

**Before the**  
**MAHARASHTRA ELECTRICITY REGULATORY COMMISSION**  
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**CASE NO.14 OF 2004**

In the matter of  
Jai Bamleshwari Rice Mill's Application regarding non-compliance by MSEB of Section 126 of the  
Electricity Act, 2003.

**Dr. Pramod Deo, Member**  
**Shri. A. Velayutham, Member**

**ORDER**

Dated: **24<sup>th</sup> November, 2004**

1. The present Petition is filed on 27<sup>th</sup> April 2004 by M/s Jai Bamleshwari Rice Mill, Gondia against the Maharashtra State Electricity Board (MSEB) as Respondents. The prayers in the Petition are as follows:
  - a) *To direct the Respondents to reassess the provisional assessment as per the provisions of Section 126 of the Electricity Act, 2003 and restore the power supply immediately;*
  - b) *Guilty officer be punished as per the provisions of Section 142 and 146 of the Electricity Act, 2003 for contravention of this Act or rules or regulations made there under.*
2. Shri. Prakash R. Jaiswal, Proprietor of Jai Bamleshwari Rice Mill has stated in his Petition that on 24<sup>th</sup> December 2003 the Flying Squad of the MSEB, Nagpur (Urban) inspected the Petitioner's unit and prepared a spot inspection report which showed that the Seal of the meter was intact but the meter was slow by 63%. As the meter was found to be slow, on 25<sup>th</sup> December 2003 the Petitioner made an application to the Electrical Inspector requesting him to get the meter installation tested.
2. The Petition states that on 26<sup>th</sup> December 2003 once again the Flying Squad visited the Petitioner's unit and prepared a computerized test report and joint inspection report. On 27<sup>th</sup> December 2003, MSEB registered a FIR under Sections 135 and 138 of the EA, 2003 and the meter box along with the meter was seized by MSEB and the electricity supply was discontinued immediately.
3. It is further stated in the Petition that on 31<sup>st</sup> December 2003, the Petitioner received a provisional assessment bill for payment of Rs.41,21,995/- in which the period of assessment was shown to be 35 months, which is against the provisions of the Electricity Act (EA), 2003. On the same day, the Petitioner approached the Superintending Engineer (S.E.) MSEB, Bhandara with a request to restore the electricity supply. On 1<sup>st</sup> January 2004, the Petitioner received a letter from the S.E., Bhandara directing the Petitioner to pay 1/3<sup>rd</sup> of the amount of the provisional bill. Therefore, the Petitioner filed a representation against the above letter before the concerned Executive Engineer, MSEB requesting him to reassess as per Section 126 of the EA, 2003.



