

SUPREME COURT OF INDIA

The Executive Engineer

Vs.

Sri Seetaram Ricemill

C.A.No.8859 of 2011

(S.H.Kapadia, CJI., K.S.Radhakrishnan and Swatanter Kumar, JJ.,)

20.10.2011

JUDGMENT

Swatanter Kumar, J.,

SLP(Civil)No.36166 of 2010

1. Leave granted.

2. Over a period of time, it was felt that the performance of the State Electricity Boards had deteriorated on account of various factors. Amongst others, the inability on the part of the State Electricity Boards to take decisions on tariffs in a professional and independent manner was one of the main drawbacks in their functioning. Cross-subsidies had reached unsustainable levels. To address this issue and to provide for distancing of governments from determination of tariffs, the Electricity Regulatory Commissions Act, 1998 (hereinafter, 'the 1998 Act') was enacted in addition to the existing statutes like Indian Electricity Act, 1910 (hereinafter, 'the 1910 Act') and the Electricity (Supply) Act, 1948 (hereinafter, 'the 1948 Act'). For a considerable time, these three legislations remained in force, governing the electricity supply industry in India. The Boards created by the 1948 Act and the bodies created under the 1998 Act, as well as the State Governments, were provided distinct roles under these statutes. There was still overlapping of duties and some uncertainty with regard to exercise of power under these Acts. To address the issues like deterioration in performance of the Boards and the difficulties in achieving efficient discharge of functions, a better, professional and regulatory regime was introduced under the Electricity Bill, 2001, with the policy of encouraging private sector participation in generation, transmission and distribution of electricity and with the objective of distancing regulatory responsibilities from the Government by transferring the same to the Regulatory Commissions. The - need for harmonizing and rationalizing the provisions of the earlier statutes was met by creating a new, self-contained and comprehensive legislation. Another object was to bring unity in legislation and eliminate the need for the respective State Governments to pass any reform Act of their own. This Bill had progressive features and strived to strike the right balance between the economic profitability and public purpose given the current realities of the

power sector in India. This Bill was put to great discussion and then emerged the Electricity Act, 2003 (for short, 'the 2003 Act'). The 2003 Act had notably provided for private sector participation, private transmission licences for rural and remote areas, stand alone systems for generation and distribution, the constitution of an Appellate Tribunal, more regulatory powers for the State Electricity Regulation Commission and provisions relating to theft of electricity. The additional provisions were introduced in the 2003 Act in relation to misuse of power and punishment of malpractices such as over-consumption of sanctioned electric load which are not covered by the provisions relating to theft; all of which had significant bearing upon the revenue focus - intended by the Legislature. This is the legislative history and objects and reasons for enacting the 2003 Act.

3. To ensure better regulatory, supervisory and revenue recovery system, as expressed in the objects and reasons of the 2003 Act, there was definite concerted effort in preventing unauthorized use of electricity on the one hand and theft of electricity on the other. The present case falls in the former. According to the appellant, there was breach of the terms and conditions of the Standard Agreement Form for Supply of Electrical Energy by the Grid Corporation of Orissa Ltd. (hereinafter, 'the Agreement') as the consumer (respondent herein) had consumed electricity in excess of the contracted load.

FACTS

4. We may briefly refer to the facts giving rise to the present appeal. Respondent herein, a partnership firm, claims to be a small scale industrial unit engaged in the production of rice. For carrying on the said business, it had obtained electric supply under the Agreement. Between the present appellant - No.1 and the respondent the Agreement dated 9th December, 1997 was executed for supply of power to the respondent. Keeping in view the contracted load, the respondent was classified as 'medium industry category'. This category deals with the contract demand of 99 KVA and above but below 110 KVA. According to the respondent, since the day of connection of power supply, the meter and all other associated equipments had been inspected by the appellants. On 10th June, 2009, the Executive Engineer, Jeypore Electrical Division and SDO, Electrical MRT Division, Jeypore inspected the business premises of the respondent's unit and dump was conducted. These officers issued a dump report by noticing as follows:

"Dump of the Meter taken. Calibration of meter done and error found within limit. If any abnormality detected in Dump, it will be intimated later on."

5. It is the case of the respondent that no intimation was given to it as to finding of defects if any, in dump. On 25 th July, 2009, provisional assessment order bearing No.854 was issued by the appellants to the respondent. Intimation - bearing No.853 had also been issued on the same day which informed the respondent that there was unauthorized use of electricity falling squarely within the ambit of provisions of Section 126 of the 2003 Act. In the dump report dated 10 th June, 2009, it was stated that there was unauthorized use of electricity and Maximum Demand (hereinafter MD) had been consumed up to 142 KVA. On this basis, the appellant passed the order of provisional assessment by taking the contracted demand as that

applicable to large industry. The demand was raised, assessing the consumer for the period from June 2008 to August 2009 for a sum of Rs.7,77,300/-. This was computed for 15 months at the rate of Rs.200 per KVA (i.e., tariff for large industry) multiplied by two times, aggregating to the claimed amount. Vide the provisional assessment order dated 25th July, 2009, assessment was made under Section 126(1) of the 2003 Act for unauthorized use of electricity, the respondent was required to file objections, if any, and to also pay the amount. The relevant part of the said provisional assessment order reads as under :

"And Whereas you are entitled to file objections against the aforesaid - provisional assessment order under Section 126(3) of Electricity Act, 2003, within 30 days from receipt hereof and further entitled to appear before the undersigned for an opportunity of being heard on 25.08.2009 during working hours from 11.00 AM to 5.00 PM. And Whereas you are further entitled u/s 126(4) to deposit the aforesaid amount within 7 days and upon such deposit being made within 7 days, you shall not be subject to any further liability or any action by any authority whatsoever. And Whereas if you fail to file the objection within 30 days from receipt hereof, the undersigned shall presume that you have no objection to the provisional assessment and the undersigned shall proceed to pass final order u/s 126(3) on assessment of electricity charges payable by you. And Whereas, if you fail to appear before the undersigned at the aforesaid date and time after filing objections, if any, the undersigned shall proceed to pass the final order under section 126(3), based on the objection filed by you and evidence available on record."

6. The respondent did not file its objections/reply but challenged the said provisional assessment order and the intimation of unauthorized use before the High Court of Orissa, Cuttack by filing writ petition No.WP(C) No.12175 of - 2009 on the grounds of lack of authority and jurisdiction on the part of the Executive Engineer to frame the provisional assessment by alleging unauthorized use of electricity since 4th June, 2008. It was also contended that no inspection had been conducted in the business premises till date of dump, i.e., 10th June, 2009 when unauthorized use of electricity was found. The respondent also challenged the maintainability and sustainability of the order of provisional assessment in calculating the dump charges for a period of 15 months from June 2008 to August 2009 on the basis of dump charges relating to large industry while the respondent was classified as medium scale industry. It was also the contention raised by the respondent before the High Court that the provisions of Section 126 of the 2003 Act were not attracted in the present case at all. This claim of the respondent was contested by the appellants, as according to them, unauthorized use of electricity as defined under Section 126 will come into play as per clause (b) of the Explanation appended to Section 126 of the 2003 Act. The dump report dated 10th June, 2009 and the intimation dated 25th July, 2009 had been sent showing - overdrawal of MD where, according to the appellants, the respondent had consumed electricity 'by means unauthorized by the licensee (overdrawal of maximum demand)' and thereby breached the Agreement and, therefore, the provisional assessment order and the intimation were fully justified.

