



GAHC010105582021

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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/3427/2021

M/S SHIV ALLOYS STEEL
A PARTNERSHIP FIRM DULY REGD. UNDER THE INDIAN PARTNERSHIP
ACT, 1932 HAVING ITS PRINCIPAL PLACE OF BUSINESS AND
FACTORY/INDUSTRIAL UNIT AT WEST BORAGAON, GHY-33 IN THE DIST.
OF KAMRUP, ASSAM DULY REP. BY ONE OF ITS PARTNERS NAMEDLY, SRI
DIPAK DAS, S/O- LT. BOGARAM DAS, MAA ASHIRBAD APARTMENT,
VIGYAN PATH, WEST BORAGAON, GHY-33, DIST.- KAMRUP, ASSAM

VERSUS

ASSAM POWER DISTRIBUTION COMPANY LIMITED AND 2 ORS.
A GOVT. OF ASSAM UNDERTAKING DULY INCORPORATED UNDER THE
COMPANIES ACT, 1956 HAVING ITS OFFICE AT BIJULEE BHAWAN, PALTAN
BAZAR, GHY-1, DULY REP. BY ITS MANAGING DIRECTOR

2:THE AREA MANAGER
IRCA-II
APSCL (LAR)
JALUKBARI
GHY-12

3:THE ASSTT. GENERAL MANAGER
T AND C DIVISION
GEC-II AMINGAON
GHY-3

Advocate for the Petitioner : MR. S K KEJRIWAL

Advocate for the Respondent : SC, APDCL



BEFORE
THE HON'BLE MR JUSTICE PRASANTA KUMAR DEKA

For the Petitioner : Dr. A. Saraf, Sr. Advocate
Mr. S. K. Kejriwal, Advocate.

For the respondents : Mr. P.N.Goswami,
Additional Advocate General, Assam
Mr. I. Kalita, Standing Counsel, APDCL

Date of hearing : 12.08.2021

Date of Judgment/ Order : 12.08.2021

JUDGMENT & ORDER

12.08.2021

Heard Dr. A. Saraf, the learned Senior Counsel assisted by Mr. S. K. Kejriwal, the learned counsel for the petitioner. Also heard Mr. P. N. Goswami, the learned Additional Advocate General, Assam assisted by Mr. I. Kalita, the learned counsel appearing on behalf of the respondent APDCL.

1. The petitioner is the consumer of the respondent Assam Power Distribution Company Ltd. (APDCL) with a connected load to the petitioner's industry being 1200 KW. That on 01.06.2021, the Inspecting Team of APDCL visited the petitioner's premises and while replacing the modem, the consumer meter was also checked and seals of meter terminal cover and cabinet box were replaced by new seals. On 09.06.2021, the meter of the petitioner was inspected which was replaced on 22.03.2021. On 09.06.2021 site inspection of metering installation of the petitioner in presence of Central Inspection Team from APDCL Head Quarter Vigilance Wing was done, the metering installation was checked. The meter data was downloaded for further analysis. On opening

of the top cover of the CT/PT set bearing serial No. 6766, an external RF circuit was found connected with the CT/PT secondary terminals inside the CT/PT set which was used to interfere with the energy recording by the metering system. On 09.06.2021 itself the power supply was disconnected. Assessment proceeding was initiated followed by provisional assessment order dated 15.06.2021. The provisional assessment bill of Rs. 2,78,95,505.00 for the period of 23.11.2020 to 09.06.2021 was served on the petitioner. On 09.06.2021 a seizure was made whereafter an FIR was lodged by the APDCL team in the Gorchuk Police Station.

2. Assessment proceeding was initiated by the Area Manager for theft related case. The petitioner preferred its representation before the Area Manager against the said proceeding and thereafter the matter was heard on 02.07.2021 and the Assessing Officer issued Final Assessment Order dated 07.07.2021 upholding the provisional assessment bill. Accordingly, the petitioner challenged the legality and validity of the inspection report dated 09.06.2021 including the seizure and observation report, illegal disconnection of power supply on 09.06.2021, Assessment Bill dated 15.06.2021 and the Final Assessment Order dated 07.07.2021.

