

(2008) 03 MAD CK 0116

In the Madras High Court

Case No : Writ Petition No. 36026 of 2007 and M.P. No. 1 of 2007

S. Senthil Kumar and S. Sridevi

APPELLANT

Vs

The Executive Engineer (Distribution), Tamil Nadu Electricity Board and The Assistant Executive Engineer (Operation and Maintenance)

RESPONDENT

Date of Decision : 27-03-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Electricity Act, 2003 — Section 126, 135, 135(1), 153, 153(2)
Tamil Nadu Electricity Supply Code, 2004 — Regulation 23AA

Citation : (2008) 4 MLJ 546

Hon'ble Judges : P. Jyothimani, J

Bench : Single Bench

Advocate : A. Sivaji, for the Appellant; S.N. Kirubanandam, for the Respondent

Final Decision : Allowed

Judgement

P. Jyothimani, J.—This writ petition is filed challenging the final assessment order passed by the second respondent dated 26.9.2007 in respect of a detected theft of energy regarding service connection No. 402, Kallapalayam, Tariff III-B of Pappampatty section.

2. The petitioners were running an industry, by name, M/s.Sri Adhavan Textiles for two years, owned by one P.Ranganathan under a lease agreement. On inspection, the second respondent of the Tamil Nadu Electricity Board has made a complaint to Sulur Police Station, Coimbatore for an offence of theft of energy. The petitioners have filed a Criminal O.P. No. 13688 of 2006 to quash the said proceedings in Crime No. 299/06 and the said O.P. was admitted and stay was granted on 13.6.2006. The petitioners have also obtained anticipatory bail.

2(a). The second respondent has issued a notice dated 23.5.2006 u/s 135(1)(b) of the Electricity Act, 2003 referring to the inspection made on 23.5.2006. The petitioners have replied on 9.6.2006. On 19.6.2006, the first respondent,

Executive Engineer has issued a notice for enquiry on 29.6.2006 and 7.7.2006. The petitioners have appeared and denied the charge of theft of energy. The petitioners have challenged the said enquiry in W.P. No. 23188 of 2006 on the basis that there is a Special Court contemplated under Sections 153 and 154(5) of the Electricity Act, 2003. The said writ petition was allowed on 9.10.2006 and it was after that, the present impugned order came to be passed by the second respondent on 26.9.2007.

2(b). The said order is challenged on various grounds including that in the proceedings dated 23.5.2006 it was stated that the alleged violation is an offence u/s 135(1)(b) of the Electricity Act, 2003 (in short, "the Act") and in such circumstances, even before the conclusion of the criminal action, the respondents cannot presume any violation and proceed further, that Section 154(5) provides for a Special Court to determine the civil liability in terms of money against the consumer and therefore, a mere complaint to Police Station cannot be deemed to be a complaint to the Special Court constituted u/s 153 of the Act, that after the conclusion of W.P. No. 23188 of 2006, no opportunity was given to the petitioners, that by virtue of notification issued on 5.10.2006, Special Courts have been constituted, that the reference made about the Regulation No. 23(AA) (15) of the Tamil Nadu Electricity Supply Code is not proper since the same was amended by the Tamil Nadu Electricity Supply (Amendment) Act, 2007 with effect from 13.6.2007 and Regulation 23(AA) was introduced setting out the procedure and the said procedure is prospective in nature whereas the impugned order relates to an inspection which was conducted on 23.5.2006 before the amendment, that the second respondent was not the duly authorised officer as contemplated under the said Regulation and that as per Sections 153(2) of the Act and 154(5) of the Amended Act, the Special Court shall determine the liability in respect of matters like this.

3. The respondents have filed a counter affidavit. While it is stated that the respondents are not aware of the lease agreement between the owner and the petitioners, it is the respondents' case that on 23.5.2006, the Assistant Executive Engineer, Karadivavi and Enforcement Squad inspected the service connection No. 402/IIIB Kallapalayam in the presence of Mrs. Sri Devi, the second petitioner and at that time, the textile mill was running in a full swing and it was found that one electric generator available in the premises was not functioning. It was also found that MRT security seals provided in the current transformer and bus bar chamber and T.T.B. Chamber were found tampered and sealing wire was found cut and refixed using lead and wax. When the tampered seal was shown to the second petitioner, she has neither refused, nor explained the reason.