7. The High Court, vide impugned judgment, accepted the case of the respondent and held that the words 'unauthorized use of electricity' and 'means' as provided in Explanation to Section 126 of the 2003 Act were exhaustive. Overdrawal of MD would not fall under the scope of 'unauthorized use of electricity' as defined under the 2003 Act, and the appellants had no jurisdiction to issue the intimation in question and pass the assessment order in terms of Section 126 of the 2003 Act. Aggrieved by the judgment of the High Court, the appellants have filed the present appeal by way of a special leave petition before this Court.

Questions for Determination :

“1. Wherever the consumer consumes electricity in excess of the maximum of the contracted load, would the -

provisions of Section 126 of the 2003 Act be attracted on its true scope and interpretation?

2. Whether the High Court, in the facts and circumstances of the case, was justified in interfering with the provisional order of assessment/show cause notice dated 25th July, 2009, in exercise of its jurisdiction under Article 226 of the Constitution of India?

3. Was the writ petition before the High Court under Article 226 of the Constitution of India not maintainable because of a statutory alternative remedy being available under Section 127 of the 2003 Act?

Discussion on Merits

1. Wherever the consumer consumes electricity in excess of the maximum of the connected load, would the provisions of Section 126 of the 2003 Act be attracted on its true scope and interpretation?

8. On the simple analysis of the facts as pleaded by the parties, it is contended on behalf of the respondent that the provisions of Section 126 of the 2003 Act are not attracted and no liability could be imposed upon them by the authorities in

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exercise of their power under that provision. Even if the case advanced by the appellants against the respondent without prejudice and for the sake of argument is admitted, even then, at best, the demand could be raised under Regulation 82 of the Orissa Electricity Regulatory Commission Distribution (Condition of Supply) Regulations, 2004 (for short, 'the Regulations'). But recourse to the provisions of Section 126 was impermissible in law. The contention is that the case of a consumer consuming the electricity in excess of maximum and the installed load does not fall within the mischief covered under Section 126 of the 2003

Act. To put it plainly, the argument is that the appellants lack inherent authority to raise such demand with reference to the present case on facts and law both.

9. On the contra, submission on behalf of the appellants is that the case of excessive consumption of power beyond the sanctioned load would be a case falling within the ambit of Section 126 of the 2003 Act. Section 126 of the 2003 Act is incapable of an interpretation which would render the said provision otiose in cases which do not specifically fall under Section 135 of the 2003 Act. In order to answer these contentions more precisely, we find it appropriate to examine the question framed above, under the following sub-headings:

(a) Interpretation;

(b) Distinction between Sections 126 and 135 of the 2003 Act;

(c) The ambit and scope of Section 126 with reference to the construction of the words 'unauthorised use' and 'means'; and

(d) Effect and impact of change in applicability of tariff upon the power of assessment in accordance with the provisions of the 2003 Act and the relevant Regulations in the facts of the case.

1(a) Interpretation

10. First and foremost, we have to examine how provisions like Section 126 of the 2003 Act should be construed. From the objects and reasons stated by us in the beginning of this judgment, it is clear that 'revenue focus' was one of the - principal considerations that weighed with the Legislature while enacting this law. The regulatory regime under the 2003 Act 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. We are not prepared to accept the contention on behalf of the respondent that the provisions of Section 126 of the 2003 Act have to be given a strict and textual construction to the extent that they have to be read exhaustively in absolute terms. This is a legislation which establishes a regulatory regime for the generation and distribution of power, as well as deals with serious fiscal repercussions of this entire regime. In our considered view, the two maxims which should be applied for interpretation of such statutes are *ex visceribus actus* (construction of the act as a whole) and *ut res magis valeat quam pereat* (it is better to validate a thing than to invalidate it). It is a settled canon of interpretative jurisprudence that the statute should be read as a whole. 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.

11. It is true that fiscal and penal laws are normally construed strictly but this rule is not free of exceptions. In given situations, this 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 2003 Act, in fact, becomes a code in itself. Right from the initiation of the proceedings by conducting an inspection, 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 the electricity and for the manner of - conducting assessment proceedings. In other words, Section 126 of the 2003 Act has a purpose to achieve, i.e., to put an implied restriction on such unauthorized consumption of electricity. The provisions of the 2003 Act, applicable regulations and the Agreement executed between the parties at the time of sanction of the load prohibit consumption of electricity in excess of maximum sanctioned/ installed load. In the event of default, it also provides for the consequences that a consumer is likely to face. It embodies complete process for assessment, determination and passing of a demand order. This defined legislative purpose cannot be permitted to be frustrated by interpreting a provision in a manner not intended in law. This Court would have to apply the principle of purposive interpretation in preference to textual interpretation of the provisions of Section 126 of the 2003 Act. We shall shortly discuss the meaning and scope of the expressions used by the Legislature under these provisions. At this stage, suffice it to note that this Court would prefer to adopt purposive interpretation so as to ensure attainment of the object and purpose of the 2003 Act, - particularly, of the provisions of Section 126 in question. We may usefully refer to the judgment of this Court in the case of wherein *Balram Kumawat v. Union of India & Ors*¹. his Court discussed various tenets of interpretation and unambiguously held that these principles could be applied even to the interpretation of a fiscal or a penal statute.

This Court held as under :

"20. Contextual reading is a well-known proposition of interpretation of statute. The clauses of a statute should be construed with reference to the context vis-a-vis the other provisions so as to make a consistent enactment of the whole statute relating to the subject- matter. The rule of 'ex visceribus actus' should be resorted to in a situation of this nature.

21. In *State of West Bengal v. Union of India*² the learned Chief Justice stated the law thus :

"The Court must ascertain the intention of the Legislature by directing its attention not merely to the clauses to be construed but to the entire statute; it must compare the clause with the other parts of the law, and the setting in which the clause to be interpreted occurs."

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22. The said principle has been reiterated in *R.S. Raghunath v. State of Karnataka and Anr*³.

23. Furthermore, even in relation to a penal statute any narrow and pedantic, literal and lexical construction may not always be given effect to. The law would have to be interpreted having regard to the subject matter of the offence and the object of the law it seeks to achieve. The purpose of the law is not to allow the offender to sneak out of the meshes of law. Criminal Jurisprudence does not say so.

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25. A statute must be construed as a workable instrument. *Ut res magis valeat quam pereat* is a well-known principle of law. In *Tinsukhia Electric Supply Co. Ltd. v. State of Assam*⁴ this Court stated the law thus :

"118. The courts strongly lean against any construction, which tends to reduce a statute to a futility. The provision of a statute must be so construed as to make it effective and operative, on the principle "*ut res magis valeat quam pereat*". It is, no doubt, true that if a statute is absolutely vague and its language wholly intractable and absolutely meaningless, the statute could be declared void for vagueness. This is not in judicial review by testing the law for arbitrariness or unreasonableness under Article 14; but what a court of construction, dealing with the language of a statute, does in order to ascertain from, and accord to, the statute the meaning and purpose which the legislature intended for it. In *Manchester Ship Canal Co. v. Manchester Racecourse Co*⁵. Farwell J. said : (pp. 360-

61) "Unless the words were so absolutely senseless that I could do nothing at all with them, I should be bound to find some meaning and not to declare them void for uncertainty."

