

77744 IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 26.10.2018

Pronounced on : 31.12.2019

CORAM:

THE HON'BLE MR. JUSTICE R.SURESH KUMAR

W.P.No.32341 of 2003

and W.P.M.P.No.37262 of 2004

W.P.M.P.No.39215 of 2003 and W.V.M.P.No.2314 of 2003

M/s. Sai Krishna Alloys
P.B.No.750, 262/1B-3,
Manjakkalpatty Village,
Akkempet Post,
Sankari - 637 301.
Rep. by its Partner, N.Anbalagan
... Petitioner

-vs-

The Superintending Engineer (Metro)
Tamil Nadu Electricity Board,
Coimbatore Electricity Distribution Circle,
Coimbatore.

.... Respondent

Prayer: This Writ petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari calling for the records of the respondent in Lr.No.SE/CEDC/Metro/AEE.GI/F.DKT/D.230/2003, dated 28.10.2003 and quash the same.

For Petitioner : Mr.N.L.Rajah, Senior counsel
for Mr.C.S.Krishnamoorthy

For Respondent : Mr.C.Manishankar, AAG
Assisted by Mr.S.K.Raameshwar

O R D E R

The prayer sought for in this writ petition is for a writ of Certiorari, calling for the records of the respondent in Lr.No.SE/CEDC/Metro/AEE.GI/F.DKT/D.230/2003, dated 28.10.2003 and quash the same.

2. The petitioner, namely Sri Krishna Alloys, is an Industry involved in running Steel Re-Rolling / furnace unit in Sankari Taluk, Salem District. For the said industry, a High Tension Power supply was given in HTSC No.110 by the respondent Board. The said supply was given in the year 1992. While so, in the year 1997, all these kind of HT service connections were provided with electronic meters which replaced the then existing Electro mechanical meter, as that has become mandatory for all High Tension services.

3. This kind of electronic meters had the facilities to record technical details of the industry like power factor, voltage, current pilferage if any, interruption of supply etc.,

4. The last such meter reading prior to the issue in question was taken at the said HT service connection on 27.04.2003 and thereafter a surprise inspection seems to have been conducted on 06.05.2003 at the petitioner industry by the respondent Board officials and in both occasions, it seems that, there had been no adverse remarks against the petitioner industry.

5. While that being so, on 15.05.2003, there has been a surprise check up with officials of the respondent Board especially belonging to anti power theft squad, Coimbatore and they made a surprise inspection and allegedly found that, the electronic meter got tampered, accordingly, after having recorded or downloaded the relevant particulars from the electronic meter, the respondent Board officials found certain materials for theft of energy, accordingly, on the same day, an FIR was registered in FIR No.459 of 2003 before the concerned jurisdictional police station against the petitioner, i.e., one Anbalagan, who is the partner of the petitioner industry and one Pandian, another partner of the petitioner firm and one Thirunavukkarasu, electrician of the petitioner industry.

6. Pursuant to the said surprise inspection and registering of the FIR, the respondent Board issued a show cause notice to the petitioner industry on 27.05.2003 requiring the petitioner to attend the enquiry, which was fixed on 16.06.2003. On receipt of the show cause notice, the petitioner had requested to furnish the copies of the mahazar, working sheet and other relevant records. However, according to the petitioners, those documents were not furnished, still they fixed enquiry on 26.06.2003. On 26.06.2003, the petitioner again made a request to the respondent Board to furnish the relevant records such as billing data, load survey data for the period from 06.11.2002 to 15.05.2003 and also the tampered data etc. In this regard, except the mahazar copy, other records were not furnished and however the enquiry was fixed on 10.07.2003.

7. In that circumstances, according to the petitioner, since the relevant records were not furnished to the petitioners, without it the enquiry was fixed to be conducted, the petitioner filed a writ petition in W.P.No.19582 of 2003 before this Court, seeking for direction against the respondent Board for furnishing the relevant records and also to quash the impugned notice fixing the enquiry on 10.07.2003.

8. Even prior to the filing of W.P.No.19582 of 2003, the writ petitioner already approached this Court by filing W.P.No.15361 of 2001, where also a writ of mandamus was sought for directing the respondents, i.e., respondent Board to furnish Meter Reading Instrument (MRI) data downloaded in the computer of the vital agency / demand / tampering related information of HT Electricity Service connection bearing No.137 belonging to the petitioner.

9. In the said writ petition, this Court, by order, dated 29.01.2003, directed the respondent to furnish a copy of the Meter Reading Instrument (MRI) within one month. However it is the case of the petitioner at that time that, despite the time given by this Court, certain documents were not furnished by the respondent. Therefore the second writ petition, i.e., W.P.No.19582 of 2003 was filed. In the second writ petition, this Court by order, dated 13.08.2003 has passed the following order :

"7. In the circumstances, after considering the respective contentions, the writ petition is disposed of with the following directions :
The respondents shall furnish the following :

- a) Billing data, tampering data except Load Survey data.
- b) Instantaneous Power factor.
- c) Average power factor
- d) K.V.A - demand
- e) Cumulative M.D
- f) Total no. of Hour of supply available can be furnished in the Billing data.
- g) Available Load Survey Data (xerox copy)
- h) The CMRI details taken on 06.05.2003 and 15.05.2003 (xerox copy)

8. The learned standing counsel represents that the respondents will readily furnish the above items, namely a to h. Within 5 days from the date of the respondents furnishing the above details or copies or extracts, the petitioner may submit his objections or explanation as the case may be and thereafter, the respondents may fix the date for an enquiry and proceed with the assessment.

9. The writ petition is ordered in the above

terms. Consequently, W.P.M.P.No.24465 of 2003 is dismissed and W.V.M.P.No.1449 of 2003 is closed. The parties shall bear their respective costs."

10. It is the further case of the petitioner that, despite the said orders passed by this Court in the two round of litigations, still some of the documents have not been furnished, though majority of the documents have been furnished. In the meanwhile, on 10.10.2003, the respondent Board directed the petitioner to appear for enquiry which was fixed on 22.10.2003. In response to the said notice, the petitioner on 15.10.2003 has sent a detailed reply, where also the petitioner took the stand that, still some of the documents which are very crucial, according to the petitioner, had not been supplied to the petitioner. Therefore without supplying those documents, the enquiry cannot be conducted, hence, the petitioner sought for supplying of those documents.

11. In response to the said reply / request of the petitioner, dated 15.10.2003, the respondent Board on 17.10.2003 had stated that, what are all the documents directed to be given, as directed by the Court, had been given to the petitioner and therefore no more documents are available as sought for by the petitioner to grant or supply and therefore the respondent in the said communication, dated 17.10.2003 directed the petitioner to attend the enquiry which was fixed on 22.10.2003.

12. Still not satisfied with the said reply, the petitioner on 19.10.2003 has written a letter stating that, some of the documents which are very essential for facing the enquiry are still not provided to the petitioner, therefore the following request has been made by the petitioner :

"8. Therefore I once against request you to furnish

- a) All potential missing / power outages
- b) Individual potential missing and duration, this will indicate occurrence and re-set of abnormal conditions.
- c) Availability of power to the meter during the disputed period.
- d) Individual day load survey graph has not been furnished, only compressed graphs was given. This will not helpful to study the half hourly load pattern of the service.
- e) Current reversal phase wise.

Load survey data as directed by the Hon'ble High Court in order, dated 13582/03 and admission made by EE/Sankari/TNEB (item "g" in the High Court order)

CMRI reading and details taken 6.5.03 and 15.05.2003 (Item "h" in the High Court order)

9. After furnishing the above documents I will submit my reply. The High Court has directed to hold the enquiry after furnishing the above documents and getting explanation or objections to fix the enquiry. The High Court has not directed to "Complete the enquiry within a short period". On the other hand without furnishing the above documents the enquiry cannot be fixed."

13. On receipt of the said request-cum-reply dated 19.10.2003 of the petitioner, the respondent Board on 28.10.2003 had sent a communication stating that, the records as directed by the High Court have been furnished already to the petitioner and therefore on the enquiry date which has been refixed on 14.11.2003, it was directed the petitioner to attend, failing which the same would be conducted ex parte and decision would be made. Aggrieved over the said communication, dated 28.10.2003 made by the respondent requiring the petitioner to attend the enquiry, which was fixed on 14.11.2003, the petitioner once again approached this Court by filing the present writ petition with the prayer to quash the said communication, dated 28.10.2003.