4. The Petition states that thereafter the Petitioner, on several occasions, requested the S.E., Bhandara to reconsider the provisional assessment as per the provisions of Section 126 of the EA, 2003. After several reminders, the S.E, asked the Petitioner to pay 20% of the provisional assessment and get reconnection of electricity supply.
5. The Petition contends that MSEB, though aware about the procedures and applicability of legal provisions of law, are not complying with the provisions of Section 126 of the EA, 2003 and are therefore liable for action under Sections 142 and 146.
6. In their Reply dated 10<sup>th</sup> August 2004, MSEB have submitted that, during inspection on 24<sup>th</sup> December 2003, the Petitioner was detected as being involved in prejudicial use of energy. Accordingly, criminal proceedings were initiated against the Petitioner under Section 135 of the EA, 2003, and assessment on account of the loss of revenue to the Board has also been issued under the relevant provisions of the Act.
7. In their Reply, MSEB have further submitted that the Act prescribes different treatments for consumers involved in “unauthorised use of electricity” and “theft of electricity”. Since the Petitioner was involved in theft of electricity, the assessment and other action needed to be carried out in accordance with the provisions of Section 135 of the EA, 2003 along with the provisions of MSEB’s prevailing Supply Conditions.
8. In his Rejoinder, the Petitioner has urged that the word “theft” also comes within the purview of the term “unauthorised use”. In Sections 135(2)(a), 135(2)(b), 138(a) and 138(b), the word “unauthorised” is used. Thus, the Rejoinder states that there is no separate provision under the new Act, which provides a distinct and separate mode of assessment in theft cases.
9. The admissibility hearing was held on 19<sup>th</sup> October 2004, at which Shri. M. K. Gupta, representative of the Petitioner, briefly reiterated the sequence of events and correspondence set out in the Petition. He submitted that inspection of the Petitioner’s unit was undertaken on 24<sup>th</sup> December, 2003 by the Flying Squad. A spot inspection report (Annexure 'A' to the Petition) was prepared which showed that the Seal of the meter was intact but that the meter was found to be slow by 63%. The report further showed variance in the C.T. Ratio calculated by the investigating team, and it was alleged in the report that the overhead LT wires were passing through the Petitioner’s premises, thus making them easily accessible. As the meter was found to be a slow meter, on 25<sup>th</sup> December 2003 the Petitioner made an application to the Electrical Inspector (Annexure 'B') requesting him to have the meter installation tested. Thus, the Petitioner's bonafides are clearly established. He submitted that only after testing the meter can one conclude whether the meter was defective, or whether it was a case of tampering.
10. Shri. Gupta further submitted that once the Electrical Inspector makes his report and the meter is found to be a slow meter, then an assessment can be done for a period of six months in respect of the same. However, in this case, neither the Electrical Inspector nor the MSEB officials tested the meter even though there was a spot inspection report in this regard. The Electrical Inspector stated that the meter cannot be tested where theft is alleged. However, Shri. Gupta alleged that there was some kind of connivance between the Electrical Inspector and officials of MSEB. He submitted that if there was no evidence of tampering found, then MSEB cannot presume on any grounds whatsoever that this is a case of theft. He submitted that there could also be some technical problem in reading the meter, or there could be some problem with the reading equipment, in which case the meter has to be tested by MSEB.



11. Shri. Gupta submitted that once again the Flying Squad visited the Petitioner's unit on 26<sup>th</sup> December 2003 and prepared a computerized test report and joint inspection report (Annexure 'C') which included new allegations that the name plates on the CTs appeared to be spurious and that the name plates were dislodged. The next day, i.e. on 27<sup>th</sup> December 2003, MSEB lodged a Police complaint (Annexure 'D') against the Petitioner at 2.00 a.m.
12. It was further submitted that the Petitioner made repeated requests to MSEB to give a provisional assessment order so that he could make the necessary payment and then take steps to file an appeal. On 31<sup>st</sup> December 2003, the Petitioner received a letter from MSEB (Annexure 'E') along with a bill setting out the provisional assessment for a period of 35 months. Shri. Gupta submitted that the Petitioner raised an objection to the provisional bill because, under Section 126 of the Electricity Act, 2003, the maximum period of assessment for non-domestic use is only 6 months immediately preceding the date of inspection. As such, the assessment is illegal.
13. Shri. Gupta further pointed out the significance of Part XII of the EA, 2003 regarding Investigation and Enforcement and Part XIV regarding Offences and Penalties, and the distinction between the two.

**S.126 Assessment (under Part XII) –**

- "(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 judgement the electricity charges payable by such person or by any other person benefited by such use.*
- (5) If the assessing officer reaches to the conclusion that unauthorized use of electricity has taken place, it shall be presumed that such unauthorized use of electricity was continuing for a period of three months immediately preceding the date of inspection in case of domestic and agricultural services and for a period of six months immediately preceding the date of inspection for all other categories of services, unless the onus is rebutted by the person, occupier or possessor of such premises or place."*

Thus, under Section 126, there is a presumption of six months of unauthorized use, unless rebutted. He further submitted that Section 126 may be read with Section 145 of the EA, 2003, which is regarding jurisdiction of the Civil Court:

*"No Civil Court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which an assessing officer referred to in Section 126 or an appellate authority referred to in Section 127..."*

Shri. Gupta submitted that, according to the above provisions, the assessment of the assessing officer is outside the jurisdiction of the Civil Court. Section 145 clearly indicates that it is only the assessing officer who can assess the provisional bill. He submitted that the term "assessing officer" is not mentioned in Section 135 (Chapter XIV), which pertains to offences and penalties for theft of electricity. Under this Section, no assessing officer has been mentioned as in Section 126. Even though offences and penalties regarding theft of electricity cannot be



taken up before the police but only by cognizance by the competent Court, in this case MSEB lodged a FIR with the police against the Petitioner. Under this Section, and even as per the old Indian Electricity Act, 1910, assessment cannot be made for a period of 35 months (amounting to Rs 41 lakhs in this case). He submitted that MSEB cannot make any assessment according to their Circulars when they are inconsistent with the present Act.

