A.F.R.

HIGH COURT OF ORISSA: CUTTACK

W.P.(C) No. 972 of 2012

In the matter of an application under Articles 226 and 227 of the Constitution of India.

Executive Engineer (Electrical),
Central Electrical Division, NESCO,
Balasore

... Petitioner

-Versus-

Appellate Authority-cum-Dy. Electrical
Inspector (T & D), Balasore
and another ... Opp. Parties

For Petitioners : M/s Prasanta Kumar Tripathy & S.Pattnayak

For Opp. parties : M/s L.Pangari, B.Jena & A.K.Das (Caveator & O.Ps.)

P R E S E N T:

THE HONOURABLE SHRI JUSTICE B.N.MAHAPATRA

Date of Judgment: 17.05.2013

B.N. MAHAPATRA, J. This writ petition has been filed with a prayer to quash the order dated 20.09.2011 passed under Annexure-11 by opposite party No.1 Appellate Authority-cum-Deputy Electrical Inspector (T & D), Balasore in AAC No.01.07.2011 on the ground that the same is illegal, arbitrary and contrary to Rules and Regulations of OERC Distribution (Conditions of Supply) Code, 2004 (hereinafter referred to as "OERC Distribution Code,

2004"). The further prayer of the petitioner is to declare the order of final assessment passed by the Assessing Officer as legal, correct and justified.

2. Petitioner's case in a nut-shell is that opposite party No.2 is a consumer of electricity under the petitioner and initially on 07.04.1999 executed an agreement in order to avail power supply to his rice mill for a contract demand of 83 KW as a medium industry. It has been specifically stated in the said agreement that the tariff shall be applicable for supply of powers at a single point for the purpose of industrial production with a contract demand/connected load of 22 KVA and above but exceeding 110 KVA where power is provided as motive force. Further condition was that the consumer shall take from the supplier a supply up to but not exceeding the contract demand of 83 KW. On a general review, it was found from the meter reading that the M.D.I. was recorded as 146.5 KW which is more than the existing contract demand of 83 KW. Since said additional load was extracted without taking permission from the authority, opposite party No.2 was requested to execute fresh agreement on enhanced load after completion of all formalities. Opposite party No.2 deliberately with a mala fide intention did not execute the agreement and simply paid the over-drawal penalty. Charges were levied on the basis of contract demand or energy charges on the basis of actual consumption and on payment of the penalty, subsequent bill was raised treating it as large industry. On many occasions, it was found that the M.D.I. exceeds contract demand for which penalty for over-drawal has been charged as per Regulation and prevailing

RST order. It was further found that the contract demand enhanced from 83 KW to 160 KVA and bill was raised according to consumption as large industry tariff and then 260 KVA and finally 340 KVA. Permission was granted for enhancement of contract demand from 160 KVA to 260 KVA on 15.11.2003 with condition to execute the agreement. In spite of the same, opposite party No.2 did not come forward to execute the agreement. In the said letter, additional security deposit for 260 KVA to a tune of Rs.3,46,050/- was directed to be deposited before entering into fresh agreement. It was further intimated that the previous agreement, which was executed on 07.04.1999, would be superseded by the fresh agreement. Due to excess drawal of 340 KVA over contract demand of 260 KVA, opposite party No.2-consumer was noticed vide letter No.2620 dated 18.11.2006 to execute fresh agreement at enhanced load after observing all formalities. Till the date of filing of the writ petition, except the initial agreement under Annexure-1, opposite party No.2 has not executed any agreement.

3. While the matter stood thus on 10.05.2011, the premises of opposite party No.2-consumer was verified by a Vigilance team of NESCO and during inspection, it was found that the said opposite party No.2 itself is indulged in unauthorized use of power. On such inspection, it was found that opposite party No.2-consumer has given.— (i) extended load to an under-construction oil refinery unit adjacent to the existing unit; (ii) the consumer has used a black colour 35 mm sq. 3 and ½ core cable and

availed power supply from distribution panel board existing at SNM business own building to the under construction building near about 200 meter approximately; (iii) the consumer has taken extended load violating the OERC Code, 2004.

4. Though opposite party No.2 was present at the spot but refused to sign. However, one Sanjay Somai received one copy at the instance of the consumer. One Chandan Pal was also present as representative of the consumer. Spot verification report dated 10.05.2011 under Annexure-5 was filed. Provisional assessment was made on the basis of the spot verification report of the premises of opposite party No.2. The Assessing Officer passed the provisional assessment order raising demand of Rs.11,98,934.88, which was served upon opposite party No.2 with a request to file objection within seven days of receipt of the same and fixed the date of hearing to 27.05.2011. Cost of cubical meter was separately added and opposite party No.2 was directed to pay Rs.15,48,371/- under Annexure-6. Opposite party No.2 sought for extension of time to file objection and filed the same on 30.05.2011 challenging the provisional assessment order dated 10.05.2011. In the objection, opposite party No.2 has stated that since verification was made on 10.05.2011, calculation for 12 months is wrong. It was further stated that the calculation made during spot verification about unauthorized consumption of power of 69 KVA is wrong and the same is 77 KVA. The penalty for over-drawal has been charged and he has paid the same. Therefore, the load has been

regularized. Taking into consideration the objection filed by opposite party No.2 on 30.05.2011, the Assessing Officer disposed of the said objection/show cause after providing opportunity of hearing and passed the final assessment order on 10.06.2011 raising demand of Rs.11,98,934.88. The cost of cubical meter was excluded while passing the final assessment order on 10.06.2011 under Annexure-8.

