

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

W.P.A. No. 14580 of 2015

Tapan Sen Majumdar

Vs.

**The West Bengal State Electricity Distribution Company Limited and
others**

For the petitioner	:	Mr. Sanjay Mukherjee
For the WBSEDCL	:	Mr. Sumit Kumar Panja, Mr. Sumit Ray
Hearing concluded on	:	11.07.2022
Judgment on	:	15.07.2022

Sabyasachi Bhattacharyya, J:-

1. The petitioner has sought for a direction for refund of Rs.81,668/- along with interest, that is, the amount paid by the petitioner on account of a provisional bill raised by the West Bengal State Electricity Distribution Company Limited (WBSEDCL) on the allegation of theft.
2. Learned counsel for the petitioner contends that the only allegation made in the provisional bill dated June 18, 2007 was that, allegedly, the petitioner had consumed electricity of an entire commercial premises by bypassing of meter by tapping from the service wire through another PVC wire.

- 3.** In the complaint made before the Inspector-in-Charge, Bankura Police Station, it was also alleged that during inspection it was found that the petitioner was consuming electricity by theft with the help of bypassing device after bypassing the meter. It is argued that theft is a common ingredient between 'unauthorised use' of electricity as envisaged in Section 126 of the Electricity Act, 2003 (hereinafter referred to as 'the 2003 Act') and Section 135 of the 2003 Act. Since the petitioner was honourably acquitted in connection with the theft case under Section 135, the petitioner is automatically exonerated from liability under Section 126.
- 4.** Since the amount paid by the petitioner pursuant to an order of co-ordinate Bench in a different writ petition was on account of fifty per cent of the provisional bill, it is submitted that the petitioner is entitled to refund of the entire amount with interest.
- 5.** Learned counsel for the petitioner next contends that no final order of assessment was ever passed by the WBSEDCL in respect of the petitioner's electricity meter. As such, although the petitioner was given the opportunity to file objection to the provisional assessment order, there was no hearing on the same for the purpose of passing a final order of assessment, thus precluding the petitioner from preferring a challenge under Section 127 of the 2003 Act.
- 6.** It is submitted that Section 154(6) of the 2003 Act contemplates refund in case of excess payment having been made on account of provisional bill. In the present case, since the provisional bill stands obliterated in view of the acquittal of the petitioner on the self-same

ground of theft in the criminal case, the petitioner is entitled to such refund.

7. It is contended that no basis, as envisaged under Section 126(5) of the 2003 Act, has been disclosed in the provisional bill for arriving at the quantum of dues, thereby vitiating the said bill.
8. Learned counsel for the petitioner further contends that since the petitioner did not get any opportunity to prefer an appeal under Section 127 of the 2003 Act due to no final assessment order being passed, the writ petition is maintainable under Article 226 of the Constitution of India, in the absence of alternative remedy being available to the petitioner.
9. By distinguishing the judgment reported at (2020) 18 SCC 588 [*West Bengal State Electricity Distribution company Limited and others Vs. Orion Metal Private Limited and another*], learned counsel submits that it was held therein that two parallel proceedings can proceed under Sections 26 and 135 on the same allegation of unauthorised use of electricity, however, the said judgment reflects a basis of assessing provisional bill under Section 126, which is absent in the present case. Moreover, it was not decided therein as to whether the liability under Section 126 subsists even after acquittal of the consumer in the criminal case under Section 135. In fact, it is contended, there was no occasion for the Supreme Court to consider the effect of exoneration in a proceeding under Section 135.
10. Insofar as the judgment reported at (2012) 8 SCC 108 [*Executive Engineer, Southern Electricity Supply Company of Orissa Limited*

(SOUTHCO) and another Vs. Sri Seetaram Rice Mill] is concerned, it is argued by learned counsel for the petitioner that, in the said case, Section 135 of the 2003 Act did not fall for consideration. It was a judgment on Section 126 of the 2003 Act simpliciter and the basis of assessment was disclosed in the said judgment. However, in the present case, it is an admitted position that the meter reading could not be taken in respect of the alleged defaulting meter.

