**(2014) 02 AHC CK 0187**

**In the Allahabad High Court**

**Case No :** Civil Misc. Writ Petition No. 69101 of 2013

Sandeep Kesarwani APPELLANT

Vs

State of U.P. RESPONDENT

**Date of Decision :** 11-02-2014

**Acts Referred:**

Constitution of India, 1950 — Article 14, 226

Electricity Act, 2003 — Section 126, 126(1), 126(2), 126(3), 126(4)

**Citation :** (2014) 2 ADJ 442 : (2014) 3 AWC 2982

**Hon'ble Judges :** M.C. Tripathi, J;Ashok Bhushan, J

**Bench :** Division Bench

**Advocate :** Ved Prakash Mishra, Advocate for the Appellant; Mahboob Ahmad, Advocate for the Respondent

**Final Decision :** Disposed Off

## Judgement

Ashok Bhushan, J.—The petitioner, a consumer of electricity has filed this writ petition challenging the recovery proceedings initiated against him vide citation dated 19.11.2013, for recovery of electricity dues amounting to Rs. 8,49,173/- which electricity dues have been assessed by the respondent No. 4 on the basis of checking report dated 8.3.2011, of the petitioner''s premises.

Counter and rejoinder affidavits have been exchanged between the parties, and with the consent of the learned counsel for the parties, the writ petition is being finally decided.

Brief facts which emerge from pleadings of the parties are:

The petitioner had obtained an electric connection. On 8.3.2011, a checking was conducted at the petitioner''s premises and in the checking the petitioner was found indulging in theft of electricity through L.T. Lines without meter. The petitioner was found utilising electricity for commercial purpose. An F.I.R. was lodged against the petitioner on 8.3.2011, u/s 135 of the Electricity Act, 2003 (hereinafter called the "Act, 2003"). On the basis of the F.I.R. lodged, a chargesheet was submitted and Case Crime No. 53/2011, was registered against the petitioner which is pending trial in Case No. 42/2011 before the Special Judge, E.C. Act, Allahabad. A provisional assessment notice dated 23.5.2011, proposing an assessment of Rs. 8,49,173/- against the petitioner was sent to the petitioner by registered post. A final assessment order dated 21.6.2013, has been issued to the petitioner by the Executive Engineer observing that since the petitioner did not file any objection against the provisional assessment dated 23.5.2011, the assessment is being finalised. A citation dated 19.11.2013, has been issued against the petitioner for recovery as arrears of land revenue of the aforesaid amount, against which the writ petition has been filed by the petitioner.

2. We have heard Shri Ved Prakash Mishra, learned counsel for the petitioner, Shri Mahboob Ahmad, for the respondent No. 4 and the learned Standing Counsel for the respondent Nos. 1 to 3.

Shri Ved Prakash Mishra, learned counsel for the petitioner, in support of the writ petition raised following submissions:

(1) There being allegation of theft of electricity against the petitioner and an F.I.R. having been lodged u/s 135 of the Act, 2003, the respondent No. 4 had no jurisdiction to make any assessment u/s 126 of the Act, 2003. When allegations of theft of electricity have been made against the petitioner u/s 135 of the Act, 2003, the civil liability is to be determined only by the Special Court as required u/s 154 of the Act, 2003. In the cases covered by Section 135 of the Act, 2003, provisional assessment and final assessment u/s 126 of the Act, 2003 is not contemplated, hence the entire recovery proceedings are without jurisdiction.

(2) The provisions of Section 126 of the Act, 2003 are not applicable in the cases of theft of electricity u/s 135 of the Act, 2003, more so, when the F.I.R. has been lodged and trial is pending before the Special Court. The respondents can realize any electricity charges only after civil liability of the petitioner is determined by the Special Court in the trial pending before the Special Court.

(3) The recovery proceedings against the petitioner is barred by Section 56(2) of the Act, 2003.

(4) No notice of provisional assessment or the order of final assessment has been served on the petitioner. The provisional assessment notice having been issued on 23.5.2011, there was no occasion for passing a final assessment order on 21.6.2013 i.e. after two years, whereas u/s 126 of the Act, 2003, the final assessment was to be made within one month.

3. Shri Mahboob Ahmad, learned counsel appearing for the respondent No. 4 refuting the submissions of the learned counsel for the petitioner submits that the assessment u/s 126 of the Act, 2003 has to be made in all the cases where unauthorised use of electricity is found. He submits that in the cases of theft of electricity as provided u/s 135 of the Act, 2003, assessment u/s 126 of the Act, 2003 has also to be made. Assessment u/s 126 of the Act, 2003 is made in all

 

the cases including the cases of theft of electricity u/s 135 of the Act, 2003. The Special Court trying an offence u/s 135 of the Act, 2003 is to determine the criminal and civil liability which in no manner precludes the assessment u/s 126 of the Act, 2003. Section 56(2) of the Act, 2003 is not attracted in the present case since the amount becomes due only after final assessment which having been made on 21.6.2013, there is no occasion for any bar of time. He further submits that the provisional assessment notice dated 23.5.2011 as well as the final assessment order dated 21.6.2013, were sent by registered post to the petitioner, and it cannot be said that the assessment was made without giving any notice to the petitioner. He submits that the recovery against the petitioner as arrears of land revenue has rightly been issued on the basis of final assessment dated 21.6.2013, and theft of electricity having been made out against the petitioner the assessment has rightly been made and the petitioner is not entitled to any relief in the writ petition. He lastly contended that against the final assessment order dated 21.6.2013, the petitioner has a remedy of filing an appeal u/s 127 of the Act, 2003, hence the writ petition be not entertained.

