

In the High Court at Calcutta
Constitutional Writ Jurisdiction

Appellate Side

The Hon'ble Justice Sabyasachi Bhattacharyya

W.P.A. No.7850 of 2016

CESC Limited
Vs.
The Appellate Authority and others

For the petitioner/ CESC Limited	:	Mr. Subir Sanyal, Mr. Om Narayan Rai, Mr. Debanjan Mukherjee
-------------------------------------	---	--

For the private respondent Nos.2 to 5	:	Mr. Debashis Saha, Mr. Moniruzzaman
--	---	--

Hearing concluded on	:	22.03.2023
----------------------	---	------------

Judgment on	:	03.04.2023
-------------	---	------------

Sabyasachi Bhattacharyya, J:-

1. The CESC Ltd, a distribution licensee operating in West Bengal, has preferred the instant writ petition under article 226 of the Constitution of India, challenging an order dated February 8, 2016 passed by the Appellate Authority under Section 127 of the Electricity Act, 2003.
2. Upon an allegation of theft having been made by the CESC, a complaint was lodged against the private respondent Nos. 2 to 5 and a proceeding initiated under Section 135 of the 2003 Act. A parallel

proceeding under Section 126 of the 2003 Act was also initiated against the said private respondents. A provisional order of assessment was made and, thereafter, upon hearing the private respondents, a final order of assessment was passed by the Assessing Officer of the CESC on November 11, 2015, thereby holding that the private respondents were guilty of unauthorised use of electricity.

3. The private respondents, being thus aggrieved, preferred an appeal against such final order under Section 127 of the 2003 Act. The Appellate authority, by its order dated February 8, 2016, disposed of the appeal by holding that the assessment made against the present private respondents was unjustified and the same was quashed and set aside. The petitioner CESC was, however, given liberty to take appropriate action against the appropriate person committing such unauthorised use of electricity, after proper verification of the address.
4. Being dissatisfied with the said order of the appellate authority, the CESC has preferred the instant writ petition.
5. Learned counsel for the petitioner argues that the appellate authority acted in a perverse manner in setting aside the final order of assessment without any concrete reason for doing so. It is submitted that since the assessing authority exercised discretion available to him in law in a particular way on the basis of the materials on record, the appellant authority acted without jurisdiction in quashing it.
6. Learned counsel contends that the scope of adjudication of civil liability under Section 126 is on the basis of “preponderance of probability”. However, the appellate authority proceeded on the

premise that no strict proof beyond reasonable doubt was produced by the CESC to incriminate the private respondents.

7. Learned counsel for the CESC places reliance on several photographs of the site of alleged pilferage, along with the complaint filed before the Officer-in-Charge of the Jorasanko Police Station and a seizure list obtained from the alleged site of pilferage to contend that such documents clearly show that the private respondents were guilty of unauthorised use of electricity, including theft.
8. It is submitted that in a proceeding under Section 126 of the 2003 Act, the allegation need not be proved to the hilt. It is submitted that the 'Best Judgment Rule' should be applicable to such a case. The assessing officer, who was a part of the inspecting team as per the provisions of law, gave a clear report indicating the involvement of the private respondents in the act of unauthorised use of electricity, which was sufficient to pass the provisional order of assessment. Subsequently, the private respondents appeared in the hearing on the provisional assessment but failed to rebut the evidence produced by the CESC. Hence, the assessing officer acted well within his jurisdiction to pass the final order of assessment on the basis of the provisional assessment.
9. Learned counsel argues that the assessing officer clearly came to the conclusion on the basis of materials on record that the private respondents are residents of premises no. 116/H/1, M. G. Road, Kolkata-700 007. Although it was recorded by the assessing officer that the photographs indicated that the white wire which was used for

pilferage entered the said premises into one room of the third floor, the private respondents have not produced any document whatsoever to indicate that they were residents of a different floor.

10. It is argued that the reliance placed by the appellate authority on the involvement of the premises No. 116/H/5, M. G. Road is a third case beyond the pleadings of the parties. It is argued that the said premises have no relevance to the present adjudication.
11. Learned counsel for the petitioner/CESC cites a judgment reported at (2020) 18 SCC 588 [*West Bengal State Electricity Distribution Company Limited and others Vs. Orion Metal Private Limited and another*] to argue that a proceeding under Section 126 of the 2003 Act is to be decided on the basis of preponderance of probability, which takes into account the “Best Judgment Rule”.
12. The CESC also places reliance on *Commissioner of Sales Tax, Madhya Pradesh Vs. H.M. Esufali, H.M. Abdulali, Siyaganj, Main Road, Indore*, reported at (1973) 2 SCC 137 to reiterate the “Best Judgment Rule”.
13. Learned counsel for the CESC submits that the concept of ‘inspection’ in Section 126 includes the power of the assessing officer to undertake an enquiry in order to ascertain whether any unauthorised use was going on and, if so, who was/were responsible for it. In the present case, since the CESC produced clear evidence of pilferage and unauthorised use of electricity at premises no. 116/H/1, where the private respondents admittedly reside as well, there was no reason for the appellate authority to reverse the findings of the assessing officer. It is argued that credence has to be given to the opinion of the

assessing officer inasmuch as a report, as contemplated in Section 126, is concerned.

