

**ORISSA ELECTRICITY REGULATORY COMMISSION
BIDYUT NIYAMAK BHAWAN
UNIT-VIII, BHUBANESWAR - 751 012

Present : Shri B.K. Das, Chairperson
Shri K.C. Badu, Member
Shri B.K. Misra, Member

Case No. 46/2011

M/s. Maruti Steel Moulding Pvt.Ltd	Petitioner
Vrs.		
CEO, SOUTHCO & Anr.	Respondents

In the matter of : Application u/s 142 of the Electricity Act, 2003.

For the Petitioner : Shri R.P. Mahapatra, Authorized representative.

For the Respondent : Shri A.K. Bohra, CEO (Comm.), Shri M.K. Das, GM(PT),
WESCO & Shri A.K. Patjoshi, AGM, RED, Rajganjpur.

ORDER

Date of Hearing: 30.6.2011

Date of Order: 02.7.2011

The complainant has filed the present case on 24.6.2011 for initiation of proceeding against the respondents under section 142 of the Electricity Act, 2003 (hereinafter "Act") on the ground that, the respondent has made willful contraventions of the provisions of the Act and the Rules and Regulations framed there under. He has prayed to admit the petition and declare the final order of assessment as illegal and to set aside the same. He has prayed for the following prayers:-

- i) To admit the petition and declare the final order of assessment as illegal and in contravention of the statute and to set aside the same.
- ii) Passing Ex-Parte order restraining the respondents from taking any coercive action like disconnection of power supply for non-payment of the demand, based on the illegal Final Order of assessment and

iii) Impose penalty under section 142 of the Act for contravention of the statute.

2. The case was posted on 28.6.2011 for hearing on the question of admission of the case, without serving notice on the respondent. Shri R.P. Mahapatra the authorized representative for the complainant moved the above petition and submitted that, the main issue raised in the present case is that, the Assessing Officer while making assessment under section 126 of the Act, has willfully violated the provision of the Act and the Regulation made there under as such both the provisional and final assessment made by the Assessing Officer are illegal and not sustainable and liable to be quashed. For such will full violation of the Act and regulation, Commission should admit the case under section 142 of then Act and grant the relief as prayed for.
3. The Commission heard the complainant on 28.6.2011 and perused the petition. During the course of hearing, the Commission observed and wanted to know from the authorized representative of the complainant that when the opportunity of appeal is available under section 127 of the Act against the allegedly wrong assessment made under section 126 of the Act and the Commission lacks jurisdiction to examine the legality or otherwise of the assessment made under Section 126, and quite unlike the High Court which can entertain a writ under Art. 226 of the Indian Constitution, the need for a complaint under Section 142 is not clear and, therefore, in the facts and circumstances of the case, can the Commission go into the facts as to whether the Assessment has been done in a lawful manner? Can the Commission actually sit as if on appeal, in determining violations of the Act or the Rules and Regulations under Section 142 of the Act? Hence in order to come to a definite conclusion regarding the admissibility of the petition under Section 142 of the Act, the Commission observed that it was necessary to hear the respondent before passing any order on his prayer. Shri Manas Kumar Das, General Manager (PT) Central Service Office WESCO, NESCO SOUTHCO, Bhubaneswar who was present during the hearing of another case on 28.6.2011 was directed to receive the copy of the petition filed by the complainant, from the office of the Commission and appear before Commission on 30.6.2011 for a hearing on the question of admission.

4. On a preliminary hearing on 28.6.2011 while fixing the date to 30.6.2022 for hearing, the Commission passed the following interim order on 29.6.2011 which is quoted below:-

“Pending the hearing on 30.6.2011, in view of the disconnection notice issued, as an interim measure we direct that disconnection of power supply shall not be effected to the premises of the consumer for non-payment of the assessed amount under the final assessment order made by the Assessing Officer till the disposal of the question of admission. However, we hereby make it clear that, the petitioner is also at liberty to challenge the final order of assessment made by the Assessing Officer before the Appellate Authority in accordance with the provision of the section 127 of the Act and our interim stay on disconnection of power supply shall not be taken as a plea or ground for not paying the 50% of the assessed amount which is a pre-requisite for filing an appeal within the prescribed time”.

