

(2011) 11 AHC CK 0426

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 20679 of 2010

Kunwar Sarvesh Kumar Singh

APPELLANT

Vs

Paschimanchal Vidyut Vitran Nigam Ltd. and Others

RESPONDENT

Date of Decision : 18-11-2011

Acts Referred:

Constitution of India, 1950 — Article 226
Electricity Act, 2003 — Section 126, 135, 135(1), 2(15), 2(20)
Uttar Pradesh Government (Electrical Undertakings) Dues Recovery Act, 1958 —
Section 3, 5

Citation : (2012) 2 ADJ 509 : (2012) 3 AWC 2534

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Hon'ble Sudhir Agarwal, J.—Since pleadings are complete, as requested and agreed by learned counsel for the parties, writ petition is being decided finally under the Rules of the Court at this stage. Heard Sri B.C. Rai, Advocate for the petitioner, learned Standing Counsel for the respondents 4, 5 and 6 and Miss Usha Kiran, Advocate for the respondents 1, 2 and 3.

2. This writ petition under Article 226 of the Constitution of India is directed against assessment order dated 15.12.2007 (Annexure 8 to the writ petition) passed by Assessing Officer (hereinafter referred to as the "A.O.") and the Appellate Order dated 1.4.2010 (Annexure 15 to the writ petition) passed by Commissioner, Moradabad rejecting petitioner's appeal. There are two more orders impugned in this writ petition, i.e. dated 22.6.2007 (Annexure 4 to the writ petition) whereby Executive Engineer (hereinafter referred to as "E.E.") rejected petitioner's representation against provisional assessment notice dated 25.5.2007 and recovery certificate dated 14.12.2007 issued by E.E., validity whereof would depend on the aforesaid first two orders dated 15.12.2007 and 1.4.2010.

3. The facts in brief giving rise to the present dispute are as under:

4. Petitioner owned a premise situated at Fatehullahganj, Thakurdwara, District Moradabad whereupon was running an ice factory M/s Kanchi Ice Factory. According to petitioner the said factory was running by someone else and that too with the help of a Generator. A surprise raid was conducted at the aforesaid premises on 14.5.2007 by a Raid Team consisting of Sub-Divisional Officer and Junior Engineer, Electricity Distribution Division-I, Moradabad. They detected theft of electrical energy through a direct connection from a 160 KVA Transformer (making a temporary L.T. Connection). The cable running from Transformer to Factory was taken in possession by the checking staff. A copy of checking report is Annexure-1 to the writ petition.

5. The Executive Engineer, Electricity Distribution Division-I, Moradabad (Respondent-2) (hereinafter referred to as "A.O.") issued letter dated 25.5.2007 proposing an assessment of Rs. 42, 78,355.00. The petitioner was required to submit reply, if any, within one week, failing which assessment would be made final.

6. The petitioner submitted reply dated 31.5.2007 stating that he had no connection with the said Ice factory since the premises was leased out to one Smt. Manorama Singh w/o Bhupendra Singh r/o Village Ratupura. The reply of the petitioner did not say anything in respect to charge of theft, the procedure followed by officials of respondent Corporation or the quantum of assessment. He only denied his responsibility/liability and did not challenge either the allegation of theft or correctness of the quantum of assessment. The A.O. issued order on 22.6.2007 (Annexure-4 to the writ petition) rejecting representation dated 31.5.2007 and directing petitioner to pay amount of assessment, failing which recovery proceedings shall be initiated. Immediately thereafter on 6.7.2007, the Assessing Officer issued a demand notice u/s 3 of the U.P. Government (Electrical Undertakings) Dues Recovery Act, 1958 (hereinafter referred to as Recovery Act, 1958) demanding a sum of Rs. 42,78,380/- which included Rs. 25/- towards notice expenses. Later a recovery certificate u/s 5 of Recovery Act, 1958 was also issued on 6.8.2007.

7. The petitioner challenged recovery citation dated 3.9.2007; recovery certificate dated 6.8.2007 and assessment order dated 22.6.2007 before this Court in Writ Petition No. 53463 of 2007. It was presented in the Court on 29.10.2007. It was dismissed vide judgment dated 14.11.2007. This Court observed that full opportunity was given to petitioner by A.O. where after final assessment was made where against he preferred no appeal under the Statute. The petitioner preferred Special Leave to Appeal (Civil No. 22589 of 2007) before the Apex Court and the same was withdrawn with liberty to file an appeal under Electricity Act, 2003 (hereinafter referred to as "Act, 2003"). The order dated 7.12.2007 passed by the Apex Court is reproduced as under:

Learned counsel for the petitioner desires to withdraw this petition with a liberty

to file an appeal under Electricity Act. He is allowed to withdraw the petition. The SLP is dismissed on withdrawal.

8. The petitioner immediately thereafter filed another Writ Petition No. 61969 of 2007 seeking following relief:

(a) issue a writ, order or direction in the nature of certiorari quashing the impugned letter/order dated 25.5.2007 passed by the respondent No. 4, calculating the tariff of Electricity at the rate of 3 times instead of 1.5 times of the recovery amount as is mandated by the Section 126 of the Indian Electricity Act, 2003.

