(2012) 02 PAT CK 0028

In the Patna High Court

Case No : Criminal Miscellaneous No. 5244 of 2008

Mosmat Swaran @ Swaran Manraw APPELLANT

Vs

The State of Bihar and Another RESPONDENT

Date of Decision : 29-02-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Electricity Act, 1910 — Section 39, 44
Electricity Act, 2003 — Section 126, 126(4), 126(5), 126(6), 127
Income Tax Act, 1961 — Section 35
Penal Code, 1860 (IPC) — Section 379

Citation : (2012) 2 PLJR 229

Hon'ble Judges : Navaniti Pd Singh, J;Ashwani Kr. Singh, J

Bench : Division Bench

Advocate : Shree Ganesh, for the Appellant; Vijay Kumar Verma for the B.S.E.B., for the Respondent

Judgement

Navaniti Pd. Singh

1. Noticing the apparent conflict between two decisions of Single Judges of this Court, apparently in respect of the same issue, this case has been referred to Division Bench for settling the issue. The judgments in conflict are said to be in the case of Binod Giri vs. The State of Bihar & Another in Cr. Misc. No. 45443 of 2006 decided on 24.1.2007 by Hon''ble Justice Smt. Mridula Mishra, J. and is reported in Binod Giri Vs. The State of Bihar and Another, . The second judgment, though reported later is the judgment rendered earlier in time to the former judgment. This is the case of Gopal Sao and Another vs. The State of Bihar & Another decided on 8.1.2007 by Hon''ble Mr. Justice Samrendra Pratap Singh, J. since reported in 2010(1) PLJR 614. Both cases dealt with compounding of offences of electricity theft under Indian Electricity Act, 2003. in the first noticed case, that is, Binod Giri (supra) it was, inter alia, held by this Court that if upon detection of theft of electricity amount of loss and penalty quantified by the Bihar State Electricity Board (hereinafter referred to as the Board) is fully

paid and accepted by the authority u/s 152(1) of the Electricity Act, 2003 (hereinafter referred to as the Act), that would amount to compounding of the offences resulting in acquittal and consequentially no prosecution could continue. In the later noticed case, being that of Gopal Sao and Another (supra), it has been, inter alia, held that the quantification of loss for unauthorized use of electricity in terms of Section 126 of the Act and payment thereof is totally different from the provisions of Section 152 of the Act which provides for payment of compounding fee as mentioned under that section. The two liabilities are different and distinct. Payment of assessed amount u/s 126 of the Act would not absolve the petitioner of his criminal prosecution unless the compounding fee as envisaged in Section 152(2) of the Act is separately paid.

2. Thus seen, as we understand, if facts alleged and facts found in the two cases are taken into consideration there is no apparent conflict in the two judgments which are correct on their own facts. But, in view of the generality of the statements and/or expositions contained in the two judgments there is a confusion which does required to be cleared, especially when we notice that there are large number of reported cases following the judgment in the case of Binod Giri (supra), as if it lays down the law that mere payment of the damages assessed in the F.I.R. would result in compounding the offences, which is not the correct approach.

3. The facts found in the case of Binod Giri (supra) is that the payment was accepted by the authority in terms of Section 152 of the Act and the natural consequence would be compounding and, consequential, acquittal, but this case does not say and should not be understood to be saying that if the assessed loss which is a penal assessment is paid it would amount to compounding of the offence which unfortunately is the trend of several subsequent judgments of the Single Judges of this Court.

4. It would be the duty of this Court to remind ourselves what was said by Earl of Halsbury LC more than a century back in Quinn vs. Leathem, 1901 AC 495 which has been repeatedly noticed with approval in Indian Court. I would refer to the case of State of Orissa vs. Sudhansu Sekhar Misra & Ors. the judgment of Constitution Bench of the Apex Court which decision is reported in AIR 1968 Supreme Court 647 and the relevant passage is quoted hereunder:-

.......A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. On this topic this is what Earl of Halsbury LC said in Quinn vs. Leathern, 1901 AC 495.

Now before discussing the case of Allen vs. Flood, (1898) AC 1 and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical Code, whereas every lawyer must acknowledge that the law is not always logical at all.