4. Learned counsel for the petitioner has placed reliance on the judgment of the Andhra Pradesh High Court in Sri Tirumala Modern Rice Mill Vs. Transmission Corporation of A.P. Ltd. (APTRANSCO) and Others, and the judgment of the Apex Court in The Executive Engineer and Another Vs. Sri Seetaram Rice Mill,

Shri Mahboob Ahmad, learned counsel appearing for the respondent No. 4 has also placed reliance on a Division Bench judgment of this Court in Paliwal Alloys (Pvt.) Limited Vs. U.P. Power Corporation Ltd. and Others, Kunwar Sarvesh Kumar Singh Vs. Paschimanchal Vidyut Vitran Nigam Ltd. and Others, and Mohit Paper Mills Ltd. and Another Vs. PVVNL and Others

5. We have considered the submissions of the learned counsel for the parties and have perused the record.

From the submissions made by the learned counsel for the parties and pleadings on the record, following are the issues which arises for consideration in this writ petition.

(1) Whether in the cases where theft of electricity is alleged u/s 135 of the Act, 2003, and trial for an offence u/s 135 of the Act, 2003 is pending before the Special Court, an assessment u/s 126 of the Act, 2003 can be made by the Executive Engineer.

(2) Whether assessment u/s 126 of the Act, 2003 is not applicable with regard to the cases of theft of electricity u/s 135 of the Act, 2003, and with regard to cases of theft of electricity u/s 135 of the Act, 2003, the civil liability is to be determined only by the Special Court where the trial is pending.

(3) Whether the recovery against the petitioner issued vide citation dated 19.11.2013 is barred by Section 56(2) of the Act, 2003.

(4) Whether the final assessment dated 21.6.2013, has been made in

 

consonance with the principles of natural justice.

6. The first two issues being inter-related are being taken up together.

Before we consider the rival submissions made by the learned counsel for the parties in respect of the above two issues, it is necessary to refer to the statutory provisions in that regard.

The Electricity Act, 2003 has been enacted to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and for matters connected therewith or incidental thereto.

Part XII of the Act, 2003 bears the heading "Investigation and Enforcement". Section 126 of the Act, 2003 which provides for assessment is as follows:

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 unauthorized 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.

[(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 order 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 days of service of such provisional assessment order upon him:

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[(5) If the assessing officer reaches to the conclusion that unauthorised use of electricity has taken place, the assessment shall be made for the entire period during which such unauthorized 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 [twice] the tariff rates applicable for the relevant category of services specified in sub-section (5).

 

Explanation.--For the purposes of this section,-

(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 tampered meter; or

4[(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 authorized.]

The definition of "unauthorised use of electricity" is given in explanation "b" of Section 126.

Part XIV of the Act, 2003 deals with "Offences and Penalties" Section 135 which is relevant in the present case is as follows:

135. Theft of Electricity.--1[(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 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; 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:

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;

(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 authorized 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.

(1A) Without prejudice to the provisions of this Act, the licensee or supplier, as the case may be, may, upon detection of such theft of electricity, immediately disconnect the supply of electricity:

Provided that only such officer of the licensee or supplier, as authorized for the purpose by the Appropriate Commission or any other officer of the licensee or supplier, as the case may be, of the rank higher than the rank so authorised shall disconnect the supply line of electricity:

Provided further that such officer of the licensee or supplier, as the case may be, shall lodge a complaint in writing relating to the commission of such offence in police station having jurisdiction within twenty four hours from the time of such disconnection:

Provided also that the licensee or supplier, as the case may be, on deposit or payment of the assessed amount or electricity charges in accordance with the provisions of this Act, shall, without prejudice to the obligation to lodge the complaint as referred to in the second proviso to this clause, restore the supply line of electricity within forty-eight hours of such deposit or payment.]

(2) 1[Any officer of the licensee or supplier as the case may be, authorized] 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 2[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, or is being, used for unauthorized 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.

(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."

Part XV of the Act, 2003 relates to Special Courts.

Section 153 of the Act, 2003 provides the State Government may, for the purposes of providing speedy trial of offences referred to in Sections 135 to 140 and Section 150 by notification in the Official Gazette, constitute as many Special Courts as may be necessary.

Section 154 of the Act, 2003 deals with Procedure and power of Special Court. Sections 154(1), 154(5) and 154(6) of the Act, 2003 which are relevant for the present case are as follows:

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)........

(3)........

(4).......

(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.

7. Learned counsel for the petitioner elaborating his submission contended that since it is the Special Court which is to determine the civil liability against the consumer as provided in Section 154(5) of the Act, 2003, the assessment u/s 126 cannot be made. He submits that Section 126 of the Act, 2003 shall not apply in the cases where there is allegation of theft of electricity. Submission of the learned counsel for the petitioner is that had it been contemplated that assessment be made u/s 126 of the Act, 2003 in the cases for theft of electricity also there was no occasion for empowering the special Court to determine the civil liability. He submits that in the present case since F.I.R. u/s 135 of the Act, 2003 has already been registered and an allegation of theft of electricity has been made against the petitioner which is apparent from the checking report filed alongwith counter affidavit, there was no jurisdiction in the Executive Engineer to make assessment u/s 126 of the Act, 2003.

