

**BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH**

JUDGMENT & ORDER (CAV)

Date : 04-04-2022

Heard Mr. S. K. Kejriwal, the learned counsel for the Petitioner and Mr. K. P. Pathak, the learned counsel appearing the Respondent Nos. 1 and 2.

2. The instant writ petition has been file challenging the inspection report dated 09/10/2018, the final assessment order dated 03/12/2018, the final assessment bill dated 06/12/2018, the disconnection notice dated 29/12/2018 as well as for a direction to refund all the amounts realized in excess from the petitioner on the basis of the CT ratio of 50/5 Amps. instead of 25/5 Amps i.e. by applying the wrong multiplier factor of Rs. 3000/- instead of Rs. 1500/- against the various monthly energy bills right from the date of installation of Meter No. APDC 9614 together with interest as per Section 62(6) of the Electricity Act, 2003.

3. The brief facts of the case is that the petitioner is a consumer of electricity having authorized connected load of 1105KW = 1300KVA and contracted demand of 1001 KVA. On 9/10/2018, a technical inspection of the petitioner's electrical installation was undertaken and after the inspection, an inspection report was prepared by the visiting APDCL officials showing that the petitioner's connected load at 1156 KW=1360 KVA and thus, as per the inspection report, there was an excess load of 51 KW. Thereupon, the Respondent No. 2 herein, who was the Area Manager/the

Assessing Officer issued a provisional assessment order dated 12/10/2018 along with the statement showing the reasons on the basis of the assessment in Format 15. Along with the provisional assessment order, inspection report in Format 14 and a provisional bill for Rs.35,23,421.58p. was also forwarded to the petitioner. The petitioner filed its objection on 19/10/2018 before the Assessing Officer i.e. the Respondent No. 2 herein.

4. At this stage, it may be relevant herein to mention that the petitioner received its monthly bill dated 08/11/2018 covering the period from 01/10/2018 to 31/10/2018 which includes the date of inspection dated 09/10/2018. As per the said bill, the maximum demand for the month recorded by the MDI Meter operating in the petitioner's industry was 795 KVA only i.e. even much below the contracted demand of 1001 KVA and the connected load of 1105 KW= 1300KVA. On the basis of the objection so filed by the petitioner, a hearing was taken up on 02/11/2018. Vide an order dated 03/12/2018, the Respondent No. 2 held that the petitioner was guilty of unauthorized use of electricity of 51 Kilowatt and accordingly issued the final assessment bill dated 06/12/2018 for an amount of Rs.3,11,888/-. The case of the petitioner primarily as could be seen from a perusal of the writ petition is that the inspection was not carried out by the Assessing Officer who had assessed and issued the provisional bill as well as the final assessment order dated 03/12/2018 and as such the said provisional assessment order as well as the final assessment order are in violation to Section 126 of the Electricity Act of 2003(for short the Act of 2003). It is

also the further case of the petitioner that admittedly a MDI Meter has been installed and working at the petitioner's industry. Referring to Clause 7.4.2 (iii) A (b) of the A.E.R.C. Electricity Supply Code, it is the case of the petitioner that in case of connection equipped with MDI Meter, no assessment shall be made for unauthorized extension over and above the connected load as per the agreement and penalty for drawal in excess of the contract demand shall be levied at 3 times the normal tariff for the portion of the demand exceeding the contracted demand. On the basis of the said Clause, it is the case of the petitioner that as admittedly in the petitioner's industry, a MDI Meter has been installed and working, the question of assessment as has been done by the provisional assessment order as well as the final assessment order could not have been done.

5. This Court vide an order dated 10/01/2019 issued notice making it returnable by 6 weeks and in the interim, the assessment order dated 03/12/2018 and the disconnection notice dated 29/12/2018 was suspended subject to deposit of 25% of the assessed dues within four weeks from the date of the said order. It was also made clear vide the said order that the deposit of the aforesaid amount shall be subject to the outcome of the writ petition.

6. The Respondent Nos. 1 and 2 jointly filed an affidavit-in-opposition raising the preliminary objection as regards the maintainability of the writ petition in view of availability of a statutory appellate remedy under Section 127 of the Act of 2003 against an order passed under the provisions of Section 126 of the Act. Apart from the

above, the said Respondents denied the allegations made in the writ petition and supported the issuance of the final assessment order, the final assessment bill as well as the disconnection notice which have been impugned in the instant proceedings. To the said affidavit in opposition filed by the Respondents No. 1 and 2, the petitioner had also filed an affidavit- in-reply.

7. The Respondents Nos. 1 and 2 on 8th of February, 2022 filed an Additional Affidavit. In the said additional affidavit, it was mentioned that vide notification dated 12/10/2006 issued by the Commissioner and Secretary, Power (Electricity) Department, Government of Assam in exercise of powers under Section 135(2) of the Act of 2003 certain designated Officers of the Assam State Electricity Board and its successive Companies were authorized to exercise the power of entry, search, seizure etc from detection and prevention of theft of electricity as provided under Section 135. It was specifically stated in the said additional affidavit that in exercise of such powers, the Deputy General Manager(Technical Inspection), APDCL upon receiving credible intelligence conducted a raid upon the premises of the petitioner on 09/10/2018 to determine if any theft of electricity was going on in the premises of the petitioner. However, upon inspection of the premises, in the presence of the representatives of the consumer, no theft was detected. But it was seen that since certain switches and equipments were found connected to APDCL mains at the time of joint and physical inspection, there was an excess load of 51 Kilowatt which amounted to unauthorized use of electricity. On the basis thereof a technical inspection report was prepared in presence of the representatives of the consumer and the same was forwarded to the Area Manager of the concerned Circle for necessary action. It was further mentioned that upon receipt of such

