29882 of 2004 and for Mr.R.S.Pandiyaraj, learned counsel for the Petitioner in W.P.No.3013 of 2014 and Mr.Satish Parasaran, learned Senior Counsel for Mr.C.S.Krishnamoorthy, learned counsel in W.P.(MD) Nos.2360 and 2361 of 2008, Mr.Vijay Narayan, learned Advocate General, assisted by Mr.S.K.Raameshuwar, learned Standing Counsel for TNEB in W.A.Nos.1808 of 2009 and W.P.No.3013 of 2014 and for W.A.No.1811 of 2009, Mr.P.R.Dhilipkumar, learned Counsel for the respondents in W.P.No.29882 of 2004 and for R1 in W.P.Nos.2360 & 2361 of 2008 and Mr.Abdul Saleem, learned Counsel for R2 in W.P.Nos.2360 & 2361 of 2008.

3. For the sake of brevity, the facts are being taken from W.A.No.1808 of 2009, which runs as follows:

i) The Appellant-Industry (hereinafter referred to as the 'Appellant') was inspected by the Officers of the Respondent and though the electronic meter had recorded the correct consumption, it was alleged by the Inspecting Officials that the meter was stopped by using the magnet bar and they concluded that there was a theft of energy and illegal abstraction of electricity, amounting to an offence under Section 39(1) and 44 (1)(aa) and 44(1)(c) of the Indian Electricity Act, 1910 and Rule 138 of Indian Electricity Rules, 1956;

ii) It was further stated that a Police complaint was lodged on 04.07.2003 in this regard, for which, a case in Crime No.114 of 2003 came to be registered under Section 39(1) and 44(1)(c) of the Indian Electricity Act, 1910. Subsequent thereto, the First Respondent issued a show cause notice to the Appellant without any enclosures and directed the Appellant to attend the enquiry on or before 29.07.2003 before the Second Respondent.

iii) However, to the utter shock and surprise of the Appellant, an Assessment Order was passed on 30.07.2003 without conducting any enquiry, calling upon the Appellant to pay a sum of Rs.17,00,28,124/-, against which, the Appellant had filed a Writ Petition in 23010 of 2003 and the said Writ Petition was allowed by this Court with a direction to the Appellant to remit Rs.30,00,000/- to the Electricity Board, with further direction to the Second Respondent to re-consider the matter afresh.

iv) It was the grievance of the Appellant that on 23.12.2003, the Second Respondent had once again confirmed the amount showing in the earlier show cause notice without allowing the Appellant to cross examine any of the witnesses. Aggrieved by the Act of the Second Respondent, the Appellant had filed yet another Writ Petition in W.P.2078 of 2004, challenging the order dated 23.12.2003 on various ground. During admission of the Writ Petition, interim stay was granted by directing the Appellant to pay Rs.10,00,000/- to the respondent within six weeks and the interim order was duly complied with.

v) It was submitted by the Appellant that since the alleged offence was detected after introduction of the new Central Act 36 of 2003, namely, Electricity Act, 2003 (in short the 'Act, 2003'), the Appellant had sought to apply the Act, 2003, by filing additional grounds to the Writ Petition. Later on, 11.04.2004, a revised Charge Sheet was filed in C.C.No.28 of 2004 on the file of the learned Judicial Magistrate No.1, Gobichettipalayam. However, consequent to constitution of Special Court designated by the State Government, this Court had directed the learned Judicial Magistrate No.1, Gobichettipalayam to transfer the case to the file of the learned Principal District Judge, Erode, pursuant to which, the same was re-numbered as in S.C.No.111 of 2009, with further direction to dispose of the matter within three months.

vi) It was further submitted that on 28.10.2009, though final judgment was passed in the Criminal case, acquitting the Appellant and other accused from the case, W.P.No.2078 of 2004 was dismissed by this Court without proper appraisal of the

facts of the case, against which the present Writ Appeal has been filed;

vii) The order passed in W.P.No.2078 of 2004 has been challenged in the Writ Appeal on the ground that it was dismissed along with W.P.No.6968 of 2008, in which the validity of Section 135(1A) Regulation 19A and 23(AA) of the Tamil Nadu Electricity Supply Code 2004 was under challenge, whereas the authority of the Electricity Board to proceed with the assessment after filing of charge sheet was questioned. The order of the learned Single Judge was further assailed inter alia stating that after the Act, 2003, the authorities have no power to assess any loss under the repealed Acts or Rules and Regulations framed thereunder.

4. The Respondent Nos.1 to 3 in W.A.No.1808 of 2009 have filed a counter affidavit dated 05.02.2019 and stated that the electrical supply to the Appellant was effected on 22.03.2001 for the maximum demand of 2200 KVA and during inspection by the Department Officials, it was found that though the Appellant Industry was in operation, the meter was not in function. It was further stated that a thorough inspection revealed that a sensor was inserted inside the G.I.Pipe through which the coil runs with the intention to arrest the correct consumption of voltage. When the magnet was removed from the G.I.Pipe, the meter started recording current consumption, which clearly showed that there was a commission of theft of energy.

5. In the counter affidavit, it was narrated that as per the procedures contemplated in Clause 6.01 of the Terms and Conditions of Supply of Electricity (Electricity Supply Act 1948), the extra levy on theft of electricity was assessed after affording an opportunity to the Appellant to defend their case. The Appellant, without utilizing the opportunity had filed a Writ Petition in W.P.No.23010 of 2003, which was disposed of, by directing the Respondents to reconsider the case of the Appellant afresh after personal hearing. In pursuance thereof, finding no ground to revise the previous assessment and as per Clause 8.02 of the Terms and Conditions of Supply of Electricity (Electricity Supply Act 1948), the Appellant was imposed the same levy of Rs.17,00,28,124/-.

6. The Respondents have referred to Section 185 of the Act, 2003 to contend that any provision contained in the repealed Act or any action taken thereunder is valid, unless it is inconsistent with the provisions of the Act, 2003 and therefore, the ground raised by the Appellant as to the power of the authorities to assess charges under the repealed Act or Rules is untenable. It was contended that following the procedures as

laid down in Clause 8.01 and 8.02 of the Terms and Conditions of Supply of Electricity (Electricity Supply Act 1948), the extra levy on theft of electricity was rightly assessed by duly providing a free and fair opportunity of hearing to the Appellant.

