In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side

The Hon'ble Justice Sabyasachi Bhattacharyya

WPA No. 19463 of 2021

With

WPA No. 12586 of 2013

Sukumar Das
Vs.
The West Bengal State Electricity Distribution Company Limited and others

For the petitioner	:	Mr. Sujit Kumar Rath
For the WBSEDCL	:	Mr. Sumit Kumar Panja, Mr. Sumit Ray
Hearing concluded on	:	03.02.2022
Judgment on	:	15.02.2022

Sabyasachi Bhattacharyya, J:-

1. The two writ petitions are taken up together for hearing since they arise from connected issues. The petitioner Sukumar Das is a consumer of electricity under the West Bengal State Electricity Distribution Company Limited (WBSEDCL), having Consumer ID No. 212096986.

2. A team of the WBSEDCL held an inspection of the petitioner's Husking Mill on May 24, 2012 in the absence of the petitioner. The petitioner alleges that, as on that day, the said unit was closed. A person, in the version of the petitioner a stranger, was arrested by the inspecting team on the allegation of theft of energy. The said person was subsequently enlarged on bail and ultimately acquitted in a criminal proceeding from all charges of theft.

3. Although a provisional assessment order was apparently passed by the distribution licensee, the petitioner contends that the same was never communicated to him but was sent only to the said stranger who had been arrested. Hence, the petitioner argues that the petitioner had no scope to raise any objection to the said provisional assessment within the purview of Section 126 of the Indian Electricity Act, 2003 (hereinafter referred to as 'the 2003 Act').

4. No final assessment order having been communicated to the petitioner subsequently, he was also no able to prefer any statutory appeal within time in terms of the provisions of Section127 of the 2003 Act. As a result, the petitioner moved the first writ petition bearing W.P.A. No.12586 of 2013 praying for reconnection of electricity to his unit.

5. Only on November 9, 2021, Memo No. BD/E/1819 was issued by the Divisional Manager, Belda Division of the WBSEDCL demanding from the petitioner-consumer an amount of Rs. 4,81,062/- as purported arrear dues, payable within the due date of November 24, 2021. In the said Memo, the distribution licensee threatened that the power of the petitioner's premises would be disconnected and not resumed unless such amount was paid. The said Memo has been challenged by the petitioner in W.P.A. No. 19468 of 2021 and is annexed at page 27 (Annexure P-7) of the said writ petition.

6. No demand was ever raised by the distribution company for any outstanding dues from the petitioner, except normal current bills which were continuously sent to him. As such, there was no occasion for the petitioner to have prior notice of the final order of assessment and/or the provisional order of assessment at the relevant juncture.

7. *Vide* Order dated June 10, 2013 passed in W.P.A. No.12586 of 2013, previously numbered as W.P. 12586 (W) of 2013, a learned Single Judge of the this Court directed reconnection of the electric supply to the petitioner's unit on payment of Rs.4,50,000/- by the petitioner, without prejudice to the rights and contentions of the parties.

8. On a subsequent appeal having been preferred against the said order dated June 10, 2013, bearing FMA No.2758 of 2013 and a connected application bearing CAN 7865 of 2013, a Division Bench of this Court took up the appeal for hearing on October 3, 2013 and modified the order of the learned Single Judge to the extent that the reconnection of electricity supply to the Husking Mill of the petitioner of the petitioner was subjected to payment of Rs. 4,00,000/-, also without prejudice to the rights and contentions of the parties in the pending writ petition(s).

9. Thereafter the petitioner, as mentioned above, has been allegedly paying regularly all current bills raised by the distribution licensee but on November 9, 2021, the impugned Memo was issued with a threat of disconnection in default of payment of Rs.4,81,062/-.

10. It is contended by learned counsel for the petitioner that the demand of Rs.4,81,062/- was made without any copy of the provisional or final order of assessment being served on the petitioner. The disconnection was effected at the petitioner's Husking Mill without any intimation to the petitioner at any point of time. As such, it is argued that the petitioner had no opportunity at all of representation his case on the provisional order of assessment and/or preferring an appeal against the final order of assessment at any point of time, let alone within the limitation period as stipulated in law.

11. The second demand dated November 9, 2021, impugned in W.P.A. No.19463 of 2021, has been made during pendency of the first writ petition that is W.P.A. No.12586 of 2013 *de hors* the law, even without indicating amount to be outstanding in any of the current bills sent to the petitioner during the entire period in between.

12. Thus, it is submitted that not only was the disconnection for alleged theft by a stranger unlawful but, in view of the subsequent acquittal of the accused in the criminal proceeding for theft, it has been proved beyond reasonable doubt that the allegation of theft was entirely misplaced. Thus, it is argued tht there was no justification for disconnection of electric supply of the petitioner in the first place.

