HIGH COURT OF MADHYA PRADESH
BENCH AT INDORE

1	**Case No.**	RP No.1765/2018
2	**Parties Name**	The Superintending Engineer (O&M) Madhya Pradesh Paschim Kshetra Vidyut Vitran Co. & Ors **Vs.** National Steel and Agro Industrie Ltd. & Ors.
3	**Date of Judgment**	13/5/2020
4	**Bench constituted of**	Hon'ble Shri Justice Prakash Shrivastava & Hon.Mr.Justice S.K.Awasthi
5	**Judgment delivered by**	Hon'ble Shri Justice Prakash Shrivastava
6	**Whether approved for reporting**	**Yes**
7	**Name of counsels for parties.**	Shri.Piyush Mathur,learned Sr.Counsel with Shri D.S.Panwar & Shri Akash Vijayvargiya, counsel for the petitioner. Shri A.K.Sethi, learned Sr.Counsel with Shri S.Chandravanshi, learned counsel for respondent No.1. Shri Vinay Saraf, learned Sr.Counsel with Shri Rizwan Khan, learned counsel for Intervener. Shri Ambar Pare, learned G.A for respondent/State.
8	**Law laid down**	If the challenge to the constitutional validity is given up at the time of final hearing, then the remaining issues are to be heard and decided by the appropriate bench as per Roster. (Para 8 to 11). If one writ petition is dismissed, then the second writ petition challenging the same order is hit by the principle of *resjudicat*a. (Para 12). Principle of *mensrea* is not attracted for the levy of penalty u/S.126 of the Electricity Act (Para 13 to 15 and 17). Non consideration of binding decision of superior court deciding an issue is an error apparent on the face of record (Para 16).
9	**Significant paragraph numbers**	Paragraphs 8 to 17.

(PRAKASH SHRIVASTAVA) **(S.K. AWASTHI)**

J u d g e **J u d g e**

HIGH COURT OF MADHYA PRADESH BENCH AT INDORE
(D.B.: HON.MR JUSTICE PRAKASH SHRIVASTAVA & HON.MR.JUSTICE S.K.AWASTHI)

Review Petition No.1765/2018

The Superintending Engineer (O & M)
Madhya Pradesh Paschim Kshetra Vidyut Vitran Company & Ors.

Vs.

National Steel and Agro Industries Ltd. & Ors.

Shri.Piyush Mathur,learned Sr.Counsel with Shri D.S.Panwar & Shri Akash Vijayvargiya, counsel for the petitioner.
Shri A.K.Sethi, learned Sr.Counsel with Shri S.Chandravanshi, learned counsel for respondent No.1.
Shri Vinay Saraf, learned Sr.Counsel with Shri Rizwan Khan, learned counsel for Intervener.
Shri Ambar Pare, learned G.A for respondent/State.

Whether approved for reporting :

O R D E R

(Passed on 13th May, 2020)

Per Prakash Shrivastava, J:

Petitioner is seeking review of the order dated 22/10/2018 passed by the division bench in WP No.22734/2017 allowing the writ petition by holding that instead of penalty, writ petitioner (respondent No.1 herein) is liable to pay interest on the amount of actual maximum demand charges and actual

TMM charges and further issuing a direction to raise fresh demand for the period of unauthorised use at the rates equal to the tariff rules applicable to actual minimum demand charges along with interest thereon at agreement rate of interest.

[2] The respondent No.1 runs a steel industry. On 4/4/2015 a team of officers of the review petitioner MPPKVVCL had visited the premises of respondent No.1 and had found unauthorised use of electricity by respondent No.1. The provisional assessment order dated 16/4/2015 was passed and demand of Rs.49,30,64,654/- was raised. Objections were submitted by respondent No.1 against provisional assessment order and thereafter final assessment order dated 13/5/2015 determining the liability of Rs.49,30,64,654/- for the period May 2009 to February 2015 was passed. These orders were subject matter of challenge in WP No.2814/2015 which was initially allowed by the learned Single Judge by order dated 28/7/2015 but WA No.494/2015 was allowed by the division bench and order of single bench was set aside and writ petition was dismissed. SLP against this order was also dismissed. The respondent No.1 then submitted representation for fixing the instalments to pay the amount and the prayer to that extent was allowed and respondent No.1 was allowed to pay the balance amount in 36 instalments. The respondent No.1

filed second writ petition being WP No.22734/2017 again challenging the assessment order and demand note and also challenged the constitutional validity of Sec.126(6) of Electricity Act and questioning imposition of penalty and levy of compound interest @ 16% per annum. Since constitutional validity of a statutory provision was challenged, therefore, writ petition was listed before the division bench but at the time of final hearing, respondent No.1 did not press the constitutional validity of Sec.126(6) and division bench by the judgment under review had allowed the writ petition.