7. It was also stated in the counter affidavit that though the Appellant was acquitted of the criminal offence, such acquittal will not be a bar for continuation of the civil liability, insofar as the case of the Appellant is concerned. Wrong mentioning of the provisions will not vitiate the proceedings, as the root of the matter was related to the commission of theft of energy and it was mandatory for the respondents to make good the loss caused by the Appellant. Therefore, it was pleaded in the counter that the Writ Appeal is liable to be dismissed.

8. Learned Senior Counsel for the Petitioners has vehemently submitted that once the Criminal Court has acquitted a person, it will have a bearing on the Authorities, who decided the issue under Section 126 of the Act, 2003 and no notice can be issued under Section 126 of the Act, as the person has been honorably acquitted. In support of his submission, he has relied upon a judgment of this Court in the case of *Shaik Kasim vs. Superintendent of Post Offices, Chingleput Dn. and another*, reported in 1965 (1) MLJ 197, wherein it was held as follows:

"8...Thirdly, where the acquittal is substantially on merits, on identical facts and charges it will not be proper for a disciplinary Tribunal to record a finding of guilt, and to punish thereon. This is a basic principle of jurisprudence and I cannot see that it makes any difference that the departmental authority acts before the criminal proceeding, or after it. The court, in exercise of the jurisdiction under Art. 226 of the Constitution, would be justified in striking down the action based on such findings as not in consonance with principles of natural justice. Otherwise, grave anomalies might follow, as stressed by Rajamannar C. J., and Venkatarama Aiyar J., in 1952-1 Mad LJ 35 : AIR 1952 Madras 853."

9. Learned Senior Counsel for the Petitioners has further submitted that in terms of Section 152 of the Act, which is the *non-obstante* clause and vests power in the appropriate Government or an Officer authorised by it to compound an

offence, the compounding of an offence under sub-section (1) will be allowed only once for any person or consumer and it cannot be accepted that a Special Court can determine the civil liability against a consumer or a person in terms of money for theft of energy irrespective of there being a deemed acquittal of such consumer as a result of the compounding of the offence under Section 152(3) of the Act. He has also pointed out that the determination of civil liability has to necessarily be preceded by a positive determination of the commission of the offence and such determination is not at all possible in the case of acquittal on the basis of the compounding of the offence under Section 152 of the Act in consonance with Section 154 of the Act.

10. To substantiate the above arguments, learned Senior Counsel for the Petitioners has placed strong reliance on the judgment of the Hon'ble Delhi High Court in the case of *B.S.E.S.Rajdhani Power Ltd., vs. P.P.Singh and another* [Crl.A.No.1051 of 2008] decided on 10.12.2014. The relevant portions of the judgment have been extracted as under:

"22. The Court would like to reiterate that there cannot be any compounding of the offence without the consent of a complainant. This is evident from the scheme of not only Section 320 Cr PC, but even Section 152 of the Act. While Section 152 permits compounding order to be passed by the appropriate government, it does not dispense with the need to obtain the consent for such compounding by the Complainant, which in this case is BRPL. The decision in *Radhey Shyam Bansal* still holds the field and is required to be followed by the appropriate government under Section 152 of the Act. The order of the DC in the present cases was passed prior to the decision in *Radhey Shyam Bansal*. It is evident that to the extent the order of the DC overrides the objection of BRPL to the compounding where, again, it insisted on consumer paying the theft bill amount as a pre-condition to it agreeing to the compounding, the said decision of the DC is contrary to the law, as explained by this Court in *Radhey Shyam Bansal*.

23. BRPL could have challenged the order of the DC in the present cases, in light of the law explained in *Radhey Shyam Bansal*. However, it appears that in view of the DC's order permitting the question of civil liability to be determined by the Special Court, BRPL opted not to do so. The decision in *Radhey Shyam Bansal* was also not referred to before the Special

Court when it passed the impugned order dated 7th November 2008. Therefore, as far as the present cases are concerned, BRPL cannot possibly be now permitted to urge that the question of criminal liability should be gone into afresh. However, it is made clear that in light of the law explained in Radhey Shyam Bansal, the appropriate government, while exercising powers under Section 152 of the Act, should ensure that there is consent of BRPL to the proposal for compounding put forth by a consumer.

24. As far as the question raised by BRPL in the present appeals is concerned, the Court accepts the submission put forth by learned counsel for the Respondents that the scheme of Section 154 of the Act is such that the criminal and civil liability are intrinsically linked. In *B.L. Kantroo v. BSES Rajdhani Power Ltd.* the DB was considering the plea of a consumer who sought a declaration of invalidation of an electricity bill and in that context held that the exclusive jurisdiction to determine such question, in terms of Section 145 of the Act, vested in the Special Court. The DB was not dealing with a situation where there has been a compounding of the offence under Section 152 of the Act and whether in such eventuality, the Special Court could still determine the civil liability under Sections 154 (5) of the Act.

25. In view of the Explanation to Section 154 the submission of Mr. Fernandes that Section 154(5) is a stand-alone provision should fail. In other words, it is not possible to accept the submission that a Special Court can determine the civil liability "against a consumer or a person in terms of money for theft of energy" irrespective of there being a deemed acquittal of such consumer as a result of the compounding of the offence under Section 152 (3) of the Act. The Explanation is clear that determination of the civil liability has to necessarily be preceded by a positive determination of "the commission of the offence". In terms of the Explanation, the quantum of the civil liability has necessarily to be "loss or damage incurred..... due to the commission of an offence....." If, in fact, there is no determination of commission of an offence, it is not possible for the Special Court to proceed to determine the civil liability. In other words, a collective reading of Section 152, Section 154(5) and the Explanation

to Section 154 reveals that the legislature did not intend that a different set of consequences should follow where acquittal was not at the end of a full-fledged criminal trial but on account of a „deemed acquittal" as a result of the compounding of the offence under Section 152 of the Act.

26. The view expressed by the Special Court that since it is a criminal court, it cannot determine the civil liability, is incorrect in view of the scheme of Section 154 of the Act. However, the conclusion in the impugned order of the Special Court that there cannot be any determination of the civil liability in the face of an acquittal as a result of compounding of the offence under Section 152 of the Act cannot be faulted. It is clarified that the orders passed by DC under Section 152 which have already attained finality will not be affected by the present order.

27. The appeals are disposed of with the above clarification of the legal issues but, in the circumstances, with no order as to costs."

11. Further, learned Senior Counsel for the Petitioners drew the attention of this Court to the order passed by this Court, in which one of us was a party, in the case of *M/s.Chennai Colour Coatings, Chennai vs. The Tamil Nadu Electricity Board, Chennai and others* [W.P.No.18856 of 2004] decided on 27.10.2017 to contend that once there was an acquittal by the Court, the respondents are barred from proceeding further against the petitioners.

