

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.03.2019

CORAM:

THE HON'BLE MR.JUSTICE M.VENUGOPAL
and
THE HON'BLE MR.JUSTICE S.VAIDYANATHAN

W.P.No.14924 of 2008 and
M.P.No.1 of 2008

M/s.Sri Radhakrishna Multiple Industries (P) Ltd.,
Shed Nos.179 and 186 SIDCO,
Kappalur, Madurai,
Rep. By its Director,
D.Thangaraj Petitioner

-vs-

1. The Tamil Nadu Electricity Regulatory Commission,
No.17, III Main Road,
Seethammal Colony,
Alwarpet, Chennai-600 028.
Rep. by its Secretary.
2. The Chairman,
Tamil Nadu Electricity Board,
800, Anna Salai,
Chennai-600 002.
3. The Executive Engineer,
Tamil Nadu Electricity Board,
Thirumangalam,
Madurai Electricity Distribution Circle.
4. The Union of India,
Rep. by Secretary to Government,
Ministry of Law and Justice,
Nirman Bhavan, New Delhi.
5. The Secretary to Government of India,
Ministry of Power, Shram Shakti Bhavan,
Rafi Marg, New Delhi. ... Respondents

Prayer: Writ Petition is filed under Article 226 of the
Constitution of India praying for a Writ of Declaration,
declaring the Electricity [Removal of Difficulties] order 2005,
Notified on 08.06.2005, under which Regulations 19 and 23 were

amended on 13.06.2007 and 12.09.2007 vide Tamil Nadu Electricity Supply [Amendment] Code 2007 and the proceedings of the 3rd respondent herein in Letter No.E.E./TMG/DM/F.H.T.SC.182/D.No.5415/08 dated 10.04.2008, purported to have been issued there-under as arbitrary, illegal, ultravires and unconstitutional.

For Petitioner : Mr.A.V.Arumugam
For R2 & R3 : Mr.P.R.Dhilip Kumar
For R4 & R5 : Mr.G.Rajagopalan
Asst. Solicitor General
Asst. by Mr.K.Srinivasamurthy

O R D E R

This Writ Petition has been filed, seeking to declare the Electricity [Removal of Difficulties] Order 2005, Notified on 08.06.2005 (henceforth be called as 'the Order 2005'), under which Regulations 19 and 23 were amended on 13.06.2007 and 12.09.2007, vide Tamil Nadu Electricity Supply [Amendment] Code 2007 and the proceedings of the 3rd respondent herein in Letter No.E.E. / TMG/DM / F.H.T.SC.182/ D.No.5415/08 dated 10.04.2008, purported to have been issued there-under as arbitrary, illegal, ultravires and unconstitutional.

2. Heard the learned counsel for the petitioner, the learned Standing Counsel for R2 and R3 and the learned Assistant Solicitor General appearing for R4 and R5.

3. The facts as put forth by the Petitioner, leading to filing of this Writ Petition are as follows:

i) The Petitioner-Industry (in short 'the Industry') is involved in the manufacture of Potassium Chloride and commenced its industrial production from 16.12.2004. The Industry has been providing employment to about 250 persons during the year 2008;

ii) The Industry was let out to one V.Srinivasan on 14.09.2006 and the same was duly intimated to the Superintending Engineer, working under the Control of the Second Respondent (now TANGEDCO). The Lessee, who was in occupation of the Industry, is said to have involved in tampering of meter and upon detection, a case was registered on 10.02.2007, in Crime No.49 of 2007 for offences under Sections 135(1)(b) and 138(1)(d) of the Electricity Act, 2003 before the Sub-Inspector of Police, Thirumangalam Town Police Station, Thirumangalam, alleging that

by the said theft of energy, the consumer has stolen 9,97,486.23 units and due to the said act, the Board has incurred a loss of Rs.86,26,964/-, which was foisted on the Industry;

iii) It is submitted that the meter is an electronic Trivector Static Meter and no pilferage or theft of energy can be committed in the Industry without being recorded in the meter. That apart, a notice has been issued to the Directors of the Company, which was originally withdrawn with liberty to issue afresh notice and consequent thereto, fresh notice was also issued on the Industry without appraising the fact the V.Srinivasan was the Lessee of the Industry, who duly sent explanation to the show cause notice dated 16.03.2007 on 26.03.2007, denying the commission of theft;

iv) It is further submitted that under the Electricity Act, 2003 (hereinafter referred to as 'the Act, 2003'), the Special Court, constituted under Section 153 alone is competent to try the offence committed by the accused and to determine the Civil Liability in terms of money under Section 154 of the Act. The Industry had also requested for the Working Sheet for arriving the alleged loss of Rs.86,26,964/-;