(b) issue a writ, order or direction in the nature of Mandamus commanding the respondents to reduce the Recovery amount of the petitioner by calculating the same at the rate of 1.5 times instead of 3 times of the tariff charges of the Electricity under the Mandatory provisions of Section 126 of the Indian Electricity Act 2003.

(c) issue a suitable writ order or direction in the nature of which this Hon'ble Court may deem-fit and proper under the facts and circumstances of the case.

(d) Award the cost of the present writ petition in favour of the petitioner.

9. The above writ petition was presented in Court on 12.12.2007. This Court observed since the Apex Court on 7.12.2007 had permitted petitioner to file an appeal vide order dated 7.12.2007, therefore, he should file appeal under Act, 2003 and with this observation writ petition was dismissed. The order dated 14.12.2007 passed by this Court reads as under:

Heard Sri Rajesh Pathik, learned counsel for the petitioner, learned standing counsel for the respondent Nos. 1 and Sri H.P. Dube appearing for the respondent Nos. 2, 3 and 4.

The order dated 14.11.2007 passed by this Court in Civil Misc. Writ Petition No. 53463 of 2007 was challenged by the petitioner before the Apex Court in SLP (Civil) No. 22589 of 2007. The petitioner has withdrawn his appeal before the Apex Court with liberty to file an appeal under the Electricity Act. Without filing the appeal, he has again filed this writ petition before this Court.

In our opinion, in view of the order of the Apex Court, this writ petition is not maintainable. It is open to the petitioner to file an appeal under the Electricity Act.

Subject to observation made above this petition is dismissed.

10. The Assistant Accounts Officer in the office of A.O. on 15.12.2007 submitted a report demonstrating serious mistake in the final assessment amount stating that it ought to be Rs. 21,17,016/- and recommended for amendment of final order of assessment. This was made on a representation dated 10.12.2007 of petitioner stating that instead of three times of tariff, the calculation should have

been done for one and half times of tariff. The said amendment/recommendation was approved by A.O. on the same date. This amendment resulted in suo motu change of final order of assessment reducing the amount from Rs. 42,78,355/- to Rs. 21,17,016/-. The A.O. also on his own issued an amended recovery certificate dated 14.12.2007 modifying amount of assessment to Rs. 21,17,016/-.

11. Thereafter, petitioner preferred appeal vide memo of appeal dated 17.12.2007 before Commissioner, Moradabad against the modified final order of assessment the petitioner had already deposited Rs. 10,79,679/- and thus the rest of the amount was stayed by Appellate Authority.

12. The Appellate Authority rejected appeal vide order dated 1.4.2010 upholding assessment of Rs. 21,17,016/-.

13. Petitioner has placed on record assessment order dated 23.5.2007 (Annexure-16 to the writ petition) which is duly signed by A.O. to show indiscreet manner in which A.O. passed order of assessment ignoring completely the relevant statutory provisions in this regard.

14. On behalf of State Authorities namely respondents 4 and 5, a short counter-affidavit has been filed. It is stated that respondents 4 and 5 are only statutory agency to execute recovery as arrears of land revenue based on recovery certificate issued by an officer of Electricity Department. So far as the merits on issues are concerned, they are not related to respondents 4 and 5.

15. The contesting respondents are 1, 2 and 3. They have filed counter-affidavit sworn by Khan Chand, Executive Engineer, Electricity Distribution Division-I, Moradabad. The basic facts are not in dispute. In substance it has justified assessment made by A.O. but has clarified that assessment order dated 15.12.2007 is just, proper and legal in the eyes of law. Petitioner was found committing theft of electrical energy which is an "offence" u/s 135 of Act, 2003 and hence the irregularity namely "unauthorized use of electricity" u/s 126 is not attracted to this case. It is also said that Clause 6.8 of Electricity Supply Code, 2005 (hereinafter referred to as "Code, 2005") shall not apply to the cases of theft u/s 135 of Act, 2003. So far as assessment bill dated 23.5.2007 is concerned paragraph 42 of the writ petition is replied in paragraph 26 of the counter-affidavit. It is said that aforesaid bill making assessment to the tune of Rs. 42,78,355/- was issued but later on amount was reduced to Rs. 21,17,016/- and a copy of amended assessment was given to petitioner pursuant to his representation/demand dated 14.12.2007. A copy thereof is filed as Annexure 2 to the counter-affidavit.

16. Petitioner has filed a rejoinder-affidavit in reply to the counter-affidavit filed on behalf of respondents 1 to 3 and while reiterating the facts stated in the writ petition, the only additional fact stated therein is that pursuant to inspection report dated 14.5.2007, a F.I.R. was also lodged which was investigated and thereafter a charge-sheet was submitted u/s 135 of Act, 2003. The trial proceeded but resulted in acquittal of petitioner vide judgment dated 29.1.2011

passed by Special Judge, E.C. Act, Moradabad in S.S.T. No. 69 of 2008.

17. Learned counsel for petitioner submitted that entire proceedings of assessment are patently illegal and void, being in utter violation of provisions of Act, 2003 read with the Code, 2005. Neither the assessment was made in accordance with procedure laid down in the Statute nor the petitioner was given opportunity in the manner it is contemplated in the aforesaid Statute nor the assessment order was passed establishing the charge of theft against petitioner. The A.O. proceeded on the presumption that mere inspection amounts to establish a conclusive offence on the part of petitioner and thereafter A.O. had to simply issue a letter requiring petitioner to deposit amount of assessment without following any further procedure under the Statute.

