(2023) 03 CAL CK 0015

In the Calcutta High Court

Case No : W.P.A. No. 1153 Of 2023

Angshuman Sarkar APPELLANT

Vs

West Bengal State Electricity Distribution Company Limted And Others RESPONDENT

Date of Decision : 03-03-2023

Acts Referred:

Electricity Act, 2003 — Section 126, 126(1), 126(3), 126(6), 127, 135, 135(1), 135(1)(a), 135(1)(b), 135(1)(c), 154, 154(5), 154(6)

Citation : (2023) 03 CAL CK 0015

Hon'ble Judges : Sabyasachi Bhattacharyya, J

Bench : Single Bench

Advocate : Partha Pratim Roy, Poulami Chakraborty, Dr. Madhusudan Saha Roy

Final Decision : Allowed

Judgement

Sabyasachi Bhattacharyya, J

1. The petitioner was accused of theft of electricity in respect of his connection used for operating a submersible pump. A proceeding was initiated under Section 135(1)(b) of the Electricity Act, 2003 (hereinafter referred to as, "the 2003 Act") on the basis of P.S. (Police Station) Case No.415 of 2016.

2. By Memo dated August 30, 2016, a provisional assessment order was passed under Section 126 of the said Act against the petitioner to the tune of Rs.1,63,506/-. Ultimately, the assessing authority determined the final order of assessment to the tune of Rs.1,35,858/-, which the petitioner deposited for getting restoration of electricity.

3. Subsequently, the criminal case under Section 135 of the 2003 Act against the petitioner came up for hearing before the Judge, Special Court (EC) Act, Berhampore, Murshidabad, who acquitted the petitioner from the case on the ground that the charges had not been proved against the petitioner.

4. Thereafter the petitioner wrote a letter dated December 20, 2021 seeking

refund of the excess amount demanded by the respondent-authority on the allegation of pilferage.

5. Another letter in similar tune was given on January 29, 2022.

6. Upon this, the WBSEDCL, vide Memo dated February 15, 2022, intimated the petitioner that upon submission of certain documents by the petitioner, necessary action would be taken by the authority.

7. Accordingly, such documents were deposited by the petitioner with a covering letter, which were received by the WBSEDCL on March 2, 2022.

8. However, even thereafter the WBSEDCL did not take any action. As such, another representation dated March 30, 2022 was made by the petitioner asking for disbursement of the amount to be refunded.

9. Vide Memo dated March 31, 2022, the WBSEDCL informed the petitioner that the order copy submitted by the petitioner did not contain any information related to refund of the amount and suggested to pursue the matter and to bring an order from the court, if possible.

10. Hence, the present writ petition has been preferred by the petitioner for a direction on the WBSEDCL to refund the amount deposited by the petitioner on the basis of the final assessment order.

11. Learned counsel for the petitioner argues that in view of the charge levied against the petitioner primarily being theft of electricity on the ground of tampering, which was common to both the proceeding under Section 135 and the assessments under Section 126 of the 2003 Act, the acquittal of the petitioner in the criminal case on the ground that the charges had not been proved against the petitioner would automatically entitle the petitioner to be relieved from the liability of paying the mount deposited. As such, within the purview of Section 154(6) of the 2003 Act, the amount is required to be refunded to the petitioner.

12. Learned counsel for the petitioner cites a judgment of this bench in Tapan Sen Majumdar Vs. West Bengal State Electricity Distribution Company Limited and others, reported at 2022 SCC OnLine Cal 1971 in support of his proposition.

13. Learned counsel for the WBSEDCL controverts such contention and submits that the law is otherwise. Sections 126 and 135 of the 2003 Act operate in different fields and provide for different and distinct remedies, as well-settled by the Supreme Court. Hence, it is argued that the petitioner is not entitled to any refund merely because of the petitioner having been acquitted in connection with a criminal proceeding. The criminal proceeding is on a different standard of proof than the civil assessment of liability under Section 126, it is submitted.