5. Challenging the final assessment order passed under Annexure-8 opposite party No.2 preferred appeal before the appellate authority. In the said appeal, allegation of unauthorized extension of power to an under-construction oil refinery unit adjoining to the original unit was challenged. It was further contended that opposite party No.2 has applied for a contract demand of 600 KVA as additional load to the new unit which is a part and parcel of the existing unit and therefore the use of power for the said construction purpose cannot be said to be unauthorized. The said appeal was contested by the petitioner by filing reply justifying the order of final assessment. The appellate authority after hearing both parties passed the impugned order on 20.09.2011 under Annexure-11 setting aside the final order of assessment and directed the petitioner herein to return 50% of the penal assessment amount deposited with petitioner by the appellant-opposite party No.2 by way of adjustment in subsequent energy bill. Hence, the present writ petition.

6. Mr.P.K. Tripathy, learned counsel appearing for the petitioner-Licensee submitted that the entire order of appellate authority is based on

no evidence. The said order is completely inconsistent with both fact and law for which the order of the appellate authority is liable to be quashed. Spot verification and assessment have been made in accordance with law that too after providing opportunity of hearing to opposite party No.2. Therefore, the final assessment order is legal and justified. The appellate authority has not assigned any reason for holding that the spot verification report and enhancement of load bears no weight because of procedural lapses.

7. Placing reliance on the judgments of the Hon'ble Supreme Court in the cases of *Sant Lal Gupta and others Vs. Modern Cooperative Group Housing Society Ltd. and others,* (2010) 13 SCC 336 and *State of Uttaranchal and another Vs. Sunil Kumar Vaish and others*, AIR SCW 5486 it was submitted that not only administrative but also judicial order must be supported by reason recorded in it and while deciding an issue the Court is bound to give reason for its conclusion. But in the impugned order passed by the appellate authority no reason has been assigned in support of its findings. The finding of the appellate authority at page 3 itself speaks that opposite party No.2 was consuming unauthorized power without prior approval of the licensee for such enhancement of load as per OERC Code, 2004. In absence of any agreement or sanction for the purpose of oil refinery and solvent extraction plant, the appellate authority wrongly came to the conclusion that the Assessing Officer had the latent willingness. Additional security has not been taken at any point of time for oil refinery and solvent extraction plant. Opposite party No.2 has not executed agreement for oil refinery and solvent

extraction plant. Before taking power supply, execution of agreement in the standard format as per Form No.3 is mandatory for those who intend to avail power supply in three phases. Only after execution of the agreement, the consumer can be authorized to draw power. Therefore, consumption of power without execution of agreement is unauthorized.

8. It was submitted that payment of over-drawal penalty and consumption of unauthorized power are two different things. So far the payment of over-drawal penalty is concerned, the Commission has allowed the consumer with two part tariff to draw up to 120% of their contract demand during off peak hours, i.e., 12 mid night to 6 AM next day with a view that drawal during off peak hours helps the system for maintenance of better frequency profile. In reverse, consumer will pay penalty. At the same time, the consumer is paying penalty for unauthorized consumption of power as per Section 126 when he used excessive load as against the installed load simpliciter and there is violation of terms and conditions of supply. As per Clause 105 of the OERC Code, 2004, no consumer shall sell or transfer or divert power to any person or premises unless the agreement so provides. Clause-106 of the said Code provides that no consumer shall make use of power in excess of the approved contract demand or use power for a purpose other than the one for which agreement has been executed or shall dishonestly abstract power from the licensee's system. Therefore, consumption of power in violation of Regulation and agreement for the purpose of construction of oil refinery and solvent extraction plant is

unauthorized and the assessment made under Section 126 is justified. Placing reliance on the judgment of the Hon'ble Supreme Court in the case of *Punjab State Electricity Board Vs Vishwa Caliber Builders,* (2010) 4 SCC 539, Mr. Tripathy submitted that on payment of over-drawal penalty, the unauthorized consumption cannot be regularized. The appellate authority is not justified to hold that the supply of power to the oil refinery and solvent extraction plant cannot be treated as different from the earlier purpose for which power supply was permitted, i.e., for the rice mill. Violation of terms and conditions of the agreement lead to mal practice. Finding of the appellate authority to the effect that construction of the extended premises could be treated in the same manner as repair and maintenance and renovation work of the existing unit is not correct. On the face of admission by opposite party No.2 that he was using power supply for other purpose, the appellate authority is not justified to set aside the order impugned therein. Further, placing reliance on the judgment of this Court in the case of *Dinesh Kumar Pathak and another vs. Sri Trailokya Mishra,* 2010 (Supp-II) OLR 426 and judgment of the Hon'ble Supreme Court in *Sant Lal Gupta (supra)*, it was submitted that the present writ petition is maintainable. Unauthorized consumption of power is loss to the licensee.