11. Learned counsel for the petitioner also cites a Division Bench judgment of the Allahabad High Court rendered in *Sandeep Kesarwani Vs. State of U.P.*, reported at *MANU/UP/1049/2014*, to indicate that the ground of theft is common in respect of Sections 126 and 135 of the 2003 Act. It is further submitted, by placing reliance on an unreported judgment of this Court dated February 15, 2022 passed in *WPA No.19463 of 2021 with WPA No.12586 of 2013 [Sukumar Das Vs. The West Bengal State Electricity Distribution Company Limited and another]*, that in the event the charge of theft is established and the consumer is acquitted by the criminal court, no liability remains under Section 126 of the 2003 Act.
12. Insofar as a previous complaint lodged by the petitioner on similar grounds before the Consumer Forum is concerned, the matter had ultimately gone up to the National Commission which refused to interfere on the ground that the Consumer Forum had no jurisdiction to take up the dispute.
13. Learned counsel for the respondent-Authorities submits, by placing reliance on *Orion Metal* (supra) and *Seetaram Rice Mill* (supra) that the

Supreme Court amply elaborated the scope of operation of Sections 126 and 135 of the 2003 Act therein. It was held categorically that the two proceedings can run parallelly and are distinct from each other in their respective scopes of operation.

- 14.** It is contended by the respondents that the provisional assessment order was previously challenged and that no objection had been filed by the petitioner to the provisional assessment. As such, a final order of assessment, even if were to be passed, would merely be a replica of the provisional assessment.
- 15.** However, in that context, learned counsel for the petitioner points out that it is stated in the writ petition that the petitioner had filed an objection to the provisional assessment, which has not been specifically denied by the respondent-Authorities in its opposition.
- 16.** It is further contended that Section 154 of the 2003 Act, particularly, the Explanation thereto, does not deal with a liability under Section 126 and, as such, does not come to the aid of the petitioner in the present case.
- 17.** In view of the provisional assessment order being previously challenged, it is submitted, the present challenge is not maintainable. Moreover, it is argued that in view of the provision of appeal under Section 127, which is an equally efficacious alternative remedy, the writ petition ought to be dismissed.
- 18.** A comparative study of Sections 126 and 135 of the 2003 Act shows that 'theft' or 'pilferage' is a common ground both in unauthorised use and theft as dealt with by the said Sections respectively.

Explanation (b) to Section 126 defines “unauthorised use of electricity” to mean the use of electricity through a tempered meter, which is also a part of the definition of theft of electricity.

19. As per the judgment cited by the parties, it is well-settled that the two provisions, that is, Section 126 and 135, operate in separate fields and parallel proceedings under both provisions may concurrently run. Whereas Section 126 deals with a civil liability, Section 135 is about criminal liability. The standards of proof in case of both are different. Whereas in a proceeding under Section 135, the charge of theft has to be established beyond reasonable doubt in consonance with the standard of criminal courts, in case of Section 126, preponderance of probability is the yardstick to assess materials for coming to a conclusion in respect of provisional bill.
20. In the present case, it is seen from the provisional assessment bill (Annexure P-2 at page 18 of the writ petition) that the same was raised on the ground of malpractice and theft of energy by way of bypassing the meter by tapping from the service wire through another PVC wire. The allegation of malpractice and unauthorised use was entirely based on such allegation.
21. On the other hand, the complaint lodged by the WBSEDCL on June 16, 2007 before the Inspector-in-Charge, Bankura Police Station (Annexure P-1 at page 17 of the writ petition) reveals that the consumer was allegedly consuming electricity by theft with the help of bypassing device after bypassing the meter.

22. The time of commission of the alleged offence has been mentioned in both the provisional bill and the complaint to be between 15.15 hrs and 16.30 hrs which are identical.
23. Hence, there cannot be any doubt that the proceeding under Section 135 and the provisional assessment under Section 126 were on the basis of the self-same allegation.
24. The standard of proof, as discussed earlier, is stricter in a criminal proceeding in a proceeding under Section 135 of the 2003 Act. The allegation has to be proved in such a case beyond reasonable doubt, which is of a far higher degree than preponderance of probability, which is applicable to an assessment under Section 126 of the 2003 Act.
25. It is seen from the materials-on-record that the petitioner was acquitted in the criminal case on the allegation of theft.
26. Even as per *Seetaram Rice Mill* (supra), the High Court can interfere with a provisional order of assessment under Article 226, since no appeal under Section 127 of the 2003 Act is available against the same.
27. Although it was held in *Orion Metal* (supra) that two parallel proceedings are maintainable and can go on simultaneously under Sections 126 and 135 of the 2003 Act, it has been clarified further that all instances of unauthorised use of energy, although may not amount to theft within the meaning of Section 135, but at the same time, the theft of electricity, which is covered by Section 135 of the Act, will fall within the definition of 'unauthorised use of electricity'.