14. The Commission queried as to why Shri. Gupta was referring to Section 135 while mentioning Section 126. Shri. Gupta responded that it is MSEB's submission that, since this is a case of theft, Section 126 is not applicable. It is his case that the Petitioner has shown his bonafides by asking the Electrical Inspector to test the meter. MSEB cannot superimpose any inconsistent provisions of the new Act.
15. He submitted that primarily the Petitioner's contention is that the EA, 2003 is very clear that if any provisional assessment is to be made, in this case it has to be made by MSEB only under Section 126. MSEB cannot make an assessment of Rs.41 lakhs for the period of 35 months. They should have made the assessment for 6 months, i.e. for only Rs.7.6 lakhs, out of which, only 1/3<sup>rd</sup> would be payable by the Petitioner, and the Petitioner would also then be entitled to appeal under Section 127. He submitted that in any case MSEB cannot insist on Rs.41 lakhs when the Act itself is very clear that the period of assessment cannot go beyond 6 months immediately preceding the date of inspection.
16. The Commission observed that, whether Section 126 is applicable or Section 135, the primary issue is whether the Commission is the proper forum to hear this Petition, i.e. whether it can be admitted.
17. Shri. Gupta replied by referring to Section 142 of the EA, 2003.

**S.142-Punishment for non-compliance of directions by Appropriate Commission:**

*"In case any complaint is filed before the Appropriate Commission by any person or if that Commission is satisfied that any person has contravened any of the provisions of this Act or the rules or regulations made thereunder, or any direction issued by the Commission, the Appropriate Commission may after giving such person an opportunity of being heard in the matter, by order in writing, direct that, without prejudice to any other penalty to which he may be liable ...."*

Shri. Gupta submitted that the Petitioner's main contention is that this is a case where the provisions of the Act have not been complied with inasmuch as Section 126 rather than Section 135 should have been applied, that cognizance has to be taken by a Magistrate in case of Section 135, and that 35 months' assessment is not mandated in view of the ceiling of 6 months. If the Commission is satisfied that MSEB have not complied with the said provisions, it is within its purview to give directions to MSEB to follow those provisions. Otherwise, the Petitioner is being made to pay Rs.41 lakhs and deprived of their right of appeal under Section 127, whereas the Petitioner could have deposited Rs.2.35 lakhs and raised his grievance before the appellate forum. He further referred to Section 146 of this Act, which also contains the provision for punishment for non-compliance of orders or directions given under the Act. He submitted that MSEB were simply harassing the Petitioner by filing FIR, and that the Petitioner is being penalized without any evidence of theft.



18. Ms. Deepa Chawan, Counsel for MSEB submitted that there are four different units in one compound and controlled by the family of the Petitioners. MSEB conducted spot inspection of all these units in December, 2003 and similar charges were raised by MSEB for the 4 different connections.
19. Counsel for MSEB submitted that all the 4 connections were cases of theft and MSEB proceeded against all the 4 units in a uniform manner. Interestingly, in respect of 3 of the said units, the consumers paid 20% of the amount under Clause 31(e) of MSEB's Conditions of Supply and got the reconnection. Only the present Petitioner has challenged similar action taken by MSEB in respect of 1 unit and this speaks volumes for the Petitioner's bonafides.
20. Counsel for MSEB submitted that this case is not simply about a faulty meter. MSEB have already filed a case under the new Act before the Magistrate. Counsel for MSEB explained that if you have a CT having a specific ratio and particular meter design, the multiplying factor is 'X'. In this case, the CT is replaced with a different ratio, and when the original multiplying factor is applied to it, this would amount to theft of energy. It is done with an intention to defraud MSEB of their legitimate dues. Counsel for MSEB submitted that if it is found that MSEB were wrong in their contentions, then undoubtedly the competent Court will decide in favour of the Petitioner.
21. Counsel for MSEB further submitted that MSEB have proceeded under Section 135 (theft) on the basis of Annexure "C" of the Petition (Installation Testing Report), and drew attention to the ratio observed and remarks at Sr. Nos.1 to 4. Counsel further referred to the decision of the Hon'ble Delhi High Court dated 31<sup>st</sup> May 2004 in respect of Sohan Lal Vs. North Delhi Power Limited & Others in which a similar issue was raised, where Section 126 was read with Section 135. Counsel referred to Para 48 of the decision:

*"The matter in issue may also be considered from another angle. There is bound to be distinction between cases like that of commercial user of electricity supplied for residential purposes, unauthorized diversion of electricity though being recorded in the meter, electricity being consumed by persons who may have come into possession of premises where the meter was already tampered with as distinguished from cases where a consumer dishonestly steels electricity. Where the mens rea of dishonestly steeling electricity is established, a more severe financial penalty is envisaged. The mere fact that Section 135 of the said Act also provides for certain consequences of prosecution cannot imply that a more severe civil liability would not arise in such a case. If appreciated in this context, it would be apparent as to why the distinction has been made between cases of mere 'unauthorized use of electricity' and 'theft of electricity'."*

Therefore, Counsel for MSEB concluded that such cases cannot be brought under the purview of Section 126.

22. Counsel for MSEB then proceeded to the question raised by the Commission regarding the maintainability of this Petition, and submitted that a case filed under Section 135 is not within the Commission's purview, and also pointed out that this case does not fall within the ambit of Section 128 of the EA, 2003 necessitating the Commission to appoint an Investigating Authority to investigate the affairs of MSEB.

**S.128 Investigation of certain matters:**

*"The Appropriate Commission may, on being satisfied that a licensee has failed to comply with any of the conditions of license or a generating company or a licensee has failed to comply with any of the provisions of this Act or the rules or regulations made thereunder, at*



*any time, by order in writing, direct any person (hereafter in this section referred to as "Investigating Authority") specified in the order to investigate the affairs of any generating company or licensee and to report to that Commission on any investigation made by such Investigating Authority."*

23. Counsel for MSEB further submitted that as far as the Petitioner's contention that he has no remedy left for appeal is concerned, it may be noted that in respect of 3 of their own units, the Petitioner's sister concerns have commenced production by paying 20%. So, that avenue is always open to them. Further, as per the Delhi High Court decision, MSEB can proceed under Section 135 and, therefore, Counsel submitted that this Petition should be thrown out at the threshold itself.
24. Counsel for MSEB further submitted that MSEB have filed appropriate proceedings and the matter is subjudice before the Magistrate. In that proceeding, the Petitioner will have a chance to be heard, and if the Petitioner can make out that this was not a case of theft, then he will undoubtedly get relief from the Court. Sections 142 and 146 are also not relevant, inasmuch as there is no Order of the Commission which has been disobeyed.
25. Shri. Gupta submitted that the matters relating to the other 3 units in the same compound are unconnected and do not have any relevance with the present matter. He further submitted that the extract from the judgement of the Delhi High Court has been cited out of context by MSEB. In fact, some of the other units have already filed separate Applications in respect of their matters, in which MSEB have not filed their reply inspite of reminders from the Commission.
26. Shri. Gupta further submitted that MSEB have also remained silent about their right to file a FIR because the cognizance is to be taken only by the competent Magistrate. In this regard, he compared the provisions of Section 50 of IE Act, 1910 with the provisions of Section 151 of the current EA, 2003 regarding cognizance of offences and filing of cases.

#### **Section 50 of IE, 1910 - Institution of prosecution-**

*"No prosecution shall be instituted against any person for any offence against this Act or any rule, license or order thereunder, except at the instance of the Government [or a State Electricity Board] or an [Electrical Inspector], or of a person aggrieved by the same."*

He submitted that, in the present Act, Section 151 refers to "Cognizance of offences" and not to "Institution of prosecution". Therefore, as per the old Act, MSEB could have instituted the prosecution by filing a FIR. Further, the words "... or of a person aggrieved by the same" which are present in IE Act, 1910 are missing in the new Act, and this is a meaningful and conscious omission. When an earlier statutory provision is replaced by another provision with an altogether different heading and different intention of the Legislature, then the omission of certain words and phrases from the old provision is a designed omission and not an accidental omission. He submitted that MSEB are only trying to harass the Petitioner by filing FIR and assessing for 35 months, when they do not have any right to assessment for 35 months under any of these provisions. Section 135 of the new Act is entirely different because the words "assessing officer" are missing in that Section. The words "assessing officer" are used in Section 126. Therefore, he submitted that MSEB will have to assess only under Section 126 and not under Section 135, since they have no powers to do so.