18. Sri Rai made a serious assault contending that the A.O. has gone to the extent of committing forgery by issuing a final order of assessment with back date when even provisional order of assessment was not issued and this fact having not being denied, vitiates the entire subsequent proceedings. On merit, he pointed out that assessment has been made highly excessive and not in the manner as provided in the Statute. Lastly, he submitted that in view of para 8.2 of Code, 2005 the assessment made against petitioner is void since the petitioner has been acquitted in criminal case and, therefore, amount already deposited is liable to be refunded.

19. Miss Usha Kiran, learned counsel for respondent Corporation submitted that factum of inspection has not been disputed, the irregularities found by the inspection team during investigation is also not in dispute. The only defence taken by petitioner was that premises let out to someone else and, therefore, petitioner cannot be held guilty but once it is admitted that theft of electricity was committed on the said premises owned by petitioner, the owner of the property would be liable. She said that since theft has been found established, this is not a fit case where this Court may exercise its extra-ordinary equitable jurisdiction under Article 226 of the Constitution of India and the writ petition be dismissed on this ground alone. She further submitted that assessment has been made strictly in accordance with Rules and quantum of assessment has also got substantially reduced. Petitioner has also paid substantial amount inasmuch as 50% was paid by the petitioner earlier and out of rest of the amount, 50% was paid pursuant to this Court's order dated 19.4.2010 and now only balance amount of assessment is about Rs. 5 lacs and odd which the petitioner be directed to pay and this Court may not interfere with the impugned orders.

20. From the rival submissions and perusal of record as also various authorities cited at the bar, in my view following questions arise which need be answered by this Court:

(a) Whether the petitioner can be held guilty merely on account of being owner of the premises in question.

(b) Whether the assessment has been made by the A.O. in accordance with the

procedure laid down in the Statute.

(c) Whether the Court would be justified in interfering with the orders impugned in this writ petition in its equitable extraordinary jurisdiction under Article 226 of the Constitution of India.

Issue (a):

21. For the purpose of making assessment whether a person is actually occupying the premises where theft of electricity has been detected or where unauthorized using of electricity has been found may or may not be relevant has to be examined in the light of relevant provisions.

22. The respondents admittedly have led their claim of assessment by referring Section 135 of Act, 2003 and clearly says that Section 126 is not applicable in the present case. I would thus prefer to consider Section 135 which according to respondents 1, 2 and 3 is admittedly applicable in this case and thereafter if necessary would also examine Section 126 and any other relevant provision for the reason that there cannot be any acquiescence or estoppel qua legal propositions.

23. Section 135 commences with the word "whoever". A careful reading would show that in the second proviso it has used the word "Person" and in third proviso it has also used the word "Consumer". In sub-section (3), the word "Occupant" has been used but it is for the purpose of giving effect to the power relating to inspection, search and seizer specified in sub-section (2). More over sub-section (3) besides the word "Occupant" also uses the word "Person". A cumulative reading of Section 135, therefore, shows that legislature has given widest possible scope to Section 135 and has not confined mischief sought to be checked therein giving any scope of hyper technical plea with respect to individual's status, position, capacity etc. Anyone whether a person, legal or otherwise, who may be a "Consumer" as defined in Act, 2003 or not and one who is not covered by any other descriptions as above but is occupant of the premises concerned where theft of electricity is detected, would be covered by Section 135. Action can be taken accordingly to the extent provided therein and other relevant provisions referable to Section 135.

24. A person who consumes electricity at a particular premise would be a "Consumer" in common parlance. However, the term "Consumer" for the purpose of Act, 2003 is defined and the same has to be looked into.

25. Electricity cannot be used in air. It is always extracted from the cable/wire carrying it and is used in/for some kind of apparatus, appliances etc. which in one or the other way would find connected with earth or something attached with earth. The electricity, therefore, whenever is extracted, it would have its contact in or other way with a premises. Taking into consideration this fact while defining the word "consumer", the Legislature has brought within its ambit the person(s) extracting or receiving energy in two different ways. This is evident from a bare

perusal of the definition of "Consumer" contained in Section 2(15) of Act, 2003 which reads as under:

"Consumer" means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be"

26. The first part of the definition applies to a person who is supplied with electricity for his own use by a licensee or the Government or by anyone else engaged in the business of supplying electricity to the public under Act, 2003 or any other law for the time being in force. This category includes those who have contracted with the electrical undertakings supplying electricity for receiving electricity. In other words this part of definition covers those persons who have applied for obtaining an electric connection from the licensee and after following procedure prescribed, the licensee under an agreement/contract is supplying electricity.

27. The second category is illustrated in a different manner. In the second category those who are covered by first category may also come including those who are not at all covered by first category would come. For example if a person was initially supplied electricity by the licensee pursuant to an agreement/contract but then for some reason the contract is terminated and electricity supply is disconnected, and such person on his own reconnect the supply, this would be an illustration to cover such person in the later category. It says that any person whose premise for the time being is connected for the purpose of "receiving" electricity with the works of a licensee or the Government etc. would be a consumer. Where any premise is connected with the works of Electricity Supplying Undertaking for the purpose of "receiving electricity", it is the one within the ambit of later clause. It is not necessarily based on agreement or contract. The distinction lies in the words "Supplied Electricity" and "Receiving Electricity". Normally Electrical Supply Undertaking consciously supply electricity to the persons under contract but in the later case this volition or consciousness on the part of Electricity Supply Undertaking may or may not exist. The fact remains that if works of the licensee is connected with the premises of any person for the purpose of receiving electricity it is sufficient to bring him within this clause. Further the words "Person whose premises" includes and wide enough to cover an owner of the premises besides the mere occupier and/or possessor of the premises.