It is not a profitable task to extract a sentence here and there from a judgment and to build upon it......

5. If the said principle of interpretation of judgment is kept in mind it would be seen that both the judgment are correct on their own facts. But, for the reasons as noticed above the reference having been made with pertinent questions formulated, we propose to examine the provisions of the Act in this regards as guidance for future reference in law but before we do so we must notice facts of the case in question.

6. It appears that in the afternoon of 14.3.2005 an inspection was conducted by the Junior Electrical Engineer at P.R.D.A. Rat No. 193, Block No. 24 at East of McDowell Golambar, Rajendra Nagar, P.S.-Kadamkuan, District-Patna, pursuant to which Kadamkuan P.S. Case No. 229 of 2005 was instituted for alleged theft of electricity in terms of Section 39/44 of, Indian Electricity Act, 1910 read with Section 379 I.P.C. In the F.I.R., it was, inter alia, alleged that upon inspection it was found that the aforesaid flat had an electric connection which had been disconnected for dues of Rs. 2,024/-, but the accused petitioner, Mosmat Swaran @ Swaran Mahraw was found using electricity directly from the main bar. Her installed load was 1 KVA and, as such, the Board had suffered a loss of Rs. 2024 and Rs. 5,000/-. Upon charge-sheet having been filed, the learned Chief Judicial Magistrate took cognizance of the offence and the case was pending trial for quashing of which this application u/s 482 Cr.P.C. was filed.

7. On behalf of the petitioner, it was submitted that the total amount of arrears and penalty as assessed being total of Rs. 7,024/- was deposited on 16.3.2005, as per bill raised, which is Annexure-3 to this application. It may be noted that the bill states that the bill as being raised as an F.I.R. bill and F.I.R. dues and the receipt also states the same. Petitioner''s contention is that having paid the full F.I.R. dues in terms of judgment of this Court in the case of Binod Giri (supra) the criminal proceedings would be deemed to be compounded.

8. The counsel for the Board submits that in terms of the decision of this Court in the case of Gopal Sao (supra) no compounding fee, as envisaged u/s 152 of the Act, having been paid and the payment being in terms of assessment as made u/s 126 of the Act, the criminal prosecution is to continue and cannot be quashed much less deemed to be compounded.

9. Now, we may refer to the relevant part of order dated 28.4.2010 of this Court in the present case formulating the questions required to be resolved by this

Division Bench:-

The points for determination are "whether the Board can charge the compounding amount u/s 152 of the Electricity Act, 2003, in spite of the fact that the arrears and penalty have already been deposited by the consumer or the acceptance of the arrears and the penalty will amount to acquittal."

Or

Once Electricity Board accepts the penalty and the other arrears amount, then the Electricity Board is precluded to charge the compounding amount u/s 152 of the Electricity Act or the deposit of arrears and penalty as assessed u/s 126 of the Act will not entitle the consumer for acquittal as envisaged u/s 152 of the Act unless the compounding amount u/s 152 of the Act is not deposited.

10. In order to answer the question and resulting apparent conflict, if any, we deem it proper first to discern the scheme of the Electricity Act, 2003 in relation to these issues and also to notice the difference, if any, between the provisions of the Act as it was enacted and the substantial amendments that were made to it by virtue of Electricity (Amendment) Act, 2007 with effect from 15.6.2007.

11. In order to appreciate the law and the respective changes in Sections 126, 135, 152 & 154 of the Act, the said provisions are quoted hereunder:-

Provisions of Electricity Act. 2003 as originally enacted

Provisions of Electricity Act. 2003 after 2007 Amendment

Section 126. Assessment. ?(1) If on an inspection of any place or 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 unauthorised 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.

Section 126. Assessment.?(1) If on an inspection of any place or 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 unauthorised 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.

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may be prescribed.

(3) The person, on whom a notice has been served under sub-section (2), shall be entitled to file objections, if any, against the provisional assessment before the assessing officer, who may, after affording a reasonable opportunity of hearing to such person, pass a final order of assessment of the electricity charges payable by such person.

(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 orders 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 day of service of such provisional assessment order upon him:

Provided that in case the person deposits the assessed amount, he shall not be subjected to any further liability or any action by any authority whatsoever.