- 14.** Learned counsel appearing for the private respondents argues that the final order of assessment was tainted by patent perversity. No document or other evidence was produced by the CESC to prove the involvement of the private respondents in the alleged unauthorised use of electricity, it is contended. It was the burden of the CESC Ltd. to prove the involvement of the private respondents, which it miserably failed to discharge.
- 15.** Learned counsel next argues that in view of the private respondents having been exonerated by the Special Court under Section 135 of the 2003 Act, against which no further steps were taken by the CESC before any superior forum, the said order had attained finality. Hence, the appellate authority was justified in reversing the final order of assessment.
- 16.** Learned counsel appearing on behalf of the private respondents cites a judgment reported at *2020 SCC OnLine SC 886 [State of Rajasthan and others Vs. Heem Singh]* to argue that the standard of proof in a disciplinary proceeding ought to have been adopted in the present case.
- 17.** In the absence of any proof that the private respondents reside on the third floor of premises no. 164/H/1, coupled with the fact that the private respondents have produced documents along with their affidavit-in-opposition to show that each of them resides elsewhere than 164/H/1, the final order of assessment incriminating the private

respondents was bad in law and in fact and rightly set aside by the appellate authority.

- 18.** The private respondents, in their affidavit-in-opposition, contend that they are respectable persons in the locality, run hotels there and pay huge amounts for consumption of electricity. Hence, it is argued that there was no occasion for the private respondents to commit theft of electricity. In fact, the private respondents have hinted in their opposition that they are entitled to refund of the fifty per cent of the claim amount which they had deposited at the time of filing the appeal.
- 19.** Hence, it is argued, the writ petition at the instance of the CESC should be dismissed.
- 20.** The first question which arises for consideration is whether the private respondents are entitled to be relieved of their liability to pay under Section 126 of the 2003 Act in view of their acquittal in the criminal proceeding under Section 135.
- 21.** A photocopy of the certified copy of Order No. 39 dated March 29, 2022 passed by the Special Judge in Special Case No. 02 of 2016 shows that the accused private respondents were discharged on the basis of the Final Report (FRT) filed by the police in the criminal case. A copy of the FRT has also been produced by the private respondents, which shows that due to want of evidence, the private respondents were discharged. Although the brief facts of the case appearing in the said report is next to illegible, a closer scrutiny shows that the accused persons appealed before the “electricity Tribunal” (probably

meaning the appellate authority under Section 127 of the 2003 Act) where the CESC authority failed to produce any evidence against the accused persons, for which the accused persons' appeal was allowed. In this respect, it was further recorded by the police, the accused persons had also submitted a letter annexed with the order of the "tribunal". The above facts, according to the police themselves, were ascertained from the advocate of the accused.

- 22.** The police, upon such considerations, went on to suggest in the FRT that the case against the private respondents/accused persons be dropped.
- 23.** Such considerations, in the absence of any appreciation of the evidence produced (which the police, in any event, did not have the authority to do), were a travesty of the investigation process. On the basis of such a farce of a report, the private respondents were discharged.
- 24.** It is well-settled that the civil liability in a proceeding under Section 126 of the 2003 Act is assessed on the basis of 'preponderance of probability', which is a much lesser degree of proof than 'beyond reasonable doubt', which is the standard of proof in a criminal proceeding under Section 135. Being discharged in a criminal proceeding on such high standard of proof, particularly in the context of the inadequate police report, cannot *per se* be a reasonable basis of absolving the private respondents of their civil liability, which has to be proved on a much lenient standard of proof.

- 25.** In any event, the assessing officer gave an opportunity of hearing to the private respondents and considered all the unrebutted evidence produced by the CESC to come to its ultimate conclusion. Thus, the appellate authority acted in a perverse manner in reversing the same on flimsy grounds.
- 26.** Much stress was laid by the appellate authority on the issue of no proof being furnished regarding the residence of the private respondents at premises no. 116/H/5. However, there is precious little on record to indicate that the theft was being performed for the benefit of the said premises, apart from the bald averment of the private respondents themselves in their appeal. The appellate authority arbitrarily proceeded on the premise that nothing was proved regarding premises no. 116/H/5, whereas the CESC never alleged any pilferage being committed there or that the private respondents reside there. The consistent case of the CESC is that the pilferage took place at premises no. 116, M.G. Road, where the meters-in-question are located, and the tampered electricity went to premises no. 116/H/1, where the private respondents reside.
- 27.** In fact, the private respondents, in their written contentions before the appellate authority, clearly admit that they reside, inter alia, in respect of a “small portion” of the building at premises no. 116/H/1, where they are “mere” tenants. However, there is nothing on record to indicate that the private respondents produced any document to show the exact extent or location of their tenancy in the said building.