5. The Respondents appeared in the case on 30.6.2011 and filed the reply on 30.6.2011 both on the question of maintainability of the present petition which has been filed under section 142 of the Act and as well as on merit of the case and the same was taken into record.
6. Shri Mahapatra submitting on behalf the complainant on the point of admissibility of the present application under section 142 Act, stated that, while making assessment under section 126 Act, the Assessing Officer, has not followed the mandatory provision of the Act and the regulation made there under. He submitted that, the Assessing Officer has made the following contravention of the Act for which the Commission in exercise of the power conferred under Section 142 of the Act should take action and allow the prayer as has been prayed for.

- (i) The premises of the consumer have not been inspected by the Assessing Officer by keeping himself present at the time of inspection as mentioned under sub-section 1 of Section 126 of the Act and there is no unauthorized use of electricity detected. Therefore the action of the Assessing Officer violates the section 126 (1) and 126(6)(b) of the Act. This has been decided by their Lordship of Delhi High Court in the reported case vide AIR 2007 Delhi,85 between Harvinder Motors Vrs. B.S.E.S Rajdhani Powers Limited wherein their Lordship have held that, an inspection should precede assessment.

- (ii) The Assessing Officer has committed illegality by taking the difference between “Audit Meter” and the “Billing Meter” of another consumer and the “Billing Meter” of the complainant for the purpose of making assessment under section 126 of the Act which is illegal. When the Act provides that the billing is to be done on the basis of either the billing meter or the check meter which is to be connected on the same core of CT or VT to which the main meter is connected and shall be used for accounting and billing in case of failure of main meter, the audit meter cannot be treated as billing meter. As such the Assessing Officer has violated the OERC Distribution (Conditions of Supply) Code 2004 as well as CEA (Installation and Operation of Meter) Regulations, 2006.
- (iii) When the metering installations of the consumer have been inspected at frequent intervals i.e. on 03.11.2010, 20.01.2011, 4.02.2011, 17.3.2011, 23.3.2011, 24.5.2011 and 25.5.2011 and no unauthorized use of electricity has been detected, the present assessment made by the Assessing Officer is prima facie illegal as it is not backed by any evidence as provided under 126 (6)(b) the Act. Hence the assessment being not supported by any evidence and backed by any law is to be treated ab-initio void.
- (iv) When in the final assessment order dated 30.5.2011 communicated by the Assessing Officer in his letter No.2582(5) dated 30.5.2011 which was received by the complainant on 02.6.2011, the Assessing Officer has specifically stated that, “ *if you wish , you may file appeal to the Appellate Authority under section 127 of the Electricity Act 2003 against this assessment order, within 30 days time, after depositing 50% of the assessed amount as per law*”, the Assessing Officer has committed wrong and illegality by including the said amount in the energy bill for the month of May, 2011 issued on 01.6.2011 wherein “Rebate Date” was indicated as 04.6.2011 and “Payment Date” was indicated as 16.6.2011 . Pursuant the said bill for the moth of May 2011, the

Respondent served the disconnection notice No. 2914 dated 17.6.2011 (Annexure-7) for an amount of Rs.1,21,40,530/- even though the final assessment was made to the tune of Rs.82,54,220/- and even when the Assessing Officer himself has informed that the complainant may challenge the same within 30 days of the said assessment order, he should have waited for 30 days time as has been allowed by him. Therefore the notice of disconnection is illegal and not sustainable under law.

7. The respondent in his reply submitted that, the assessing office while making assessment has not violated any Act or regulation made there under. Therefore the present petition filed under section 142 of the Act is not maintainable and liable to be rejected. He has made the following submission on the question of admissibility of the present petition.
- (i) When the present case pertains to assessment under Section 126 of the Act, and appeal lies only before the Appellate Authority under section 127, the present petition is not maintainable before the Commission.
 - (ii) Section 86 of the Electricity Act, specifies the power of the State Regulatory Commission and the said section does not envisage the power of the State Commission to adjudicate any dispute between a licensee and a consumer because sub-section (1)(f) of the said section stipulates the Commission to adjudicate upon the disputes between the Licensee and Generating Companies and to refer any dispute for arbitration
 - (iii) Under Section 94 of the Act, the Commission exercises the power of a civil court. Section 145 of the Act expressly debars the civil court from adjudicating or entertain any suit or proceeding pertaining to 126 of the Act. The Commission being a quasi judicial body and exercising the power of a civil court is not to entertain the present petition which pertains to the assessment made under section 126 of the Act and reject the same.
 - (iv) It further submitted that the respondents have not acted in contravention to provisions of Electricity Act, 2003, the OERC

Distribution (Condition of Supply) Code, 2004, the CEA (installation and operation of meters) Regulations, 2006 as alleged by the complainant.