(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, it shall be presumed that such unauthorised use of electricity was continuing for a period of three months immediately preceding the date of inspection in case of domestic and agricultural services and for a period of six months immediately preceding the date of inspection for all other categories of services, unless the onus is rebutted by the person, occupier or possessor of such premises or place.

(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 unauthorised use of electricity has taken place and if, however, the period during which such unauthorised 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 one-and-half times the tariff applicable for the relevant category of services specified in sub-section (5).

(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).

Explanation.?For the purposes of this section,?

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(a) "assessing officer" means an officer of a State Government or Board or licensee, as the case may be, designated as such by the State Government; (b) "unauthorized" use of electricity" means the usage of electricity?

(a) "assessing officer" means an officer of a State Government or Board or licensee, as the case may be, designated as such by the State Government; (b) "unauthorised use of electricity" means the usage of electricity-

(i) by any artificial means; or

(i) by any artificial means; or

(ii) by a means not authorised by

(ii) by a means not authorised by

the concerned person or authority or licensee; or

the concerned person or authority or licensee; or

(iii) through a tampered meter; or

(iii) through a tampered meter; or

(iv) for the purpose other than for which the usage of electricity was authorised.

(iv) for the purpose other than for which the usage of electricity was authorised.

(v) for the premises or areas other than those for which the supply of electricity was authorized.

Section 135. Theft of electricity.?

Section-135. Theft of electricity.?

(1) Whoever, dishonestly,?

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(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

(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

(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, 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?

(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,

(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;

(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 if it is proved that any artificial means or means not authorised by the Board or licensee 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.

(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.

(2) Any officer authorised in this behalf by the State Government may?

(2) Any officer of the licensee or supplier, as the case may be, in this behalf by the State Government may?

(a) enter, inspect, break open and search any place or premises in which he has reason to believe that electricity has been, is being, or is likely to be, used unauthorisedly ;

(a) enter, inspect, break open and search any place or premises in which he has reason to believe that electricity has been, or is being used unauthorisedly;

(b) search, seize and remove all such devices, instruments, wires and any other facilitator or article which has been, is being, or is likely to be, used for unauthorised use of electricity;

(b) search, seize and remove all such devices, instruments, wires and any other facilitator or article which has been, is being used for unauthorised use of electricity;

(c) examine or seize any books of account or documents which in his opinion shall be useful for or relevant to, any proceedings in respect of the offence under sub-section (1) and allow the person from whose custody such books of account or documents are seized to make copies thereof or take extracts therefrom in his presence.

(c) examine or seize any books of account or documents which in his opinion shall be useful for or relevant to, any proceedings in respect of the offence under sub-section (1) and allow the person from whose custody such books of account or documents are seized to make copies thereof or take extracts therefrom in his presence.

(3) The occupant of the place of search or any person on his behalf shall remain present during the search and a list of all things seized in the course of such search shall be prepared and delivered to such occupant or person who shall sign the list:

Provided that no inspection, search and seizure of any domestic places or domestic premises shall be carried out between sunset and sunrise except in the presence of an adult male member occupying such premises.

(3) The occupant of the place of search or any person on his behalf shall remain present during the search and a list of all things seized in the course of such search shall be prepared and delivered to such occupant or person who shall sign the list:

Provided that no inspection, search and seizure of any domestic places or domestic premises shall be carried out between sunset and sunrise except in the presence of an adult male member occupying such premises.

(4) The provisions of the Code of Criminal Procedure, 1973 (2 of 1974), relating to search and seizure shall apply, as far as may be, to searches and seizure under this Act.

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Section 152. Compounding of offences.?(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the Appropriate Government or any officer authorised by it in this behalf may accept from any consumer or person who committed or who is reasonably suspected of having committed an offence of theft of electricity punishable under this Act, a sum of money by way of compounding of the offence as specified in the Table below:?

TABLE

Section 152. Compounding of offences.?(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the Appropriate Government or any officer authorised by it in this behalf may accept from any consumer or person who committed or who is reasonably suspected of having committed an offence of theft of electricity punishable under this Act, a sum of money by way of compounding of the offence as specified in the Table below:?

