BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **05.07.2023**

CORAM:

THE HONOURABLE **DR.JUSTICE ANITA SUMANTH**
AND
THE HONOURABLE **MR.JUSTICE R.VIJAYAKUMAR**

W.A.(MD)Nos.242 and 243 of 2012
and
M.P.(MD)Nos.1, 1, 2 and 2 of 2012

P.Soundararajan ...Appellant in both appeals

/Vs./

1.The Tamil Nadu Electricity Board,
Rep.by its Chairman,
Anna Salai, Chennai-600 002.

2.The Assistant Executive Engineer (Distribution),
The Tamil Nadu Electricity Board,
Shenkottai. ...Respondents in both appeals

COMMON PRAYER:- Writ Appeals - filed under Clause 15 of Letters Patent Act, to set aside the order dated 27.02.2012 in W.P.(MD)Nos.632 and 633 of 2010 on the file of this Court.

In both appeals:

For Appellant : Ms.AL.Gandhimathi
Senior Counsel

For Respondents : Mr.S.Deenadhayalan
Standing Counsel for TNEB

COMMON JUDGMENT

(Judgment of the Court was delivered by **DR.ANITA SUMANTH , J.)**

The present appeals have been filed by the petitioner, a consumer under the provisions of the Tamil Nadu Electricity Supply Code, 2004 (in short '2004 Code') read with the Electricity Act, 2003 (in short 'Act').

2.The petitioner holds two service connections and had been granted the benefit of a power holiday. The respondent authorities i.e., the officials of TANGEDCO, caused inspection of the premises of the petitioner on 07.12.2009 on a suspicion that there had been theft of electricity in respect of the service connections. They allege that they had found incontrovertible proof of theft in the course of inspection.

3. Provisional assessments were framed and the appellant was called upon to furnish his objections thereto. The appellant also filed detailed objections on 14.12.2009 and 29.12.2009 refuting the allegations made and supplied evidences to support its stand that there had been no theft as alleged. The impugned orders of assessment dated 30.12.2009 have been passed confirming the provisional assessments.

4.The prayer in the Writ Petitions is two fold. The first limb of the prayer challenges the provisions of Section 135-1A of the Act. To be noted, Section 135-1A of the Act provides for immediate disconnection of electricity in matters relating to theft of electricity. The learned Single Judge by order dated 27.02.2012 rejects the prayer for Declaration as against which, the present writ appeals have been filed.

5.Both learned counsel would concur on the position that the validity of Section 135-1A has been upheld by the Division Bench of the High Court and appeals are pending before the Hon'ble Supreme Court, though no interim protection has been granted. To this extent, the order of the writ Court is sustained.

6.The second limb of the prayer challenges the assessments themselves and the challenge is on multiple grounds. The first ground concerns the assumption of jurisdiction by the respondents. The appellant had compounded the assessments, in terms of Section 152 of the Act, availing the option extended under Section 152 of the Act. The compounding fee remitted by the appellant has been duly accepted by TANGEDCO and proceedings for assessment were continued in terms of Rule 23 (AA) of the Code.

7.According to the appellant, with the acceptance of compounding fee, the requirement for framing of an assessment would go in entirety. For this purpose, they draw attention to Section 154 of the Act, which sets out the procedure and power of the Special Court constituted for the purpose of speedy trial of the offences referred to under various provisions of the Act.

8.Section 154, according to the appellant, is a self-contained scheme of assessment. Section 154 (5) states that the Special Court shall determine civil liability against a consumer in terms of money for theft of energy and sets out the method of such determination.

9.Thus, having accepted the application for compounding, the respondent is estopped from proceeding further in terms of framing an assessment under the supply code. In other words, the respondents cannot have the benefit of both the option of compounding as well as an assessment and would have to choose between one or the other.

10.This issue is no longer res integra, having been considered by the Hon'ble Supreme Court in *West Bengal State Electricity Distribution Company Ltd., and others vs. M/s.Orion Metal Pvt.Ltd., and another* [(2020) 18 SCC 588]. One of the questions considered in the civil appeals relates to the interplay between the provisions for compounding as well as the power conferred upon the authorities for framing assessment in terms of the Act.

11.Upon a consideration of the rival provisions, the Hon'ble Supreme Court has confirmed categorically that the power of the Special

Court to determine the civil liability under Section 154(5) of the Act would not stand in the way of exercise of power of assessment under Section 126 of the Act.

12.Various Benches of this Court have applied the ratio of the above judgment in testing the validity of assessments under Rule 23 AA of the Code. We would, in addition to taking support of those judgments, also notice the position that Section 126 of the 2003 Act, relating to assessment, falls under part XII, being '*Investigation and Enforcement*' and specific to 'unauthorized use of electricity'. The matter dealt with by the Hon'ble Supreme Court, related to an assessment in the context of unauthorized use of electricity.

13.This may be compared with Section 135 of the Act, which deals with theft of electricity. Section 135(1) adumbrates those situations that would constitute theft of electricity and clause (e) of Section 135 (1), states that use of electricity for purposes other than those for which such use was authorised, would also constitute theft of electricity. Unauthorized use of electricity, is thus, but one facet of theft of electricity, which is the larger issue.