- (v) The Section 126(1) of Electricity Act, 2003 authorises licensee to frame provisional assessment if after inspection of records maintained by any person the Assessing Officer comes to the conclusion that such person is indulging in unauthorized use of electricity. In the present case licensee has relied upon the dump data of meters installed at 33 KV sub-station and at the consumer's premises which shows difference in consumption to the tune of 1044838 units on different dates during the period from Sep,10 to April,11. The copy of dump data was provided to the consumer as evidence. Therefore on the basis of documents/records the assessment has been made by the Assessing Officer. So it has not violated 126(1) of the Act.
- (vi) The Respondent further submitted that, the definition given in Orissa Grid Code (OGC) regarding Audit Meter, does not mention that the Audit Meter is not a meter based on which billing to a consumer can be done. In fact the definition of audit meter appearing in the OGC has clearly mentioned that the *"Energy Accounting and Audit Meter means, meters used for accounting of electricity to various segments of electrical system so as to carry out further analysis to determine the consumption and loss of energy therein for a specified time period."* The complainant's contention that the Audit Meter is not a meter based on which billing to be done is not maintainable. The difference in units charged in the present case is on establishment of substantial difference in the units at different times recorded in the meters in conclusive to ascertain unauthorized use of supply. One of the most important functions of the "Audit Meter" is to ascertain losses in the system. Assessing Officer has reasonable doubt regarding the losses in the segment i.e. attributable to by pass of meter unauthorizedly by the consumer. As such the data of 'Audit Meter' is used by the Assessing Officer to ascertain losses in

the system and as per the best judgment of Assessing Officer , the losses in the system has recorded due to unauthorized use of electricity by the consumer. As such the data of Audit Meter is used by the Assessing Officer to ascertain losses in the system and as per the best judgment of Assessing Officer, the losses in the system has occurred due to unauthorized use of electricity by the consumer.

- (vii) It was reemphasized by the Respondent that the Assessing Officer has made the provisional assessment under section 126. The Complainant was asked to the file show cause against the provisional assessment. After hearing the complainant, the Assessing Officer has issued the final assessment order. Therefore, the Assessing Officer while making assessment has scrupulously followed all the procedure as has been provided under the Act. Further, under the Act, the Assessing Officer has been vested with the power of making provisional assessment which he has made to the best of his judgment. After giving the complainant personal hearing and considering the submission made by the complainant, the Assessing Officer has passed the final order of assessment. The Assessing Officer as such has discharged his function in accordance with law.

8. We have heard the parties and have given careful consideration to the forceful submission of both the complainant and the Respondent.

The issue before us is :

“Is this Complaint under section 142 of the Act admissible?”

Our answer to this question is in the negative.

The reasons are follows:

The Executive Engineer, RED Rajagangpur being the Assessing Officer, based on the available data from the Audit meter installed at 33 KV Kuarmunda Sub-station, the meters of M/s. Maa Jwalajee Reroller Pvt. Limited and the complainant (M/s. Maruti Moulding Pvt. Ltd.), arrived at a provisional assessment under Section 126 of the Act and communicated the same by Letter No. 2084(4) dated 30.4.2011 to the Complainant. While issuing the provisional assessment order No.2483, the consumer was asked to

file his objections within 7 days, to the said provisional assessment and appear before the Assessing Officer on 09.5.2011 for a personal hearing. The complainant/consumer had appeared before the Assessing Officer and filed his reply praying therein to withdraw the provisional assessment order as the same has not been done in accordance with the law. After considering the reply filed and the contentions made, the Assessing Officer by letter No. 2582 dated 30.5.2011 passed the final assessment order which also gave liberty to the Assessee that ***“if you wish, you may file appeal to the Appellate Authority under section 127 of the Electricity Act 2003 against this assessment order, within 30 days time, after depositing 50% of the assessed amount as per law”***. The respondent has included the final assessed amount of Rs.82,54,220/- in the bill for the month of 5/2011 and issued the disconnection notice vide No. 2914 dated 17.6.2011 under Section 56 of the Act. The complainant has come up before the Commission in the present application under Section 142 of the Act.

