

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 291 OF 2018

Mehul Jadavji Shah

....Petitioner

V/s.

The Deputy Commissioner
of Income-Tax-11(2)(1)
and 2 Ors.

...Respondents

* * * * *

Mr. Jignesh R. Shah, a/w. Ms. Teja Thanekar, Advocate
for the petitioner.

Mr. Akhileshwar Sharma, Advocate for the respondents.

CORAM :-

M.S. SANKLECHA, &

SANDEEP K. SHINDE, JJ.

DATE :-

5TH APRIL, 2018.

P.C. :-

1. At the request of the Counsel, this petition is being finally disposed of at the stage of admission.
2. This petition under Article 226 of the Constitution of India challenges the order dated 26th December, 2017 passed by the Deputy Commissioner of

Income Tax under Section 179(1) of the Income-Tax Act, 1961 (the Act). The Assessment Year involved is Assessment Year 2011-12.

3. The petitioner is a former Director of M/s. Shravan Developers Pvt. Ltd. (Private Limited Company), having resigned in the year 2013. The Private Limited Company has failed to honour its tax obligation for Assessment Year 2011-12. Thus becoming a delinquent Private Limited Company. In the above view, the petitioner received a show cause notice dated 6th February, 2017 under Section 179(1) of the Act seeking to recover the tax dues of Rs.4.69 crores of the delinquent Private Limited Company from the petitioner as its Director. The petitioner responded to the same and sought details of the notices issued to the delinquent Private Limited Company. However, without responding to the particulars sought, the impugned order dated 26th December, 2017 was passed under Section 179(1) of the Act making a demand of Rs.4.69 crores upon the

petitioner.

4. The grievance of the petitioner is that the impugned order dated 26th December, 2017 passed by the Deputy Commissioner of Income-Tax is without jurisdiction for the reason that the jurisdiction to invoke Section 179(1) of the Act can only arise when the tax dues of the delinquent Private Limited Company cannot be recovered from it. It is submitted that the issue as raised herein stands concluded in favour of the petitioner by the decision of this Court in **Madhavi Kerkar V/s. Assistant Commissioner of Income-Tax (Writ Petition No. 567 of 2016)** rendered on 5th January, 2018.

5. However, Mr. Sharma, the Learned Counsel appearing for the Revenue in support of the impugned order submits that the above decision in Madhavi Kerkar (supra) will not apply to the present facts. In support, he submits :-

(a) the petitioner is not a professional/paid Director of the delinquent Company but is a Director who holds 76% of the shareholding

therein;

(b) though the show cause notice does not indicate the steps taken by the respondent to recover the amounts from the delinquent Private Limited Company, it is indicated in the impugned order; and

(c) in any case the Affidavit-in-reply dated 14th February, 2018 filed by the Assessing Officer sets out the steps taken to recover the dues from the delinquent Private Limited Company and the failure to so recover.

For all the aforesaid reasons, it is submitted that the petition should be dismissed.

4. In so far as the first submission on behalf of the Revenue is concerned, the Act itself makes no distinction/classification between professional/paid Directors and Directors holding a large shareholding stake in the delinquent Private Limited Company. Section 179(1) of the Act only gives jurisdiction to the Assessing

Officer to proceed against a Director of a delinquent company when the Assessing Officer is unable to recover the dues of the delinquent Company from it. It is not, therefore, open for the Assessing Officer to read conditions into Section 179(1) of the Act and jettison the strict rule of interpretation of fiscal statute which inter-alia prevents implying and/or reading anything in the statute not expressed therein. Thus, we find no merit in the above distinction.

5. So far as the second and third submission on behalf of the Revenue that in the facts of this case, the efforts which were made to recover the tax dues from the delinquent company though not stated in the show cause notice are found in the impugned order or in any event in the affidavit-in-reply dated 14th February, 2018. Thus, is sufficient compliance with Section 179 of the Act. It is the petitioner's case in the petition that, an amount of Rs.49.81 crores are loans advanced to companies/associates of its Director, Mr. Praful Setna.

