

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

**W.P.A 8719 of 2012
IA No: CAN 1 of 2019
(Old No: CAN 4076 of 2019)**

With

**W.P.A 12684 of 2013
IA No: CAN 1 of 2019
(Old No: CAN 4079 of 2019)**

**Macneill Engineering Ltd. and another
Vs.
West Bengal State Electricity Distribution
Company Ltd. and others**

For the petitioner : Mr. Sidhartha Sharma
Mr. Rishav Dutt
Md. Danish Taslim
Mr. Arun Kataruka

For the WBSEDCL : Mr. Srijan Nayak
Mr. Sujit Sankar Koley

Hearing concluded on : 23.08.2024

Judgment on : 30.08.2024

Sabyasachi Bhattacharyya, J:-

1. The petitioner has preferred a challenge to the *vires* of Sections 126 and 135 of the Electricity Act, 2003 (hereinafter referred to as “the 2003 Act”). The other reliefs sought are entirely consequential to the same, primarily seeking a quashing of the FIR lodged in connection with the steps taken by the respondent no. 1, West Bengal State Electricity Distribution Company Limited (WBSEDCL) pursuant to the said provisions.

2. Learned counsel for the petitioner argues that Section 45 of the 2003 Act provides for the levy of electricity charges, which includes the actual charges for supply, a fixed charge in addition to the charge and rent or other charges in respect of electric meter or electrical plant provided by the Distribution Licensee. The said Section permits the Distribution Licensee to charge “prices” in accordance with such tariff as fixed from time to time fixed and conditions of the licence.
3. Section 126 starts with the heading “Assessment” and envisages computation of actual electricity charges, which is a compulsory money exaction from the citizen on actuals. While Section 45 contemplates the actual consumption of electricity, which is not a penalty, Section 126 is not a levy but comes within the second stage of compulsory exaction of money, that is, assessment. Such an exaction envisages three stages, levy (power), assessment and recovery. It is argued that Section 126(6) of the 2003 Act is beyond the scope of levy under Section 45, since it provides for a multiplier. Thus, Section 126 is an assessment in excess of levy contained in Section 45 and is thus *ultra vires* the Act, as it hits Article 14 of the Constitution of India on the ground of arbitrariness.
4. Section 126(5) is a dangerous and impermissible statutory fiction which has a capacity of introducing a hefty multiplier, having a confiscatory effect. Such multiplier can be conveniently relied on, since it is impossible to ascertain the actual period during which the unauthorized use of electricity has taken place.

5. The above situation has the effect of making the provisional assessment *ab initio* astronomical and impossible to oppose, rendering the right of filing objection and hearing under Section 126(3) ritualistic and farcical, since the operation of a statutory fiction cannot be resisted by objection or hearing. Thus, the appellate remedy under Section 127 is a non-starter, also owing to the pre-condition of deposit of 50 per cent of the assessment amount. In any fiscal law, there are three components - levy, assessment and recovery. A fiscal law is required to be certain. However, there is no guideline given in Section 126 for exercise of the 'best judgment', which bestows unbridled power on the Assessing Officer. The assessment is delegated to executive action, which vitiates the validity of the said provision.
6. Learned counsel appearing for the petitioner argues that the part of *Kusum Ingots & Alloys Ltd. v. Union of India and another*, reported at (2004) 6 SCC 254, where the Supreme Court held that in view of Article 226(2) of the Constitution, judgments in constructional validity of statutory provisions on Central Statutes rendered by one High Court would be binding on another, is not the correct proposition of law and thus, not binding on the court.
7. Learned counsel contends that the judgments which have dealt with the *vires* of the provisions-in-question, that is, Sections 126 and 135, do not deal with the issue now raised.
8. Learned counsel for the petitioner cites *Natural Resources Allocation, In Re, Special Reference No. 1 of 2012*, reported at (2012) 10 SCC 1, to

argue that executive action should have clearly defined limits and be predictable.