3(a). It was thereafter, the Executive Engineer, Coimbatore, who is the competent authority for Meter Related Tests (M.R.T.) has confirmed the said position and a report was submitted by him after getting a report and mahazar was prepared and given to the second petitioner and the owner P.Ranganathan, who was also present at that time, however, both of them refused to sign the

mahazar which was recorded and attested by the Village Administrative Officer, Kallapalayam.

3(b). It was, in those circumstances, a complaint was lodged to Sulur Police Station on 23.5.2006 in Crime No. 299 of 2006 u/s 135(1) of the Electricity Act. A show cause notice was issued on 23.5.2006 to the petitioners about the loss incurred by the Electricity Board and ample time was given to them to reply and a reply was received on 9.06.2006, enquiry was conducted on 29.06.2006 and 7.7.2006. Monthly consumption charges were paid by the petitioners as per demand raised by the Assistant Engineer, Pappampatty. Whenever the theft of energy is detected, the loss of revenue to the Electricity Board is calculated for previous one year or from the date of inspection from M.R.T. Enforcement Squad, whichever is less.

3(c). Regarding W.P. No. 23188 of 2006, it is the case of the respondents that while disposing of the said writ petition, the High Court has left it open to the respondents to proceed in accordance with law. The Electricity (Removal of difficulties) Order, 2005 has been issued and on that basis fresh assessment order was passed on 26.9.2007. Further, notification was issued on 25.5.2007 to ascertain the difficulties in the procedure of assessment and to assess the value of theft of energy by the competent authority, in the Government Gazette dated 13.6.2007. Under that notification, new regulations 19(A) and 23 of the Principal Code have been introduced with retrospective effect from 1.9.2004.

3(d). It is also stated that the Central Government in Notification G.S.R. No. 379 (E) u/s 176 of the Indian Electricity Act has clearly stated that police shall take cognisance of offence punishable under the Act and as and when complaint is received from the competent authority in writing, the police shall investigate in accordance with law. It is further stated that this Court has already held that mere acquittal in criminal case in respect of theft of electric energy is different from the departmental action to assess the loss suffered by the Board and therefore, the action taken by the Board is in accordance with law.

4. A reference to the impugned final order of assessment shows that the same has been passed by the second respondent u/s 135 of the Electricity Act and the same is in furtherance of the provisional assessment order dated 23.5.2006. The provisional order dated 23.5.2006 was the subject matter of challenge in the previous writ petition filed by the petitioners in W.P. No. 23188 of 2006. The main ground of challenge in the said writ petition was that when the proceedings u/s 135(1)(b) of the Electricity Act are initiated even before the criminal action is concluded, it cannot be presumed that the petitioners are liable to be punished and bound to make good the loss suffered by the Electricity Board. The said writ petition was allowed on the basis that there is no provision for assessment in case of theft in the Electricity Act, 2003. It was also observed that while Section 126 is strictly restricted to unauthorised use of energy not amounting to theft, the respondents ought not to have resorted to assessment of charges even as per Section 126 especially when they have initiated action u/s 135 of the Act. In

fact, the learned Judge has also considered the Electricity (Removal of Difficulties) Order, 2005 which was notified in the Government of India Gazette dated 8.6.2005 and having considered the same, passed the following order:

4. In these circumstance, the impugned orders dated 23.5.2006 and 19.6.2006 are quashed. It is open to the respondents to proceed in accordance with law upon the complaint, if this Court is not inclined to quash the complaint in exercise of its powers u/s 482 of the Code of Criminal Procedure in CrI.O.P. No. 13688 of 2006. It is also open to the respondents to proceed in accordance with law once the provisions as contemplated under the Electricity (Removal of Difficulties) Order, 2005, are included. Since the Act as it now stands and since the Electricity (Removal of Difficulties) Order, 2005 seems to indicate that when proceedings u/s 135 is initiated, recourse cannot be had to assessment u/s 126, the writ petition will necessarily have to be allowed. If the method of assessment of electricity charges in case of theft of electricity pending adjudication by the Criminal Court, is laid down, then also, the orders passed in this writ petition would not stand in the way of the respondents to take such action as is necessary and in accordance with law.