9. Section 127 of the Act provides for an appeal before the Appellate Authority against the assessment made under Section 126 of the Act. Section 127(1) says that, any person aggrieved by a final order made under section 126 may within thirty days of the said order prefer an appeal in such form, verified in such manner and be accompanied by such fee as may be specified by the State Commission. Section 127(2) of the Act provides that, no appeal against an order of assessment under sub-section (1) of Section 126 shall be entertained unless amount equal to half of the assessed amount is deposited. The law, therefore, mandates that if the consumer is aggrieved against the final assessment order of the Assessing Officer made under Section 126, he can have recourse to Section 127 of the Act. The Act nowhere provides that, Commission can adjudicate the correctness or legality of the final assessment order of the Assessing Officer made under Section 126 of the Act. When a specific remedy is available under Section 127, providing for a self contained machinery, no other machinery can entertain such dispute. More so the Commission cannot go into the merits of the assessment order made under Section 126 through a complaint under Section 142 of the Act, which in effect is the actual purport of the complaint. The complaint under Section 142 is not so much a complaint as an appeal in the guise of a complaint under Section

142. It would in fact be a travesty of the law if the provisions of Section 142 are to be used to negate the process laid down under Section 127 of the Act.

To illustrate the matter further, it may be useful to refer to a few instances as reported in different cases. The Hon'ble Apex Court while deciding a similar nature of dispute have held as follows:

“Constitution of India. Art.226. Alternative remedy. Maintainability of writ petition. Validity of sales tax assessment questioned. Special and adequate remedy existing under the relevant statute containing self contained machinery. Writ not maintainable.” **Titaghur Paper Mills Co. Ltd Vrs. State of Orissa and others [(1983) 2 Supreme Court Cases 433]**

The Calcutta High Court in the case of *Kuban Sk Vrs. State of West Bengal* and others reported in **AIR 2011(NOC) 124, Calcutta**, have held as follows:

“Constitution of India, Art.226. Section 126,127 of Electricity Act, 2003. Writ petition filed. Alternative remedy available to complainant against final assessment order under section 126 of the Act, 2003. No appeal filed by the complainant under section 127 of the Electricity Act, 2003. Petition filed for direction of reconnection of power supply. Not maintainable.

10. Even assuming that, the allegations of grave irregularities and violations of the Act are correct and that the assessment made by the Assessing Officer are not in accordance with law, even then, it cannot be said that, the Commission can arrogate to itself, powers and jurisdiction of the Appellate Authority through Section 142 of the Act, for the alleged violations of the provisions and procedures laid down under Section 126, while making an assessment for unauthorized use of electricity. Section 127 provides the requisite mechanism for relief and remedy for the alleged wrong assessment made under Section 126 of the Act. It is this section that must be used to redress the grievances of the complainant, rather than resorting to Section 142. When a specific and explicit provision has been made under Section 127 for relief against the assessment made under Section 126, invoking the provision of Section 142 for such relief will not only negate or defeat the provisions of an appeal under Section 127, but would also appear to be an abuse of the lawful procedures as laid down. In trying to remedy under Section 142, what should be remedied through the specific provisions of Section 127, is an attempt to circumvent Section 127 wherein relief can be sought, against the alleged wrong assessment made by the Assessing Officer under Section 126. Added to this and unlike the High Courts, the Commission does not have wide ranging

powers similar to their writ jurisdiction which may be invoked against wrongful use of the provisions of the Act.

11. Therefore, in view of the foregoing paras, when the Electricity Act provides specific remedy under Section 127, against the final assessment order made under Section 126 by the Assessing Officer, the Commission cannot act as an appellate authority by recourse to Section 142 of the Act and thereby clothing ourselves with the powers and jurisdiction prescribed in Section 127. The correctness of the order passed by the Assessing Officer must be determined by the Authority prescribed under Section 127 and whatever may have been the violations and wrongful use of the law, will have to be adjudicated by the prescribed Appellate Authority. The present petition filed before us under Section 142 of the Act, virtually is an appeal in disguise. We, therefore, refrain from giving any opinion on the merit of the case as those aspects will fall squarely within the province of the Appellate Authority.
12. As already enumerated in the foregoing discussions, the alleged acts of omission or commission, in the assessment order made under Section 126, cannot be given the colour of contravention of the provisions of the Electricity Act, 2003 and the Regulations framed there under and as such the present petition filed under Section 142 is not maintainable and, therefore, not admissible. The complaint stands dismissed.
13. Our interim order dated 29.6.2011 stands vacated. The Complainant and the Respondents are at liberty to take further action in accordance with the law.

Sd/-
(B.K. Misra)
Member

Sd/-
(K.C. Badu)
Member

Sd/-
(B. K. Das)
Chairperson