In *Fawcett Properties Ltd. v. Buckingham County Council*⁶ Lord Denning approving the dictum of Farwell, J. said :

"But when a Statute has some meaning, even though it is obscure, or several meanings, even though it is little to choose between them, the courts have to say what meaning the statute to bear rather than reject it as a nullity."

It is, therefore, the court's duty to make what it can of the statute, knowing that the statutes are meant to be operative and not inept and that nothing short of impossibility should allow a court to declare a statute unworkable. In *Whitney v. Inland Revenue Commissioners*⁷ Lord Dunedin said :

"A statute is designed to be workable, and the interpretation - thereof by a court should be to secure that object, unless crucial omission or clear direction makes that end unattainable."

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27. The Courts will therefore reject that construction which will defeat the plain intention of the Legislature even though there may be some inexactitude in the language used. [See *Salmon v. Duncombe*⁸ Reducing the legislation futility shall be avoided and in a case where the intention of the Legislature cannot be given effect to, the Courts would accept the bolder construction for the purpose of bringing about an effective result. The Courts, when rule of purposive construction is gaining momentum, should be very reluctant to hold that the Parliament has achieved nothing by the language it used when it is tolerably plain what it seeks to achieve. [See *BBC Enterprises v. Hi-Tech Xtravision Ltd*⁹.,."

12. Further, in the case of Superintendent and *Remembrancer of Legal Affairs to Government of West Bengal v. Abani Maity*¹⁰ this Court held as under :

"Exposition ex visceribus actus is a long recognised rule of construction. Words in a statute often take their meaning from the context of the statute as a whole. They are therefore, not to be construed in isolation. For instance, the use of the - word "may" would normally indicate that the provision was not mandatory. But in the context of a particular statute, this word may connote a legislative imperative, particularly when its construction in a permissive sense would relegate it to the unenviable position, as it were, "of an ineffectual angel beating its wings in a luminous void in vain". If the choice is between two interpretations", said *Viscount Simon L.C. in Nokes v. Doncaster Amalgamated Collieries, Ltd*¹¹.: `the narrower of which would fail to achieve the manifest purpose of the legislation we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result'."

13. The relevancy of objects and reasons for enacting an Act is a relevant consideration for the court while applying various principles of interpretation of statutes. Normally, the court would not go behind these objects and reasons of the Act. The discussion of a Standing Committee to a Bill may not be a very appropriate precept for tracing the legislative intent but in given circumstances, it may be of some use to notice some discussion on the legislative intent that is reflected in the substantive provisions of the Act itself. The Standing Committee on Energy, 2001, in its discussion said, `the Committee feel that there is a need to provide safeguards to check the misuse of these powers by unscrupulous elements'. The provisions of Section 126 of the 2003 Act are self- explanatory, they are intended to cover situations other than the situations specifically covered under Section 135 of the 2003 Act. This would further be a reason for this Court to adopt an interpretation which would help in attaining the legislative intent.

14. By applying these principles to the provisions of this case requiring judicial interpretation, we find no difficulty in stating that the provisions of Section 126 of the 2003 Act should be read with other provisions, the regulations in force and they should be so interpreted as to achieve the aim of workability of the enactment as a whole while giving it a

purposive interpretation in preference to textual interpretation. (b) Distinction between Sections 126 and 135 of the 2003 Act

15. Upon their plain reading, the mark differences in the contents of Sections 126 and 135 of the 2003 Act are obvious. They are distinct and different provisions which operate in different fields and have no common premise in law. We have already noticed that Sections 126 and 127 of the 2003 Act read together constitute a complete code in themselves covering all relevant considerations for passing of an order of assessment in cases which do not fall under Section 135 of the 2003 Act. Section 135 of the 2003 Act falls under Part XIV relating to 'offences and penalties' and title of the Section is 'theft of electricity'. The Section opens with the words 'whoever, dishonestly' does any or all of the acts specified under clauses (a) to (e) of Sub-section (1) of Section 135 of the 2003 Act so as to abstract or consume or use electricity shall be punishable for imprisonment for a term which may extend to three years or with fine or with both. Besides imposition of punishment as specified under these provisions or the proviso thereto, Sub-section (1A) of Section 135 of the 2003 Act provides that without prejudice to the provisions of the 2003 - Act, the licensee or supplier, as the case may be, through officer of rank authorized in this behalf by the appropriate commission, may immediately disconnect the supply of electricity and even take other measures enumerated under Sub-sections (2) to (4) of the said Section. The fine which may be imposed under Section 135 of the 2003 Act is directly proportional to the number of convictions and is also dependent on the extent of load abstracted. In contradistinction to these provisions, Section 126 of the 2003 Act would be applicable to the 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 with the inspection of the premises by an assessing officer and recording of a finding that such consumer is indulging in an 'authorized 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 of Section 126(2) of the 2003 Act. The officer is also under obligation to serve a notice in terms of Section 126(3) of the 2003 Act upon any such consumer requiring him to file his objections, if any, against the provisional assessment before a final order of assessment is passed within thirty days from the date of service of such order of provisional assessment. Thereafter, any person served with the order of provisional assessment may accept such assessment and deposit the amount with the licensee within seven days of service of such provisional assessment order upon him or prefer an appeal against the resultant final order under Section 127 of the 2003 Act. The order of assessment under Section 126 and the period for which such order would be passed has to be in terms of Sub-sections (5) and (6) of Section 126 of the 2003 Act. The Explanation to Section 126 is of some significance, which we shall deal with shortly hereinafter. Section 126 of the 2003 Act falls under Chapter XII and relates to investigation and enforcement and empowers the assessing officer to pass an order of assessment.

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16. Section 135 of the 2003 Act deals with an offence of theft of electricity and the penalty that can be imposed for such theft. This squarely falls within the dimensions of Criminal Jurisprudence and mens rea is one of the relevant factors for finding a case of theft. On the contrary, Section 126 of the 2003 Act does not speak of any criminal intent and is primarily an action and remedy available under the civil law. It does not have features or elements which are traceable to the criminal concept of mens rea.

17. Thus, it would be clear that the expression 'unauthorized use of electricity' under Section 126 of the 2003 Act deals with cases of unauthorized use, even in absence of intention. These cases would certainly be different from cases where there is dishonest abstraction of electricity by any of the methods enlisted under Section 135 of the 2003 Act. A clear example would be, where a consumer has used excessive load as against the installed load simpliciter and there is violation of the terms and conditions of supply, then, the case would fall under Section 126 of the 2003 Act. On the other hand, where a consumer, by any of the means and methods as specified under Sections 135(a) to 135(e) of the 2003 Act, has abstracted energy with dishonest intention and without authorization, like providing for a direct connection bypassing the installed meter. Therefore, there is a clear distinction between the cases that would fall under Section 126 of the 2003 Act on the one hand and Section 135 of the 2003 Act on the other. There is no commonality between them in law. They operate in different and distinct fields. The assessing officer has been vested with the powers to pass provisional and final order of assessment in cases of unauthorized use of electricity and cases of consumption of electricity beyond contracted load will squarely fall under such power. The legislative intention is to cover the cases of malpractices and unauthorized use of electricity and then theft which is governed by the provisions of Section 135 of the 2003 Act.