3. An affidavit-in-opposition was filed by the respondent Nos. 1, 2 and 3 raising the issue of maintainability of the writ petition and the interim prayer made therein. As per the said affidavit-in-opposition it is submitted that in terms of the provision of Section 126 of the Electricity Act, 2003, the provisional assessment dated 15.06.2021 was drawn up and served upon the petitioner. In terms of Section 126 (3) of the Electricity Act, 2003, the petitioner was granted an opportunity to file objections against the said provisional order. Thereafter,

the Assessing Officer came to a finding that the petitioner had indulged in “unauthorized use of electricity” under Section 126 of the Act of 2003 as well as “theft of electricity” under Section 135 of the Act. Accordingly vide order dated 07.07.2021, the Assessing Officer confirmed the provisional assessment dated 15.06.2021. It is also stated that the petitioner raised in this writ petition disputed questions of fact and moreover there is an adequate alternative remedy in order to decide the disputed questions of fact under Section 126 of the Act of 2003, Section 127 of the Act, 2003 provides an adequate and effective alternative remedy in the form of an appellate authority against Final Assessment made under Section 126 of the Act, 2003. The writ petitioner is aggrieved on the technical and factual grounds as raised in the writ petition and as such the petitioner is required to file an Appeal under Section 127 of the Electricity Act, 2003. Moreover, pursuant to the FIR dated 09.06.2021 lodged by the APDCL, there is pending a criminal investigation against the petitioner. On perusal of the FIR also reveals a prima facie case of theft of electricity and as such no interference by this court is called for.

4. Dr. Saraf submits that as per third proviso to Section 135 (1A) of Electricity Act, 2003, the assessed amount or electricity charges for theft related case has to be assessed in accordance with the provisions of the Act. Section 126 being the lone provision for assessment of electricity charges, the assessment of electricity charges even for theft related case has to be made as per Section 126 inasmuch as loss to the licensee whether it be on account of ‘unauthorized use of electricity’ or ‘theft of electricity’ would remain the same. Merely because assessment for theft related case is required to be made as per Section 126 of the Act that by itself would not convert the proceeding as one applicable for unauthorized use of electricity. Moreover, Section 135 of the Act



nowhere provides for any appeal against the assessment made for theft related case. In support of the said contention Dr. Saraf relies the case of ***Jharkhand State Electricity Board –Vs- The Chief Engineer cum Chief Electrical Inspector cum Appellate Authority, Department of Energy, Govt. of Jharkhand and Ors*** reported in ***AIR 2016 Jharkhand 1*** wherein it is held that in case of theft of electricity against the provisional bill issued under third proviso to Section 135 (1A), no appeal lies. Merely because the Assessing Authority has mentioned that the provisional bill/final bill has been issued under Section 126, no appeal under Section 127 would lie in the present case. Moreover, a case of theft of electricity cannot be deemed to be converted into a case of unauthorized use of electricity. Dr. Saraf further relies the case of ***Shyam Kishore and Ors –Vs- Municipal Corporation of Delhi*** reported in ***(1993) 1 SCC 22*** and submits that there is a basic distinction between the right of suit and the right of appeal. There is an inherent right in every person to bring a suit of a civil nature. But the right of appeal inheres in no one and therefore, an appeal for its maintainability must have the clear authority of law. He also relied the case of ***West Bengal State Electricity Distribution Company Ltd. and Others –Vs- Orion Metal Pvt. Ltd. and Another*** downloaded from ***2019 SCC Online SC 1077*** wherein it was held that when allegation is of unauthorized use of energy amounting to theft, in such case apart from the assessing proceeding under Section 126(1) of the Act, a complaint also could 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 the civil liability. Accordingly it is the submission of Dr. Saraf that in theft cases, no appeal lies under Section 127 of the Act. Relying the case of ***Executive Engineer, Southern Electricity Supply Company of Orissa Limited***

(SOUTHCO) and Another –Vs- Sri Seetaram Rice Mill reported in **(2012) 2 SCC 108** , it is submitted that Section 126 of the Act would be applicable only in the case where there is no theft of electricity. In support of his contention that appeal does not lie under Section 127 of the Act, against a case of theft, he relied various provisions of the Electricity Act, 2003 more specifically Sections 151, 154 (1), 155 and 156 of the Act, 2003. It is also contended by Dr. Saraf that this court in various cases of similar nature was satisfied to issue notice subject to deposit of amount out of the provisional bill/final bill and the said interim orders passed in various writ petitions still holds the field and as such in present case in hand there should not be any deviation from the practice followed by this court.

5. Mr. Goswami on the other hand countered the submission of Dr. Saraf and wanted to project that the unauthorized use of electricity as stipulated under Section 126(1) of the Act, 2003 includes use of such electricity by theft. It is submitted that the petitioner has raised various disputed questions of fact. Admittedly a final bill was raised after disposing the representation made by the petitioner before the Area Manager/ Assessing Officer and if at all, the petitioner is aggrieved, he was supposed to file appeal as prescribed under Section 127 of the Act, 2003.