28. The term "Works" has also been defined u/s 2(77) and read as under :

"Works" includes electric line, and any building, plant, machinery, apparatus and any other thing of whatever description required to transmit, distribute or supply electricity to the public, and to carry into effect the objects of a licence or

sanction granted under this Act or any other law for the time being in force."

(emphasis added)

29. The definition of "Works" is very wide and covers any kind of electricity carrying item as also the structure connected with the process of transmission, distribution and supply of electricity to the public.

30. The word "Electric Line" used in the definition of "Works" has also been separately defined in Section 2 (20) and reads as under:

"Electric Line" means any line which is used for carrying electricity for any purpose and includes--

(a) any support for any such line, that is to say, any structure, tower, pole or other thing in, on, by or from which any such line is, or may be, supported, carried or suspended; and

(b) any apparatus connected to any such line for the purpose of carrying electricity;

(emphasis added)

31. The premises of a person for the purpose of receiving electricity, therefore, if connected with any line used for carrying electricity or support structure or any other from which such line is or may be supported, carried or assisted and any apparatus connected to such line for the purpose of carrying electricity, all will make such person "Consumer" u/s 2 (50). This is interesting that even the word "Line" has been defined in Section 2 (40) and reads as under:

"Line" means any wire, cable, tube, pipe, insulator, conductor or other similar thing (including its casing or coating) which is designed or adapted for use in carrying electricity and includes any line which surrounds or supports, or is surrounded or supported by or is installed in close proximity to, or is supported, carried or suspended in association with, any such line;

32. A cumulative, comprehensive and harmonious reading of the aforesaid "definitions" in the context of the issue, this Court has no hesitation in saying that if a person's premises is connected in any manner with anything which is capable of carrying electricity belong to Electricity Supply Undertaking (Licensee), that person would be covered by the definition of "Consumer". The suggestion is made that if a premises is let out to someone and such tenant is occupying commits some offence, it would not be justified to penalize/victimize the owner for something over which neither he has any control nor is otherwise the breach can be attributed to him. The submission at first flush appears attractive but lack substance. As already said in order to constitute offence the elements of mens rea is clearly contemplated by Section 135 and, therefore, on owner lack of mens rea can never be penalize for an offence committed by his tenant etc. but it cannot be said that in order to cause revenue loss to the licensee he has not done anything, it is his act of leasing out the property to an

unscrupulous person if has caused a loss to the licensee, for the purpose of revenue assessment, I do not find any reason not to cover him within the definition of "Consumer" particularly when there is nothing expressed or impliedly in the definition of "Consumer" to exclude him. It is well established principle of interpretation that a statute otherwise straight unambiguous and clear should be given a simple interpretation born out from the language and no violence should be done by twisting the clear and unambiguous phrases of the statute.

33. Here the petitioner had not disputed that the premises in question is owned by him. He for the time being tried to dislodge his liability on the ground that the premises in question is/was let out to someone else. Even if for the moment petitioner's plea is taken to be correct, that would not make any difference. If at the concerned premises theft is detected, for the purpose of Section 135, the proceedings can be initiated against the petitioner and the mere fact that premises is let out to someone else would make no difference. It may be a different thing that petitioner in such circumstances may have a defence of the existence of mens rea on his part which is a condition precedent for attracting "offence" u/s 135 of Act, 2003 but that is a matter to be seen during the course of trial. For our purposes the Section 135 would be attracted to the petitioner if he is owner of the premises.

34. However, I intend to place on record that the factum that premises in question was let out to someone else was not substantiated by petitioner and has been disbelieved by A.O. as also by the Appellate Authority. Before this Court also nothing has been shown to substantiate above plea. In the circumstances the issue No. 1 is answered against petitioner and in favour of respondents holding that petitioner can be held guilty merely on account of he being owner of premises in question.

Issue (b):

35. Now I come to second issue. This is principal and broader issue. The respondents 1, 2 and 3 have relied on Section 135 of Act, 2003, paragraphs 8.1 and 8.2. of Supply Code, 2005. It is, specifically pleaded that paragraph 6.8 of Supply Code, 2005 will not apply for making assessment in case of theft of electricity u/s 135. Similarly applicability of Section 126 of Act, 2003 is also refuted by respondents 1, 2 and 3. This is evident from paragraph 17 of counter-affidavit. This Court has recently discussed scope of Section 135 viz-a-viz Section 126 of Act, 2003 and paragraphs 8.1 and 8.2 viz-a-viz paragraph 6.8 of Supply Code, 2005 in "M/s Mohit Paper Mills Ltd. And another v. PVVNL and others, 2011 (9) ADJ 239".