records of inspection, the Area Manager, IRCA II, APDCL proceeded in terms with the provisions of Section 126 of the Act of 2003. It was also stated that in order that the petitioner can get an opportunity to rebut the inspection report prepared by the DGM (TI), APDCL the details of the same were provided to the petitioner in Format 14. The said report clearly stated that the inspection have been conducted by the DGM (TI), APDCL. It was further mentioned in the said additional affidavit that as per Government Notification dated 29/11/2004 issued by the Commissioner and Secretary, Power (Electricity) Department, Government of Assam, all Officers of the Assam State Electricity Board or its successive Companies above the rank of the Executive Engineer or equivalent has been designated as the Assessing Officer in exercise of the powers under Section 126 (6) (a) of the Act of 2003. Upon receipt of such report, the Assessing Officer proceeded to exercise his powers under Section 126 of the Act of 2003 and prepared a provisional bill which was furnished to the petitioner and this exercise of the power as per the Respondents, there was no jurisdictional error committed by the Assessing Officer. Thereafter the petitioner was provided with an opportunity to file objection against the said provisional bill. The Petitioner filed objection whereupon after hearing the Petitioner, the final assessment bill was prepared. It was pleaded by way of the said Additional Affidavit that there was no requirement under law for the Assessing Officer to personally conduct the inspection in each and every case and if there is any minor deviation from the procedure laid down under the under the Assam Electricity Regulatory Commission (Electricity Supply Code) Regulation, 2017 (in short "the Supply Code") for booking a case for unauthorized use of electricity, the same would not render the entire assessment proceedings as void, more so, since no prejudice whatsoever has been caused to the petitioner because of the minor deviation from such procedure. It

was also mentioned that the Act of 2003 was enacted with an objective to prevent theft as well as unauthorized use of electricity and provisions relating to such theft should have a revenue focus. On the basis thereof, it was mentioned that when an officer, who is legitimately exercising powers under Section 135 of the Act of 2003 to identify theft of electricity but instead uncovers unauthorized use of electricity, the assessment proceedings under Section 126 of the Act should necessarily follow, particularly since there is no bar to the same under the Act of 2003.

8. To the said Additional Affidavit, an Additional Affidavit cum Affidavit in Reply was filed by the Petitioner. In the said Additional Affidavit cum Affidavit in Reply the petitioner contended that the said Additional Affidavit has been filed by the Respondents in order to cover up certain gaps which came into light during the course of the hearing of the instant case on 04/02/2022. It was further mentioned that since upon inspection, no theft was found and some excess connected load was allegedly detected, the technical inspection team prepared an inspection report and forwarded the same to the Area Manager of the concerned Circle for necessary action, who in turn issued a provisional assessment bill upon the petitioner's firm. The stand which has been taken presently in the additional affidavit by the Respondents was further countered by the petitioner in its additional affidavit cum affidavit in reply stating inter alia that the said stand was never there in the inspection report, Format 14, provisional assessment order as well as the final assessment order. It was further stated in the said Affidavit in Reply that at paragraph A (4) and A (6) of the final assessment order dated 03/12/2018, it was clearly stated by the Assessing Officer that the inspection and assessment was for the connected load of the installation and that the Assessing Officer had prepared a report giving details of the connected load and there is not even a whisper that

the inspection was based on credible intelligence to determine if there was any theft of electricity in as much as if the inspection and assessment was for the connected load of the installation, there cannot be any case of theft of electricity or raid under Section 135 of the Act of 2003. It was also mentioned in the said additional affidavit cum affidavit in reply that the APDCL being a distribution licensee of the electricity within the meaning of Clause 2.1 (m) of the A.E.R.C.(Procedure, Terms and Conditions for Granting Distribution License and other Related Matters), Regulation 2005 read with Section 14 of the Act of 2003 filed a Misc. Petition No. 12/2018 before the Assam State Electricity Regulatory Commission in terms with Clause 23.2 of the said Regulation of 2005 praying for review of Clause 7.4.1 of the Supply Code to do away with the mandatory presence of the Assessing Officer during inspection. The Assam State Electricity Regulatory Commission vide an order dated 18/9/2018 rejected the prayer for review of the Clause 7.4.1 and ordered that the Assessing Officer must be present during all inspection, because he is the one who will prepare the assessment bill. It is on the basis of the said order dated 18/9/2018 the petitioner had further contended in the said Affidavit in Reply that as per Section 126 of the Act of 2003 read with Clause 7.4.1 of the Supply Code, the Assessing Officer undertaking the inspection and issuing the assessment bill must be one person.

9. Mr. Kejriwal, the learned counsel for the Petitioner submitted as follows :-

- (i) It was submitted that as per Section 126 of the Act of 2003 the Assessing Officer has to be a part of the inspection team in order to exercise the powers under Section 126 of the Act of 2003. He submits that a further reading of Clause 7.4.1 and the order dated 18/09/2018 passed by the Assam Electricity Regulatory Commission, the Assessing Officer undertaking inspection and making the assessment must be one

person. On the basis of the said submission, the learned counsel appearing on behalf of the Petitioner submits that as in the instant case admittedly the person who had made the inspection and the person who made the assessment are two different persons, the learned counsel submits that the passing of the final assessment order dated 3/1/2018, the issuance of the assessment bill dated 06.12.2018 and the disconnection notice dated 29/12/2018 are without jurisdiction and in violation to Section 126 of the Act of 2003 read with the Supply Code for which the same are liable to be interfered with. Mr. Kejriwal had also in support of his contention relied upon the judgment of the Division Bench of the Calcutta High Court rendered in the case of **Narayan Chandra Kundu Vs. The State of West Bengal and Ors.** reported in **AIR 2007 Calcutta 298.**