TABLE

Nature of Service Rate at which the sum of money for compounding to be collected per Kilowatt (KW)/Horse Power (HP) or part thereof for Low Tension (LT) supply and per Kilo Volt Ampere (KVA) of contracted demand for High Tension (HT)

Nature of Service Rate at which the sum of money for compounding to be collected per Kilowatt (KW)/Horse Power (HP) or part thereof for Low Tension (LT) supply and per Kilo Volt Ampere (KVA) of contracted demand for High Tension HT)

(1)

(2)

1. Industrial Service

twenty thousand rupees;

2. Commercial Service

ten thousand rupees;

3. Agricultural Service

two thousand rupees;

4. Other Services

four thousand rupees;

(1)

(2)

1. Industrial Service

twenty thousand rupees;

2. Commercial Service

ten thousand rupees;

3. Agricultural Service

two thousand rupees;

4. Other Services

four thousand rupees;

Provided that the Appropriate Government may, by notification in the Official Gazette, amend the rates specified in the Table above.

(2) On payment of the sum of money in accordance with sub-section (1), any person in custody in connection with that offence shall be set at liberty and no proceedings shall be instituted or continued against such consumer or person in any criminal court.

Provided that the Appropriate Government may, by notification in the Official Gazette, amend the rates specified in the Table above.

(2) On payment of the sum of money in accordance with sub-section (1), any person in custody in connection with that offence shall be set at liberty and no proceedings shall be instituted or continued against such consumer or person in any criminal court.

(3) The acceptance of the sum of money for compounding an offence in accordance with sub-section (1) by the Appropriate Government or an officer empowered in this behalf shall be deemed to amount to an acquittal within the meaning of Section 300 of the Code of Criminal Procedure, 1973 (2 of 1974).

(3) The acceptance of the sum of money for compounding an offence in accordance with sub-section (1) by the Appropriate Government or an officer empowered in this behalf shall be deemed to amount to an acquittal within the meaning of Section 300 of the Code of Criminal Procedure, 1973 (2 of 1974).

(4) The compounding of an offence under sub-section (1) shall be allowed only once for any person or consumer.

Section 154. Procedure and power of Special Court.?(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),every offence punishable under sections 135 to 139 shall be triable only by the Special Court within whose jurisdiction such offence has been committed.

(4) The compounding of an offence under sub-section (1) shall be .allowed only once for any person or consumer.

Section 154. Procedure and power of Special Court.?(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence punishable under Sections 135 to 140 and Section 150 shall be triable only by the Special Court within whose jurisdiction such offence has been committed.

(2) Where it appears to any court in the course of any inquiry or trial that an offence punishable under Sections 135 to 139 in respect of any offence that the case is one which is triable by a Special Court constituted under this Act for the area in which such case has arisen, it shall transfer such case to such Special Court, and thereupon such case shall be tried and disposed of by such Special Court in accordance with the provisions of this Act:

(2) Where it appears to any court in the course of any inquiry or trial that an offence punishable under Sections 135 to 140 and Section 150 in respect of any offence that the case is one which is triable by a Special Court constituted under this Act for the area in which such case has arisen, it shall transfer such case to such Special Court, and thereupon such case shall be tried and disposed of by such Special Court in accordance with the provisions of this Act:

Provided that it shall be lawful for such Special Court to act on that evidence, if any, recorded by any court in the case of presence of the accused before the transfer of the case to any Special Court

Provided that it shall be lawful for such Special Court to act on that evidence, if any, recorded by any court in the case of presence of the accused before the transfer of the case to any Special Court

Provided further that if such Special Court is of opinion that further examination, cross-examination and re-examination of any of the witnesses whose evidence has already been recorded, is

Provided further that if such Special Court is of opinion that further examination, cross-examination and re-examination of any of the witnesses whose evidence has already been recorded, is

required in the interest of justice, it may re-summon any such witness and after such further examination, cross-examination or re-examination, if any as it may permit, the witness shall be discharged.

required in the interest of justice, it may re-summon any such witness and after such further examination, cross-examination or re-examination, if any, as it may permit, the witness shall be discharged.