'Tampered meter' is a common ground for both the said Sections and is the only allegation levelled against the petitioner in the present case in both the proceedings under Section 126 and 135 of the 2003 Act. Since the petitioner has been acquitted scot-free in the criminal proceeding under Section 135 on the self-same allegation, it cannot be said that, on a preponderance of probability, the petitioner can be indicted for the same charge.

- 28.** Inasmuch as availability of Section 127 is concerned, no such appeal lay in the present case, since no final order of assessment was made by the WBSEDCL at any point of time. Even if the petitioner had not filed a written objection to the provisional assessment, it was the incumbent duty of the distribution licensee to pass a final order of assessment within 30 days from the date of service of the order of provisional assessment on the consumer, in terms of sub-section (3) of Section 26 of the 2003 Act.
- 29.** Although the provisional assessment bill, annexed at page 18, indicates that a calculation sheet was enclosed therewith, there is nothing on record to indicate that the assessment had been made in terms of sub-section (5) of Section 126 of the Act.
- 30.** In any event, since no final order of assessment was drawn up on the basis of the provisional assessment, the provisional order of assessment spent its force after 30 days from service of the provisional assessment order on the petitioner.
- 31.** That apart, the allegation made by the petitioner in the writ petition, that a written objection was filed to the provisional assessment

bill, having been, at best, evasively denied in the affidavit-in-opposition by the WBSEDCL, it has to be deemed that a written objection was actually filed by the petitioner. However, no opportunity of hearing was given to the petitioner on the provisional assessment bill, let alone taking into consideration the written objection.

32. The proposition laid down by the Division Bench of the Allahabad High Court in *Sandeep Kesarwani* (supra) strengthens the proposition advanced by the petitioner, inasmuch as no final order of assessment was passed within 30 days as per Section 126(3) of the 2003 Act in the said case as well.
33. Inasmuch as *Sukumar Das* (supra) is concerned, the consideration therein was different from the instant case, inasmuch as the provisional order of assessment was never served on the petitioner in the said case. As such, the provisional and final assessment orders in the said matter were observed to be not binding on the petitioner-consumer.
34. Inasmuch as Section 154 of the 2003 Act is concerned, the Explanation to sub-section (6) thereof indicates that, for the purposes of the said 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. Although Section 126 has been kept out of the purview of the said Explanation, the only occasion of a 'civil liability', loss or damage incurred by the licensee due to commission of an offence referred to in Section 135 of the Act, can arise under sub-section (5)

which provides that 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 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. It further provides that the amount of civil liability so determined, shall be recovered as if it were a decree of a civil court.

- 35.** Sub-section (5) of Section 154 further provides that, in case of civil liability so determined finally by the Special Court being less than the amount deposited by the consumer or the person, the excess amount which was deposited by the consumer to the licensee shall be refunded by the licensee 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.
- 36.** It transpires from a proper interpretation of Section 154(6) that the Explanation thereto refers to the civil liability as specified in sub-section (5) of Section 154 and not the amount raised as provisional assessment under Section 126 of the Act.
- 37.** Be that as it may, since it has been observed above that the provisional assessment bill raised by the WBSEDCL spent its force and cannot stand in the view of the acquittal of the petitioner on the self-same allegation in the proceeding under Section 135 of the 2003 Act, it is only appropriate that the petitioner is directed to refund

whatever amount was paid by the petitioner in connection with the proceeding under Section 126.

- 38.** It is revealed from Annexure P-3 at page 19 of the writ petition, which is a copy of an order dated June 26, 2007 passed by a co-ordinate bench in WP No.13447(W) of 2007, that the petitioner was directed to pay fifty per cent of the amount specified in the provisional bill dated June 18, 2007, that is, Rs.1,63,335/-, which comes to Rs.81,668/-.
- 39.** Accordingly, WPA No.14580 of 2015 is allowed, thereby directing the WBSEDCL to refund the amount of Rs.81,668/- with interest at the rate of 6 (six) per cent from the date of deposit of the said amount pursuant to the order dated June 26, 2007 till such payment is made to the petitioner.
- 40.** There will be no order as to costs.
- 41.** 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.)

Later:

Learned counsel for the WBSEDCL seeks a stay of operation of the above order.

Such prayer is opposed by learned counsel for the petitioner.

Since certain questions of interpretation of law are involved, such stay is granted till August 15, 2022.

(Sabyasachi Bhattacharyya, J.)