Though quashed the provisional assessment order dated 23.5.2006, this Court has given liberty to the respondents to proceed in accordance with law. Further, this Court was not inclined to quash the complaint in criminal O.P. No. 13688 of 2006. Liberty was also given to the respondent Electricity Board to proceed further when the provisions contemplated under the Electricity (Removal of Difficulties) Order, 2005 are included. It is also further stated that if, for the assessment of electricity charges in respect of theft of electricity pending adjudication by the criminal Court, procedure has been laid down, there is no bar for the respondents to proceed with.

5. It is relevant to point out that under the Electricity (Removal of Difficulties) Order, 2005, in Clause 2, the measures to include control of theft in Electricity Supply Code are explained, which is as follows:

2. Inclusion of measures to control theft in Electricity Supply Code---

(1) The Electricity Supply Code as specified by the State Commission u/s 50 of the Act shall also include the following, namely:

(i) method of assessment of the electricity charges payable in case of theft of electricity pending adjudication by the appropriate Court;

(ii) disconnection of supply of electricity and removing the meter, electric line, electric plant and other apparatus in case of theft or unauthorised use of electricity; and

(iii) measures to prevent diversion of electricity, or tampering, distress or damage to electrical plant, electric lines or meter.

(2) The above provisions in the Electricity Supply Code shall be without prejudice

to other rights of the licensee under the Act or any other applicable laws to recover the sum due and to protect the assets and interests of the licensee.

As per the said clause, the State Electricity Regulatory Commission can prohibit the method of assessment of electricity charges payable in case of theft of electricity pending adjudication by the appropriate court.

6. Even though it is stated in the counter affidavit that the authority to assess the value of theft of energy had been notified and published in the Government Gazette dated 13.6.2007 by inserting new Regulations 19A and 23 of the Principal Code with retrospective effect from 1.9.2004 and such notification has not been placed before this Court, it is not known as to how the final assessment order which is impugned in this writ proceedings can be passed by the second respondent u/s 135 of the Electricity Act, 2003 based on the provisional assessment dated 23.5.2006 issued by the third respondent in Vu.Se.Po/E&Pe/Ka.Vavi./Va.Aa/Ko.Min/Thiruttu/Aa. No. 180/2006, which was set aside by this Court by order dated 9.10.2006 and without giving any fresh notice to the petitioner.

7. In addition to that, as submitted by the learned Counsel for the petitioners, as per the powers of the Central Government to make Rules u/s 176 of the Electricity Act, 2003, such powers will enable the framing of any Rule by giving retrospective effect from 1.9.2004.

8. It is further relevant to note that by Act 26/07 by virtue of amendment to Section 154(5) of the Electricity Act, 2003, the word, "may" has been substituted by the word, "shall" by which it is made clear as follows:

154. Procedure and power of Special Court.-

(1) to (4) xxxxx

(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.

9. In such circumstances, when admittedly Section 135 relates to theft of electricity and Section 126 relates to unauthorised use of electricity, it is not acceptable that even before the criminal liability of theft is concluded as per Section 135 of the Act, any final assessment can be made without giving notice to the petitioners and giving opportunity to explain. In view of the same and on the ground that before making the provisional assessment into final order which is impugned in this writ petition, no show cause notice was issued to the petitioners, the impugned order is set aside. It is open to the respondents to give proper opportunity in accordance with the notification issued by the Government on 13.6.2007 and pass appropriate orders.

The writ petition is allowed with the above observations. No costs. Connected miscellaneous petition is closed.