12. Thus, learned Senior Counsel for the Petitioners have concluded their arguments firstly stating that once a Special Court is constituted for trying the offence relating to Electricity Offences, such as theft of energy, etc., subsequent assessment made by the authorities under Section 126 of the Act is not valid in the eye of law. Secondly, there should not be any determination of civil liability by the Special Court in the event of the offence being compounded. Therefore, on these grounds, the assessment and extra levy on theft of energy have no legs to stand and these matters warrant interference by this Court.

13. Repelling the above submissions, learned Advocate General appearing for the Official Respondents has strenuously contended that though the old Act, viz., the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commission Act, 1998 were repealed, there

is a Saving provision provided in the New Act, viz., Section 185 of the Electricity Act, 2003, which reads as under:

"185. Repeal and saving

(1) Save as otherwise provided in this Act, the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998 are hereby repealed.

(2) Notwithstanding such repeal, -

(a) anything done or any action taken or purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any appointment, confirmation or declaration made or any licence, permission, authorisation or exemption granted or any document or instrument executed or any direction given under the repealed laws shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act.

(b) the provisions contained in sections 12 to 18 of the Indian Electricity Act, 1910 and rules made thereunder shall have effect until the rules under section 67 to 69 of this Act are made;.

(c) Indian Electricity Rules, 1956 made under section 37 of the Indian Electricity Act, 1910 as it stood before such repeal shall continue to be in force till the regulations under section 53 of this Act are made.

(d) all rules made under sub-section (1) of section 69 of the Electricity (Supply) Act, 1948 shall continue to have effect until such rules are rescinded or modified, as the case may be;

(e) all directives issued, before the commencement of this Act, by a State Government under the enactments specified in the Schedule shall continue to apply for the period for which such directions were issued by the State Government."

(3) The provisions of the enactments specified in the Schedule, not inconsistent with the provisions of this Act, shall apply to the States in which such enactments are applicable.

(4) The Central Government may, as and when considered necessary, by notification, amend the Schedule.

(5) Save as otherwise provided in sub-section (2), the mention of particular matters in that section, shall not be held to prejudice or affect the general application of section 6 of the General Clauses Act, 1897, with regard to the effect of repeals."

Thus, it was stated that the contention put forth by the Petitioners that the action taken under the Old Act cannot be sustained, cannot be accepted as the above provision clearly states that any provision contained in the repealed Act or any action taken thereunder is valid, unless it is inconsistent with the provisions of the Act, 2003.

14. It was further argued that Sections 126 and 135 of the Act operate on two different fields, as Section 126 deals with monetary liability, whereas the other Section involves criminal liability. In support of his stand, he has quoted the judgment of the Hon'ble Supreme Court in the case *Maharashtra State Electricity Distribution Company Ltd., vs. Appellate Authority and another*, reported in (2018) 3 SCC 608, wherein it was held as follows:

"16. In the scheme of the Act, we find that Section 126 of the Act deals with assessment of electricity charges payable by such person (consumer) for unauthorized use of electricity whereas Section 135 deals with the cases of theft of electricity. In other words, once the Board detects the case of unauthorized use of electricity by any consumer, in such event, the Board gets a cause of action to proceed against such person/consumer under Section 126 or/and 135 under the Act. Both Sections 126 and 135 are independent in all respects and provide different kind of liability and consequences. One involves monetary liability (Section 126) whereas the other involves criminal liability (Section 135). The Board is, therefore, at liberty to take recourse to the provisions of Section 126 or/and 135 of the Act against such person/consumer as provided therein in accordance with law.

17. In these circumstances, if the Board initiates any action against any person/consumer, then such action must be brought to its logical end in accordance with the procedure prescribed under the Act after affording an opportunity to such person/consumer.

18. In view of the foregoing discussion and subject to the observations, we find no merit in the appeals, which fail and are accordingly dismissed. As a consequence to the dismissal of the appeals, the authorities are directed to comply with the directions of the High Court and pass consequential order under Section 126 of the Act in accordance with law in the case of consumers (respondents) within three months from the date of this order."

15. The learned Advocate General has also referred to yet another judgment of the Hon'ble Supreme Court in the case of *Executive Engineer vs. Sri Seetaram Rice Mill*, reported in (2012) 2 SCC 108, wherein the scope of Sections 126 and 135 of the Act have been discussed in extenso and the relevant paragraphs runs thus:

"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 (1A) of Section 135 of the 2003 Act provides that without prejudice to the provisions of the 2003 - Act, the licensee or supplier, as the case may be, through officer of rank authorized in this behalf by the appropriate commission, may immediately disconnect the supply of electricity and even take other measures enumerated under Sub-sections (2) to (4) of the said Section. The fine which may be imposed under Section 135 of the 2003 Act is directly proportional to the number of convictions and is also dependent on the extent of load abstracted.

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.

27. The officer is also under obligation to serve a notice in terms of Section 126(3) of the 2003 Act upon any such consumer requiring him to file his objections, if any, against the provisional assessment before a final order of assessment is passed within thirty days from the date of service of such order of provisional assessment. Thereafter, any person served with the order of provisional assessment may accept such assessment and deposit the amount with the licensee within seven days of service of such provisional assessment order upon him or prefer an appeal against the resultant final order under Section 127 of the 2003 Act. The order of assessment under Section 126 and the period for which such order would be passed has to be in terms of Sub-sections (5) and (6) of Section 126 of the 2003 Act. The Explanation to Section 126 is of some significance, which we shall deal with shortly hereinafter. Section 126 of the 2003 Act falls under Chapter XII and relates to investigation and enforcement and empowers the assessing officer to pass an order of assessment.

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.

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

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. The provisions of Section 126 contemplate the following steps to be taken:

(i) 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.

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

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

(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.

Assessment and Computation

37. Wherever the assessing officer arrives at the conclusion that unauthorized 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 such period cannot be ascertained, it shall be limited to a - period of 12 months immediately preceding the date of inspection and the assessment shall be made at the rate equal to twice the tariff applicable for the relevant category of service specified under these provisions. This computation has to be taken in terms of Sections 126 (5), 126(6) and 127 of the 2003 Act. The complete procedure is provided under these sections. Right from the initiation of the proceedings till preferring of an appeal against the final order of assessment and termination thereof, as such, it is a complete code in itself.