(3) The Special Court may, notwithstanding anything contained in sub-section (1) of Section 260 or Section 262 of the Code of Criminal Procedure, 1973 (2 of 1974), try the offence referred to in Sections 135 to 139 in a summary way in accordance with the procedure prescribed in the said Code and the provisions of sections 263 to 265 of the said Code shall, so far as may be, apply to such trial:

(3) The Special Court may, notwithstanding anything contained in sub-section (1) of Section 260 or Section 262 of the Code of Criminal Procedure, 1973 (2 of 1974), try the offence referred to in Sections 135 to 140 and Section 150 in a summary way in accordance with the procedure prescribed in the said Code and the provisions of sections 263 to 265 of the said Code shall, so far as may be, apply to such trial:

Provided that where in the course of a summary trial under this sub-section, it appears to the Special Court that the nature of the case is such that it is undesirable to try such case in summary way, the Special Court shall recall any witness who may have been examined and proceed to re-hear the case in the manner provided by the provisions of the said Code for the trial of such offence:

Provided that where in the course of a summary trial under this sub-section, it appears to the Special Court that the nature of the case is such that it is undesirable to try such case in summary way, the Special Court shall recall any witness who may have been examined and proceed to re-hear the case in the manner provided by the provisions of the said Code for the trial of such offence:

Provided further that in the case of any conviction in a summary trial under this section, it shall be lawful for a Special Court to pass sentence of imprisonment for a term not exceeding five years.

Provided further that in the case of any conviction in a summary trial under this section, it shall be lawful for a Special Court to pass sentence of imprisonment for a term not exceeding five years.

(4) A Special Court may, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to, any offence tender pardon to such person on condition of his making a full and true disclosure of the circumstances within his knowledge relating to the offence and to every other person concerned whether as principal or abettor in the commission thereof, and any pardon so tendered shall, for the purposes of Section 308 of the Code of Criminal Procedure, 1973 (2 of 1974), be deemed to have been tendered u/s 307 thereof.

(4) A Special Court may, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to, any offence tender pardon to such person on condition of his making a full and true disclosure of the circumstances within his knowledge relating to the offence and to every other person concerned whether as principal or abettor in the commission thereof, and any pardon so tendered shall, for the purposes of Section 308 of the Code of Criminal Procedure, 1973 (2 of 1974), be deemed to have been tendered u/s 307 thereof.

(5) The Special Court may 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.

(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.

(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.

(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.

Explanation.?For the purposes of this section, "civil liability" means loss or damage incurred by the Board or licensee or the concerned person, as the case may be, due to the commission of an offence referred to in Sections 135 to 139.

Explanation.?For the purposes of this section, "civil liability" means loss or damage incurred by the Board or licensee or the concerned person, as the case may be, due to the commission of an offence referred to in Sections 135 to 140 and Section 150.

12. First, we would like to point out the concept of theft of electricity. Earlier under the Indian Electricity Act, 1910 theft of electricity was dealt with under Sections 39 & 44 thereof and for the purposes of punishment it was referable to Section 379 I.P.C. The reason was as explained by the Apex Court in the case of Avtar Singh Vs. State of Punjab, that electricity being not considered to be a movable property, there cannot be theft thereof within the meaning of Section 379 I.P.C. It is a theft as statutorily defined u/s 39/44 of the Electricity Act, 1910 and Section 379 I.P.C. is referred only for the purposes of punishment that is to be awarded. It is not a substantive offence punishable u/s 379 of the I.P.C. This Electricity Act of 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commission Act, 1998 have been repealed and replaced by the Electricity Act, 2003 as a comprehensive legislation in this regards. In this new Act, being Act of 2003, apart from others a concept of unauthorized use of electricity has been created as distinct from theft of electricity. The basic distinction between the two provisions being the concept of dishonesty. Section 126 of the Act provides for situations where unauthorized usage of energy is found as defined therein and authorizes the specified Assessing Officer to assess to the best of his judgment the electricity charges payable by such person who uses electricity unauthorisedly. A reference to the proviso as contained in sub-section (4) of Section 126 of the Act, as it was originally enacted, would show that if upon detection of unauthorized use a provisional assessment is made and if the sum so assessed is deposited then the person shall not be subject to any further liability or any action by any authority whatsoever. The manner in which the assessment has to be made, as originally provided, is contained in sub-Section (6) of Section 126 which stipulates that it shall be made at the rate equal to 1 1/2 times the tariff applicable. Sub-section (5) of Section 126 provides, inter alia, that the period would be maximum of six months subject to the consumer establishes a shorter period. What is unauthorized use of electricity is to be found in the explanation (b) of the said section.