14. This writ petition was filed on 11.11.2003 and on 13.11.2003 in the miscellaneous petition in W.P.M.P.No.39215 of 2003, this Court granted an interim order of stay. Subsequently, W.V.M.P.No.2314 of 2003 was filed by the respondent Board to vacate the interim stay and both petitions were heard by a learned Judge of this Court on 23.02.2004, where the learned Judge passed the following order :

"2. Mr.C.S.Krishnamurthi, learned counsel appearing for the respondent (WVMP.No.2314 of 2003) submits that he requested the petitioner-Board to furnish the below mentioned documents :

(i) Load survey for the petitioner's service connection

(ii) CMRI Reading

(iii) Tamper data

for the period from 06.11.2002 to 15.05.2003.

But Mr.N.Srinivasan, learned counsel appearing for the petitioner-Board submits that the above said documents are not available for the said period.

3. Learned counsel appearing for the respondent submits that a technical expert may be appointed, so that he can verify and

if the said documents are found, he can produce the same with the permission of the petitioner-Board, before this Court. He further submits that for that purpose, one Mr.Ranganathan, Retired Superintending Engineer, TNEB, No.156, 8th Street, 'F' Block, Anna Nagar East, Chennai-102 may be appointed.

4. Learned counsel appearing for the petitioner says that he has no objection to appoint Mr.Ranganathan for the said purpose.

5. Hence, Mr.Ranganathan, Retired Superintending Engineer, TNEB, No.156, 8th Street, 'F' Block, Anna Nagar East, Chennai-102 is appointed as Commissioner to verify as to whether the above said documents are available for the said period and if it is available, collect the details and submit a report within a period of four weeks from today. Office is directed to post W.P.No.32341 of 2003 along with these petitions after four weeks.

6. This order can be communicated to the Commissioner by the counsel for the respondent (WVMP No.2314 of 2003) and the expenses of the Commissioner shall also be born by the counsel for the respondent."

15. Pursuant to the said order passed by the learned Judge as referred to above, the technical person, one Mr.Ranganathan who was appointed as a Commissioner to file a report, had filed a report before this Court along with supporting affidavit in March 2004, where inter alia the Commissioner has stated the following under the heading "Conclusion" :

"2. Before giving a report of possible theft in High Tension service in the MRT wing will prepare a report after inspection and after study of down loaded meter particulars from the meters and if they are satisfied that there is a prima facie case then only report about theft has to given by MRT. But in this case meter was down loaded on 06.05.2003 and no such report was available in this records. Again there was inspection on 15.05.2003 the meter was down loaded, but without studying the tamper data, load survey data, Executive Engineer (MRT) has given a report that "it is possible to steal the energy with the existing arrangement". Even after studying down load parameters on 16.05.2003 the

Executive Engineer (Meter Relay Test) has not stated anything about the method of theft. With regard to the meters & metering arrangement only the Meter Relay Test wing are only competent to give a report or complaint about the nature of theft and they are play a vital role in detecting the theft, since the theft of energy means not recording the actual consumption. There is no such report or complaint by the Meter Relay Test wing in this case.

3. In this service last monthly reading was taken 27.04.2003 and bill was given and the same was paid well before 06.05.2003. There was inspection on 06.05.2003 and meter was down loaded and load survey data, tamper data were taken and they have not found any abnormality in the service and reported to the other Higher officials.

4. In this service no records for load survey data and tamper data for the period 06.11.2002 to 21.03.2003 are available. In the absence of any records it is not possible to come to the conclusion about theft in this service, especially after fixation of Electronic Meters and after fixation of Electronic Meter Theft of Energy can be proved scientifically.

I am herewith submitting the following copies given by the respondent, which has not been furnished to the consumer.

1. Billing Data taken on 06.05.2003 & 15.05.2003.
2. Load Survey Data, i.e., daily load graph taken on 06.05.2003 & 15.05.2003.
3. Tamper data taken on 06.05.2003 & 15.05.2003.

(A.RANGANATHAN) "

16. Thereafter this writ petition has not been decided and it has been kept pending for all these period. In the meanwhile, on behalf of the petitioner, an additional affidavit was filed on 02.10.2017, where the petitioner sought for moulding the relief in the writ petition to the extent that, the proceedings initiated by the respondent Electricity Board, under the provisions of the terms and conditions of the supply framed under Section 49 of the Electricity (Supply) Act, 1948, cannot be continued and that, the proceedings can only be had before the Special Court constituted under the Notification, dated

05.10.2006. The said Special Court was constituted under Section 153 of the Electricity Act, 2003 by issuing the following Notification :

"Notification issued under G.O.Ms.No.102, Energy (B.1) Department, dated 05.10.2006.
G.O.Ms.No.126, Energy (B1) Department, dated 14.12.2007 and
G.O.Ms.No.47, Energy (B1), 17th May 2010
The Government of Tamil Nadu with the concurrence of the High Court, Chennai, herein constitutes the Court of Sessions specified in column (3) of the Table below to be the special court for the purposes of providing speedy trial of offences under Sections 135 to 139 of the said Act within the jurisdiction comprising of the Sessions Division, specified in column (4) in respect of the districts specified in column (2) thereof."

17. In the present case, the jurisdiction shall be before the concerned Principal District and Sessions Judge, Salem, who shall determine the civil liability also, if any in terms of money, i.e., alleged loss or damage said to have been sustained by the Board on account of the alleged offence of theft of energy. Since this prayer to mould the relief was sought for by the petitioner, during the final hearing of this writ petition, detailed arguments were advanced by the learned Senior counsel appearing for the petitioner as well as the learned Additional Advocate General appearing for the respondent Board on the issue as to whether the civil liability, if any, arises on the part of the writ petitioner, has to be decided by the authority concerned under the Electricity Act, 1910 or by the Special Court constituted in this regard under the New Act, namely Electricity Act, 2003.

18. The said issue has arisen, in other words that has become necessitated to be adjudicated before this Court, because of the change in the legislation in the meanwhile.

19. In this context, it is to be noted that, the Electricity Act 2003 came into force from 10.06.2003, which repealed the then existing Electricity Laws, namely Electricity Act, 1910, Electricity (Supply) Act, 1948 and also the Electricity Regulatory Commissions Act, 1998.

20. The Electricity Act 2003, herein after would be called as 2003 Act and the Electricity Act, 1910 be called as 1910 Act.

21. In this context, it is the submission made by Mr.N.L.Rajah, learned Senior counsel appearing for the writ petitioner that, under Section 185 of the 2003 Act, the 1910 Act

as well as the Electricity (Supply) Act and Electricity Regulatory Commissions Act, 1998 were repealed. In view of the repeal, since the new Act 2003 came into effect from 10.06.2003, the criminal case which was pending before the concerned Magistrate Court has already been stand transferred to the Special Court, in view of the constitution of the Special Court under section 153 of the 2003 Act. Under Section 154(5) of the 2003 Act, it empowers the Special Court to determine the civil liability also against a consumer or a person in terms of money for theft of energy. Therefore the learned Senior counsel would contend that, in view of such repeal and the constitution of the Special Courts under the 2003 Act, where, in view of the specific provision, i.e., Section 154(5) of the 2003 Act, not only the criminal liability but also the civil liability of a consumer has to be decided only by the Special Court and not by any forum or authority or Court. Therefore if at all any civil liability on the part of the consumer, that is the writ petitioner herein, is to be decided or determined, the same shall be decided only by the Special Court constituted in this regard, to which the criminal case already been transferred by concerned Magistrate Court, where it was originally pending and therefore the respondent, who is the authority originally to conduct the enquiry against the petitioner to determine the civil liability, if any, has become functus officio or their power is denuded and therefore if at all this Court decides that, the enquiry to be conducted on the alleged theft of energy pursuant to the surprise inspection conducted by the respondent, dated 15.05.2003, the same shall be decided only by the Special Court and not by the respondent or any other authority under the old Act and therefore in this context, the learned Senior counsel would submit that, the moulded relief as has been sought for now by the petitioner may be considered by this Court.

