

**(2012) 08 CAL CK 0018**

**Calcutta High Court**

**Case No:** W. P. No. 2281 (W) of 2006

Gopal Khatick

APPELLANT

Vs

Chairman, CESC Limited and  
Others

RESPONDENT

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**Date of Decision:** Aug. 16, 2012

**Acts Referred:**

- Constitution of India, 1950 - Article 226
- Electricity Act, 2003 - Section 126, 126(1), 127, 135

**Citation:** AIR 2013 Cal 11

**Hon'ble Judges:** Jayanta Kumar Biswas, J

**Bench:** Single Bench

**Advocate:** Kishore Mukherjee, for the Appellant; Om Narayan Rai, for CESC, for the Respondent

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### **Judgement**

@JUDGMENTTAG-ORDER

Jayanta Kumar Biswas, J.

The petitioner in this WP under Art. 226 dated January 24, 2006 is seeking the following principal relief:-

(a) Writ of Mandamus commanding the respondent authorities not to effect or further effect the order dated 1-9-2005 passed by the Assessing Officer being the Respondent No. 5 as well as order dated 6-1-2006 passed by the Deputy General Manager as an Appellate Authority being the respondent No. 4 and cancel and/or set aside the same.

As a licensee under the Electricity Act, 2003 CESC was supplying electricity to one Sri Madan M. Khatick at 104 Christopher Road, Kolkata - 700 046. An authorised officer of CESC gave him a disconnection notice dated August 16, 2005 alleging that inspection of the service installation and metering system in the premises on August

16, 2005 revealed unauthorised use of electricity. It was mentioned that someone had tampered with the body seal and T.P. seal.

2. Saying that after perusing the records available with him, he had come to the conclusion that Madan had been indulging in unauthorised use of electricity, an assessing officer of CESC passed an order of provisional assessment dated August 16, 2005. The order was passed under S. 126(1) of the Electricity Act, 2003.

3. An objection to the order of provisional assessment dated August 24, 2005 signed by the petitioner was submitted to the assessing officer. It was asserted that the allegation of unauthorised use of electricity was baseless.

4. After considering the objection and hearing advocate for the consumer, the assessing officer passed the order of final assessment dated September 1, 2005 - referred to in prayer (a) of the WP. The assessing officer accepted the case of CESC that the consumer was guilty of unauthorised use of electricity and assessed the unmatured consumption.

5. Feeling aggrieved by the order of final assessment, Madan filed an appeal under S. 127 of the Electricity Act, 2003. After hearing the petitioner who appeared as Madan's representative and considering the case, the appellate authority passed the order dated January 6, 2006 - also referred to in prayer (a) of the WP. The appellate authority upheld the order of final assessment of the assessing officer.

6. Mr. Mukherjee appearing for the petitioner has argued that since the assessing officer was not a party to the team that inspected the premises on August 16, 2005, he was not competent to pass the order of provisional assessment and the order of final assessment; for in view of the provisions of S. 126, only an assessing officer inspecting the premises is competent to pass an order under S. 126.

7. His submission is that in any case, the liability was arbitrarily assessed on the basis that electricity was consumed during the period continuously for 24 (twenty-four) hours every day, - an evident impossibility; and that the load factor was inflated, though there was no allegation that the inspection had revealed employment of any illegal means for increasing the sanctioned load factor.

8. Mr. Mukherjee has relied on the decisions of this Court in [Hasi Mazumdar and Another Vs. The West Bengal State Electricity Board and Others](#), [Narayan Chandra Kundu Vs. State of West Bengal and Others](#), : : AIR 2007 Cal 291) and [Jadabpur Tea Company Ltd. and Another Vs. West Bengal State Electricity Distribution Co. Ltd. and Others](#) .

9. Mr. Rai appearing for CESC has submitted that the three decisions cited by Mr. Mukherjee do not apply to the facts and circumstances of the case.

10. The first question is whether the assessing officer was competent to initiate the assessment proceeding under S. 126 of the Electricity Act, 2003 and pass the order

of provisional assessment and the order of final assessment.

11. Sub-section (1) of S. 126 of the Electricity Act, 2003 is quoted below:-

(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 unauthorised 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.

12. From the provisions of sub-s. (1) of S. 126 it is evident that an assessing officer passing an order thereunder can come to the requisite conclusion either on an inspection of the place or premises, or after inspection of the pieces of equipment, gadgets, machines, devices found connected or used, or after inspection of records maintained by the person against whom the allegation of unauthorised use of electricity has been made.

13. I am, therefore, unable to see how it can be said that unless The assessing officer himself was a party to the team that-inspected the premises and disconnected the supply alleging detection of unauthorised use of electricity, he is not competent to initiate the assessment proceeding under S. 126 and pass the order of provisional assessment and the order of final assessment.

14. Inspection of the place or premises is only one of the three ways following which a S. 126 assessing officer can come to the conclusion necessary for initiating the assessment proceeding and passing the order. The officer can come to the conclusion and pass the orders also after inspection of the things and records seized by the authorised officer of the licensee and produced before him by the licensee.

15. The decision in [Hasi Mazumdar and Another Vs. The West Bengal State Electricity Board and Others](#), was given finding that the assessing officer inspecting the premises did not assess the payable amount "on the basis of his own judgment". (para 18 of the report).