36. It has been held that in case of theft of electrical energy, for the purpose of assessment, provisions under paragraphs 8.1 and 8.2 would apply and not 6.8. In paragraphs 122, 123, 131 of the judgment this Court said as under:

122. Sri Shashi Nandan, Senior Advocate, has also argued and contended that it

is para 8.1 and 8.2 which would apply where an assessment on the allegation of theft of electricity is made and not para 6.8. He also contended that in the present case, assessment of the petitioner has actually been made observing procedure under paras 8.1 and 8.2 of the Supply Code 2005 and, therefore, the arguments advanced by learned counsel for the petitioner relying on para 6.8 is not correct. He also said that the Division Bench Judgment of this Court in Ashok Kumar (Supra) would also not apply to the case in hand since the Court had considered therein the procedure laid down in para 6.8 of the Code, 2005 and not not para 8.1 and 8.2 of the Code.

123. I find substance in the submission of Sri Shashi Nandan in respect to applicability of paras 8.1 and 8.2 in this case. When two provisions are made covering simultaneously same or similar field or having some overlapping on certain aspects, the provision which is specific would prevail over the provision which is general in nature.

131. Probably this aspect has been appreciated by UPERC also which is evident from para 6.8 (c) (iii) Note where it has clarified that assessment therein is made when the Assessing Officer finds that unauthorized use of electricity was not made with dishonest intention but due to ignorance of procedure or rules or compulsion that only warrant a suitable assessment commensurate with the Act. I may add that this clarification has found mention in para 6.8 of Supply Code, 2005 pursuant to amendment made with effect from 14.6.2008, but to my mind it is a kind of clarification and, therefore, the declaration made as above, in fact, only recognizes the situation arises out of the various provision of the Code, 2005 as existing already and not creating new one.

37. The inspection in the case in hand was made on 14.5.2007, therefore, provisions as stood on that date would apply here at. Paragraph 120 of the judgment in Mohit Papers Mills (supra) shows that paragraphs 8.1 and 8.2 remain in three different conditions i.e. prior to 11.8.2006, thereafter and till 14.6.2008 and after 14.6.2008. For our purpose in this case the provisions as it stood after 11.8.2006 and till 14.6.2008 would be relevant. Paragraph 8.1 talks of the inspection, search and seizer at the premises. Paragraph 8.1 (a) (i), (iv), (v), (vi), (viii) and (ix) read as under:

8.1. (a) Procedure to be adopted by licensee for Inspection, Provisional Assessment Hearing and Final assessment in case of theft of electricity u/s 135 of the Act.

(i) An Officer authorized u/s 135 of the Act, suo moto or on receipt of reliable information regarding theft of electricity, shall promptly conduct, inspection of such premises exercising due diligence. (Annexure-7.3 (ii)).

iv. The occupant of the place of search or any person on his behalf shall remain present during the inspection. A list of all things seized in the course of such search shall be prepared and delivered to such occupant or person present on his behalf who shall sign the list.

v. In all cases of inspection, a report shall be prepared at site giving details of connected load, condition and details of old seals, working of meter, details of new seals and clearly mention any irregularity noticed which may lead to theft of electricity in the format given in Annexure 6.4. The Authorized Officer shall carry seals for this purpose. Any damage/destruction to the electric meter, metering equipments, apparatus, line, cable or electrical plant of the licensee caused or allowed to be caused by the person so as to interfere with the proper or accurate metering of electricity or for theft of electricity shall also be duly recorded in the report. The Authorized officer may also prepare a diagram illustrating the arrangements found to have been made for theft of electricity, wherever feasible and such diagram shall form a part of inspection report. The report shall be certified by the authorized officer that the procedure of Supply Code as laid herein had been followed.

vi. The report shall clearly indicate whether prima facie a case for theft can be inferred. The report shall be signed by each member of the inspection team and handed over to the consumer or his / her representative at site immediately under proper receipt. In case of refusal by the consumer or his/her representative to either accept or give a receipt, a copy of inspection report shall be pasted at a conspicuous place in/outside the premises and may be photographed. Simultaneously, the report shall be sent to the consumer under Registered Post / Speed post on the day or the next day of the inspection.

viii. In cases where the theft of electricity is detected by by-passing the meter or metering equipment and the electrical load, fully or partially, of the person's connection is found connected directly with the lines, cables or electrical plant, electric supply to such premises shall be disconnected forth-with on the spot by the licensee and shall be restored only after the cause of theft is removed to the satisfaction of licensee and the person pays the charges raised as per assessment bill, with due opportunity to him for making representation etc. as per the procedure prescribed for the same in the Code.

ix. In cases of direct theft by tapping the licensee's lines, cables or electrical plant, electric supply to such premises or place shall be disconnected forthwith by the licensee. The licensee may subsequently remove or divert or convert his line, cable or electrical plant to prevent further theft of electricity provided that such action shall not result into any inconvenience in affording quality supply or disruption of supply, to other consumers.

38. Then paragraph 8.1 (b) (i), (iii) and (iv) talk of the procedure of hearing and read as under:

(b) Hearing

(i) Within 3 working days of the date of inspection, the designated Authorized officer shall analyse the case after carefully considering all the evidences like documents, facts on record, the consumption pattern, wherever available and the report of inspection.

(iii) If the Assessing Officer of the licensee suspects that theft of Electricity has taken place (as defined u/s 135 of the Act), he will serve the provisional assessment bill along with show-cause notice to the consumer for hearing, giving 15 working days, under proper receipt. The notice shall invite objections in writing from the consumer, if any, against the charges and provisional assessment and require the presence of the consumer to answer to all the charges imposed by the licensee.