- (ii) Mr. Kejriwal, the learned counsel further submitted that in terms with Clause 7.4.2 (III) (A) (a) of the Supply Code, assessment for excess connected load is possible in case of connection without MDI Meter or where the MDI Meter is tampered or bypassed. Admittedly in the case of the Petitioner, a MDI Meter is/was operating and there is no case of tampering or bypassing of the said Meter and therefore in terms with clause 7.4.2 (III) (A) (b) of the Supply Code, there was no scope for any assessment. Consequently the assessment proceedings undertaken by the Assessing Officer was in conflict with the Supply Code, and as such the Assessing Officer committed a jurisdictional error.
- (iii) As regards the stand taken by the Respondents to the effect that the Assessing Officer can provisionally assess to the best of his judgment on the basis of either an inspection of any place or premises or an inspection of the equipments, gadgets,

machines, device found connected or used or an inspection of the records maintained by any person and the said report prepared by the inspection team without the Assessing Officer can be taken for the purpose of carrying out the assessment proceedings, the learned counsel for the Petitioner submitted that the said contention on the face of it was misconceived. He submits that a perusal of Section 126 of the Act of 2003 would show that the term "records maintained by any person" has to be understood in the context in which the same is used. He further submits that a reading of Section 126 of the Act of 2003 in its entirety would show that the same is designed to undertake assessment proceedings against a consumer, who is found using electricity in an unauthorized manner or against a person, who has benefitted by such use. Section 126(1) of the Act of 2003 clearly provides that if after inspection of the records maintained by "any person", the Assessing Officer comes to the conclusion that "such person" is indulging in unauthorized use of electricity, he shall provisionally assess to the best of his judgment, the electricity charges payable by such person. The learned counsel further submits that the use of the word "such person" is in itself sufficient to conclude that while framing Section 126, the legislature in its wisdom clearly meant that if upon inspection of records maintained by a consumer, the Assessing Officer reaches a conclusion that such consumer was indulging in unauthorized use of electricity assessment could be done against that consumer and therefore the meaning of the term "records maintained by any person" has to be understood in the context of the record maintained by any person, who was found indulging in unauthorized use of electricity and the same cannot be equated with any technical inspection report prepared by the inspection team.

(iv) As regards the contention pertaining to non-maintainability of the writ petition, the learned counsel referring to the Supreme Court judgment rendered in the case of the **Executive Engineer and Anr. Vs. Sri Seetaram Rice Mill** reported in **(2012) 2 SCC 108**, submits that where cases involve a pure question of law or vires of an Act is challenged, this Court under Article 226 of the Constitution can entertain a writ or appropriate proceedings despite availability of an alternative remedy. He further submitted that when an order or proceedings are wholly without jurisdiction a proceedings under Article 226 of the Constitution can very well be entertained by this Court. He submitted that in the instant case the passing of the provisional assessment order dated 12/10/2018, the final assessment order dated 3/12/2018 and the subsequent issuance of the assessment bill dated 6/12/2018 and the disconnection notice dated 29/12/2018 by a person who was not a part of the inspection team is wholly without jurisdiction and consequently this Court would be within its powers to entertain the writ petition challenging the assessment order dated 3.12.2018 and the consequential action of issuance of the assessment bill dated 06.12.2018 and the disconnection notice dated 29/12/2018.

10. On the other hand, Mr. K.P. Pathak, the learned counsel appearing on behalf of the Respondents submitted as follows :-

(i) The instant writ petition is not maintainable in as much as against an order passed under Section 126 of the Act of 2003, an appeal lies under Section 127 of the said Act. He submitted that in various cases before this Court i.e. in the case of **Shiv Alloys Steel Vs. Assam Power Distribution Company Ltd and 2 Ors. (W.P. (C) No. 3427/2021)**, this Court vide order dated 12/08/2021 had refused to entertain the

writ petition on the ground of availability of an alternative remedy under Section 127 of the Act of 2003. He further submitted that the said judgment and order dated 12/08/2021 was carried in Appeal before the Division Bench of this Court in WA No. 286/2021 and the Division Bench of this Court have affirmed the said judgment holding inter alia that the Single Judge did not commit any jurisdictional error in not entertaining the writ petition on the ground of availability of the statutory remedy under Section 127 of the Act of 2003.

- (ii) He further submitted that the issue pertaining to non-compliance to Clause 7.4.2 (III) (A) (b) of the Supply Code can very well be raised before the Appellate Authority under Section 127 of the Act of 2003. He further submitted that in terms with Section 126 (6) (a) of the Act of 2003, the Governor of Assam had designated the Officers not below the rank of the Executive Engineer or posts equivalent thereto of the Assam State Electricity Board or Government Companies which may succeed in the electricity distribution and retail supply functions of the Board or its reorganization as the Assessing Officer for the circle or division or area as specified in the notification. On the basis thereof, he submits that the inspection which was carried out by the DGN(TI), APDCL is an Assessing Officer within the meaning of Section 126(6)(a) of the Act of 2003. He further submitted that in exercise of the powers under Section 135(2) of the Act of 2003 certain designated Officers of the Assam State Electricity Board and its successive Companies were authorized to exercise the power of entry,

search, seizure etc for detection and prevention of theft of electricity as provided under Section 135 of the Act of 2003. On the basis of credible intelligence a raid was conducted in the premise of the petitioner on 9/10/2018 to determine if any theft of electricity was going on in the said premises. However, upon inspection of the premises in the presence of the representatives of the consumer, no theft was detected but it was seen that since certain switches and equipments were connected to the APDCL mains at the time of joint and physical inspection and there was an excess load of 51 KW which amounted to "unauthorized use of electricity". The inspection report was prepared then and there in presence of the representatives of the petitioner and the copy of the same was served upon the representatives of the petitioner. On the basis of the said inspection report which would come within the meaning of "inspection of records maintained by any person", the provisional assessment was made by another Assessing Officer, i.e. the Area Manager IRCA-II, APDCL (LAR) and this very officer thereupon passed the final assessment order on 3/12/2018 and on the basis thereof had issued the assessment bill dated 6/12/2018 and a disconnection notice dated 29/12/2018. The learned counsel for the Respondents APDCL therefore submits that it is not necessary that it has to be the same Assessing Officer who had made the inspection to carry out the assessment. In that regard, he referred to a judgment of the Division Bench of the Bombay High Court in the case of **Reliance Energy Ltd. Vs. Chief**