38. We have already indicated that the provisions of Section 126 do not attract the principles of Criminal Jurisprudence including mens rea. These provisions primarily relate to unauthorized use of electricity and the charges which would be payable in terms thereof. To determine the controversy in the present case, it will be essential to examine the implication of the expression 'unauthorised use of electricity' as contained in Explanation (b) of Section 126 of the 2003 Act.

39. In order to explain these expressions, it will be necessary for us to refer to certain other provisions and the Regulations-as well. These expressions have to be understood and given meaning with reference to their background and are incapable of being fairly understood, if examined in isolation. It is always appropriate to examine the words of a statute in their correct perspective and with reference to relevant statutory provisions. The expression 'unauthorized use of electricity' on its plain reading means use of electricity in a manner not authorized by the licensee of the Board. 'Authorization' refers to the permission of the licensee to use of electricity', subject to the terms and conditions for such use and the law governing the subject.

41. The "unauthorized use of electricity" means the usage of electricity by the means and for the reasons stated in sub- clauses (i) to (v) of clause

(b) of Explanation to Section 126 of the 2003 Act. Some of the illustratively stated circumstances of 'unauthorised use' in the section cannot be construed as exhaustive. The 'unauthorized use of electricity' would mean what is stated under that Explanation, as well as such other unauthorized user, which is squarely in violation of the above-mentioned statutory or contractual provisions."

16. Finally, a judgment of the Hon'ble High Court of Orissa in the case of *Jindal Resources Pvt. Ltd., vs. Executive Engineer (Elect), Western Electricity Supply Camp of Orissa Ltd.*, reported in *CDJ 2018 Orissa HC 124*, was relied upon, wherein it was observed that the benefit of acquittal in the criminal case cannot be extended to the proceeding initiated under the provisions of Section 126 of the Act, by holding as under:

"9. In view of such legal position, now it is to be examined by this Court whether after acquittal in the criminal case, the petitioner can be given any benefit in a proceeding initiated under the provision of Section-126 of the Act, 2003?

It is evident from the judgment as has been annexed by the petitioner by way of rejoinder affidavit that the trial court has taken into consideration the deposition of P.W.1 given in paragraph-5 to the effect that the meter situated outside the factory is accessible to the public and it can be tampered by anybody desiring to do so. The statement of P.W.12 has also been taken note as has been recorded in paragraph-4 of the deposition that audio meter situating outside is guarded by a WESCO employee and they had not received any report regarding any tampering from him.

Further it has been revealed from the evident of P.Ws.10 and 12 that a dump report was prepared by WESCO every month which discloses actual reading of audit meter and main meter but the dump copy had not been handed over to police during investigation which would have clarified the actual energy consumption, and if the meters would have been tampered, then there would certainly have been discrepant readings of audit meter and dump copy reading.

Further it has been taken note of the seized article marked as Ext.2 which was seized on 5.6.2011 that was after about six months of lodging of the F.I.R. but

without any explanation by the I.O. and thereby acquitted the petitioner from the criminal case.

This Court is of the view after going across the aforesaid judgment that the same is not clean acquittal rather on technicality, the benefit of doubt has been given and thereby the petitioner has been acquitted.

However, this Court is not making any comment upon the legality and propriety of the judgment, since that is not the issue before this Court.

This Court, after reiterating the legal settled position as has been discussed in the preceding paragraphs, is of the view that since proceeding is initiated under the provision of Section-135 of the Act, 2003 will have no bearing upon the proceeding initiated under Section-126 of the Act, 2003 that will also applicable even in case of acquittal in the criminal case for offence committed under Section-135 of the Act, 2003."

17. Contending that the Petitioners cannot insist upon the authorities to proceed only under the Act, 2003, when the said Act itself has provided a saving clause, validating the action taken thereunder, the averments raised by the Petitioners do not hold good and the same are liable to be rejected, as the commission of offence in respect of theft of energy has been duly established. Since the act of the Petitioners had incurred huge loss to the exchequer, it was prayed that all these matters ought to be dismissed in limine.

18. This Court heard the learned Senior Counsel for the Petitioners and the learned Advocate General appearing for the Respondents and also perused the material documents available on record.

19. Before deciding the issue on hand, it is appropriate for this Court to extract the relevant provisions of the Act, 2003, namely, Section 126, 135 as follows:

"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 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 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).

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 Authorized; or

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

Section 135. (Theft of Electricity):1[(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,

(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) 1[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 2[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."

20. The main contention canvassed by the Petitioners was that the Central Act, 2003 came into existence with effect from 10.06.2003 and when there is an acquittal in a proceeding under Section 135 of the Act, 2003, no proceedings can be initiated under Section 126 of the Act, 2003 subsequently that deals with Investigation and Enforcement by the Officials of the

Electricity Board. It was further stated that the powers are exclusively vested with the Special Court in case of theft of energy and the civil liability can be foisted only by the said Court, as the order of the Criminal Court acquitting the accused will be binding on the Electricity Board. The authorities, who are equivalent to the rank of Judicial Officers of the Special Court cannot proceed departmentally to determine the amount under Section 126 of Act, 2003. Even though the Criminal Case in S.C.No.111 of 2009 on the file of the learned Principal Sessions Judge, Erode had ended in acquittal and later on, affirmed by the Hon'ble High Court in Crl.R.C.No.46 of 2010, yet, the same will not absolve the Petitioner from the civil liability in regard to the payment of dues under the Electricity Act for alleged act of illegal consumption of energy so far as the provisional assessment stands, as per decision *Rias Ahmad V. U.P.Power Corporation Limited*, AIR 2010 Allahabad 115.

21. It is seen that on 04.07.2003 at about 9.00am, one Govindarajan, the then Assistant Executive Engineer had lodged a complaint against the Appellant herein and others to the Inspector of Police, Siruvalur Police Station, Gobichettipalayam, alleging that the accused had dishonestly tampered the electricity meter by fixing a magnet in the meter as well as had unauthorizedly connected the meter with magnet so as to prevent the meter from functioning, thereby committed the offence punishable under Section 135(1)(b) and 138(1)(a) and (d) of the Act, 2003. After investigation, a Final Report was filed before the learned Judicial Magistrate No.1, Gobichettipalayam in C.C.No.28 of 2004 and thereafter, pursuant to constitution of Special Court to deal with the Electricity Offences and based on the orders of this Court in Crl.O.P.No.20112 of 2006, a revised charge sheet was filed before the Special Court, viz., Principal Sessions Court, Erode and the said Final Report was taken on file in S.C.No.111 of 2009. The Special Court, after analyzing the oral and documentary evidences, had acquitted all the accused on 28.10.2009, on the failure of the prosecution to prove the charges beyond reasonable doubt.

