**In the High Court at Calcutta**

**Constitutional Writ Jurisdiction**

**Appellate Side**

**The Hon'ble Justice Sabyasachi Bhattacharyya**

**W.P.A. No.23810 of 2006**
**+**
**CAN 1 of 2008 (CAN 3516 of 2008)**
**+**
**CAN 2 of 2012 (CAN 11378 of 2012)**

**Badal Chandra Shit**
**Vs.**
**State of West Bengal and others**

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|---|---|---|
| For the petitioner | : | Mr. Subir Sanyal,<br>Mrs. Sumita Sen,<br>Mr. Sutirtha Das |
| For the WBSEDCL | : | Mr. Sumit Kumar Panja,<br>Mr. Sumit Ray |
| Hearing concluded on | : | 27.03.2023 |
| Judgment on | : | 04.04.2023 |

**Sabyasachi Bhattacharyya, J:-**

**1.** The writ petitioner is a consumer of electricity under the West Bengal State Electricity Distribution Company Limited (WBSEDCL). The petitioner runs a husking mill. An allegation of theft was made against the petitioner and a proceeding initiated under Section 135(1)(b) and (c) of the Electricity Act, 2003 (hereinafter referred to as, "the 2003 Act").

**2.** The WBSEDCL also made a provisional order of assessment under Section 126 of the 2003 Act to the tune of Rs.2,78,369/-. The petitioner obtained anticipatory bail from a co-ordinate bench of this Court on August 23, 2006 on condition of deposit of 1/4th of the provisional bill amount dated July 8, 2006.

**3.** Challenging the said provisional assessment bill dated July 8, 2006, the present writ petition was filed.

**4.** During pendency of the writ petition, an order of acquittal was passed in favour of the petitioner in connection with the criminal case under Section 135 of the 2003 Act.

**5.** The petitioner filed CAN 11378 of 2012 (subsequently renumbered as CAN 2 of 2012). In the said application, it was pointed out that the petitioner had applied for reconnection of electricity upon acquittal.

**6.** However, the WBSEDCL, *vide* Memo No. NGR/1519 dated September 12, 2012, asked the petitioner to pay the rest of the assessed amount and disconnection and reconnection charges within September 15, 2012 to avail restoration of his industrial connection. It was further intimated by the WBSEDCL in the said Memo that the industrial connection had already been converted to deemed permanent disconnection and his agreement terminated but that a scope had been opened up for reconnection of such type of deemed permanent connections up to September 15, 2012, which opportunity the petitioner was asked to avail.

**7.** Learned counsel for the petitioner argues that in view of the primary allegation against the petitioner being meter tampering, which finds place in the definitions of both “unauthorized use of electricity” and “pilferage/theft” respectively within the contemplations of Sections 126 and 135 of the 2003 Act, the acquittal of the petitioner in the criminal case on similar ground absolves the petitioner of the liability to pay the provisionally assessed amount. Hence, the said amount ought to be waived, the amount already deposited as condition of anticipatory bail be refunded and the electricity connection of the petitioner to be immediately restored.

**8.** Learned counsel submits that in the meantime, a final order of assessment was passed under Section 126, which is cryptic and, as such, ought to be set aside on such ground alone.

**9.** Learned counsel for the petitioner cites an unreported judgment of this Court dated July 15, 2022 in *WPA 14580 of 2015 [Tapan Sen Majumdar Vs. The West Bengal State Electricity Distribution Company Limited and others]*, in which case, in view of acquittal of the writ petitioner on the self-same allegation under Section 135 as in the proceeding under Section 126, the licensee was directed to refund the entire amount paid by the petitioner in connection with the proceeding under Section 126.

**10.** Learned counsel places the provisions of Sections 126, 135 and 154 of the 2003 Act to develop his argument. It is submitted that the restoration of electricity connection is to be given on deposit of the entire amount assessed. Placing reliance on sub-section (5) of Section 154, it is argued that the Special Court taking up the proceeding under Section 135 also has to determine the civil liability against a consumer or a person in terms of money for theft of energy as per the procedure laid down therein.