v) It is also submitted that after lapse of seven months, the Third Respondent had withdrawn the show cause notice dated 16.03.2007 with liberty to take further action in this theft of energy case. Later on, another show cause notice was issued on 19.10.2007, asking the Petitioner and the Directors to pay the assessed loss of Rs.86,26,964/- with a threat of disconnection of electricity. In response to the show cause notice, a detailed reply was given not only by the Directors of the Industry, but also by the Lessee, to whom no notice was issued;

vi) It is the stand of the Industry that as a Special Court has been constituted under Section 154 of the Act, 2003, the Third Respondent had issued the Provisional and the Final Assessment orders on due determination of the loss, thereby usurped the jurisdiction of the Special Court. It is the grievance of the Industry that the Provisional Assessment dated 03.03.2008 and the impugned Final Assessment order dated 10.04.2008 had arisen pursuant to the amendments made to the Tamil Nadu Electricity Supply Code, 2004 on 13.06.2007 and 12.09.2007;

vii) It is further stated that the Amendments brought under the Order 2005 and the consequential assessment orders are

unconstitutional and against Sections 154 and 183 of the Act, 2003, as there are sufficient provisions made under the Act, 2003 to determine the civil liability in the event of theft of energy and except the Special Court, the Authorities are not empowered to foist any liability on the Industry;

viii) It is vehemently contended that neither Section 50 nor Section 181 confers power on the 1st Respondent to deal with the situation, arising out of issuance of impugned Regulations 19-A and 23 of the Tamil Nadu Electricity Supply (Amendment) Code, 2007 dated 13.06.2007 and Tamil Nadu Electricity Supply (Second Amendment) Code, 2007 dated 12.09.2007. The power conferred on the 1st Respondent to frame Regulations is to be consistent with the provisions of the main enactment and the same cannot be expanded by introducing the Order 2005, by which the power to frame Regulations with regard to the emphasis of assessment in case of theft of energy pending adjudication by an appropriate Court, disconnection of supply, etc., are sought to be conferred;

ix) Finally, it is stated that the Order, 2005 is void, inoperative and the Central Government by such Code cannot confer power on the same Commission, which it otherwise does not have power to frame regulations against the determination of civil liability in theft of energy cases by the Special Court under Section 154(5) of the Act and the Order, 2005 issued by the Central Government on 08.06.2005 is violative of Section 183 of the Act, 2003. Thus, it is pleaded that the final assessment order is pre-determined, arbitrary and illegal and therefore, the Order, 2005 has to be struck down and the consequential assessment order to be quashed.

4. The Fifth Respondent has filed a counter, wherein it has been stated that there is no pleading in the petition as to what is inconsistent in the Order, 2005 and in the absence of challenge to Section 183 of the Act, 2003, there is no hurdle / bar for the respondents to exercise the power under the said Section. It is further stated that a search was conducted in February, 2007 and the new provisions have come into force in the year 2007, which have not been invoked in the present case on hand. Section 183 of the Act, 2003 can be used to fill up the gap. Hence, the Order, 2005 is not inconsistent with any of the provisions of the Act, 2003 and 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. It is also stated that as the incident had taken place prior to the Amendment, the old provision was invoked in the year 2007 for commission of the offence by the Industry and therefore, the Order, 2005 cannot be said to be violative of the provisions of the Constitution of India.

5. The Respondent has submitted that an FIR has been registered for commission of theft of energy and this Court, by an order dated 14.12.2007 in Crl.O.P.(MD) No.1291 of 2007 had held that in the absence of power under the Act, 2003, the Police have not authority to register a complaint and it is only for the authority concerned to initiate action before the Special Court. However, the said provision has been amended subsequently, but the said amendment / provision may not be applicable to the facts of the case. At present, the Police is empowered to register an FIR by means of subsequent amendment and file a charge sheet before the Special Court.

6. Learned Standing Counsel appearing for R2 and R3 / TNEB has contended that after the orders passed in Crl.O.P.(MD) No.1291 of 2007 dated 14.12.2007, a private complaint has been preferred against the Industry under Section 135 (1)(a)(b)(c) and 138 (d) of the Act, 2003 and the same is pending before the Principal and Sessions Judge, Madurai in C.C.No.3 of 2008, in which, there were 11 prosecution witnesses and 8 exhibits were marked and the case is posted on 29.03.2019 for examination of P.W.11.

7. In reply, learned counsel for the Industry has submitted that since the matter is pending before the Special Court, he confines his argument to the effect that unless and until the Special Court decides about the veracity of the complaint with regard to theft of electricity, no civil liability can be foisted and therefore, the Court may decide the issue regarding the constitutional validity of the Order, 2005 in accordance with law and pass a suitable order thereon.

