

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**SPECIAL CIVIL APPLICATION NO. 2474 of 2010****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE RAJESH H.SHUKLA****Sd/-**

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	No
2	To be referred to the Reporter or not ?	No
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

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MADHUBEN R KANSARA SINCE DECEASED THRO' HEIRS....Petitioner(s)

Versus

DEPUTY ENGINEER & 1....Respondent(s)

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Appearance:

DECEASED LITIGANT, ADVOCATE for the Petitioner(s) No. 1

MR BM VAISHNAV, ADVOCATE for the Petitioner(s) No. 1.1 - 1.4

MS LILU K BHAYA, ADVOCATE for the Respondent(s) No. 1

NOTICE SERVED for the Respondent(s) No. 2

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CORAM: HONOURABLE MR.JUSTICE RAJESH H.SHUKLA**Date : 11/01/2018****ORAL JUDGMENT**

1. Present petition is filed by the petitioner under Articles 14, 226 and 227 of the Constitution of India as well as under the Electricity Act, 2003 (for short 'the Act') read with

Electricity Supply Code, 2005, (for short 'the Code') for the prayer as prayed for inter alia that appropriate writ, order or direction may be issued quashing and setting aside the assessment for Rs.1,35,885.90 dated 30.05.2009, at Annexure-B, issued by the respondent authority for the theft of electricity under Section 135 of the Act.

2. The facts of the case briefly summarized are as follows:

2.1 The petitioner (now heirs) had applied for the industrial line or the connection to the licensee for a load of 27 HP, which was released on 03.01.2009 after the prescribed procedure for payment of Rs.58,980/- towards the estimate. It is the case of the petitioner that the meter was installed by the authorized representative of the licensee-respondent herein and the petitioner started production using the connection. However, the meter installed in the premises was removed by the Junior Engineer on 10.05.2009 on the ground of slow running and the installation of the petitioner was isolated from the supply system of the licensee. Thereafter, the representative of the licensee visited the premises of the petitioner on 14.05.2009 and the petitioner was called in the office of the licensee on 21.05.2009 and the statements were recorded, which are produced at Annexure-A.

2.2 It is the case of the petitioner that thereafter a report was prepared stating that the load of 25.75 HP was connected as recorded, which is less than the contracted load of 27 HP. However, though the theft of energy was not alleged at that time nor any theft was detected during the inspection and no report was prepared in his presence, the order of assessment was made for theft of electricity under Section 135 of the Act. Therefore, the petitioner paid up the amount including the compounding charges and the supply of the electricity was reconnected to avoid any hardship and the criminal proceedings to the petitioner, who is aged about 74 years. It is, therefore, contended that the petitioner as a consumer could not be subjected to punishment for theft of energy under Section 135 of the Act. It is contended that there is no device has been recovered in a search or seizure at the time of inspection on 14.05.2009 or any other date and therefore, the petitioner as a consumer cannot be said to have committed any offence or theft of energy under Section 135 of the Act. Therefore, the petitioner made a representation, but no response has been given and therefore, the present petition is filed.

2.3 The affidavit-in-reply has been filed by the respondent

contending that the petitioner is not consumer of the respondent-Company. It is also stated that the petitioner had deposited the registration charges on 29.12.2008, but the deposit of registration charges does not automatically make the depositor as consumer. It is contended that the depositor has to complete the procedure prescribed in Section 4 of the GERC notification no.11/2005 before the connection is released. A copy of the same is produced as Annexure-1. It is, therefore, contended that the petitioner did not take any action and did not complete the prescribed procedure and therefore, during the course of checking on 14.05.2009, it was found that the petitioner has been using the electricity unauthorizedly.