18. Section 135 of the 2003 Act significantly uses the words 'whoever, dishonestly' does any of the listed actions so as to abstract or consume electricity would be punished in accordance with the provisions of the 2003 Act. 'Dishonesty' is a state of mind which has to be shown to exist before a person can be punished under the provisions of that Section.

19. The word 'dishonest' in normal parlance means 'wanting in honesty'. A person can be said to have 'dishonest intention' if in taking the property it is his intention to cause gain, by unlawful means, of the property to which the person so gaining is not legally entitled or to cause loss, by wrongful means, of property to which the person so losing is legally entitled. 'Dishonestly' is an expression which has been explained by the Courts in terms of Section 24 of the Indian Penal Code, 1860 as 'whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person is said to do that thing dishonestly'. [The Law Lexicon (2nd Edn. 1997) by P. Ramanatha Aiyar]

20. This Court in the case of *Dr. S. Dutt v. State of U.P.*^{1 2} stated that a person who does anything with the intention to cause wrongful gain to one person or wrongful loss to another is said to do that dishonestly.

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21. Collins English Dictionary explains the word 'dishonest' as 'not honest or fair; deceiving or fraudulent'. Black's Law Dictionary (Eighth Edition) explains the expression 'dishonest act' as a fraudulent act, 'fraudulent act' being a conduct involving bad faith, dishonesty, a lack of integrity or moral turpitude.

22. All these explanations clearly show that dishonesty is a state of mind where a person does an act with an intent to deceive the other, acts fraudulently and with a deceptive mind, to cause wrongful loss to the other. The act has to be of the type stated under Sub-sections (1)(a) to (1)(e) of Section 135 of the 2003 Act. If these acts are committed and that state of mind, mens rea, exists, the person shall be liable to punishment and payment of penalty as contemplated under the provisions of the 2003 Act. In contradistinction to this, the intention is not the foundation for invoking powers of the competent authority and passing of an order of assessment under Section 126 of the 2003 Act. 1(c) The ambit and scope of Section 126 with reference to the construction of the words 'unauthorised use' and 'means'

23. Having dealt with the principle of interpretation of these provisions and the distinction between Sections 126 and 135 of the 2003 Act, we shall now discuss the ambit and scope of Section 126. The provisions of Section 126 contemplate the following steps to be taken :

“(i) An assessing officer is to conduct inspection of a place or premises and the equipments, gadgets, machines, devices found connected or used in such place.

(ii) The formation of a conclusion that such person has indulged in unauthorized use of electricity.

(iii) The assessing officer to provisionally assess, to the best of his judgment, the electricity charges payable by such person.

(iv) The order of provisional assessment to be served upon the person concerned in the manner prescribed, giving -

him an opportunity to file objections, if any, against the provisional assessment.

(v) The assessing officer has to afford a reasonable opportunity of being heard to such person and pass a final order of assessment within 30 days from the date of service of such order of provisional assessment.

(vi) The person, upon whom the provisional order of assessment is served, is at liberty to pay the said amount within seven days of the receipt of such order and where he files such objections, final order of assessment shall be passed, against which such person has a right of appeal under Section 127 of the 2003 Act within the prescribed period of limitation.

Assessment and Computation”

24. Wherever the assessing officer arrives at 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 such period cannot be ascertained, it shall be limited to a period of 12 months immediately preceding the date of inspection and the assessment shall be made at the rate equal to twice the tariff applicable for the relevant category of service specified under these provisions. This computation has to be taken in terms of Sections 126(5), 126(6) and 127 of the 2003 Act. The complete procedure is provided under these sections. Right from the initiation of the proceedings till preferring of an appeal against the final order of assessment and termination thereof, as such, it is a complete code in itself. We have already indicated that the provisions of Section 126 do not attract the principles of Criminal Jurisprudence including mens rea. These provisions primarily relate to unauthorized use of electricity and the charges which would be payable in terms thereof.

25. To determine the controversy in the present case, it will be essential to examine the implication of the expression 'unauthorised use of electricity' as contained in Explanation (b) of Section 126 of the 2003 Act.

26. In order to explain these expressions, it will be necessary for us to refer to certain other provisions and the Regulations - as well. These expressions have to be understood and given meaning with reference to their background and are incapable of being fairly understood, if examined in isolation. It is always appropriate to examine the words of a statute in their correct perspective and with reference to relevant statutory provisions.

27. The expression 'unauthorized use of electricity' on its plain reading means use of electricity in a manner not authorized by the licensee of the Board. 'Authorization' refers to the permission of the licensee to use of electricity', subject to the terms and conditions for such use and the law governing the subject. To put it more aptly, the supply of electricity to a consumer is always subject to the provisions of the 2003 Act, State Acts, Regulations framed thereunder and the terms and conditions of supply in the form of a contract or otherwise. Generally, when electricity is consumed in violation of any or all of these, it would be understood as 'unauthorized use of electricity'. But this general view will have to be examined in the light of the fact that the legislature has opted to explain - this term for the purposes of Section 126 of the 2003 Act. The said provision, along with the Explanation, reads as under: -

"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 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. (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 unauthorised use of electricity has taken place, the assessment shall be made for the entire period during which such unauthorised use of electricity has taken place and if, however, the period during which such unauthorised 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 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) "unauthorised use of electricity" means the usage of electricity--

(i) by any artificial means; or

(ii) by a means not authorised 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 authorised."

28. The 'unauthorized use of electricity' means the usage of electricity by the means and for the reasons stated in sub-clauses (i) to (v) of clause (b) of Explanation to Section 126 of the 2003 Act. Some of the illustratively stated circumstances of 'unauthorised use' in the section cannot be construed as exhaustive. The 'unauthorized use of electricity' would mean what is

stated under that Explanation, as well as such other unauthorized user, which is squarely in violation of the above- mentioned statutory or contractual provisions.

29. The Black's Law Dictionary (Eighth Edition) defines 'unauthorized' as 'done without the authority, made without actual, implied or apparent authority'. 'Unauthorized' is a concept well-recognized under different statutes, for example, under Section 31A of the Delhi Development Act, 1957 (the 'DDA Act') the authority has the power to seal the 'unauthorized' development, if the misuser of the premises would come within the ambit of 'unauthorized development'. But if such misuse does not come within the ambit of 'unauthorized development', such power is not available to the authority. Simple misuse, therefore, may not fall within the ambit of unauthorized development under the provisions of the DDA Act. In *M.C. Mehta v. Union of India*¹³ this Court held that if the misuse was in violation of the permission, approval or sanction or in contravention of any conditions, subject to which the said permission/approval has been granted in terms of Section 30 of the DDA Act, then it will be 'unauthorized use'.

30. We have primarily referred to this case to support the reasoning that 'unauthorized development' is one which is contrary to a master plan or zonal development plan as was the case under the DDA Act. Just as the right to develop a property is controlled by the restrictions of law as well as the terms and conditions of the permission granted for that purpose, the use of electricity is similarly controlled by the statutory provisions and the terms and conditions on which such permission is granted to use the electricity.