9. In *Atiabari Tea Co. Ltd. v. State of Assam and others*, reported at AIR 1961 SC 232, it was held that executive power to tax must be controlled by constitutional provisions.
10. Although not contextually referred to in the arguments, written or oral, the petitioner also relies on *Agricultural Market Committee v. Shalimar Chemical Works Ltd.*, reported at (1997) 5 SCC 516, for the proposition that the delegate, while making subsidiary rules or regulations, cannot widen or restrict the scope of the Act or the policy or principle.
11. Learned counsel cites *Commissioners of Basirhat Municipality v. Anukul Chandra Das*, reported at AIR 1974 Cal 9, in support of his contention that absolute powers without any classification or even guidance is discriminatory and void. *Dr. K.R. Lakshmanan v. State of T.N. and another*, reported at (1996) 2 SCC 226, is cited for the argument that when two provisions are contradictory to each other, reasonable interpretation can be given to the two sets of provisions by applying them to two different situations. Since Sections 126 and 135 operate in the same field, the constitutional validity of the provisions is required to be gone into.
12. It is next argued that the manner in which delegation is to be exercised is conditional legislation, as distinguished from excessive legislation or abdication of legislative power. The delegation must be for implementation of the law enacted by the Legislature and should

provide sufficient guidelines, conditions, etc., fulfillment of which would be enforced by the delegatee. Conferring unfettered, uncanalised power without laying down certain norms for enforcement is tantamount to abdication of legislative powers by the Legislature, which is not permissible in law. In support of such proposition, learned counsel for the petitioner cites *State of Tamil Nadu and others v. K. Shyam Sunder and others*, reported at (2011) 8 SCC 737. A provision forcing the members to act under compulsion/direction of the State rather than on their free will is violative of the very first principle of law, being vitiated by non-application of mind and irrelevant and extraneous considerations. Substantive unreasonableness in the statute furnishes a ground for invalidation on the ground of Article 14 of the Constitution of India. For such proposition, *Andhra Pradesh Dairy Development Corpn. Federation v. B. Narasimha Reddy and others*, reported at (2011) 9 SCC 286, is relied on.

13. The procedure prescribed in law must be fair, just and reasonable and not fanciful, oppressive and arbitrary. The petitioner cites *Mithu v. State of Punjab*, reported at (1983) 2 SCC 277 to strengthen such argument.
14. In *Shayara Bano v. Union of India and others*, reported at (2017) 9 SCC 1, the Supreme Court held that Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment.
15. Again, *Sunil Batra v. Delhi Administration and others*, reported at (1978) 4 SCC 494, is cited for the proposition that the court can so

interpret the law that it is saved from unconstitutionality. Pro-Constitution statutes can be so read as to conform with the Constitution of India.

16. Learned counsel for the respondents opposes the petitioners' arguments and contends that the issue of *vires* of the concerned Sections is no longer *res integra*. Learned counsel relies on a Division Bench judgment of the Punjab and Haryana High Court in *M/s JTG Alloys Private Ltd. Mandi Gobindgarh District Fatehgarh Sahib Vs. Punjab State Power Corporation Ltd. Patiala & Ors.*, where the judgment of *Southern Electricity Supply Co. of Orissa Ltd. (SOUTHCO) and another v. Sri Seetaram Rice Mill*, reported at (2012) 2 SCC 108 was followed. In the said judgments, it was held that there is a clear distinction between cases which would fall under Section 126 of the 2003 Act on the one hand and those falling under Section 135 on the other.
17. In *WBSEDCL v. M/s Orion Metal Pvt. Ltd. and another* [Civil Appeal No. 6547 of 2019 arising out of SLP(C) No. 22207 of 2018], the Supreme Court discussed the law relating to the said provisions with an observation that there is no conflict in application of those. All instances of unauthorized use of energy may not amount to theft of electricity within the meaning of Section 135 but at the same time, the theft of electricity covered by Section 135 will fall within the definition of 'unauthorized use of electricity'. It was held that the authorities under the 2003 Act are empowered to make a provisional and a final assessment by invoking power under Section 126(1) even in cases

where electricity is unauthorizedly used by way of theft. Section 126 forms a part of the scheme which authorizes electricity suppliers to ascertain loss in terms of revenue caused to them by the consumer by his act of “unauthorized use of electricity”. However, Section 135 deals with offences of theft if the consumer is found to have indulged in acts mentioned in Clauses (a) to (e) of sub-section (1) of Section 135.

