



W.A.No.470 of 2011

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 30.08.2023

Delivered on: 20.09.2023

CORAM:

THE HONOURABLE MR.JUSTICE D.KRISHNAKUMAR

AND

THE HONOURABLE MR.JUSTICE P.B.BALAJI

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1. S. Senthil Kumar S/o. Sundaramoorthy
2. S. Sridevi W/o. S. Senthil Kumar

.. Appellants

Vs.

1. The Executive Engineer (Distribution),
Tamil Nadu Electricity Board,
Palladam,
Coimbatore District.

2. The Assistant Executive Engineer,
(Operation and Maintenance),
Coimbatore,
Electricity Distribution Circle (South),
Tamil Nadu Electricity Board,
Karadivavi – 641 658.

3. The Assistant Executive Engineer,
Distribution / CEDC / South,
Tamil Nadu Electricity Board,
Karadivavi – 641 658.

.. Respondents



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Prayer:- Appeal filed under Clause 15 of Letter Patent praying to set aside the order passed by this Court in W.P.No.20560 of 2008 dated 19.08.2009.

For Appellants : Mr. A. Sivaji.

For Respondents : Mr. P. Wilson, Senior Counsel
for Mr. L. Jaivenkatesh, Senior Counsel,
Tamil Nadu Electricity Board.

JUDGMENT

(Judgment of the Court was made by P.B.BALAJI,J.)

The unsuccessful writ petitioners in W.P. No.20560 of 2008 are the appellants before us.

2. The appellants are running an industry on lease, under the name and style of “M/s. Shree Aadhavan Textiles” and that in the course of business, consequent to an inspection made by the Electricity Board officials, Cr. No.299 of 2006 was registered for theft of electricity. The appellants submitted a reply to the Show Cause notice issued to them and also attended the enquiry and contended that they have been prompt in payment of consumption of charges and there has been no violation in any form. It is the specific case of the appellants that the authorities have no power to initiate action for the alleged offence of theft of energy under the



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new act namely Electricity Act 2003 and only the special Court, as contemplated u/s.153 and 154(5) of the said Act, would be competent to decide the same. In fact, the appellants challenged the jurisdiction of the authorities to initiate such action in W.P. No.23188 of 2006. The said Writ petition was allowed on 09.10.2006, consequent to which, the final assessment order was passed on 26.09.2007. The appellants challenged the said final assessment order in W.P. No.36026 of 2007 and the said Writ petition was also allowed on 27.03.2008.

3. It is subsequent to the said orders in the Writ petitions, another notice for provisional assessment dated 14.07.2008 came to be issued by the Assistant Executive Engineer, Tamil Nadu Electricity Board. The said notice is under challenge in the Writ petition.

4. The respondents filed a counter affidavit, admitting to the two Writ proceedings initiated by the appellants earlier. However according to the respondents, while disposing of the Writ petition in W.P. No.36026 of 2007, this Court has specifically reserved liberty on the respondents to



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give a proper opportunity to the appellants and to pass appropriate orders.

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According to the respondents, in furtherance of such liberty granted by this Court, the provisional assessment order u/s.155 r/w 138 of the Indian Electricity Act 2003 came to be issued and therefore, they sought for dismissal of the Writ petition.

5. The Writ court after considering the rival submissions put forth by the appellants as well as the respondents, dismissed the Writ petition, holding that there was no manifest legality in the impugned order and that the relevant. Statutory provisions have been followed and it was also within the jurisdiction and authority of the authorized officer, namely the 2nd respondent to issue the impugned notice.

6. Aggrieved by the dismissal of the Writ petition, the appellants have filed the present Writ appeal raising the following grounds:

(i) The Special Court constituted u/s.153 of the Act alone has exclusive jurisdiction to decide the civil liability;



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(ii) Criminal O.P. No.1368 of 2016 filed by the appellant was allowed;

(iii) The amended rules in 2007 cannot be applied retrospectively to an occurrence that is alleged to be taken place on 23.05.2006;

(iv) The respondents failed to bring it to the notice of the Writ court that the amendment had come into effect in 2007 and Removal of the Difficulties Order was issued in the Gazette dated 13.06.2007 and notification dated 14.07.2008 came to be issued by the Tamil Nadu Electricity Regulatory Commission;

(v) The two orders of this Court on the very same subject matter operated as res judicata.

(vi) Notification in G.O. (Ms) No.118 dated 27.10.2006 can only apply prospectively and cannot have retrospective application, in the absence of a specific notification to such effect;

(vii) Section 153 of the Act and the Removal of Difficulties Order cannot co-exist, especially in the light of the amendment introduced by Act 26 of 2007, incorporating the word “shall”, thereby deeming it mandatory to invoke the procedure u/s.153 of the Act.