31. The unauthorized use of electricity in the manner as is undisputed on record clearly brings the respondent 'under - liability and in blame' within the ambit and scope of Section 126 of the 2003 Act. The blame is in relation to excess load while the liability is to pay on a different tariff for the period prescribed in law and in terms of an order of assessment passed by the assessing officer by the powers vested in him under the provisions of Section 126 of the 2003 Act.

32. The expression 'means' used in the definition clause of Section 126 of the 2003 Act can have different connotations depending on the context in which such expression is used. In terms of Black's Law Dictionary (Eighth Edition) page 1001, 'mean' is - 'of or relating to an intermediate point between two points or extremes' and 'meaning' would be 'the sense of anything, but esp. of words; that which is conveyed'. The word ordinarily includes a mistaken but reasonable understanding of a communication. 'Means' by itself is a restrictive term and when used with the word 'includes', it is construed as exhaustive. In those circumstances, a definition using the term 'means' is a statement of literal connotation of a term and the courts have interpreted 'means and includes' as an expression defining the section exhaustively. It is to be kept in mind that while determining whether a provision is exhaustive or merely illustrative, this will have to depend upon the language of the Section, scheme of the Act, the object of the Legislature and its intent.

33. 'Purposive construction' is certainly a cardinal principle of interpretation. Equally true is that no rule of interpretation should either be over-stated or over-extended.

Without being over-extended or over-stated, this rule of interpretation can be applied to the present case. It points to the conclusion that an interpretation which would attain the object and purpose of the Act has to be given precedence over any other interpretation which may not further the cause of the statute. The development of law is particularly liberated both from literal and blinkered interpretation, though to a limited extent.

34. The precepts of interpretation of contractual documents have also undergone a wide ranged variation in the recent times. The result has been subject to one important exception to assimilate the way in which such documents are interpreted by judges on the common sense principle by which any serious utterance would be interpreted by ordinary life. In other words, the common sense view relating to the implication and impact of provisions is the relevant consideration for interpreting a term of document so as to achieve temporal proximity of the end result.

35. Another similar rule is the rule of practical interpretation. This test can be effectuatedly applied to the provisions of a statute of the present kind. It must be understood that an interpretation which upon application of the provisions at the ground reality, would frustrate the very law should not be accepted against the common sense view which will further such application.

36. Once the court decides that it has to take a purposive construction as opposed to textual construction, then the legislative purpose sought to be achieved by such an interpretation has to be kept in mind. We have already indicated that keeping in view the legislative scheme and the provisions of the 2003 Act, it will be appropriate to adopt the approach of purposive construction on the facts of this case. We have also indicated above that the provisions of Section 126 of the 2003 Act are intended to cover the cases over and - above the cases which would be specifically covered under the provisions of Section 135 of the 2003 Act.

37. In other words, the purpose sought to be achieved is to ensure stoppage of misuse/unauthorized use of the electricity as well as to ensure prevention of revenue loss. It is in this background that the scope of the expression `means' has to be construed. If we hold that the expression `means' is exhaustive and cases of unauthorized use of electricity are restricted to the ones stated under Explanation (b) of Section 126 alone, then it shall defeat the very purpose of the 2003 Act, inasmuch as the different cases of breach of the terms and conditions of the contract of supply, regulations and the provisions of the 2003 Act would escape the liability sought to be imposed upon them by the Legislature under the provisions of Section 126 of the 2003 Act. Thus, it will not be appropriate for the courts to adopt such an approach. The primary object of the expression `means' is intended to explain the term `unauthorized use of electricity' which, even from the plain reading of the provisions of the 2003 Act or on a common sense view cannot be restricted to the examples given in the Explanation. The -Legislature has intentionally omitted to use the word `includes' and has only used the word `means' with an intention to explain inter alia what an unauthorized use of electricity would be. It must be noticed that clause (iv) of Explanation (b) and sub-Section (5) of Section 126 of the 2003 Act were both amended/substituted by the same amending Act

26 of 2007, with a purpose and object of preventing unauthorised use of electricity not amounting to theft of electricity within the meaning of Section 135 of the 2003 Act. This amendment, therefore, has to be given its due meaning which will fit into the scheme of the 2003 Act and would achieve its object and purpose.

38. The expression 'means' would not always be open to such a strict construction that the terms mentioned in a definition clause under such expression would have to be inevitably treated as being exhaustive. There can be a large number of cases and examples where even the expression 'means' can be construed liberally and treated to be inclusive but not completely exhaustive of the scope of the definition, of course, depending upon the facts of a given case and the provisions governing that law. In the case of *K.V. Muthu v. Angamuthu Ammal*¹⁴ this Court was dealing with a case under the Tamil Nadu Rent Act and the expression 'member of his family' as defined under Section 2(6-A) of that Act. Section 2(6-A) provides that 'member of his family' in relation to a landlord means his spouse, son, daughter, grand-child or dependent parents. If the principle of construction advanced by the learned counsel appearing for the respondent is to be accepted, then even in that case, the Court could not have expanded the expression 'members of his family' to include any other person than those specifically mentioned under that definition. The definition and the expression 'means', if construed as exhaustive would necessarily imply exclusion of all other terms except those stated in that Section but this Court, while adopting the principle of purposive construction, came to the conclusion that even a foster son, who is obviously not the real son or direct descendant of a person, would be included. This Court, observing that there was consensus in precedent that the word 'family' is a word of great flexibility and is capable of different meanings, held as under :

"While interpreting a definition, it has to be borne in mind that the interpretation placed on it should not only be not repugnant to the context, it should also be such as would aid the achievement of the purpose which is sought to be served by the Act. A construction which would defeat or was likely to defeat the purpose of the Act has to be ignored and not accepted. Where the definition or expression, as in the instant case, is preceded by the words "unless the context otherwise requires", the said definition set out in the section is to be applied and given effect to but this rule, which is the normal rule may be departed from if there be something in the context to show that the definition could not be applied."

39. Another comparable example of such interpretation by this Court can be traced out in the case of *Union of India v. Prabhakaran Vijaya Kumar & Ors*¹⁵. wherein it was dealing with the provisions of Section 123(c) of the Railways Act, 1989 which read as under :

"123 (c) "untoward incident" means--

(1) (i) the commission of a terrorist act within the meaning of sub-section (1) of section (3) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 ; or

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(ii) the making of a violent attack or the commission of robbery or dacoity; or

(iii) the indulging in rioting, shoot-out or arson, by any person in or on any train carrying passengers, or in a waiting hall, cloak room or reservation or booking office or on any platform or in any other place within the precincts of a railway station; or
(2) the accidental falling of any passenger from a train carrying passengers."