18. It is also clear from Section 154 of the 2003 Act, which prescribes procedure and power of the Special Court, that it empowers the said court to convict the consumer and impose a sentence of imprisonment. Under Section 154(6), in case the civil liability determined by the Special Court is less than the amount deposited by the consumer or the person, the excess amount so deposited shall be refunded by the licensee 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/final assessment under Section 126 of the said Act.
19. In cases where the allegation is of unauthorized use of energy amounting to theft, apart from assessment under Section 126(1), a complaint can also be lodged alleging theft of energy as defined under Section 135(1) of the 2003 Act. In such cases, the Special Court is empowered to determine civil liability under Section 154(5) of the Act. On such determination, the excess amount is to be refunded. To prove the guilt of the accused in a criminal proceeding, the authorities

have to prove the case beyond reasonable doubt and the element of *mens rea* is also to be established.

20. Learned counsel for the respondents next relies on *Ranchhodbhai vs. Union of India*, where a Division Bench of the Gujarat High Court also came to a conclusion in favour of constitutionality of Sections 126 and 135. Another Division Bench of the Gujarat High Court, in *Satish Babu Bhai Patel Vs. Union of India and others*, affirmed the said conclusion.
21. Learned counsel appearing for the WBSEDCL submits that after passage of a long time of about 20 years, when constitutionality of the provisions of the 2003 Act has been tested before different judicial platforms and the validity and the correctness thereof have been upheld, the present writ petition has been filed. Thus, it is motivated, without the respondents availing of the alternative remedy of appeal in time.
22. Lastly, learned counsel cites the judgment of this Court in *Md. Abdul Matin Vs. WBSEDCL*, where all the previous judgments were discussed.
23. Thus, it is contended by the respondents that the writ petition ought to be dismissed.
24. Upon a careful consideration of the arguments of the parties, the limited conspectus of the present challenge is found to be that the Legislature has allegedly delegated the power to assess a penalty to the Executive. The petitioner argues that such unbridled power is

arbitrary and unconstitutional. Section 126 provides for a penalty beyond levy of tariff.

- 25.** That apart, it has been argued that Sections 126 and 135 operate in the same field and thus it is left to the discretion of the Executive to apply either of the two or both according to its whims, which option has also been canvassed as unconstitutional.
- 26.** However, the said issue has been dealt with extensively in several judgments of the Supreme Court as well as different High Courts.
- 27.** In *Sri Seetaram Rice Mil (supra)*, the Supreme Court laid down in no uncertain terms that there is a clear distinction between cases which would fall under Section 126 on the one hand and Section 135 of the 2003 Act on the other. Whereas Section 126 deals with unauthorized use of electricity, which has been defined in Explanation (b) to Section 126(6), Section 135(1) also defines theft under the said provision. While there are certain common features and overlaps in the said Sections, the defining feature of Section 135 is that the act-in-question has to be done “dishonestly” by the perpetrator. Thus, an element of motive or *mens rea* is factored in, which requires strict proof beyond reasonable doubt in consonance of the standard of proof in criminal proceedings. The consequences of theft under Section 135 are the registration of a complaint and a consequential First Information Report and a criminal proceeding in terms thereof. In the same breath, Section 154 confers power on the Special Court contemplated therein to assess the civil liability for such act of theft as well.