22. The learned Senior counsel, in support of his case has relied upon the following Judgments :

1. Gujarat Urja Vikash Nigam Ltd., v. Essar Power Ltd., 2008 (4) CTC 539
2. A.R.Metallurgicals Private Limited v. The Chairman, Tamil Nadu Electricity Board and others, 2016 Writ L.R. 850
3. The Chairman, Tamil Nadu Electricity Board and others v. A.R.Metallurgicals Private Limited, 2016 Writ L.R. 851
4. M.Indra v. The Director, Institute of Mental Health, Kilpauk, Chennai, 2016 Writ L.R. 852
5. Delhi High Court Judgment in the matter of B.S.E.S.Rajdhani Power Ltd., v. P.P.Singh & Anr, dated 10.12.2014

23. Per contra, Mr.C.Manishankar, learned Additional Advocate General made submissions opposing the stand taken by the petitioner's side and would state that, even though the 2003 Act came into effect from 10.06.2003 and by virtue of that, the

1910 Act was repealed, notwithstanding the said repeal, the issue raised in this writ petition, i.e., the adjudication of civil liability of the writ petitioner / consumer, can very well be decided by the authority under the 1910 Act. In support of this contention, the learned Additional Advocate General further submitted that, the occurrence was taken place on 15.05.2003 when the respondent Board inspected the service connection / premises of the petitioner, where they found that, the electronic meter got tampered, thereby there had been a strong case on the part of the respondent Board that, there could have been theft of energy by the petitioner side and therefore, on that date, the criminal law was set in motion by filing an FIR, therefore what has been taken place in May 2003 cannot be brought forward to be decided under the 2003 Act, which admittedly came into effect only from June 2003.

24. The learned Additional Advocate General would also submit that, the Special Court was constituted as contemplated under Section 153 of the 2003 Act only from 2006 and therefore at the time of either occurrence, i.e., on 15.05.2003 and even subsequently when investigation went on by the concerned Investigating Agency on the criminal liability of the petitioner, either the 2003 Act did not come into force or the Special Court was not constituted.

25. Merely because the Special Court was constituted sometime in 2006 and because of litigation after litigation, the issue has been kept pending without making any progress to adjudicate the issue to fix the civil liability on the petitioner by the respondent Board or its authority, the petitioner cannot take advantage of the situation and make a plea that, as of now since the Special Court was constituted, the issue has to be referred to the Special Court to decide the civil liability as well as the criminal liability of the petitioner within the meaning of Section 154 of the 2003 Act.

26. The issue raised in this writ petition, as of now, as per the request made by the petitioner to give the moulded relief as to whether the civil liability on the petitioner is to be determined by the Special Court constituted under Section 153 of the 2003 Act or by the authority under the 1910 Act, can be no longer res integra in view of the number of decisions already been made by this Court as well as the Hon'ble Apex Court in this regard.

27. In support of the aforesaid submissions and the stand taken by the respondent Board, the learned Additional Advocate General has relied upon the following decisions :

1. N.S.Nayak & Sons v. State of Goa, (2003) 6 SCC 56
2. Gammon India Ltd., v. Special Chief Secretary, (2006) 3 SCC 354

3. Executive Engineer (Distribution), T.N.E.B. v. S.J.Gayas, (2008) 2 MLJ 812

4. H.P.State Electricity Regulatory Commission v. H.P.SEB, (2014) 5 SCC 219

5. K.M.Pareeth v. Kerala State Electricity Board & Ors. 2014 SCC Online Ker 28376

6. D.D.Dhorrairaj v. State, 2017 (4) CTC 846

28. I have given my anxious consideration to the rival submission made by the learned respective counsel for the parties as well as the materials placed before this Court for perusal.

29. In so far as the original issue raised in this writ petition that, the impugned order, dated 28.10.2003 whether to be sustained or not is concerned, the said impugned order was questioned in this writ petition on the ground that, despite the direction given by this Court to supply the materials relevant to the issue to the petitioner before commencing the enquiry, according to the petitioner, some of the documents yet to be supplied by the respondent Board and on that ground, the enquiry proposed as per the impugned order, dated 28.10.2003 cannot be permitted to go on and therefore on that ground, the petitioner wanted to quash the said impugned proceedings.

30. To decide the said issue, first let me dwell into the various proceedings and the Court orders pertaining to the issue till the filing of the present writ petition.

31. On 15.05.2003, surprise inspection was conducted by the respondent Board at the High Tension service connection of the petitioner industry and according to the respondent, they found some sabotage or tampering of the electronic meter, thereby there had been chance of theft of energy and accordingly, complaint was given to the concerned police, who registered the FIR against the petitioner, i.e., the partners of the petitioner as well as the electrician attached to the petitioner industry. Subsequently, at least three round of litigations went on, as the petitioner had filed writ petition in W.P.No.15361 of 2001, where a direction was given on 29.01.2003 by a learned Judge of this Court, directing the respondent Board to furnish the Meter Reading Instrument (MRI) within a period of one month. In this context, the document sought for by the petitioner, though was directed by the Court, was not furnished to them, they approached this Court second time by filing W.P.No.19582 of 2003, where this Court, by order, dated 13.08.2003 had given a set of directions, which has already been extracted herein above.

32. In the meanwhile, the petitioner also approached this Court by filing W.P.No.24848 of 2003 seeking a prayer to change

the enquiry officer or adjudicating authority and that was directed by this Court by giving a direction to the respondent Board to consider the request of the petitioner for change of the authority / enquiry officer.

33. A learned Judge of this Court in W.P.No.24848 of 2003 filed by the petitioner in this regard, had by his order, dated 05.09.2003 directed the respondent Board to consider the request of the petitioner for change of the enquiry officer / authority and it seems that, pursuant to the said order, the request of the petitioner also was accepted and the adjudicating authority originally was fixed has got changed to the present one.

34. Therefore these three writ petitions had already been filed by the petitioner for various relief, where the aforementioned or extracted orders have been passed by this Court.

35. Ultimately it is the case of the petitioner that, despite these directions had been given in separate writ petitions filed by the petitioners as referred to above, still full compliance had not been made by the respondent as full documents as sought for by the petitioner had not been furnished.

36. Therefore the enquiry notice given by the respondent, dated 10.10.2003 was responded by the petitioner on 15.10.2003 and that was also further responded by the respondent on 17.10.2003. Once again the stand was reiterated by the petitioner on 19.10.2003, where four or five documents mentioned in para 8 of the said letter, dated 19.10.2003, which has already been extracted herein above, were again sought for.

37. However the respondent by the impugned communication, dated 28.10.2003 has stated that, all those documents which are all available with the respondent had been served and the remaining documents sought for by the petitioner or still insisting by the petitioner, were not available with the respondent, therefore that could not be supplied and accordingly, they fixed the enquiry date on 14.11.2003. The said order was challenged in this writ petition, where an interim order of stay was granted by this Court and the same is still pending.

38. In so far as the non-supply of those documents are concerned, the writ court by order, dated 23.02.2004 appointed a technical man as Commissioner to file a report. Pursuant to which the Commissioner also had filed a report in March 2004 and the relevant portion of the technical man / Commissioner had already been extracted herein above.

39. After perusal of these documents, this Court is of the view that, majority of the documents as has been sought for by the petitioner and directed to be given by the orders of this Court had already been furnished to the petitioner.

40. If at all still more some documents are yet to be furnished is concerned, the report of the Technical man appointed by this Court has made it clear that, some of the documents / datas were not available with the respondent and in this context, para 2 to 4 of the report, which has already been extracted herein above, would speak for itself.

41. Therefore if at all any documents which were wanted by the petitioner or directed by this Court, had not been furnished to the petitioner, certainly those documents either may not be available with the respondent or those documents assuming if it is available, if had not been furnished to the petitioner, those documents cannot at any point of time be relied upon by the respondent during the adjudication process.

42. If at all any of the document sought for by the petitioner which has not been furnished to the petitioner on the ground that it is not available, the respondent is precluded from relying upon those documents at the time of enquiry / adjudication. Moreover by virtue of the non-filing or non-furnishing of those documents since the respondent loses its chance of relying upon those documents against the petitioner, certainly the petitioner can take advantage of the situation during the enquiry and therefore in this context, this Court is of the considered view that, no more direction is required to be issued by this Court to the respondent to furnish any other left out documents, except to observe that, what are all the documents so far have been supplied or furnished to the petitioner by the respondent, that alone shall be relied upon by the respondent during the enquiry and not beyond that.