6. I have given due consideration to the submissions of the learned counsel. Mr. Goswami submits that the petitioner pleaded mainly the facts leading to disconnection of the power supply to its factory premises were false. For instance it is pleaded that the detection of foreign circuit in the CT/PT secondaries are totally fake as per the petitioner and the seizure was false. There was no tampering of meter inasmuch as the officials of APDCL used to

check all the connection and the metering systems in a routine manner. So as per the submission of Mr. Goswami in case the writ petitioner has any grievance on technical and factual grounds in respect of the impugned final order dated 07.07.2021 it ought to have availed the alternative remedy available under Section 127 of the Act, 2003. The appellate authority under Section 127 is equipped to determine all the disputed factual and technical issues raised in this writ petition as the appellate authority consists of experts in the field. In support of the said contention Mr. Goswami relies ***Shyam Kishore and Ors –Vs- Municipal Corporation of Delhi*** (supra) wherein it was held that when a statute provides for an adequate alternative remedy, then parties should be discouraged from resorting to invocation of Article 226 of the Constitution. Again referring ***Executive Engineer, Southern Electricity Supply Company of Orissa Limited (SOUTHCO) and Another –Vs- Sri Seetaram Rice Mill*** (supra) submits that it was held that cases under the Electricity Act should be heard by the Hon'ble High Courts only when they invoke primary issues of jurisdiction, and cases which require adjudication on the merits of the assessment and / or factual matrix of the case should be decided by the Tribunal or Appellate Authority. Accordingly the writ petition is not maintainable.

7. Now the issues before the court are:-

- (a) Whether provisional assessment by the assessing officer against the act of indulging in "unauthorized use of electricity" after an inspection of any place or premises of a consumer and the final order of assessment of the electricity charges payable by such consumer under Section 126 (3) is restricted only to such "unauthorized use of electricity" where there is no allegation of theft

of electricity defined under Section 135 of the Act, 2003?

- (b) Whether Section 127 of the Act, 2003 covers under its sweep the final order of assessment on the basis of the provisional bill under Section 126(1) of the Act 2003 against the “unauthorized use of electricity” on the allegation of theft of electricity falling under Section 135 of the Act, 2003?
- (c) Whether considering the factual matrix this writ petition is maintainable?

Issue No. (a) Whether provisional assessment by the assessing officer against the act of indulging in “unauthorized use of electricity” after an inspection of any place or premises of a consumer and the final order of assessment of the electricity charges payable by such consumer under Section 126 (3) is restricted only to such “unauthorized use of electricity” where there is no allegation of theft of electricity defined under Section 135 of the Act, 2003?

8. Section 126 of the Act, 2003 is extracted below:-

126. Assessment.- (1) *If on an inspection of any place of 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 judgment 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 charge of the place or premises in such manner as may be prescribed.

(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.

(5) If the assessing officer reaches to the conclusion that unauthorized 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 unauthorized 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 [twice] the tariff applicable for the relevant category of services specified in sub-section (5)".

9. It stipulates that if the assessing officer on an inspection of any place or premises or after inspection of equipments, devices found connected or used including records maintained by any person comes to the finding that such person indulged in "unauthorized use of electricity" the assessing officer to the "best of his judgment" is authorized to provisionally assess the electricity charge



payable by such person. Upon the provisional assessment being served, the person concerned is entitled to file objections as per sub-Section (3) of Section 126 whereafter affording reasonable opportunity of hearing to such person, the assessing officer under sub-Section (1) of Section 126 shall pass a final order of assessment within thirty days from the date of service of provisional assessment of the electricity charges payable by such person. Sub Section (5) of Section 126 authorises the assessing officer once he comes to the conclusion that unauthorized use of electricity has taken place, the assessment shall be made for the entire period in which such unauthorized use of electricity has taken place. If the period cannot be ascertained than the period shall be limited to a period of twelve months immediately preceding the date of inspection. Sub-Section (6) of Section 126 stipulates assessment rate equal to twice the tariff applicable for the relevant category of services specified in sub-Section (5). Sub Section (6) (b)(iii) stipulates "unauthorized use of electricity" which includes the usage of electricity through a tampered meter.

10. Part XII of the Act, 2003 covers the procedure for investigation and enforcement which empowers under Section 126 of the Act 2003 the assessing officer to inspect the equipments, gadgets, machines found connected in the receiving end of the electricity by the consumer in his or her premises. If upon such inspection, the metering system at the consumer end records lesser consumption of electricity than the actual consumption, the assessing officer is required to inspect and record the cause of such wrong recording. Such cause may be due to fault with the meter itself or with other gadgets like CT/PT connected to the metering system. Upon further inspection, if the assessing officer comes to the conclusion that there was tampering in the metering system/circuit then also the drawal of electricity by the consumer would fall

within the term “unauthorized use of electricity” and he is empowered under Section 126 of Act, 2003 to raise the provisional bill and the subsequent final order thereon as per Section 126(3) of the Act, 2003.