8. Learned counsel for the petitioner referring to Uttar Pradesh Electricity Supply Code, 2005 (hereinafter called the "Code, 2005") submitted that under para 8.0(6) in the cases of theft of electricity the consumer at his option, can approach M.D. of the discom for restoration of supply, on interim payment of the assessed amount, calculated at 1.0 times of existing tariff, less payment already made by the consumer for the period of assessment subject to final decision by Special Courts. He submits that sixth proviso to Section 135(1) of the Act, 2003 relates to payment of the said amount as referred to in para 8.0(6) of the Code, 2005, thus for restoration of supply on interim payment of the assessed amount the procedure is already provided in para 8.0(6) of the Code, 2005 which clearly indicates that no assessment is to be made u/s 126 of the Act, 2003. He submits that there cannot be presumption to any duplicacy in assessment in so far as theft of electricity cases are concerned. Legislature could not have contemplated determination of civil liability by the special Court on the one hand and on the other hand giving power to the Executive Engineer to make assessment u/s 126 of the Act, 2003. He submits that the assessment made u/s 126 of the Act, 2003 on 21.6.2013 being without jurisdiction, consequential recovery proceedings has also to go. He further submits that the assessment being not contemplated u/s 126 of the Act, 2003, regarding theft of electricity, there was no occasion for the petitioner to avail the remedy of appeal u/s 127 of the Act, 2003. He submits that the remedy of appeal cannot be resorted to in the present case and the writ petition be entertained on merits rejecting the objection raised by the learned counsel appearing for the respondent No. 4.

 

Section 126 of the Act, 2003 is in Part XII "Investigation and Enforcement" whereas Section 135 is in Part XIV "Offences and penalties". An offence for finding out whether a consumer or a person has committed offence, investigation has to be undertaken earlier. Section 126(1) uses the words "if on an inspection of any place or premises or after inspection or 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."

Unauthorised use of electricity" has been defined in explanation (b) of Section 126 of the Act, 2003. Section 135(1) of the Act, 2003 begins with the words "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 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; 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

9. All instances detailed in Section 135(1) of the Act, 2003 are instances of "unauthorised use of electricity" as defined in explanation (b) of Section 126 of the Act, 2003. The unauthorised use of electricity is genus of which the instances detailed in Section 135(1) of the Act, 2003 are species. Theft of electricity is unauthorised use of electricity done "dishonestly" hence the assessment u/s 126 of the Act, 2003 has to follow whenever unauthorised use of electricity is made by a person or a consumer. The said unauthorised use of electricity becomes theft when coupled with dishonest intention which invites imprisonment. Section 126 of the Act, 2003 does not indicate that assessment shall not be made if the unauthorised use of electricity becomes a theft, Section 135 of the Act, 2003 also does not give any indication that assessment u/s 126 of the Act, 2003 is not to be undertaken, if there is a theft of electricity. The sixth proviso to Section 135(1) provides as follows:

Provided also that the licensee or supplier, as the case may be, on deposit or payment of the assessed amount or electricity charges in accordance with the provisions of this Act, shall, without prejudice to the obligation to lodge the complaint as referred to in the second proviso to this clause, restore the supply line of electricity within forty-eight hours of such deposit or payment.

Sixth proviso to Section 135(1) of the Act, 2003, uses the words "assessed amount" which is nothing but an assessed amount as contemplated by Section 126 of the Act, 2003.

10. Learned counsel for the petitioner to support his submissions has referred to sub-sections (5) and (6) of Section 154 of the Act, 2003. He submits that the said provision empowers the Civil Court to determine the civil liability against a consumer or a person, hence it is only the special Court which has jurisdiction to determine the civil liability, hence in theft cases the assessment u/s 126 of the Act, is not contemplated, since for determining the civil liability, two forums shall not be created. For ready reference sub-sections (5) and (6) of Section 154 of the Act, 2003 is again reproduced below:

154.(1)......

(2)........

(3)........

(4).......

(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."

Civil liability is defined in the explanation to Section 154 of the Act, 2003 which is to the following effect:

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.

Sub-section (6) of Section 154 of the Act, 2003 provides that 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.

Sub-section (6) of Section 154 of the Act, 2003 uses the word "deposited" by the consumer or the person. The word "deposited" by the consumer or the person used in sub-section (6) of Section 154 of the Act, 2003 is nothing but an amount deposited by the consumer in accordance with Section 126 of the Act, 2003, since there is no other provision in the Act, 2003 for deposit of the amount by a consumer or the person relating to theft of electricity. Thus, the submission of the learned counsel for the petitioner that Section 154 of the Act, 2003 indicates that it is only the Special Court which shall determine the civil liability in terms of money for theft of electricity cannot be accepted.

11. Learned counsel for the petitioner in this context has heavily relied on Clause 8.0(6) of the Code, 2005 which is to the following effect:

8.0(1)..............

(2)....................

(3)....................

(4)....................

(5)...................

(6) It is also provided that in the matter related to theft, the consumer at his option, can approach M.D. of the discom for restoration of supply, on interim payment of the assessed amount calculated at 1.0 times of existing tariff, less payment already made by the consumer for the period of assessment subject to final decision by Special Courts. The reconnection in such case shall be not later than seven days after the consumer has made payment.

It is relevant to note that sub-clause (6) of the Code, 2005 has been omitted by notification dated 27.3.2008, published in the U.P. Gazette, Part 1 (Ka) dated 14.6.2008. Thus, sub-clause (6) of the Code, 2005 has no relevance. Even though, sub-clause (6) of the Code, 2005 was in existence, which contemplated a situation that in the matter relating to theft, the consumer at his option, can approach M.D. of the discom for restoration of supply, on interim payment of the assessed amount. The said provision was an option to a consumer against whom a theft is alleged to get restoration of supply. The said provision in no manner indicates that in case of theft of energy, assessment is not to be made u/s 126 of the Act, 2003.

U.P. Electricity Supply Code, 2005 has been framed in exercise of powers conferred u/s 50 of the Act, 2003. The provisions of the Code, 2005 can be utilised to know as to how the provisions of Sections 126 and 135 of the Act, 2003 has been understood by Uttar Pradesh State Electricity Regulatory Commission which has framed the Code, 2005.

Chapter 8 of the Code, 2005 contains the heading "Tampering, Distress or Damage to Electrical Plant, Meters Etc.

Clause 8.1(a) of the Code, 2005 contains the heading "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."

Clause 8.1(b) of the Code, 2005 which is relevant in the present case is quoted below:

(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.