43. Therefore on these grounds as has been urged by the petitioner originally in this writ petition, the impugned proceedings, dated 28.10.2003 cannot be assailed successfully by the petitioner.

44. But at the same time, since the enquiry date, i.e., 14.11.2003 has already been gone by, a fresh enquiry date has to be given by the respondent to enquire into the matter to fix the civil liability on the part of the petitioner.

45. However only at this juncture now the fresh issue or a main issue has been raised, which is purely a legal issue, by the petitioner as to whether the adjudication / enquiry should be made by the erstwhile authority under the 1910 Act or the Special Court constituted under Section 153 of the 2003 Act.

Therefore this issue has to be necessarily decided so as to enable the parties to adjudicate upon the issue before the concerned forum either before the authority under the 1910 Act or before the Special Court under the 2003 Act. Therefore this Court wants to dwell into these aspects and for the said purpose, Judgments referred to or relied upon by both the learned counsel appearing for the parties have been gone into and it can be pressed into service.

46. Before such exercise of ascertaining the legal issue, the relevant provisions of the Act, i.e., 2003 Act can be looked into.

47. Sections 153, 154 and 185 of the 2003 Act are the relevant provisions which are extracted hereunder :

Section 153. (Constitution of Special Courts): --- (1) The State Government may, for the purposes of providing speedy trial of offences referred to in 1[sections 135 to 140 and section 150], by notification in the Official Gazette, constitute as many Special Courts as may be necessary for such area or areas, as may be specified in the notification.

(2) A Special Court shall consist of a single Judge who shall be appointed by the State Government with the concurrence of the High Court.

(3) A person shall not be qualified for appointment as a Judge of a Special Court unless he was, immediately before such appointment, an Additional District and Sessions Judge.

(4) Where the office of the Judge of a Special Court is vacant, or such Judge is absent from the ordinary place of sitting of such Special Court, or he is incapacitated by illness or otherwise for the performance of his duties, any urgent business in the Special Court shall be disposed of -

(a) by a Judge, if any, exercising jurisdiction in the Special Court;

(b) where there is no such other Judge available, in accordance with the direction of District and Sessions Judge having jurisdiction over the ordinary place of sitting of Special Court, as notified under sub- section (1).

State Amendment - [Maharashtra] - In this

application to the State of Maharashtra, in S.153, after sub-S. (4), add the following sub-section, namely ; -

"(5) Where no Special Court for any area or areas has been constituted under sub-section (1), one or more Additional District and Sessions Judges, as may be designated by the High Court, for such area or areas, from time to time, shall exercise the powers of the Special Court under this Act and any Judge so designated shall be deemed to be a Special Court for the purpose of this Act" - Maharashtra Act 36 of 2005, S.3 (w.e.f. 23-6-2005).

Section 154. (Procedure and power of Special Court): --- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, every offence punishable under [2sections 135 to 140 and section 150] shall be triable only by the Special Court within whose jurisdiction such offence has been committed.

(2) Where it appears to any court in the course of any inquiry or trial that an offence punishable under sections 135 to 139 in respect of any offence that the case is one which is triable by a Special Court constituted under this Act for the area in which such case has arisen, it shall transfer such case to such Special Court, and thereupon such case shall be tried and disposed of by such Special Court in accordance with the provisions of this Act : Provided that it shall be lawful for such Special Court to act on the evidence, if any, recorded by any court in the case of presence of the accused before the transfer of the case to any Special Court :

Provided further that if such Special Court is of opinion that further examination, cross-examination and re-examination of any of the witnesses whose evidence has already been recorded, is required in the interest of justice, it may re-summon any such witness and after such further examination, cross-examination or re-examination, if any, as it may permit, the witness shall be discharged.

(3) The Special Court may, notwithstanding anything contained in subsection (1) of section 260 or section 262 of the Code of

Criminal Procedure, 1973, try the offence referred to in sections 135 to 140 and section 150 in a summary way in accordance with the procedure prescribed in the said Code and the provisions of sections 263 to 265 of the said Code shall, so far as may be, apply to such trial :

Provided that where in the course of a summary trial under this subsection, it appears to the Special Court that the nature of the case is such that it is undesirable to try such case in summary way, the Special Court shall recall any witness who may have been examined and proceed to re-hear the case in the manner provided by the provisions of the said Code for the trial of such offence:

Provided further that in the case of any conviction in a summary trial under this section, it shall be lawful for a Special Court to pass a sentence of imprisonment for a term not exceeding five years.

(4) A Special Court may, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to, any offence tender pardon to such person on condition of his making a full and true disclosure of the circumstances within his knowledge relating to the offence and to every other person concerned whether as principal or abettor in the commission thereof, and any pardon so tendered shall, for the purposes of section 308 of the Code of Criminal Procedure, 1973, be deemed to have been tendered under section 307 thereof.

(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.

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.

Section 185. (Repeal and saving): ---

(1) Save as otherwise provided in this Act, the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998 are hereby repealed.

(2) Notwithstanding such repeal,

(a) anything done or any action taken or purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any appointment, confirmation or declaration made or any licence, permission, authorisation or exemption granted or any document or instrument executed or any direction given under the repealed laws shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act.

(b) the provisions contained in sections 12 to 18 of the Indian Electricity Act, 1910 and rules made thereunder shall have effect until the rules under section 67 to 69 of this Act are made;

(c) the Indian Electricity Rules, 1956 made under section 37 of the Indian Electricity Act, 1910 as it stood before such repeal shall continue to be in force till the regulations under section 53 of this Act are made.

(d) all rules made under sub-section (1) of section 69 of the Electricity (Supply) Act, 1948 shall continue to have effect until

such rules are rescinded or modified, as the case may be;

(e) all directives issued, before the commencement of this Act, by a State Government under the enactments specified in the Schedule shall continue to apply for the period for which such directions were issued by the State Government.

(3) The provisions of the enactments specified in the Schedule, not inconsistent with the provisions of this Act, shall apply to the States in which such enactments are applicable.

(4) The Central Government may, as and when considered necessary, by notification, amend the Schedule.

(5) Save as otherwise provided in sub-section (2), the mention of particular matters in that section, shall not be held to prejudice or affect the general application of section 6 of the General Clauses Act, 1897, with regard to the effect of repeals."

48. Under the 2003 Act, in Section 185 under the heading "Repeal and Saving", Indian Electricity Act (1910 Act) as well as the Electricity (Supply) Act 1948 and the Electricity Regulatory Commissions Act, 1998 were repealed. Under the saving clause under Section 185(2)(a), it makes clear that, notwithstanding such repeal anything done or any action taken or purported to have been taken in so far as it is not inconsistent with the provisions of this Act be deemed to have been done or taken under the corresponding provisions of this Act.

49. It means notwithstanding the repeal, anything has already been done or any action taken, that shall be deemed to have been done under the 2003 Act, provided it should not be inconsistent with the provisions of the 2003 Act

50. In this context, it is the vehement contention of the learned Additional Advocate General that, the surprise inspection was conducted on 15.05.2003, on that date, on prima facie case, under which the respondent found some materials to conclude that, there has been a chance of theft of energy, criminal law was set in motion as FIR was filed on the same day before the concerned police station.

51. It is the further case of the respondent as projected by the learned Additional Advocate General that, immediately show cause notice was issued calling explanation from the petitioner and for conducting an enquiry to fix the civil liability on the

part of the petitioner in lieu of the loss sustained by the respondent due to the alleged theft of energy.

52. This occurrences had been taken place in the month of May 2003, where the 2003 Act has not come into force, as admittedly the 2003 Act came into force only from 02.06.2003. Pursuant to the FIR registered, the issue had been pending before the Magistrate Court concerned under the 1910 Act to take the trial to fix the criminal liability on the petitioner.