11. Further if the tampering of any gadgets in the metering system at the receiving end of the consumer is with dishonest intention then under Section 135 of the Act, 2003 it would amount to theft of electricity. Now in order to answer the issue No. (a) relevant portion of Section 135 of the Act, 2003 is extracted below:-

“**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 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; or

(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:

Provided that in a case where the load abstracted, consumed, or used or attempted abstraction or attempted consumption or attempted use--

(i) does not exceed 10 kilowatt, the fine imposed on first conviction shall not be less than

three times the financial gain on account of such theft of electricity and in the event of second or subsequent conviction the fine imposed shall not be less than six times the financial gain on account of such theft of electricity;

(ii) exceeds 10 kilowatt, the fine imposed on first conviction shall not be less than three times the financial gain on account of such theft of electricity and in the event of second or subsequent conviction, the sentence shall be imprisonment for a term not less than six months, but which may extend to five years and with fine not less than six times the financial gain on account of such theft of electricity:

Provided further that in the event of second and subsequent conviction of a person where the load abstracted, consumed, or used or attempted abstraction or attempted consumption or attempted use exceeds 10 kilowatt, such person shall also be debarred from getting any supply of electricity for a period which shall not be less than three months but may extend to two years and shall also be debarred from getting supply of electricity for that period from any other source or generating station:

Provided also that if it is proved that any artificial means or means not authorised by the Board or licensee or supplier, as the case may be, exist for the abstraction, consumption or use of electricity by the consumer, it shall be presumed, until the contrary is proved, that any abstraction, consumption or use of electricity has been dishonestly caused by such consumer.

(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:

Provided that only such officer of the licensee or supplier, as authorised for the purpose by the Appropriate Commission or any other officer of the licensee or supplier, as the case may be, of the rank higher than the rank so authorised shall disconnect the supply line of electricity:

Provided further that such officer of the licensee or supplier, as the case may be, shall lodge a complaint in writing relating to the commission of such offence in police station having jurisdiction within twenty-four hours from the time of such disconnection:

Provided also that the licensee or supplier, as the case may be, on deposit or payment of the

assessed amount or electricity charges in accordance with the provisions of this Act, shall, without prejudice to the obligation to lodge the complaint as referred to in the second proviso to this clause, restore the supply line of electricity within forty-eight hours of such deposit or payment.]”

12. It is stipulated that whoever dishonestly amongst other acts tampers a meter so as to abstract or use electricity amounts to theft of electricity. Thereafter the various modes of punishment are stipulated. Sub Section (1A) stipulates that without prejudice to the provisions of the Act, the licensee or supplier (APDCL in the present case) immediately upon detection of such theft of electricity disconnect the supply of electricity. The licensee or supplier on deposit of “the assessed amount” or electricity charges in accordance with the provisions of the Act restore the supply line of electricity but without prejudice to the obligation to lodge the complaint as per the second proviso to this sub-clause (1A). Thus the assessment of electricity charge contemplated in this section is immediately after the disconnection but before lodging the complaint and that too for the purpose of restoration of the supply line of electricity within forty eight hours of such deposit of payment.

13. But Section 126 of the Act, 2003 is totally silent in respect of disconnection of power supply immediately on detection of indulging in unauthorized use of electricity. Accordingly in case of “unauthorized use of electricity” detected at the time of inspection under Section 126(1) of Act, 2003 the assessing officer is directed to apply “the best of his judgment” to provisionally assess the charges payable by such consumer and he is not authorized to disconnect the power supply. But if after applying his discretion to the “best of his judgment” he arrives at a conclusion that the “unauthorized use of electricity” was due to default in the metering system and such default is by



way of tampering of meter with dishonest intention by the consumer then he is authorized to invoke the authority given to him under Section 135 sub-section (1A) to disconnect the power supply. Sub Section (6) b (iii) of Section 126 specifies that "unauthorized use of electricity" means the usage of electricity through a tampered meter which also amounts to theft of electricity as per Section 135(b) of the Act, 2003. So if on inspection the assessing officer noticed unauthorized usage of electricity through a tampered meter he is authorized to raise provisional bill under sub Section (1) of the Section 126 of Act, 2003. Whether the tampering was with dishonest intention or not amounting to theft that part is left open to be decided by the Special Court. Even if there is no disconnection of supply of electricity, the assessing officer is authorized to raise provisional bill under sub Section (1) of Section 126 of the Act, 2003. The assessment required to be carried out in the third proviso of sub section (1A) of section 135 of Act, 2003 is the assessment authorized under sub section (1) of Section 126 of Act, 2003. The assessment must be as per the Act, 2003 i.e. under section 126 of the Act, 2003 as the Act has no other provision for assessment other than Section 126.

14. The assessment of electricity charge contemplated under third proviso to sub Section (1 A) of Section 135 must be in terms of the Act, 2003 i.e. during inspection inasmuch as it is only during an investigation detection of "unauthorized use of electricity" would be noticed. So the said assessment must be according to Section 126 of the Act 2003 because the assessment is before lodging of the complaint against theft of electricity but after disconnection of the power supply to the consumer under Section 135 of the Act, 2003. Moreover Part XII of the Act, 2003 stipulates the investigations and enforcement which empowers the assessing officer to raise the assessment bills. The assessment so

contemplated is irrespective of theft of electricity but for “unauthorized use of electricity”. The said term as hereinabove observed includes drawal of power by tampered meter.

