

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

The Hon'ble Justice Sabyasachi Bhattacharyya

W.P.O. No. 94 of 2021

**Pearl Corporation
Vs.
Calcutta Electric Supply Company Ltd. and others**

For the petitioner	:	Mr. Tapas Dutta, Mr. Mritunjay Halder
For the CESC	:	Mr. Suman Ghosh, Mr. Debanjan Mukherji
Hearing concluded on	:	21.03.2022
Judgment on	:	04.04.2022

Sabyasachi Bhattacharyya, J:-

1. The petitioner has challenged the provisional and final orders of assessment, culminating in a bill dated October 15, 2020, issued under Section 126 of the Electricity Act, 2003 (herein after referred to as “the 2003 Act”) and quashing of an FIR registered at the behest of the Distribution Licensee under Section 135 of the 2003 Act, as well as recovery of the amount of Rs. 1,50,000/- (Rupees One Lakh Fifty Thousand only) paid by the petitioner in that regard.
2. Learned counsel for the petitioner argues that in view of the Distribution Licensee patently lacking jurisdiction to issue the provisional and final assessment bills, the writ petition under

Article 226 of the Constitution of India is maintainable, despite the final assessment being appellable.

3. It is argued that, since a specific allegation of theft has been brought against the petitioner and a proceeding initiated under Section 135 of the 2003 Act, the purported provisional and final assessments under Section 126 of the said Act were beyond jurisdiction.
4. Learned counsel places reliance on the judgment of *WBSEDCL Vs. Orion Metal Private Limited*, reported at (2020) 18 SCC 588, for advancing the proposition that the operation of Sections 126 and 135 of the 2003 Act are distinct in their scope of operation. It was held by the Supreme Court in the said judgment, *inter alia*, that the assessed amount, relating to assessment contemplated under Section 126(1) of the Act, is distinct from the scope of Section 135 of the Act. While observing about the distinction between the two provisions, the Supreme Court held that Section 126 forms part of the Scheme which authorizes an electricity supplier to ascertain loss in terms of the revenue caused to it by the consumer by his act of “unauthorised use of electricity”, whereas Section 135 deals with the offence of theft if he has been found to have indulged himself in the acts mentioned in Clauses (a) to (e) of Sub-Section (1) of Section 135 of the 2003 Act. It was observed further that it is also clear from Section 154 of the Act, which prescribes procedure and power of the Special Court, that the Special Court is empowered to convict the consumer and impose a sentence of imprisonment and also to determine civil liability under Section 154(5) of the Act.

5. Learned counsel submits, however, that the observation of the Supreme Court in Paragraph No.15 of *Orion Metal* (supra) was contrary to a Three-Judge Bench decision of the Supreme Court rendered in *Executive Engineer, Southern Electricity Supply Company of Orissa Limited (Sourthco) and another Vs. Sri Seetaram Rice Mill*, reported at (2012) 2 SCC 108.
6. In Paragraph No.15 of *Orion Metal* (supra), a Two-Judge Bench of the Supreme Court considered *Sri Seetaram Rice Mill* (supra) and observed, *inter alia*, that the said Bench did not find any valid reason for making a distinction as made by the High Court applying Section 126 of the Act. From the Scheme of the Act, it appears that after inspection team notices unauthorised use of energy by tampering the meter, the authorities can disconnect the power supply immediately and make immediate assessment for loss of energy, by invoking power under Section 126(1) of the Act. The term “*unauthorised use of energy*” was held to be of wide connotation. The Supreme Court further found that there may be cases of unauthorised use of energy, not amounting to theft, which are cases namely exceeding the sanctioned load or using the electricity in the premises where its use is not authorised, etc. But, at the same time, it was observed, when there is an allegation of unauthorised use of energy by tampering the meter, such cases of unauthorised use of energy include “*theft*” as defined under Section 135 of the Act.
7. By placing reliance on the Three-Judge Bench decision of the Supreme Court rendered in *Sri Seetaram Rice Mill* (supra), learned