28. The Supreme Court has repeatedly held that in spite of the overlaps, the Sections 126 and 135 operate in different fields. While the former deals with a provisional assessment on a civil footing, the latter contemplates a criminal action.
29. Different consequences – civil and criminal in nature – for the self-same set of cause of action, is not unknown to law. There may be several instances where the same act leads to both civil and criminal consequences. For example, if there is a trespass, the same may acquire the character of a criminal trespass while, at the same time, furnishing cause of action for a civil action before a regular civil court for eviction/injunction, etc.
30. In certain cases, the infringement of a legal entitlement may also furnish similar reliefs both under the civil and criminal law. For example, the right of maintenance has its ramifications under several statutes, both of civil and criminal nature.
31. In *M/s Orion Metal Pvt. Ltd. (supra)*, the Supreme Court discussed the distinctions between Sections 126 and 135 threadbare, which was again followed by this Court in *Md. Abdul Matin (supra)*.
32. Division Benches of the Gujarat High Court in *Ranchhodbhai (supra)* as well as *Satish Babu Bhai Patel (supra)* have also discussed the distinctions between the two elaborately.
33. *M/s JTG Alloys Private Ltd. (supra)* also discusses and reiterates *Seetaram Rice Mill's* case and the proposition laid down therein.

34. The exercise of powers under Sections 126 and 135 are in distinct fields and operate on defined parameters, not leaving it entirely to the Executive to choose between the two.
35. Thus, the bogey of excessive executive delegation of legislative power has already been dealt with by the Supreme Court and various High Courts previously. The present challenge is, thus, merely old wine in a new bottle.
36. In any event, the said argument cannot be accepted on merits as well. The petitioner has cited several judgments, including *State of Tamil Nadu (supra)*, *Dr. K.R. Lakshmanan (supra)*, *Commissioners of Basirhat Municipality (supra)* and *Agricultural Market Committee (supra)* to argue that delegation cannot widen or restrict the scope of the parent Act and cannot confer absolute powers without classification or without stipulating the guidelines.
37. *Natural Resources Allocation (supra)* has also been cited for the proposition that executive action should have clearly defined limits and be predictable.
38. Section 126 clearly defines the parameters of exercise of power by the Executive. It is trite that the Legislature merely lays down the governing law, but cannot deal with each and every conceivable factual situation which could arise to attract the said provisions of law. Statutes lay down the first principles and their manifestations, but cannot address each and every factual scenario coming within the purview thereof, for which some amount of delegation of power has to be vested in the Executive.

- 39.** In the backdrop of the above, the provisions of Section 126 are to be looked into. With regard to perceived uncertainty in the said provision, such argument is misconceived. Sub-section (1) of Section 126 clearly provides that the Assessing Officer is to undertake the exercise contemplated therein “to the best of his judgment”. However, the best judgment is to be exercised not in thin air but under defined parameters. The judgment so exercised is not on the rates at which the penalty is to be exacted or the rate of tariff, but on the extent and period of the benefits derived by a person from unauthorized use of electricity as well as for identifying the persons who have derived such benefit, for which the assessing officer has to hold an inspection of any place or premises or the equipments, gadgets, machines, devices found connected or used or of the records maintained by any person. Thus, such assessment is not based on fiction but on solid yardsticks and methodology which has been provided in the Seciton itself.
- 40.** Insofar as the calculations are concerned, Section 126(6) clearly provides that the assessment will be at a fixed rate, which will be twice the tariff applicable for the relevant category of services specified in sub-section (5) of Section 126. Thus, the use of the expression “tariff” takes us within the domain of Section 45, which stipulates the tariffs which are to be fixed from time to time.
- 41.** The 2003 Act provides amply for the modalities and parameters for fixation of tariff and there cannot be any manner of doubt, nor has the same been argued by the petitioner, on such count. The imposition of double the rate of tariff is not by way of levy of a charge for the use of

electricity but in the nature of a penalty for unauthorized use of electricity in contravention of law.