- 28.** The seizure list conclusively shows that about 4 metres of PVC-insulated black copper wire with hooking arrangement used for direct connection from the service cut-out was found, along with about 19 metres of aluminium wire (pre-insulated, black in colour) used for distribution of electricity. Signatures of two witnesses are also found on the seizure list.
- 29.** Importantly, the initial complaint lodged by the CESC, contemporaneous with the alleged discovery of unauthorized use of electricity, clearly mentions that on enquiry in the locality it was learnt that the private respondents, all of 116/H/1, M.G. Road, were beneficiaries of the unauthorized abstraction of electricity and they used the electricity to run domestic establishment at premises no. 116/H/1, which was situated “just beside” premises no. 116, where the meters were located and from where the pilferage was taking place.
- 30.** It is notable that the CESC, in their complaint, mentioned that the private respondents were committing unauthorized use of electricity, punishable not only under Section 135 (theft) but also Section 138 (relating to interference with meters or works of licensee and unauthorized activities) of the 2003 Act.
- 31.** Hence, even apart from the allegation of pure theft, complaints of unauthorized use of electricity were clearly levelled against the private respondents. Thus, in any event, the allegations against the said respondents were not restricted to pure theft, but also encompassed other unauthorized use of electricity as contemplated in Section 126.

As such, an acquittal under Section 135 *ipso facto* does not come to the rescue of the private respondents, inasmuch as the wider allegation of unauthorized use, justifying clamping of Section 126 even independently of theft, came into play.

- 32.** Another aspect of the matter cannot be overlooked. A liability assessment-proceeding under Section 126 of the 2003 Act is, after all, not a full-fledged civil suit or judicial proceeding. Even as per the language of the section, the inspection by the assessing officer has to be given primacy unless, of course, rebutted by cogent material.
- 33.** The officer dealt in his complaint with his inspection at the place, particular premise and of the devices found connected as well as undertook a painstaking enquiry which revealed the direct involvement and primary role of the private respondents in the unauthorized use of electricity. The assessing officer was a party to the inspection team and passed the order of provisional assessment to the best of his judgment, which was modified in final order of assessment upon hearing the private respondents.
- 34.** No fault can be found in such valid exercise of authority by the assessing officer for the appellate authority to upset his conclusions. The appellate authority overlooked clinching evidence of unauthorized use by way of photographs, articles of seizure and failed to lend sufficient weight to the presumption of correctness attached to the assessment made on the basis of the assessing officer's personal inspection, thereby giving a go-bye both to Section 126 of the 2003 Act

and the presumption attached to official acts under Section 114 (e) of the Indian Evidence Act.

35. Thus, the order of the appellate authority cannot survive judicial scrutiny.
36. The private respondents have gone so far as to claim refund of the fifty per cent of assessed amount deposited by them for preferring the appeal. However, the refund contemplated in Section 154 (6) of the 2003 Act can be granted only if the civil liability determined is less than amount deposited.
37. The judgments cited by the petitioner on the score of preponderance of probability being the standard of proof in proceedings under Section 126 of the 2003 Act, as opposed to criminal proceedings under Section 135, lay down a well-settled proposition of law and there cannot be any quarrel with the same.
38. However, the 'best judgment' principle harped on by the CESC, although applicable to an extent, cannot be so sacrosanct so as to obviate the necessity of some *prima facie* evidence. Even on such score, there is evidence galore in the present case to indict the private respondent, as discussed above.
39. Insofar as the decisions relied on by the private respondents are concerned, *Heem Singh (supra)* lays down that an honourable acquittal in a criminal proceeding may lead to dismissal of charge. However, in the present case, the acquittal was on technical grounds and not "honourable" in any sense of the term. Hence the said decision only strengthens the petitioner's case.

- 40.** In *Phool Singh (supra)*, the Supreme Court relied on *Heem Singh (supra)* and reiterated the principle that the court has the jurisdiction to interfere when the findings in the enquiry are based on no evidence or when they suffer from perversity. A failure to consider vital evidence is an incident of what the law regards as a perverse determination of fact.
- 41.** In the present case, however, the relevant evidence clearly points to unauthorized use of electricity by the private respondents. We also have to keep in mind that a disciplinary proceeding is visited by penal action, whereas, for the purpose of Section 126 of the 2003 Act, the decision is on the civil liability to pay the licensee for loss or damage suffered by it due to unauthorized use of electricity. The two cannot be exactly equated.
- 42.** In fine, the above considerations unerringly indicate that the appellate authority's decision reversing the final order of assessment and absolving the private respondents of their liability to pay was perverse and the decision-making process was not only unlawful but contrary to evidence.
- 43.** The private respondents never challenged the calculations or quantum of assessment at any point of time as being faulty; hence, there does not arise any scope of further scrutiny of the same.
- 44.** The decision of the appellate authority cannot, therefore, survive judicial scrutiny and ought to be set aside.
- 45.** Accordingly, WPA 7850 of 2016 is allowed, thereby setting aside the order dated February 8, 2016 passed by the appellate authority and

restoring the final order of assessment dated November 11, 2015 passed by the assessing officer, CESC Ltd. whereby the private respondents were directed to pay an amount of Rs. 3,19,060/-.

- 46.** There will be no order as to costs.
- 47.** Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)