53. In so far as the civil liability is concerned, though various attempts had been made by the respondents to conduct the enquiry against the petitioner, each and every time litigations were generated as at least 3 writ petitions had been filed by the petitioner at various point of time and ultimately the impugned communication to fix the enquiry on 14.11.2003 was issued by the respondent on 28.10.2003. Even the said communication has been challenged in the present writ petition, as the said writ petition was filed on 11.11.2003, where interim order of stay was granted on 13.11.2003, subsequently though vacate stay petition was filed, this Court, by order dated 23.02.2004, appointed a technical person as Commissioner, who was directed to file a report, who also in pursuant of the said order, filed a report in March 2004, which is form part of the record of this case. Thereafter the issue had been pending for all these years.

54. All these developments have been taken place and thereafter only, in 2006, i.e., from 10.06.2006, the Special Court was constituted by the appropriate Government under Section 153 of the 2003 Act. Pursuant to the constitution of the Special Court in all the Revenue Districts, the Principal District and Sessions Judge / Court has been designated as Special Court under Section 153 of the 2003 Act.

55. In this context, it is to be noted that, under Section 154(5), the Special Court may determine the civil liability against the consumer or a person in terms of money for theft of energy, have been provided. Therefore originally Section 154(5) was given the liberty to the State Government to constitute the Special Court and once the Special Court is constituted, the civil liability also can be decided by the Special Court because the language employed in sub-section (5) in the opening line originally as it stood was as follows "The Special Court may determine the civil liability against a consumer". However the said word "Special Court may", has been amended by the Electricity Amendment Act, 2007 (Act 26 of 2007) with the following words "The Special Court shall" w.e.f 15.06.2007. Therefore between 2006 and 15.06.2007, Section 154(5) reads as "the Special Court may determine the civil liability against a

consumer". The legislature thereafter thought it fit to make an amendment to make it mandatory that, the civil liability also shall be decided by the Special Court, accordingly, the amendment taken place and the word "may" was replaced by the word "shall".

56. It is also a settled proposition in this regard that, the word "may", can presume shall, however the legislature thought it fit to give a meaning that, the word may in sub-section 5 originally employed before amendment has to be construed only as "may", and not "shall", that is the reason why the amendment was necessitated and the word "shall" replaced the earlier word "may", therefore the legislature thought it fit to make it as a mandatory one to decide the civil liability by the Special Court constituted under Section 153 and accordingly, the word "shall" was inserted only w.e.f. 15.06.2007.

57. In this context, some of the Judgments referred to by both sides can be looked into.

58. The learned Senior counsel for the petitioner relied upon a Judgment of the Hon'ble Apex Court in the matter of Gujarat Urja Nigam Ltd., v. Essar Power Ltd., reported in 2008 (4) CTC 539, where he relied upon the following passages :

"25. In our opinion, the submission of Mr.K.K.Venugopal has to be accepted.

26. It may be noted that Section 86(1)(f) of the Act of 2003 is a special provision for adjudication of disputes between the licensee and the generating companies. Such disputes can be adjudicated upon either by the State Commission or the person or persons to whom it is referred for arbitration. In our opinion the word 'and' in Section 86(1) (f) between the words 'generating companies' and 'to refer any dispute for arbitration' means 'or'. It is well settled that sometimes 'and' can mean 'or' and sometimes 'or' can mean 'and' (vide G.P.Singh's 'Principle of Statutory Interpretation' 9th Edition, 2004 page 404).

27. In our opinion in Section 86(1)(f) of the Electricity Act, 2003 the word 'and' between the words 'generating Companies' and the words 'refer any dispute' means 'or', otherwise it will lead to an anomalous situation because obviously the State Commission cannot both decide a dispute itself and also refer it to some Arbitrator.

Hence the word 'and' in Section 86(1)(f) means 'or'.

28. Section 86(1)(f) is a special provision and hence will override the general provision in Section 11 of the Arbitration and Conciliation Act, 1996 for arbitration of disputes between the licensee and generating Companies. It is well settled that the special law overrides the general law. Hence, in our opinion, Section 11 of the Arbitration and Conciliation Act, 1996 has not application to the question who can adjudicate / arbitrate disputes between licensees and generating Companies, and only Section 86(1)(f) shall apply in such a situation.

29. This is also evident from Section 158 of the Electricity Act, 2003 which has been quoted above. We may clarify that the agreement dated 30.05.1996 is not a part of the license of the licensee. An agreement is something prior to the issuance of a licence. Hence any provision for arbitration in the agreement cannot be deemed to be a provision for arbitration in the licence. Hence also it is the State Commission which alone has power to arbitrate / adjudicate the dispute either itself or by appointing an Arbitrator.

...

34. It is well settled that where a statute provides for a thing to be done in a particular manner, then it has to be done in that manner, and in no other manner, vide Chandra Kishore Jha v. Mahavir Prasad, AIR 1999 SC 3558 (para 12), Dhananjaya Reddy v. State of Karnataka, AIR 2001 SC 1512 (para 22), etc. Section 86(1)(f) provides a special manner of making references to an arbitrator in disputes between a licensee and a generating company. Hence by implication all other methods are barred."

59. In an unreported Judgment, in B.S.E.S.Rajdhani Power Ltd., v. P.P.Singh & Anr, the Delhi High Court has held as follows :

"154. Procedure and power of Special Court.--
.....

(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.

.....

Explanation.--For the purposes of this section, "civil liability" means loss or damage incurred by the Board of 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."

17. The Explanation in Section 154 provides the link between the exercise of the two jurisdictions of the Special Court, i.e., the criminal jurisdiction and the civil jurisdiction. The definition of "civil liability" in terms of Explanation is exclusive. It "means" loss or damage that is incurred "due to commission of an offence." The word "due to" necessarily requires the Special Court to first determine the criminal liability arising out of the commission of an offence punishable under Sections 135 to 140 and Section 150 of the Act.

18. If, in a given case, at the end of a trial, the Special Court comes to the conclusion that no offence is made out against the Respondents before it, the question of the Special Court thereafter determining the civil liability cannot arise. There is only one trial for determining both the criminal liability as well as the civil liability. It is on the same evidence that both liabilities have to be determined. In fact, it was fairly stated by Mr. Fernandes that the understanding of the provision by BRPL was such that in the event of a full-fledged trial resulting in acquittal of an accused, the question of requiring the Special Court to determine the civil

liability does not arise. Indeed, in such cases, where the acquittal orders have attained finality, BRPL had promptly obeyed the consequential orders requiring it to refund the amounts that may have been deposited when the proceedings were pending.

...

25. In view of the Explanation to Section 154 the submission of Mr. Fernandes that Section 154(5) is a stand-alone provision should fail. In other words, it is not possible to accept the submission that a Special Court can determine the civil liability "against a consumer or a person in terms of money for theft of energy" irrespective of there being a deemed acquittal of such consumer as a result of the compounding of the offence under Section 152 (3) of the Act. The Explanation is clear that determination of the civil liability has to necessarily be preceded by a positive determination of "the commission of the offence". In terms of the Explanation, the quantum of the civil liability has necessarily to be "loss or damage incurred..... due to the commission of an offence....." If, in fact, there is no determination of commission of an offence, it is not possible for the Special Court to proceed to determine the civil liability. In other words, a collective reading of Section 152, Section 154(5) and the Explanation to Section 154 reveals that the legislature did not intend that a different set of consequences should follow where acquittal was not at the end of a full-fledged criminal trial but on account of a "deemed acquittal" as a result of the compounding of the offence under Section 152 of the Act.

26. The view expressed by the Special Court that since it is a criminal court, it cannot determine the civil liability, is incorrect in view of the scheme of Section 154 of the Act. However, the conclusion in the impugned order of the Special Court that there cannot be any determination of the civil liability in the face of an acquittal as a result of compounding of the offence under Section 152

of the Act cannot be faulted. It is clarified that the orders passed by DC under Section 152 which have already attained finality will not be affected by the present order."

60. That apart, the learned Senior counsel for the petitioner has relied upon some of the orders made in Criminal Original Petitions, where the criminal trial pending before the concerned Magistrate court, in so far as the case of theft of energy under the 1910 Act stands transferred to the concerned Special Court in view of the constitution of the Special Court under Section 153 of the 2003 Act.

61. The learned Senior counsel would also rely upon the order passed by a learned Judge of this Court in Crl.O.P.No.10427 of 2005 and Crl.O.P.No.29370 of 2004, to submit that, two out of three accused shown in the FIR against whom the charges had been quashed by this Court in the said two orders and now the charge is pending only against the said Anbalagan who represent the present writ petition.