14.The ratio of the judgment in *West Bengal State Electricity Distribution Company Limited* (Supra) applies on all fours in this matter. The relevant portion of the judgment is extracted below:

> "*12......There is apparent distinction between Section 126 and Section 135 of the Act. Section 126 forms part of the scheme which authorizes electricity supplier to ascertain loss in terms of revenue caused to it by the consumer by his act of "unauthorized use of electricity" whereas Section 135 deals with offence of theft if he is found to have indulged himself in the acts mentioned in clauses (a) to (e) of sub-section (1) of Section 135 of Electricity Act. Further, it is also clear from Section 154 of the Act, which prescribes procedure and power of Special Court, that the Special Court is empowered to convict the consumer and impose a sentence of imprisonment. The Special Court, in cases, where a criminal complaint is lodged, is also empowered to determine civil liability under Section 154(5) of the Act. As per Section 154(6) of the Act, in case civil liability so determined 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, shall be refunded by the licensee or the concerned person, as the case may be. Merely because the Special Court is empowered to determine civil liability under Section 154(5) of the Act, in cases where a complaint is lodged, it cannot be said that there is no power conferred on authorities to make provisional assessment/final assessment under Section 126 of the Act.*
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> *14.We also do not find any valid reason for making a distinction as made by the High Court in applying Section 126*

of the Act. From the scheme of the Act, it appears that after inspection team notices unauthorized 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 "unauthorized use of energy" is of wide connotation. There may be cases of unauthorized use of energy, not amounting to theft, which are cases viz. Exceeding the sanctioned load or using the electricity in the premises where its use is not authorized etc. But at the same time, when there is an allegation of unauthorized use of energy by tampering the meter, such cases of unauthorized use of energy include 'theft' as defined under Section 135 of the Act. The power conferred on authorities for making assessment under Section 126(1) of the Act and power to determine civil liability under Section 154(5) of the Act, cannot be said to be parallel to each other. In this regard, we are of the view that the High Court has committed an error in recording a finding, that both proceedings cannot operate parallelly. In a given case where there is no theft of energy, amounting to unauthorized use of energy, in such cases no complaint of theft can be lodged as contemplated under Section 135 of the Act. In such cases for loss of energy, on account of unauthorized use of energy not amounting to theft, it is always open for the authorities to assess the loss of energy by resorting to power under Section 126(1) of the Act. In cases where allegation is of unauthorized use of energy amounting to theft, in such cases, apart from assessing the proceedings under Section 126(1) of the Act, a complaint also can be lodged alleging theft of energy as defined under Section 135(1) of the Act. In such cases, the Special Court is empowered to determine civil liability under Section 154(5) of the Act. On such determination of civil liability by the Special Court, the excess amount, if any, deposited by the petitioner, is to be refunded to the consumer. It is a settled principle that to prove the guilt of the accused in a criminal proceeding, authorities have to prove the case beyond reasonable doubt and the element of mens rea is also to be *established. On the other hand, such a strict proof is not necessary for assessing the liability under Section 126(1) of the Act"*

The legal question is thus answered in favour of the respondents and adverse to the appellant.

15.That takes us to the next argument, in relation to the proprietary of the procedure followed in framing of the impugned assessment. Rule 23 (AA) of the Code stipulates in detail the procedure to be followed for framing assessment. In the present case, a provisional assessment has been made, to which the response of the assesee has been solicited. In that response, the appellant has set out its contentions in detail, also enclosing some evidences stated to be in support of its stand.

16.The impugned orders of assessment, are however, completely non-speaking. The respondents make no reference to the objection filed, let alone dealing with the same in detail. In our considered view, this constitutes a fatal flaw in procedure. The submissions of the learned Standing Counsel to the effect that the counter reveals the mind of the officer in dealing with the objections of the appellant, contains no merit.

17.The Hon'ble Supreme Court in *Mohindar Singh Gill vs. Chief Election Commisioner* [(1978) 1 SCC 405], has settled the position that an order impugned would have to either stand or fall on its own strength and cannot be supplemented either by counter affidavit or oral arguments. An order is not, the Bench states, like old wine that gets better over the years.

18.In fact, the provisions of Clause 15 of Rule 23 (AA) would itself support the position that orders of assessment are expected to be speaking, assigning reasons and addressing every contention raised by the consumer.

19.In the light of the discussion as above, and while answering the legal question in favour of the respondents, we are inclined to set aside the orders of assessments dated 30.12.2009 as being in violation of the principles of natural justice. Upon consent expressed by both the

Counsel, the date of hearing for de novo assessment is fixed as 19.07.2023. The appellant shall appear before the officer on the aforesaid date, without expecting any further notice in this regard, with all materials in respect of its submissions and orders of assessment shall be passed on or before 07.09.2023.

20.These writ appeals are disposed in terms of the above order. No costs. Consequently, connected miscellaneous appeals are closed.

[A.S.M.J.,] & [R.V.J.,]
05.07.2023

NCC :Yes/No
Index :Yes/No
Internet :Yes
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To

1.The Tamil Nadu Electricity Board,
Rep.by its Chairman,
Anna Salai, Chennai-600 002.

2.The Assistant Executive Engineer (Distribution),
The Tamil Nadu Electricity Board,
Shenkottai.

DR.ANITA SUMANTH, J.
AND
R.VIJAYAKUMAR, J.

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Order made in
W.A.(MD)Nos.242 and 243 of 2012

Dated:
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