IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.10.2021

CORAM :

THE HONOURABLE MR.JUSTICE N.ANAND VENKATESH

W.P. No.11580 of 2021
and
W.M.P. No.12329 of 2021

S.Kavitha ... Petitioner

-Vs-

1. The Chairman,
TANGEDCO,
Tamil Nadu Electricity Board,
Anna Salai, Chennai – 600 002.

2. The Assistant Engineer,
TANGEDCO Operation and Maintenance,
No.47, Malaiyappan Street,
Tamil Nadu Electricity Board,
Chennai – 600 012.

3. K.Kannan ... Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorarified Mandamus, calling upon the orders of the 2nd respondent in Lr.No.AE/O&M/F.Court Case/D.No.103/2021 dated 20.4.2021 and to quash the same and to direct the 2nd respondent to issue temporary electricity supply connection for the application made by the petitioner on 05.03.2021 in petitioner's name with respect of petitioner property new Door No.28 (Old No.151) Strahans Road, Otteri, Chennai-600012 without insisting to furnish indemnity bond for Rs.11,13,445/-

For Petitioner : Mr.S.Krishnasamy

For Respondent : Mr.L.Jai Venkatesh
Standing Counsel for R1 & R2

Mr.K.P.Chandrasekaran for R36

ORDER

The background facts of this case was captured in the order passed by this Court on 08.09.2021 and the same is extracted hereunder:

> This writ petition has been filed challenging the proceedings of the second respondent dated 20.04.2021, wherein the petitioner was directed to pay the dues amounting to a sum of Rs. 11,13,455/-, which was caused due to theft of energy that is said to have taken place in the year 2001.
>
> 2. The petitioner is a subsequent purchaser, who had purchased the subject property by virtue of a registered sale deed dated 26.11.2012. According to the petitioner, the theft of energy was committed in the year 2001, when the service connection stood in the name of M/s.S.K. Metals. Therefore, the amount that is due and payable towards energy theft cannot be recovered from the petitioner, since it is in the nature of a personal liability against the person, who committed such theft of energy.
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> 3. The learned standing counsel appearing on behalf of the first and second respondent shall come up with an answer for the following queries:-
>
> (a) Whether the dues recoverable in a case involving theft of energy can be considered as statutory dues which will create a charge over the property and whether the same can be recovered even from a subsequent purchaser?
>
> (b) Whether the dues payable by the erstwhile owner of the property actually creates a charge over the property and it runs with the property and consequentially is recoverable from the subsequent purchaser by treating him like a debtor? and
>
> (c) Whether in a case of theft of energy, the dues which are more in the nature of compounding fees and penalty can be collected from any other person other than the person who committed theft of energy? The learned standing counsel shall also take into consideration the judgment of this Court in [V.B.R.Menon Vs. The Assistant

Executive Engineer and others] in 2016 2 CWC 573.

4.The answers provided for the above three queries will enable this Court to pass a final order in this writ petition.

5. The learned counsel for the petitioner shall also make his submissions on the queries raised by this Court.

6.Post this case under the caption “for orders” on 28.09.2021.

2.The learned counsel for the petitioner submitted that Regulation 17(4) of the Supply Code will not apply in a case of theft of energy. It will only apply in cases where the consumer fails to pay the charges for consumption of electricity or other charges which are due and payable by him under the agreement. The learned counsel submitted that this Regulation will not apply in case of theft of energy. To substantiate his submissions, the learned counsel relied upon the judgment of this Court in V.B.R.Menon vs. The Assistant Executive Engineer, O&M/PORUR/CEDC/South, Tamil Nadu Electricity Board, Porur 110KV SS Complex, Kundrathur Road, Porur, Chennai-16 and others reported in 2016 (2) CWC 573.

3.Per contra, the learned Standing Counsel appearing on behalf of the respondents 1 and 2 relied upon Clause 6.10 of the TNEB Terms and Conditions and also Clause 17 of the Supply Code. The learned Standing Counsel submitted that where the services have been disconnected/dismantled for non-payment of arrears or default in payment of dues, the same will be reconnected or a new service connection will be given only after the payment of the entire dues outstanding by the intending consumer. The learned Standing Counsel submitted that in the present case, the occupant of the property during the relevant point of time had committed theft of energy and he paid the compounding fee only with a view to avoid criminal proceedings. However, the penalty that is payable towards the current consumption charges consumed by the offender, can be collected from the intending consumer who has purchased the property subsequently. Therefore, the learned Standing Counsel justified the demand made by the respondents as a condition precedent for giving fresh service connection in the name of the petitioner. The learned Standing Counsel in order to substantiate his submissions, also relied upon the order passed by this Court in W.P.No.7587 of 2011, dated 29.04.2014.