The attempts at recovery if made known in the show cause notice, would have given an opportunity to the petitioner to bring the above facts to the notice of the Assessing Officer who could have recovered from them before proceeding with the notice. Therefore, the giving of particulars of efforts made and failure to recover the tax dues for the delinquent Private Limited Company in a notice issued under Section 179(1) of the Act is a *sine qua non* for proceeding further. This is so as not only the Assessing Officer can assume/acquire jurisdiction only on failure to recover its dues from a Private Limited Company after proper efforts. But it also gives an opportunity to the assessee to point out why the efforts made are inadequate and/or improper. Infact in *Madhavi Kerkar* (supra), we have observed as under :-

“7. Therefore, the Revenue would acquire / get jurisdiction to proceed against the directors of the delinquent Private Limited Company only after it has failed to recover its dues from the Private Limited Company, in which the Petitioner is a director. This is a

condition precedent for the Assessing Officer to exercise jurisdiction under Section 179 (1) of the Act against the director of the delinquent company. In our view the jurisdictional requirement cannot be said to be satisfied by a mere statement in the impugned order that the recovery proceedings had been conducted against the defaulting Private Limited Company but it had failed to recover its dues. The above statement should be supported by mentioning briefly the types of efforts made and its results.

8. Therefore appropriately, the notice to show cause issued under Section 179 (1) of the Act to the directors of the delinquent Private Limited Company must indicate albeit, briefly, the steps taken to recover the tax dues and its failure. In cases where the notice does not indicate the same and the Petitioner raises the objection of jurisdiction on the above account, then the Petitioner must be informed of the basis of the Assessing Officer exercising jurisdiction and the notice' / directors response, if any, should be considered in the order passed under Section 179 (1) of the Act. In this case the show cause notice dated 16th December 2015 under Section 179 (1) of the Act does not indicate or give any particulars in respect of the steps taken by the Income Tax Department to recover the tax dues of the defaulting Private Limited Company and its failure. The Petitioner in response dated 29th December 2015 to the above notice, questioned the jurisdiction of the Revenue to issue the notice under Section 179 (1) of the Act and sought details of the steps taken by the department to recover tax dues from the

defaulting Private Limited Company. In fact, in its reply dated 29th December 2015, the Petitioner pointed out that the defaulting Company had assets of over Rs.100 Crores. Admittedly, in this case no particulars of steps taken to recover the dues from the defaulting Company were communicated to the Petitioner nor indicated in the impugned order. In this case we find that except a statement that recovery proceedings against the assessee had failed, no particulars of the same are indicated, so as to enable the Petitioner to object to it on facts.”

Thus, giving of particulars in the impugned order or in the Affidavit-in-reply does not meet with the requirement of proper notice to the noticee.

6. In view of the above, it is clear that before the Assessing Officer assumes jurisdiction efforts to recover the tax dues from the delinquent Private Limited Company should have failed. This effort and failure of recovery of the tax dues must find mention in the show cause notice howsoever briefly. This would give an opportunity to the noticee to object to the same on facts and if the Revenue finds merit in the objection, it can take

action to recover it from the delinquent Private Limited Company. This before any order under Section 179(1) of the Act is passed adverse to the noticee. In this case, admittedly the show cause notice itself does not indicate any particulars of the failed efforts to recover the tax dues from the delinquent Private Limited Company. Thus, the issue stands covered in favour of the petitioner by the order of this Court in *Madhavi Kerkar* (supra). In the above circumstances, the impugned order dated 26th December, 2017 is quashed and set aside.

7. However, it is made clear that the Assessing Officer is at liberty to pass a fresh order after issuing appropriate notice to the petitioner which must indicate briefly the steps taken by the Department to recover the tax dues from the delinquent private limited company and its failure to recover the same. Needless to state, the Assessing Officer would hear the petitioner on its objection and pass a fresh order in accordance with law. As the demand relates to Assessment Year 2011-12, Mr.

Shah, the Learned Counsel appearing for the petitioner, on instructions, states that the petitioner would co-operate with the Assessing Officer in early disposal of notice issued to him under Section 179 of the Act.

8. We are informed that the bank accounts of the delinquent private Limited company is attached. The attachment of the bank account including that of the petitioner if it stands already attached before 9th February, 2018 (when ad-interim relief was granted) would continue till the passing of the order by the Assessing Officer under Section 179(1) of the Act after giving a fresh notice. However, in case the bank accounts of the petitioner have not been attached till today, it would not, in these proceedings be attached until an order under Section 179(1) of the Act, adverse to him is passed.

9. The Writ Petition is disposed of in above terms. No order as to costs.

(SANDEEP K. SHINDE, J)

(M.S. SANKLECHA, J)