40. As is obvious from the bare reading of the above provision, the provision used the expression 'untoward incident means' and under clause (2) of that provision 'accidental falling of any passenger from a train carrying passengers' is included. If it was to be understood as an absolute rule of law that the use of the term 'means' unexceptionally would always require an exhaustive interpretation of what is stated in or can be construed to that provision, then a person who was climbing on the train which was carrying passengers and who meets with an accident, would not be covered. However, this Court, while repelling this contention, held that by adopting a restrictive meaning to the expression 'accidental falling of a passenger from a train - carrying passengers' in Section 123(c) of the Railways Act, 1989, this Court would be depriving a large number of railway passengers from receiving compensation in railway accidents. Treating the statute to be a beneficial piece of legislation, this Court applied purposive interpretation, while observing as under :

"No doubt, it is possible that two interpretations can be given to the expression "accidental falling of a passenger from a train carrying passengers", the first being that it only applies when a person has actually got inside the train and thereafter falls down from the train, while the second being that it includes a situation where a person is trying to board the train and falls down while trying to do so. Since the provision for compensation in the Railways Act is a beneficial piece of legislation, in our opinion, it should receive a liberal and wider interpretation and not a narrow and technical one. Hence, in our opinion the latter of the abovementioned two interpretations i.e. the one which advances the object of the statute and serves its purpose should be preferred vide *Kunal Singh v. Union of India*¹⁶ para 9], *B.D. Shetty v. Ceat Ltd.*¹⁷ – para 12) and *Transport Corpn. Of India v. ESI Corpn.*¹⁸ "

41. The above judgments clearly support the view that we have taken with reference to the facts and law of the present case. It cannot be stated as an absolute proposition of law that the expression 'means' wherever occurring in a provision would inevitably render that provision exhaustive and limited. This rule of interpretation is not without exceptions as there could be statutory provisions whose interpretation demands somewhat liberal construction and require inclusive construction. An approach or an interpretation which will destroy the very purpose and object of the enacted law has to be avoided. The other expressions used by the Legislature in various sub-clauses of Explanation (b) of Section 126 of the 2003 Act are also indicative of its intent to make this provision wider and of greater application. Expressions like 'any artificial means', 'by a means not authorised by the licensee' etc. are terms which cannot be exhaustive even linguistically and are likely to take within their ambit what is not

specifically stated. For example, 'any artificial means' is a generic term and so the expression 'means' would have to be construed generally. This Court in the case of Eureka Forbes Ltd. v. - Allahabad Bank [(2010) 6 SCC 193], while examining the interpretation and application of the word 'debt', held that it was a generic term and, thus, of wide amplitude :

"50. In this background, let us read the language of Section 2(g) of the Recovery Act. The plain reading of the Section suggests that legislature has used a general expression in contra distinction to specific, restricted or limited expression.

This obviously means that, the legislature intended to give wider meaning to the provisions. Larger area of jurisdiction was intended to be covered under this provision so as to ensure attainment of the legislative object, i.e. expeditious recovery and providing provisions for taking such measures which would prevent the wastage of securities available with the banks and financial institutions.

51. We may notice some of the general expressions used by the framers of law in this provision:

- “a) any liability;
- b) claim as due from any person;
- c) during the course of any business activity undertaken by the Bank;
- d) where secured or unsecured;
- e) and lastly legally recoverable.”

52. All the above expressions used in the definition clause clearly suggest that, - expression 'debt' has to be given general and wider meaning, just to illustrate, the word 'any liability' as opposed to the word 'determined liability' or 'definite liability' or 'any person' in contrast to 'from the debtor'. The expression 'any person' shows that the framers do not wish to restrict the same in its ambit or application. The legislature has not intended to restrict to the relationship of a creditor or debtor alone. General terms, therefore, have been used by the legislature to give the provision a wider and liberal meaning. These are generic or general terms. Therefore, it will be difficult for the Court, even on cumulative reading of the provision, to hold that the expression should be given a narrower or restricted meaning. What will be more in consonance with the purpose and object of the Act is to give this expression a general meaning on its plain language rather than apply unnecessary emphasis or narrow the scope and interpretation of these provisions, as they are likely to frustrate the very object of the Act."

42. The expressions 'means', 'means and includes' and 'does not include' are expressions of different connotation and significance. When the Legislature has used a particular expression out of these three, it must be given its plain meaning while even keeping in mind that the use of other two expressions has not been favoured by the Legislature. To put it simply, the Legislature has favoured non-use of such - expression as opposed to other specific expression. In the present case, the Explanation to Section 126 has used the word 'means' in contradistinction to 'does not include' and/or 'means and includes'. This would lead to one obvious result that even the Legislature did not intend to completely restrict or limit the scope of this provision.

43. Unauthorised use of electricity cannot be restricted to the stated clauses under the explanation but has to be given a wider meaning so as to cover cases of violation of terms and conditions of supply and the regulations and provisions of the 2003 Act governing such supply. 'Unauthorised use of electricity' itself is an expression which would, on its plain reading, take within its scope all the misuse of the electricity or even malpractices adopted while using electricity. It is difficult to restrict this expression and limit its application by the categories stated in the explanation. It is indisputable that the electricity supply to a consumer is restricted and controlled by the terms and conditions of supply, the regulations framed and the provisions of the 2003 Act. The requirement of grant of licence itself suggests that electricity is a controlled commodity and is to be regulated by the regulatory authorities. If a person unauthorisedly consumes electricity, then he can certainly be dealt with in accordance with law and penalties may be imposed upon him as contemplated under the contractual, regulatory and statutory regime. The Orissa Electricity Regulatory Commission, in exercise of its powers under Section 181(2)(t), (v), (w) and (x) read with Part VI of the 2003 Act, Orissa Electricity Reforms Act, 1995 and all other powers enabling it in that behalf, made the regulations to govern distribution and supply of electricity and procedure thereof such as system of billing, modality of payment, the powers, functions and applications of the distribution licensees form for supply and/or suppliers and the rights and obligations of the consumers. These were called 'Orissa Electricity Regulatory Commission Distribution (Conditions of Supply) Code, 2004 (hereinafter referred to as 'Conditions of Supply) vide notification dated 21st May, 2004. The Agreement has been placed on record. This Agreement was undisputedly executed between the parties. Clause (2) of the Agreement deals with Conditions of Supply. It states that consumer had obtained and perused a copy of the Grid Corporation of Orissa Ltd. (General Conditions of Supply) Regulations, 1995, understood its content and undertook to observe and abide by all the terms and conditions stipulated therein to the extent they are applicable to him. The respondent was a consumer under the 'medium industry category'. Clause (A) of the terms and conditions applicable to medium industry category reads as under :

"This tariff rate shall be applicable to supply of power at a single point for industrial production purposes with contract demand/connected load of 22 KV and above up to but excluding 110 KVA where power is generally utilized as a motive force."

44. Minimum energy charges are to be levied with reference to 'contract demand' at the rate prescribed under the terms and conditions. These clauses of the Agreement clearly show that

the charges for consumption of electricity are directly relatable to the sanctioned/connected load and also the load consumed at a given point of time if it is in excess of the sanctioned/connected load. The respondent could consume electricity up to 110 KVA but if the connected load exceeded -that higher limit, the category of the respondent itself could stand changed from `medium industry' to `large industry' which will be governed by a higher tariff.

45. Chapter VII of the Conditions of Supply classifies the consumers into various categories and heads. The electricity could be provided for a domestic, LT Industrial, LT/HT Industrial, Large Industry, Heavy Industries and Power Intensive Industries, etc. In terms of Regulation 80, the industry would fall under LT/HT category, if it relates to supply for industrial production with a contract demand of 22 KVA and above but below 110 KVA. However, it will become a `large industry' under Regulation 80(10) if it relates to supply of power to an industry with a contract demand of 110 KVA and above but below 25,000 KVA. Once the category stands changed because of excessive consumption of electricity, the tariff and other conditions would stand automatically changed. The licensee has a right to reclassify the consumer under Regulation 82 if it is found that a consumer has been classified in a particular category erroneously or the purpose of supply as mentioned in the agreement has changed or the consumption of power has exceeded the limit of that category etc. The Conditions of Supply even places a specific prohibition on consumption of excessive electricity by a consumer. Regulation 106 of the Conditions of Supply reads as under :

"No consumer shall make use of power in excess of the approved contract demand or use power for a purpose other than the one for which agreement has been executed or shall dishonestly abstract power from the licensee's system."