15. Special courts are constituted as per Section 153 of the Act, 2003 with an intent for the purpose of providing speedy trial of offences referred to in Sections 135 to 140 and Section 150 of the Act, 2003. Section 154 of the Act, 2003 prescribes the procedure and power of Special Court. It is authorized to try offence referred to in Sections 135 to 140 and Section 150 in a summary way in accordance of Section 263 to 265 of the Code of Criminal Procedure, 1973. The discretion is given to the Special Court to proceed to re-hear the case in the manner provided by the provisions of said Code of Criminal Procedure, 1973 for the trial of such offence. Sub Sections (5) and (6) of Section 154 of the Act, 2003 also provide for determination of Civil liability in terms of money for theft of energy against a consumer which are extracted below:-

“154. Procedure and Power of Special Court.

154 (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 determined whichever is less and the amount of civil liability so determined shall be recovered as if it were a decree of civil court.

154 (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 Board or licensee 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 lending rate for the period from the date of such deposit till the date of payment”.

16. From sub Section (5) of Section 154 it can be inferred that the civil liability contemplated therein is the one after the allegation of theft of electricity is established i.e. the dishonest intention of the consumer. For the said offence of theft punishment is prescribed under Section 135 of the Act 2003. If the dishonest intention leading to theft of electricity under Section 135 is not established then question of imposing punishment and determination of civil liability by the Special Court doesnot arise. But there remains the faulty recording of the metering system showing lesser consumption of electricity or no consumption at all on the face of actual drawal of electricity by the consumer at his receiving end which might be due to unauthorized use of electricity for any other reasons specified in sub section (6) (b) of Section 126 leaving aside due to tampering of meters as stipulated under sub section (6)(b)(iii) of Section 126. The consumer is bound to pay the energy/electricity charges against the consumption of electricity. Section 126 of the Act 2003 stipulates for assessment of the electricity charges even in such a situation when there is an allegation of theft of electricity if the statement of objects and reasons of the Act, 2003 is looked into which has given revenue focus relating to theft of electricity. Sub Section (6) of Section 154 of Act 2003 stipulates that in the event the civil liability assessed by the Special Court is less than the amount deposited by the consumer the excess amount so deposited by the consumer to the licensee or Board shall be refunded by the Board or licensee within a fortnight from the date of the order communicated together with interest. The “amount deposited” in my considered opinion meant the amount assessed under Section 126(1) and



126(3) of the Act, 2003.

17. The decision rendered by the Hon'ble Supreme Court in ***West Bengal State Electricity Distribution Company Ltd and Others –Vs- Orion Metal Pvt. Ltd and Another*** downloaded from ***2019 SCC Online SC 1077*** is relevant to take note of. In the said case the respondent Orion Metal Pvt. Ltd was the bulk high voltage consumer of electricity with a contracted load of 1450 KVA. An inspection was made by the officials of the appellant West Bengal State Electricity Distribution Company Ltd., it was noticed that input current was abnormally high from the output current at TTB end in respect of R&B phases of PT secondary. Inspecting team on breaking open the TTB found some foreign materials inside and the inspection team was of the view that there was theft of energy by tampering the meter by the respondent company. The three phase meter and the metering equipment was seized by the inspecting team by preparing a seizure list. In view of such discrepancies, in exercise of power under Section 126 (1) of the Act 2003 provisional assessment for loss of energy by un-metered consumption was made by the Assessing Officer of the appellant company. After inspection a criminal complaint was lodged before the local police by the Superintending Engineer (Commercial) of the appellant company alleging that by inserting a foreign material in the meter the respondent company indulged in theft of energy. The facts are similar to the one in the present case in hand.

18. The respondent Orion Metal Pvt. Ltd moved the Hon'ble Calcutta High Court and the learned Single Judge set aside and quashed the provisional assessment bill on the ground the assessing officer was not present at the time of inspection. West Bengal State Electricity Distribution Company filed an appeal

challenging the order of the learned Single Judge. On the other hand in terms of the direction of the learned Single Judge a fresh provisional bill was raised which was allowed to be challenged by the Hon'ble Division Bench of High Court in the appeal. The Hon'ble Division Bench of the High court disposed of the appeal holding that only in cases where restoration is sought after disconnection, authorities can resort to make assessment under Section 126(1) of the Act, otherwise, the civil liability can be determined by the Special Court only as per sub-Section (5) of Section 154 of the Act. Accordingly a distinction was drawn insofar as application of Section 126(1) of the Act, in case of the assessment under section 126(1) of the Act.

