(2016) 12 CAL CK 0019

In the Calcutta High Court

Case No : A.S.T. No. 314 of 2016

M/s. Orion Metal Pvt. Ltd. APPELLANT

Vs

West Bengal State Electricity Distribution Company Limited RESPONDENT

Date of Decision : 15-12-2016

Acts Referred:
Electricity Act, 2003 — Section 126(1)

Citation : (2017) 170 AIC 439

Hon'ble Judges : I.P. Mukerji, J.

Bench : Single Bench

Advocate : Mr. Sumit Panja and Mr. Sumit Roy, Advocates, for the Respondent; Mr. Subir Sanyal and Mr. Sutirtha Das, Advocates, for the Petitioner

Final Decision : Disposed off

Judgement

I.P. Mukerji, J. - The writ petitioner company (the writ petitioner) is an establishment at Bighati, Delhi Road, Bhadreswar, District-Hooghly.

2. On 28th October, 2016 at 1.15 in the afternoon, officials of the West Bengal State Electricity Distribution Company Limited (the respondent licensee) inspected and tested the metering system. There appeared to them "load imbalance". The same day, late in the evening at 8.40 hrs., they served on the writ petitioner another notice alleging "tampering/ malpractice/unauthorised use of electricity against them, under Section 135 (1), 138 and 139 of the Indian Electricity Act, 2003. This notice was issued under regulation 5.2 of the West Bengal Electricity Regulatory Commission (Electricity Supply Code) Regulation, 2004. The electricity supply was disconnected at or about the time of service of the second notice. The inspection team report was shown to me. It was also dated 28th October, 2016. The following part of the report is very important and is extracted hereinbelow:

"13. Abnormality: input current is abnormally high from output current. At TTB end in respect of R & B phase PT secondary wires. From load survey data of installed meter (seen in laptop), B phase current occasionally found abnormally lower than R phase current. After break open of TTB foreign material found inside the same.

14. Theft of energy detected or not: Yes

15. Means of Theft: By inserting foreign material inside the TTB of WBSEDCL."

3. All members of the inspection team signed this report. A seizure list was prepared. Various items like a three phases meter, test terminal block (TTB), plastic seals etc. were seized. It very important to note that there was no mention of the "foreign material" in the seizure list.

4. On 29th October, 2016 the respondent licensee sent a provisional assessment of electricity charges, as an annexure, to their letter, to the writ petitioner. It was clear from this sheet that the assessment was made under Section 126 of the Electricity Act, 2003 on the basis of "abstraction or consumption of electrical energy by an artificial means or through a tampered meter or any other method covered by Section 135 (1) (a) (b) (c) (d) of the said Act." The assessed amount was Rs. 134,117,482.30.

5. Admittedly, this provisional assessment was made by an assessing officer who was not part of the inspection team which inspected the metering system on 28th October, 2016 in the said establishment of the writ petitioner.

6. The final assessment has not been made. The writ petitioner has filed this application under Article 226 of the Constitution of India challenging this provisional assessment.

7. Mr. Sanyal for the writ petitioner submitted that there was no need on the part of his client to approach the statutory authority under the Electricity Act, 2003. He said that the assessing officer had no jurisdiction to make the provisional assessment as he was not part of the inspection team which made the inspection of the metering equipment of the petitioner on 28th October, 2016. Any provisional assessment made by this assessing officer was a nullity. He also said that this lack of jurisdiction went to the root of the matter. His client was not obliged to avail of the alternative remedy.

8. The second point raised by Mr. Sanyal was based on a decision of the Supreme Court in Executive Engineer, Southern Electricity Supply Company of Orissa Limited (Southco) and Another v. Sri Seetaram Rice Mill reported in (2012) 2 SCC 108. He submitted that the allegation of unauthorised use of electricity under Section 126 of the said Act could not be maintained along with theft under Section 135 of the said Act. Both were completely different. The respondent licence had tried to make out a case for unauthorised use and theft against the writ petitioner. This was not possible according to learned Counsel, on his interpretation of the said Supreme Court decision. It should have been either. If theft was alleged and proved the consumer had to deposit a fine as opposed to unauthorised use, which if proved would result in the consumer paying the

assessed amount which was twice the rate of tariff under Section 126 (6) of the said Act.

9. Mr. Panja for the respondent licensee contended that the provisional assessment was duly made. Section 126 of the said Act provided for alternative modes to assess unauthorised use of electricity. The assessing officer need not have been part of the inspection team. The assessment was correctly made.

Analysis

10. This court has the jurisdiction to entertain this writ, as the foundation of the jurisdiction of the assessing officer is challenged.

11. In my view, Section 126 (1) of the said Act has to be interpreted literally as well as purposively. The assessing officer has to come to the conclusion that a person is indulging in unauthorised use of electricity. Nobody else can. This subsection provides the method by which he can reach this conclusion. He may do so on inspection of any place or of any equipment, device etc. found connected or used or on an inspection of records. All these three methods may be employed alternatively or together, if one makes a purposive construction of the statute. If the basis of charging a person is the result of an inspection, of a place or premises then the assessing officer had to make the inspection to satisfy himself. The next mode is that by examination of the equipments, devices etc. which are found connected or used, the conclusion of unauthorised use of electricity can be drawn. The use of the word "found" is very important because the equipment, gadget, devices etc. has to be found at the site. Obviously, they cannot be so found unless the site is inspected. This can only be done by the Assessing Officer, before the conclusion is reached that there is theft of electricity.