16. I am unable to see how the decision can be said to be a precedent for the proposition that unless an assessing officer passing an order under S. 126 was a party to the team that inspected the premises and detected the unauthorised use of electricity, he is not competent to initiate the S. 126 assessment proceeding and pass the order of provisional assessment and the order of final assessment.

17. In [Narayan Chandra Kundu Vs. State of West Bengal and Others](#), the question that was examined was whether the assessment proceeding was "vitiating for the reason that the prosecutor u/s 135 of the Act was the Assessing officer u/s 126 of the same."

18. It is in the context of deciding that question that the Division Bench observed that "the Officer must be a person who was actually a member of the inspection team at the time of detecting the pilferage or unauthorised use of the electricity so that he can pass the order of assessment not on the basis of papers placed before him but after actually visiting the site at the time of detection of the illegality."

19. It is evident from the decision that the Division Bench did not have any occasion to examine the question that has arisen in this case. I am, therefore, unable to accept that Narayan Chandra Kundu is a binding precedent for the question involved in this WP.

20. The decision in Jadabpur Tea was given treating Narayan Chandra Kundu as a binding precedent for the proposition that an assessing officer who was not a party to the team that inspected the premises and disconnected the supply detecting unauthorised use of electricity, is not competent to initiate assessment proceeding under S. 126 and pass the order of provisional assessment and the order of final assessment.

21. I am, therefore, unable to accept that Jadabpur Tea is either a binding precedent for the question that has arisen in this WP.

22. A reading of the provisions of sub-sec. (1) of S. 126 that unless the assessing officer initiating the S. 126 assessment proceeding was a party to the team that inspected the premises and disconnected the supply alleging detection of unauthorised use of electricity, he is not competent to pass the S. 126 orders (provisional and final), is bound to give rise to an unworkable situation.

23. The assessing officer may not necessarily be also an officer within the meaning of sub-sec. (2) of S. 135 of the Electricity Act, 2003. It is only an authorised officer within the meaning of sub-sec. (2) of S. 135 who is empowered to 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.

24. Such officer is empowered to search, seize and remove all such devices, instruments, wires and any other facilitator or article which has been or is being used for unauthorised use of electricity. He is also empowered to examine or seize any books of account or documents; and he can be a witness in the assessment proceeding under S. 126.

25. Again an officer authorised under sub-S. (2) of S. 135 to do the things mentioned therein may not necessarily be the assessing officer for the purposes of S. 126 of the Electricity Act, 2003. No law has created an obligation of a licensee to appoint the same person as the assessing officer for the purposes of S. 126 and also the authorised officer for the purposes of S. 135. Such an obligation will make the functioning of a licensee unworkable.

26. If the S. 126 assessing officer must also be a party to the team inspecting the premises and detecting the unauthorised use of electricity, then the possibility of a large number of assessment proceedings ending in futility is a foregone conclusion; for there is no guarantee that the assessing officer inspecting the premises will definitely be available for initiating the proceeding and also for passing the order of provisional assessment and the order of final assessment.

27. There is no prohibition (and there cannot be one) against initiating litigation questioning the disconnection or the order of provisional assessment. Hence, there is no reason to say that the possible absence of the assessing officer who initiated the proceeding and passed the order of provisional assessment in the capacity of an assessing officer participating in the inspection of the premises is an impossible imagination.

28. I am, therefore, of the view that a reading of the provisions of sub-sec. (1) of S. 126 that unless the assessing officer was a party to the team that inspected the premises and disconnected the supply alleging detection of unauthorised use of electricity, he is not competent to initiate the assessment proceeding and pass the S. 126 orders (provisional and final), will clearly defeat that provisions of S. 126.

29. I, therefore, hold that The assessing officer who passed the S. 126 orders (provisional and final) in this case, though was not a party to the team that had inspected the premises on August 16, 2005 and disconnected the supply alleging detection of unauthorised use of electricity, was competent to initiate the proceeding and pass the orders (provisional and final).

30. The next question is whether the assessing officer and the appellate authority were justified in proceeding on the basis that the person concerned had unauthorisedly used electricity round-the clock.

31. The question whether the person unauthorisedly used electricity round-the-clock is a question of fact. According to the report prepared by the team inspecting the premises and disconnecting the supply alleging detection of unauthorised use of electricity, and produced before the assessing officer, the person had been unauthorisedly using electricity round-the-clock.

32. Electricity was being used for running a factory. In the face of the inspection report case, the person concerned did not take any step to give evidence to show that electricity could not be used for more than 10 to 12 hours in a day. This fact asserted by the person before the appellate authority was not supported by any evidence given in proof thereof.

33. There was nothing before the assessing officer and the appellate authority to reject the inspection report case and accept the case of the person. In exercise of power under Art. 226 this Court cannot now decide for how many hours the factory was running in a day and substitute its finding of fact for that of the assessing

officer and the appellate authority.

34. As to the allegation that the inspecting team highly inflated the load factor, once again the admitted position is that the person concerned did not give any evidence before the assessing officer that the detected load factor could not be more than the sanctioned load factor.

35. For disproving the case of the team inspecting the premises proved by its report, the person did not give any evidence. Now referring to the absence of an allegation that illegal method was adopted for increasing the load factor bypassing the service installation and metering system, this High Court cannot record a finding of fact that the detected load factor could not be more than the sanctioned one. For these reasons, I dismiss the W.P. No costs. Certified Xerox.