46. On the cumulative reading of the terms and conditions of supply, the contract executed between the parties and the provisions of the 2003 Act, we have no hesitation in holding that consumption of electricity in excess of the sanctioned/ connected load shall be an `unauthorised use' of electricity in terms of Section 126 of the 2003 Act. This, we also say for the reason that 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 fluctuations. In somewhat similar circumstances, where the consumer had been found to be drawing electricity in excess of contracted load and the general conditions of supply of electricity energy by the Board and clause 31(f) of the same empowered the Board to disconnect supply and even levy higher charges as per the tariff applicable, this Court held that such higher tariff charges could be recovered. While noticing the prejudice caused, the Court in the case *Bhilai Rerollers & Ors. v. M.P. Electricity Board & Ors*¹⁹. held as under :

"21. The respondent-Board, therefore, is entitled to raise the demand under challenge since such right has been specifically provided for and is part of the conditions for supply and particularly when such drawal of extra load in excess of the contracted load is bound to throw out of gear the entire supply system undermining its

efficiency, efficacy not only causing stress on the installations of the Board but considerably affect other consumers who will experience voltage fluctuations. Consequently, we see no merit in the challenge made on behalf of the appellants. The appeals, therefore, fail and shall stand dismissed but with no costs."

47. Similar view was taken by this Court in the case of *Orissa State Electricity Board & Anr. v. IPI Steel Ltd. & Ors*²⁰.

48. It will also be useful to notice that certain malpractices adopted by the consumer for consuming electricity in excess of the contracted load could squarely fall within the ambit and scope of Section 126 of the 2003 Act as it is intended to provide safeguards against pilferage of energy and malpractices by the consumer. The Regulations framed in exercise of power of subordinate legislation or terms and conditions imposed in furtherance of statutory provisions have been held to be valid and enforceable. They do not offend the provisions of the 2003 Act. In fact, the power to impose penal charges or disconnect electricity has been held not violative even of Article 14 of the Constitution of India. The expression 'malpractices' does not find mention in the provisions under the 2003 Act but as a term coined by judicial pronouncements. Thus, the expression 'malpractices' has to be construed in its proper perspective and normally may not amount to theft of electricity as contemplated under Section 135 of the 2003 Act. Such - acts/malpractices would fall within the mischief of unauthorized use of electricity as stipulated under Section 126 of the 2003 Act. Cases of pilferage of electricity by adopting malpractices which patently may not be a theft would be the cases that would fall within the jurisdiction of the Board in furtherance to the terms and conditions of supply. Reference in this regard can be made to the judgment of this Court in the case of *Hyderabad Vanaspathi Lts. v. A.P. State Electricity Board & Anr*²¹.

49. There is another angle from which the present case can be examined and obviously without prejudice to the other contentions raised. It is a case where, upon inspection, the officers of the appellant found that respondent was consuming 142 KVA of electricity which was in excess of the sanctioned load. To the inspection report, the respondent had not filed any objection before the competent authority as contemplated under Section 126(3) and had approached the High Court. Limited for the purposes of these proceedings, excess consumption is not really in dispute. As stated above, the contentions raised by the respondent were to challenge the - very jurisdiction of the concerned authorities. Consumption in excess of sanctioned load is violative of the terms and conditions of the agreement as well as of the statutory benefits. Under Explanation (b)(iv), 'unauthorised use of electricity' means if the electricity was used for a purpose other than for which the usage of electricity was authorised. Explanation (b) (iv), thus, would also cover the cases where electricity is being consumed in excess of sanctioned load, particularly when it amounts to change of category and tariff. As is clear from the agreement deed, the electric connection was given to the respondent on a contractual stipulation that he would consume the electricity in excess of 22 KVA but not more than 110 KVA. The use of the negative language in the condition itself declares the intent of the parties that there was an implied prohibition in consuming electricity in excess of the maximum load as it would per se be also

prejudiced. Not only this, the language of Regulations 82 and 106 also prescribe that the consumer is not expected to make use of power in excess of approved contract demand otherwise it would be change of user falling within the ambit of 'unauthorised use of electricity'. Again, there is no occasion for this Court to give a restricted meaning to the language of Explanation (b)(iv) of Section 126. According to the learned counsel appearing for the respondent, it is only the actual change in purpose of use of electricity and not change of category that would attract the provisions of Section 126 of the 2003 Act. The contention is that where the electricity was provided for a domestic purpose and is used for industrial purpose or commercial purpose, then alone it will amount to change of user or purpose. The cases of excess load would not fall in this category. This argument is again without any substance and, in fact, needs to be noticed only to be rejected. We have already discussed in some detail above that the expressions of the Explanation to Section 126 are to be given a wider and amplified meaning so as to ensure the implementation of the provisions in contradistinction to defeating the very object of the 2003 Act. Without being innovative and while predicating, we only state the principles which have been authoritatively pronounced by this Court in different cases. In the case of *Association of Industrial Electricity Users v. State of A.P. & Ors*²¹, this Court, while expressing that fixation of tariff in electricity or allied matters can hardly be a subject matter of judicial review. The courts would not venture to examine the tariff on merit and restrict its power of judicial review only to procedural matters that too where it is ex facie arbitrary. The Court rejecting the contention raised before it that Section 126 of the Andhra Pradesh Electricity Reforms Act does not envisage classification of consumers according to the purpose for which the electricity is used and held that the supply of electricity permits differentiation according to the consumer's load factor or power factor, total consumption of energy during the specified period, the time at which the supply is required and the need for cross-subsidisation or such tariff as is just and reasonable and such as to promote economic efficiency in the supply and consumption of electricity. The tariff may also be such as to satisfy all other relevant provisions of the 2003 Act and the relevant conditions of the Agreement. Thus, there is a direct relation between the quantum of electricity demanded, supplied and tariff rate. The purpose, therefore, would include by necessary implication, the category under -which the electricity supply is being provided by the licensee to the consumer. Still, in another case of *Punjab State Electricity Board v. Vishwa Caliber Builders Private Ltd*²², this Court was primarily concerned with the question whether the ombudsman would have the jurisdiction to issue directions for regularization of unauthorized electricity. Answering the same in the negative and dealing with the question of excess load, this Court held as under:

"The fact that the appellant could not release connection with a load of 2548 KW on account of non-availability of transformer necessary for transfer of 8 MVA load from 66 KV sub station, G.T. Road, Ludhiana had no bearing on the issue of consumption of electricity by the respondent beyond the sanctioned load. Undisputedly, in terms of the request made by the respondent, the Chief Engineer had sanctioned connection on the existing system with a load of 1500 KW, but the respondent used excess load to the tune of 481.637 KW and this amounted to unauthorized use of electrical energy."