**11.** Sub-section (6) of the said Section provides that 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 person shall be refunded.

**12.** It is argued that a conjoint reading of the aforesaid provisions clearly shows that it is the incumbent duty of the licensee to refund the amount paid by way of provisional or final assessment by the petitioner since, upon acquittal in the criminal proceeding, there does not remain any further question of meeting the civil liability.

**13.** Learned counsel for the WBSEDCL submits that the petitioner voluntarily admitted having committed the offence at the hearing on provisional assessment.

**14.** It is further contended that the investigation and enforcement contemplated under Section 126 of the 2003 Act are civil in nature, whereas Section 135 is a criminal procedure with a different standard of proof.

**15.** Section 154(1), it is pointed out, clearly limits the operation of the said Section to offences under Sections 135-140 of the 2003 Act. Thus, Section 126 is specifically excluded from the purview of Section 154.

**16.** Hence, it is argued that the licensee is not liable to refund the amount assessed under Section 126, in terms of the second proviso to Section 135 (1-A).

**17.** It is next contended by the WBSEDCL that the deposit made by the petitioner was not under Section 126 of the Code of Criminal Procedure but as a condition for obtaining anticipatory bail. Such deposit in connection with the criminal proceeding for obtaining anticipatory bail under Section 438 of the Criminal Procedure Code cannot be a 'deposit' as envisaged in Section 126.

**18.** Learned counsel for the WBSEDCL cites an unreported judgment of this Court dated January 25, 2022 in *WPA 21298 of 2021 [Ashok Kumar Maity Vs. The West Bengal State Electricity Board, through Chairman, WBSEDCL and others]* for the proposition that deposit by a consumer under Section 154(6) can only be an independent deposit. Thus, it was held, the language of sub-section (6) of Section 154 *ex facie* distinguishes between the scopes of the two Sections.

**19.** The assessment of the civil liability by the Special Court under Section 154(5), it was observed, is independent of the criminal action and, as per Section 154(6), is subject to the deposit made by the consumer under Section 126, thus operating on an entirely different footing than the assessment under Section 126 of the 2003 Act.

**20.** Hence, it is argued that, the provisions of Sections 126 and 154 cannot be mixed up with one another.

**21.** Learned counsel next places reliance on a Division Bench judgment of this Court reported at *2015 (5) CHN (Cal) 165 [Talat Shahmid Vs. WBSE Distribution Co. Ltd.]* 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. Hence, Sections 126 and 135 operate in separate fields.

**22.** The WBSEDCL next places reliance on *West Bengal State Electricity Distribution Company Limited Vs. Orion Metal Private Limited and another*, reported at *(2020) 18 SCC 588*, where the provisions of Sections 126, 135(1-A) and 154 were considered. The term "unauthorised use of energy", it was held, is of wide connotation. There may be cases of unauthorised use of energy not amounting to theft but at the same time when there is an allegation of unauthorised use of electricity by tampering the meter, such cases of unauthorised use of energy also fall within the purview of "theft" under Section 135. The power conferred on the authorities for making assessment under Section 126(1) of the Act and power to determine civil liability under Section 154(5) of the Act, it was held, cannot be said to be parallel to each other.

**23.** While distinguishing the judgments cited by the WBSEDCL, learned counsel for the petitioner replies that the judgment rendered in *Orion Metal Private Limited and another (supra)* was in a case prior to adjudication or acquittal in the criminal proceeding. Moreover, although Section 154 of the 2003 Act was mentioned in the passing, the contention raised in the present writ petition was not considered on merits.