counsel submits that the Supreme Court, in the said judgment, categorically observed that Section 135 of the 2003 Act falls under Part-XIV relating to “offences and penalties” and the title of the Section is “Theft of Electricity”. In contradistinction to the said provision, Section 126 of the 2003 Act would be applicable to the cases where there is no theft of electricity but the electricity is being consumed in violation of the terms and conditions of supply leading to malpractices which may squarely fall within the expression “unauthorised use of electricity”. Section 135 of the 2003 Act, it was held, deals with an offence of theft of electricity and the penalty that can be imposed for such theft. This squarely falls within the dimensions of criminal jurisprudence and *mens rea* is one of the relevant factors for finding a case of theft. On the contrary, Section 126 of the 2003 Act does not speak of any criminal intendment and is primarily an action and remedy available under the Civil Law. It does not have features or elements which are traceable to the criminal concept of *mens rea*. Therefore, the Supreme Court held, there is a clear distinction between the cases that would fall under Section 126 on the one hand and Section 135 on the other and there is no commonality between them in law. They operate in different and distinct fields. The word “dishonest” was considered by the Supreme Court to qualify an offence under Section 135, whereas, in contradistinction to this, the intention is not the foundation for invoking powers under Section 126 of the 2003 Act.

8. It is, thus, submitted that the said clear distinction between Sections 126 and 135 of the 2003 Act, as iterated in *Sri Seetaram Rice Mill* (supra) by a Three-Judge Bench of the Supreme Court, was virtually overruled by the subsequent Two-Judge Bench in *Orion Metal* (supra). In such view of the matter, it is argued by learned counsel for the petitioner that the prior Three-Judge Bench judgment, being rendered by a Bench of higher strength, ought to be followed as a precedent in preference to *Orion Metal* (supra), so far as this court is concerned.
9. Learned counsel for the petitioner submits that the petitioner was merely heard in connection with Section 135 of the 2003 Act. However, no prior hearing and/or notice were given to the petitioner regarding the assessment under Section 126 of the Act.
10. The petitioner, it is submitted, had to put in an amount of Rs. 1,50,000/- (Rupees One Lakh Fifty Thousand only) in order to get bail in the criminal proceeding initiated against the petitioner on the ground of theft of electricity. However, in view of no prior notice and/or hearing having been given to the petitioner in connection with the proceeding for assessment under Section 126, the said proceeding and the resultant assessments were *de hors* the law and patently without jurisdiction. Sections 126 and 135 do not and cannot operate simultaneously, it is contended by learned counsel for the petitioner.
11. Learned counsel appearing for the CESC Limited contends that the petitioner appeared, through an agent and thereafter through an

advocate, before the authorities in connection with the hearing under Section 126 of the 2003 Act.

12. Contrary to the submissions of the petitioner, it is argued that the proceeding under Section 135 was initiated independently from the proceeding under Section 126, there being no conflict between the two.
13. Learned counsel appearing for the CESC Limited, in support of his submissions, cites a Division Bench judgment of this Court rendered in *Talat Sahmid Vs. The W.B.S.E. Distribution Co. Ltd. & Anr.*, reported at (2015) 5 CHN (Cal) 165, for the proposition that every case of unauthorised use of electricity may not lead to the conclusion that there is theft of energy, however, vice-versa is true as every case of theft of energy amounts to unauthorised use of electricity also.
14. That apart, learned counsel for the CESC Limited argues that the proposition laid down in *Sri Seetaram Rice Mill* (supra) is not applicable to the facts of the present case. In the said case, it is contended, no allegation of theft was dealt with, as opposed to the present case. It has not been laid down in *Sri Seetaram Rice Mill* (supra) that proceedings under Section 126 and Section 135 of the 2003 Act cannot go on parallelly.
15. Upon hearing learned counsel for the parties, it is evident that, after disconnection on October 8, 2020, a notice was given by the CESC Limited to the petitioner, as annexed at page 24 (Annexure R-2) of the affidavit-in-opposition used by the CESC Limited. It was clearly indicated therein that the electricity supply of the petitioner was

disconnected due to detection of “unauthorised use of electricity”. Again, the order of provisional assessment dated October 8, 2020 clearly enumerates that hooking was found from service cut-out of the CESC Limited located at the petitioner’s premises.

- 16.** In the said order, it has also been mentioned that the charges for unauthorised use of electricity had been assessed provisionally.
- 17.** The said order is annexed at page 25 of the affidavit-in-opposition of the CESC Limited.
- 18.** The petitioner has taken a consistent stand that although the petitioner was represented by his agent and advocate, they appeared in connection with the proceeding under Section 135 of the 2003 Act. However, as evident from Annexure R-4 of the affidavit-in-opposition of CESC Limited (at page 28 thereof), the petitioner’s agent confirmed full and final acceptance of the order of provisional assessment under Section 126 of the 2003 Act. Hence, the final order of assessment only remained a mere formality.
- 19.** A vakalatnama was also filed on behalf of the petitioner by an advocate in connection with the matter, which has been annexed at page 34 (Annexure R-5) of the affidavit-in-opposition.
- 20.** There is evidence galore from the materials-on-record, annexed by both the parties, that the CESC Limited undertook proceedings under Section 135 as well as under Section 126 of the 2003 Act simultaneously.
- 21.** Undoubtedly, as per the observations made in the cited judgments of the Supreme Court, it was clarified that Sections 126 and 135 operate

