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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **20.09.2023**

CORAM

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

W.A.(MD)No.709 of 2015
and
M.P.(MD)No.1 of 2015

1.The Superintending Engineer,
Tamil Nadu Electricity Board,
Trichy.

2.The Assistant Executive Engineer,
(Operation and Maintenance),
TANGEDCO, Lalgudi, Trichy District.

...Appellants

-Vs.-

Karuppanan

...Respondent

PRAYER:- Writ Appeal - filed under Clause 15 of Letters Patent Act, to
set aside the order dated 03.06.2015 made in W.P.(MD)No.5370 of 2015
on the file of this Court.

For Appellants : Mr.S.Deenadhayalan
For Respondent : Mr.T.Lenin Kumar



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JUDGMENT

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

The Electricity Department is the appellant in this Writ Appeal.

These proceedings have a chequered history and it would be appropriate to set out the trajectory its journey.

(i) On 13.08.2012, there was an inspection in the premises of the Writ Petitioner. The officials of the Electricity Department alleged commission of theft of energy insofar as electricity supply from agricultural service connection No.1147/TF IV (admittedly the number is erroneous since the correct service connection number is 534/TF IV) had been diverted and used in a commercial brick kiln.

(ii) Form-11 invoking Regulation 23AA(22) of the Tamil Nadu Electricity Supply Code, 2004 (in short 'Code') was issued to the Writ Petitioner offering the option to compound the offence under Section 152 of the Electricity Act, 2003 (in short 'Act').

(iii) At this stage the characterisation of the offence as 'theft of electricity' becomes final. This assumes importance in light of the fact that the Act provides for a dual methodology of assessment, firstly, under



Section 126 of the Act r/w Regulation 19 of the Code, which provides for framing of an assessment in cases where a consumer is found to be indulging in 'unauthorised use of electricity' and secondly, under Section 135 of the Act r/w Regulation 23AA of Code in cases of 'theft of electricity'.

(iv) Some arguments have been made on the distinction between '*unauthorised use*' and '*theft*' of electricity and we will dilate on this aspect in the subsequent portions of this order.

(v) To continue with the narration of facts, a corrigendum was issued on 13.08.2012 itself, on the heels of Form-11, correcting the error in service connection number from 1147 to 534.

(vi) Thereafter, a provisional assessment order in Form-9 for theft of energy under Section 135/138 of the Act came to be issued. Under this provisional assessment order, the petitioner was granted an opportunity to file objections.

(vii) The annexed working sheet raised a demand for a sum of Rs.1,90,797/-, rounded off to Rs.1,90,800/- and compounding fee of Rs.16,000/-, which the petitioner has remitted, compounding the offence.

(viii) The first of the five Writ Petitions filed by the Writ



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Petitioner was W.P.(MD)No.12673 of 2012, where the challenge was to provisional assessment order dated 14.08.2012. The Writ Petition had been disposed at the time of admission (by R.Sudhakar J.) directing restoration of electricity connection and permitting the Writ Petitioner to pursue the matter after filing of objections. The respondents were directed to pass final assessment orders in accordance with law.

(ix)The second of the Writ Petitions was W.P.(MD)No.16385 of 2012 praying for a stay of proceedings dated 27.11.2012 for disconnection of electricity supply. That Writ Petition came to be disposed on 07.07.2014 (by S.Nagamuthu J.). Pending this proceeding, a final assessment order has been passed and a statutory appeal had been filed by the writ petitioner.

(x) W.P.(MD)No.16385 of 2012 was thus closed directing the first respondent therein to pass orders on the appeal within a time frame fixed by the Court. Inter alia, the Court permitted the respondents to decide on the question of maintainability of the appeal as well.

(xi)The third Writ Petition was W.P.(MD)No.17214 of 2014. The challenge was to proceedings of the second respondent therein, dated 27.11.2012, which is a recovery notice and proceedings dated



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17.09.2014, where the appellate authority had rejected the statutory appeal filed by the Writ Petitioner on merits. The Writ Petition was disposed by order dated 27.10.2014 (by M.Venugopal J.).