62. It was also pointed out by the learned Senior counsel for the petitioner that, as against those two orders made in Crl.O.Ps referred to above quashing the charge against the two out of three accused, the respondent Electricity Board preferred SLPs before the Supreme Court of India, where initially though notice was issued and subsequently those SLPs were dismissed, thereby the orders passed by this Court in the said Crl.Ops quashing the charge made against two out of three accused, have been confirmed.

63. However, Mr.C.Manishankar, learned Additional Advocate General appearing for the respondent Electricity Board has relied upon the following passage of the Judgment in Executive Engineer (Distribution), T.N.E.B v. S.J.Gayas reported in (2008) 2 MLJ 812.

"25. As has already been adverted to supra, serious allegations of theft of energy worth lakhs of rupees is made against the consumers in the cases on hand and only at their instance the proceedings were either stalled or dragged on till the new Act came into force. When, as per the directions of the legal fora, fresh assessment orders were issued following the procedure prevalent as on the date of detection of the alleged theft, the consumers have initiated these proceedings to further drag on the matters, with the sole aim of avoiding or delaying the

amounts assessed. It is also to be pointed out that by the new amendment Act of the year 2007, the tariff rates prevalent in the old Act are restored. Since the commission of offence, its detection and the commencement of the necessary proceedings all took place before the coming into force of 2003 Act, the consumers cannot claim any benefits during the interregnum period of 2003 Act and the 2007 Act. Therefore, the other argument advanced on the part of the consumers that only the Special Court is entitled to determine the civil liability against the consumer, as per Section 153(5) of the Electricity Act 2003 and hence, the assessment orders issued by the electricity Department shall be quashed on that ground also, does not arise for consideration in the cases on hand, in view of our specific finding that for the cases in hand, only the provisions of the old Act are applicable."

64. The learned Senior counsel for the petitioner also relied upon the following Judgment of the learned single Judge of this Court in A.R.Metallurgicals Private Limited v. The Chairman, Tamil Nadu Electricity Board and others, reported in 2016 WLR 850, wherein it has been held as follows :

"2. Now the learned Senior Counsel appearing for the petitioner would submit that in view of Sections 153 and 154 of the Indian Electricity Act of 2003 (hereinafter referred to as 'the Act'), the remedy for the petitioner is to file an appropriate appeal before the Special Court constituted under the Act. According to the learned Senior Counsel, the Writ Petition may be disposed of with liberty to the petitioner to prefer an appeal.

3. A perusal of Section 185 of the Act would go to show that any order passed under the Indian Electricity Act of 1910 would be construed to be an order made under the corresponding provision of the present Act. In view of the said provision, the order impugned in this Writ Petition should be considered to have been passed under the Act of 2003 and therefore, an appeal should lie before the Special Court. That is the view taken by a learned single judge of this Court

in W.P. No. 335 of 2002 dated 19.8.20099 (S. Navarathinam v. The Executive Engineer (Distribution), Tamil Nadu Electricity Board, Tiruchendur). The learned Senior counsel also relied on a judgment of the Honourable Supreme Court in Gujarat Urja Vikash Nigam Limited v. Essar Power Limited reported in 2008-4-CTC 539).

4. In view of the above legal position as held, the remedy for the petitioner at present is to file an appropriate appeal under Sections 153 and 154 of the Act before the Special Court."

65. The said decision was appealed by the respondent Electricity Board, where a Division Bench of this Court in 2016 WLR 851 has held as follows :

"In the issue of theft of electricity prior to the commencement of the Indian Electricity Act, 2003, the learned Single Judge, by the impugned order dated 09.08.2010, refused to entertain the writ petition of the respondent by delegating it to the appellate remedy. The only aspect is that keeping in mind the provisions of the new Act, the appellate remedy is stated to be before the Special Court constituted under the new Act.

2. In coming to the conclusion, the learned Single Judge has relied on the provision of Section 185 of the new Act stipulating that any order passed under the old Act would be construed to be an order made under the corresponding provision of the present Act. In fact, the matter in issue is really of procedural nature as to where the appeal would lie.

3. We regret that this issue has been hanging fire now for seven years and we find no reason to interfere with the impugned order.

4. The appeal is dismissed. No costs."

66. The learned Additional Advocate General has however relied upon heavily the decision of the learned Judge of this Court, where exactly the similar issue was confronted, in the matter of D.D.Dhorrairaj v. State reported in 2017 (4) CTC 846, where the learned Judge has in detail dealt with the exact issue now has been confronted before this Court and has given a quietus. For the sake of convenience and easy understanding, the relevant paras of the said decision of the learned Judge in

Dhorrairaaj's case is extracted hereunder :

"9. Assuming for a moment that in the year 2003, The Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948 are repealed by the Parliament simpliciter, then, by virtue of Section 6(e) of the General Clauses Act, the prosecution against the petitioner herein before the criminal Court and the determination of civil liability before the authorities will not stand extinguished, because, those actions are statutorily protected by Section 6 of the General Clauses Act and they have to be necessarily taken to their logical conclusions.

10. The question now is, whether the 2003 Act has denuded the aforesaid two jurisdictions, viz., the jurisdiction of the Magistrate to proceed with the trial and the jurisdiction of the authorities to determine the civil liability?

11. Section 185(5) of the 2003 Act which has been extracted above clearly saves Section 6 of the General Clauses Act and there is no evidence to infer that the 2003 Act has extinguished either the jurisdiction of the Magistrates for trial of the offence; or the jurisdiction of the authorities for determining the civil liability for the acts that have taken place prior to coming into force of the 2003 Act.

12. To sum up, from a bare reading of the aforesaid provisions of the old and the new Act, prosecutions under the old Act are statutorily protected and there is no ambiguity at all to come to a different conclusion as canvassed by the learned counsel for the petitioner. On the contrary, if his submission is accepted, Section 185(5) of the 2003 Act would become otiose.

13. Now coming to the various rulings, it is true that a learned Single Judge in A.R.Metallurgicals (supra) had taken a view that the civil liability under the old Act should be referred to the Special Court created under the new Act.

14. Indubitably, the new Act has repealed the 1910 Act and the 1948 Act and has vested the Special Court with the power to try the offences as well as determine the civil liability arising out of the offence committed by the consumer. When the 2003 Act came into force on 02.06.2003, Section 151 did not have any proviso. However, Sections 153 and 154 as they stand now, were available then too. The first and second provisos to Section 151 were introduced only with effect from 15.06.2007. Bearing this in mind, if the opening sentence of Section 153, viz., "the State Government may, for the purposes of providing speedy trial of offences referred to" is viewed, it is apparent that constitution of Special Courts is not mandatory. It was left to the discretion of the State Governments to constitute a Special Court taking into consideration the backlog of electricity theft cases in the State and the need for providing speedy trial of offences. The constitution of Special Courts have been left to the State Governments and therefore, the Parliament was aware that the moment the 2003 Act comes into force, the State Governments cannot be expected to constitute Special Courts overnight, because the constitution of a Court is not by a magic wand. It requires a discussion by the State Government with the High Court for making available Judicial Officers and the necessary infrastructure to man the Court. For instance, in the State of Tamil Nadu, the Special Courts under the 2003 Act were constituted with the concurrence of the High Court only in 2006 by G.O.Ms.No.102, Energy (B1) Department dated 05.10.2006. That is why Section 151 of 2003 Act used the expression "no Court shall take cognizance of". It does not say "the Special Court shall take cognizance of". This means that even in the absence of Special Courts, the Court empowered under Classification II of Schedule I of the Code of Criminal Procedure can take cognizance of the offence under the 2003 Act. But, one may, after reading Section 154, impulsively jump to a conclusion that the offence under the Act can be tried only by a

Special Court, notwithstanding the provisions of the Code of Criminal Procedure. A harmonious reading of Sections 151, 153 and 154 would lead to the conclusion that it is only when the State Government constitutes the Special Court, with the concurrence of the High Court, that all other Courts are denuded of the jurisdiction to try the offence. It is only then that the Special Court will have exclusive jurisdiction to try the offences under the 2003 Act.