9. Mr. Tripathy further submitted that there is no provision under the Electricity Act, 2003 and Regulations framed thereunder for regularization of unauthorized use of electricity. Consumption of excess load is always

considered as unauthorized. Placing reliance on the judgment of the Hon'ble Supreme Court in *Executive Engineer and another Vs. M/s Seetaram Rice Mill, (*2012) 2 SCC 108, Mr. Tripathy submitted that provision of Section 126 read with Section 127 of the Act, 2003, in fact, becomes a Code in itself and right from initiation of the proceedings by conducting an inspection, to the right of filing an appeal before the appellate authority, all matters are squarely covered under these provisions. It specifically provides the method of computation of electricity and the manner of conducting assessment proceedings. Execution of agreement between the parties at the time of sanction of the load prohibits consumption of electricity in excess of maximum sanctioned/ installed load. In the event of default, it embodies complete process of assessment, determination and passing of a demand order. The defined legislative purpose cannot be frustrated by interpreting a provision in a manner not intended in law. Execution of agreement on 30.05.2012 between the parties for enhancement of load from 340 KVA to 600 KVA proves itself that in absence of agreement and sanction, opposite party No.2 was drawing excess power for the purpose of construction of oil refinery unit, which is unauthorized in view of Section 126 of the Act, 2003. Therefore, the proceedings initiated against opposite party No.2 is legal and justified. Concluding the argument, Mr.Tripathy prayed to allow the writ petition.

10. Mr.L.Pangari, learned counsel appearing for opposite party No.2 submitted that ordinarily while exercising power under Article 226 of the Constitution of India a writ Court does not sit on appeal to re-

appreciate the evidence on record unless it is shown that the order of the Court/forum below is patently illegal, perverse and cannot be allowed to stand as it is. Since the matter involves use of electricity, it requires adequate knowledge and experience in the subject/field. The Legislature in its wisdom has entrusted the task of deciding an appeal under Section 127 of the Act, 2003. In the instant case, appellate authority being the fact finding authority has decided the appeal by passing a reasoned order and therefore the same is not open for challenge by the petitioner on flimsy and mere technical grounds and therefore the writ petition is liable to be dismissed. The provisional assessment order is passed without jurisdiction and without authority of law in view of the provisions of Section 126 of the Act, 2003, inasmuch as, when there is no allegation regarding theft of electricity by way of hooking, by-passing or tampering of meter and more particularly when there is no allegation regarding any escaped consumption or loss to NESCO. The alleged enhancement / extension of load by the petitioner was within the knowledge and with the consent of the petitioner. Earlier enhancement of load to 260 KVA and 340 KVA was within the knowledge and approval of the petitioner as per Annexure-A/2 series. Hence, the allegation of unauthorized use of electricity is misconceived.

11. It was submitted that whenever opposite party No.2 exceeded the contract demand of 340 KVA, it was subjected to over-drawal charges at the rate prescribed under the relevant Tariff Order of the OERC and opposite party No.2 has paid such over-drawal charges as claimed by the

petitioner in the energy bills for the months of January, February, March and April, 2011. Referring to paragraph 523 of the OERC Tariff Order dated 20.03.2010 for the financial year 2010-11, Mr.Pangari submitted that the existing tariff structure for the consumers availing power supply with a contract demand of 110 KVA and above, which includes Large Industry category like opposite party No.2, permits such consumer to draw power in excess of his contract demand subject to payment of over-drawal charges. There is no illegality in drawing excess load subject to payment of over-drawal charges, which is permissible under law. Further placing reliance on paragraph 539 of the said Tariff Order, it is submitted that when the maximum demand exceeds the contract demand during the hours other than off peak hours, such excess demand is liable for a penalty and payable at the prescribed rate of demand charge.

12. Mr.Pangari further submitted that when the allegation in the verification report is confined to drawl of excess load of 69 KVA by opposite party No.2 over and above the existing contract demand of 340 KVA, the same would be permissible under law and cannot be said to be unauthorized use/consumption within the meaning of Section 126 of the Act, 2003, more particularly when the application dated 07.04.2011 of opposite party No.2 for enhancement of load is under process by the petitioner. The allegation regarding extension of excess load to an adjacent oil refinery unit is totally misconceived in fact and law. The adjacent premises is also owned by opposite party No.2 and the refinery unit is a

downstream sub-unit of the main rice mill for better utilization of the by-products of the rice mill.

13. Mr. Pangari further submitted that opposite party No.2 having applied for enhancement of the load and while such application is under process by the petitioner, passing of provisional as well as final assessment order basing upon verification report dated 10.05.2011 for the self same use is illegal, which has been rightly set aside by the appellate authority. Appellate authority is fully justified to hold that the extended premises of the existing unit cannot be treated as a different premises keeping in view the nature and purpose of use of electricity by opposite party No.2 in its rice mill and the expanded units like oil mill and solvent extraction plant and the refinery mill. Therefore, question of sale or transfer or diversion of power to any other person as prohibited under Regulation-105 of the OERC Code, 2004 does not arise, inasmuch as the refinery unit is not a different unit altogether having no nexus with the main unit, i.e., the rice mill. Concluding his argument, Mr. Pangari submitted for dismissal of the writ petition and for a direction to refund the amount of Rs.5,99,468/- deposited by opposite party No.2, as per the order of the appellate authority.