(ii) No theft case shall be booked for mere breakage of window glass or old seal of the energy meter. In such cases, if the average monthly consumption pattern for last one year is reasonably uniform as the assessed consumption (monthly), and there is no other prima facie evidence of theft/UUE found at the consumer premises, no further proceedings shall be taken for theft/UUE of electricity and the decision shall be communicated to the consumer under proper receipt within 7 working days of the date of inspection, and connection shall be restored through original meter after proper checking/resealing. The contents of such report recommending for dropping the case shall be communicated to the Special Court with a copy to the police station where the FIR was lodged.

(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 alongwith 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 [2 (two) 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 cl. 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 instalments 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/instalments should be clearly stated in the speaking order.

Code, 2005 thus clearly provides that even in the cases of theft of electricity u/s 135, of the Act, 2003, the Authorised Officer has to serve a provisional assessment bill and thereafter finalise the assessment. Thus, the provision of the Code, 2005, clearly indicates that for a theft of electricity u/s 135 of the Act, 2003 assessment has to be made u/s 126 of the Act, 2003.

12. Learned counsel for the petitioner in support of his submission has placed reliance on the judgment of the Andhra Pradesh High Court in Tirumala Modern Rice Mill (supra). In the said case, the Andhra Pradesh High Court considered both the expression i.e. "unauthorised use of electricity" and "theft of electricity". The Andhra Pradesh High Court held that a careful reading of Section 135 and explanation to Section 126 would show that some of the unauthorised uses of electricity also amount to theft and in a given case theft itself amounts to unauthorised electricity. It is useful to quote paragraph 29 of the said judgment which is quoted below:

29. ''Unauthorised use of electricity'' means usage of electricity (i) by any artificial means; or (ii) by a means not authorized by the concerned person or authority or licencee; or (iii) through a tampered meter; or (iv) for the purpose other than for which the usage of electricity was authorized (see Explanation to Section 126 of the Electricity Act.) Theft of electricity is defined in Section 135. A reading of the same would show that theft, inter alia, is dishonest tapping of electricity from overhead or underground cables or facilities of Distribution or transformation licensee, tampering the meters and damaging and destroying electrical meters (see Section 135 of the Electricity Act). A careful reading of Section 135 and Explanation to Section 126 would show that some of the unauthorized uses of electricity also amount to theft and in a given case, theft itself amounts to unauthorized electricity. When once a provisional assessment is made, an inference can be drawn that it is falling within the scope of ''unauthorised use of electricity and not a theft''. If the Assessing Officer resorts to serving a provisional assessment order, the same would be referable to Section 126(2) of the Electricity Act. Parts XIV and XV of the Electricity Act do not contemplate the provisional assessment of the energy pilfered in the case of theft. Here, one may notice that condition 10.2 of GTCS refers to provisional assessment of energy consumed by theft but the same is conspicuous by its absence in the provisions of the Electricity Act.

From this, what would emerge is that when a provisional assessment order is made and the consumer accepts and deposits the amount without demur, consumer cannot be subjected to any further liability and no further action can be taken against him. In case of theft, however, in the event of provisional assessment order not being served as required u/s 126(2), only remedy available for the Inspecting/assessing officer would be to refer the cases to Special Court for the purpose of determining civil and criminal liability. In such a case, it may be reiterated that the question of serving a provisional assessment order does not arise and there would not be any opportunity for the consumer to pay the provisionally assessed amount.

13. Before the Andhra Pradesh High Court, the question which came up for consideration has been noticed in paragraph 8 which is to the following effect:

8. The background facts and the rival submissions throw up two questions for consideration.

1. Whether Assessing Officer is bound to value the electricity unauthorisedly used presuming such use only for a period of 3/6 months? What is the true interpretation of Section 126(5) of the Electricity Act? 2. When the consumer deposits the assessed amount, can he be subjected to further liability? What is the true interpretation of the proviso to Section 126(4) of the Electricity Act?

The Andhra Pradesh High Court, in the said case does not lay down any proposition that in case of theft of electricity within the meaning of Section 135 of the Act, 2003, no assessment can be made u/s 126 of the Act, 2003. The said authority cannot be read in a manner as suggested by the learned counsel for the petitioner.

14. A Division Bench of this Court in which one of us (Ashok Bhushan, J.) was also a member had occasion to consider both the provisions i.e. Sections 126 and 135 of the Act, 2003 in M/s. Paliwal Alloys Pvt. Ltd. (supra). The Division Bench in the said case has laid down that theft of electricity u/s 135 of the Act, 2003 is also an unauthorised use of electricity for which assessment is contemplated u/s 126 of the Act, 2003. It is useful to quote paragraphs 24, 25, 26, 27 and 28 of the said judgment which are quoted below:

24. Section 126 provides that if on an inspection of any place it is found that such person is indulging in unauthorised use of electricity he shall be provisionally assessed. The words used in Section 126 are "unauthorised use of electricity''. Unauthorised use of electricity has been defined in Explanation (b), as quoted above. The definition of unauthorised use of electricity as given in Explanation (b) is wide enough which covers the usage of electricity by any artificial means or by a means not authorised by the concerned person or authority or licensee or through a tampered meter. The said definition of unauthorised use of electricity as explained in Explanation (b) is comprehensive enough to cover in itself the theft of electricity. The theft of electricity has been more elaborately explained in Section 135 but the theft of electricity as defined in Section 135 is fully covered by the definition "unauthorised use of electricity'' and the theft of electricity u/s 135 is also an unauthorised use of electricity for