14. In support of his contention, learned counsel for the WBSEDCL cites West Bengal State Electricity Distribution company Ltd. Vs. M/s. Orion Metal Pvt. Ltd., reported at 2014 (5) CHN (SC) 72. In the said judgment, the Supreme Court

took into consideration the provisions of Sections 126, 135 and 154 of the 2003 Act and observed that even in cases where a complaint is lodged under Section 126 of the Act, a proceeding under Section 135 is maintainable.

15. Learned counsel next cites Sudhir Kr. Mondal Vs. The West Bengal State Electricity Distribution Company Ltd. and others, an unreported judgment of a co-ordinate bench of this court passed in WP No.18100 (W) of 2009, wherein a similar prayer for refund on the ground that the petitioner had been acquitted in a criminal case had been turned down by the learned Single Judge.

16. Learned counsel for the WBSEDCL next cites another unreported judgment of a Division Bench of this Court rendered in MAT 263 of 2015 [Basudev Paine Vs. WBSEDCL and others], wherein the Division Bench, by placing reliance on judgments of the Supreme Court, held that proceedings under Sections 126 and 135 of the 2003 Act stand on separate and independent footings and do not depend on each other. The Division Bench further held that there is no justification in the stand of the appellant to contend that in the light of acquittal of the accused in the proceeding under Section 135 of the Act, there should not be any assessment of provisional charges.

17. Learned counsel next relies on another Division Bench judgment of this Court rendered in 2015 (5) CHN (CAL) 165 [Talat Sahmid Vs. W.B.S.E. Distribution Co. Ltd.] for the same proposition.

18. Lastly, learned counsel places reliance on an unreported Judgment of this Court passed in WPA 21298 of 2021 [Ashok Kumar Maity Vs. The West Bengal State Electricity Board through Chairman, WBSEDCL and others], wherein the Court distinguished between the scope of Sections 126 and 135 in the light of Section 154(6) of the 2003 Act.

19. That apart, it is argued by the WBSEDCL that the judgment cited by the petitioner is clearly distinguishable on facts, inasmuch as in the said matter, no final order of assessment was passed within 30 days as per Section 126(3) of the 2003 Act and the provisional order of assessment was never served on the petitioner.

20. It is next argued that the allegation made out by the WBSEDCL in the provisional and final orders of assessment pertained to unauthorised use of electricity as defined in the explanation to Section 126(6) of the Electricity Act, 2003, whereas the allegation levelled against the petitioner in the criminal proceeding under Section 135 was on the premise of theft on the ground of alleged tampering, which is common to theft and unauthorised use of electricity.

21. Lastly, it is contended that the petitioner never preferred any appeal as contemplated under Section 127 of the 2003 Act, due to which the final assessment has attained finality. Hence, it is argued that the same cannot be reopened at this stage.

22. The moot question which arises in the present case is whether the petitioner

is entitled to refund of the money deposited under Section 126 of the 2003 Act for getting restoration of electricity connection, being absolved of such liability to pay due to his acquittal under Section 135 of the 2003 Act by the Special Court.

23. Inasmuch as the judgment of Tapan Sen Majumdar (supra) is concerned, which has been relied on by the petitioner, the specific charge against the petitioner was that the petitioner had bypassed the meter by tapping from the service wire through another PVC wire, which was a common ingredient for theft as well as unauthorised use of electricity.

24. Inasmuch as the question of refund is concerned, it was observed in paragraph no.37 of the said judgment that since the provisional assessment bill raised by the WBSEDCL spent its force and could not stand in view of the acquittal of the petitioner on the self-same allegation in the proceeding under Section 135 of the 2003 Act, a refund was directed to be given to the petitioner with regard to the amount deposited under Section 126. The point to be noted is that the allegation made in the said case in connection with the proceedings under Section 135 and 126 of the 2003 Act were exactly similar.