4.This Court has carefully considered the submissions made on either side and also the materials available on record.

5.The issue involved in the present case has been substantially dealt with in the judgment that was cited by the learned counsel for the petitioner in V.B.R.Menon vs. The Assistant Executive Engineer, O&M/PORUR/CEDC/South, Tamil Nadu Electricity Board, Porur 110KV SS Complex, Kundrathur Road, Porur, Chennai-16 and others referred supra. The relevant portions in the judgment are extracted hereunder:

> 10. In view of the submissions made on either side, the following questions fall for consideration in this writ petition:
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> > (1)Whether the petitioner, who was neither the owner nor the occupier nor enjoyer of the premises, on the date of inspection by the respondents, is liable to pay the Compounding Fee and Penalty as demanded by the respondents, under Section 135 of the Act, for the alleged unauthorised usage of electricity power by the third party?
> >
> > (2)Whether the petitioner is liable to pay the Compounding Fee and Penalty as demanded by the respondents, under Section 135 of the Act, since he has failed to give advance intimation to the Electricity Board with regard to transfer/leasing out of the property to the third party, as required under Regulation 17(4) of the Supply Code?
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> 11. The case of the petitioner is that he had already transferred the property in favour of his sons, who in turn leased out the property to M/s.Zhafir Plastic Machinery India (P) Ltd, an industrial unit. Therefore, on the date of inspection by the respondents i.e, on 26.05.2015, the petitioner was neither the owner nor the occupier or enjoyer of the premises. Hence, he is not liable to pay the amount as demanded by the respondents.
>
> 12. According to the Electricity Board, the petitioner would fall within the meaning of Consumer, since he had not transferred the electricity service connection from his name to the others and the service connection was standing in the name of the petitioner only; therefore, he would fall within the definition of Consumer under Section 2(15) the Electricity Act, 2003; as such, he is liable to pay the compounding fee

and penalty amount under Section 135 of the Act. The liability under Section 135 of the Act is a criminal liability.

13. Before entering into the discussion, it would be appropriate to extract Section 135 of the Act_

> "135. Theft of electricity.-[(1) Whoever, dishonestly,-
>
> (a) taps, makes or causes to be made any connection with overhead, underground or under water lines or cables, or service wires or service facilities of a licensee or supplier, as the case may be; or
>
> (b) tampers a meter, installs or uses a tampered meter, current reversing transformer, loop connection or any other device or method which interferes with accurate or proper registration, calibration or metering of electric current or otherwise results in a manner whereby electricity is stolen or wasted; or
>
> (c)damages or destroys an electric meter, apparatus, equipment, or wire or causes or allows any of them to be so damaged or destroyed as to interfere with the proper or accurate metering of electricity; or
>
> (d) uses electricity through a tampered meter; or
>
> (e) uses electricity for the purpose other than for which the usage of electricity was authorized,"
>
> 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) 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 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.

(1-A) 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 authorized 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 maybe, on deposit or payment of the assessed amount or electricity charges in accordance with the provisions of this Act, shall, without prejudice to the obligation to lodge the complaint as referred to in the second proviso to this clause, restore the supply line of electricity within forty-eight hours of such deposit or payment."

(2)Any Officer of the licensee or supplier as the case may be, authorised in this behalf by the State Government may:

(a)enter, inspect, break open and search any place or premises in which he has reason to believe that electricity has been or is being, used unauthorisedly;

(b)search, seize and remove all such devices, instruments, wires and any other facilitator or article which has been or is being, used for unauthorised 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 92 of 1974), relating to search and seizure shall apply, as far as may be, to searchers and seizure under this Act."

A reading of Section 135 of the Act would show that there must be a prima facie evidence of dishonest intention on the part of the accused person, before invoking the proceedings under Section 135(1)(e of the Act.