 

which assessment is contemplated u/s 126. The provisions of Section 135 is under the Chapter "Offences and Penalties'', which deals a different subject than the assessment. A person found indulging in theft is also liable for offences and penalties and can be prosecuted and convicted according to the Act. The scheme of the 2003 Act does not exclude the assessment u/s 126 in theft cases. Our above conclusion is further fortified by Section 135(1A) third proviso, which provides that the licensee or supplier, as the case may be, on deposit or payment of the assessed amount or electricity charges in accordance with the provisions of the Act, shall without prejudice to the obligation to lodge the complaint as referred to in the second proviso to this clause, restore the supply. Thus assessment of electricity charges due to theft of electricity is contemplated u/s 135 itself, which further provides that after deposit of the assessed amount electricity is required to be restored. In case in theft no assessment is to be made u/s 126. Section 135(1A) third proviso would not have been as contained in the Act. The scheme of the 2003 Act thus clearly delineates the object that Legislature contemplated assessment u/s 126 with regard to all categories of unauthorised use of electricity including theft of electricity and the submission of learned counsel for the Corporation that assessment of theft cases is not done u/s 126 hence the appeal cannot be filed u/s 127 does not appeal to us.

25. Learned counsel for the Corporation submits that separate procedure has been provided with regard to assessment in theft cases under Paragraph 8.1 of the 2005 Code but no appeal has been provided to the appellate authority under Paragraph 8.1. The provisions regarding right of appeal is a substantive provision, which has been provided in the Act itself. The right of the appeal given in the Act cannot be taken away by any provision framed in the U.P. Electricity Supply Code, 2005. Moreso, there is no provision in the Code which indicates that there is no right of appeal for the theft assessment made under Paragraph 8.1. There are two decisions of the Division Bench of this Court, first in Writ Petition No. 19574 of 2008 (M/s. Radha Krishna Cold Storage v. State of U.P. and others) where also the submission made before us was raised. Following observations were made by the Division Bench in the said case:

In reply to the aforesaid, learned counsel for the petitioner submitted firstly, that an appeal does not lie against the order in question as the appeal lies only against the order u/s 126 of the Act and not u/s 135 of the Act. It settled principle that the order under challenge in the writ petition is the assessment order, which can be passed only u/s 126 of the Act and mere non mention of the relevant provisions or incorrect mention of the provisions will not vitiate the order. This is the settled legal proposition therefore this contention raised by learned counsel for the petitioner that since the order has been passed u/s 135 of the Act, therefore the remedy u/s 127 of the Act is not available to him deserves to be rejected and is hereby rejected.

26. The second Division Bench judgment is in the case of Ashok Kumar and others v. State of U.P. and others, 2008(6) ADJ 669. In the said judgment the

 

Division Bench of this Court has held that unauthorised use of electricity as defined in Explanation (b) of Section 126 also covers within its ambit certain acts/ omission which constitute an offence u/s 135 of the Act, 2003. Paragraph 58 of the said judgment is quoted below:

58. The term "unauthorized use of electricity" is defined in explanation (b) to Section 126 which includes usage of electricity (i) by any artificial means; or (b) by a means not authorised by the concerned person or authority or licensee; or (iii) through a tampered meter; or (iv) for the purpose other than for which the usage of electricity was authorised. Before issuing an assessment notice, therefore, the assessing officer must record its conclusion that the person concerned or any other person benefited has used electricity unauthorizedly in terms as defined in Explanation (b) of Section 126. The Act in respect to the stage of recording of conclusion by assessing officer regarding user of electricity by the person unauthorizedly does not provide specifically for any opportunity of hearing to the person concerned but also simultaneously does not prohibit the same. The allegation of unauthorised use of electricity by a person concerned, as defined in Explanation (b) also covers within its ambit certain acts/omission which constitute an offence u/s 135 of the Act, 2003. Therefore, it is a serious matter and no person can be indicted and held guilty of user of electricity unauthorizedly unless he is given an opportunity of hearing before coming to such conclusion.

27. Learned counsel for the petitioner has also relied on a judgment of the Apex Court in the case of The Chairman, West Bengal State Electricity Board and Others Vs. Syed Mukbul Hossain and Others, , where in a case of theft of electricity the Apex Court noticed the right of appeal u/s 127 of the Electricity Act, 2003.

28. In aforesaid view of the matter, we are of the considered opinion that assessment u/s 126 is also to be made in theft cases and a person has right of appeal. In the present case it is on the record that assessment was made by the Executive Engineer on the basis of checking dated 14th June, 2006 and assessment bill was given on 13th July, 2006 (Annexure-1 to the writ petition). The assessment made by Executive Engineer was u/s 126 and the petitioner has right of appeal, which appeal has already been filed and is pending. Learned counsel for the Corporation has further submitted that against the order of this Court dated 3rd August, 2008 by which this Court directed that on payment of Rs. 10,00,000/- further recovery shall not been made till the decision of appeal, has been challenged by the Corporation in the Apex Court. It is true that special leave to appeal (civil) has been filed against the Division Bench order of this Court but it is not the case of the Corporation that the Apex Court has stayed that order till date. Thus the order dated 3rd August, 2006 passed by this Court permitting the petitioner to file appeal and subject to deposit of Rs. 10,00,000/- the realisation was stayed still enures to the benefit of the petitioner and till such date the Apex Court passes an order either staying the order of this Court, it was

 

not open for the Corporation to recover the amount of theft assessment in view of the fact that the petitioner had complied with the order of this Court dated 3rd August, 2006 by depositing the amount of Rs. 10,00,000/-.

15. The Division Bench in the said case has also laid down that for theft of electricity u/s 135 of the Act, 2003, assessment is to take place u/s 126 of the Act, 2003. The issue being covered by the Division Bench of this Court, the judgment of the Andhra Pradesh High Court in Tirumala Modern Rice Mill (supra) does not lend any support to the submission of the learned counsel for the petitioner.

Learned counsel for the petitioner has also placed reliance on the judgment of the Apex Court in Executive Engineer, Southern Electricity Supply Company of Orissa Limited (Southco) and another (supra).