14. On the rival contentions of both parties, following questions arise for consideration by this Court.

(i) Whether the writ petition is maintainable?

(ii) Whether the spot verification has been made in accordance with law?

(iii) Whether electricity supplied to opposite party No.2-Consumer under the agreement dated 7th April, 1999 (Annexure-1) for Rice Mill, but used for construction of oil refinery unit would amount to unauthorized use of electricity as contemplated under explanation (b) (iv) of Section 126 of the Act, 2003 and violative of clause 106 of OERC Code, 2004?

(iv) Whether extension of 69 KVA load to adjacent premises for construction purpose amounts to unauthorized use of electricity as contemplated under Explanation (b) (v) of Sec. 126 of the Act, 2003 and the same is violative of clause 105 of the OERC Code, 2004?

(v) Whether determination of the quantum of electricity as unauthorized use of electricity and extra demand raised on best judgment in the provisional assessment order dated 10.05.2011 which is confirmed in final assessment order is valid in law? If the answer is affirmative whether the order of the appellate authority is sustainable in law?

(vi) What order?

15. Question No.(i) relates to maintainability of the writ petition. Case of opposite party no.2- consumer is that ordinarily while exercising power under Article 226 of the Constitution of India, the Court does not sit on appeal to re-appreciate the evidence on record. Unless, it is shown that the order of the Forum below is patently illegal, perverse and cannot be allowed to stand as it is, the Court should not exercise its judicial review power. The appellate authority who possesses adequate knowledge and experience in the subject/ field having decided the appeal, the same is not

open for challenge by the licensee on flimsy and technical grounds and therefore, the petition is liable to be dismissed. The contention of the licensee-petitioner is that power under Article 227 of the Constitution can be exercised to interfere with the order of the Lower Court in cases of serious derelictions of duty and flagrant violation of fundamental principle of law or injustice, but in absence of intervention by the Hon'ble Court, grave injustice would be caused.

16. At this juncture, it is necessary to refer to the decision of the Hon'ble Supreme Court in the case of ***Shivedeo Singh and others vs. State of Punjab and others,*** *AIR 1963 SC 1909,* wherein it is held as under:

> "8. The other contention of Mr. Gopal Singh pertains to the second order of Khosla, J., which in effect, reviews his prior order. Learned counsel contends that Art. 226 of the Constitution does not confer any power on the High Court to review its own order and, therefore, the second order of Khosla, J., was without jurisdiction. It is sufficient to say that there is nothing in Art. 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. Here the previous order of Khosla, J., affected the interests of persons who were not made parties to the proceeding before him. It was at their instance and for giving them a hearing that Khosla' J. entertained the second petition. In doing so, he merely did what the principles of natural justice required him to do. It is said that the respondents before us had no right to apply for review because they were not parties to the previous proceedings. As we have already pointed out, it is precisely because they were not made parties to the previous proceedings, though their interests were sought to be affected by the decision of the High Court, that the second application was entertained by Khosla, J."

17. The Hon'ble Supreme Court in the case of ***Sant Lal Gupta and Ors (supra)***, *held* as under:

> **"28.** The High Court ought to have considered that it was a writ of certiorari and it was not dealing with an appeal. The writ of certiorari under Article 226 of the Constitution can be issued only when there is a failure of justice and it cannot be issued merely because it may be legally permissible to do so. There must be an error apparent on the face of record as the High Court acts merely in a supervisory capacity. An error apparent on the face of the record means an error which strikes one on mere looking and does not need long drawn out process of reasoning on points where there may conceivably be two opinions. Such error should not require any extraneous matter to show its incorrectness. Such errors may include the giving of reasons that are bad in law or inconsistent, unintelligible or inadequate. It may also include the application of a wrong legal test to the facts found, taking irrelevant considerations into account and failing to take relevant considerations into account, and wrongful admission or exclusion of evidence, as well as arriving at a conclusion without any supporting evidence. Such a writ can be issued when there is an error in jurisdiction or authority whose order is to be reviewed has acted without jurisdiction or in excess of its jurisdiction or has failed to act. While issuing the writ of certiorari, the order under challenge should not undergo scrutiny of an appellate court. It is obligatory on the part of the petitioner to show that a jurisdictional error has been committed by the statutory authorities. There must be a breach of the principles of natural justice for resorting to such a course. (Vide *Harbans Lal* v. *Jagmohan Saran, AIR 1986 SC 302; Municipal Council, Sujanpur* v. *Surinder Kumar*, (2006) 5 SCC 173; *Sarabjit Rick Singh* v. *Union of India, (2008) 2 SCC 417;* and *CIT* v. *Saurashtra Kutch Stock Exchange Ltd, (2008) 14 SCC 171*)"

18. Perusal of the impugned order prima facie reveals that the reasonings given in support of some findings by the appellate authority are

bad in law, unintelligible and contrary to the position of law settled by the Hon'ble Supreme Court. Therefore, this Court is of the view that the writ petition is maintainable.