(iv) If, after hearing, the authorized officer finds that a case of theft has been established, the assessment shall be done for the energy consumption for past period as per the assessment formula given in Annexure 6.3 on 1.5 (one and a half) times the rates as per applicable normal tariff to the purpose for which the energy is abstracted, used or consumed or wasted or diverted, whichever is higher and demand and collect the same by including the same in a separate bill. This is in addition to any civil / criminal proceedings that may be instituted as provided by the Act, and described in clause 8.2(vii).

(v) A copy of the order shall be served to the consumer under proper receipt and in case of refusal to accept the order or in absence of the consumer, shall be served on him under Registered Post / Speed Post. The Authorized officer may extend the last date of payment or approve the payment to be made in installments on a consideration of the financial position and other conditions of the licensee. The amount, the extended last date and/or time schedule of payment/installments should be clearly stated in the speaking order.

39. The above provisions require A.O. to analyze evidence like documentary facts on record, consumption pattern, report of inspection etc. and if there from he suspects that theft of electricity has taken place, he shall serve a provisional assessment bill along with show-cause notice to consumer defaulter giving opportunity of hearing, giving 15 working days under proper receipt. It also say that notice shall invite objections in writing from the person concerned against charges leveled and provisional assessment. The A.O. shall also require the presence of consumer/defaulters to answer all the charges leveled by him. The A.O., therefore, is under obligation to give a show-cause notice containing charges as also provisional assessment bill to the consumer which he is supposed to reply and for this purpose the procedure contemplates written and oral hearing both.

40. This Court considered *pari materia* provisions i.e. paragraph 6.8 in *Ashok Kumar and others v. State of U.P. and others*, 2008(6) ADJ 660 and had observed that such show-cause notice contemplates and inherent therein material relied by A.O. to formulate charge with proper details to be communicated to the consumer so that he may be able to understand what is against him and also what he has to reply.

41. In this context, I proceed to consider show-cause notice and provisional assessment bill said to have been issued by A.O. on 25.5.2007. It refers to

inspection report No. 6/3 dated 14.5.2007 and then says that illegal connection was found running (I) It does not talk of or refers to anything mentioned in various clauses of Sub-section (1) of Section 135 which would constitute theft of electrical energy. It does not show what was to be replied by petitioner. It also gives a week's time to submit representation though paragraph 8.1 (b) (III) clearly specified 15 working days time and that too under proper receipt.

42. The provisional assessment proposed in the notice dated 25.5.2007 was to the tune of Rs. 42, 78, 355/- calculated on the basis of formula given in the Supply Code, 2005 i.e. LFTH. Applying formula $L \times F \times T \times H$, the A.O. determined 362880 units whereupon the cost proposed was calculated at thrice the tariff rate and there how the aforesaid amount of Rs. 42,78,355/- was arrived at. The A.O. also calculated Rs. 32659/- towards electricity duty and added the same in the said assessment.

43. The manner in which the A.O. proceeded shows either lack of clarity with respect to procedure or a kind of simple casual negligence. It does not appear that he has cared to go through the statutory provisions laying down procedure carefully so as to follow and apply the same. It is true that A.O. being basically an Engineer, a Technocrate may not be expected to be well conversant with legal matters but where an onerous statutory power is conferred upon him which has the effect of burdening a person in public with heavy financial liability, the officer cannot be excused on the pretext of lack of understanding or knowledge of legal matters and if necessary, it is the obligation of licensee to provide adequate training to these officers so that they may not commit material illegality in the procedure which may ultimately give benefit to the scrupulous person and results in loss to the licensee.

44. So far as the present case is concerned, however, the lapse as discussed above may not help the petitioner for the reason that in reply dated 31.5.2007 submitted by petitioner, his only defense was about letting out premises to Smt. Manorama Singh. He said nothing on other aspects. The A.O. in these circumstances held by order dated 22.6.2007 that checking report demonstrated illegal use of electricity without any valid connection for running an ice factory at petitioner's premises which constitute theft of electricity. In absence of any explanation from petitioner his reply was rejected.

45. The assessment under paragraph 8.1 (b) (IV) was to be made at 1.5 times the rates of normal tariff but in the present case it was made at thrice the rate and A.O. directed petitioner to pay amount of assessment by order dated 22.6.2007. This was/is the final order of assessment. It is true that A.O. can make final assessment only when he has held that a case of theft has been established. This Court has taken the view that it is not mere suspicion but a clear reasoned finding has to be recorded to prove the charge of theft. Here also the lapse however, would not help the petitioner. In the present case checking report was already available with the petitioner which alleges detection of theft at his premises in respect where to nothing was stated by petitioner in his reply

dated 31.5.2007. Truly but unfortunately order dated 22.6.2007 is not written in the manner so as to establish the charge of theft against petitioner before making provisional assessment, final but it is quite understandable that it was so written since petitioner's representation did not contain any reply on this aspect and thus was rejected and petitioner was advised to make payment. Hence in the peculiar facts of this case I do not find any fault with A.O. order dated 22.6.2007.