16. In the said case, the Apex Court had occasion to consider the distinction between "unauthorised use of electricity" as used in Section 126 of the Act, 2003 and "theft of electricity" as provided in Section 135 of the Act, 2003. In the said case, the respondents had obtained electricity supply under an agreement on 9.12.1997. The premises was inspected on 10.6.2009. On 25.7.2009 a provisional assessment order was issued raising a demand. The respondent was required to file abjections. The respondent did not file any objections but filed Writ Petition No. 12175 of 2009 challenging the provisional assessment order before the High Court. The respondent contended that the provisions of Section 126 of the Act, 2003 were not attracted in the above case. The High Court held that overdrawal of (Maximum Demand) would not fall under the scope of "unauthorised use of electricity" and the appellants had no jurisdiction to issue provisional assessment order. Against the order of the High Court, the appellants had filed appeal. The issues which fell for consideration were noticed by the Apex Court in para 12 of the judgment which is to the following effect:

Questions for Determination:

12.1. Wherever the consumer consumes electricity in excess of the maximum of the contracted load, would the provisions of Section 126 of the 2003 Act be attracted on its true scope and interpretation?

2. Whether the High Court, in the facts and circumstances of the case, was justified in interfering with the provisional order of assessment/show-cause notice dated 25.7.2009, in exercise of its jurisdiction under Article 226 of the Constitution of India?

3. Was the writ petition before the High Court under Article 226 of the Constitution of India not maintainable because of a statutory alternative remedy being available u/s 127 of the 2003 Act?

17. In the above context, the Apex Court considered the provisions of Sections 126 and 135 of the Act, 2003. The Apex Court held that the provisions of Sections 126 and 135 of the Act, 2003 work in different fields. Following was laid

 

down in paragraphs 24, 25, 26, 27, 28, 29 and 30 pointing out the distinction between the "unauthorised use of electricity" and "theft of electricity" which are quoted below:

24. Upon their plain reading, the marked differences in the contents of Sections 126 and 135 of the 2003 Act are obvious. They are distinct and different provisions which operate in different fields and have no common premise in law. We have already noticed that Sections 126 and 127 of the 2003 Act read together constitute a complete code in themselves covering all relevant considerations for passing of an order of assessment in cases which do not fall u/s 135 of the 2003 Act.

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 (1A) 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 of rank authorized in this behalf by the appropriate commission, may immediately disconnect the supply of electricity and even take other measures enumerated under sub-sections (2) to (4) of the said Section. The fine which may be imposed u/s 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 "unauthorized 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 "authorized use of electricity". Then the assessing officer shall provisionally assess, to the best of his judgment, 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.

27. The officer is also under obligation to serve a notice in terms of Section 126(3) of the 2003 Act upon any such consumer requiring him to file his objections, if any, against the provisional assessment before a final order of assessment is passed within thirty days from the date of service of such order of provisional assessment.

Thereafter, any person served with the order of provisional assessment may accept such assessment and deposit the amount with the licensee within seven days of service of such provisional assessment order upon him or prefer an appeal against the resultant final order u/s 127 of the 2003 Act. The order of assessment u/s 126 and the period for which such order would be passed has to be in terms of sub-sections (5) and (6) of Section 126 of the 2003 Act. The Explanation to Section 126 is of some significance, which we shall deal with shortly hereinafter. Section 126 of the 2003 Act falls under Part XII and relates to investigation and enforcement and empowers the assessing officer to pass an order of assessment.

28. Section 135 of the 2003 Act deals with an offence of theft of electricity and the penalty that can be imposed for such theft. This squarely falls within the dimensions of Criminal Jurisprudence and mens rea is one of the relevant factors for finding a case of theft. On the contrary, Section 126 of the 2003 Act does not speak of any criminal intendment and is primarily an action and remedy available under the civil law. It does not have features or elements which are traceable to the criminal concept of mens rea.

29. Thus, it would be clear that the expression "unauthorized use of electricity" u/s 126 of the 2003 Act deals with cases of unauthorized use, even in absence of intention. These cases would certainly be different from cases where there is dishonest abstraction of electricity by any of the methods enlisted u/s 135 of the 2003 Act. A clear example would be, where a consumer has used excessive load as against the installed load simpliciter and there is violation of the terms and conditions of supply, then, the case would fall u/s 126 of the 2003 Act. On the other hand, where a consumer, by any of the means and methods as specified under Sections 135(a) to 135(e) of the 2003 Act, has abstracted energy with dishonest intention and without authorization, like providing for a direct connection by passing the installed meter, the cases would fall u/s 135 of the Act.

30. Therefore, there is a clear distinction between the cases that would fall u/s 126 of the 2003 Act on the one hand and Section 135 of the 2003 Act on the other. There is no commonality between them in law. They operate in different and distinct fields. The assessing officer has been vested with the powers to pass provisional and final order of assessment in cases of unauthorized use of electricity and cases of consumption of electricity beyond contracted load will squarely fall under such power. The legislative intention is to cover the cases of malpractices and unauthorized use of electricity and then theft which is governed by the provisions of Section 135 of the 2003 Act.

In paragraph 49 of the said judgment the Apex Court further held that the provisions of Section 126 of the Act, 2003 are intended to cover the cases over and above the cases which would be specifically covered under the provisions of Section 135 of the Act, 2003. Paragraph 49 of the said judgment is quoted below:

49. Once the Court decides that it has to take a purposive construction as opposed to textual construction, then the legislative purpose sought to be achieved by such an interpretation has to be kept in mind. We have already

 

indicated that keeping in view the legislative scheme and the provisions of the 2003 Act, it will be appropriate to adopt the approach of purposive construction on the facts of this case. We have also indicated above that the provisions of Section 126 of the 2003 Act are intended to cover the cases over and above the cases which would be specifically covered under the provisions of Section 135 of the 2003 Act.

