D/L. 15.
April 20, 2023.
MNS.

WPA No. 3942 of 2021

Amal Sarkar
Vs.
The West Bengal State Electricity Distribution Company Limited and another

Mr. Sounak Bhattacharya,
Mr. Sounak Mandal,
Mr. Anirban Saha Roy

…for the petitioner.

Mr. Srijan Nayak
Mrs. Rituparna Maitra

…for the WBSEDCL.

The petitioner has challenged an order passed by the appellate authority under Section 127 of the Electricity Act, 2003 (in short “2003 Act”), whereby the appellate authority did not set aside the final order of assessment, but modified the same by reducing the hours of calculations of pilferage to twelve from fourteen per day.

Learned counsel for the petitioner submits that an order of acquittal was passed by the criminal court, which was taking up the case against the petitioner for theft under Section 135 of the 2003 Act. It was categorically observed by the criminal court that the alleged offence could not be proved by any cogent evidence by the

West Bengal State Electricity Distribution Company Limited (WBSEDCL). As such, the same logic ought to be applied to the present case as well, since the assessment was entirely on the premise of pilferage.

Learned counsel appearing for the petitioner, in this context, cites a judgment of this Court reported at *2022 SCC OnLine Cal 1971 (Tapan Majumdar Versus West Bengal State Electricity Distribution Company Limited and others).* It is submitted that in the said case as well, on the basis of acquittal in a proceeding under Section 135 of the 2003 Act, an assessment under Section 126 of the 2003 Act was set aside.

Learned counsel next argues that a specific modality of calculation has been stipulated in Section 126(5) of the 2003 Act, which does not get reflected either in the final order of assessment or the appellate authority's impugned order. Hence, on such ground, the assessment ought to be set aside.

It is further contended by the petitioner that the petitioner has already deposited the entire assessed amount by way of condition for getting bail. As such, it is argued that the entire amount ought to be refunded to the petitioner on the above grounds.

Learned counsel appearing for the WBSEDCL controverts such submissions and argues that the criminal court's findings have no bearing on the assessment under Section 126 of the 2003 Act, as well-settled by several charges, both by this Court as well as the Supreme Court. The two proceedings are parallel and stand on different footings.

It is argued that test of proof in a criminal case is "beyond reasonable doubt", whereas in case of a civil assessment under Section 126 of 2003 Act, it is "preponderance of probability".

It is next argued that in the event there is any discrepancy in the process adopted by the Distribution Licensee under Section 126 of the 2003 Act, it could definitely be a justified ground for interference under Article 226 of the Constitution of India. However, in the present case, there is no such discrepancy to invite the jurisdiction of this Court under Article 226 of the Constitution.

Over and above, learned counsel for the WBSEDCL contends that the impugned order was passed as long back as in the year 2016.

However, the writ petition has only been preferred in the year 2021. In the absence of any explanation in the writ petition for the said delay, the present equitable remedy sought by the petitioner ought not to be granted.

A scrutiny of the order, whereby the petitioner was acquitted from the proceeding under Section 135 of the 2003 Act, shows that the same was rendered on March 13, 2019, that is, three years after the order of the appellate authority. As such, *prima facie*, the same could not have any bearing on the order of the appellate authority to vitiate the same.

However, even taking the best case of the petitioner on such score, a perusal of the several components of the said order indicate that in paragraph no. 19 of the same, the Criminal Court observed that no one made any attempt to ascertain the quantum of units of electricity (actual or tentative), which has been illegally used by the accused. At the time of evidence, it was further observed, the Officer (PW1) of WBSEDCL did not state any single word as regards the quantum of the electricity in units, which have been used illegally. Similarly, it was recorded, the accused also did not dispute and/or challenge the final order of assessment made by WBSEDCL under Section 127 of the 2003 Act, which was not the position as on that date.

The accused had, in fact, challenged the final order of assessment under Section 127 of the 2003 Act, which ultimately met with the order impugned herein.

Hence, one of the premises of the criminal court's order, that the accused did not dispute or challenge the final order of assessment made by the WBSEDCL, is erroneous.