[3] Learned counsel for review petitioner submits that the division bench had no jurisdiction to hear the petition once challenge to the *vires* of Sec.126(6) of the Electricity Act was given up. He further submits that after dismissal of earlier writ petition second writ petition on the same ground could not be entertained. He has also submitted that there is error apparent on the face of record as this court has held the provision u/S.126(6) of the Act as penal provision and in this regard the judgments of the Supreme Court in the case of **Executive Engineer southern Electricity Supply Co. of Orissa Vs. Sitaram Rice Mills (2012) 2 SCC 108 and The Chairman, SEBI Vs. Shri Ram Mutual Funds & another (2006) 5 SCC 361** have not been noticed by this court. He has also submitted

that direction to levy interest at the agreed rate runs counter to provisions contained u./S.127(6) of the Act which has not been considered by this court and the direction to raise fresh demand at the rate equal to the tariff rules applicable to actual minimum demand charges runs counter to the provisions contained u/S.126(6) of the Act which has also not been noticed by this court and while invoking the principles of *mens rea* for levy of penalty the law settled by the Hon'ble Supreme Court in the matter of **Executive Engineer southern Electricity Supply Co. of Orissa Vs. Sitaram Rice Mills (2012) 2 SCC 108** has not been taken note of, hence there is error apparent on the face of record which requires review and recall of the order.

[2] Learned counsel for respondent No.1 submits that the scope of review is limited and the argument which the counsel for petitioner has raised do not furnish any ground for review and it is not a case of *res judicata* because the division bench of this court has only set aside the penalty and interest levied which was not challenged in the first writ petition. He has also submitted that objection relating to *res judicata* has been expressly overruled by the division bench, therefore, the ground which the petitioner is raising can be a ground for appeal and not for review.

[3] Shri Vinay Saraf, learned counsel for intervener workers has supported the respondent No.1.

[4] Having heard the learned counsel for parties and on perusal of the record, it is noticed that the respondent No.1 had

earlier filed WP No.2814/2015 challenging the provisional assessment order dated 16/4/2015 and by amending the writ petition final assessment order dated 13/5/2015 was also challenged.

[5] Learned Single Judge by order dated 28th July, 2015 had allowed the writ petition and quashed the provisional assessment order dated 16/4/2015 and final assessment order dated 13/5/2015. In WA No.494/2015 the entire matter was examined and by a detailed order dated 22/6/2016 the order of the learned Single Judge was set aside and writ petition was dismissed by holding as under:-

> "47. From the above mentioned reasons, we are of the view that there has been a clear case of unauthorised use of electricity by the respondent within the meaning of section 126 of the Electricity Act and the action of appellant No.1 is justified to initiate a proceeding under the said provision for assessment for such unauthorised use and for consequential compensation to be recovered from the National Steel. Accordingly the appellant No.1 rightly initiated the proceedings against the National Steel and passed final Assessment Order dated 13/05/2015."

[6] The SLP No.18678/2016 against the order passed in WA No.494/2015 was dismissed by the Hon'ble The Supreme Court by order dated 16/8/2016 by holding as under:-

> "Heard learned counsel for the parties.
>
> No ground for interference is made out in exercise of our jurisdiction under Article 136 of the Constitution of India.
>
> The special leave petition is accordingly dismissed.
>
> Interlocutory Applications, if any, shall stand disposed of."

[7] The respondent No.1 again filed the second writ petition being WP No.22734/2017 challenging the same provisional and final assessment order dated 13/5/2015 (Annexure P/2) and consequential demand notice (Annexure P/3) and assessment order dated 16/4/2015 (Annexure P/1) and further challenging the constitutional validity of Sec.126(6) of the Electricity Act and questioning levy of penalty in the form of compound interest @ 16%.

[8] Paragraph 1 of the order passed by the division bench of this court dated 22nd October, 2018 in WP No.22734/2017 reveals that when the petition was taken up for hearing, the writ petitioner (respondent No.1 herein) at the outset gave up the challenge to the constitutional validity of Sec.126 of the Electricity Act. After giving up challenge to the *vires* of the provision, for remaining issues roster for hearing the writ petition was with Single Judge as per Rule 1 of Chapter IV of the High Court of M.P. Rules 2008 and it could not have been heard by the division bench, but it appears that nobody brought it to the notice of the division bench, hence the division bench proceeded to hear the WP No.22734/207 and passed the order dated 22nd October 2018.