2.4. It is also stated that during the inquiry, it revealed that the petitioner had in complicity with Junior Engineer, got the electric connection of 27 HP installed in his premises, in an under hand dealing involving illegal money transaction between the petitioner and the said Junior Engineer. Needless to add that the said Junior Engineer was also found to have made fraudulent entries in the Coy records and made embezzlement of substantial amount of money in this manner. Thus, it is contended that the petitioner had used the power by means of not authorized by the Board or licensee or

supplier, during the period from 04.01.2009 to 09.05.2009, for which a supplementary bill was issued to the petitioner amounting to Rs.1,35,885.90 coupled with compounding charges of Rs.1,08,000.00.

2.5. It is also stated that the amount has been deposited including compounding charges, no FIR is lodged against the petitioner. The reference is made to Section 135 of the Act and it is sought to be contended that the petitioner had removed the meter in illegal manner with Junior Engineer. It is contended that there are disputed questions of fact which cannot be raised in writ jurisdiction and it has been also contended relying upon the judgment of the Hon'ble Apex Court reported in AIR 1985 SC 330 that the writ jurisdiction of High Court may not be used by petitioner to short-circuit or circumvent the statutory procedure.

2.6 In rejoinder, the petitioner has clearly stated as to what has transpired and contended that the load of 27 HP was released to the petitioner by licensee after following procedure prescribed in relevant rules i.e. Electricity Supply Code after recovering the amount of Rs.59,980 towards the estimate.

(emphasis supplied)

2.7 It is, therefore, contended that as per the definition of consumer under Section 215 of the Act, the petitioner would be covered in the definition of consumer and also under the regulation or the supply code. It is, therefore, contended that there is no evidence collected for the purpose of Section 135 of the Act and therefore, the petitioner cannot be said to have committed any theft of energy in the absence of fulfillment of the necessary conditions prescribed in Section 135 of the Act.

2.8. It is stated that unless any of the eventually stated in Section 135 are fulfilled, it cannot be said that the petitioner has committed any theft and therefore, the supplementary bill issued is without jurisdiction. It is contended that the petitioner has no alternate remedy as the representation has also not been replied, the present petition is filed.

3. Learned advocate Shri B. M. Vaishnav has referred to the background of the facts and submitted that the examination report does not show any irregularity or theft of energy. Learned advocate Shri Vaishnav emphasized that it has been clearly stated in column 'J' referring to the irregularity or theft with reference to the earlier checking. He, therefore, submitted that when an application is made for supply of energy in the proforma, which is produced on record

along with the required amount towards the estimate of the expenses or the cost, such an exercise of power on the ground of theft of energy is an abuse of power. He submitted that if it was a theft of energy, it was necessary and obligatory for the officers of the respondent to make a panchnama or recover any such devise or the article used for theft of energy and take the signature of the consumer on such papers. He, therefore, submitted that as no such procedure has been followed and on the contrary the procedure for grant of supply as referred in Annexure-1 to the affidavit-in-reply clearly states that the application is required to be made to the licensee and when the petitioner has made the payment of the cost or the expenses, there is no issue of theft of energy.

4. Learned advocate Shri Vaishnav submitted that the petitioner as a consumer is not required to examine whether the officer of the respondent-licensee, who is visiting the premises for the purpose of installation of the connection and whether he has complied with the procedure at his end. It is not in dispute that the person, who made the installation and supply of connection is employee of the respondent licensee and therefore, the petitioner cannot be said to have been involved with him.

5. Learned advocate Shri Vaishnav has referred to Section 135 of the Act and submitted that it requires the fulfillment of any of the conditions before Section 135 could be attracted. Learned advocate Shri Vaishnav pointedly referred to Section 135 and submitted that it provides that the occupant of the place shall remain present during the search and all things seized in course of the inspection shall be prepared and delivered to the occupant. He submitted that Section 135 (4) refers to the fact that the provisions of the Code of Criminal Procedure, 1973 relating to search and seizure shall apply to any search and seizure made under this Act. He submitted that no such procedure has been followed and nothing has been recovered and therefore, the so-called theft of energy is without any basis.

6. Learned advocate Shri Vaishnav submitted that admittedly no FIR has been registered and the charges have been recovered and the petitioner is an aged person has made the payment with compounding charges which would not be a ground to make any adverse inference against the petitioner. He, therefore, submitted that the petition may be allowed.