19. Question No.(ii) is as to whether the spot verification has been made in accordance with law.

The stand of the petitioner-licensee is that the spot verification has been made in accordance with law, whereas the case of the consumer is contrary to the same. The appellate authority without discussing the rival contentions of the parties in this regard and assigning any reason observed that "some procedural lapses have been committed by both the appellant and respondent in the matter of verification of premises and request for enhancement of CD which bears no weight at this stage in view of the core of allegations made by the respondent and objections raised by the appellant against the same." No reason has been assigned in support of the above conclusion. There is also no detailed discussion as to why the appellate authority has come to such a conclusion.

20. The Hon'ble Supreme Court in ***S.N.Mukherjee-v-Union of India, AIR 1990 SC 1984,*** held that the recording of reasons by an administrative authority serves a salutary purpose namely; it excludes chances of arbitrariness and ensures a degree of fairness in the process of decision-making. The said purpose would apply equally to all decisions and its application cannot be confined to decisions which are subject to appeal,

revision or judicial review. The need for recording of reasons is greater in a case where the order is passed at the original stage.

Reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same it becomes lifeless. [S*ee Raj Kishore Jha V. State of Bihar (2003) 11 SCC 519]*.

Even in respect of administrative orders Lord Denning, M.R. in ***Breen V. Amalgamated Engg. Union*** (1971) 1 All ER 1148, observed: "The giving of reasons is one of the fundamentals of good administration."

In ***Alexander Machinery (Dudley) Ltd. V. Crabtree*** (1974) ICR 120 (NIRC) it was observed: "Failure to give reasons amounts to denial of justice".

In ***Vasant D. Bhavsar V. Bar Council of India*** (1999) 1 SCC 45, the apex Court held that an authority must pass a speaking and reasoned order indicating the material on which its conclusions are based.

21. In view of the above, the observations and findings of the appellate authority with regard to spot verification of premises of the consumer are not sustainable in law.

22. Question Nos.(iii) and (iv) being inter-linked, they are dealt with together.

23. Case of the petitioner-licensee is that the consumer has utilized the electricity other than the purpose for which the use of electricity was authorized under the agreement and also that the electricity has been used for the premises or areas other than those for which the supply of electricity was authorized. Such allegations are based on the vigilance verification

report dated 10.05.2011. From the said report, it reveals that during surprise checking on 10.05.2011 it was found that the consumer has given extended load to an under-construction oil Refinery Unit which was adjacent to the unit to which power supply was given by the petitioner-licensee as per agreement dated 07.04.1999 under Annexue-1. The consumer has used a black colour 35 mm sq. 3 ½ core cable and availed power supply from distribution penal board existing at SNM Business own building to the under-construction building near about 200 metre distance approximately. Pursuant to the said report, the Assessing Officer issued a provisional order alleging unauthorized use of electricity as contemplated under Section 126 of the Act, 2003.

24. The case of the opposite party-consumer is that the provisional assessment order is passed without jurisdiction and without authority of law in view of the provisions of Section 126 of the Act, 2003, inasmuch as when there is no allegation regarding theft of electricity by way of hooking, by-passing or tampering of meter and more particularly where there is no loss to NESCO. The alleged extension of load by the consumer to the adjacent premises of opp. Party no.2 for the purpose of construction of oil refinery unit was within the knowledge and with the consent of the petitioner. In support of his contention, opposite party No.2 relied upon Annexure-A/2 to the counter affidavit.

25. Further case of opposite party No.2-consumer is that whenever it has exceeded the contract demand, it has been subjected to overdrawal

charges at the rate prescribed under the relevant tariff order of the OERC and opposite party no.2 paid such over-drawal charges claimed by the petitioner in the energy bill. The existing tariff structure for the consumers availing power supply with a contract demand of 110 KVA and above which includes "Larger Industry" category like opposite party No.2 permits such consumer to draw power in excess of its contract demand subject to payment of overdrawal charges. Further contention of opposite party no.2 is that verification report is confined to drawal of extended load of 69 KVA it over and above the existing contract demand of 340 KVA and the same would be permissible under law and cannot be said to be unauthorized use/consumption within the meaning of Section 126 of the Act, 2003, more particularly when the application dated 07.04.2011 of opposite party no.2 for enhancement of load was under process by the petitioner. The allegation regarding extension of the excess load to an adjacent Oil Refinery Unit is totally misconceived in fact and law as explained by opposite party no.2 in it's objection to provisional assessment that the adjacent premises is also owned by opposite party No.2 and the refinery unit is a downstream sub-unit of the main Rice Mill for better utilization of the by-products of the Rice Mill.