[9] Hon'ble Supreme Court in the matter of **Jasbir Singh Vs. State of Punjab(2006) 8 SCC 294** after taking note of its earlier judgment in the matter of **State of Rajasthan Vs. Prakash Chand AIR 1998 SC 1344** has held that Hon'ble The Chief Justice alone has the power to decide as to how the benches of the High Court are to be constituted and it is not within the competence of a single or division bench of the High Court to get the matter listed before it contrary to the direction of the Hon'ble The Chief Justice. The division bench of Allahabad

High Court in the matter of **<u>Pandit Jagdish Narain Mishra Vs. State of U.P. LAWS (ALL) 2007-11-42</u>** has held that hearing of a matter by a single bench or division bench contrary to Roster is not within their competence.

[10] Hon'ble The Supreme Court in the matter of **<u>PGF Ltd.Vs. Union of India (2015) 13 SCC 50</u>** has taken note of the frivolous or vexatious litigation raising constitutional validity of the provision only to avoid compliance and has laid down general principles/guidelines/precautions, but the said judgment was not brought to the notice of this court and the division bench could not consider this aspect that by raising the issue of constitutional validity and giving up the challenge at the time of hearing, the respondent No.1 had avoided the hearing by the learned single bench and persuaded the division bench to hear the matter which otherwise could not be heard by it as per the Roster and the High Court Rules. In view of the legal position that a Single or Division Bench only has the jurisdiction to hear the case as per Roster or Rules or assigned by the Hon'ble Chief Justice, the division bench was not competent to hear the matter which was required to be heard by the Single bench as per Roster. Hence, this is the first error apparent on the face of record.

[11] The above facts also reveal that the constitutional validity of Sec.126(6) of the Electricity Act was challenged so that the matter could straightaway go to the division bench. The division bench of Gujarat High Court by the judgment dated 30th November, 2013 in the matter of <u>Satish Babubhai Patel Vs. Union of India (2014) 1 GLH 483</u> had already upheld constitutional validity of section 126(6).

[12] The second error on the face of record is that the same

provisional assessment order dated 16/4/2015 and final assessment dated 13/5/2015 were under challenge in WP No.2814/2015 and the said writ petition was dismissed by the division bench and the order was affirmed by Hon'ble Supreme Court, yet WP No.22734/2017 was filed challenging these very orders alongwith some ancillary reliefs which could not have been entertained in view of the judgment of the Supreme Court in the matter of **Devilal Modi Vs. STO Ratlam AIR 1965 SC 1150** wherein it has been held that a citizen should not be allowed to challenge the validity of the same order by successive petition under Article 226 as the earlier order becomes final and no one should be made to face the same kind of litigation twice as it would be contrary to consideration of fair play and justice. This also escaped the attention of this court that issue of penalty and interest could be raised in earlier round of litigation but not raised, therefore, second writ petition challenging the same orders raising additional ground could not be entertained. The issue of constructive resjudicata escaped the attention of this court.

[13] The third error apparent on the face of the record is that this court in Para 13 of the order under review has invoked the principle of *mens rea* in setting aside the penalty u/S.126 of the Act whereas the Hon'ble Supreme Court in the matter of **Executive Engineer Southern Electricity Supply Co. of Orissa Vs. Sitaram Rice Mills (2012) 2 SCC 108** has settled that Sec.126 primarily fall under the civil law and does not involve *mens rea*. It has been held that:-

> "28. Section 135 of the 2003 Act deals with the 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, Sec.126 of the 2003 Act does not speak of any criminal intendment 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*.

[14] The above judgment of the Hon'ble Supreme Court has binding effect under Article 141 of the Constitution, but the said judgment was not brought to the notice of this court. Hence, this court could not have taken a contrary view.

[15] The view of Hon'ble Supreme Court in the case of **Executive Engineer Southern Electricity** (supra) is in continuation of its earlier view in the matter of **J.K. Industries Vs. The Chief Inspector (1996) 6 SCC 665** and **Guljag Industries Vs. CTO (2007) 7 SCC 269**.

[16] It is settled that non consideration of binding decision of superior court deciding the issue is an error apparent on the face of the record. [See judgment of Hon. Supreme Court in the matter of **Assistant Commissioner of Income-tax, Rajkot Vs. Saurashtra Kutch Stock Exchange Ltd, (2008)14 SCC 171]**. Thus, this Court committed an error apparent on the face of record in not noticing the binding judgment of the Supreme Court on the issue involved.

[17] The division bench of this court while passing the order under review and invoking the principles of *mens rea* has relied upon the judgment of the Hon'ble Supreme Court in the case of **Hindustan Steel Ltd. Vs. State of Orissa AIR 1970 SC 253** which was a case of levy of penalty under Sales Tax Act whereas the Hon'ble Supreme Court in the matter of **The Chairman SEBI Vs. Shriram Mutual Fund & Anr. (2006) 5 SCC 361** while considering the similar provision contained in

SEBI Act 1992 has found penalty under Chapter VI A as consequence of breach of civil obligation and had therefore found error in the judgment of the tribunal which had relied upon the judgment in the case of **Hindustan Steel Ltd** (supra) pertaining to criminal/quasi criminal liability, but the said judgment was also not brought to the notice of division bench of this court. Thus this court committed error apparent on the face of record in attracting principle of *mensrea* in a case of breach of civil obligation.