It was also recorded that the accused had paid the entire theft bill on July 13, 2016. Therefore, the criminal court observed that it was "not in a position to determine civil liability" in absence of any evidence in this regard.

However, the Special Court taking up the application under Section 135 of the 2003 Act further observed that in view of the discussions indicated above, it appeared that the accused was entitled to get "benefit of a doubt" in respect of the offence punishable under Section 135(1)(b) of the 2003 Act due to insufficient evidence. On such ground, it was ultimately held that the petitioner was found not guilty on the charge under Section 135(1)(b) of the 2003 Act and was acquitted.

Hence, it is clearly reflected from the order of the criminal court itself that the same was ultimately passed on the premise that the benefit of doubt ought to be extended to the petitioner because of insufficient evidence being produced.

Such finding was vis-à-vis the prosecution having failed to prove the charge under Section 135(1)(b) of the 2003 Act, thereby directly connecting the two.

A composite reading of the said observations clearly indicates that the standard of proof on which the petitioner was acquitted was purely that followed in a criminal proceeding, that is, “beyond reasonable doubt”.

Hence, it cannot be said that without any iota of doubt that the same will hold good for absolving the petitioner from his liability to deposit the civil amounts assessed by the authorities.

Inasmuch as the cited judgement is concerned, in the said case, there were certain other distinguishing features as well. In paragraph no. 37 of the said judgement, it was observed by the court as follows :

> *“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."

It is clear from the said observation that it played in the mind of the court, crucially, that the provisional assessment bill raised by the WBSEDCL had spent its force.

Moreover, in paragraph no. 28 of the said judgment, it was observed by the court that inasmuch as availability of Section 127 is concerned, no such appeal lay in the said case, since no final order of assessment was made by the WBSEDCL at any point of time.

The court proceeded on the premise that even if the petitioner had filed a written objection to the provisional order of assessment, it was the incumbent duty of the Distribution Licensee to pass a final order of assessment within thirty days.

It was held in paragraph no. 30 that 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 thirty days from service of the provisional assessment order to the petitioner.

Such features, however, are entirely absent in the present case.

Since the remedy under Article 226 of the Constitution is an equitable remedy, this Court is also required to be conscious of the fact whether the petitioner has come with clean hands.

The petitioner took his chance by preferring challenge under Section 127 of the 2003 Act against the final order of assessment and long thereafter, that is, after about five years, has preferred the present writ petition, apparently taking a cue from the acquittal of the petitioner in the criminal court.

Hence, there is no reason why, at this belated juncture, the petitioner's attempt to upset the conclusion of the appellate authority, drawn before the acquittal, should be allowed.

In so far as the allegation of non-reflection of the modalities envisaged in Section 126(5) of the 2003 Act in either the appellate authority's order or the final order of assessment is concerned, a perusal of the said Section reveals that there is no mandate at all for the authorities to elaborately state the exact calculations on the basis of which the ultimate order was passed at the stage of the final order.

In general, it is the common practice of the Distribution Licensees to reflect such calculations in the provisional order of assessment. Upon written objection being filed against the same and hearing the parties, the final order of assessment is passed.

In the present case, the petitioner has withheld the provisional order of assessment and thereby an adverse inference can be drawn against the petitioner. Even without any such adverse inference, the mere non-mention of the exact calculation method apropos Section 126(5) of the 2003 Act cannot itself be so fatal so as to vitiate the entire order of final assessment.

The petitioner has failed to demonstrate by way of calculations that the quantum arrived at by the authorities was *de hors* the law or contrary to the mode of calculation specified in Section 126(5) of the 2003 Act.

Hence, there is no scope of interfering with the impugned order of the appellate authority on such ground alone.

Keeping in view that the petitioner has exhausted all forums and has taken a chance in the present writ petition, coupled with the above discussions, there is no scope of interference in the present matter.

Accordingly, WPA No. 3942 of 2021 is dismissed on contest.

There will be no order as to costs.

Urgent photostat certified copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Sabyasachi Bhattacharyya, J.)