Engineer (Electrical), PWD Department reported in **(2006) 6 M.H. L.J. 479** and submitted that a similar issue had arisen before the Bombay High Court wherein the Bombay High Court had held that considering that there are large numbers of consumers and the need for the generating companies to recover from the persons who make unauthorized use of electricity, Section 126 of the Act of 2003 was therefore read down to mean that the Assessing Officer need not restrict himself to the inspection carried out personally by the Assessing Officer as notified In the Explanation to Section 126 of the Act of 2003, but can rely on the record and inspection carried out by the Officer authorized under Section 135(2) of the Act in discharge of his duties.

- (iii) He submitted that in the present case admittedly the inspection was carried out by a person who was authorized and the assessment which was carried out was also by a person who was authorized but the only question which arises for consideration is as to whether the assessment has to be carried out only by the Assessing Officer who had made the inspection.
- (iv) He submitted that the inspection report prepared by the officials who were authorized cannot be said to be bad or illegal that too in a proceedings under Article 226 of the Constitution and as such the said inspection report can very well be taken into consideration by the another Assessing Officer while making the assessment in terms with Section 126 of the Act of 2003.
- (v) He further submitted that a perusal of the Supreme Court judgment in the case

of **Sri Seetaram Rice Mill** (supra), the Supreme Court had keeping in view the legislative scheme and the provisions of the Act of 2003, held that it would be appropriate to adopt a purposive construction and the purpose sought to be achieved in terms with the Act of 2003 is to ensure stoppage/misuse of authorized use of electricity as well as to ensure prevention of revenue loss.

11. I have heard the learned counsel for the parties and from the contention so made/raised by the parties, the following issues arise for consideration:

- (1) Whether the instant writ petition is maintainable in view of the alternative remedy available under Section 127 of the Act of 2003 ?
- (2) If the writ petition is maintainable, whether the Assessing Officer for the purpose of making assessment under Section 126 has to be the same person who had made inspection ?
- (3) Whether the assessment carried out by the Assessing Officer in respect to the instant case committed a jurisdictional error in view of the provisions of Clause 7.4.2 (III) A (b) ?

12. Let this Court take into consideration the first issue as to whether the instant writ petition would be maintainable or not. From a perusal of the writ petition and the contention so raised by the parties, a question of law arises as to whether in terms with Section 126 of the Act of 2003 the Assessing Officer who shall provisionally assess to the best of his judgment and thereupon pass the final assessment order has

to be present at the time of inspection and another question of law arises as to whether the Inspection Report prepared by another officer duly authorized can be the basis for making the provisional assessment as well as final assessment. At this stage, it would be relevant to refer to paragraphs 80,81, 82, 84, 85 and 86 of the judgment in the case of **Sri Seetaram Rice Mill** (supra) which are quoted herein below :

“80. It is a settled canon of law that the High Court would not normally interfere in exercise of its jurisdiction under Article 226 of the Constitution of India where statutory alternative remedy is available. It is equally settled that this canon of law is not free of exceptions. The courts, including this Court, have taken the view that the statutory remedy, if provided under a specific law, would impliedly oust the jurisdiction of the civil courts. The High Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India can entertain writ or appropriate proceedings despite availability of an alternative remedy. This jurisdiction, the High Court would exercise with some circumspection in exceptional cases, particularly, where the cases involve a pure question of law or vires of an Act are challenged. This class of cases we are mentioning by way of illustration and should not be understood to be an exhaustive exposition of law which, in our opinion, is neither practical nor possible to state with precision. The availability of alternative statutory or other remedy by itself may not operate as an absolute bar for exercise of jurisdiction by the courts. It will normally depend upon the facts and circumstances of a given case. The further question that would inevitably come up for consideration before the Court even in such cases would be as to what extent the jurisdiction has to be exercised.

81. Should the courts determine on merits of the case or should they preferably answer the preliminary issue or jurisdictional issue arising in the facts of the case and remit the matter for consideration on merits by the competent authority? Again, it is somewhat difficult to state with absolute clarity any principle governing such exercise of jurisdiction. It always will depend upon the facts of a given case. We are of the considered view that interest of administration of justice shall be better subserved if the cases of the present kind are heard by the courts only where they involve primary questions of jurisdiction or the matters which go to the very root of jurisdiction and where the authorities have acted beyond the provisions of the Act. However, it should only be for the specialised tribunal or the appellate authorities to examine the merits of assessment or even the factual matrix of the case.

82. It is argued and to some extent correctly that the High Court should not

*decline to exercise its jurisdiction merely for the reason that there is a statutory alternative remedy available even when the case falls in the abovestated class of cases. It is a settled principle that the courts/tribunal will not exercise jurisdiction in futility. The law will not itself attempt to do an act which would be vain, *lex nil frustra facit*, nor to enforce one which would be frivolous—*lex neminem cogit ad vana seu inutilia*—the law will not force anyone to do a thing vain and fruitless. In other words, if exercise of jurisdiction by the tribunal *ex facie* appears to be an exercise of jurisdiction in futility for any of the stated reasons, then it will be permissible for the High Court to interfere in exercise of its jurisdiction. This issue is no longer *res integra* and has been settled by a catena of judgments of this Court, which we find entirely unnecessary to refer to in detail. Suffice it to make a reference to the judgment of this Court in *Whirlpool Corpn. v. Registrar of Trade Marks* where this Court was concerned with the powers of the Registrar of Trade Marks and the Tribunal under the Trade and Merchandise Marks Act, 1958 and exercise of jurisdiction by the High Court in the face of availability of a remedy under the Act.*