46. Obviously the petitioner did not make payment hereafter A.O. proceeded to recover amount of assessment as arrears of land revenue by initiating proceedings under Recovery Act, 1958 and a demand notice under Section 3 was issued on 6.7.2008. The petitioner failed to honour demand notice hence recovery certificate was issued on 6.8.2007. In the manner thereafter A.O. reviewed assessment is also very strange inasmuch as an office note appears to have been submitted by Office Assistant drawing attention of A.O. that assessment has been made at thrice the tariff rate instead of 1.5. Times as per the provision at the relevant time hence actual assessment ought to have been almost half of the amount i.e. Rs. 21,17,016/-. Thereafter the order of assessment as if it is a sheer administrative order, the A.O. simply approved the said note and issued another letter on 14.12.2007 i.e. a day earlier when the correction in assessment was actually approved and Collector was informed that amount of assessment has been modified. This letter dated 14.12.2007 is on record at page 83, (Annexure 14) which shows that petitioner made objection on 10.12.2007 against the amount mentioned in recovery certificate and expressed his desire to deposit the corrected amount as a result whereof amount of assessment was modified and reduced to Rs. 21,17,016/-. A revised recovery certificate was also issued to the Collector which is on page 85 of the writ petition which shows the reckless manner in which A.O. of Electricity Supply Undertaking had worked in this matter. The learned counsel for respondent Corporation could not explain how letter was issued on 14.12.2007 when correction itself was proposed and approved on 15.12.2007. These facts also show sheer negligent, reckless manner in which A.O. proceeded in this case. It appears that in his way he tried to left all kinds of lacuna in the procedure so in due course advantage may go to the affected party. The Writ Petition No. 53463 of 2007 was dismissed by this Court on 14.11.2007 and SLP stood dismissed as withdrawn on 7.12.2007. There was no occasion for the officials of the respondents thereafter to tinker with the final order of assessment. If any error was there, since the petitioner had already taken liberty to file appeal, care could have been taken by Appellate Authority to correct it. More over it remained unexplained as to how A.O. could issue letter to Collector on 14.12.2007 communicating reduction in amount of assessment when proposal and approval of such reduction was made only on 15.12.2007. The conduct of A.O. in this matter is really reprehensible and beyond one's comprehension. However, since no serious objection has been raised by the Corporation and it has accepted the situation that the correct assessment was of Rs. 21,17,016/-, I leave any further comment thereon.

47. If the situation would have remain only to this extent probably no serious objection could have been raised but what transpire from record is that after inspection report dated 14.5.2007 and before issuing show-cause notice dated 25.5.2007, the A.O. prepared a final assessment which did not give any reason complying requirement of establishment of charge of theft under paragraph 8.1 (b) (IV) of Supply Code of 2005 and this final order of assessment was given the date as 23.5.2007. This document is on record as Annexure 16 to the writ petition which the petitioner clearly claim to be forged and fictitious. Paragraph 42 of the writ petition where such assertion has been made is replied in paragraph 26 of counter-affidavit which reads as under:

That the content of paragraph No. 42 to the writ petition is not admitted hence denied. In reply there to it is submitted that on 23.5.2007 executive engineer made assessment to the tune of Rs. 42,78,355/- but later on, on the request of the petitioner said assessment was reduced and the same was corrected to the tune of Rs. 21,17,016/- and a copy whereof was demanded by the petitioner by way of representation vide representation dated 14.12.07.

48. The A.O. admits assessment order (Annexure 16 to the writ petition) as also its date as 23.5.2007. This is apparently an error in the date of this order for the reason that it contains provisional assessment order's date as 25.5.2007 and also refers to petitioner's representation dated 31.5.2007. It is therefore difficult to conceive that the said letter could have been issued before 31.5.2007. Evidently it must have been issued after 31.5.2007.

49. Learned counsel for the respondents 1, 2 and 3 was required to tell what could be the correct date on which the said order (Annexure-16) was issued. If there is mistake in the month then there could not have been any occasion to pass another order on 23.6.2007 since A.O. already passed order on 22.6.2007 (Annexure-4 to the writ petition). Besides there is nothing to show that Annexure-16 is a letter which could have been issued after Annexure-4 to the writ petition for the reason that letter No. 2362 (Annexure-4 to the writ petition) is dated 22.6.2007 while that of Annexure 16 it is 230-C dated 23.5.2007. Despite of repeated query this inconsistency could not be explained by learned counsel for the respondents 1, 2 and 3.

50. The Court could not find any justification or reason for issuance of such an order giving a date 23.5.2007 particularly in absence of any explanation forthcoming from concerned respondents themselves. If the letter was ante-dated by A.O. deliberately this is a serious charge and amounts to forging a document and construe a major misconduct. Learned counsel for the petitioner tried to explain that as a matter of fact, in a hurried manner final assessment was made without recording any reasons etc. but when A.O. realized that a proforma order like Annexure-16 may not withstand judicial review, he passed order dated 22.6.2007 and since Annexure-16 was prepared and issued in a hurried manner, the A.O. could not care about the date and that is how an anterior date got mentioned in the said order. Sri Rai also suspected that date

23.5.2007 may have been given taking into consideration availability of space in the dispatch register for giving letter number to the said document and all this demonstrate the extent to which A.O. had gone in this matter against the petitioner.