8. It is the case of the Industry that there was a Deed of Lease entered into between the Petitioner-Industry and one V.Srinivasan on 14.09.2006, which expired as early as in August, 2007 itself subsequent to expiry of 11 months' period. Admittedly, the inspection in the premises of the Industry had taken place in February, 2007, for which action has been initiated by the Electricity Board. This Court, in Crl.O.P.(MD) No.1291 of 2007 dated 14.12.2007, had held that the Police have no power to initiate action and that it is for the Authorities to act as per the provisions of the Electricity Act, 2003. It is needless to mention here 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 against the accused, whereas in the event of acquittal from the criminal case, it will not preclude the Electricity Board from invoking Section 126 of the Act, 2003. Since the matter is pending before the Special Court, this Court, without expressing any opinion on the matters pending before the Special Court, can, at the best,

direct the Special Court to dispose of the case in C.C.No.3 of 2008 as expeditiously as possible, as it is for the Special Court to decide as to whether the Directors or the Lessee are responsible is responsible for theft of energy and the Criminal Court is empowered to invoke Section 319 Cr.P.C at any stage of proceedings to proceed against the person other than the accused, appearing to be guilty of offence on due evidence recorded in the courses of inquiry or trial.

9. Insofar as this petition is concerned, the Petitioner has questioned the Constitutional validity of the Electricity [Removal of Difficulties] order 2005, Notified on 08.06.2005. It is pertinent to state here that the Industry has not challenged Section 185 of the Act, 2003, which is a saving clause to fill up the lacuna. For the purpose of clear understanding, Section 185 of the Act, 2003 is hereby extracted as under:

"Section 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) the 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."

10. It is true that as per the then provision, the Police had no power to register a case, whereas after the amendment in the Electricity (Amendment) Act, 2007 (Act No. 26 of 2007), there were insertions to Section 151, recognizing the power of a Police Officer to investigate the offences under Sections 135 to 140 and Section 150 of the Act as cognizable and non-bailable. For the purpose of clarity, the insertions to Sections 151, namely Clause A & B of the Electricity Act, 2003 are extracted as under:

"151A. Power of police to investigate. - For the purposes of investigation of an offence punishable under this Act, the police officer shall have all the powers as provided in Chapter XII of the Code of Criminal Procedure, 1973;

151B. Certain offences to be cognizable and non-bailable. - Notwithstanding anything contained in the Code of Criminal Procedure, 1973, an offence punishable under sections 135 to 140 or section 150 shall be cognizable and non-bailable."

Thus, it is clear that after the amendment in 2007, the Police is empowered to lodge a complaint to decide the issue on hand. Since the matter has arisen in February, 2007 much prior to the amendment, in terms of the old provision, the Electricity Board has rightly taken up the matter before the Special Court, which has got to be decided in accordance with the provisions of the Act, 2007, as the said Act was in existence, when the incident

had taken place. It is apposite to state that the Special Court can prosecute under Section 135 of the Act, 2003 and proceed further with regard to determination of civil liability, in case it holds the guilty of offences by the accused. Whereas in the event of acquittal from the criminal case, it will not preclude the Electricity Board from invoking Section 126 of the Act, 2003.

11. Moreover, 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.

12. A glance at the Electricity [Removal of Difficulties] Order 2005, Notified on 08.06.2005, under which Regulations 19 and 23 were amended, reveals that the Order, 2005 cannot be construed to be inconsistent with any provisions of the Act, 2003 and the Legislature has thought it fit to fill up the gap by making the Order, 2005 in order to give quietus to the issue. 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 taken.

13. Secondly, the Regulations 19 and 23 were amended with an object to develop the electricity industry and supply of electricity to all areas by way of conducive measures, which 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 prescribing procedures for disconnection of supply of electricity and removal of the unauthorized usage of electricity, so as to control theft of electricity. For the sake of convenience, this Court thinks it fit to extract those two Regulation Nos.19 and 23, which read as follows:

"Insertion of new Regulation 19-A in the Principal Code:

After Regulation 19 of the principal code, the following new Regulation shall be inserted, namely,-

19-A Procedure for disconnection of supply of electricity and removal of the unauthorized usage of electricity.

(1) An assessing officer mentioned under section 126 of the Act, may either suo motu or on receipt of reliable information regarding unauthorized use of electricity in any premises conduct inspection of such premises.

(2) The assessing officer shall prepare a report giving details such as connected load, condition of seals, working of meter and record any irregularity noticed/ unauthorized use of electricity found.