19. The Hon'ble Supreme Court looked into the issue before the Division Bench of the Hon'ble Calcutta High Court raised by the respondent Orion Metal Pvt. Ltd that two parallel proceedings i.e. the criminal complaint before the competent Court and also assessment proceedings under Section 126(1) of the Act 2003 cannot go simultaneously. The Hon'ble Supreme Court took note of the objects and reasons of the Act, 2003 wherein a specific reference is made to incorporate provisions relating to theft of electricity and the ratio of ***Executive Engineer Southern Electricity Supply Company of Orissa Limited (SOUTHCO)*** (Supra), to have a revenue focus and held as follows:-

“17. It is clear from the reading of Section 126(6)(b)(iii) of the Act that instances of use of energy through a tampered meter is included in the definition of unauthorized use of electricity. If that is so, there is no reason, for excluding the power of the authorities for making assessment under Section 126(1) of the Act to assess the loss of energy, where electricity is used through a tampered meter. All instances of unauthorized use of energy may not amount to theft of electricity within the meaning of Section 135 of the Act, but at the same time, the theft of

electricity which is covered by Section 135(1A) of the Act, without prejudice to the other provisions of the Act, the licensee or supplier, as the case may be, upon detection of theft of electricity, is empowered to disconnect the power supply immediately. Further as per the third proviso to Section 135(1A) of the Act, the licensee or supplier, as the case may be, on deposit or payment of assessed amount or electricity charges, without prejudice to the obligation to lodge a complaint, can restore the power supply electricity within forty eight (48) hours of deposit/payment of such amount. Thus, it is clear that the authorities under the Act are empowered to make a provisional and final assessment by invoking power under Section 126(1) of the Act, even in cases where electricity is unauthorisedly used by way of theft. When a consumer deposits the assessed amount, the licensee or the supplier has to restore the power supply. The assessed amount referred to in the aforesaid proviso, relates to assessment which is contemplated under Section 126(1) of the Act only. 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”.

20. Dr Saraf relies the Case of ***Jharkhand State Electricity Board –Vs- The Chief Engineer-Cum-Chief Electrical Inspector-Cum-Appellate Authority, Department of Energy, Govt. of Jharkhand and Others*** reported in ***(2016) AIR (Jharkhand) 1: (2015) 4 AIR Jhar R 441: (2015) 3 JLJR 74*** wherein it was held that in cases of theft of electricity against the provisional bill issued under third proviso to Section 135(1A), no appeal lies. It was also held that the procedure under Section 126 followed by the Assessing Officer, a case of theft of electricity cannot be deemed to be converted into a case of unauthorized use of electricity. With due respect, I am unable to agree with the said finding of the learned Single Judge of the Hon’ble Jharkhand High Court. Dr. Saraf relying the ***West Bengal State Electricity Distribution Company Ltd and Others (Supra)*** submits that 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 and in such cases, the Special Court is empowered to determine civil liability under Section 154(5) of the Act 2003. But the said observation was made contemplating the completion of the trial by the Special Court.

21. It would not be out of place to mention here that in ***Executive Engineer Southern Electricity Supply Company of Orissa Limited (SOUTHCO)*** (Supra) a three Judge Bench of the Hon’ble Supreme Court held that Section 126 of the Act, 2003 does not speak of any criminal intendment 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. Accordingly the expression of "unauthorized use of electricity" under Section 126 of the Act, 2003 deal with cases of unauthorized use, even in the absence of intention. These 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. In the **West Bengal State Electricity Distribution Company Ltd and Others (Supra)** the Hon'ble two Judge Bench held that in the said case of **Executive Engineer Southern Electricity Supply Company of Orissa Limited (SOUTHCO)** (Supra) there was no allegation of theft as such it was held that consumption in excess of sanctioned/contracted load, comes within the meaning of unauthorized use of electricity as per Explanation (b)(iv) of Section 126 of Electricity Act, 2003 and observed the distinction referred hereinabove and held as follows:-

"19. 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 of 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 the Act and power 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".

22. In view of the said discussion, I am of the considered opinion that the provisional assessment by the assessing officer against the act of indulging in “unauthorized use of electricity” after an inspection of any place or premises of a consumer and the final order of the assessment of the electricity charges payable by such consumer under Section 126 is not restricted only to “unauthorized use of electricity” simpliciter but includes such unauthorized use of electricity when there is allegation of theft of electricity defined under Section 135 of the Act, 2003 and accordingly Issue No. (a) i.e. whether provisional assessment by the assessing officer against the act of indulging in unauthorized use of electricity after an inspection of any place or premises of a consumer and the final order of assessment of the electricity charges payable by such consumer under Section 126 is restricted only to such unauthorized use of electricity where there is no allegation of theft of electricity defined under Section 135 of the Act, 2003 is decided in the negative.

Issue No. (b) i.e. Whether Section 127 of the Act, 2003 covers under its sweep the final order of assessment on the basis of the provisional bill under Section 126 of the Act 2003 against the unauthorized use of electricity on the allegation of theft under Section 135 of the Act, 2003?