13. Now, we may refer to Section 135 of the Act, as originally enacted. The opening words whereof are whoever dishonestly abstracts or consumes or uses electricity, commits theft of electricity and different punishment for different contingencies are provided therein. The essential difference between Section 126 and Section 135, that is, between unauthorized user of electricity and theft of elec?tricity has been pointed out by the Apex Court in a very recent decision in the case of Executive Engineer, Southern Electricity Supply Company of Orissa Limited (SOUTHCO) & Another vs. Sri Seetaram Rice Mill since reported in (2012)2 SC Cases 108. The Apex Court has pointed out the two provisions operate in different fields and have no commonality with each other. Section 135 deals with offence and penalty of theft of electricity, which falls within criminal jurisprudence and mens rea is constituent of the said offence whereas Section 126 primarily falls under civil law and does not involve mens rea.

14. Section 152 is for compounding of offences. It clearly provides how offences of theft of electricity punishable under the Act may be compounded. A table of compounding fee is prescribed therein and it clearly states that the appropriate authority may accept from the consumer a sum of money by way of compounding of offences as specified and the effect of payment would be that the criminal proceedings would stand terminated and would amount to acquittal. Subsection (4) of Section 152 clearly stipulates the disability clause and provides that compounding of offences would be available to a person only once.

15. At this juncture in relation to concept and the right of compounding, we would like to note that this Section 152 is prima facie enabling provision. By the use of expression "may" as held by the Apex Court in the case of L. Hirday Narain Vs. Income Tax Officer, Bareilly, the Court would readily infer a duty to exercise a power which is in aid of enforcement of a right public or private. In that case, it was dealing with Section 35 of the Income Tax Act which, inter alia, provided that the Assessing Officer may rectify a mistake. The Assessing Officer took the plea that the provision being merely enabling he may or he may not rectify the mistake. The Apex Court negatived the contention and held thus:-

...If a statute invests a public Officer with authority to do an act in a specified set of circumstances, it is imperative upon him to exercise his authority in a manner appropriate to the case when a party interested and having a right to apply moves in that behalf and circumstances for exercise of authority are shown to exist. Even if the words used in the statute are prima facie enabling, the Courts will readily infer a duty to exercise power which is invested in aid of enforcement of a right-public or private-of a citizen....

"May" in the said statute was thus held to be "shall".

16. We may also notice that Section 152 of the Act also provides the disability clause by virtue of sub-section (4) thereof, thus, leaving no discretion upon the authority in the matter except as provided therein. Thus, if in a case application for compounding is made the authority have no option but to accept the same

upon payment of fee as specified therein which would result in acquittal. The authority has no discretion to refuse the request for compounding fees made in accordance with the provisions of Section 152 of the Act.

17. Now, we may refer to the procedural aspect of criminal prosecution as envisaged under the Electricity Act, 2003. The offences of theft of electricity, as contemplated u/s 135 of the Act, are to be tried by Special Courts appointed by the State Government with concurrence of the High Court who has to be an Additional District & Sessions Judge. By virtue of sub-section (5) of Section 154, as was originally enacted, the Special Court had to determine the civil liability against the consumer in terms of money for theft of energy. Sub-section (5) of Section 154 provides that it shall be calculated at the rate two times the tariff rate applicable and for the period of twelve months or the exact period of theft if determined whichever less is. Here, we would like to compare this with Section 126 of sub-sections (5) & (6) of the Act as originally enacted. The calculations are on different parameters. Under sub-sections (5) & (6) of Section 126 for unauthorized user of electricity the rate of calculation is 1 1/2 times the tariff and the period is maximum six months which could be less, if proved by the consumer. Whereas under sub-section (5) of Section 154 the rate is two times the tariff rate and could extend to a period of twelve months or less upon proof by the consumer in relation to theft cases. But, when we come to the provisions of the Electricity Act, 2003 after its amendment by Electricity (Amendment) Act, 2007 with effect from 15.6.2007, we find that sub-sections (5) & (6) of Section 126 have been amended and, now for unauthorised user the calculation has to be based for a period of twelve months unless proved otherwise by the consumer and the rate is twice the tariff rate applicable. As noticed earlier, originally the maximum period was six months and the applicable rate was 1 1/2 times. Similarly, under sub-section (5) of Section 154 of the Act, as now stands amended, the rate is again two times the tariff and the period is twelve months. It has now become obligatory on the Special Court by use of expression "Special Court shall" to make the said calculation.