- 42.** “Unauthorized use of electricity” is clearly defined and put under specific categories under Explanation (b) of Section 126(6) of the 2003 Act.
- 43.** The provisional and final assessments are to be at a rate equal to twice the tariff applicable otherwise under the 2003 Act. Hence, there is no dichotomy or unbridled authority involved, as the Assessing Officer has to work within the framework of Section 126, sub-sections (1) and (6) to arrive even at a *prima facie* finding which gives rise to the provisional assessment.
- 44.** Not stopping there, Section 126(2) envisages service of a copy of the order of provisional assessment upon the perceived perpetrator and thereafter sub-section (3) contemplates affording a reasonable opportunity of hearing to such person, also stipulating the outer limit of 30 days from the date of service of the order, upon which a final assessment is arrived at.
- 45.** Sub-section (5) of Section 126 provides for final assessment, which can only be after affording such reasonable opportunity to the offender. Also, sub-section (5) further specifies that the assessment shall be restricted to the entire period during which the unauthorized use of electricity has taken place, at the first instance. Only if such period cannot be ascertained, which is also a reasonable scenario, the period is to be limited to 12 months immediately preceding the date of inspection. The stipulation of 12 months as the preceding period is

not unreasonable or shocking to the conscience in any manner. It is well with the Legislative discretion to stipulate such period in the event an exact finding as to the period of unauthorized use cannot be ascertained.

- 46.** The petitioners argue that the period of unauthorised use can never be ascertained. However, the said argument cannot be accepted, since it may very well be possible for the assessing officer, upon inspection of the site, the equipments and gadgets used in such unauthorised use and/or the records maintained by the offender to arrive at a conclusion as to the period during which such use continued.
- 47.** Explanation (a) to Section 126(6) also defines “Assessing Officer”, who is not necessarily any employee of the Licensee but may be an officer of the State Government or Board or the Licensee, in all of which cases she/he has to be designated as such by the State Government. Thus, it is not that the licensee, at its discretion, appoints any of its employees who is not sufficiently qualified to make such assessment. The designation by the State Government contemplated in Explanation (a) is a sufficient safeguard for ensuring that the Assessing Officer is neutral.
- 48.** Hence, the argument of uncertainty and excessive delegation is entirely belied by the provision itself.
- 49.** If aggrieved by the final assessment order, it is also open for the offender to prefer a challenge before the Appellate Authority as prescribed. “Prescribed”, under Section 2 (52) of the 2003 Act, means

prescribed by rules made by the Appropriate Government under the Act, thus ensuring the neutrality of the said authority as well.

50. The requirement of fifty per cent deposit while filing an appeal under Section 126 is also within legislative competence and is similar to several other statutes. The *vires* of such imposition of a pre-requisite deposit has been upheld not only in the judgments referred to above but in respect of other similar statutes as well.
51. The petitioner next assails the “fine-calculating provisions” of Section 135 as discriminatory and arbitrary.
52. We have, however, to be cautious in assessing a challenge to the *vires* of a statute, which has to be on a higher footing than a challenge to an executive action. It has to be kept in mind that the Legislature is comprised of an elected body of persons who are supposed to reflect the will of the electorate. The Legislature may very well adopt a policy which cannot be questioned under normal circumstances by courts otherwise than on high grounds of unconstitutionality. The mere allegation that there is arbitrariness cannot be sufficient justification for striking down a statute.
53. The arbitrariness alleged in Section 135 is, in fact, non-existent, as the proviso to Section 135(1) is well-reasoned and based on justifiable parameters. While sub-clause (i) thereof contemplates situations not exceeding 10KW, sub-clause (ii) deals with situations where the theft is of more than 10KW. In both cases, the Legislature distinguishes between the first conviction and the second or subsequent conviction, which is also entirely justifiable, since the recalcitrance of an offender

in committing the second or subsequent offence has to be taken to be higher than that a first offender. The exact rates of imposition of fine have also been provided, the upper limits thereof being stipulated at three times and six times of the financial gain on account of such theft of electricity respectively.