26. To deal with the aforesaid questions and rival contentions, it is necessary to extract here the relevant portion of Section 126 of the Electricity Act, 2003:

"***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.

xx xx xx

(5) If the assessing officer reaches to the conclusion that unauthorized use of electricity has taken place, the assessment shall be made for the entire period during which such unauthorized use of electricity has taken place and if, however, the period during which such unauthorized 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 the tariff 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 of licensee, as the case may be, designated as such by the State Government;

(b) "unauthorized use of electricity" means the usage of electricity-

(i) by any artificial means; or

(ii) by a means not authorized 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 authorized; or

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

(underlined for exphasis)

27. For our purpose, it is also necessary to reproduce here Regulations 105 and 106 of OERC Code, 2004"

> "105. No consumer shall sell or transfer or divert power to any person or premises unless the agreement so provides.
>
> 106. No consumer shall make use of power in excess of the approved contract demand or use power for a purpose other than the one for which agreement has been executed or shall dishonestly abstract power from the licensee's system."
>
> (Underlined for emphasis)

28. A conjoint reading of Section 126 of the Act, 2003 and Regulations 105 and 106 of the OERC Code, 2004 extracted above, makes it clear that use of electricity other than the purpose for which the same was authorized or for the premises or area other than those for which the supply of electricity was authorized amounts to unauthorized use of electricity for which the consumer is liable to be assessed under Section 126 of the Act, 2003.

29. The questions involved in the present case are no more *res integra*.

The Hon'ble Supreme Court in the case of ***Executive Engineer and another vs. Seetaram Rice Mill,*** (2012) 2 SCC 108, held as under:

> "**16.** First and foremost, we have to examine how provisions like Section 126 of the 2003 Act should be construed. From the objects and reasons stated by us in the beginning of this judgment, it is clear that "revenue focus" was one of the principal considerations that weighed with the legislature while enacting this law. The regulatory regime under

the 2003 Act empowers the Commission to frame the tariff, which shall be the very basis for raising a demand upon a consumer, depending upon the category to which such consumer belongs and the purpose for which the power is sanctioned to such consumer. We are not prepared to accept the contention on behalf of the respondent that the provisions of Section 126 of the 2003 Act have to be given a strict and textual construction to the extent that they have to be read exhaustively in absolute terms.

17. This is a legislation which establishes a regulatory regime for the generation and distribution of power, as well as deals with serious fiscal repercussions of this entire regime. In our considered view, the two maxims which should be applied for interpretation of such statutes are *ex visceribus actus* (construction of the Act as a whole) and *ut res magis valeat quam pereat* (it is better to validate a thing than to invalidate it). It is a settled canon of interpretative jurisprudence that the statute should be read as a whole. In other words, its different provisions may have to be construed together to make consistent construction of the whole statute relating to the subject-matter. A construction which will improve the workability of the statute, to be more effective and purposive, should be preferred to any other interpretation which may lead to undesirable results.

xx xx xx

29[*]**.** Thus, it would be clear that the expression "unauthorised use of electricity" under Section 126 of the 2003 Act deals with cases of unauthorised use, even in the absence of intention. These cases would certainly be different from cases where there is dishonest abstraction of electricity by any of the methods enlisted under Section 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 under Section 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 authorisation, like providing for a direct connection bypassing the installed meter, the case would fall under Section 135 of the Act.

30. Therefore, there is a clear distinction between the cases that would fall under Section 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 unauthorised 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 unauthorised use of electricity and then theft which is governed by the provisions of Section 135 of the 2003 Act.

xx xx xx

39. ……The expression "unauthorised use of electricity" on its plain reading means use of electricity in a manner not authorised by the licensee of the Board. "Authorisation" refers to the permission of the licensee to use of electricity, subject to the terms and conditions for such use and the law governing the subject.

40. To put it more aptly, the supply of electricity to a consumer is always subject to the provisions of the 2003 Act, State Acts, Regulations framed thereunder and the terms and conditions of supply in the form of a contract or otherwise. Generally, when electricity is consumed in violation of any or all of these, it would be understood as "unauthorised use of electricity". But this general view will have to be examined in the light of the fact that the legislature has opted to explain this term for the purposes of Section 126 of the 2003 Act.

41. The "unauthorised use of electricity" means the usage of electricity by the means and for the reasons stated in sub-clauses (*i*) to (*v*) of clause (*b*) of the Explanation to Section 126 of the 2003 Act. Some of the illustratively stated circumstances of "unauthorised use" in the section cannot be construed as exhaustive. The "unauthorised use of electricity" would mean what is stated under that Explanation, as well as such other unauthorised user, which is

squarely in violation of the abovementioned statutory or contractual provisions.

xx xx xx

"50. In other words, the purpose sought to be achieved is to ensure stoppage of misuse/unauthorised use of the electricity as well as to ensure prevention of revenue loss. It is in this background that the scope of the expression "means" has to be construed. If we hold that the expression "means" is exhaustive and cases of unauthorised use of electricity are restricted to the ones stated under Explanation (*b*) of Section 126 alone, then it shall defeat the very purpose of the 2003 Act, inasmuch as the different cases of breach of the terms and conditions of the contract of supply, Regulations and the provisions of the 2003 Act would escape the liability sought to be imposed upon them by the legislature under the provisions of Section 126 of the 2003 Act. Thus, it will not be appropriate for the courts to adopt such an approach."

Xxx xxx xxx

"66. Regulation 106 of the Conditions of Supply reads as under:

"**106.** No consumer shall make use of power in excess of the approved contract demand or use power for a purpose other than the one for which agreement has been executed or shall dishonestly abstract power from the licensee's system."