[18] Another error apparent on the face of record is that the division bench of this court has held that the liability for assessment at a rate equal to twice the tariff is excessive and harsh and accordingly has directed to issue fresh demand at the rate equal to the tariff rules applicable to actual minimum demand charges, but at that stage the provisions contained in Sec.126(6) of the Act were not noticed which reads as under:-

> "126(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 authorised; or
>
> (v) for the premises or areas other than those for which the supply of electricity was authorised."

[19] U/S.126(6), there is no option but to make the

assessment u/S.126 at a rate equal to twice the tariff applicable.

[20] Hon.Supreme Court in the matter of **<u>State of Rajasthan Vs. D.P. Metals (2002) 1 SCC 279</u>** while considering Sec.178(5) of the Rajasthan Sales Tax Act 1974 has held that the legislature is competent to specify a fixed rate of penalty and not give any discretion in lowering the rate of penalty and there is nothing wrong in providing such deterrent penalty.

[21] In the matter of **<u>Prem Chand Garg Vs. Excise Commissioner, U.P; Allahabad AIR 1963 996</u>** the Hon'ble Supreme Court has held that even the order under Article 142 of the Constitution cannot be passed inconsistent with the substantive provisions of the relevant statutory law. In the matter of **<u>Union of India & Another Vs. Kirloskar Pneumatic Co. Ltd. (1996) 4 SCC 453</u>** it has been held that the jurisdiction of the High Court under Article 226/227 of the Constitution cannot be invoked to direct the statutory authorities to act contrary to law. Hence, direction of this Court to issue fresh demand equal to the tariff rate applicable to actual minimum demand charges is contrary to Sec.126(6) of the Act, which is not permissible in law.

[22] There is also error apparent on the face of record inasmuch as this Court in the order under review has directed for charging interest on the demand and actual TMM charges on the agreements rate of interest but at that time the provisions contained in Sec.127(6) of the Act escaped the attention of this court which provides as under:-

> "127(6)-- When a person defaults in making payment of assessed amount, he, in addition to the assessed amount, shall be liable to pay, on the expiry of thirty days from the date of order of assessment, an amount of

interest at the rate of sixteen per cent per annum compounded every six months."

[23] As per the aforesaid provision, interest @ 16% per annum is chargeable, hence, this court could not have issued direction for charging the interest at the rate contrary to what has been provided statutorily.

[24] In the order under review the division bench of this court has relied upon judgment of the Hon'ble Supreme Court in the matter of **Shivashakti Sugars Ltd. Vs. Shree Renuka Sugar Limited and others (2017)7 SCC 729** but in that judgment it was made clear that first duty of the court is to decide the case by applying statutory provision but this part of the judgment of supreme Court escaped the attention of this court. Similarly judgment in the matter of **Excel Crop Care Limited Vs. Competition Commission of India (2017) 8 SCC 47** could be attracted by the division bench in case if another view was possible.

[25] Learned counsel for respondent has relied upon the judgments of the Supreme Court in the matter of **Meera Bhanja Vs. Nirmal (1995) 1 SCC 170**, **Lily Thomas Vs. Union of India (2000) 6 SCC 224**, **Haridas Das Vs. Usha Rani (2006) 4 SCC 78**, **Union of India Vs. Sandur (2013) 8 SCC 337**, **State of Rajasthan Vs. Surendra (2014) 14 SCC 77**, **Sasi Vs. Aravindakshan Nair (2017) 4 SCC 692** and **Sivakami Vs. State of Tamil Nadu (2018) 4 SCC 587** on the scope of power of review. In these judgments the principles already settled have been reiterated that for review there must be error apparent on the face of record, re-appraisal of the entire evidence on record for finding the error would amount to exercise the appellate jurisdiction which is not permissible,

mere fact that two views on the same subject are possible is not a ground for review of the earlier judgment passed by a bench of the same strength, where the remedy of appeal is available the power of review should be exercised by the court with greater circumspection.

[26] In the present case, there are errors apparent on the face of record, therefore, a case for review in exercise of the limited review jurisdiction as settled by the aforesaid judgments is made out.

[27] Having regard to the reasons assigned above, the Review Petition is **allowed** and order dated 22/10/2018 passed in WP No.22734/2017 is reviewed and recalled and WP No.22734/2017 is dismissed.

(Prakash Shrivastava)
Judge

(S.K.Awasthi)
Judge

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