15. It is also a fact that the order passed by the learned Single Judge has been confirmed by the Division Bench in the Chairman, Tamil Nadu Electricity Board vs. A.R.Metallurgicals Private Limited [2016 W.L.R. 851]. With due deference, however, neither the Single Judge nor the Division Bench, in A.R.Metallurgicals (supra), had noticed the earlier judgments of this Court rendered by two Single Judges in State (TNEB) rep. by Inspector of Police, Sethupavasathiram Police Station, Thanjavur [unreported order in CrI.R.C.(MD) No.108 of 2008 dated 09.06.201] and Hi-Tech Mineral Industries (supra). They have also missed the Division Bench judgment in the Executive Engineer (Distribution), Tamil Nadu Electricity Board, Thiruchendur vs. S.J.Gayas (supra).

16. Be that as it may, the issue has been settled beyond cavil by the judgment of the Supreme Court in Himachal Pradesh State Electricity Regulatory Commission and another vs. Himachal Pradesh State Electricity Board [(2014) 5 SCC 219]. The issue before the Supreme Court was whether the action taken by the Himachal Pradesh State Electricity Regulatory Commission under the repealed Electricity Regulation Commissions Act, 1998 should be transposed into the 2003 Enactment. In other words, under the 1998 Enactment, an appellate remedy was provided with the High Court, whereas, in the 2003 Enactment, the appellate remedy lay before the Appellate Tribunal created under Section 110. While dealing with this issue, the Supreme Court considered Section 185 of the 2003 Act and

has held as follows:

"25. At this stage, we may state with profit that it is a well-settled proposition of law that enactments dealing with substantive rights are primarily prospective unless they are expressly or by necessary intention or implication given retrospectivity. The aforesaid principle has full play when vested rights are affected. In the absence of any unequivocal expose, the piece of legislation must exposit adequate intendment of legislature to make the provision retrospective. As has been stated in various authorities referred to hereinabove, a right of appeal as well as forum is a vested right unless the said right is taken away by the legislature by an express provision in the statute by necessary intention.

28. We have referred to the aforesaid paragraphs as Mr Gupta has contended that when there is repeal of an enactment and substitution of new law, ordinarily the vested right of a forum has to perish. On reading of Section 185 of the 2003 Act in entirety, it is difficult to accept the submission that even if Section 6 of the General Clauses Act would apply, then also the same does not save the forum of appeal. We do not perceive any contrary intention that Section 6 of the General Clauses Act would not be applicable. It is also to be kept in mind that the distinction between what is and what is not a right by the provisions of Section 6 of the General Clauses Act is often one of great fitness. What is unaffected by the repeal of a statute is a right acquired or accrued under it and not a mere hope, or expectation of, or liberty to apply for, acquiring right (see M.S. Shivananda v. Karnataka SRTC [(1980) 1 SCC 149 : 1980 SCC (L&S) 131])." (emphasis supplied)

17. The following statement of law in the judgment of the Division Bench in A.R.Metallurgicals (supra) is clearly contrary to the above extracted observation of the Supreme Court in Himachal Pradesh

State Electricity Board.

"2. In coming to the conclusion, the learned Single Judge has relied on the provision of Section 185 of the new Act stipulating that any order passed under the old Act would be construed to be an order made under the corresponding provision of the present Act. In fact, the matter in issue is really of procedural nature as to where the appeal would lie."

(emphasis supplied)

In other words, when the Supreme Court says that the right of appeal as well as the forum of appeal is a vested right, the observation of the Division Bench that the "issue is really of procedural nature as to where the appeal would lie" cannot be reconciled. This Court is bound by the aforesaid judgment of the Supreme Court in Himachal Pradesh State Electricity Regulatory Commission (supra).

18. A comparison of Section 39(1) of 1910 Act with Section 135 (1) of the 2003 Act would show that those two provisions are not in pari materia. Of course, Section 41(1)(c) of the 1910 Act is in pari materia with 138 (1)(d) of the 2003 Act. Nevertheless, that cannot mean that for the offence committed by a person prior to coming into force of the 2003 Act, he should be prosecuted via the procedure laid down for prosecution of the offence under the 2003 Act. The forum cannot be automatically shifted in the absence of an intention to the contrary in the new Act. This can be viewed from another angle also. After a magisterial trial under the old Act, the accused will be entitled to an appeal before the Sessions Court and a further revision before the High Court. However, after a trial by a Special Court under the new Act, the accused will have a right of appeal only before the High Court under Section 156 of the 2003 Act. Thus, by shifting the trial from the Magistrate Court to the Special Court, the accused will be denied an opportunity to approach the High Court under its revisional jurisdiction, challenging the appellate order of the Sessions Judge, which opportunity cannot be

ordinarily denied by a judicial fiat either in exercise of powers under Section 407 or 482 Cr.P.C.

19. The reliance placed upon by the learned counsel for the petitioner on Section 154(2) of the 2003 Act requires expatiation. As explained earlier the moment the Parliament passed the 2003 Act, one cannot expect the State Government to constitute a Special Court immediately. As pointed above, though the 2003 Act came into force on 02.06.2003, the Special Courts in Tamil Nadu were constituted only on 05.10.2006. Section 154(2) is so designed that it is intended to adjudicate cases instituted in ordinary Courts in respect of offences committed after the coming into force of the 2003 Act, but before the constitution of Special Court by the State Government. To further elaborate, if an offence under the 2003 Act has been committed after coming into force of Act on 02.06.2003 and before the constitution of Special Court, the prosecution can be launched only before the jurisdictional Magistrate at the first instance. If the trial prolongs after the constitution of the Special Court, the trial Court is empowered under Section 154(2) to transfer the case to the Special Court. This provision is not intended to transfer all pending trials in respect of offences committed prior to coming into force of the 2003 Act, as that would militate against the provisions of Section 185(5) of the 2003 Act and Section 6(e) of the General Clauses Act and lead to ridiculous and ludicrous consequences. This power has to be exercised only by the trial Court and the superior Courts cannot order such transfer. The superior Court can only judicially review the order of the trial Court ordering or refusing to transfer the case to the Special Court."

67. On perusal of all these decisions referred to above, the following conclusive derivatives are emerged :

(a) Though the 1910 Act has got repealed by 2003 Act, by virtue of saving clause, especially by Section 185 of the 2003 Act,

whatever has been done or action taken, that has been saved as if that those actions had been taken under the 2003 Act, provided if the same is not inconsistent with the provisions of 2003 Act.

(b) The Section 153 of the 2003 Act enables the State Government to constitute Special Court, that was done in this State only in the year 2006 and from June 2006 onwards, Special Courts have come into effect.

(c) Under Section 154(5) originally the words employed was that, the Special Court "may" determine the civil liability, that situation was prevailing till 14.06.2007. However the Legislature, i.e., the Parliament thought it fit to make an amendment making it as mandatory that, the civil liability "shall", be decided only by the Special Court to be constituted in this regard under Section 153 of the 2003 Act.

(d) The position which was prevailed at the time of 2003 Act came into effect, that is, what has been done already under the 1910 Act, since has been saved, those issue has to be gone into or to be decided under 1910 Act itself as it has been specifically saved under Section 185(2) of the 2003 Act.

(e) Nevertheless in view of Section 6(e) of the General Clauses Act as has been held by the learned Judge in Dhorrairaj's case (cited supra), the position has been made very clear that the continuity of the criminal proceedings under the old Act is not affected by virtue of the repeal made under the 2003 Act.

68. In so far as it relates to the issue of as to whether the 2003 Act override the provisions of the Arbitration Act is concerned, the said dictum of the Hon'ble Apex Court in Gujarat Urja Vikash Nigam Ltd, case (cited supra) has declared that, the provision under the 2003 Act is a special provision which can always override the general provisions especially Section 11 of the Arbitration Act, 1996.

69. In Metallurgical's case (cited supra), the learned single Judge has decided as to where the appeal has to be preferred and accordingly under Sections 153 and 154 of the 2003 Act, the appeal shall be entertained by the Special Court. However the said Judgment which has been confirmed by the

Division Bench reported in 2016 WLR 851, may not advance the case of the writ petitioner to drive the prosecution including the decision of the civil liability before the Special Court constituted under Section 153 of the Act.