7. Learned advocate Ms. Lilu K. Bhaya referred to the procedure as stated in the Annexure-I to the affidavit-in-reply

and submitted that for grant of supply, necessary procedure has to be complied with and thereafter, the connection could be given. She submitted that the respondent as a licensee has not been given the connection and still in connivance with the Junior Engineer of the respondent-licensee, supply has been connected and therefore, it would amount to theft of energy.

8. Learned advocate Ms. Bhaya submitted that Section 135 of the Act would be attracted. She referred to Section 135 of the Act and submitted that the consumer has to apply to the Special Court and such petition would not be maintainable.

9. Learned advocate Ms. Bhaya referred to the judgment reported in AIR 1985 SC 330 emphasized the observations made in paragraph 4 and 5 that as provided if the assessment officer came to the conclusion that the person is indulging unauthorized use of electricity, the provisional assessment could be made. She has also submitted that the Act provides for civil liability as well as criminal liability and as the amount has been paid, the criminal case is not registered. However, she pointedly referred to Section 153 of the Act, which provides for Special Courts and Section 154 of the Act, which refers to the procedure and power of the Special Court.

10. Learned advocate Ms. Bhaya emphasized that the civil

liability and submitted that the civil liability would include the loss or damage to the licensee due to the offence under Section 135 to 140 of the Act.

11. In view of this rival submissions it is required to be considered whether the present petition deserves consideration. The Electricity Act, 2003, has been enacted with specific purpose and objected with regard to the framework for electricity supply industry. The statements and objects refer to the fact that the electricity supply industry in India is governed by three status viz., Indian Electricity Act, 1910, Electricity Supply Code, 1948 and Electricity Regulatory Commission, 1998. The Indian Electricity Act, 1910 created a basic framework for electricity supply industry in India. Electricity Supply Code, 1948 states about creation of State Electricity Board with an idea that the State should shoulder the responsibility for arranging the supply of electricity in the State. However, as stated in detail with experience and regarding the purpose of the board, the policy has been floated to encourage the private sector for participating in generation, transmission and distribution of the electricity and the present Electricity Act, 2003 has been enacted as a part of development of the electricity industry with an idea of promoting competition and also protecting the

interest of the consumer with detailed procedure. The present Electricity Act, 2003 has no doubt the trappings of the civil liability as well as the criminal liability, which have been blended together. However, in the welfare State or in a democracy, the enactment made with an object of meeting the purpose or catering to the needs by way of distribution of electricity energy is a step forward for the development. However, the stringent provisions to stop any misuse, cannot be permitted to be an handle for abuse by the licensee or the respondent-company.

12. Therefore, in light of the background of the facts recorded herein, the relevant provisions are required to be considered. The issue, which has been sought to be joined that the petitioner cannot said to be a consumer as defined under Section 215 of the Act, requires closer scrutiny. In the facts of the case, the respondent-company as a licensee is also obliged with supply of the line subject to the procedure. The reliance placed on Annexure-1 to the affidavit-in-reply filed, refers to the procedure for grant of supply. It is not in dispute that the petitioner had made an application with the amount of Rs.58,980/- towards the estimate through the Junior Engineer. It is not in dispute that the Junior Engineer against whom the doubt has been raised that the petitioner in

connivance with such officer or the Junior Engineer, has taken the connection without following procedure and it could not be any justification for the action taken by the respondent. If the officer of the company has behaved in a manner, it will be open for the respondent to have the recourse, but it cannot be presumed that the person like petitioner, who is a consumer having made an application with the amount of estimate, has committed any theft of energy. When the application is made, the authorized officer of the respondent-licensee has visited the premises of the person like petitioner and has proceeded with the installation. Such presumption or assumption that till the procedure is completed any supply of connection is theft of energy, is misconceived. Assuming for the sake of argument that there is some laps at the most, it could lead to any irregularity as referred in Section 126 of the Act. The provisions of Section 126 of the Act referred to the assessment and part XII of the Act provide investigation and enforcement. It relates to the assessment regarding unauthorized use of electricity, which can be detected after inspection, and the procedure is prescribed as stated including the procedure under Section 126 (3), which is to be followed and thereafter, only provisional assessment could be made. Therefore, at the most it could be a matter of