Rule 22(a) of Regulation 23AA Chapter IV of the Supply Code defines the "Accused Person" as follows_

"Accused person" shall mean and include the owner or occupier of the premises or his authorized agent or representative or any other person who is in occupation or possession or in charge of the premises at the relevant time of detection of theft of electricity or any other person show has been benefited by the theft of electricity."

A reading of the Rule 22(a) of Regulation 23AA Chapter IV of the Supply Code, along with Section 135 of the Act, would unambiguously go to show that the person who was under the occupation of the premises and committed the offence alone would be held responsible. So far the present case is concerned, the petitioner was neither the owner nor the occupier or enjoyer of the property on the date of inspection; therefore, the petitioner does not come under the ambit of definition of "Accused Person", for initiating the proceedings under Section 135 of the Act.

14. In this regard, a reference could be placed in the judgment relied upon by the learned counsel for the petitioner, delivered by the High Court of Gujarat, reported in CDJ 2009 GHC 003 in the case of Barot Vitthalbhai Damodardas Vs. Natwarbhai Umedbhai Patel, wherein it has been observed as follows_

> "3. It appears that it is an admitted position that at the time when the inspection took place the shop in question - premises was in the occupation of the tenant Patel Pankajkumar Bhikhabhai. The said aspect is also recorded in the complaint by the complainant and the petitioner was not at all in actual occupation or using the shop or the electricity supply. When there is any allegation for fastening of criminal liability, it would be qua the person, who has committed offence and it cannot be extended to the owner of the property, unless there is any specific accusation that the owner is aware about it and he has played role in alleged offence for use of the electricity by the tenant by doing alleged theft. The principles of fastening criminal liability is different than that of civil liability in case of an ownership of the property or the use of the electricity. The language of Section 135 of the Act even if considered as it is, it refers to whoever and the same would mean a person, who is involved in the commission of offence. In a case where the property is owned by a and is given on rental basis on any other agreement or contract known to law to b and when b is in occupation and using the electricity supply, any offence, if detected, such principles of criminal liability may be qua b and it cannot be extended against a in mere capacity as the owner of the property. If the criminal liability is extended to the owner of the property when admittedly the property is in occupation of the person other than the owner in whatsoever capacity it may be, it would be not only result into re-writing the principles of criminal

> liability in absence of any mens rea and other necessary ingredients for fastening criminal liability, but it would also result into miscarriage of justice on the face of it. The law never intends to punish the person, who is not guilty or the person, who cannot be said as guilty on the face of the accusation. If such is permitted, it would, on the face of it, also abuse the process of law."

The dictum laid down in the above judgment would clearly show that if the property is in occupation of the tenant and the tenant is the beneficiary of the alleged offence, he should alone be held responsible under Section 135 of the Act.

15. In fact, in an identical case, in W.P.No.39070 of 2002, in the case of T.M.Marasimhan Vs. The Superintending Engineer, Tamil Nadu Electricity Board, and another, when a tenant approached this Court stating that only the owner of the premises would be held responsible, the contention of the tenant was rejected by the learned Single Judge of this Court by order dated 10.01.2013.

16. In this regard, a reference could be placed in one more judgment delivered by the Division Bench in W.A.No.719 of 2014, dated 27.01.2015, in the case of The Assistant Engineer/O & M Vs. Sabasthi Ammal and Ors, wherein it has been observed as follows:-

> "7...... In short, Section 135 of the Tamil Nadu Electricity Act, 2003 and the explanation of Section 23 of the Tamil Nadu Electricity Supply Code categorically state that for the purpose of the above Section, tampering of meters and theft of energy if the premises in question is occupied by an authorised tenant, the responsibility shall vest with the authorised tenant only. ....
>
> 10......In fact, Section 126 of the Tamil Nadu Electricity Act, 2003 empowers the Assessing Officer to make assessment in the case of unauthorised use of electricity. It specifies that 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 a conclusion that such person in indulging in unauthorised use of electricity, then he shall assess the electricity charges payable by such person or by any other person benefited by such use...."

In view of the dictum laid down in the above decision and considering the factual aspects of the case on hand, I am of the considered opinion that the initiation of the proceedings under Section 135 of the Act and the entire procedure adopted by the respondents during the proceedings of the criminal nature against the petitioner, are not legally sustainable, when admittedly he was neither the owner nor the occupier or enjoyer of the premises on the date of inspection.