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Canvassing all the above-mentioned grounds, the appellants prayed for the appeal being allowed.

7. We have heard Mr. A. Sivaji, counsel for the appellants and Mr. P. Wilson, Senior Counsel for Mr. L. Jaivenkatesh, Senior Counsel, Tamil Nadu Electricity Board.

8. The main contention of the appellants is that when the statute specifically bestows exclusive jurisdiction on a Special Court u/s.154 of the Electricity Act, the respondents had no right to even to issue the Electricity (Removal of Difficulties) Order, 2005. The key issue that requires to be answered is as to whether the Electricity (Removal of Difficulties) Order 2005 can survive in the light of the specific provision in the statute, namely Section 154 of the Act.

9. In the instant case, the appellants were issued a Show Cause Notice on 23.05.2006 for alleged theft of Electricity, assessing an amount of Rs.30,96,082/- On 19.06.2006, the enquiry notice was issued. However,



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the appellant filed a W.P. No.23188 of 2006 challenging the said Show Cause Notice. The said Writ petition was allowed and the respondents were directed to take action in accordance with law, specifically referring to the Electricity (Removal of Difficulties) Order 2005 dated 08.06.2005. Subsequent to the disposal of the Writ petition, the assessment was made as prescribed under Regulation 23 AA dated 13.06.2007 and a final assessment order was also passed on 26.09.2007. The same was also challenged by the appellants in W.P. No.36028 of 2007 and the said Writ petition was allowed on 27.03.2008, directing the respondents to give an opportunity to the appellants in accordance with the notification dated 13.06.2007 and thereafter pass orders. Only in the light of the said liberty and directions granted by the Writ Court while disposing the W.P. No.36028 of 2007, the impugned provisional assessment order came to be issued on 14.07.2008. The said provisional assessment order was the subject matter of challenge before the Writ Court.

10. Mr. A. Sivaji, the counsel for the appellants would contend that once the Act requires the Special Court alone to deal with the matter in



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issue, the respondents have no authority or right to rely on Electricity (Removal of Difficulties) Order, 2005 and take action as contemplated there under. The counsel for the appellants would also submit that when the appellants had succeeded before this Court in setting aside and having the criminal proceeding quashed, it was not open to the authorities to thereafter impose any civil liability on the appellants, drawing source from the Electricity (Removal of Difficulties) Order, 2005.

11. Per contra, P. Wilson, the Senior Counsel would submit that the power u/s.154 of the Electricity Act available to the Special Court and the power of authorities under the Electricity (Removal of Difficulties) Order 2005, operate in different fields. Even under the Statute, the authorities have power to frame rules to prescribe procedures wherever required and therefore invoking such powers available under the Act, the Electricity (Removal of Difficulties) Order, 2005 came to be issued. Therefore, the Senior Counsel for the respondents would submit that the very reasoned order of the Writ Court, does not required any interference and prayed for dismissal of the Writ appeal.



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12. We have carefully considered the submissions of the counsel on either side. We have also perused the records available as well as the order of the Writ Court.

13. Sub Sections 5 and 6 of the Section 154 of the Electricity Act assume relevance for the purpose of deciding the present appeal and the same are hereby extracted for easy reference:

“(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 determine 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 person, to the Board or license 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



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lending rate for the period from the date of such deposit till the date of payment”.

14. Only in order to tide over certain practical and procedural difficulties, the Electricity (Removal of Difficulties) Order, 2005 was issued on 08.06.2005, setting out the method of assessment in cases of theft of electricity. Pursuant to the said order dated 08.06.2005, the Electricity Supply Code was amended and Regulation 23 (AA) was inserted. According to the respondent Board, they have scrupulously followed the procedure mandated under Regulation 23 (AA) (7)(8) and prepared the provisional assessment order, in accordance with forms 8 and 9 of Electricity Supply Code.

15. At the outset, we are unable to accept the arguments of the counsel for the appellants that the respondents cannot fall back on the Electricity (Removal of Difficulties) Order, 2005 for the simple reason that even when the earlier W.P. No.20560 of 2008 came to be disposed of by an order dated 30.11.2009, the Court had referred to the Electricity (Removal of Difficulties) Order, 2005 and consequent insertion of



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Regulations to the Tamil Nadu Electricity (Supply) Amendment Code 2007. The Writ court specifically held that the said Electricity (Removal of Difficulties) Order, 2005 and Regulations have to be read in conjunction with each other and the provisions of the Act cannot be read in isolation.

16. We are also able to find that the respondents had absolute power to issue the Electricity (Removal of Difficulties) Order, 2005 and also the new regulations.