13. It is further argued that, since the provisional assessment order was never communicated to the petitioner, the petitioner could not avail the opportunity to raise objection to the same under Section 126 of the 2003 Act. Subsequently, the final order of assessment was also not communicated to the petitioner, thus, precluding the petitioner also from preferring any statutory appeal within the stipulated limitation period as envisaged under Section 127 of the 2003 Act. Hence, the exorbitant demand of Rs.4,81,062/-, it is submitted, is also not sustainable in law.

14. Moreover, learned counsel for the petitioner contends, since the demand *vide* Memo dated November 9, 2021 was never raised earlier and is being made for the first time after expiry of about eight years from the alleged ate of default, the said claim is squarely barred by limitation as per Section 56(2) of the 2003 Act.

15. Hence, the petitioner seeks a quashing of the order and Memo dated November 9, 2021 and sustenance of the electric supply to the petitioner.

16. Learned counsel for the distribution license, on the other hand, submits that the petitioner cannot bypass the statutory limitation period and move the present applications under Article 226 of the Constitution of India, thereby giving a go-by to the provision of appeal as provided in Section 127 of the 2003 Act. Since the said Section provides that "*any person aggrieved by a final order made under Section 126 may prefer an appeal*", it was always open to the petitioner to challenge the final assessment by way of an appeal. In fact, no separate communication of the provisional or final order of assessment was required upon the petitioner, since it is evident from the conduct of the petitioner that the petitioner had full knowledge of such provisional assessment and the final assessment at all material times. In fact, by preferring the writ petition as long back as in the year 2013, contemporaneously with the disconnection, the petitioner betrayed his knowledge in respect of such provisional assessment and, subsequently, the final assessment order.

17. Learned counsel for the distribution licensee places reliance on an unreported judgment of a co-ordinate bench of this Court dated May 16, 2012 passed in W.P. No.18100 (W) of 2009 where it was held that the adjudication of claims for unauthorised use of electricity under Section 126 of the 2003 Act operates in a entirely different field from a prosecution of an offence under Section 135 of the said Act and that the standard of proof of the proceedings are also different. The co-ordinate bench further held that he purpose and object of the two proceedings are entirely different – one is to ascertain the liability for unauthorised use of electricity and the other is to punish an offender for committing a crime. It was ultimately held that the petitioners in the said case were not entitled to refund of the amount paid by them in response to the final assessment bill raised under Section 126 of the 2003 Act, merely on the ground that they have been acquitted of the charge of theft of electricity.

18. Learned counsel further places reliance on the judgment of *Executive Engineer, Southern Electricity Supply Company of Orissa Limited (SOUTHCO) and another Vs. Sri Seetaram Rice Mill*, reported *at 2012 (2) SCC 108.*

19. Learned counsel for the distribution licensee also relies on another unreported judgment of the Supreme Court delivered on August 21, 2019 in *West Bengal State Electricity Distribution Company Ltd. and others Vs. M/s. Orion Metal Pvt. Ltd. and another* in *Civil Appeal No.6547 of 2019.*

20. In both the said judgments, the Supreme Court observed that from the scheme of the 2003 Act, cases of theft as contemplated un Sections 135 and 154 of the 2003 Act may amount to 'unauthorised use of energy' as envisaged in Section 126 of the said Act, but the converse may not always be true, since all unauthorised use of energy cannot be labeled as theft.

21. It is, thus, contended by the distribution licensee that the acquittal of Subal Das, the accused in the theft case, subsequently did not mitigate the liability of the present writ petitioner/consumer of depositing the amount which was assessed under Section 126 of the 2003 Act, first provisionally and then finally.

22. In order to decide the present case, the following sections of the 2003 Act are required to be looked into:

> *"**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 judgments the electricity charges payable by such person or by any other person benefited by such use.*
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> *(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 maybe 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 the section shall be made at a rate equal to 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 authorised; or

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

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

(2) No appeal against an order of assessment under sub-section (1) shall be entertained unless an amount equal to [half of the assessed amount] is deposited in cash or by way of bank draft with the licensee and documentary evidence of such deposit has been enclosed along with the appeal.

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

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

(5) No appeal shall lie to the appellate authority referred to in sub0section (1) against the final order made with the consent of the parties.

(6) When a person defaults in making payment of assessed amount, he, in addition to the assessed amount shall be liable

to pay, on the expiry of thirty days from the date of order of assessment, an amount of interest at the rate of sixteen per cent, per annum compounded every six months.