27. Shri. Gupta referred to the first spot inspection report dated 23<sup>rd</sup> December, 2003 (Annexure "A") and submitted that it shows that primary and secondary load are different from the subsequent test report. It also shows that the name plates on the CTs are taken off and preserved for verification of record with the consent of the consumer. However, in the joint report at Annexure "C", it is reported that the nameplates provided on the CTs appear to be spurious and are easily dislodged. This shows clearly the manipulation of record done intentionally by MSEB to harass the Petitioner.
28. Shri. Gupta submitted that, in fact, this is only a case of faulty meter, and CT has not been changed. When there is an allegation of slow metering, and when the Petitioner has requested MSEB and the Electrical Inspector for testing the meter installation, the meter should have been independently tested. The Petitioner cannot be held liable for any offence without testing the meter. With regard to MSEB's reply, he also pointed out that they are a LT and not HT consumer, to which MSEB Counsel agreed.
29. Representative of the Petitioner further referred to a Bombay High Court (Nagpur Bench) judgement on whether FIR under Section 151 can be lodged wherein, since there was no authority to file a FIR under the provisions of the present Act, the FIR was quashed. He circulated a copy of the judgement in CA No. 1783/2004 dated 14<sup>th</sup> July, 2004, which has been challenged in the Supreme Court but not been stayed.
30. He also referred to the judgement of the Supreme Court (AIR 93 SC 2414) to the effect that a clarificatory Circular can only aid in interpretation and is not binding if it is not in consonance with the statute. In this matter, MSEB had issued several Circulars to their subordinate officials and directed them to file FIR under Section 135 and follow the procedure under the repealed Act even after the commencement of the new Act, resulting in wrongful actions by the subordinate officials of the Board which are against the provisions of the present Act.
31. The Petitioner's representative lastly referred to another judgement in the case of Aditya Polymers in which the Bombay High Court has given directions regarding Section 126, of which MSEB is well aware, regarding how to assess, and the limit of 6 months under that provision. He further submitted that MSEB are referring only to the judgement of the Delhi High Court but are suppressing the judgement of High Court Nagpur Bench. He submitted finally that provisional assessment can be carried out by MSEB for a period of upto only 6 months under Section 126, and the Petitioner may be entitled to pay 1/3<sup>rd</sup> of the amount as per the present Act, pursuant to which the Petitioner will also be entitled to file an appeal.
32. The Commission has considered the written submissions and oral presentations made by the by the parties. The short preliminary point is whether it would be appropriate for the Commission to interfere under the penal provisions of Sections 142 and 143 in the circumstances of the present case. The Commission notes that these provisions are generic in nature, and have to be read with the specific provisions relating to unauthorized use and theft under Sections 126 and 135 respectively, and the jurisdiction of different authorities under those provisions. The procedure, dispensation and assessing authority have been set out in Section 126. The appellate authority has also been indicated in Section 127. Similarly, Section 135 sets out the provisions in cases of alleged theft, and Chapter XV refers to the forum for trial of such cases. Thus, the Commission cannot make assessment under Section 126, or entertain appeals against such assessment under Section 127. Similarly, it cannot try cases under Section 135. As far as the criminal proceedings initiated by MSEB against the Petitioner under Section 135 are concerned, whether the same are maintainable and whether



MSEB have followed due procedure and process of law, and whether there is at all a case made out under Section 135 rather than Section 126, are all matters which will be decided by the competent Court before which the Petitioner will have his say, and not by the Commission. The question of the Commission ascribing to itself that jurisdiction and invoking the provisions of Section 142 or 146 does not, therefore, arise.

33. In view of the above, the Commission declines to admit the Petition, and disposes of it accordingly.

Sd/-  
(A. Velayutham)  
Member

Sd/-  
(Dr. Pramod Deo)  
Member

(A.M. Khan)  
Secretary, MERC.