17. With regard to the second question, as to whether the petitioner is liable to pay the amount since he failed to give advance intimation to the Electricity Board with regard to the transfer/leasing out of the property, as required under Regulation 17 (4) of the Supply Code, I am of the opinion that when the petitioner does not fall under the definition of "Accused Person", merely for non-communication with regard to transferring/leasing out of the property, he cannot be held responsible. At this juncture, it would be appropriate to extract the Regulation 17(4) of the Supply Code_

> "If the consumer fails to give advance intimation as aforementioned of his intention to sell or lease out or otherwise dispose of the properties or business to which supply is given or contracted for, the licensee shall have the right to recover the charges for consumption and other charges due to the licensee under the agreement even beyond the date of sale or lease out or otherwise disposal of the properties or business."

It is clear from the above Regulation, that lawful dues arising out of the agreement between the Consumer and the Licensee are civil liabilities, being contractual in nature, against which a criminal prosecution under Section 135 of the Act cannot be invoked. Moreover, Regulation 17(1) as well as

Regulation 4 of the Supply Code, list the various types of lawful charges recoverable from the Consumer, in which compounding fee and penalty under Section 135 of the Act do not find a place. Hence, the right to claim lawful dues under Regulation 17(4) cannot be taken as a ground to justify the proceedings against the petitioner under Section 135 of the Act. In this regard, a reference could be placed in the decision of a Division Bench of this Court, in W.A.No.719 of 2014 (cited supra), wherein it has been held as follows_

> "18.Therefore, in the present case, the fact of the matter is that the First Respondent/writ Petitioner by means of an order dated 31.12.2005 was allotted a shed bearing No.915, 28th street, B.V.Colony, Vyasarpadi, Chennai-39 and she is engaged in a small trade of packing salt in small polythene bags and sell the same in retail. Moreover, electricity supply is necessary for her small business and as such, the impugned order dated 17.03.2011 passed by the Appellant/First Respondent recovering the First Respondent/writ Petitioner to pay the sum of Rs.15,53,975/- together with interest to the Tamil Nadu Electricity Board and only when she is willing to pay the aforesaid amount, the new service connection in her name would be considered is not legally a tenable one in the eye of law because of the simple reason for theft of energy or for the benefit enjoyed by a person in regard to the theft of electricity only that particular person can be considered to be an accused person and against whom the Appellant/First Respondent/TNEB can proceed in the manner known to law and in accordance with law. But the First Respondent/writ Petitioner by no stretch of imagination be called upon to pay a sum of Rs.15,53,975/- with interest to the Tamil Nadu Electricity Board and putting a precondition in regard to the above said payment by the Appellant/Tamil Nadu Electricity Board is not correct and legally valid one in the eye of law based on the reason that the First Respondent/writ Petitioner had not committed theft of electricity or energy or even benefited by the theft of electricity which was detected

on 19.04.2001 and in fact, the previous tenant Sengalammal was alone responsible for the same in regard to her electricity connections A/c.67-17-584. Also that, the First Respondent/writ Petitioner who is not at all connected with the previous tenant of the Second respondent/Tamil Nadu Slum Clearance Board in the considered opinion of this Court cannot be imposed with a liability of erstwhile tenant in the absence of any agreement between her and the Electricity supplier, more so when the theft of energy was purportedly detected on 19.04.2001 in A/c.67-17-584, wherein, the theft of energy detected was used by the erstwhile tenant namely, Sengalammal.

19. In view of the foregoing reasons, this Court holds that the demand/claim made by the Appellant/First Respondent through its letter No.AE/O&M/V.Va.No.53, dated 17.03.2011, claiming a sum of Rs.15,53,975/- towards theft of energy charges as penalty from the First Respondent/writ Petitioner is clearly unsustainable in the eye of law and to that effect, we concur with the view taken by the Learned Single Judge in the Writ Petition. However, this Court bearing in mind, Clause 17(9)(a) of the Tamil Nadu Electricity Supply Code, 2004, directs the Appellant/First Respondent to issue a fresh demand notice/communication requiring the First Respondent/writ Petitioner to pay the lawful due electricity consumption charges of the previous occupier/tenant, reconnection charges or other ancillary/incidental charges by specifying the time limit as per relevant rule of the Tamil Nadu Electricity Supply Code, 2004, within a period of two weeks from the date of receipt of a copy of this order. Further, upon payment of the said claim amount by the First Respondent/Writ Petitioner, the Appellant/TNEB is directed to reconnect/restore/provide new service connection as the case may be forthwith."