50. The consistent view of this Court would support the proposition that the cases of excess load of consumption would be squarely covered under Explanation (b)(iv) of Section 126 of the 2003 Act. Once this factor is established, then the assessing officer has to pass the final order of assessment in terms of Sections 126(3) to 126(6) of the 2003 Act.

51. Under the procedure prescribed, the person (the consumer) has to be served with the notice inviting him to file objections, if any, within the stipulated time in terms of Section 126(3) and the assessing officer is required to pass a final order within 30 days from the date of service of such order of provisional assessment. If the consumer does not pay the provisional assessment amount, as required under Section 126(4) and file objections under Section 126(3), then after affording opportunity to the consumer, the assessing officer shall assess the amount and pass an order of final assessment, as stated in Section 126(5). Section 126(6) contemplates that the assessment under the Section shall be made at a rate equal to twice the tariff applicable for the relevant category of services specified in Sub-section (5). The reference to the category in Section 126(6) fully substantiate the view that we have taken that change of category by -consumption of excess load will automatically bring the defaulter within the mischief of Explanation to Section 126(6). Once the order of assessment is finally passed and is served upon the consumer, he is expected to pay the said charges unless, being aggrieved from such an order, he prefers an appeal under Section 127 of the 2003 Act. The appeal under Section 127 would lie only against the final order passed under Section 126 that too within 30 days of the said order. The appeal shall be filed, maintained and dealt with in accordance with the procedure specified in Section 127 of the 2003 Act. A bare reading of the provisions of Section 127 shows that it is the final order made under Section 126 which is appealable under Section 127 of the 2003 Act. In other words, issuance of a notice or a provisional order of assessment as may be made by the assessing officer in terms of sub-section (1) to sub-section (3) of Section 126 of the 2003 Act would not be the order against which an appeal would lie.

52. It may be noticed that admittedly the present respondent had not preferred any appeal against the provisional order of assessment dated 25th July, 2009 and, in fact, had preferred a writ petition against the very issuance of a notice issued in terms of Sub-sections (2) and (3) of Section 126 of the 2003 Act. This brings us to the question as to what is the scope of jurisdiction under Article 226 of the Constitution of India in face of the provisions of Section 127 of the 2003 Act.

53. 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.

54. Should the Courts determine on merits of the case or should it 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 it involves primary questions of jurisdiction or the matters which goes 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 specialized Tribunal or the appellate authorities to examine the merits of assessment or even factual matrix of the case. 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 above-stated 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 any one 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. Suffices it to make a reference to the judgment of this Court in the case of *Whirlpool Corporation v. Registrar of Trade Marks, Mumbai*²³ 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 face of availability of a remedy under the Act. This Court while referring to various judgments of this Court and specifying the cases where the alternative remedy would not bar the exercise of jurisdiction by the Court, held as under: -

"14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution This power can be exercised by the High Court not only for issuing writs in the nature of Habeas Corpus, Mandamus, prohibition, Qua Warranto and Certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other purpose".

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an

effective and efficacious remedy is - available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case law on this point but to cut down this circle of forensic whirlpool we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.

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19. Another Constitution Bench decision in *Calcutta Discount Co. Ltd. v. ITO Companies Distt*²⁴: laid down :

"Though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Court will issue appropriate orders or directions to prevent such consequences. Writ of certiorari and prohibition can issue - against Income Tax Officer acting without jurisdiction Under Section 34 Income Tax Act."

20. Much water has since flown under the bridge, but there has been no corrosive effect on these decisions which command though old, continue to hold the field with the result that law as to the jurisdiction of the High Court in entertaining a writ petition under Article 226 of the Constitution, in spite of the alternative statutory remedies, is not affected, specially in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation.

21. That being so, the High Court was not justified in dismissing the writ petition at the initial stage without examining the contention that the show cause notice issued to the appellant was wholly without jurisdiction and that the Registrar, in the circumstances of the case, was not justified in acting as the `Tribunal'."

55. Even in the case of *Union of India v. State of Haryana*²⁵ 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.

56. 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.

57. 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 specialized 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 specialized 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.

58. Having dealt with and answered determinatively the questions framed in the judgment, we consider it necessary to precisely record the conclusions of our judgment which are as follows:-

“1. Wherever the consumer commits the breach of the terms of the Agreement, Regulations and the provisions of the Act by consuming electricity in excess of the sanctioned and connected load, such consumer would be `in blame -

2. and under liability' within the ambit and scope of Section 126 of the 2003 Act.

3. The expression `unauthorized use of electricity means' as appearing in Section 126 of the 2003 Act is an expression of wider connotation and has to be construed purposively in contrast to contextual interpretation while keeping in mind the object and purpose of the Act. The cases of excess load consumption than the connected load inter alia would fall under Explanation (b)(iv) to Section 126 of the 2003 Act, besides it being in violation of Regulations 82 and 106 of the Regulations and terms of the Agreement.

4. In view of the language of Section 127 of the 2003 Act, only a final order of assessment passed under Section 126(3) is an order appealable under Section 127 and a notice-cum-provisional assessment made under Section 126(2) is not appealable.

5. Thus, the High Court should normally decline to interfere in a final order of assessment passed by the assessing -

6. officer in terms of Section 126(3) of the 2003 Act in exercise of its jurisdiction under Article 226 of the Constitution of India.

7. The High Court did not commit any error of jurisdiction in entertaining the writ petition against the order raising a jurisdictional challenge to the notice/provisional assessment order dated 25th July, 2009. However, the High Court transgressed its jurisdictional limitations while travelling into the exclusive domain of the Assessing Officer relating to passing of an order of assessment and determining factual controversy of the case.

8. The High Court having dealt with the jurisdictional issue, the appropriate course of action would have been to remand the matter to the Assessing Authority by directing the consumer to file his objections, if any, as contemplated under Section 126(3) and require the Authority to pass a final order of assessment as contemplated under Section 126(5) of the 2003 Act in accordance with law.

59. For the reasons afore-recorded, the judgment of the High Court is set aside and the matter is remanded to the Assessing Officer to pass a final order of assessment expeditiously, after providing opportunity to the respondent herein to file objections, if any, to the provisional assessment order, as contemplated under Section 126(3) of the 2003 Act.

60. The appeal is allowed in the above terms, while leaving the parties to bear their own costs.

Judgment Referred.

¹(2003) 7 SCC 0628

²(1964) 1 SCR 0371

³AIR 1992 SC 0081

⁴AIR 1990 SC 0123

⁵(1900) 2 Ch 352

⁶(1960) 3 All ER 503

⁷1928 AC 0037

⁸(1886) 11 AC 0827

⁹(1990) 2 All ER 0118

¹⁰(1979) 4 SCC 0085

¹¹(1940) A.C. 1014

¹²AIR 1966 SC 0523

¹³(2006) 3 SCC 0391

¹⁴(1997) 2 SCC 0053

¹⁵(2008) 9 SCC 0527

¹⁶(2003) 4 SCC 0524

¹⁷(2002) 1 SCC 0193

¹⁸(2000) 1 SCC 0332

¹⁹(2003) 7 SCC 0185

²⁰(1995) 4 SCC 0328

²¹(2002) 3 SCC 0711

²²(2010) 4 SCC 0539

²³(1998) 8 SCC 0001

²⁴(1961) 41 ITR 0191 (SC)

²⁵(2000) 10 SCC 0482