18. Thus seen, with effect from 15.6.2007, now there is no difference between the calculation of liability in respect of unauthorized user or for that matter in a case of theft.

19. Now, we may refer to sub-section (6) of Section 154 which has remained unaltered. A reference to the said provision would show that if an assessment is made u/s 126 subject to appellate order u/s 127 that would get superseded by the quantification done by the Special Court in terms of subsection (6) of Section 154 and if the amount as earlier determined u/s 126 and deposited by the consumer was more than what is determined by the Special Court then the amount has to be refunded to the consumer and the amount if determined is higher by the Special Court it is to be recovered as civil debt being a decree of Civil Court.

20. The reason for combining Section 126 and the consequence of Section 135

by virtue of sub-section (6) of Section 154 is that where an unauthorized user is with a dishonest intention proved, it would be subject to what is stated in Section 135, a theft of electricity. Thus, upon detection of dishonest unauthorised user of electricity, the authority has a right to assess the amount u/s 126, subject to adjustment by final determination by the Criminal Court upon prosecution being launched.

21. Here, we wish to point out that the legislative policy and the mandate is that the liability of a person in default either by way of unauthorized use of electricity or by way of theft of electricity is to be determined only by the statutory authorities or the Assessing Officer u/s 126 of the Act and/or Section 154 by the Special Court. Any ipse dixit calculation or averment made in the F.I.R. has no legal sanctity at all because it is well established principle of law that when the legislature has prescribed a mode for performance of an act then the act can only be performed in the manner prescribed and all other modes are impliedly prohibited.

22. In this connection, we may refer to the decision of the Constitution Bench of the Apex Court in the case of Hukam Chand Shyam Lal vs. Union of India & Ors. since reported in AIR 1976 SC 789 and, in particular, what is stated in paragraph-18 thereof, the relevant part whereof is quoted hereunder:-

18. It is well settled that where a power is required to be exercised by a certain authority in a certain way, it should be exercised in that manner or not at all, and all other modes of performance are necessarily forbidden. It is all the more necessary to observe this rule where power is of a drastic nature.....

23. We may also notice one another important change brought by the amendment in the year 2007 which is to be found in Section 126 and Section 135. As noticed earlier, as originally enacted subsection (4) of Section 126 had a proviso which provided that if a person deposits the amount as assessed u/s 126 then he would be not subjected to any further liability or any action by any authority whatsoever but this proviso has been deleted by the 2007 Amendment Act and instead a proviso has been introduced alongwith sub-section (1-A) to Section 135 providing that if a person deposits the assessed amount then without prejudice to the prosecution the electric supply would be restored within 48 hours of such deposit. Here, we would like to point out that again the amount of deposit has to be as per assessment u/s 126 and not on any ipse dixit figure mentioned in the F.I.R. or in the criminal complaint.

24. Thus seen, the scheme of the Act as it now stands is that where unauthorized user of electricity, within the Section 126 of the Act is detected an assessment is to be made and to be paid by the consumer, subject to appellate remedy as provided u/s 127 of the Act. If it is coupled with dishonest intention which would make it an offence u/s 135 of the Act, being theft of electricity, then again the person would be liable to pay the assessed amount as is required to be assessed u/s 126 of the Act and in the trial before the Special Court, i.e. Special

Court has to determine the amount on the same basis that is the same rate and period upon evidence and if the assessment is less than what is assessed u/s 126 of the Act the consumer is entitled to a refund otherwise he is liable to pay it as a civil liability.