22. Aggrieved by the order of acquittal dated 28.10.2009 in S.C.No.111 of 2009, the State, represented by the Inspector of Police, Siruvalur Police Station, Erode District had preferred an appeal in C.A.No.431 of 2010 before this Court and the said Appeal came to be dismissed by this Court on 31.10.2011, by holding as under:

"17. The appellant/complainant is not able to make out that the judgment of the trial court is in any manner tainted with perversity or irregularity and

is the outcome of misconception of evidence by overlooking material aspects. As it is well settled law that in the case of acquittal, the presumption of innocence in favour of the accused is reiterated, reinforced and strengthened and when two views are possible, one that of innocence of the accused, the same in favour of the accused shall be adopted by the court. The trial court has rightly adopted the view in favour of the accused and the appellant has not made out any valid ground to interfere with the same."

23. As against the very same judgment of the Trial Court dated 28.10.2009 in S.C.No.111 of 2009, the Defacto Complainant / The Assistant Executive Engineer had also filed Crl.R.C.No.46 of 2010 before this Court, in which, consequent to the admission made by the Revision Petitioner / Defacto Complainant therein that the appeal preferred by the State was dismissed, this Court dismissed the Revision Petition on the ground of non-maintainability.

24. It is to be relevantly pointed out that in the judgment in S.C.No.111 of 2009 dated 28.10.2009 at Paragraph No.26, it is inter alia mentioned as under:

"26. As per the evidence of P.Ws.1 to 4 at the time of alleged inspection of A.1 company, regarding the consumption of electricity energy was prevented by M.Os.4 and 5 which was allegedly used by the accused and thereby they have committed theft of electrical energy. P.W.1 in the cross examination has stated that previously a mechanic meter was installed in the mill and subsequently electronic driverter meter was installed in the meter and it has not been visible as seen in driverter meter on a display alone has been shown in M.O.1 and in M.O.1, there is a facility for Velar voltage, vilbrank supply, absence of voltage and current 31 other would be coming that every month not below the rank of Assistant Engineer would inspect the meter and recorded the consumption in card which was given for registering the High Tension power and obtained signature of the persons who were available at the time of taking reading; that at the time of recording the consumption, the officer has also brought common meter reading instrument viz., C.M.R.I. and the same was placed in a proof portion in M.O.1 after removing the same and particulars recorded in the M.O.1 was transferred to C.M.R.I. and D.1 has given in which the features of C.M.R.I. were explained; that the C.M.R.I. which was sent to

Superintending Engineer, Gobichettipalayam where the entries were downloaded to a computer from C.M.R.I. and a copy would have been obtained. The said procedure was done on every month; that on 28.06.2003 A.1 company was inspected; that when down loaded from C.M.R.I. the particulars regarding load survey data, billing data, Tamper data would come; that the particulars regarding how many times and what times and at what date and the particulars of tampering would be come out from tampering data; that those particulars were available at Electricity Board; if any wrong has been committed at electronic meters, it has been clearly detected through C.M.R.I.; that it has also detected from tampering data, whether the consumer has committed mistake or not; as per the tampering data; he had been note that till 28.06.2003 no such wrong information would come from tamper data; that no action has been taken against the consumer before the inspection; the officer who came for recording the data by every month and the ante-theft wing and M.R.I.group would taken action if they found any mistake. As far as this case is concerned, no complaint was sent by Govindarajan to M.R.I.regarding the said procedure. He also further deposed that at every 15 minutes, if electricity is available it would be recorded at tamper data, it also recorded if electricity not supplied due to fuse andnot supplied from Electricity Board. The data would be coming as per Power Failure data, from tamper data. Fuse call register also was maintained at Sub Station. If any theft was contained regarding electricity, it would be detected at C.M.R.I. As per Ex.D.2 no theft of energy was not detected at load survey data. In Ex.D.2, the entries from 19.05.2003 to 04.07.2003 was shown and every entry between 15 minutes also recorded. At about 7.30 p.m. On 03.07.2003 when the meter was seen, the consumption of electricity was not recorded. In Ed.D.2.K.V.A.H. And K.W.H. entries were given for which the day and the consumption of electricity from 9.30 a.m. to 12.00 noon on 03.07.2003 was recorded and the billing data Ex.D.3 belongs to A.1 company."

25. Also, in the aforesaid judgment at Paragraph No.27, it is observed as under:

"27. P.W.21 in his cross examination has stated that the deceased Govindarajan demonstrated as to how the M.O.1 meter was functioning along with

C.M.R.I.data. He has not seized the data entry. He also not seized the log book, fuse call register from the Sub Station regarding A.1 company service functioning from Sub Station. From the above evidence of P.W.1 and P.W.21, Exs.D.2 and D.3, it reveals that the C.M.R.I.entries are very important in this case to decide whether the accused have committed the offence or not. But, though, it is very important document. P.W.1 has not handed over the same to P.W.21 and in turn P.W.21 has not seized the said document. If really, the accused have committed the offences as alleged by the prosecution, definitely, it would be revealed in the C.M.R.I. But as per Ex.D.2 from 0.15 hours on 03.07.2003 to 19.30 hours i.e., 7.30 p.m., the consumption of electricity was recorded, and the billing data Ex.D3 has shown the recording of consumption of electrical energy consumed by 1st accused. If as per the evidence of P.W.1 at the time of inspection of M.O.1, the consumption of energy was not display would falsify the document filed by the accuse under Ex.D2. If really the meter was not functioning and the accused have committed the energy theft by means of M.Os.4 and 5, definitely, Ex.D.2 could not record the consumption of energy. On the other hand and as per Ex.D.2, the alleged time of inspection i.e., 7.30p.m. Was recorded in which the consumption of energy has been shown. If really P.W.1 is fair on his part, definitely, he would have handed over the relevant entries of C.M.R.I. to P.W.21. But as per the evidence of P.W.21, he has not handed over the same to P.W.21., who in turn has not seized the same. If the said entry of C.M.R.I. is filed, it would reveal the consumption of energy by A.1 by legal means. That is why, they have not produced the same before P.W.21 at the time of investigation and create a doubt regarding the allegation of prosecution that on 03.07.2003 at about 7.30 p.m. when M.O.1 was inspected, it did not show the consumption of energy by A.1 has not been proved."