on different footings; however, the petitioner's argument that the Two-Judge Bench decision of the Supreme Court rendered in *Orion Metal* (supra) cannot be a binding precedent in view of the said judgment having 'overruled' the Three-Judge Bench decision in *Sri Seetaram Rice Mill* (supra), is unacceptable.

22. The Two-Judge Bench, in *Orion Metal* (supra), categorically considered *Sri Seetaram Rice Mill* (supra) in paragraph no.14 of the said judgment and upon an interpretation of the same proceeded to observe that there was no valid reason for making a distinction in applying Section 126 of the 2003 Act. In view of the Two-Judge Bench, in the subsequent judgment of the Supreme Court, having considered and interpreted the Three-Judge Bench decision, there cannot remain any option before this Court to overlook and ignore the proposition laid down in the latter, that is, *Orion Metal* (supra) as not binding. The rule of precedence clearly stipulates that, in the event a previous judgment of the Supreme Court is considered and interpreted in a particular manner by a subsequent judgment, the later judgment prevails as a precedent.

23. The situation might have been different if the Two-Judge Bench decision did not take note of the prior Three-Judge Bench decision; however, such an academic exploration is futile in the present case as the Two-Judge Bench decision categorically considered and interpreted the prior Three-Judge Bench decision of *Sri Seetaram Rice Mill* (supra).

- 24.** It is evident from the materials-on-record that the petitioner was represented through an agent and an advocate at various stages of the matter, including the proceeding under Section 126 of the 2003 Act. The agent of the petitioner acting on behalf of the petitioner had categorically conceded to the provisional assessment quantum as raised by the CESC Limited. Hence, the petitioner cannot now resile from such position and controvert the provisional and consequent final orders of assessment.
- 25.** In the present case, the post-disconnection notice clearly mentioned hooking as well as the unauthorised use of electricity as charges levelled against the petitioner, thereby prompting the CESC Limited to initiate proceedings under Section 135 as well as Section 126 of the 2003 Act parallelly and independently.
- 26.** Although the two provisions are independent and distinct from each other, there are several areas of intersection between the two.
- 27.** The Explanation (b) to Section 126 defines “unauthorised use of electricity”. Clause (iii) thereof envisages usage of electricity through a tampered meter to fall within the purview of unauthorised use.
- 28.** Section 135(1)(d), on the other hand, also contemplates usage of electricity through a tampered meter, although qualified by the expression ‘dishonestly’, to come within the ambit of Section 135 of the 2003 Act. Thus, there are common areas between the two provisions. There may be a distinction with regard to the consequences of the two Sections, one being a civil liability and the other having penal consequences, the expression “unauthorised use

of electricity” is a genus, of which ‘theft’ is a species. Hence, although all instances of unauthorised usage of electricity are not thefts, all thefts come within the ambit of “unauthorised use of electricity”.

29. Since ingredients of both have been indicated in the allegations made against the petitioner by the CESC Limited in its several communications to the petitioner, there is nothing to vitiate the parallel conduct of the provisional and final assessment under Section 126 of the 2003 Act on the one hand and criminal proceedings for theft under Section 135 of the 2003 Act on the other.
30. Hence, the plinth of the submission of the petitioner, that the CESC Limited acted patently *de hors* the law and without jurisdiction in claiming a bill on the basis of provisional and final assessment orders, is not tenable in the eye of law and, as such, is turned down.
31. In the event the petitioner had a grievance against the final order of assessment, after the provisional assessment merged into the same, the remedy before the petitioner, in ordinary course, would lie in an appeal under Section 127 of the 2003 Act.
32. However, since the petitioner in the present case, through his agent, squarely admitted and conceded to the provisionally assessed amount, the final assessment reached on the basis of such provisional assessment by the CESC Limited cannot now be challenged by the petitioner before any forum whatsoever.
33. In such view of the matter, the present writ petition fails.
34. Accordingly, W.P.O. No.94 of 2021 is dismissed on contest without any order as to costs.

- 35.** 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.)