18. The Apex Court itself observed in the said judgment that expression to explanation u/s 126 of the Act, 2003 is to be given wider and amplified meaning. Conclusions have been recorded in paragraph 87 of the said judgment which is quoted below:

87. Having dealt with and answered determinatively the questions framed in the judgment, we consider it necessary to precisely record the conclusions of our judgment which are as follows:

1. Wherever the consumer commits the breach of the terms of the Agreement, Regulations and the provisions of the Act by consuming electricity in excess of the sanctioned and connected load, such consumer would be "in blame and under liability" within the ambit and scope of Section 126 of the 2003 Act.

2. The expression "unauthorized use of electricity means" as appearing in Section 126 of the 2003 Act is an expression of wider connotation and has to be construed purposively in contrast to contextual interpretation while keeping in mind the object and purpose of the Act. The cases of excess load consumption than the connected load inter alia would fall under Explanation (b)(iv) to Section 126 of the 2003 Act, besides it being in violation of Regulations 82 and 106 of the Regulations and terms of the Agreement.

3. In view of the language of Section 127 of the 2003 Act, only a final order of assessment passed u/s 126(3) is an order appealable u/s 127 and a notice-cum-provisional assessment made u/s 126(2) is not appealable.

4. Thus, the High Court should normally decline to interfere in a final order of assessment passed by the assessing officer in terms of Section 126(3) of the 2003 Act in exercise of its jurisdiction under Article 226 of the Constitution of India.

5. The High Court did not commit any error of jurisdiction in entertaining the writ petition against the order raising a jurisdictional challenge to the notice/ provisional assessment order dated 25.7.2009. However, the High Court transgressed its jurisdictional limitations while travelling into the exclusive domain of the assessing officer relating to passing of an order of assessment and determining the factual controversy of the case.

6. The High Court having dealt with the jurisdictional issue, the appropriate course of action would have been to remand the matter to the assessing authority by directing the consumer to file his objections, if any, as contemplated u/s 126(3) and require the authority to pass a final order of assessment as

 

contemplated u/s 126(5) of the 2003 Act in accordance with law.

19. From the issues which fell for consideration as the Apex Court has noted in paragraph 12 and the conclusions recorded in paragraph 87 does not indicate that the Apex Court considered the issues that assessment is not to be made u/s 126 of the Act, 2003 in the cases falling u/s 135 of the Act, 2003 nor any such ratio has been laid down by the Apex Court in the aforesaid judgment.

20. From the facts of the case as noted above, the writ petition was filed in the High Court challenging the provisional assessment notice. The main issue for consideration before the High Court was that wherever the consumer consumes electricity in excess of the consumption of the contracted load, would the provisions of Section 126 of the 2003 Act be attracted. Certain observations made by the Apex Court as noted above were to the effect of highlighting distinctions between the cases of "unauthorised use of electricity" u/s 126 of the Act, 2003 and "theft of electricity" u/s 135 of the Act, 2003.

In the said judgment of the Apex Court, no such ratio has been laid down which may support the petitioner''s case that in the cases of theft of electricity u/s 135 of the Act, 2003, no assessment can be undertaken u/s 126 of the Act, 2003.

Provisions of Sections 126 and 135 of the Act, 2003 has to be interpreted in a manner so as to give effect to the object and purpose of the Act, 2003. Interpretation of both the provisions is to be made in a harmonious manner to advance the object and to make both the provisions workable and effective.

21. A Constitution Bench in Tinsukhia Electric Supply Co. Ltd. Vs. State of Assam and others, has laid down that the provision of a statute must be so construed as to make it effective and operative. Paragraphs 118 and 120 of the said judgment are quoted below:

118. The Courts strongly lean against any construction which tends to reduce a statute to a futility. The provision of a statute must be so construed as to make it effective and operative, on the principle "ut res majis valeat quam periat". It is, no doubt, true that if a statute is absolutely vague and its language wholly intractable and absolutely meaningless, the statute could be declared void for vagueness. This is not in judicial review by testing the law for arbitrariness or unreasonableness under Article 14; but what a Court of construction, dealing with the language of a statute, does in order to ascertain from, and accord to, the statute the meaning and purpose which the legislature intended for it. In Manchester Ship Canal Co. v. Manchester Racecourse Co., (1904) 2 Ch 352, Farwell J. said:

Unless the words were so absolutely senseless that I could do nothing at all with them, I should be bound to find some meaning and not to declare them void for uncertainty.

120. It is, therefore, the Court''s duty to make what it can of the statute, knowing that the statutes are meant to be operative and not inept and the

 

nothing short of impossibility should allow a Court to declare a statute unworkable. In Whitney v. IRC, (1926) AC 37, Lord Dunedin said:

A statute is designed to be workable, and the interpretation thereof by a Court should be to secure that object, unless crucial omission or clear direction makes that end unattainable.

22. In Kunwar Sarvesh Kumar Singh''s case (supra), learned Single Judge held that in the case of theft assessment procedure as laid down in para 8.1 of the Code, 2005 shall be applicable.

23. In M/s. Mohit Paper Mills Ltd. and another (supra), learned Single Judge of this Court has also held that whenever electricity is used through a "tampered meter" it would constitute "unauthorised use of electricity" for which assessment can be made u/s 126 and simultaneously criminal proceedings can also be initiated, it being an offence u/s 135(1)(d) of the Act, 2003. Paragraphs 60, 61, 62 and 63 which are relevant are quoted below:

60. Though the provision relating to assessment i.e. Section 126 figures in Part XII and Section 135 figures in Part XIV but to some extent there is an overlapping. Section 126 talks of assessment when the competent authority is satisfied that a person is indulging in "unauthorized use of electricity". This term has been defined in Explanation (b). The Court finds that some of the aspects included within the term "unauthorized use of electricity" also constitute ''theft'' u/s 135, e.g., usage of electricity through a tampered meter constitutes "unauthorized use of electricity" as also the "theft".