26. Moreover, the Trial Court in S.C.No.111 of 2009 in its judgment at Paragraph No.29 had categorically observed that "From the evidence of P.W.21, it revealed that he has not properly investigated the case by non seizure of seals which were broken at the time of alleged inspection by P.Ws.1 to 4 and non recovery of registers kept by Sub Station and the entries of C.M.R.I. which would affect the case of the prosecution."

27. In effect, only based on the observation of the Trial Court in S.C.No.111 of 2009 at Paragraph No.26, wherein the evidence of P.W.1 was referred to, etc., it is the submission of the learned Senior Counsel for the Appellant that when once the theft of electricity / electricity stolen under Section 135(1) (b) of the Act and when the Trial Court had resultantly acquitted the accused 1 to 6 in Criminal Case, then no assessment can be made for the purported theft of electricity by the Electricity Authorities and the assessment so made and the final orders in this regard are otiose and futile one.

28. It was also stated that Section 185 of the Act, 2003 cannot come to the rescue of the Electricity Board, as the action has been initiated only after the Act, 2003 came into existence and no proceedings initiated under the Old provisions / Repealed Act cannot be continued. Further, the Board cannot initiate proceedings under Clause 8.01 and 8.02 of the Terms and Conditions of Supply of Electricity (Electricity Supply Act 1948) with regard to theft of energy, as those clauses are no longer in vogue, as on the date of initiation of proceedings, the Old Act got repealed and the Act, 2003 had come into force. Clause 8.01 and 8.02 Clause 8.01 and 8.02 of the Terms and Conditions of Supply of Electricity (Electricity Supply Act 1948) in the repealed Act reads as follows:

8.00 Theft of Energy and Extra Levy:

8.01 Any consumer who dishonestly abstracts or uses energy shall be deemed to have committed theft within the theft within the meaning of Indian Electricity Act, 1910 as amended by the Tamil Nadu Government and the Indian Penal Code and the existence of artificial means for such abstractions shall be *prima facie* evidence of such dishonest abstraction. Illegal restoration of supply to a disconnected service connection will fall under this category.

8.02 Extra levy for theft of energy by tampering of meters / meter seals will be made at the rates given below:-

- (a) for a period of twelve months; or
- (b) for a period from the date of prior inspection if any by the APTS or MRT wing to the date of detection; or
- (c) for a period from the date of replacement of meter to the date of detection; or

(d) for a period from the date of service connection to the date of detection whichever period of the above is less.

For other cases of theft of energy, the extra levy will be made for a period of twelve months or from the date of service connection to the date of detection whichever period is less at the same rates given below.]

(i) For Energy:-

(a) Low Tension Service Connection:- Highest Low Tension tariff rate x 3, The charges arrived at will be rounded off to the next higher rupee.

(b) High Tension Service Connection:-

Highest High Tension Tariff rate x 4.

The charges arrived at will be rounded off to the next higher rupee.

(ii) For maximum demand: (In High Tension Service Connection):-

Highest High Tension tariff rate for maximum demand x 4.

Extra levy for illegal restoration of supply to a disconnected service connection will be made for a period of twelve months immediately preceding the date of detection of the violation or for the period from the date of disconnection of the service connection to the date of detection of the illegal restoration, whichever period is less, at the rates given above..."

29. The above submission made by the learned Senior Counsel for the Petitioners cannot be accepted, because once there is a saving clause provided under the New Act, then there is no impediment or bar for the Department to proceed under the Old Act in the absence of proof that it is inconsistent with the provisions of the Act, 2003. More so, quoting a wrong provision of the Act will not entitle a wrong doer to escape from the clutches of law, especially when Section 126 of the Act, 2003 extends power to the Department / Board / Authorities to ensure that the electricity consumed unauthorizedly is calculated and necessary charges are paid by the defaulter. In the decision, *Hitech Mineral Industries (P) Ltd., Salem V. TNERC, Chennai*, reported in 2010 (3) MLJ 697, it is inter alia, observed that 'the persons who steal energy or use energy unauthorisedly have to be punished'.

30. As a matter of fact, the assessment proceedings under the Old Act for the action that had occurred, when the Old Act was in force to continue as per decision in *E.E. (Distribution), TNEB V. S.J.Gayas, 2008 (2) MLJ 812 (Mad)*.

31. It is to be pointed out that in the decision of the Hon'ble Supreme Court in *Syed Askari Hadi Ali Augustine Imam and another vs. State (Delhi Administration) and another*, reported in (2009) 5 SCC 528, at paragraph 25, it is observed as under:

"25. It is, however, significant to notice that the decision of this Court in *M/s Karam Chand Ganga Prasad & anr. etc. vs. Union of India & ors.* [(1970) 3 SCC 694], wherein it was categorically held that the decisions of the civil courts will be binding on the criminal courts but the converse is not true, was overruled, stating:

"33. Hence, the observation made by this Court in *V.M. Shah* case that the finding recorded by the criminal court stands superseded by the finding recorded by the civil court is not correct enunciation of law. Further, the general observations made in *Karam Chand* case are in context of the facts of the case stated above. The Court was not required to consider the earlier decision of the Constitution Bench in *M.S. Sheriff* case as well as Sections 40 to 43 of the Evidence Act."

32. Also, in the decision *Motising Chhagasing Vaghela vs. S.D.Meha*, AIR 1966 Gujarat 233, wherein it is observed as follows:

"Where an officer decides to hold a departmental enquiry, all that he does is to start a proceeding for the purpose of satisfying himself as to whether, in fact, the delinquent is guilty of any misconduct or delinquency which requires to be dealt with in the interest of public administration. When holding such an enquiry, he is not at all concerned, nor is it his object to undertake the decision of the question as to whether the findings recorded by the criminal Court were right or wrong. His object is only to enquire into the question as to whether the delinquent is guilty of a misconduct or a

delinquency and the mere fact that he is likely to reach a conclusion different from that recorded by the criminal Court cannot bring him within the ambit of the law of contempt of Court. The two proceedings, the departmental and the criminal, are entirely different in nature, they operate in different fields and they have different objectives. So also the degree of proof which is necessary to record an order of conviction is different from the degree of proof which is necessary to record the commission of a delinquency.

The the holding of a departmental enquiry after an order of acquittal has been recorded by the High Court does not constitute a contempt of the High Court or that any principle of law becomes offended when a departmental enquiry follows an order of acquittal in favour of a public servant by a criminal Court."

33. The next argument of the Petitioners, that the Special Court alone has got jurisdiction to determine the civil liability and the Authorities cannot make any assessment under Section 126 of the Act, 2003 and impose levy on theft of energy, is a vexatious one, on account of the reason that after acquittal by the Special Court under Section 135 of the Act, there is no hurdle or preclusion for the Department to initiate action under Section 126 of the Act, 2003 for determination of civil liability, as both Sections 126 and 135 of the Act, 2003 stand on different footing and are independent to each other.