**24.** Heard learned counsel for the parties. For a comprehensive adjudication of the present dispute, a perusal of Sections 126, 135 and 154 of the 2003 Act is necessary. The said Sections are, accordingly, set out below:

"***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 judgment the electricity charges payable by such person or by any other person benefited by such use.*

*(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 may be 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 licence 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 twice 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 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.*

***135. Theft of electricity.****--1) Whoever, dishonestly,--*

*(a) taps, makes or causes to be made any connection with overhead, underground or underwater lines or cables, or service wires, or service facilities of a licensee or supplier, as the case may be; or*

*(b) tampers a meter, installs or uses a tampered meter, current reversing transformer, loop connection or any other device or method which interferes with accurate or proper registration, calibration or metering of electric current or otherwise results in a manner whereby electricity is stolen or wasted; or*

*(c) damages or destroys an electric meter, apparatus, equipment, or wire or causes or allows any of them to be so damaged or destroys as to interfere with the proper or accurate metering of electricity; or*

*(d) uses electricity through a tampered meter; or*

*(e) uses electricity for the purpose other than for which the usage of electricity was authorised,*

*so as to abstract or consume or use electricity shall be punishable with imprisonment for a term which may be extend to three years or with fine or with both:*

*Provided that in a case where the load abstracted, consumed, or used or attempted abstraction or attempted consumption or attempted use--*

*(i) does not exceed 10 kilowatt, the fine imposed on first conviction shall not be less than three times the financial gain on account of such theft of electricity and in the event of second or subsequent conviction the fine imposed shall not be less than six times the financial gain on account of such theft of electricity;*

*(ii) exceeds 10 kilowatt, the fine imposed on first conviction shall not be less than three times the financial gain on account of such theft of electricity and in the event of second or subsequent conviction, the sentence shall be imprisonment for a term not less than six months, but which may extend to five years and with fine not less than six times the financial gain on account of such theft of electricity:*

*Provided further that in the event of second and subsequent conviction of a person where the load abstracted, consumed, or used or attempted abstraction or attempted consumption or attempted use exceeds 10 kilowatt, such person shall also be debarred from getting any supply of electricity for a period which shall not be less than three months but may extend to two years and shall also be debarred, from getting supply of electricity for that period from any other source or generating station:*

*Provided also that if it is proved that any artificial means or means not authorised by the Board or licensee or supplier, as the case may be, exist for* *the abstraction, consumption or use of electricity by the consumer, it shall be presumed, until the contrary is proved, that any abstraction, consumption or use of electricity has been dishonestly caused by such consumer.*

*(1-A) Without prejudice to the provisions of this Act, the licensee or supplier, as the case may be, may, upon detection of such theft or electricity, immediately disconnect the supply of electricity:*

*Provided that only such officer of the licensee or supplier, as authorised for the purpose by the Appropriate Commission or any other officer of the licensee or supplier, as the case may, of the rank higher than the rank so authorised shall disconnect the supply line of electricity:*

*Provided further that such officer of the licensee or supplier, as the case may be, shall lodge a complaint in writing relating to the commission of such offence in police station having jurisdiction within twenty-four hours from the time of such disconnection:*

*Provided also that the licensee or supplier, as the case may be, on deposit or payment of the assessed amount or electricity charges in accordance with the provisions of this Act, shall, without prejudice to the obligation to the lodge the complaint as referred to in the second proviso to this clause, restore the supply line of electricity within forty-eight hours of such deposit or payment.*

*(2) Any officer of the licensee or supplier as the case may be, authorised in this behalf by the State Government may—*

*(a) enter, inspect, break open and search any place or premises in which he has reason to believe that electricity has been or is being used unauthorisedly;*

*(b) search, seize and remove all such devices, instruments, wires and any facilitator or article which has been or is being used for unauthorised use of electricity;*

*(c) examine or seize any books of account or documents which in his opinion shall be useful for or relevant to, any proceedings in respect of the offence under sub-section (1) and allow the person from whose custody such books of account or documents are seized to make copies thereof or take extracts therefrom in his presence.*

*(3) The occupant of the place of search or any person of his behalf shall remain present during the search and a list of all things sized in the course of such search shall be prepared and delivered to such occupant or person who shall sign the list:*

*Provided that no inspection, search and seizure of any domestic places or domestic premises shall be carried out between sunset and sunrise except in the presence of an adult male member occupying such premises.*