23. Dr. Saraf initially raised the objection that as against the assessment made for theft related case falling under Section 135 of the Act, 2003 and the subsequent assessment made therein in terms of the third proviso of sub-section (1 A) of Section 135 of the Act, 2003, no specific appellate authority nor any provision for appeal is prescribed in the Act, 2003. Though Section 126 covers provisional bill raised due to “unauthorized use of electricity” and even after it is assumed that theft of electricity also falls within the definition of



“unauthorized use of electricity” however, the final bill under Sub-Section (3) of Section 126 of the Act, 2003 and the final order of assessment thereof is not appealable. Section 127 of the Act does not prescribe the appellate authority covering the assessment made under third proviso of Sub-Section (1A) of Section 135 of the Act, 2003. In support of the said submission Dr. Saraf relied the case of ***M/S. Himadri Steel Pvt. Ltd. –Vs- Jharkhand Urja Vikas Nigam*** reported in ***AIR 2019 Jharkhand-28 decided on 5th September, 2018*** wherein it was held that under the Electricity Act, 2003 against the provisional assessment order passed under Sub-Section (1A) no appeal is provided as in the case of an assessment under Section 126 of the Act, 2003. Again relying the ***West Bengal State Electricity Distribution Company Ltd and Others (Supra)*** it is submitted by Dr. Saraf that in theft cases no appeal lies under Section 127 of the Act.

24. I am unable to accept the said submission of Dr. Saraf inasmuch as the Hon’ble Apex Court in ***West Bengal State Electricity Distribution Company Ltd and Others (Supra)*** referred hereinabove had held that as the Special Court is empowered to determine civil liability under Section 154(5) of the Act in cases where a complaint is lodged it could not be said that there is no power conferred on authority to make provisional assessment/ final assessment under Section 126 of the Act, 2003 and the finding that 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 held to be parallel to each other. Accordingly if the assessing officer is authorized to pass a final order on the basis of the provisional assessment for unauthorized use of electricity which cover theft by tampering of meter, Section 127 covers under its sweep the appellate authority for any final order of assessment including

unauthorized use of electricity with allegations of theft of electricity. Accordingly the issue is decided against the petitioner.

Issue No. (c): i.e. Whether considering the factual matrix this writ petition is maintainable?

25. In ***Southern Electricity Supply Company of Orissa Limited (SOUTHCO)*** (Supra) it was held that High Court would not normally interfere in exercise of its jurisdiction under Article 226 of the Constitution of India where statutory alternative remedy is available. Further it was also held that the said settled law is not free of exceptions. The High Court should not decline to exercise its jurisdiction merely for the reason that there is a statutory alternative remedy available. It was also held that if exercise of jurisdiction by the tribunal ex facie appears to be an exercise of jurisdiction in futility for any of the stated reasons, then it will be permissible for the High Court to interfere in exercise of its jurisdiction. In this regard, the three Judge Bench took note of the ratio laid down in Whirlpool Corporation –Vs- Registrar of Trade Marks, Mumbai and Others reported in (1998) 8 SCC 1 as follows:-

“It is argued and to some extent correctly that the High Court should not decline to exercise its jurisdiction merely for the reason that there is a statutory alternative remedy available even when the case falls in the above stated class of cases. It is a settled principle that the courts/tribunal will not exercise jurisdiction in futility. The law will not itself attempt to do an act which would be vain. Lex nil frustra facit, nor to enforce one which would be frivolous- lex neminem cogit and vana seu inutilia- the law will not force anyone to do a thing vain and fruitless. In other words, if exercise of jurisdiction by the tribunal ex facie appears to be an exercise of jurisdiction in futility for any of the stated reasons, then it will be permissible for the High Court to interfere in exercise of



its jurisdiction. This issue is no longer res integra and has been settled by a catena of judgments of this Court, which we find entirely unnecessary to refer to in detail. Suffice it to make a reference to the judgment of this Court in Whirlpool Corpn. Vs. Registrar of Trade Marks where this Court was concerned with the power of the Registrar of Trade Marks and the Tribunal under the Trade and Merchandise Marks Act, 1958 and exercise of jurisdiction by the High Court in the face of availability of a remedy under the Act”.