84. *Even in *Union of India v. State of Haryana*²⁷ this Court took the view that the question raised was a legal one which required determination as to whether provision of telephone connections and instruments amounted to sale and why the Union of India should not be exempted from payment of sales tax under the respective statutes. Holding that the question was fundamental in character and need not even be put through the mill of statutory appeals in hierarchy, this Court remitted the matter to the High Court for determination of the questions of law involved in that case.*

85. *Applying these principles to the facts of the present case, it is obvious that no statutory appeal lay against a provisional order of assessment and the Respondents herein were required to file objections as contemplated under Section 126(3) of the 2003 Act. It was only when a final order of assessment was passed that the Respondents could prefer a statutory appeal which admittedly was not done in the case in hand.*

86. *In the present case, the High Court did not fall in error of jurisdiction in entertaining the writ petition but certainly failed to finally exercise the jurisdiction within the prescribed limitations of law for exercise of such jurisdiction. Keeping in view the functions and expertise of the specialised body constituted under the Act including the assessing officer, it would have been proper exercise of jurisdiction, if the High Court, upon entertaining and deciding the writ petition on a jurisdictional issue, would have remanded the matter to the competent authority for its adjudication on merits and in accordance with law. In the facts of the present case, the High Court should have answered the question of law relating to lack of jurisdiction and exercise of jurisdiction in futility without travelling into and determining the validity of the demand which squarely fell within the domain of the specialised authority. The High Court should have remanded the case to the assessing officer with a direction to the respondent to file its objections*

including non-applicability of the tariff before the assessing authority and for determination in accordance with law."

13. A perusal of the aforementioned paragraphs would show that the High Court could exercise with some circumspection in exceptional cases, particularly when the case involves a pure question of law or the vires of the Act is challenged. It was observed that when jurisdictional questions are raised the Court exercising jurisdiction under Article 226 of the Constitution of the Constitution ought to answer the question of law relating to lack of jurisdiction and exercising of jurisdiction in futility without travelling into and determining the validity of the demand which squarely fell within the domain of the specialized authority. In view of the said observations, this Court taking into consideration that the questions of law which have arisen herein in the instant matter would like to decide the said questions of law and thereupon if need be relegate the matter to be decided by the specialized authority under Section 127 of the Act of 2003.

14. The second issue so framed is as to whether the Assessing Officer who shall make the provisional assessment to the best of his judgment and thereupon also passed the final assessment order has to be a part of the inspection team. For the said purpose, it would be relevant to take note of Section 126 of the Act of 2003 which is quoted herein below :-

“Section 126: (Assessment): ---

- (1) *If on an inspection of any place or premises or after inspection of the equipments, gadgets, machines, devices found connected or used, or after inspection of records maintained by any person, the assessing officer comes to the conclusion that such person is indulging in unauthorized use of electricity, he shall provisionally assess to the best of his judgment the electricity charges*

payable by such person or by any other person benefited by such use.

- (2) *The order of provisional assessment shall be served upon the person in occupation or possession or in charge of the place or premises in such manner as may be prescribed.*
- (3) *The person, on whom an order has been served under sub- section (2) shall be entitled to file objections, if any, against the provisional assessment before the assessing officer, who shall, after affording a reasonable opportunity of hearing to such person, pass a final order of assessment within thirty days from the date of service of such order of provisional assessment of the electricity charges payable by such person.*
- (4). *Any person served with the order of provisional assessment, may, accept such assessment and deposit the assessed amount with the licensee within seven days of service of such provisional assessment order upon him:*
- (5). *If the assessing officer reaches to the conclusion that unauthorized use of electricity has taken place, the assessment shall be made for the entire period during which such unauthorized use of electricity has taken place and if, however, the period during which such unauthorized use of electricity has taken place cannot be ascertained, such period shall be limited to a period of twelve months immediately preceding the date of inspection.*
- (6). *The assessment under this section shall be made at a rate equal to twice the tariff rates applicable for the relevant category of services specified in sub-section (5)*

Explanation .—*For the purposes of this Section—*

- (a) *“**assessing officer**” means an officer of a State Government or Board or licensee, as the case may be, designated as such by the State Government;*
- (b) *“**unauthorized sue of electricity**” means the usage of electricity*
 - (i) *by any artificial means; or*
 - (ii) *by a means not authorized by the concerned person or authority or licensee ; or*
 - (iii) *through a tampered meter; or*
 - (iv) *for the purpose other than for which the usage of electricity was authorized; or*
 - (v) *for the premises or areas other than those for which the supply of electricity was authorized.”*

15. Before proceeding with the interpretation of Section 126, it would be relevant to examine how a provision like Section 126 of the Act of 2003 should be construed.

From the object and reasons of the Act of the 2003, it is apparent that "revenue focus" was one of the principal consideration that weighed with the legislature while enacting the said law. The regulatory regime under the Act of 2003 empowers the Commission to frame the tariff which shall be the very basis for raising a demand upon a consumer, depending upon the category to which such consumer belongs and the purpose for which the power is sanctioned to such consumer. The Act of 2003 establishes a regulatory regime for the generation and distribution of power, as well as deals with serious fiscal repercussions. The Supreme Court in the case of **Sri Seetaram Rice Mill** (supra) had observed that the two maxims which should be applied for interpretation of statutes like the Act of 2003 are (i) **ex visceribus actus** (construction of the Act as a whole) and (ii) **utres magis valeat quam pereat** (it is better to validate a thing than to invalidate it). It was also observed in the said judgment that it is a settled cannon of interpretative jurisprudence that the statute should be read as a whole or in other words, its different provisions may have to be construed together to make consistent construction of the whole statute relating to the subject matter. A construction which will improve the workability of the statute, to be more effective and purposive, should be preferred to any other interpretation which may lead to undesirable results. It was further observed that though fiscal and penal laws are normally construed strictly, but this Rule is not free of exceptions as in a given situation the Court may even in relation to penal statutes, decide that any narrow and pedantic, literal and lexical construction may not be given effect to, as the

