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akb 28.4.15

M.A.T. 581 of 2015

Talat Sahmid

-Versus-

The W.B.S.E. Distribution Co. Ltd. & Anr.

Mr. Subir Sanyal

Mr. Dibyendu Chatterjee

Ms. Jhuma Chakraborti

Ms. Madhuparna Kanrar

...For the Appellant

Mr. Rammohan Chattopdhyay

...For the WBSEDCL Co. Ltd.

Re.: C.A.N. 3790 of 2015 (Section 5).

The appeal is barred by six days.

Causes being sufficient, delay is condoned and the appeal is taken on record.

The application for condonation of delay is, thus, disposed of.

There will be no order as to costs.

Re.: C.A.N. 3791 of 2015 (Stay).

Heard learned Counsel appearing for the appellant as well as learned Counsel for the respondent Company.

According to the learned Counsel for the appellant, the so-called demand bills appearing at pages 51 and 52 to the stay application are arbitrary and without jurisdiction. When the provisional assessment order dated June 18, 2014 was brought to our attention by the standing Counsel for the respondent Company, the learned Counsel for the appellant contends that once the authority concerned forms an opinion that the consumer is guilty of pilferage of electricity, the procedure contemplated under Section 135, Special Court has to be resorted to decide the said issue. He also relied upon paragraphs 26, 28, 29 and 30 of a decision of the Apex Court in the case of ***Executive Engineer, Southern Electricity Supply Company of Orissa Limited (SOUTHCO) & Anr. Vs. Sri Seetaram Rice Mill*** reported in **(2012) 2 SCC 108**. He also took us through the Section 156 of the Electricity Act, 2003 in order to contend that notice dated June 18, 2014 would give rise to proceeding under Section 135 and not proceeding under Section 126 and 127.

On perusal of the impugned judgment and the facts placed on record as spelt out in the annexed documents, we find there are two bills at pages 51 and 52. One is dated 11.7.2014 for the reading of the electricity consumption as per meter between 27.3.2014 to 11.7.2014 and another bill dated 18.10.2014 for the

reading of the electricity consumption as per meter between 11.7.2014 to 17.10.2014. Based on this factual situation according to the learned Counsel for the appellant, the demand and the procedure adopted neither indicate process of provisional or final assessment nor proceeding under Section 135 of 2003 Act. Therefore, the learned Single Judge ought to have allowed the writ petition. Alternatively, he contends that the reading of provisional assessment order dated June 18, 2014 indicates that the Authority was to take recourse to proceeding under Section 135 read with 156 and not under Section 126.

Paragraphs 26, 28, 29 and 30 of the judgment of **Executive Engineer, Southern Electricity Supply Company of Orissa Limited (SOUTHCO) & Anr. (Supra)** are quoted below :-

26. In contradistinction to these provisions, Section 126 of the 2003 Act would be applicable to the cases where there is no theft of electricity but the electricity is being consumed in violation of the terms and conditions of supply leading to malpractices which may squarely fall within the expression 'unauthorised use of electricity'. This assessment / proceedings would commence with the inspection of the premises by an assessing officer and recording of a finding that such consumer is indulging in an 'unauthorised use of electricity'. Then the assessing officer shall provisionally assess, to the best of his judgment, the electricity charges payable by such consumer, as well as pass a provisional assessment order in terms of Section 126(2) of the 2003 Act.

28. Section 135 of the 2003 Act deals with an offence of theft of electricity and the penalty that can be imposed for such theft. This squarely falls within the dimensions of criminal jurisprudence and mens rea is one of the relevant factors for finding a case of theft. On the contrary, Section 126 of the 2003 Act does not speak of any criminal intentment and is primarily an action and remedy available under the civil law. It does not have features or elements which are traceable to the criminal concept of mens rea.

29. Thus, it would be clear that the expression "unauthorised use of electricity" under Section 126 of the 2003 Act deals with cases would certainly be different from cases where there is dishonest abstraction of electricity by any of the methods enlisted under Section 135 of the 2003 Act. A clear example would be, where a consumer has used excessive load as against the installed load simpliciter and there is violation of the terms and conditions of supply, then, the case would fall under Section 126 of the 2003 Act. On the other hand, where a consumer, by any of the means and methods as specified under Sections 135(a) to 135(e) of the 2003 Act, has abstracted energy with dishonest intention and without authorisation, like providing for a direct connection bypassing the installed meter,

the case would fall under Section 135 of the Act.

30. Therefore, there is a clear distinction between the cases that would fall under Section 126 of the 2003 Act on the one hand and Section 135 of the 2003 Act on the other. There is no commonality between them in law. They operate in different and distinct fields. The assessing officer has been vested with the powers to pass provisional and final order of assessment in cases of unauthorised use of electricity and cases of consumption of electricity beyond contracted load will squarely fall under such power. The legislative intention is to cover the cases of malpractices and unauthorised use of electricity and then theft which is governed by the provisions of Section 135 of the 2003 Act.

Reading of the above paragraphs clearly indicates unauthorised use of electricity could be on account of various reasons including theft of energy or pilferage. Ultimately it is made clear that such unauthorised use may lead to two actions, one under Sections 126 and 127 of the 2003 Act and the other before a Special Court under Section 135 of the Act, 2003. A clear example would be, where a consumer has used excessive load as against the installed load simpliciter and there is violation of the terms and conditions of supply, then, the case would fall under Section 126 of the 2003 Act. On the other hand, where a consumer, by any of the means and methods as specified under Section 135(a) to 135(e) of the 2003 Act, has abstracted energy with dishonest intention and without authorisation, like providing for a direct connection bypassing the installed meter, this would be led to the conclusion that consumer intends to pilferage the energy.

In the present case, the proceeding as indicated in the order dated June 18, 2014 speaks of recourse to civil action for recovery of unpaid electricity charges for unauthorised use of electricity which is ordinarily known as back billing, indicates a procedure for provisional assessment and after hearing the consumer, final assessment.

So far as the action under Section 135, already FIR is registered and the proceedings are pending. In the order dated June 18, 2014 the basic allegation is unauthorised use of electricity leading to theft of energy. Reference to the words 'theft of energy' by itself will not lead as to the conclusion that there is no jurisdiction for the Authority to take recourse to Sections 126/127 of the Act and issue the impugned order dated June 18, 2014. Reference to Section 156 of the Act 2003 particularly Sub-Section (5) & (6) is misplaced. The said provisions relate to loss or unliquidated damages caused to the

licensee in a case of theft which is recoverable over and above recovery of unpaid electricity charges upon conviction under Section 135 of the Act of 2003. So far as the grievance of two bills at pages 51 and 52, it is always open to the consumer to place on record when he appears before the Assessing Authority for ventilating his grievance about two bills. So far as the issue of lack of jurisdiction of the Authority, in invoking Section 126/127 of the Act of 2003, we disagree with the contention of the learned Counsel for the appellant as we are of the view two proceedings are possible for same cause of action of unauthorised use of electricity. 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 theft of energy amounts to unauthorised use of electricity also.

In the light of above observations, we are of the opinion, none of the grounds raised by the appellant herein would warrant any interference with the order of the learned Single Judge.

Accordingly, the appeal is dismissed along with the application for stay.

(Manjula Chellur, Chief Justice)

(Joymalya Bagchi, J.)