70. In view of Section 185 of the 2003 Act r/w Section 6(e) of the General Clauses Act and also by taking into account the amendment made in Section 154(5) of the 2003 Act to insert the word 'shall' instead of the word 'may' to make it mandatory that the civil liability also to be decided by the Special Court only w.e.f. 15.06.2007, the arguments advanced by the learned Senior counsel for the writ petitioner cannot be accepted by this Court.

71. Since the issue has been elaborately discussed and a quietus has been given in the afore referred decisions especially in the decision of Dhorrairaj's case by the learned Judge, I am in complete agreement with the said view taken by the learned Judge in the Dhorrairaj's case which has been extensively relied upon and extracted herein above.

72. The admitted fact was that, the occurrence taken place on 15.05.2003 was well before the 2003 Act came into effect. Even after the Act came in to effect, the Special Court was not immediately constituted and it was constituted only on 05.10.2006 as per G.O.Ms.No.102, Energy (B.1) Department. Up to 15.06.2007 the word 'may' alone was employed in Section 154(5) of the 2003 Act, thereby it can only be construed that, the determination of civil liability of the consumer can be undertaken by the Special Court, that does not mean that only the Special Court should undertake the adjudicative aspect to fix the civil liability of the consumer.

73. Moreover in this case, had the petitioner not approached this Court one after another by filing series of writ petitions, the issue could have been decided very many years back, i.e., well before the 2007, amendment made in 154(5) of the 2003 Act.

74. Moreover it is a settled proposition that, anything is done by making any amendment in the legislation or by bringing a new legislation repealing the erstwhile one, especially in the context of criminal liability, the same shall be only in prospective nature and not with retrospective effect. This issue also has been dealt with by the learned Judge in Dhorrairaj's case (cited supra).

75. Moreover once the civil liability is hanging in the said proceedings initiated by the respondent which included the impugned communication, dated 28.10.2003 fixing the enquiry on 14.11.2003, that liability to be resolved and decided only by

the authority under 1910 Act alone.

76. Merely because the criminal case pending before the Magistrate court was transferred to the Special Court, that would not ipso facto take away or abrogate the jurisdiction of the erstwhile authority under the 1910 Act, i.e., the respondent to decide the civil liability of the petitioner.

77. Moreover some of the Judgments cited by the petitioner side to state that, it become an automatic to transfer the criminal case pending before the Magistrate to the Special Court, on perusal, would reveal the fact that, all those cases were ordered to transfer the case to the Special Court on the consent given by the Public Prosecutor concerned in each of such case.

78. The very mandatory effect of deciding the civil liability of a consumer at the hands of the Special Court has come into effect only from 15.06.2007 by virtue of the amendment made in this regard by employing the word 'shall' instead of 'may' in Section 154(5) of the 2003 Act. The said position cannot be visualised prior to the said date. Therefore what has been taken place or occurred in May 2003 cannot be considered to be the occurrence to be decided by the Special Court as has been mandated under Section 154(5) of the Act by the word 'shall' in the said sub-section, merely because it came into effect by virtue of amendment only from 15.06.2007. Therefore the attempt made by the learned Senior counsel appearing for the petitioner that, once the 2003 Act came into effect and Sections 153 and 154 has been enacted and the Special Court was constituted in the year 2006 and the word 'shall' has been employed in Section 154(5) of the Act in 2007 as of now still the issue is pending, the same shall be decided by the Special Court, cannot be accepted by this Court.

79. All these aspects as has been mentioned above has been discussed and decided by the learned Judge in Dhorrairaaj's case (cited supra), which has given the complete answer to all these issues, where also all these decisions supported by both sides have been dealt with elaborately. I am in full agreement with the said view expressed by the learned Judge in the said Dhorrairaaj's case (cited supra) and that apart, the present conclusion arrived at in this case is also supported by specific reasons discussed above.

80. For all these reasons, this court feel that, the impugned order need not be quashed as the petitioner can take advantage of the situation if at all any documents still has not been furnished to the petitioner and moreover it has already been held in the first part of this order that, the respondent

during the enquiry shall not rely upon any document other than what has been supplied to the petitioner.

81. Also the enquiry as contemplated through the impugned order, which was originally contemplated in the notice for enquiry issued by the respondent on various dates in the year 2003, can very well be conducted or adjudicated to fix the civil liability on the petitioner, if any, pursuant to the charge of alleged theft of energy as allegedly found on 15.05.2003 during the surprise inspection conducted by the respondent Board and can very well be decided by the respondent's authority under the 1910 Act.

82. Accordingly, the petitioner is relegated to submit itself to the adjudicating / enquiry authority of the respondent Board under the 1910 Act and face the enquiry in accordance with law.

83. Resultantly, while disposing the writ petition, this Court passes the following orders :

- (i) that the impugned order is sustainable, as it does not require to be quashed.
- (ii) Since the enquiry date fixed as 14.11.2003 already been gone by, the new enquiry date can be decided by the respondent and due intimation to be communicated to the petitioner.
- (iii) The respondent while conducting the enquiry / adjudication shall not rely upon any documents other than what has been supplied to the petitioner.
- (iv) The respondent authority is very well entitled to or is having jurisdiction to conduct the enquiry or to adjudicate the issue to find out the civil liability on the petitioner, if any, on the alleged theft of energy case, dated 15.05.2003 and accordingly, such authority can proceed to determine the said issue in accordance with law.

With the aforesaid directions, this writ petition is

disposed of. However there shall be no order as to costs.
Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS-)

// True Copy//

Sub Assistant Registrar

tsvn

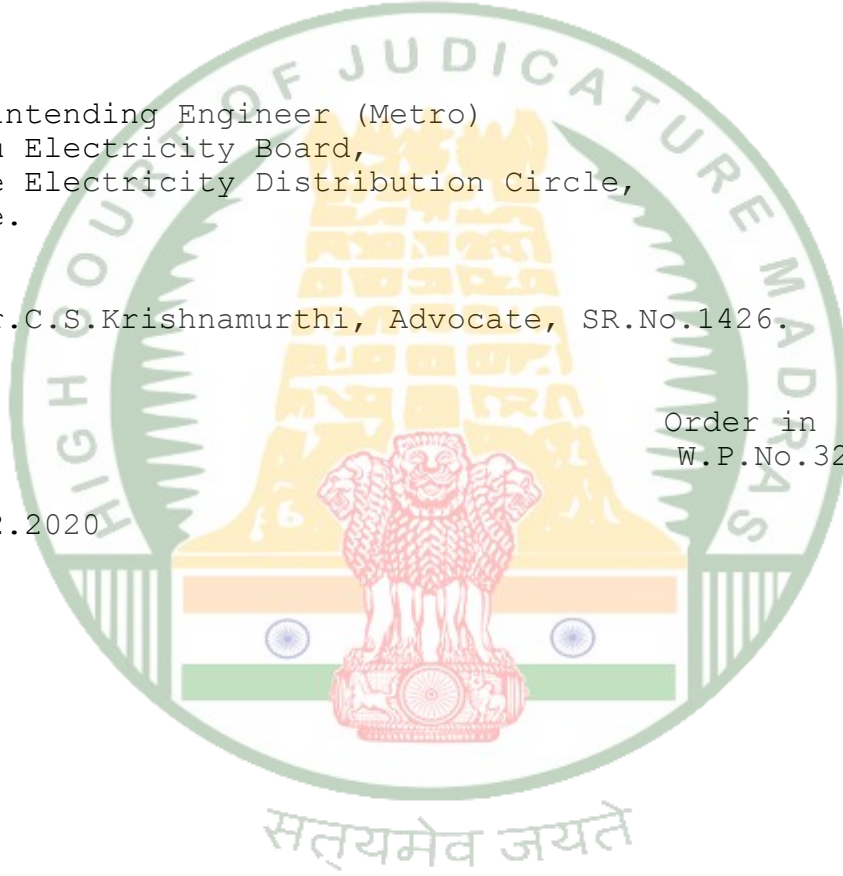
To

The Superintending Engineer (Metro)
Tamil Nadu Electricity Board,
Coimbatore Electricity Distribution Circle,
Coimbatore.

+1cc to Mr.C.S.Krishnamurthi, Advocate, SR.No.1426.

Order in
W.P.No.32341 of 2003

SSV(CO)
CSR: 10.02.2020



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