

OD – 2

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE

APOT/171/2022
IA NO. GA/1/2022, GA/2/2022
RAJA RAM DALMIA
VS.

PRINCIPAL COMMISSIONER OF INCOME TAX – 1, KOLKATA AND ANR.

BEFORE :

THE HON'BLE JUSTICE T.S. SIVAGNANAM

And

THE HON'BLE JUSTICE SUPRATIM BHATTACHARYA

Date : SEPTEMBER 28, 2022.

Appearance:

Ms. Smita Das De, Adv.

... for appellant

Mr. Abhratosh Majumder, Sr. Adv.

Mr. Avra Mazumder, Adv.

Mr. Gopal Ram Sharma, Adv.

...for respondent.

RE: GA/1/2022

The Court :- We have heard Ms. Smita Das Dey, learned standing Counsel for the appellant and Mr. Abhratosh Majumder, learned Senior Advocate duly assisted by Mr. Avra Mazumder, learned Advocate for the respondent.

There is a delay of 85 days in filing the appeal. We have perused the affidavit filed in support of the application and we find that sufficient cause has been shown for not being able to prefer the appeal within the period of limitation. The delay in filing the appeal is condoned. Accordingly, the application for condonation of delay is allowed.

APOT/171/2022

This intra-court appeal by the writ petitioner is directed against the order dated April 21, 2022 in WPO 213 of 2013. The appellant, an erstwhile director of M/s. Basant Udyog Pvt. Ltd., has filed the writ petition challenging garnishee notice issued by the respondent department under Section 179 of the Income Tax Act, 1961 (the Act) stating

that there is a outstanding tax demand payable by the company for the assessment years 1983-84, 1985-86 and 1986-87. The appellant was granted five days time to pay the amount of Rs.191.39 lakhs failing which the appellant was informed that action will be taken for recovery of the outstanding. The appellant contended that no order having been passed under Section 179 of the Act demand of tax on account of the private company of which the appellant was a former shareholder-director cannot be enforced. Further it was contended that in the implied terms of the provisions of Section 179 the respondent were in the statutory duty bound to take steps to recover the tax due from the continuing company instead of proceeding against the appellant merely because the appellant was a past director and letting of the company the real assessee in default. Further it was contended no notice of demand has been served on the appellant as required under Section 156 of the Act and in the absence of any such notice no coercive action could have been initiated against the appellant. With these grounds the appellant sought for issuance of Writ of Mandamus to forbear the respondent/department from initiating any recovery action against the appellant by invoking the power under Section 179 of the Act. The learned Single Bench by the impugned order had dismissed the writ petition observing that it is not inclined to go into the disputed questions of fact more particularly because the company in the year 1990 was taken over by a new set of directors and subsequently in the year 1997 went into liquidation and the dispute as to whether a claim was lodged before the Official Liquidator was not gone into, but yet the learned Writ Court was of the opinion that the proceedings initiated pursuant to the garnishee notice cannot be stalled.

Accordingly, the writ petition stood dismissed..

Aggrieved by such order the appellant is before us by way of this appeal.

We have heard Ms. Smita Das Dey, learned standing Counsel for the appellant and Mr. Abhratosh Majumder, learned Senior Advocate duly assisted by Mr. Avra Mazumder, learned Advocate for the respondent.

The legal issue which arises for consideration in the instant appeal is as to in what manner the power under Section 179 of the Act could be invoked. We need not labour much to decide this issue as there are several decisions of the various High Courts on this aspect. In the case of K.B. REDDY VERSUS ASSISTANT COMMISSIONER OF INCOME TAX, 1998, 232, ITR 305 (AP). The Court after taking note of Section 179 as it stood after the amendment in the year 1975 pointed out in terms of the said provision where any tax due from a private company in respect of any income of any previous year cannot be recovered, then every person who was a director of the company during the relevant previous year shall be jointly and severally liable for the payment, noting that the language of the Section is clear that it is only in cases where tax cannot be recovered from the company, the liability of the director arises. Since in the said case there was no finding that the department could not recover the arrears of tax from the company, the proceedings initiated under Section 179 of the Act was held to be without jurisdiction.

The decision in K.V. Reddy was taken note of in the case of *C. Rajendran vs. Income-tax Officer, (2002) 263 ITR 139 (Madras)*. In the said decision also the Court took note of the amended Section 179 and held as follows :-

“This section has been amended and it is the amended version which is reproduced above. The language of the section is very clear to suggest that the action under the section can be activated only when the tax due from a private limited company pertaining to the previous year cannot be recovered. The words “cannot be recovered” are most important. The phraseology suggests essentially that in spite of the efforts made as per the procedure followed in the Income-tax Act

for recovery of the tax arrears when the said tax arrears cannot be recovered then alone the liability can be transferred under section 179(1) of the Income-tax Act to the directors. Therefore, in order to activate this section and the action thereunder, a finding would have to be recorded to the effect that in spite of the efforts to recover the tax arrears the said tax arrears could not be recovered from the assessee company. The second part of the section comes into effect only thereafter. Firstly, once there is a finding that such tax arrears cannot be recovered then the liability could be transferred to every person who was a director and it would be then for such a person to show that the non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company and when he discharges this burden, he would no more be required to discharge the tax liability so transferred to him. However, that stage would come only later on, after it is found that the tax arrears cannot be recovered from the assessee-company.”