12. If one analyses the first two methods, taken together one will realise that on an inspection made by the assessing officer, at the spot, on the basis of examination of the metering system, gadgets, devices etc. or connected wires and apparatus found there he can come to the conclusion that there has been unauthorised use of electricity. This is like catching the thief red handed with the stolen articles. Nobody else can come to the conclusion except the assessing officer on inspection, according to the language of the statute.

13. Next, comes the most important part of the section. It speaks about provisional assessment on the basis of the records. This is the third alternative. If you take this phrase disjunctively, then on the basis of the records alone the assessing officer can come to the conclusion regarding the unauthorised use of electricity, with or without inspection of the place or premise or gadgets, devices etc.

14. Therefore, an assessing officer may adopt all the three methods or any of the three methods to come to his conclusion. For the first two methods, his presence is necessary at the time of inspection. If he is not part of the inspection team then any finding during inspection cannot be used for the purpose of making the

provisional assessment. But if the third method is adopted then it is not important whether he was part of the inspection team or not.

15. In Narayan Chandra Kundu v. State of West Bengal & Ors. reported in AIR 2007 Cal 298, Mr. Justice Bhaskar Bhattacharya delivering the judgement of a division bench of this court said.

"After going through the provisions contained in Section 126 and 135 of the Act we find that the legislature has intended that the Assessing Officer must be a person who was actually a member of the inspection team at the time of detecting the pilferage or the unauthorised use of the electricity so that he can pass the order of assessment not on the basis of papers placed before him but after actually visiting the site at the time of detection of the illegality."

16. It only supports the interpretation of the Section which I have made above that if the basis of determination of unauthorised use of electricity is inspection, then the assessing officer had to be part of the inspection team. In this case the third method of making assessment referred to above was neither in issue nor discussed in the judgement. Only the first two methods can be said to have been dealt with in this judgement. A later division bench of this court headed by Mr. Justice Girish Chandra Gupta in C.E.S.C. Ltd. v. Abdos Trading Co. Pvt. Ltd. reported in 2013 (2) CHN (CAL) 242 followed this judgement. This judgement, also did not consider the third mode of making the assessment provided in Section 126 of the said Act. However, it was discussed broadly by Mr. Justice Jyotirmay Bhattacharya in CESC Limited & Anr. v. Deputy Chief Engineer-Customer Relation Management reported in 2011 (1) CLJ (Cal) 622 in the following manner:

17. "The use of expression ''or'' in between the aforesaid three situations, in my view, was used in a disjunctive way. The expression ''or'' used in between the aforesaid three situations cannot be read as conjunctive. If ''or'' used in between the three alternatives situations is read as conjunctive, then even the provisional assessment cannot be made by the Assessing Officer unless all the aforesaid three courses are followed. In my view, that was never the intention of the legislature. The last situation which is mentioned in item no. (iii) as above, clearly indicates that provisional assessment can be made by the Assessing Officer, if the Assessing Officer after inspecting the records maintained by any 14 person can come to the conclusion that such person is indulging in unauthorized use of electricity and such conclusion can be arrived at, even without following the other two courses as mentioned above. Thus this Court is of the view, that if the assessing officer is satisfied about the unauthorized use of electricity by following any of the courses as mentioned above, he is competent to pass provisional assessment order. The expression ''any person'' used in the last alternative course is significant as instead of using the expression consumer, the expression ''any person'' is used therein. In my view, this ''any person'' is used in the said provision to include all persons including the consumer, the beneficiary of such illegal connection or any person who is related to such unauthorized

extension and/or use of such electricity and the officer authorised to inspect any premises under Section 135(2) of the said Act. The records maintained by any person means and includes the records of inspection prepared by the officer having authority under Section 135(2) of the said Act."

18. The interpretation that I have made of Section 126 (1) of the said Act takes into account the ratio of these cases. Additionally, I have tried to explain certain parts of the Section which were not dealt with by them.

19. There is no dispute that the writ petitioners have challenged the provisional assessment dated 29th October, 2016. This provisional assessment was made by an assessing officer who did not constitute the inspection team. The letter dated 29th October, 2016 of the respondent licensee forwarding the provisional assessment referred to a joint inspection made on 28th October, 2016. The provisional assessment does not say whether this assessment was made on the basis of the inspection or on the basis of other records or both. When there is only a reference to a joint inspection in the letter of 29th October, 2016 there is every reason to believe that this provisional assessment was made only on the basis of this joint inspection. The third mode was not adopted.

20. On the basis of the above authorities this provisional assessment is vulnerable as the assessing officer was not a member of the inspection team.