Xxx xxx xxx

"67. On the cumulative reading of the terms and conditions of supply, the contract executed between the parties and the provisions of the 2003 Act, we have no hesitation in holding that consumption of electricity in excess of the sanctioned/connected load shall be an "unauthorised use of electricity" in terms of Section 126 of the 2003 Act. This, we also say for the reason that overdrawal of electricity amounts to breach of the terms and conditions of the contract and the statutory conditions, besides such overdrawal being prejudicial to the public at large, as it is likely to throw out of gear the entire supply system, undermining its efficiency, efficacy and even increasing voltage fluctuations."

Xxx xxx xxx

> **"71.** Consumption in excess of sanctioned load is violative of the terms and conditions of the agreement as well as of the statutory benefits. Under Explanation (*b*)(*iv*), "unauthorised use of electricity" means if the electricity was used for a purpose other than for which the usage of electricity was authorised. Explanation (*b*)(*iv*), thus, would also cover the cases where electricity is being consumed in excess of sanctioned load, particularly when it amounts to change of category and tariff. ....."
>
> xx xx xx
>
> **"76.** The consistent view of this Court would support the proposition that the cases of excess load of consumption would be squarely covered under Explanation (*b*)(*iv*) of Section 126 of the 2003 Act. Once this factor is established, then the assessing officer has to pass the final order of assessment in terms of Sections 126(3) to 126(6) of the 2003 Act."

30. The Hon'ble Supreme Court in the case of ***Vishwa Caliber Builder Pvt. Ltd.,****(supra)* held as under:

> "13. We have considered the arguments of the learned counsel and agree with him that in the absence of any provision in the Act or the Regulations framed by the appellant, the Ombudsman committed jurisdictional error by directing regularisation of unauthorised use of electricity by the respondent and refund of the alleged excess amount charged by the appellant."

31. In the present case, it is not in dispute that the original agreement annexed to the writ petition as Annexure-1 reveals that the consumer has been authorized to utilize the power supply for the purpose of Rice Mill only but the verification report reveals that opposite party No.2 has extended and utilized the power supply for construction of the oil refinery unit. The contention of opp. parties no.2-consumer is that use of the extended load by it for the purpose of construction of oil refinery unit

was within the knowledge and consent of the petitioner is well evident from Annexure-A/2 to the counter affidavit filed by opposite party no.2. Perusal of the said counter affidavit does not reveal that the extended load was given to an under-construction oil refinery unit. Therefore, such contention of the petitioner does not merit consideration.

32. Assuming that extension of load given by the consumer for the purpose of construction of oil refinery unit was within the knowledge and consent of the petitioner, it cannot absolve the consumer from being assessed under Section 126 of the Act.

Law is well-settled that there is no estoppel against law.

(see Plasmac Machine Maufacturing Co. Pvt. Ltd. Vs. Collector of Central Excise, Bombay, 1991 Supp. (I) SCC 57)

33. Needless to say that any action of public authority de hors the provision of law or not supported by any provisions of law lacks legal sanction and therefore does not confer any enforceable right in law.

34. Law is well-settled that an order passed by the Court must not only be inconsistent with the fundamental rights guaranteed by the Constitution, but also it cannot even be inconsistent with the substantive provision of the relevant statute. [See *A.B. Bhaskar Rao vs. Inspector of Police, CBI, Bisakhpatnam*, (2011) 10 SCC 259]

35. Needless to say that Court is the custodian of law and it cannot pass order contrary to law. High Court under Article 226 of the Constitution is required to enforce the rule of law and not pass an order or

direction which is contrary to law. [See *Karnataka State Road Transport Corpn. vs. Ashrafulla Khan and others* (2002) 2 SCC 560]

36. Paragraphs 523 and 539 of the tariff order dated 20.03.2010 of OERC for the financial year 2011 has nothing to do with making of assessment under Section 126 of the Act.

37. Therefore, this Court is of the view that the extension of load given by the consumer was for the purpose other than for which the use of electricity was authorized under assessment (Annexure-1) to the writ petition and the same amounts to unauthorized use of electricity as contemplated under Explanation (b)(iv) of Sec. 126 of the Act, 2003 and violative of Clause 106 of OERC Code, 2004.

38. Now, the question arises whether extension of 69 KVA load by opp. party no.2 to an adjacent premises for construction purpose amounts to unauthorized use of electricity.

Annexure-1, which is a copy of the agreement dated 7th day of April, 1999, reveals that a request has been made by the consumer to supply electricity energy to its premises situated over Plot No.23, Khata No.105, Mouza: Patra (Sergad), Tahasil: Balasore and Dist: Balasore for the purpose of Rice Mill to which the petitioner agreed to supply the power. But clause (ii) of the application dated 7.4.2011 for power supply of electrical energy filed by opposite party No.2 (which is available at page 16 of the counter affidavit) shows that such power is sought in respect of several plots and Khata numbers. Clause-(iii) of the said application contains the

purpose for which power is proposed to be used, i.e., processing of paddy, extraction and refining of oil with its allied and ancillary activity. Comparison of Annexure-1 and application dated 7.4.2011 for power supply of electrical energy clearly shows that power supply is required for different premises.