(xii)Inter alia, the rival contentions of the parties in regard to whether at all there was provision for a statutory appeal as against final order of assessment, were noted. However, the Court declined to decide that issue and, while setting aside appellate order dated 17.09.2014, remanded the matter back to the file of the appellate authority to decide the issue of maintainability by way of a reasoned speaking order uninfluenced by any of the observations made by the Court in that order.

(xiii)As regards restoration of supply, a positive direction was issued conditional upon part payment of the demand by the Writ Petitioner. Some payments have been made thereafter, periodically by the Writ Petitioner, as a result that electricity connection was restored and is at the moment, live.

(xiv)On 11.02.2015, an order came to be passed by the authorities referring to a legal opinion received from Standing Counsel for Tamil Nadu Electricity Board to the effect that the Superintending Engineer has no appellate power in cases where the assessment was



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made invoking the provisions of Section 135 of the Act r/w Regulation 23AA of Code. The matter was remanded to the file of the Assistant Executive Engineer to pass final assessment orders.

(xv)A personal hearing was conducted by the authorities pursuant thereto and a final assessment order came to be passed on 30.03.2015. That order was the subject matter of challenge in W.P.(MD)No.5370 of 2015. After a detailed discussion of the matter, the Writ Petition came to be allowed by order dated 03.06.2015 and final assessment order dated 30.03.2015 was set aside directing the respondents to strictly adhere to the directions already issued in previous orders including order dated 27.10.2014 in W.P.(MD)No.17214 of 2014. It is this order dated 03.06.2015 has been assailed before us in the present Writ Appeal.

2.The primary contention advanced by the appellants, ie., the authorities of Tamil Nadu Electricity Board, is to the effect that there is no appeal remedy provided in cases where Section 135 of the Act relating to theft of electricity has been invoked. This contention is well placed in light of Section 127 of the Act, which provides for an appeal only as against any final order made under Section 126, to be filed within



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30 days of such order.

3. Thus, as against an order passed under Section 135 r/w Regulation 23AA, there is no statutory appeal provided and this position emanates from the clear and unambiguous language of Section 127 of the Act. While the respondent/Writ Petitioner does not, and rightly, argue with this position, it's submission is that the assessment ought to have, at the first instance, been made under Section 126 of the Act relating to unauthorized use of electricity, in which case, a statutory appeal would lie. Thus, the difference in opinion qua the parties is as to whether the final assessment ought to have been framed under Section 126 or 135 of the Act.

4. Section 126 is the statutory provision relating to framing of assessment and reads thus:

“Section 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 unauthorized use of electricity, he shall provisionally assess to the best of his judgement 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



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charge of the place or premises in such manner as may be prescribed.

1[(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 licensee within seven days of service of such provisional assessment order upon him:

*2[***]*

3[(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 unauthorized 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 this section shall be made at a rate equal to 1[twice] the tariff rates 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 a means not authorised by the concerned person or authority or licensee; or



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*(iii) through a tampered meter; or
2[(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 authorized.] ”*

5. The provision addresses cases of unauthorized use of electricity as well, under Clause (b) of the explanation. This includes unauthorized use through a tampered meter, by artificial means, by means not authorised, for purposes other than those for which supply was authorised and in premises other than where the supply has been authorised.

6. Section 135 of the Act deals with theft of electricity and Sub Section (1A) provides for immediate disconnection of supply of electricity where such theft is deducted. The relevant part of the provision reads as follows:

“Section 135. Theft of Electricity: ---

[(1) Whoever, dishonestly:

(a) taps, makes or causes to be made any connection with overhead, underground or under water 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



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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 destroyed as to interfere with the proper or accurate metering of electricity,

(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 extend to three years or with fine or with both:

.....

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

.....”