154. (Procedure and power of Special Court).--- *(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, every offence punishable under [2sections 135 to 140 and section 150] shall be triable only by the Special Court within whose jurisdiction such offence has been committed.*

(2) Where it appears to any court in the course of any inquiry or trial that an offence punishable under sections 135 to 139 in respect of any offence that the case is one which is triable by a Special Court constituted under this Act for the area in which such case has arisen, it shall transfer such case to such Special Court, and thereupon such case shall be tried and disposed of by such Special Court in accordance with the provisions of this Act :

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

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

(3) The Special Court may, notwithstanding anything contained in subsection (1) of section 260 or section 262 of the Code of Criminal Procedure, 1973, try the offence referred to in sections 135 to 139 in a summary way in accordance with the procedure prescribed in the said Code and the provisions of sections 263 to 265 of the said Code shall, so far as may be, apply to such trial :

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

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

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

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

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

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

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

23. It is evident from the language used in Section 126 that a provisional assessment under the said provision can be done within sub-section (1) thereof upon inspection of any place or premises or the equipment or gadgets, etc. found connected or used or of the records maintained by any person, by the Assessing Officer upon coming to the conclusion that such person is indulging in unauthorised use of electricity. The provisionally assessed amount is payable by such person or by any other person benefitted by such use.

24. By the expression "such person", sub-section (1) of Section 126 indicates a person who is indulging in unauthorised use of electricity. The electricity charges was assessed provisionally is payable by "such person" or "by any other person benefitted by such use".

25. Sub-section (2) of Section 126 provides that the order of provisional assessment shall be served upon the person "in occupation or possession or in charge of the place or premises."

26. Sub-section (3) stipulates that 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 and is entitled to a reasonable opportunity of hearing before the final order of assessment is passed by the Assessing Officer.

27. Sub-section (4) also gives opportunity only to persons served within the contemplation of sub-section (2) to accept such assessment and deposit the assessed amount within seven days of service of such provisional assessment order upon him.

28. Section 127, on the other hand, gives opportunity to "any person aggrieved" by a final order made under Section 126 to prefer an appeal within 30 days of the said order before the appellate authority.

29. Arguably, a chink is left by the legislature in framing the language of Section 126, insofar as it does not provide specifically and distinctly that the order of provisional assessment has to be served upon the consumer, whose electric connection is cut off. Subsection (2) of Section 126 contemplates service on persons in occupation or possession or in charge of the place or premises. However, it may very well be that the consumer is neither in occupation or possession of the place or that the charge of the place or premises has been left with the same person other than the consumer.

30. Unfortunately, sub-sections (3) and (4) give opportunity of filing objection and being afforded reasonable opportunity of hearing only to persons who have been served within the contemplation of sub-section (2), thereby omitting to include distinctly and separately the consumer, who shall be the worst sufferer inasmuch as her/her connection is severed. Although Section 127 uses the language "any person aggrieved by a final order" made under Section 126, which may, again arguably, include a consumer as well, such an appeal at the behest of a particular consumer who has not been served with the provisional assessment order or the final order of assessment will be entirely illusory in nature. Since the consumer, in such a case, does not have any opportunity of presenting her/her case before the Assessing Officer on the provisional assessment order, the opportunity as envisaged in Section 12692) is entirely lost on such a consumer. As such, there would be no material before the appellate authority to adjudicate the dispute completely, since such a consumer does not have any opportunity of disputing the provisional order in the first place. Even in respect of the final order, it would be difficult to contemplate how a consumer who has not received a copy of the final order of assessment can assail such an order for the first time before the appellate authority. Mere knowledge of an assessment order having been made cannot be equated with being served a specific copy of the provisional and/or final order. The two stand on an entirely different footing.

31. Thus, by no stretch of imagination, could the petitioner-consumer in the present case, without any service of either the provisional or final order of assessment, have any opportunity to assail either of the two before the Assessing Officer and/or the appellate authority respectively.

32. Section 135 of the 2003 Act merely deals with theft of electricity and its penal consequences.

33. Section 154 is inseparably linked with Section 135 and also deals with offences punishable under Sections 135 to 140 and Section 150 of the 2003 Act. Although sub-sections (5) and (6) of Section 154 deal with determination of the civil liability for theft, such determination has to be done by a Special Court as appointed under the 2003 Act.

34. In the present case, however, there was no assessment of civil liability by any Special Court at any point of time. Even the accused person, Subal Das was acquitted from the charge of theft in the criminal proceeding, thereby denuding the allegation of theft of its credibility.

35. The assessment in the present case was entirely within the contemplation of Section 126 of the 2003 Act. As such, in the absence of any pleading or proof as to service of the provisional or final orders of assessment on the petitioner/consumer at the relevant point of time, no liability could be fixed on the petitioner either for contesting the provisional assessment meaningfully or for preferring an appeal against the final order.