34. Significantly, it is to be pointed out that in respect of theft of energy as per Section 135 of the Electricity Act, 2003, 'Mens Rea' is required. Whereas under Section 126 (6) Explanation (b) of the Act, an intention relating to unauthorised use of electricity by utilising the electricity by the means as mentioned is just enough. In a proceeding under Section 126, a high degree of responsibility on the part of authority concerned rests, mainly to act impartially, fairly, objectively and to proceed in the matter with an open mind due consideration and deeper application of mind.

35. At the risk of repetition, the assessment under Sections 126 and 135 of the Electricity Act, 2003 is quite different from each other. In reality, the ingredients of Section 126 of the Act can be pressed into service 'for unauthorised use of Electricity'. However, in respect of Section 135 of the Act, it is for 'Theft of Energy' and this subtle difference is to be borne in mind by a reasonable and prudent person.

36. One cannot brush aside an important fact that unless and until a provisional assessment is converted into a final assessment, the stage of challenging the same before an Appellate Authority under Section 127 of the Electricity Act, 2003 does not arise, as per decision *Sanjay Rizvi V. M.D. Kanpur Electricity Supply, Kesco, Kanpur Nagar* reported in AIR 2012 Alld 163. Moreover, Section 50 of the Act, 2003 gives powers to the State Commission to specify an Electricity Supply Code to provide for recovery of electricity charges, etc.

37. It is poignant to state here that if the acquittal is based on merits, there will certainly be determination of civil liability by the Special Court and in case of acquittal on the basis of compounding of the offence based on the settlement between the parties, it will be prudent to say that there is no need for such determination.

38. The yet another contention raised by the Petitioners that there should not be any determination of civil liability either by the Special Court or by the Authorities concerned, in the event of the offence being compounded, has no legs to stand. As long as the Act does not stipulate that when there is a compounding of the offence, the Civil Liability will also come to a standstill, it cannot be said in the air that no proceedings under Section 126 can be initiated nor notice be issued.

39. A bare reading of Section 154 (5) of the Act, 2003 in conjunction with the explanation to the provision goes to show that the said provision enables the Special Court to determine the civil liability in terms of money in case guilt is established, is for theft of energy after full fledged trial. If the accused is acquitted, Civil Court has no jurisdiction to decide/foist civil liability and in that event the Board will have to fall back upon Section 126 of the Act, 2003. For the sake of brevity, Section 154 is extracted hereunder:

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

(5) The 1[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.

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 139."

40. It is to be remembered that the employment of words as if it were a Decree of the Civil Court in Section 154 (5) of the Electricity Act is a clear firm indicator of the legislative intent and clearly exhibits that the determination of civil liability by Special Court by itself will not be a 'Decree' passed by the Civil Court and it is only by fiction of Law that such a liability would be recovered as if it were a Decree of Civil Court.

41. This Bench, while dealing with an issue falling under the purview of Electricity Act in the case of *M/s.Sri Radhakrishna Multiple Industries (P) Ltd., Madurai vs. The Tamil Nadu Electricity Regulatory Commission, Chennai* [W.P.No.14924 of 2008] decided on 26.03.2019, has made a passing remark that the Special Court has the power to prosecute under Section 135 of the Act, 2003 and proceed further with regard to determination of civil liability, in case it comes to the conclusion that offence is made out by the accused. Further, it went on to add that in the event of acquittal from the criminal case, it will not preclude the Electricity Board from invoking Section 126 of the Act, 2003.

42. In yet another case, this Court in the case of *Chairman, TNEB, Madras vs. Govindasamy Naidu*, reported in 2004 (4) MLJ 89 (Mad) was pleased to hold that mere acquittal from the case for alleged theft of electricity and property of the Electricity Board will not absolve the consumer from the liability of compensating the loss sustained by the Board. It was the case of the Respondents that the factum of tampering of meter was established by duly following the procedures as adumbrated under the Act and that the assessment arrived at by the Respondents is sustainable, as this Court, while dealing with the similar issue in the case of *P.Yamuna vs. State*, reported in 2008 (3) MLJ (Cr) 761, had fixed the liability of loss on the person, who has tampered the meter unlawfully.

43. The judgment quoted by the Petitioners in *M/s.Chennai Colour Coatings, Chennai vs. The Tamil Nadu Electricity Board, Chennai and others* (cited supra) is not applicable to the

present case on hand, as in that case, though Clauses 8.02 and 8.03 - Table B as per Schedule Part-I of the Board's Terms and Conditions of Supply of Electricity and the power of the Assessing Officer under Section 126 of the Act, 2003 were discussed, the Saving Clause prescribed under Section 185 of the Act as well as the factum of notification of The Tamil Nadu Electricity Supply Code, 2004 in the Gazette on 01.09.2004, were not brought to the notice of this Court. Moreover, the tampering of meter was not proved therein, whereas in the present case on hand, there is a tampering of meter by keeping a magnet bar on it and the petitioner therein had also exhausted the remedy of appeal, but some of the petitioners herein have straightaway approached this Court without availing the appellate remedy. Once the facts and background of the case are different, then there is no need to give much importance to the particular judgment. The Hon'ble Supreme Court in the case of Padmasundara Rao (Dead) & others vs. State of Tamil Nadu and others, reported in (2002) 3 SCC 533 observed that if it is found that the facts of the cited judgment of the Higher Forum totally differs with the one on hand, then there is no compulsion for the subordinate courts to blindly rely on the same to arrive at a conclusion. It is appropriate to extract the relevant paragraph of the said judgment, which reads as follows:

"Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in *Herrington vs. British Railways Board* (1972) 2 WLR 537. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases."

44. It is pertinent to mention here that there may be possibilities of certain documents, which are available, being not produced before the Criminal Court and the same can be introduced when a proceeding under Section 126 of the Act is initiated. Further, the order passed by the Criminal Court would be final insofar as the Criminal matter is concerned and it will have no bearing on the civil issue, whereas the decision of the Civil Court will have an effect on the Criminal Court.