*(4) The provisions of the Code of Criminal Procedure, 1973, relating to search and seizure shall apply, as far as may be, to searches and seizure under this Act.*

***154. Procedure and power of Special Court.****—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence punishable under sections 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 140 and section 150 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, cross-examination or re-examination, if any, as it may permit, the witness shall be discharged.*

*(3) The Special Court may, notwithstanding anything contained in sub-section (1) of section 260 or section 262 of the Code of Criminal Procedure, 1973 (2 of 1974), try the offence referred to in sections 135 to 140 and section 150 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 sub-section, 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 (2 of 1974), 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."*

**25.** The scheme of the 2003 Act envisages interplay between the above Sections. While Section 126 contemplates a civil assessment on the standard of proof of civil law, that is, preponderance of probability, a proceeding under Section 135 is decided on the strict proof principle of "beyond reasonable doubt".

**26.** To appreciate properly the scope and applicability of Section 154, sub-section (1) thereof acquires vital importance. It includes a non obstante clause and stipulates that offences punishable specifically under Sections 135 to 140 and Section 150 shall be triable by the Special Court.

**27.** Sub-sections (2) to (4) of Section 154 deal exclusively with the criminal trial by the Special Court for offences under Sections 135 to 140 and 150 of the 2003 Act.

**28.** The last two sub-sections, that is, (5) and (6), however, speak about determination of civil liability by the Special Court itself. From sub-section (5), it is unambiguously understood that the mode of calculation is not equivalent to that envisaged under Section 126 (5). The latter provides that the assessment shall be made for the entire period of unauthorised use of electricity, otherwise (if the exact period is not ascertainable) for the preceding twelve months before inspection. However, Section 154 (5) stipulates that the calculation shall be *not less than twice* the amount as Section 126 (5).

**29.** This is understandable, since Section 126(1) describes the assessment as "the electricity charges payable by such person or by any other person benefited by such use", whereas the Explanation to Section 154 (6) defines the "civil liability" to be determined therein as "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".

**30.** Therefore, whereas Section 126 assesses the electricity charges payable for unauthorised use of electricity, the 'civil liability' in Section 154 is the loss or damage suffered by the licensee due to the commission of theft under Section 135 or the other offences specified therein.

**31.** The above distinctions indicate that the 'assessment' under Section 126 and the 'determination' under Section 154 are distinct and different from each other.

**32.** The confusion, however, is created when sub-section (6) of Section 154 provides for a refund of the excess amount "deposited by the consumer or the person". The question which arises consequently is *which deposit* is to be refunded? If the deposit as per sub-section (5) of Section 154 is to be taken into account, where is the question of such amount being *less* than the deposit under sub-section (5) itself?

**33.** The only way in which sub-sections (5) and (6) of Section 154 can be harmonized and reconciled *inter se* is to read the term "determine" in sub-section (5) as "determine *provisionally*", in contradistinction with the expression "determined *finally*" which is actually used in sub-section (6). Although no such term 'provisionally' has actually been used in sub-section (5), the "determine" therein cannot but mean a provisional determination if we have to attribute meaning to sub-section (6).

**34.** Seen in such perspective, of course, the determination under sub-section (5), which is provisional and can even be recovered like a civil court's decree, has to give way to the final determination under sub-section (6), which can only be undertaken at the conclusion of the trial under Sections 135 to 140 or 150, as the case may be.

**35.** Thus in the present case, if any amount was deposited in the first place *as an amount determined as civil liability under Section 154 (5),* the same had to be refunded on the Special Court coming to the conclusion that the petitioner was acquitted of the charge of theft under Section 135.

**36.** What is to be noted is that the Explanation to sub-section (6) of Section 154 inextricably links the “civil liability” contemplated in both sub-sections (5) and (6) with “the commission of an offence referred to in Sections 135 to 140 and Section 150”, since the liability is the loss or damage suffered “due to” commission of such offence.