law would have to be interpreted having regard to the subject matter of the offence and the object that the law seeks to achieve. The provisions of Section 126 read with Section 127 of the Act of 2003 in fact, becomes a Code in itself i.e. right from the initiation of the assessment proceedings on the basis of the inspection so conducted to the right to file an appeal before the Appellate Authority; all matters are squarely covered under these provisions. It specifically provides the method of computation of the amount that a consumer would be liable to pay for excessive consumption of electricity and for the manner of conducting assessment proceedings. In terms with the said judgment of the Supreme Court in **Sri Seetaram Rice Mill** (supra) Section 126 of the Act of 2003 has a purpose to achieve i.e. to put an implied restriction on such unauthorized consumption of electricity.

16. At this stage, it would also be relevant to take note of that from a reading of the various provisions of the Act of 2003, it would show that the power to inspect can be found in Section 135(2) as well as Section 163 of the said Act. Section 135(2) of the Act of 2003, empowers any officer of the licensee or supplier as the case may be authorized in that behalf by the State Government to enter, inspect etc. On the other hand, Section 163 of the Act of 2003 empowers a licensee or any person duly authorized by a license may at any reasonable time and informing the occupier of his intention, enter any premises to which electricity is, or has been, supplied by him, of any premises or land, under, over, along, across, in or upon which the electric supply lines or other works have been lawfully placed by him for the purpose of inspecting,

testing etc. Unlike Section 135(2) of the Act of 2003 which mandates such officer to be authorized by the State Government; the person inspecting under Section 163 of the Act of 2003 can be the licensee or any person duly authorized by a license. Taking into consideration that in the instant case, the inspection was carried out in terms of Section 135 (2) of the Act of 2003, it is relevant to quote the said sub-section as herein under.

“Section 135 (2)-- Any officer of the licensee or supplier as the case may be, authorized in this behalf by the State Government may --

- (a) enter, inspect, break open and search any place or premises in which he has reason to believe that electricity has been or is being used unauthorisedly ;*
- (b) search, seize and remove all such devices, instruments, wires and any other facilitators or articles which has been or is being used for unauthorized use of electricity;*
- (c) examine or seize any books of account or documents which in his opinion shall be useful for or relevant to any proceedings in respect of the offence under sub-section (1) and allow the person from whose custody such books of account or documents are seized to make copies thereof or take extracts therefrom in his presence.”*

17. From a conjoint reading of Section 126 and Section 135, it would be seen that Section 126 of the Act of 2003 is intended to cover the situation other than the situation specifically covered under Section 135 (1) of the Act of 2003. This aspect of the matter would be clear from a plain reading of both the said Sections. Section 135 of the Act of 2003 falls under the Chapter XV relating to “offences and penalties” and the title of the Section is “theft of electricity”. Section 135 opens with the words “whoever dishonestly”. Thus, any or all of the acts specified under Clauses (a) to (e) of Sub-Section(1) of Section 135 of the Act of 2003 so as to abstract or consume or

use electricity shall be punishable for an imprisonment for a term which may extend to 3 years or with fine or both. In contradiction to these provisions Section 126 of the Act of 2003 would be applicable to cases where there is no theft of electricity but the electricity is being consumed in violation of the terms and conditions of supply leading to malpractices which may squarely fall within the expression "unauthorized use of electricity". This assessment proceedings would commence on the basis of the inspection of the premises or equipments, gadgets, etc or after inspection of records and thereupon the Assessing Officer comes to a conclusion that such consumer is indulging in "unauthorized use of electricity"; then the Assessing Officer shall provisionally assess, to the best of his judgment, the electricity charges payable by such consumer, as well as pass a provisional assessment order in terms with Section 126 (2) of the Act of 2003. Section 126 (3) enables the person on whom an order has been served under Sub-Section (2) of Section 126 to file objections if any, against the provisional assessment before the Assessing Officer, who shall, after affording a reasonable opportunity of hearing to such person, pass a final order of assessment within 30 days from the date of service of such order of provisional assessment of the electricity charges payable by such person. Sub-Section (4) of Section 126 stipulates that any person served with the order of provisional assessment may accept such assessment and deposit the assessed amount with the licensee within 7 days of such provisional assessment order served upon him. The order of assessment under Section 126 and the period for which such order would be passed has to be in terms with Sub-

Sections (5) and (6) of Section 126 of the Act of 2003. The Explanation to Section 126 is of some significance, in as much as Explanation (a) to Section 126 defines the term "Assessing Officer" to mean an Officer of the State Government or the Board or the licensee, as the case may be, designated as such by the State Government. If this Court refers to the facts of the instant case, the State Government had issued a notification dated 29/11/2004 stating inter alia that the Governor of Assam was pleased to designate the Officers not below the rank of Executive Engineer or post equivalent thereto of the Assam State Electricity Board or the Government Companies which may succeed of the electricity distribution and retail supply functions of the Board on its re-organization as the Assessing Officers for the circle or division or area as specified in the notification. In other words, all Officers of the Respondent APDCL not below the rank of the Executive Engineer would come within the definition of "Assessing Officer" for the circle or division or area. Explanation (b) to Section 126 of the Act of 2003 defines the term "unauthorized use of electricity".