25. In the present case, however, it is revealed from the provisional order of assessment dated August 30, 2016 (Annexure P-2 at page 19 of the writ petition) that the petitioner was allegedly using electricity in an "unauthorised manner" by meter bypassing for running his domestic appliances. It was further alleged that the accused indulged in "unauthorised use of electricity" and, as such, was guilty of causing loss of revenue of the WBSEDCL, on which basis the provisional assessment bill was raised.

26. In the final assessment dated October 17, 2016 (Annexure P-3 at page 22 of the writ petition), it was reiterated that the petitioner had committed "unauthorised use of electricity" and the assessed amount was reduced by the Authority.

27. The petitioner never preferred any appeal against the final order of assessment dated October 17, 2016 and, for the first time, claims refund by way of the present writ petition, filed on January 13, 2023.

28. The complaint against the petitioner in the criminal proceeding arose out of an alleged commission of "theft of electricity" at his submersible pump by bypassing energy meter by means of extra PVC cables. Certain articles were seized, like a three-phase energy meter, etc., from the petitioner.

29. The allegation was primarily of tampering incoming electricity cable, energy meter and bypassing cable.

30. Explanation (b) to Section 126(6) of the 2003 Act, in Clause (iii) thereof, envisages usage of electricity through a tampered meter as unauthorised use of electricity. However, in the instant case, the allegation against the petitioner was theft not through a tampered meter but direct tampering of the incoming service cable, although the energy meter had been bypassed. However, explanation (b)

(ii) also includes usage of electricity by means not authorised by the licensee and Clause (iv) includes usage for the purpose other than for which it was authorised. Clause (v) mentions usage for premises or areas other than those for which the supply of electricity was authorised.

31. The allegation in the present case against the petitioner was, thus, squarely covered by the definition of ‘unauthorised use of electricity’ as contemplated in Section 126 of the 2003 Act.

32. Section 135(1)(a) covers within the purview of theft of electricity tapping or making any connection with lines or cables, service wires, service facilities of a licensee as well as tampering a meter, loop connection of 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 the electricity is stolen or wasted.

33. Clause (c) of Section 135(1) includes usage of electricity through a tampered meter and Clause (e) usage of electricity for purpose other than for which the electricity was authorised so as to abstract or consume or use electricity.

34. Under the broad spectrum of the acts incorporated in Sections 126 as well as 135 of the 2003 Act, the allegation against the petitioner is covered by both the said Sections.

35. The allegation in the assessment under Section 126 of the 2003 Act was not merely confined to the expression “theft” but also specifically mentioned “unauthorised use of electricity”, thereby attracting the independent application of Section 126 of the 2003 Act.

36. Inasmuch as M/s. Orion Metal Pvt. Ltd. (supra) is concerned, the Supreme Court took into consideration the provisions of Sections 126 as well as 135 in the light of Section 154(6) of the 2003 Act. It was observed by the Supreme Court that 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.

37. In paragraph 14 of the said judgment, the Supreme Court discussed that the term “unauthorised use of electricity” is of wide connotation and includes ‘theft’ as defined under Section 135 of the Act.

38. In cases where the allegation is of unauthorised use of electricity amounting to theft, apart from assessing the proceedings under Section 126(1), it was held that a complaint also can be lodged alleging theft of energy as defined under Section 135(1) of the Act. The tests were different in the two cases, it was observed.

39. In the present case, the question which has arisen is whether the petitioner is entitled to refund of the amount deposited under Section 126, in view of being

absolved of the offence under Section 135 of the 2003 Act.

40. The question which fell for consideration in the case of M/s. Orion Metal Pvt. Ltd. (supra) was whether 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.

41. Section 126 forms part of the scheme which authorises the electricity supplier to ascertain loss in terms of revenue caused by the act of unauthorised use of electricity, whereas Section 135 deals with the offence of theft, on which the Special Court is empowered to convict and impose a sentence of imprisonment.