51. Be that as it may, even if this Court forms a view that A.O.'s conduct has been highly derogatory that would not condone the kind of activity in which the petitioner has been found indulged. In absence of anything further, I find difficult to justify interference of this Court with the order of assessment particularly considering the fact that ultimately A.O. had reduced the amount of final assessment by applying correct quantum i.e. 1.5 times instead of thrice. It is true that manner in which A.O. has proceeded, strictly does not satisfy procedure prescribed in the Rules but in absence of any substantial irregularity going to the root of the matter satisfying the Court that here is a person who is innocent and victimised, this Court may not find any reason to interfere with the ultimate assessment, impugned in this writ petition. Though negligence, recklessness on the part of officers of respondents 1 to 3 is glaring and that too repeated but then for this reason above, in absence of anything further, I am not inclined to extend any advantage to petitioner.

52. I am inclined not to interfere in the matter for the reason that a heinous crime like theft of electrical energy from the record available before this Court demonstrably has been committed at the premises in question owned by the petitioner. This Court is a Court of equity while exercising jurisdiction under Article 226 and if it comes to the conclusion that substantial justice has been done or that conduct of a person is blameworthy, no amount of technicality would compel the Court to help such blameworthy person(s) so as to cause loss to public revenue and public interest.

53. The inspection note shows that 160 KVA transformer was installed at the premises of petitioner which was kept by constructing a temporary plinth. This transformer was made a distribution point for extracting electricity therefrom. From the checking report it appears that high tension line of 11 KV was carrying electricity and to step down this High tension line, the aforesaid transformer was used. By making a temporary L.T. connection, the electricity was being extracted at the premises in question for the purpose of running Ice Factory. It is true that at the time of checking L.T. conductor inside the Ice Factory was found cut and L.T. cable, just at the point of transformer, was also found open but in what manner and why this arrangement was made could not be explained by the petitioner. The transformer was connected with 11 KV line of Electricity Supply Undertaking remain uncontroverted. The transformer was found at the premises of the petitioner, therefore, it cannot be said that Works of supplier was not connected with the premises of the petitioner for the purpose of receiving electricity. Whether electricity at the relevant time was actually being received or not, is immaterial. The case of theft of electrical energy u/s 135 (1)(a), in my view stands made out and established justifying assessment under paragraph 8.1

and 8.2 of Supply Code, 2005.

54. I may clarify at this stage that observations made above shall not be construed as a finding recorded for the purpose of criminal trial to attract offence u/s 135 since there are additional elements which have to be proved is the intention i.e. dishonesty i.e. the mens rea. Whatever I am observing hereat is for the purpose of assessment under paragraph 8.1. and 8.2 of Supply Code, 2005 impugned in this writ petition. The Appellate Authority has also recorded a finding that no electrical connection was released by respondents Electricity Supply Undertaking to the aforesaid Ice Factory running in the name of Kanchi Ice Factory and, therefore, the charge of illegal connection at the petitioner's premises in my view got established with reasonable certainty justifying assessment made against petitioner. Therefore, the impugned assessment order therefore warrants no interference in the facts and circumstances as discussed above in the present case.

55. The issues B and C formulated above are both answered accordingly against the petitioner and in favour of the respondents.

56. At this stage there remains one more question raised by the petitioner drawing my attention to paragraph 8.2(X) (g) and (h) of Supply Code, 2005 which reads as under :

(g) The final assessment done by the licensees assessing officer in case of theft, is also subject to adjudication by the Court.

Same as in Column (2)

(h) In case of the decision of the Court that theft is not established, the charges levelled and assessment made by the licensee against the consumer or person shall be withdrawn in writing and the connection shall be restored through the original meter.

Same as in Column (2)

57. It is submitted that an F.I.R. was lodged against petitioner and he was tried after submission of charge-sheet by Police. The Trial Court vide judgment dated 23.1.2011 has acquitted the petitioner. The judgment of Trial Court is on record as Annexure-1 to rejoinder-affidavit. Since this fact has been disclosed only in the rejoinder affidavit which was filed by serving upon the respondents' counsel only on 8.7.2011, the respondents have not been able to tell whether any appeal has been filed against the said judgment or not.

58. More over when the appellate order was passed by Commissioner i.e. on 1.4.2010 the criminal trial was pending and the judgment of Trial Court was not available. Therefore, there was no occasion for the Commissioner to consider the matter in the light of paragraph 8.2(X), (g) and (h) of Supply Code, 2005.

59. In the circumstances, I propose and to hereby modify appellate order to the extent that Commissioner shall examine the matter in the light of the judgment

of Trial Court in S.S.T. No. 69 of 2008 as well as paragraph 8.2 (X), (G) and (H) of Supply Code, 2005 and pass appropriate order in accordance with law and for the said purpose appeal of the petitioner shall be treated to be pending before the Commissioner. The appellate order is modified/partly set-aside only to this extent that appeal shall be treated pending and after considering the above aspect of the matter, Commissioner shall pass an appropriate order. It is also made clear that for the purpose of applicability and efficacy as also the consequences of paragraph 8.2 (X), (g) and (h) of Supply Code, 2005 the Commissioner shall exercise his power independently and objectively and shall not be influenced by any observations made above in the judgment and the same shall not come in the way of the Appellate Authority. The parties are also granted liberty to file their additional pleading/documents, if any, before Appellate Authority. The writ petition is allowed partly with the above directions. There shall be no order as to costs.