From a reading of the above decision, it could be seen that in the case of theft of electricity, the person who has committed the theft of electricity and the person who enjoyed the benefit alone could be held responsible. Moreover, Regulations 17(5) to 17(9) contain the provisions for the recovery of such lawful dues from the consumers. The criminal proceedings under Section 135 of the Act do not find a place anywhere among the above recovery measures mentioned in Regulations 17(5) to 17(9). Hence, to invoke the Regulation 17(4) against the petitioner, some pre-existing lawful charges must have been in existence. But, that is not the state of affairs in the case on hand. A reading of Regulation 17(4) of the Supply Code would show that if the consumer fails to give advance intimation about the transfer/leasing of property to the Electricity Board, he is liable to pay the charges payable by the consumer, containing in Regulation 17 (5) to 17(9) of the Supply Code, and not beyond that. But, the Compounding fee and Penalty under Section 135 of the Act, do not come under the ambit of Regulation 17(4). Therefore, I am not inclined to accept the submission made by the learned Standing Counsel for the Electricity Board that since the petitioner failed to give advance intimation about the transfer/leasing out of the property, he alone is liable to pay the charges; and the said submission of the learned Standing Counsel has no legal force.

6.It is clear from the above that insofar as the payment of penalty towards current consumption by theft of energy, the same can only be imposed against the occupier of the property who committed such theft of energy and the liability cannot be shifted to any other person. The compounding fee or the penalty as the case may be is collected more by way of a punishment against the offender who committed theft of energy. It is trite law that insofar as commission of offences are concerned, the consequences of the same can never be shifted to any other person from the offender. The concept of vicarious liability is unknown to criminal law since the commission of a crime involves mens rea and the same can be attributed only to the person who commits the crime and it cannot be shifted to anyone else. Therefore, this Court is in complete agreement with the reasoning of the learned Judge in the above judgment.

7.Insofar as Regulation 17(4) of the Supply Code is concerned, the learned Judge has again categorically held that the same will not apply in cases falling under theft of energy. The reason assigned by the learned Judge to the effect that this Regulation will apply only in case of recovery of lawful dues from the consumer, makes all the difference when it comes to the same recovery being attempted to be made by way of penalty in cases of theft of energy. The recovery from the subsequent consumer with regard to the pre-existing charges will only confine itself to the lawful charges and it cannot be extended to penalty that is imposed for theft of energy.

8.In the considered view of this Court, the above judgment will squarely apply to the facts of the present case and hence the demand made by the 2nd respondent through the impugned proceedings dated 20.04.2021, is unsustainable in law. It goes without saying that this amount is recoverable from the person who committed the theft and it is always left open to the respondents to proceed against the offender.

9.In view of the above discussion, the impugned proceedings of the 2nd respondent dated 20.04.2021 is hereby quashed and there shall be a direction to the 2nd respondent to process the application submitted by the petitioner on 05.03.2021 after collecting the necessary charges and the service connection shall be effected in the name of the petitioner, within a period of two weeks from the date of receipt of copy of this order.

10.As a result, this writ petition stands allowed with the above direction. No Costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

ssr

To
1. The Chairman,
TANGEDCO,Tamil Nadu Electricity Board,
Anna Salai, Chennai - 600 002.

2. The Assistant Engineer,
TANGEDCO Operation and Maintenance,
No.47, Malaiyappan Street,
Tamil Nadu Electricity Board,
Chennai - 600 012.

+1cc to M/s.L.Jaivenkatesan, Advocate, S.R.No.55951
+1cc to M/s.K.P.Chandra Sekaran, Advocate, S.R.No.55955
+1cc to M/s.s.Krishnasamy, Advocate, S.R.No.56036

W.P. No.11580 of 2021
and W.M.P. No.12329 of 2021

RR(CO)
RGA(22/11/2021)