36. The allegation of the distribution licensee as regards the purported knowledge of the petitioner, allegedly evident from the pleadings in the writ petition bearing W.P.A. No.12586 of 2013, which was contemporaneous with the disconnection, does not stand on firm footing. It is so, because mere knowledge, as discussed above, cannot be equated with service of copies of the provisional and final assessment orders on the petitioner. Of course, a statute cannot be interpreted with the presumption that it would create an absurdity. However, in the present case, there is no scope of reconciling such gap in Section 126 of the 2003 Act. Mere introduction of the expression "and the consumer" in sub-section (2) of Section 126 would suffice to take care of such anomaly. It is expected that the legislature will look into such apparent lacuna and take remedial steps at the earliest in order to avoid future complications of frivolous nature.

37. In the present case, even if the petitioner had knowledge in 2013 about a provisional assessment and/or a final assessment being made by the distribution licensee and the pendency of the criminal proceeding on the allegation of theft, there is nothing on record to establish that the service upon the said Subal Das, who was the accused person allegedly found to have committed theft amounted to good service on the petitioner, who is the consumer and was not involved in the entire operation of detection of alleged theft at all on the relevant date.

38. Hence, it cannot be said that the petitioner was liable in any matter for the theft alleged, all the more so since ultimately the charge of theft against Subal Das was dropped by the court and the said accused acquitted by a competent criminal court. The distinction between the scopes of operation of Sections 126, 135 and 154 of the 2003 Act have no bearing in the present case, since the allegation of theft was the sole "unauthorised use" of electricity alleged by the distribution licensee, which smudges the distinction between the two for the purpose of making the petitioner liable in any manner.

39. As such, although the disconnection of electric supply to the petitioner's premises might have been justified on the perception of theft of the concerned Assessing Officer on the basis of an inspection of the Husking Mill, such reconnection lost justification upon the accused Subal Das being discharged on the allegation of theft and acquitted from the criminal case.

40. Insofar as the provisional and final assessment are concerned neither of those is binding on the petitioner-consumer, who is the worst sufferer for such disconnection.

41. For abundant caution, the distribution licensee ought to serve a notice of the provisional and final orders of assessment on the consumer as well, in the event such consumer does not fall within the ambit of "such person as contemplated in Section 126 of the 2003 Act", in bind the consumer.

42. No such notice having been served on the consumer at the relevant point time, it would be said that the electric supply of the petitioner's Husking Mill will not be restored for non-payment of the amounts assessed provisionally or finally. None of the said orders were served on the petitioner and, as such, insofar as the petitioner is concerned, the electric supply to his Husking Mill ought to have been restored unconditionally by the distribution company immediately upon acquittal of Subal Das from the charge of theft. An alternative *modus operandi* available to the petitioner was to serve a notice of the provisional and/or the final order of assessment on the petitioner, which might have arguably entitled the distribution licensee to fix responsibility for non-payment and/or absence of challenge to such orders by the petitioner. However, in the absence of any such notice, the petitioner cannot suffer for the disconnection after the criminal case was disposed of on acquittal of the accused person on the charge of theft. On such acquittal, the very basis of disconnection was shaken and the provisional and final orders of assessment lost credibility at least insofar as the petitioner is concerned.

43. Hence, the distribution licensee acted arbitrarily and patently *de hors* the law and its powers in refusing to restore the electric connection of the petitioner in the absence of any challenge of the final order or payment in terms of the said order of assessment.

44. However, since the distribution licensee deals with public money and, in the event the said company is directed to pay damages to the petitioner from the date of disconnection and/or at least from the date of acquittal of the accused Subal Das, the punishment would in all probability be disproportionately large as compared to the wrong done. Hence, it is deemed that non-payment of the electric charges during the entire relevant period, during which the electric supply remained disconnected, would be sufficient penalty for the distribution company.

45. In view of the aforesaid discussions W.P.A. No.12586 of 2013 and W.P.A. No.19463 of 2021 are allowed, thereby setting aside the provisional and final assessment order of the WBSEDCL. The WBSEDCL is directed to restore electric connection to the petitioner's Husking Mill immediately, positively within a week from date if not already restored, without charging a single paisa by way of electricity charges or other dues. Needless to say, no further charges including reconnection charges shall be levied by the distribution company for such reconnection.

46. However, upon such restoration of connection within a week from date as directed, if not already restored, the petitioner shall go on paying current electricity charges and other charges, if due in law from the petitioner to the distribution licensee, subject to bills being raised duly in that regard by the WBSEDCL. The WBSEDCL will be at liberty to take appropriate steps in accordance with law in the event of subsequent default on the part of the petitioner in making such payments.

47. There will be no order as to costs.

48. Urgent certified copies of this order shall be supplied to the parties applying for the same, upon due compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)