(3) The report referred to in sub-regulation (2) shall clearly indicate whether conclusive evidence substantiating the fact that unauthorized use of electricity was found or not. The details of such evidence should be recorded in the report.

(4) In case of suspected unauthorised use of electricity, provisional assessment order shall be issued in the manner prescribed under the rules made by the State Government under section 126 (2) of the Act and final assessment order shall be issued by the assessment officer by following the procedure stipulated in section 126 of the Act. In respect of a tariff where different rates are adopted based on the slabs of consumption, the highest tariff rate specified in the tariff structure for the relevant category of service may be adopted.

(5) If the person does not deposit the assessed amount with the licensee concerned as stipulated under sub-section (4) of section 126 of the Act, the licensee concerned may proceed to recover such assessed amount and take such further action as is permitted under the Act.

(6) The enforcement provisions of the Act and the procedures given in this code shall be followed to recover the assessed amount from the person. In case of default in payment of the assessed amount, including default in payment of any of the installment permitted by the licensee concerned and agreed by the person, the licensee concerned may, after giving a fifteen days' notice in writing disconnect the supply of electricity.

(7) The person shall remove the cause of unauthorized use immediately after its detection and give a written intimation to the licensee concerned. The licensee concerned shall check the claim of the person about the removal of the cause of unauthorized use of electricity, verified to his satisfaction. Failure of the person to remove the cause of unauthorized use shall result in levy of charges on account of unauthorized use of electricity till the cause of such unauthorised use of electricity is removed and verified and recorded by the licensee concerned or the onus of allegation of unauthorized use of electricity is rebutted by the person and accepted by the licensee concerned."

Amendment of Regulation 23 of the Principal Code:

(ii) After sub-regulation(A), the following new sub-regulation shall be inserted, namely -

(AA) The Procedure for assessment of the electricity charges, and disconnection of supply of electricity and removing the meter, electric line, electric plant and other apparatus in case of theft of electricity as detailed in section 135 of the Act is given below: (1) The officer authorized under sub-section (2) of section 135 of the Act (hereinafter referred to as the authorized officer), may either suo-motu or on receipt of reliable information regarding theft of electricity in any premises, conduct inspection of such place or premises (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.).

Therefore, this Court is of the view that the Order, 2005, under which Regulations 19 and 23 were amended, is not in contravention of the Act, 2003, inasmuch as it is an enforcement provisions of the Act and the procedures given in this code shall be followed to recover the assessed amount from the person. If the Electricity [Removal of Difficulties] order 2005, Notified on 08.06.2005 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.

14. In fine, in view of what is discussed and observed hereinabove, this Writ Petition is disposed of with the following directions:

a) the Special Court, namely, the Principal and Sessions Judge, Madurai is directed to dispose of C.C.No.3 of 2008, pending before it on merits and in accordance with law, at the earliest point of time, being uninfluenced by what is observed hereinabove;

b) the Order, 2005 is perfectly valid and it cannot be said to be in violation of any of the provisions of the Constitution of India and also the provisions of the Electricity Act, 2003 and it is for the Special Court to decide as to who is (whether the Directors of the Company or the Lessee) is responsible for theft of energy on the basis of the oral and documentary evidence let in by the respective parties, as the Special Court, under Section 319 Cr.P.C., has got the power to proceed against the person other than the accused, appearing to be guilty of offence on due evidence recorded in the courses of inquiry or trial and has also got the adequate power to summon any accused, as the circumstances of the case warrant for the said purpose. The Hon'ble Supreme Court, while dealing with the said Section in the case of Sunil Bharti Mittal vs. Central Bureau of Investigation, reported in (2015) 4 SCC 609, held as under:

"....In the first instance, we make it clear that there is no denying the legal position that even when a person is not named in the charge sheet as an accused person, the trial court has adequate powers to summon such a non-named person as well, if the trial court finds that the charge sheet and the documents/material placed along with the charge-sheet disclose sufficient prima facie material to proceed against such a person as well.

No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1. The Secretary,
Tamil Nadu Electricity Regulatory Commission,
No.17, III Main Road,
Seethammal Colony,
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2. The Chairman,
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Rafi Marg, New Delhi.
6. The Principal Sessions Judge,
Madurai.

+1 cc to Mr.K.Srinivasamurthy, Advocate, S.R.No.28718

+1 cc to Mr.P.R.Dhilip Kumar, Advocate, S.R.No.28808

+2 ccs to Mr.A.V.Arumugam , Advocate, S.R.No.28939

RR(CO)
SSM(09/05/2019).

W.P.No.14924 of 2008

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