7. Proceedings under Section 126 of the Act must follow the procedure laid down under Regulation 19 of the Code, that stipulates the rate applicable as twice the regular tariff as relevant for the specific category of services specified in Sub Section 5 of Section 126 of the Act. Per contra, an assessment invoking Section 135 of the Act must be framed in line with Regulation 23AA of Code, which provides for a different and more stringent process of assessment. The rate in such cases would be six times the applicable tariff rate. Furthermore, an assessment invoking Section 135 of the Act is final and no statutory



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appeal is provided as against the same.

8. Section 126 vests power in the concerned authority to frame an assessment. The Act however provides for two genres of assessment, one, a regular assessment under Section 126 and two, an aggravated assessment, invoking Section 135 of the Act. Section 135 of the Act carves out those cases relating to theft of electricity, where, the liability is placed at a greater degree than those cases that are to be assessed regularly.

9. There is undoubtedly, some amount of overlap in the two provisions, as both the provisions address unauthorised use of electricity in various forms. However, if the Officer is of the view that there has been a conscious (dishonest) attempt to engage in those actions set out in clauses (a) to (e) of Section 135, then he may, at the first instance, take recourse to Section 135, which provides for an alternate and more aggravated assessment. In such cases, an assessment would be framed in terms of Section 126 r/w Section 135 r/w Regulation 23AA of the Code.

10. In the present case, the Officer has, even at the first instance, issued Form-11 and inspection report, which are in terms of Regulation 23AA of the Code and Section 152 of the Act. Thus, he has



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expressed his mind that Section 135 of the Act has been invoked. The invocation of Section 135 has also been accepted by the Writ Petitioner. In such circumstances, there is no merit in the contentions of the Writ Petitioner that an assessment ought to have been made in line with the prescription under Section 126 and Regulation 19, which limits liability to twice the applicable tariff.

11. In fact, the petitioner has accepted the offer of compounding under proceedings dated 13.08.2010 and remitted the fee and with that, acquiescence with the invocation of Section 135 is complete. It is too late in the day for the Writ Petitioner to go back on such acquiescence now.

12. We asked whether there was any demarcation as to the situations that would come under Section 126 and those that would come under Section 135 for the reason that both the provisions use the term '*unauthorized use of electricity*'. However, no guidelines appear to have been issued by the authorities in this regard and the invocation of Section 135 would thus fall within the subjective satisfaction of the Officer concerned. If at all the noticee/consumer believes that the invocation is erroneous as there is no dishonest act/mens rea on its part, then it is up to it to reject the offer of compounding and establish innocence in the



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course of trial before the Special Court under Sections 152 to 155 of the Act.

13. In light of the discussion as above, we do not find any necessity to relegate the parties once again to the process of appeal and the direction at paragraph 13 of the order of the Writ Court dated 03.06.2015 is set aside.

14. We now advert to the assessments/appellate order passed by the authorities and find that all the orders, provisional assessment order dated 14.08.2012, appellate order dated 17.09.2014 and final assessment order dated 30.03.2015 are non-speaking and do not contain any reasons in support of their conclusions.

15. The provisional assessment order contains a working sheet on the basis of which, the demand has been arrived at. In the working sheet, the Officer proceeds as though the motor has been working on all days of the year for 12 hours every day. We find this basis unrealistic and thus unacceptable.

16. That apart, the appellate order does not adduce any reasons for confirming the assessment and the finding regarding diversion of electricity, and the order of final assessment, while referring to the fact



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that explanations were tendered by the Writ Petitioner, does not detail, or deal with the same.

17. Pending proceedings from 2010, the Writ Petitioner has paid a sum of Rs.1,50,000/- (approx.) as against a total demand of Rs.1,90,000/-. Bearing in mind our finding to the effect that the impugned orders do not reflect proper application of mind and are unsupported by any evidences, as well as the fact that the parties have been before the Court from 2012 onwards, we confirm the impugned final assessment order dated 30.03.2015 to the extent of amount already remitted by the Writ Petitioner only. To clarify, the demand over and above the amount already remitted by the Writ Petitioner, is set aside.

18. This Writ Appeal is disposed in terms of this order. No costs. Consequently, connected miscellaneous petition is closed.

[A.S.M.J.,] & [R.V.J.,]
20.09.2023

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

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AND



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