26. In the present case in hand, the petitioner challenged the final order passed under sub section (3) of Section 126 of the Act, 2003 along with the other consequential reliefs. The issues decided hereinabove shows that the final order passed under sub Section (3) of section 126 of the Act, 2003 also include the one against the “unauthorized use of electricity” where there is an allegation of theft of electricity under section 135 of the Act, 2003. Sub section (1) of Section 126 of the Act, 2003 authorises the assessing officer initially to raise the provisional assessment to the best of his judgment, the electricity charges payable by the consumer after the inspection. Sub section (3) of section 126 of the Act, 2003 allows the affected consumer to be heard and thereafter, the assessing officer is required to pass a final order of assessment. In the present writ petition as hereinabove taken note, the petitioner disputed the provisional assessment and the final assessment order on the ground that there were no cogent reason / grounds to impute the petitioner for “unauthorized use of electricity” with the dishonest intention. Accordingly, the issues raised in this writ petition are factual in nature coupled with technicality of the metering system in the premises of the petitioner. Section 127 of the Act, 2003 allows any person aggrieved by the final order made under section 126 of the Act, 2003 to prefer an appeal before the appellate authority prescribed under the said section. From the submission of the learned counsel for the petitioner and on



perusal of the averments made in the writ petition, I do not find any averment showing that there was jurisdictional error while passing the final order against the provisional assessment made by the assessing officer. If there is any apparent jurisdictional error there is no point in sending the petitioner to the appellate forum inasmuch as that would be a mere wastage of time. In view of the said discussion, in my considered opinion in the present factual matrix which requires technical expertise for a decision in the issues raised in this writ petition, the petitioner is required to file an appeal under Section 127 of the Act, 2003 against the final order dated 07.07.2021 passed by the assessing officer.

27. In this regard it would be proper to take note of the decision of the Apex Court in ***Assistant Collector of Central Excise, Chandan Nagar, West Bengal –Vs- Dunlop India Ltd. And Others*** reported in **(1985) 1 SCC 260** which is extracted herein below:-

“3. In Titaghur Paper Mills Co. Ltd. V. State of Orissa A. P. Sen, E.S. Venkantaramiah and R. B. Mishra, JJ. held that where the statute itself provided the petitioners with an efficacious alternative remedy by way of an appeal to the Prescribed Authority, a second appeal to the Tribunal and thereafter to have the case stated to the High Court, it was not for the High Court to exercise its extraordinary jurisdiction under Article 226 of the Constitution ignoring as it were, the complete statutory machinery. That it has become necessary, even now, for us to repeat this admonition is indeed a matter of tragic concern to us. Article 226 is not meant to short-circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill-suited to meet the demands of extraordinary situations, as for instance where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to



Article 226 of the Constitution. But then the Court must have good and sufficient reason to bypass the alternative remedy provided by statute. Surely matters involving the revenue where statutory remedies are available are not such matters. We can also take judicial notice of the fact that the vast majority of the petitions under Article 226 of the Constitution are filed solely for the purpose of obtaining interim orders and thereafter prolong the proceedings by one device or the other. The practice certainly needs to be strongly discouraged”.

28. The appellate forum under Section 127 of the Act 2003 is equipped to decide both the factual issues and also the technical issue. Moreover the issues involved are related to the revenue of the respondent APDCL. Accordingly in my considered view this is not a fit case to invoke Article 226 of the Constitution of India considering the statutory alternative remedy in the form of appeal and as such the writ petition is not maintainable and the **Issue No. (c)** i.e. whether considering the factual matrix this writ petition is maintainable is decided against the petitioner.

29. Dr. Saraf referring to various interim orders passed in various writ petitions in similar circumstances, submits that this court may pass similar interim order directing the petitioner to deposit an amount and take up for disposal of this writ petition exercising the jurisdiction under Article 226 of the Constitution of India. Against the said contention, Mr. Goswami vehemently objected and relied the case of ***State of Assam –Vs- Barak Upatyaka D.U. Karmachari Sanstha*** reported in ***(2009) 5 SCC 694***.

30. The Apex Court in ***State of Assam –Vs- Barak Uptyaka D.U. Karmachari Sanstha*** (Supra) held that an interim order which does not finally and conclusively decide an issue cannot be a precedent. Any reasons assigned



in support of such non-final interim order containing prima facie findings, are only tentative. Any interim directions issued on the basis of such prima facie findings are temporary arrangements to preserve the status quo till the matter is finally decided, to ensure that the matter does not become either infructuous or a fait accompli before the final hearing. An interim order has its base on the prima facie satisfaction of the court based on the factual matrix pleaded before it. It is observed hereinabove that there is no jurisdictional issues pleaded before this court and under such circumstances it has been held that considering the matter having technical issues to be decided, the appellate authority under Section 127 of the Act, 2003 would be the proper statutory authority to decide the issues. I do not find any sufficient reason to bypass the alternative remedy provided by the statute. As held in ***Assistant Collector of Central Excise, Chandan Nagar, West Bengal –Vs- Dunlop India Ltd. And Others (supra)*** if the matter involves revenue and the statute prescribes a statutory remedy, those matters ought not to be considered bypassing the said statutory mechanism. Accordingly the submission of Dr. Saraf cannot be accepted.

31. In view of the same, this writ petition stands dismissed on the ground that the same is not maintainable as there is a specific alternative remedy i.e. the appellate authority prescribed under Section 127 of the Act, 2003.

JUDGE

Comparing Assistant