42. The decision rendered therein was on the score that proceedings under Sections 126 and 135 of the Act can operate parallelly. The question was answered in the affirmative by the Supreme Court.

43. As opposed to the same, in the present case, the question is different. The petitioner has not challenged the parallel operation of proceedings under Sections 126 and 135 of the Act at all. What has been impugned here is the refusal to refund the amount deposited under Section 126 even after acquittal on similar allegations made under Section 135.

44. Inasmuch as the Division Bench judgment in Basudev Paine (supra) is concerned, it was merely observed on the basis of judgments of the Supreme Court that proceedings under Sections 126 and 135 of the Act stand on separate and independent footings and do not depend on each other. In such perspective, it was held that there was no justification in the stand of the appellant to contend that in the light of acquittal of the accused in the proceeding under Section 135 of the Act, there should not be any assessment on consumption charges.

45. In the present case, however, the assessment under Section 126 was duly made. The question is as to how far Section 154(6) of the 2003 Act operates in favour of the petitioner to claim refund of the deposit.

46. The Division Bench judgment of this Court in Talat Sahmid (supra), observed that 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 of theft of energy amounts to unauthorised use of electricity also.

47. Such general proposition, however, is not under challenge in the present proceeding, where both proceedings were initiated and concluded parallelly.

48. This Court, in Ashok Kumar Maity (supra) had taken into consideration several other factors than those raised in the present writ petition. In the said case, the petitioner had prayed for unqualified restoration of electric connection even after final assessment, despite the petitioner not depositing any amount.

49. The question is not whether the petitioner can challenge the final order of assessment after expiry of the limitation period in the present case. In fact, the

present petitioner does not challenge the legality of the final assessment at the relevant juncture when the same was raised. Hence, there was no occasion for the petitioner to prefer any appeal under Section 127 of the 2003 Act.

50. The question which has arisen in the present case is distinct and different inasmuch as the petitioner, abiding by the provisions of Section 126 of the 2003 Act, duly deposited the amount mentioned therein to get restoration of electricity connection as per the process prescribed in Section 126. At that juncture, the proceeding under Section 135 of the 2003 Act was pending for final adjudication before the Special Court.

51. Inasmuch as the proceeding under Section 135 was concerned, the same proceeded parallelly with the assessment under Section 126 in the present case, to which the petitioner did not raise any objection at any point of time. It is only after the culmination of the proceeding under Section 135 that the present cause of action for refund has arisen.

52. The question is not whether the two proceedings could continue parallelly (which they did) but as to whether, even after continuing parallelly and having reached their respective culminations, the petitioner is now entitled to refund of the amount deposited for reconnection.

53. In order to answer such query, which did not fall specifically for adjudication before the Supreme Court in M/s. Orion Metal Pvt. Ltd. (supra), we are to take into consideration the proper connotation of Section 154(6) of the 2003 Act. Although M/s. Orion Metal Pvt. Ltd. (supra) discussed such provision, it was in a different context and not for the purpose of determining the scope of refund upon acquittal.

54. Sub-section (6) of Section 154 clearly stipulates that in case the civil liability determined by the Special Court under sub-section (5) of Section 154 is less than ‶the amount deposited by the consumer or the person”, the excess amount so deposited shall be refunded by the licensee 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.

55. The Special Court taking up the proceeding under Section 135 of the 2003 Act against the present petitioner, by its judgment dated August 9, 2021, upon extensive consideration of the evidence adduced by the parties, came to the specific finding that the charge under Section 135(1)(b) had not been established against him, on which ground he was acquitted from the case.

56. Thus, the Special Court which was to determine the civil liability against the consumer, itself absolved the petitioner of the charge. Consequentially, it has also to be deemed that the civil liability determined by the Special Court was nil.