18. The Supreme Court in the case of **Sri Seetaram Rice Mill** (supra) had observed that the term "unauthorized use of electricity" cannot be restricted to the stated clauses under the Explanation(b) but has to be given a wider meaning so as to cover cases of violation of the terms and conditions of supply and the Regulations and the provisions of the Act of 2003 governing such supply. It has been further observed that the term "unauthorized use of electricity" itself is an expression which would, on its plain reading, take within its scope all the misuses of electricity or even

malpractices adopted while using electricity. In paragraph 67 of the said judgment, it was held that consumption of electricity in excess of the sanctioned/connected load shall be "unauthorized use of electricity" in terms with Section 126 of the Act of 2003 as overdrawal of electricity amounts to breach of the terms and conditions of the contract and the statutory conditions besides such overdrawal being prejudicial to the public at large, as it is likely to throw out of gear the entire supply system, undermining its efficiency, efficacy and even increasing voltage fluctuation. This aspect of the matter assumes importance as the allegation against the petitioner is unauthorized use of electricity above the connected load by 51 kilowatts.

19. At this stage, if this Court further takes into consideration the provisions of the Act of 2003, it would be seen from the above quoted provisions of Section 135(2) that in terms with Clause (a) the officer of the licensee or supplier upon being authorized may enter, inspect, break open and search any place or premises in which he has reasons to believe that electricity has been or is being used unauthorisedly. In terms with Clause (b) the said Officer has the power to search, seize and remove all such devices, instruments, wires and any other facilitators or articles which has been or is being used for unauthorized use of electricity and in terms with Clause (c) the said Officer has the power to examine or seize any books of account or documents which in his opinion shall be useful for or relevant to any proceedings in respect to the offence under Sub-Section (1) of Section 135 of the Act of 2003 and allows the person from whose custody such books of account or documents are seized to make copies

thereof or take extracts therefrom in his presence. As already aforesaid, vide a notification bearing No PEL.166/2003/Pt/155 dated 12/10/2006, the Governor of Assam had authorized the various Officers in the said notification to discharge the functions for the purpose of Sub-Section 135(2) of the Act of 2003 within their respective jurisdiction in the State of Assam with immediate effect. Relevant herein to mention that the DGM(TI), APDCL by the said notification dated 12/10/2006 is authorized to carry out the powers under Section 135(2) of the Act of 2003. It is also noteworthy to mention that the said Officer is an Officer who is above the rank of Executive Engineer and by virtue of the notification dated 29/11/2004, he would also come within the ambit of the "Assessing Officer" as defined in Explanation (a) to Section 126 of the Act of 2003.

20. In the backdrop of the same, it is relevant to take note as to whether any person designated in terms with Explanation (a) of Section 126 of the Act of 2003 has to make the inspection and thereupon the very person has to pass the provisional assessment order and thereafter a final assessment order in terms with Section 126(3) of the Act of 2003. Sub-Sections (1), (2), (3) and (5) of Section 126 refers to the powers and duties of an Assessing Officer. A reading of the said Sub-Sections reveal that the Assessing Officer is to provisionally assess to the best of his judgment and pass an order of provisional assessment; conduct a hearing upon the objections filed and pass the final order of assessment. The Assessing Officer shall do so on the basis of the materials which had come to light on an inspection of any place or premises or

after inspection of the equipments, gadgets, machines, devices found connected or used or after inspection of records maintained by any person.

21. At this stage, it is also pertinent to mention that the term "Assessing Officer" has not been defined in Section 2 of the Act of 2003 which provides the definition of the various terms but the term "Assessing Officer" has been specifically defined in Clause (a) to the Explanation to Section 126 of the Act of 2003. At the cost of prolixity, the term "Assessing Officer" has been defined as an officer of the State Government or Board or licensee, as the case may be, designated as such by the State Government.

22. Now at this stage, it is relevant to take into consideration the contention as submitted by the counsel of the Petitioner that the same Assessing Officer has to be a part of inspection team, make the provisional assessment and the final order of assessment. Explanation (a) to Section 126 does not confine the term "Assessing Officer" to a particular post to be held but it defines the term "Assessing Officer" to mean an Officer of the State Government or Board or Licensee, as the case may be, designated as such by the State Government. The notification dated 29/11/2004 whereby the State Government had designated the various officers not below the rank of Executive Engineer to be the Assessing Officer is not a subject matter of challenge before this Court. The Supreme Court had in **Sri Seetaram Rice Mill**(supra) held that a purposive construction as opposed to textual construction has to be given in view of the legislative scheme and the provisions of the Act of 2003. Furthermore, a

construction which will improve the workability of the statute to be more effective and purposive should be adopted to any other interpretation which may lead to undesirable result. If this Court has to accept that it is the same Assessing Officer who is a part of the inspection team, can make the provisional assessment and pass the final order of assessment, then it will result in a construction which would impair the workability of the statute. Just for example, if a particular Assessing Officer 'A' makes an inspection and thereupon passes the provisional assessment order but for some reason the said Assessing Officer 'A' on account of superannuation or transfer or death is not able to pass the final order of assessment then applying the contention made by the petitioner, it would result in unworkability of the provisions of Section 126 (3) of the Act of 2003 which empowers the Assessing Officer to make the final order of assessment. It is also relevant to take note of that the Respondent APDCL Authority has large numbers of consumers and restricting the Assessing Officer to be the same person who would make the inspection, the provisional assessment and final order of assessment, it would result in an unworkable situation thereby impairing the very object behind enactment of the Act of 2003. Considering the above, this Court is therefore of the opinion that an assessment can be made in terms with Section 126 of the Act of 2003 by the person who has been designated as such by the State Government in terms with Explanation (a) of Section 126 of the Act of 2003.