21. Now, I will deal with the next submission of Mr. Sanyal. In the notice dated 28th October, 2016 issued by the respondent licensee, the writ petitioner was charged with theft as well as unauthorised use of electricity. In the provisional bill under Section 126 of the said Act, a reference was made to a first information report lodged by the licensee with the police on 29th October, 2016 under Section 135 of the said Act.

22. I read paragraphs 25 and 26 of Executive Engineer, Southern Electricity Supply Company of Orissa Limited (Southco) and Another v. Sri Seetaram Rice Mill reported in (2012) 2 SCC 108,

"25. Section 135 of the 2003 Act falls under Part XIV relating to " offences and penalties" and title of the section is " theft of electricity". The section opens with the words "whoever, dishonestly" does any or all of the acts specified under clauses (a) to (e) of sub-Section (1) of Section 135 of the 2003 Act so as to abstract or consume or use electricity shall be punishable for imprisonment for a term which may extend to three years or with fine or with both. Besides imposition of punishment as specified under these provisions or the proviso thereto, sub-section 1-A of Section 135 of the 2003 Act provides that without prejudice to the provisions of the 2003 Act, the licensee or supplier, as the case may be, through officer or rank authorised in this behalf by the appropriate commission, may immediately disconnect the supply of electricity and even take other measures enumerated under sub-sections (2) (4) of the said section. The fine which may be imposed under Section 135 of the 2003 Act is directly proportional to the number of convictions and is also dependent on the extent of load abstracted.

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

23. I think Mr. Sanyal is not correct.

24. Let us now see how unauthorised use of electricity is defined by Section 126 (6) (b) of the said Act.

"126. Assessment:- (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).

(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

(ii) by a means not authorised by the concerned person or authority or licensee; or

(iii) through a tempered meter ; or

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

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

25. Now, Section 135 defines theft as follows:-

"135. Theft of electricity---(1) whoever, dishonestly,

(a) taps, makes or causes to be made any connection with overhead, underground or under water lines or cables, or service wires, or service facilities of a licensee or supplier, as the case may be; or

(b) tampers a meter, installs or uses a tampered meter, current reversing transformer, loop connection or any other device or method which interferes with accurate or proper registration, calibration or metering or electric current or otherwise results in a manner whereby electricity is stolen or wasted; or

(c) damages or destroys an electric meter, apparatus, equipment, or wire or causes or allows any of them to be so damaged or destroyed as to interfere with the proper or accurate metering of electricity; or

(d) uses electricity through a tampered meter; or

(e) uses electricity for the purpose other than for which the usage of electricity was authorised,

So as to abstract or consume or use electricity shall be punishable with imprisonment for a term which may extend to three years or with fine or with both."

26. In my understanding of the provisions there can be theft of electricity without unauthorised use. Take for example Section 135 (1) (c) which is about an act resulting in damage or destruction of any electric meter or apparatus or wires. If one simply destroys or damages the metering system or destroys transmission or distribution lines, he is not making any illegal abstraction of electricity or making unauthorised use of it. This kind of an act amounts to theft pure and simple. It does not amount to or result in unauthorised use. On the other hand, one may make, without any intention or neglect, unauthorised utilisation of electricity under Section 126 of the said Act. In that case he has not indulged in theft because the required mens rea is not involved,. It was this kind of cases which was referred to by the Supreme Court in the above paragraphs of the judgement.

27. But it is also possible, as in this case, that a person is guilty of unauthorised use of electricity, as well as theft. Take for example the act described in Explanation-b of Sub-Section 6 of 126 and Section 135 (1) (b) of the said Act. It may be both theft and unauthorised use of electricity. According to the charge levelled against the writ petitioners they are accused of both unauthorised use and theft of electricity. There is nothing wrong with the accusation.

28. This ground raised by Mr. Sanyal fails.

29. The strongest point in favour of the petitioner is that the assessing officer was not a member of the inspection team.

30. Since, the assessing officer was not a member of the inspection team the provisional assessment made by him on 29th October, 2016 is invalid and is set aside. However, there will be grave injustice if the unauthorised use of electricity by the writ petitioner is left undetermined, and the writ petitioner asked to go virtually scot free just because this particular assessing officer appointed by the Government was not part of the inspection team.

31. In those circumstances, following the ratio laid down in the case of Jadabpur Tea Company Ltd. & Anr. v. West Bengal State Electricity Distribution Co. Ltd. Ors. reported in 2010 (2) CHN (CAL) 381, I direct the State Government to immediately appoint a member of the inspection team as an assessing officer,

even for a limited period of time, or even for this particular case to make a fresh provisional assessment, and then a final assessment in this case. Such appointment of the assessing officer should be made within three weeks of communication of this order. The assessment should be completed within a further period of eight weeks, upon hearing the petitioner and by a reasoned decision showing intelligible calculations. During this period no coercive action of a civil nature will be taken by the respondent licensee against the writ petitioners.

32. This writ application is disposed of accordingly.

33. Certified photocopy of this Judgment and order, if applied for, be supplied to the parties upon compliance with all requisite formalities.