57. The expression “the amount deposited by the consumer” is not explained otherwise in Section 154. The only ‘deposit’ contemplated in the Act in the

present context is that under Section 126 of the 2003 Act, which was complied with by the petitioner in the present case to get restoration of electricity connection by deposit of the entire amount. Hence, subtracting the civil liability determined by the Special Court, that is, naught, from the amount deposited by the petitioner to the licensee, the petitioner is entitled under Section 154(6) to be refunded the entire amount of such deposit, which was to be paid back within a fortnight from the date of communication of the order of the Special Court together with interest at the prevailing RBI prime lending rate for the period from the date of such deposit till the date of payment.

58. The co-ordinate bench of this court, in Sudhir Kr. Mondal (supra), had proceeded on the premise of the arguments made therein that the findings of the criminal court while acquitting the petitioner therein were not binding on the authority while assessing the liability of the petitioner under Section 126 of the Act. The learned Single Judge held that the standard of proof of the proceedings are different, one being to ascertain the liability for unauthorised use and the other to punish an offender for committing the crime.

59. On such premise, the learned Single Judge was of the opinion that the petitioners were not entitled to refund of the amount paid in response to the final assessment bill merely on the ground that they had been acquitted for the charge of theft of electricity.

60. Conspicuously, the only consideration in the said case was the different standards of proof and scopes of the two proceedings, which have been well-settled by the Supreme Court to operate on different footings. There cannot be any quarrel with such proposition.

61. However, it was neither argued before the co-ordinate bench in Sudhir Kr. Mondal (supra), nor decided by the said Court, as to whether the refund under Section 154(6) of the 2003 Act contemplates a refund of the amount deposited under Section 126 of the 2003 Act. Since such question was neither raised nor adjudicated, it cannot be said that the judgment of the co-ordinate bench rendered in Sudhir Kr. Mondal (supra) operates as a binding precedent on such issue, which has specifically arisen in the present case.

62. It is seen that the broad allegations made against the petitioner in both the proceedings under Sections 126 and 135 were on the same footing and are covered by both Sections. Hence, legitimately, the two proceedings went on parallelly against the petitioner and reached their respective logical culminations. The issue is whether upon acquittal of the petitioner on the finding of the Special Court, albeit in connection with the proceeding under Section 135, that the charges have not been proved against the petitioner, it has to be deemed that the civil liability determined by the Special Court amounted to zero.

63. In view of such inevitable conclusion in the present case, it has to be construed in the light of Section 154(6) of the 2003 Act that the petitioner is actually entitled to refund by the licensee of the entire amount deposited by the

petitioner under Section 126 within a fortnight from the date of communication of the order of the Special Court. As such, the question posed in the present writ petition is answered in the affirmative.

64. As a consequence, it is hereby held that the petitioner is entitled to refund of the entire amount deposited by the petitioner in terms of the final order of assessment, to the tune of Rs.1,38,059/-, together with statutory interest accrued thereon.

65. Since none of the parties have advanced arguments on the prevailing prime lending rates of the Reserve Bank of India during various phases of the relevant period, such exact rate cannot be ascertained by this court. However, instead of keeping the matter unnecessarily pending on such minor issue, it would serve the ends of expeditious justice if a flat rate of 6% is imposed on the refundable principal amount.

66. Hence, W.P.A. No.1153 of 2023 is allowed, thereby directing the WBSEDCL to refund the entire amount of Rs.1,38,059/-, together with statutory interest at the rate of 6% per annum till the date of refund of such amount to the petitioner, within a month, that is, by April 3, 2023.

67. In the event such amount is not paid by April 3, 2023, the WBSEDCL shall, over and above the amount as directed above, pay to the petitioner further interest at the rate of 6% per annum calculated for the period of delay from April 4, 2023 till recovery on the total amount of Rs. Rs.1,38,059/- plus the interest accrued up to April 3, 2023, which would form the total amount due as on April 3, 2023, as the principal for the purpose of such calculation of further interest.

68. There will be no order as to costs.

69. Urgent certified copies, if applied for, be issued to the applicants subject to compliance of due formalities.