In *Mehul Jadauji Shah vs. Deputy Commissioner of Income-tax-11(2)(1)*, (2018) 92 taxmann.com 401 (Bombay), identical issue arose for consideration and the Court after taking note of the decision in *Madhavi Kerkar vs. Asstt. CIT* (2018) 90 taxmann.com 55 (Bom.) held that before the Assessing Officer assumes jurisdiction under section 179 requires to recover the tax due from the delinquent private limited company should have failed and if no steps were taken then the notice issued under section 179 is required to be quashed.

In *Ashita Nilesch Patel vs. Assistant Commissioner of Income-tax, Circle 4(1)(2)*, (2020) 115 taxmann.com 37 (Gujarat), the Court after taking note of the decision in *Maganbhai Hansrajibhai Patel vs. Asstt. CIT*, (2012) 26 taxmann.com 226 (Guj.), held as follows :-

“20. In the case of Maganbhai Hansrajbhai Patel vs. Asstt. CIT, (2012) 26 taxmann.com 226/211 Taxman 386/[2013] 353 ITR 567 (Guj.), this Court had the occasion to examine section 179 of the Act, 1961 in detail. It has been held therein that sub-section (1) of section 179 of the Act, 1961 provides for the joint and several liability of the directors of a private company, wherein the tax dues from such company in respect of any income of any previous year cannot be recovered. The first requirement, therefore, to attract such liability of the director of a private limited company is that the tax cannot be recovered from the company itself. Such requirement is held to be a pre-requisite and necessary condition to be fulfilled before action under section 179 of the Act can be taken. In the context of section 179 of the Act, 1961, this Court held that before recovery in respect of the dues from a private company can be initiated against the directors, to make them jointly and severally liable for such dues, it is necessary for the Revenue to establish that such recovery cannot be made against the company and then alone it can reach to the directors who were responsible for the conduct of the business during the previous year in relation to which liability exists.”

Thus, the law on the subject as could have culled out from the above decisions is that the department has to first initiate proceedings against the defaulting private limited company and upon failure in their attempt to recover the tax dues power under section 179 of the Act could have been invoked. On facts it is clear that no such attempt was made by the department to recover the tax dues, which were stated to be in arrears for the assessment years 1983-84, 1985-86 and 1986-87. Admittedly, in the year 1990 the appellant had retired from his directorship and the company had changed hands and fresh set of directors had taken over the company, necessary formalities under the

Income tax Act, 1956 was complied with and fresh certificate of incorporation incorporating the new name of the company was issued. The new set of directors carried on business till the year 1997 when the company went under liquidation. From the records placed before the Court, it is clear that the department has not taken any steps to recover the dues from the defaulting private limited company. It is nearly after 25 years the present attempt had been made by issuing garnishee notice on the appellant who is no more the director of the company ever since 1990. After the company had gone into liquidation, the department could have lodged a claim before the Official Liquidator. However, there is nothing on record to show that such a claim was made by the department before the Official Liquidator. This aspect is very crucial aspect which the learned Writ Court ought to have considered and the same cannot be brushed aside and a direction could not have been issued without reference to the said fact.

The learned standing Counsel for the respondent placed reliance on a decision in the case of *Hardip Singh & Anr. Vs. The Income Tax Officer, Amritsar & Ors.*, AIR 1979 SC 1453. Firstly, the said decision arose out of a case under section 179 as it stood prior to the amendment. That apart, the private limited company in question was voluntarily liquidated by the directors. Considering these facts, the Court held that the directors had to be made liable to pay the arrears of tax to the Income tax department. Thus, the decision cited by the revenue is clearly distinguishable on facts.

Thus, in the light of the above discussion, we hold that the garnishee notices which were impugned in the writ petition are held to be wholly without jurisdiction and accordingly, they are quashed.

In the writ petition, apart from seeking to quash the garnishee notices, there is also a prayer made by the appellant for refund of Rs.26,680/- which has been recovered by way of attachment of the appellant's bank account. Considering the fact that the

matter pertains to the assessment years 1983-84, 1985-86 and 1986-87 and the amount was recovered from the appellant's bank account in the year 2012, we are of the view that the prayer for refund of the said recovered amount need not be granted.

In the result, the appeal filed is allowed.

The order passed in the writ petition is set aside.

Consequently, the impugned garnishee notices issued on the appellant stand quashed as being without jurisdiction. Consequently, the proceedings initiated under section 179 of the Income tax Act, 1961 are held to be wholly without jurisdiction.

However, the amount of Rs.26,680/- recovered from the appellant's bank account need not be refunded by the department.

Affidavit of service filed be kept on the record.

(T.S. SIVAGNANAM, J.)

(SUPRATIM BHATTACHARYA, J.)