61. Clause (V) Explanation (b) did not exist before 15.6.2007 in Section 126 but inserted vide amendment of 2007. Section 135(1)(e) also covers use of electricity for a purpose other than authorized constituting "theft of electricity". This clause has also been inserted with effect from 15.6.2007. Both these provisions i.e. Sections 126 and 135 inserted in 2007 cover an identical situation.

62. Therefore, whenever electricity is used through a "tampered meter" it would constitute "unauthorized use of electricity" for which assessment can be made u/s 126 and simultaneously criminal proceedings can also be initiated, it being an offence u/s 135(1)(d) of Act 2003.

63. Similarly usage of electricity for purposes other than for which the usage of electricity was authorized, constitutes "unauthorized use of electricity" vide Explanation (b)(v) to Section 126 and simultaneously the same also constitutes ''theft of electricity'' u/s 135(1)(e) clauses (i) and (ii).

24. In view of the foregoing discussions, we are of the view that the submission of the learned counsel for the petitioner that since F.I.R. has'' been lodged u/s 135 of the Act, 2003 against the petitioner and the case is proceeding for trial before the Special Court, no assessment proceedings could have been undertaken u/s 126 of the Act, 2003 cannot be accepted and both the above issues are answered as follows:

 

(1) Assessment u/s 126 of the Act, 2003 is to be made even in a case where an offence u/s 135 has been made and is pending for trial before the Special Court.

(2) In the case involving theft of electricity, assessment has to be made u/s 126 of the Act, 2003 by the Authorised Officer. The Special Court trying an offence is to finally determine the civil liability and after determination of civil liability further action is to be taken in accordance with Section 154(6) of the Act, 2003.

25. Now we come to the issue No. 3, the submission of the learned counsel for the petitioner is that the recovery against the petitioner vide citation dated 19.11.2013 is barred by Section 56(2) of the Act, 2003. Section 56(2) of the Act, 2003 provides as follows:

56(2). No sum due from any consumer, under this section shall be recoverable after the period of two years from the date when such sum became first due unless such sum has been shown continuously as recoverable as arrear of charges for electricity supplied and the licensee shall not cut off the supply of the electricity.

26. In the present case, the final assessment u/s 126 of the Act, 2003 is claimed to have been made only on 21.6.2003. Copy of the final assessment order u/s 126 of the Act, 2003 has been filed as Annexure-CA-2. Citation has been issued to the petitioner on 19.11.2013, after the final assessment order is passed. u/s 126 of the Act, 2003, the sum cannot be held to be due against the petitioner till a final assessment is made. The recovery proceedings having been initiated against the petitioner well within time, the bar u/s 56(2) of the Act, 2003 is not attracted.

Submission of the learned counsel for the petitioner that recovery is barred by Section 56(2) of the Act, 2003 thus cannot be accepted. It is held that the recovery proceedings were initiated well within two years from the date when the sum became due.

Now comes the last submission of the learned counsel for the petitioner that assessment proceedings has been done against the petitioner in principles of natural justice.

In paragraph 12 of the writ petition the petitioner has pleaded that no order of provisional assessment, no show-cause notice, no final assessment order and no notice under Section- 3 of the U.P. Electrical Undertaking (dues recovery) Act was ever served on the petitioner. In paragraph 6 of the counter affidavit it has been stated that the provisional assessment was prepared on the basis of checking report which was sent on 23.5.2011, to the petitioner through registered post giving 15 days time to file objection. Although, it was claimed that the provisional assessment notice was sent to the petitioner through registered post on 23.5.2011, but no proof was annexed alongwith the counter affidavit. The final assessment has been made by the respondents on 21.6.2013. In the final assessment order dated 21.6.2013 filed as Annexure-CA-2 reference of provisional assessment notice dated 23.5.2011 has been made. It is claimed that in the provisional assessment notice only 15 days time was allowed to the petitioner to file objection, but the final assessment has been made after more than 2 years i.e. on 21.6.2013. When no assessment was made after the provisional assessment notice dated 23.5.2011, for a period of 2 years, it was in fitness of things that fresh opportunity would have been given to the petitioner before making the final assessment. It is relevant to note that u/s 126(3) of the Act, 2003 it is contemplated that final order of assessment is to be passed within 30 days of service of such order of provisional assessment. Thus, in any view of the matter the final assessment order dated 21.6.2013, cannot be said to have been passed in consonance of the principles of natural justice and cannot be sustained.

Admittedly, the petitioner did not file any objection against the provisional assessment notice. Although, there is a right of appeal u/s 127 of the Act, 2003 against the order of final assessment, but we have proceeded to examine the contention of the learned counsel for the petitioner on merit, since the petitioner has challenged the very jurisdiction of the Assessing Officer to make assessment u/s 126 of the Act, 2003 in the cases of theft covered by Section 135 of the Act, 2003. However, we find that the final assessment order dated 21.6.2013, having been passed in violation of the principles of natural justice, the writ petition is to be entertained and decided on merits.

In the result, the writ petition is disposed of with the following directions:

(1) The Recovery Citation 19.11.2013, Annexure-3 to the writ petition is set-aside.

(2) The petitioner shall file objection to the provisional assessment notice dated 23.5.2011, within 15 days from today before the Executive Engineer.

(3) The Executive Engineer shall consider the objection of the petitioner and take a fresh decision regarding the final assessment against the petitioner within a period of one month.

(4) It shall be open for the respondents to proceed further in accordance with law after making final assessment as indicated above.

Parties shall bear their own costs.

 