23. The said aspect of the matter can also be looked at from another angle. A reading of Section 126 (1) stipulates that if on an inspection of any place or premises

or after inspection of the equipments, gadgets, machines, devices found connected or used or after inspection of records maintained by any person, the Assessing Officer comes to the conclusion that such person is indulging in unauthorized use of electricity, he shall provisionally assess to the best of his judgment the electricity charges payable by such person or by any other person benefitted by such use. The materials to be used by the Assessing Officer is not limited only to inspection of records maintained by any person but also includes an inspection of any place or premises or after inspection of equipments, gadgets, machines, devices etc found connected or used. The three sub clauses of Sub-Section (2) of Section 135 of the Act of 2003 clearly shows that an officer authorized by the State Government can enter, inspect, search, seize etc and on the basis of the exercise of the powers under Section 135(2) of the Act of 2003. The materials which would come to light can be used for the purpose of provisional assessment or final assessment by the Assessing Officer as a conjoint reading of Section 135(2) and Section 126(1) of the Act of 2003 nowhere prohibits use of such materials for the purpose of provisional assessment or final assessment. Accordingly the Assessing Officer for the purpose of carrying out the provisional assessment as well as the final assessment can use such materials which would come into light on the basis of the inspection carried out under Section 135 (2) of the Act of 2003. The necessary corollary therefore follows that the Assessing Officer for making the provisional assessment or the final assessment need not be a part of the inspection team as the Assessing Officer can carry out the proceedings under

Section 126 of the Act of 2003 on the basis of such materials. As already stated, the Act has to be read as a whole to give effect to the legislative intent and this Court is of the opinion that the materials which had come to light by virtue of exercise of powers under Section 135(2) of the Act of 2003 can be used for the purpose of assessment under Section 126 of the Act of 2003. It is however, clarified that when such materials are used for the purpose of carrying out the provisional assessment, the consumer shall be entitled to challenge the veracity of the materials in the objection filed under Section 126(3) of the Act of 2003 and for the purpose may place evidence before the Assessing Officer countering such materials.

24. Further to the above, it is also pertinent to note that Explanation (a) to Section 126 of the Act of 2003 defines the term "Assessing Officer" to mean an officer designated by the State Government whereas Section 135 (2) empowers only those officers who have been authorized by the State Government. In certain circumstances, it may result that the person who had been designated as an Assessing Officer may not be authorized to make the inspection under Section 135 (2) and vice versa. To limit the operation of Section 126 of the Act of 2003 by holding that the Assessing Officer has to be present during the inspection in order to pass the assessment order, that too when Section 126 does not specifically states so, would amount to adding words to the legislation which the legislature never intended. Apart from that, to limit the Assessing Officer to make an assessment only on the basis of inspection being carried out by the Assessing Officer himself would make the provision of Section 126

of the Act of 2003 highly ineffectual or unworkable which would be going against the legislature intent as already noted herein above.

25. At this stage, it may also be relevant herein to take note of the order dated 18/9/2018 of the Assam Electricity Regulatory Commission wherein it has been held that the Assessing Officer must be present during all inspection because he is the one who will prepare the assessment bill. Relying upon the said order passed by the Assam Electricity Regulatory Commission, the learned counsel for the petitioner submitted that in terms with A.E.R.C. (Procedure, Terns and Conditions for Granting Distribution License and other Related Matters), Regulation, 2005, the Respondent APDCL is bound by the order dated 18/9/2018. It is no longer res integra that an interpretation given by a statutory authority would not bind this Court with the interpretation so given if the same is not found to be consistent with the provisions of the Act of 2003 as well as the objects and reasons. Furthermore a perusal of Section 177 of the Act of 2003 stipulates that the Regulation to be framed has to be consistent with the Act, Rules and generally to carry out the provisions of the Act.

26. On the basis of the above analysis, this Court arrives at the following conclusions in respect to the second issue.

(A) Section 126 of the Act of 2003 empowers the Assessing Officer as designated in terms with Explanation (a) to Section 126 of the Act of 2003 to carry out the provisional assessment to the best of his judgment and thereupon to pass the order of provisional assessment, to hear the objections if so filed and to pass

the final order of assessment.

- (B) The Assessing Officer in order to make the provisional assessment to the best of his judgment shall take into consideration the materials which has come into light on the basis of an inspection of any place or premises **or** after inspection of the equipments, gadgets, machines, devices found connected or used **or** after inspection or records maintained by any person. The materials can be on the basis of such inspection, search, seizure etc. carried out by officers duly authorized under Section 135(2) of the Act of 2003.
- (C) The consumer shall be entitled to challenge the veracity of such materials on the basis of which provisional assessment was made in the objection to be filed under Section 126(3) of the Act of 2003 apart from other grounds so raised. The consumer shall also be entitled to place evidence countering such materials on the basis of which provisional assessment has been made.

27. Now coming to the third question as to whether the Assessing Officer committed a jurisdictional error in carrying out the assessment in violation of Clause 7.4.2 (iii) A (b) on the ground that the petitioner had a MDI Meter which was neither tampered nor bypass. This matter pertains to adjudication of facts and this Court is of the opinion that such adjudication of facts should be left to the decision of specialized Tribunals as constituted under Section 127 of the Act of 2003.

28. In view of the findings and observations made herein above, this Court is of the opinion that having decided the question of law, the conclusions of which have been

specifically mentioned in paragraph 26 herein above, this Court deems it proper to relegate the petitioner to seek ventilation of its grievances under Section 127 of the Act of 2003 by filing an appeal if it so desires and thereafter wherein the petitioner shall be entitled to raise all such points as regards the non-compliance to the Supply Code including violation to Clause 7.4.2 (III) A (b) of the Supply Code. Taking into consideration that the petitioner had filed the writ petition challenging the assessment order and the lis therein was pending, this Court further deems it proper to grant the petitioner an additional 30 days from the date of the instant judgment to file an appeal in terms with Section 127 of the Act of 2003.

29. With the above observations and directions, the petition stands disposed. No costs.

JUDGE

Comparing Assistant