**37.** The moment the petitioner is acquitted of the offence, the loss/damage suffered by the licensee due to such offence becomes Nil. Hence, if any amount was deposited or recovered under Section 154 (5), the same had to be refunded to the petitioner with interest as per sub-section (6) of the said Section.

**38.** Yet, no such deposit under sub-section (5) of Section 154 was made in the present case by the petitioner. The deposit made was fifty per cent of the assessed dues, but as *condition of grant of anticipatory bail*, which was furnished under Criminal Law, more precisely, under Section 438 of the Code of Criminal Procedure. Thus, it was not a deposit of the ‘civil liability’ under Section 154(5), which would be required to be refunded in case of acquittal.

**39.** Even under criminal law, it has been held by several High Courts of the country that an acquittal entitles the accused to refund of the deposits made as condition of bail. However, such refund is beyond the scope of the present proceeding.

**40.** In any event, since the assessment of electricity charges under Section 126 and determination of civil liability under Section 154(5) have been held to be on different footings for reasons disclosed in the earlier part of this judgment, the petitioner is, in any event, still liable to deposit the amount assessed finally under Section 126 of the 2003 Act.

**41.** In the present case, the complaints lodged against the petitioner have several elements, some of which go beyond the pale of 'theft' as per definition in Section 135 and reach the domain of 'unauthorised use' of electricity under Section 126. Moreover, the standards of proof in both proceedings are different, as specifically held by the Supreme Court in *Orion Metal (supra)* and a Division Bench of this court in *Talat Sahmid (supra)*.

**42.** In *Tapen Sen Majumdar's case*, cited by the petitioner, the charges fell entirely in the domain of 'theft', which is also a species of 'unauthorised use'. Therefore, acquittal of the petitioner therein in the criminal case entitled him to waiver of the provisional assessment. Furthermore, the petitioner there was absolved at least on two other considerations too – firstly, the calculation by the Assessing Officer was not in terms of Section 126 (5) and secondly, no final order had been passed within thirty days of the provisional order, which is the mandate of Section 126. None of the above mitigating factors are present in the instant case. For the above reasons, the said citation does not come to the rescue of the petitioner in the case at hand.

**43.** The licensee has cited *Ashok Kumar Maity's case*. The ratio laid down in paragraph no. 36 therein was that since the petitioner consciously bypassed the remedy of appeal under Section 127 against the final order of assessment, it was not for him to contend that he was entitled to unqualified restoration. Again, in paragraph no. 34 thereof it was observed, by following two Supreme Court judgments, that even an acquittal on the charge of theft under Section 135 on the test of evidence beyond reasonable doubt did not *ipso facto* exonerate the petitioner from the liability to pay under Section 126 of the 2003 Act. The same reasoning is applicable to the present case as well. Hence, the ratio laid down therein is followed in the present case.

**44.** Since I authored *Ashok Maity (supra)*, it is my moral responsibility to own up to a somewhat incorrect approach adopted in paragraph no. 33 of the said judgment, inasmuch as the assessment of civil liability by the Special Court under Section 154 (5) was observed to be "subject to" the deposit made by the consumer under Section 126, which is not strictly correct. However, it was also clarified later in the same paragraph as well as in other paragraphs thereof (such as paragraph nos. 20 to 24, 26 and 27) that the yardsticks of assessment of the two are distinct and different. Hence, in any event, the partially incorrect observation was justified in the context of the rest of the judgment. Thus, in any event, the said judgment operates against the proposition advanced by the petitioner in the case at hand.

**45.** The final order of assessment under Section 126 in the present case, in the absence of any challenge by the petitioner under Section 127 of the 2003 Act, has attained finality. The provisional order has now merged in the final order. Thus, the challenge in the writ petition to such assessment cannot succeed.

**46.** Hence, WPA No.23810 of 2006 is dismissed on contest. Consequentially, CAN 1 of 2008 (previously CAN 3516 of 2008) and CAN 2 of 2012 (previously CAN 11378 of 2012) also stand dismissed.

**47.** There will be no order as to costs.

**48.** Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

**( Sabyasachi Bhattacharyya, J. )**