inspection and examination under Section 126 of the Act. The issue is sought to be joined that the petitioner is not even consumer, the provision of Section 126 and Section 135 of the Act would be attracted. The part XIV of the Act refers to “offence and penalties”. Section 135 of the Act refers to “theft of electricity” provides for in case of such theft of electricity, petitioner shall be punishable imprisonment for a term which extend to three years or with fine or with both. However, it is subject to further proviso and procedure, it is required to be followed. Section 135(2) refers to inspection and search and Section 135(3) refers to manner in which the search shall be carried out and it will be as per the provisions of Code of Criminal Procedure, 1973.

13. Therefore, if there is any theft as sought to be canvassed, the procedure under Section 135 is required to be followed and admittedly no panchnama, no investigation, no search and recovery of any article or devise has been made. Therefore, when the officers of the respondent-licensee having failed to comply with the procedure and when there is no FIR even filed and still the submissions are made referring to Section 135 on a misconception, cannot be accepted. Further, it is admittedly stated even in the affidavit-in-reply that no FIR has been filed. Therefore, when there is no FIR

has been filed this provision and this chapter would not be attracted. Further, even Section 135 contemplates certain procedure by which sufficient care can be taken to safeguard the interest of the consumer and any abuse of the provision at the time of search or seizure or inspection. A judicial notice could be taken inspite of the judgment of the Courts including this Court reported in 2010 (3) GLR 1917 suggesting the manner in which the powers under Section 135 are abused without following any procedure and how the recovery of muddamal and the panchnama are made.

14. There cannot be any quarrel with the submissions, which have been made by learned advocate Ms. Bhaya that the provisions have been made to curb the theft or pilferage of energy. However, at the same time the committee of the parliament has considered the implementation part of the Act. Therefore, the balance has to be stuck between the right of an individual as well as right of the licensee, who are also obliged to comply with the requirement of the law. In the facts of the case, it is their own case that their own officer was not reliable, and the inference qua the petitioner that he has indulged in any irregularity hand-in-glove with the officer, would not justify. As stated above, even if there is any such irregularity at the most, it could have been a matter under

Section 126 of the Act and by no stretch of imagination, it could be a matter falling under Section 135 of the Act. Therefore, unless required ingredients of Section 135 are fulfilled, Section 135 of the Electricity Act would not be attracted. The statements of the petitioner, which are said to have been recorded has to be read in toto and it would not leave a scope for inference regarding the theft of energy. Therefore, when Section 135 cannot be attracted as discussed above, the supplementary bill issued without any basis cannot be sustained.

15. The another facet of the submission made by learned advocate Ms. Bhaya relying upon the judgment of the Hon'ble Apex Court reported in (1985) 1 SCC 260 with much emphasis that the petition under Article 226 may not be a short-circuit to avoid any statutory remedy, is thoroughly misconceived and deserves to be rejected. In the background of the facts as stated above, the High Court is obliged to consider the right of the persons or the citizens and also to protect against any abuse and misuse of the statutory powers. It clearly states that as the entire amount has been made with compounding charges, the FIR is not lodged and therefore, the petitioner would not have any remedy and he has filed representation, it has not been responded.

16. It is in these circumstances, such a submission cannot be accepted. The present petition deserves to be allowed. Prayer in terms of paragraph 16(A) deserves to be granted. The supplementary bill is hereby quashed and set aside and the compounding charges paid by the petitioner, who are ordered to be refunded to the petitioner with interest at the rate of 9% within a period of four weeks.

17. Therefore, the present petition is allowed. Rule is made absolute.

ABHISHEK

Sd/-
(RAJESH H.SHUKLA, J.)