- 54.** “Financial gains” has to be kept fluid, since the gain derived by the offender differs from case to case and has to be assessed and proved only after taking into consideration all facets of the factual matrix. Thus, there is no excessive delegation in such stipulations. On the contrary, Section 154 provides the particular forum (Special Court) for dealing with such thefts, which is also empowered to determine the civil liability associated with theft. Sub-section (5) of Section 154 provides the lower limit of the fine to be imposed on account of civil liability which is exactly in consonance with Section 126(6) of the 2003 Act. Hence, it is noteworthy that there is absolute parity on assessment of civil liability between Sections 126(6) and 154(5). The two, in fact, go hand-in-hand.
- 55.** Again, as an additional safety-net for the offender, sub-section (6) of Section 154 provides for refund of excess deposit by the offender. Thus, Sections 126, 135 and 154, between themselves, contemplate an entire ecosystem for cases dealing with unauthorized use of electricity and theft of electricity, the latter being merely a species of the former genus.
- 56.** What constitutes theft, as opposed to a general case of unauthorized use of electricity, is clearly defined in Section 135(1), with the

additional component of “dishonesty” which establishes the requirement of proving theft on the standards of criminal jurisprudence.

- 57.** Hence, we find that the imposition of fines at specific and well-explained rates, in turn dependent on tariff which is also defined under the statute, lends certainty to the procedure of fixation of fines and the regime of penalty contemplated in the three aforesaid Sections. The financial gains and period of unauthorized use/theft are also logical and objective standards which are well-accepted in legislations.
- 58.** In any event, Sections 127 provides for an appeal against the final order of assessment. Any criminal conviction under Section 135 is also amenable to challenge before the appropriate forum. Section 126(4) as well as Section 135(1A) provide for restoration of electricity in the event the assessed amount is deposited by the offender, which also provides an additional outlet for immediate relief, keeping in tune with the fact that electricity is a basic necessity.
- 59.** Thus, Sections 126, 135 and 154 of the 2003 Act comprise of a complete Code in themselves, based on well-defined parameters and clear principles as discussed above, which do not admit of any aspersion of arbitrariness or uncertainty.
- 60.** That apart, the present challenge to the *vires* to Sections 126 and 135 on the specious plea of additional components of challenge is deliberately intended to stall the proceedings taken out against the petitioners under the said provisions. The said attempt on the part of

the petitioners, despite the *vires* of the said provisions being no longer *res integra*, lacks *bona fides* and is calculated to protract litigation. Such act on the part of the petitioner is deprecated and, for the harassment caused to the respondents, the petitioners are liable to pay costs.

61. Since the other reliefs sought in the writ petitions are consequential to the challenge to the *vires* of Sections 126 and 135 of the 2003 Act, consequential to the challenge to *vires* being turned down, the said reliefs are also refused.
62. Accordingly, W.P.A. No. 8719 of 2012 and W.P.A. No. 12684 of 2013, along with the consequential applications being respectively IA No: CAN 1 of 2019 (Old No: CAN 4076 of 2019) and IA No: CAN 1 of 2019 (Old No: CAN 4079 of 2019), are dismissed on contest with costs of Rs. 20,000/- (Rupees Twenty Thousand), to be paid by the petitioners to the respondents within a fortnight from date.
63. It is hereby held that Sections 126 and 135 of the Electricity Act, 2003 are *intra vires* the Constitution of India and the Act itself.
64. Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)

Later

At this juncture, learned counsel for the petitioners seeks an order of stay of operation of the above order. Since the order also contains a mandatory direction of payment of costs, the operation of

the order insofar as it relates to payment of costs of Rs. 20,000/- is stayed for a period of four weeks from date to enable the petitioners to prefer a challenge against the order.

However, it is made clear that insofar as the dismissal of the challenge to *vires* is concerned, the said portion of the order is not stayed.

(**Sabyasachi Bhattacharyya, J.**)