Section 183 of the Electricity Act runs as follows:-

“Section 183. (Power to remove difficulties): ---

(1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published, make such provisions not inconsistent with the provisions of this Act, as may appear to be necessary for removing the difficulty: Provided that no order shall be made under this section after the expiry of two years from the date of commencement of this Act.

(2) Every order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament”.

Thus, we hold that the respondents had the authority to issue the Electrical (Removal of Difficulties) Order, 2005 and the same is not



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beyond their authority or power and the same is not ultra vires the Electricity Act.

17. Moreover, while disposing of W.P. No.36026 of 2007, this Court directed the respondents to apply the methodology available under the newly amended Regulation 23 (AA) which was only pursuant to the issuance of Electricity (Removal of Difficulties) Order, 2005 and therefore when the appellants were parties to the said Writ petition and the said order having become final, it is too late in the day for the appellants to contend that the respondents cannot take recourse to Regulation 23 (AA) of the Electricity (Supply) Code.

18. Moreover, we find that the notice under the challenge is only in the nature of a Show Cause Notice. It is a provisional assessment made by the respondents and it is always open to the appellants to file their objections to the same and require a personal hearing. Only thereafter, a final assessment order could be issued even under Regulation 23(AA) (15) of the Electricity (Supply) Code.



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19. The appellants, without filing their objections to the Show Cause Notice, under a misconception that the respondents have no rule to issue the impugned notice, have approached the Writ Court.

20. The Writ court has considered all the contentions put forth by the appellants and in the light of the provisions in the statute, proceeded to dismiss the Writ petition by giving reasons for rejecting all the contentions of the appellants.

21. We also required the respondents to file an affidavit clarifying the apprehensions of the appellants that parallel proceedings should not be initiated for the same offence.

22. In compliance, the 2nd respondent has filed an affidavit dated 30.08.2023. The relevant portion of the affidavit is extracted for the purpose of reference:

“8. I humbly submit that the provisional assessment order dated 14.07.2008 as per



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Regulation 23AA of Electricity Supply Code was issued based on the Orders passed by the Hon'ble High Court. It is also further submitted that FIR registered in Crime No.299 of 2006 was quashed by the Hon'ble High Court, Madras by an order dated 30.11.2009 in Crl. O.P. No.13688 of 2006 and hence the Special Court could not take cognizance of the offence. Hence S154(5) doesn't get attracted.

9. Further the theft of electricity was detected on 23.05.2006. The Electricity (Removal of Difficulties) Order 2005 was published on 08.06.2005. As per the order, the difficulties of distribution licensees was felt by the Union Government where the theft of Electricity has taken place and to remove difficulties the Union Government issued this order pursuant to proviso under S 183 of Electricity Act. The method of assessment is set out in Regulation 23 AA of TN Electricity Supply Code 2004. Merely because the methodology came on 13.06.2007 by virtue of insertion of Regulation 23 AA doesn't mean that Regulation 23 AA cannot be applied to the case in hand. This Hon'ble Court has given liberty in W.P. No.36026 / 2007 (Pg.83) to apply the methodology framed under Regulation 23AA”.

23. The respondents have, thus made it clear that in view of the order of this Court in Crl. O.P. No.13688 of 2006 dated 30.11.2009, quashing the FIR registered in Crime No.299 of 2006, the Special Court is not in a position to take cognizance of the offence and therefore Section 154(5) of the Act does not get attracted. It is also clarified that the theft of electricity



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was detected on 23.05.2006 and the Electricity (Removal of Difficulties) Order 2005 came to be published earlier ie., on 08.06.2005 and the authorities are only following the methodology prescribed in Regulation 23(AA).

24. We take the said affidavit filed by the 2nd respondent on record.

25. The appellants, as already mentioned, have been party to the order in W.P. No.36028 of 2007 which was disposed on 27.03.2008 and only pursuant to the said order, the respondents have invoked Regulation 23(AA) and issued the provisional assessment order / notice. The said provisional order is only akin to a Show Cause Notice because it requires the addressee to file his / her objections and also contemplates an enquiry to be conducted thereafter. Therefore when the appellants have sufficient fair opportunity to put forth all the objections to the said temporary or provisional assessment order, without availing of the opportunity available in the statute, the appellants have rushed to this Court challenging the said provisional assessment order, on unsubstantiated grounds. We are in



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agreement with the findings of the Writ Court. We see no reason for interfering with the same.

26. In fine, this Writ appeal stands dismissed. There shall be no order as to costs.

(D.K.K.J) & (P.B.B.J)

20.09.2023

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mjs

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D.KRISHNAKUMAR, J.,
and
P.B.BALAJI, J.

(mjs)

Pre-delivery judgment in
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