25. The provision of compounding as contained in Section 154 is different and distinct from the liabilities as contemplated u/s 126 or for that matter Section 154. This is an independent liability to compound the offence and is a fixed liability irrespective of the quantum of assessment. The only difference is between the Act as enacted and as it now stands after 2007 Amendment is that if earlier assessment was made and it was paid in full then no further action including criminal prosecution could be taken by virtue of the then proviso to sub-section (4) of Section 126 which now stands deleted. Further, now after the 2007 Amendment once even if there is a criminal prosecution and the line has been disconnected upon payment of the assessed amount by virtue of the third proviso to sub-section (1-A) of Section 135, the supply has to be restored. Further under the Act, as originally enacted, the basis of calculation for an assessment u/s 126 and Section 154 was different. In respect of Section 126 it was 1 1/2 times the tariff rate for a maximum period of six months [Section 126(5) & (6)], whereas u/s 154(5) it was two times the tariff for a period of 12 months or less as the case may be. But, now under the amended provisions both the calculations are on the same basis of twice the tariff rate and for a period of 12 months subject to consumer proving a shorter period.

26. Thus seen, Section 126, Section 135, Section 152 and Section 154 of the Act operate in different and distinct manner. The liability to compound is independent and distinct of assessment made in terms of Section 126 of the Act which is ultimately subject to assessment in terms of Section 154(5) of the Act.

27. Thus, having examined the scheme and provisions of the Act, the effect of amendment in the year 2007, our answer to the referred questions would be that deposit of arrears and penalty, as assessed u/s 126 of the Act, does not amount to acquittal by virtue of compounding as contemplated u/s 152 of the Act. Compounding application has to be separately made with the deposit of compounding fee as stipulated u/s 152 of the Act and only upon payment thereof the offence can be said to be compounded resulting in acquittal and not otherwise.

28. A word of caution before closing. As we have noticed in respect of the present case, by virtue of Annexure-3 to this application a bill was served on the consumer showing it to be an F.I.R. bill which the consumer paid and the receipt also shows that it is a payment in respect of the F.I.R. This has no sanctity in law. The Board is entitled to bill a consumer only in accordance with the tariff and the statute. There is no scope of an F.I.R. bill as we have noted above. It is either billing regularly as per tariff or punitively u/s 126 and/or Section 154(5) as the case may be. There is no fourth option. On threat of prosecution the Board cannot realize any amount which is not authorized or sanctioned by law.

29. Accordingly, we are of the view that the judgments of this Court, inter alia, in the case of K.N. Ram @ Kedar Nath Ram Vs. The State of Bihar and Another, , Sanjay Kumar Yadav and Another Vs. The State of Bihar and Another, , Vimala Prasad, Proprietor Hotel Swagatam, Exhibition Road, Patna Vs. The Bihar State Electricity Board and Others, , Sri Anant Kumar Vs. The State of Bihar and Others, and Prabhash Kumar Vs. The State of Bihar and Bihar State Electricity Board, , which merely hold that as the delinquent consumer has paid the punitive amount of loss as mentioned in the F.I.R. or assessed. u/s 126, the prosecution cannot continue, do not lay down the correct proposition of law as in absence of compounding fee being paid as contemplated u/s 152 the offences cannot be compounded. Those lines of decisions are disapproved and consequently overruled.

30. While doing so, we concur with and approve the decisions of this Court taken in the case of Kamaljeet Singh vs. The Bihar State Electricity Board & Others since reported in 2010(3) PLJR 514, M/s Zee Saheb Cosmetic Zone through its Proprietor Mr. Rajiv Ranjan Gupta vs. The Bihar State Electricity Board & Others since reported in 2010(4) PLJR 863, S.K. Food Product Vs. The Bihar State Electricity Board and Others, and Md. Sakil Ahmad Vs. Bihar State Electricity Board and Others, which is in consonance with the scheme of the Act as found by us above. The reference to Division Bench having been answered accordingly. Let the matter be placed before appropriate Single Bench of this Court for final disposal in accordance with the observations made by the Hon''ble Judge referring the matter to Division Bench by order dated 28.4.2010 in this case.