45. Placing reliance on the judgment of the Hon'ble Supreme Court in the case of *State of Uttaranchal and others vs. Kharak Singh*, reported in (2008) 8 SCC 236, it was argued on the side

of the Petitioners that the Officer, who is a witness in the case, should not be appointed as Enquiry Officer to conduct the enquiry. The aforesaid judgment may be applicable to a case where there is an existence of employee and employer relationship and in a case of unauthorized use of electricity, certainly, the person, who is a witness is empowered to conduct the enquiry and come to a logical conclusion. *As long as the views taken by the person are not perverse, Court need not interfere with the enquiry on technical grounds.*

46. For the reasons afore-recorded and in view of what is discussed and observed hereinabove, W.A.Nos.1808 and 1811 of 2009, W.P.Nos.29882 of 2004 and 3013 of 2014 and W.P.(MD) No.2361 of 2008, challenging the impugned assessment and extra levy on theft of energy are liable to be dismissed and *accordingly, they are dismissed in entirety.* Since the impugned orders of assessment are upheld, the arrears to the Electricity Board shall be paid within 90 days from the date of receipt of a copy of this order, failing which the property of the Company and the personal properties of Directors can be attached to recover the money.

47. Insofar as W.P.No.2360 of 2008 is concerned, the Petitioner has questioned the Constitutional validity of the Tamil Nadu Electricity Supply (Amendment) Code, 2007 dated 13.06.2007, stating that the said Amendment is ultra vires the Electricity Act, 2003. The constitutional validity of an Act can be challenged only on two grounds viz. (i) lack of legislative competence and (ii) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. The Hon'ble Supreme Court, in the case of *State of A.P. vs. McDowell & Co.*, reported in (1996) 3 SCC 709, opined that except the above two grounds, there is no third ground on the basis of which the law made by the competent legislature can be invalidated and that the ground of invalidation must necessarily fall within the four corners of the aforementioned two grounds.

48. A glance at the Tamil Nadu Electricity Supply (Amendment) Code, 2007 reveals that it has been amended in exercise of the powers conferred on it by Section 181 r/w Section 50 of the Electricity Act, 2003, with the sole object of removing the difficulties and misconceptions. Therefore, at no stretch of imagination, it can be said that the said amendment lacks legislative competence. The consumers, who are getting electricity supply are governed by the terms and conditions of such supply and it is our bounden duty to ensure prevention of the loss of energy or theft of energy. In the said course,

Section 50 of the Act, 2003 empowers the Regulatory Commission to amend the Act, in which no exception can be drawn.

49. Secondly, the conferment of power to the Authorized Officer to determine the civil liability under the amended Regulation 23(AA) of the Code cannot be said to be violative of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision, as it only aims at detection of exact levy to be imposed on the unauthorized users of electricity so as to generate income to the Government and all law making, be it in the context of delegated legislation or primary legislation, have to conform to the fundamental tenets of transparency and openness on one hand and responsiveness and accountability on the other. Therefore, it is not in contravention of the Act, 2003, inasmuch as the Special Court has the power to prosecute under Section 135 of the Act, 2003 and foist the civil liability, if the accused is found guilty, whereas the Authorized Officer can proceed to determine the civil liability under Section 126 of the Act, 2003, if the guilt is not established under Section 135 of the Act, 2003, by the Special Court under Section 154 of the Act, 2003.

50. If the Tamil Nadu Electricity Supply (Amendment) Code, 2007 is testified in the light of the above touchstone, the amendment certainly promotes rational and accountable policy implementation, which does not call for any interference by this Court. In case of theft of energy, the assessment will be as per clause 23(b) of Conditions of Supply to be read with condition No.11 of Part III of the Conditions of Supply and Miscellaneous Charges framed under the Act of 1910 and not under Section 126 of the Electricity Act, 2003, and in terms of clause 11(1)(iii), energy charges will be leviable at twice the applicable rate.

In the light of the above, *W.P.No.2360 of 2008 sans merits and stands dismissed.* No costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

To:

1. THE EXECUTIVE ENGINEER,
TAMIL NADU ELECTRICITY BOARD,
GOBICHETTIPALAYAM, ERODE DIST.

2. THE SUPERINTENDING ENGINEER, GOBI ELECTRICITY DISTRIBUTION CIRCLE, TAMIL NADU ELECTRICITY BOARD, GOBICHETTIPALAYAM-638 452, ERODE DIST.
3. THE CHAIRMAN, TAMIL NADU ELECTRICITY BOARD, 144, ANNA SALAI, CHENNAI-2.
4. THE EXECUTIVE ENGINEER/O&M, MYLAPORE CHENNI ELECTRICITY DISTRIBUTION CIRCLE/CENTRAL, ROYAPETTAH, CHENNAI 600 014.
5. THE ASSISTANT EXECUTIVE ENGINEER/O&M, SANTHOME, TAMIL NADU ELECTRICITY BOARD, CHENNAI 600 004.
6. THE ASSISTANT EXECUTIVE ENGINEER/O&M, TNEB ESPLANADE, CHENNAI ELECTRICITY DISTRIBUTION CIRCLE/CENTRAL, CHENNAI-104.
7. THE EXECUTIVE ENGINEER/O&M, TNEB ANNA SALAI, CHENNAI ELECTRICITY DISTRIBUTION CIRCLE, CHENNAI.
8. THE SUPERINTENDING ENGINEER TIRUPUR ELECTRICITY DISTRIBUTION CIRCLE, TAMILNADU GENERATION & DISTRIBUTION CORPN.LTD., (TANGEDCO), TIRUPUR.
9. THE ASSISTANT EXECUTIVE ENGINEER O&M/TEDC, TAMILNADU GENERATION & DISTRIBUTION CORPN. LTD. (TANGEDCO) TOWN/SOUTH/ TIRUPUR.
10. THE CHAIRMAN, TAMIL NADU ELECTRICITY BOARD, 800, ANNA SALAI, CHENNAI-2.
11. THE SECRETARY, TAMIL NADU ELECTRICITY REGULATORY COMMISSION, 17, 3RD MAIN ROAD, SEETHAMAL COLONY, ALWARPET, CHENNAI-600 018.
12. THE ASSISTANT EXECUTIVE ENGINEER, DISTRIBUTION/URBAN/NORTH, TAMIL NADU ELECTRICITY BOARD, TUTICORIN.

+1 cc to Mr.S.K.Raameshwar, Advocate Sr.No. 34594

+3 cc to Mr.K.Seshadri, Advocate SR.No.33943 to 33945

AKM/22.10.19/37P- 17C /

AKM/09.01.2020

JUDGMENT MADE IN
W.A.Nos.1808 and 1811 of 2009, W.P.Nos.29882 of 2004
and 3013 of 2014 and W.P.(MD) Nos.2360 and 2361 of 2008