39. In the fact situation, this Court is of the view that electricity used for construction of the oil refinery unit being in a premises other than the premises for which the supply of electricity was authorized under Annexure-1 such use of electricity amounts to unauthorized use of the electricity as contemplated under Section 126 of the Act and violative of Clause 105 of OERC Code, 2004.

40. Question No.(v) is as to whether determination of quantum of electricity as unauthorized use of electricity and extra demand raised on best judgment basis in the provisional assessment order dated 10.05.2011 and confirmed in final assessment order is valid in law. If the answer is in affirmative, whether the order of the appellate authority is sustainable in law.

Sub-section (1) of Section 126 of the Act contemplates that when the Assessing Officer comes to the conclusion that a 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 other person benefited by such use.

41. Mr. Pangari submitted that the calculation adopted by the Assessing Officer to convert the KVA to unit has not been prescribed either in the Regulation or in the Act. It is further submitted that the Central Government vide the Electricity (Removal of Difficulties) Order, 2005 dated 8th June, 2005 has framed the Rule to include in the Electricity Supply Code, the method of assessment of the electricity charges payable in case of theft of electricity pending adjudication by the appropriate Court. Pursuant to such Order, 2005, the OERC has not yet prescribed any method of calculation to be adopted in the assessment.

Referring to paragraph-11(p) of the provisional order under Annexure-6 to the writ petition, Mr. Pangari submitted that while converting 69 KVA to units, the Assessing Officer had made calculation on the basis that such power is used round the clock, i.e., 24 hours.

42. Mr. Tripathy, learned counsel for the petitioner referring to the Orissa Electricity Regulatory Commission Regulations, 2004 submitted that the said Regulations provide the load factor in terms of percentage for calculation of energy consumption in respect of different categories of consumers and as per the said load factor 30% of 24 hours has been taken into account which comes to 7.20 hours per day for the purpose of conversion and the same is quite reasonable. It is further submitted that as per Regulation 2(aa) in order to convert KVA to units .9 multiplier factor has to be applied.

43. At this juncture, it is relevant to refer to Clause 11(p) of the Provisional order under Annexure-6 which reads as under :

> "p. Quantum of Electricity being unauthorized used on best judgment basis :69Kva*.9x24x30x.30 = 13414 Unit"

Perusal of Clause 11(p) of the provisional order reveals that the contention taken by Mr. Tripathy merits consideration.

Perusal of provisional assessment order further reveals that while passing the same the billed amount against 69 KVA in ST category amounting to Rs.64,304/- per month has already been taken into consideration.

44. It may be noted that the assessment under Section 126 in the instant case has been made on the ground of unauthorized use of electricity, i.e., (i) use of the electricity other than the purpose for which the use of the electricity was authorized, and (ii) use of electricity in a premises other than the premises for which the supply of electricity was authorized. Therefore, there is no need to deal with the other contention taken by the petitioner that after payment of electricity duty for consumption of excess power and over drawal penalty, the assessment made under Section 126 is not legal, as the same would be of mere academic in nature. Otherwise also, in view of the judgment of the Hon'ble Supreme Court in the case of Seetaram Rice Mill (supra), the cases of excess load of consumption would be squarely covered under explanation (b)(iv) of Section 126 of the Act,

2003. Once this factor is established then the Assessing Officer has to pass the final order of assessment in terms of Section 126(3) to Section 126(6) of the Act, 2003. Moreover, provisional assessment order reveals that the payments made by opp. party no.2-consumer for the period of assessment in respect of extended load of 69 KVA has already been deducted from the total amount assessed in the provisional assessment order.

45. Even though, the appellate authority in his order has noted that the provisional assessment order has been passed under Section 126(1) and (2) of the Electricity Act, 2003 on the basis of a verification report dated 10.05.2011 of the verification squad of NESCO alleging violation of Regulations 34, 104, 105 and 106 of OERC (Distribution and Condition of Supply) Code, 2004, it has not taken into consideration those statutory provisions while adjudicating the issues involved in the appeal. This Court further notices that despite observing that the consumer never sought for prior approval of the Licensee for enhancement of the loads as per provision of Regulations 53, 72, 73 and 74 of the OERC Code, 2004, the appellate authority has set aside the final order of assessment made under Section 126 of the Act on the ground of unauthorized use of electricity. I am shocked that the appellate authority while exercising power under Section 127 of the Act to examine the correctness of the order passed under Section 126 of the Act has closed its eyes to various statutory provisions and the judicial pronouncements, which have strong bearing for deciding the issues involved in the present case.

46. For the reasons stated in the preceding paragraphs, this Court is of the view that the impugned order has been passed in gross violation of the statutory provisions as well as the principles of law settled by the Hon'ble Supreme Court.

47. In view of the above, the impugned order dated 20.09.2011 passed by the appellate authority under Annexure-11 is set aside and quashed as this Court does not find any illegality or infirmity in the final order of assessment dated 10.06.2011 passed under Annexure-8.

48. In the result, the writ petition is allowed. No costs.

.....
B.N.Mahapatra, J.

Orissa High Court, Cuttack
Dated 17th May, 2013/ssd