

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 437 OF 2021

Jagesh Savjani An Adult, Indian Inhabitant Having Address at, 13-B, Sambhavgir, CHS, Ltd., Haji Ali, Mumbai	}	...Petitioner
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Versus

1. Union of India through its Mumbai Office located at Ayakar Bhavan, New Marline Lines, Mumbai, representing Income Tax Department, Ministry of Finance, Government of India. 2. Income Tax Officer, Ward 5(3)(1), Mumbai, having office at Room No.526, 5 th Floor, Aykar Bhavan, MK Road, Mumbai	}	...Respondents
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WITH

INTERIM APPLICATION IA(L) NO.24778 OF 2022

WHITE WATER PARKS INDIA PVT. LTD. 319, Bussa Industrial Estate, 3 rd Floor, Century Bazar, Prabhadevi, Mumbai 400 025. PAN : AAACW0865E Jagesh Savjani An Adult, Indian inhabitant Having address at 13-B, Sambhavgir CHS Ltd., Haji Ali, Mumbai	}	...Intervenor/Applicant
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IN THE MATTER BETWEEN :

JAGESH BHADRAKUMAR SAVJANI Having Address at, 13-B, Sambhav Tirth, CHS, Ltd., Haji Ali, Mumbai	...Petitioner
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Versus

1. The Union of India
Ayakar Bhavan, New Marline Line, Mumbai,
Representing Income Tax Department,
Ministry of Finance, Government of India.

2. Income Tax Officer,
Ward 5(3)(1), Mumbai, having office at
Room No.526, 5th Floor, Aykar Bhavan,
MK Road, Mumbai

...Respondents

WITH

INTERIM APPLICATION IA (L) NO. 26761 OF 2022

SAMIR BHADRAKUMAR SAVJANI
Office at 319, Bussa Industrial Estate, 3rd
Floor, CenturyBazaar, Prabhadevi,
Mumbai 400 025.
PAN :AAACW0865E

...Intervenor/Applicant

IN THE MATTER BETWEEN :

JAGESH BHADRAKUMAR SAVJANI

...Petitioner

Versus

1. Union of India
through its Mumbai Office located at
Ayakar Bhavan, New Marline Lines,
Mumbai, representing Income Tax
Department, Ministry of Finance,
Government of India.

2. Income Tax Officer,
Ward 5(3)(1), Mumbai, having office at
Room No.526, 5th Floor, Aykar Bhavan,
MK Road, Mumbai

...Respondents

Mr.Rahul Gaikwad, Advocate with Mr. Aman Jhawar, Ms. Garima Joshi, Mr. Vivek Akshali, Ms. Reshma Nair and Ms. Nikita Abhyankar i/b Gravitas Legal, for petitioner.

Mr. Suresh Kumar, Advocate for Respondent – Revenue

Mr.Aseem Naphade with Mr. Vishesh Srivastav, Advocate for applicant in IAL/24778/2022.

Mr. Samir Savjani, Applicant-in-person in IAL/26761/2022.

CORAM : DHIRAJ SINGH THAKUR AND
VALMIKI SA MENEZES, JJ.

RESERVED ON : 09.12.2022.

PRONOUNCED ON : 10.02.2023.

JUDGMENT : PER (Valmiki Sa Menezes,J)

Rule. Rule made returnable forthwith. Heard finally by consent of the parties present before us and who have waived service of notice, the petition is heard finally.

(2) This is a writ petition filed under Article 226 of the Constitution of India seeking the quashing and setting aside of show cause notices under Section 179 of the Income Tax Act,1961, (for short ‘the Act’) dated 15.10.2019, 24.02.2020, 19.03.2020, 04.12.2020 and order dated 14.12.2020 issued by the respondent No.2, as being contrary to law.

(3) It is the petitioner’s case as averred in the petition, that he had received show cause notices dated 24.02.2020, 19.03.2020 and 04.12.2020 from the respondent No.2 purportedly invoking powers under Section 179 of the Act. He further avers that the issuance of a similar notice dated

15.10.2019 also impugned herein by the respondents came to his knowledge from the reply filed by the respondents, which notice he claims, was never served upon him. The petitioner has averred that he had filed an affidavit-in-reply dated 19.03.2020 to the income tax authorities stating therein that the petitioner had not attended any Board meetings of M/s. White Water Park India Private Ltd. (for short 'the Company') during the financial year 2006-07 till date, nor handled any income tax assessment of the said company for the Assessment Year 2007-08 as its Director. He claims that under the provisions of Section 283 of the Companies Act, 1956, as also under the provisions of Section 167 of the Companies Act, 2013, since, he has not attended three consecutive meetings of the Board of Directors of the said company or for that the matter, all meetings of Board of Directors during the period of 12 months without seeking leave, he is deemed to have vacated the Office of Director of the said company. According to the petitioner, as he was not the Director of the Company, he was not liable to receive any notice under Section 179 of the Act, which provision can be invoked only against a Director of a private Company.

(4) It is further the petitioner's contention that he has filed before this Court an affidavit dated 01.02.2022, reiterating the facts stated by him in his affidavit-in-reply before the respondent No.2 dated 19.03.2020 in answered to the show cause notice. He further submits that neither the show cause notice issued to him nor the order dated 14.12.2020 issued under Section 179 of the Act, states the steps taken by the respondents to recover tax dues from the company. It is the petitioner's submission that it is obligatory on the part of the respondents to demonstrate by referring to material before it, and by making specific references to such material as to the steps taken by it, and also state such facts in its show cause notice, and refer to the same in the impugned order. The petitioner submits that the failure to aver the steps taken by it to recover tax dues from the company or failure to make disclosures in the show cause notice of the material which constituted the steps taken by the department against the company, would render the impugned order dated 14.12.2020 contrary to the provisions of Section 179 of the Act. Amongst the grounds taken by the petitioner to lay a challenge to the impugned show cause notices

and the impugned order, is also the ground that facts which are required to be disclosed in the show cause notices and in the impugned order are steps taken to recover tax dues from the company, which are missing and therefore, the respondents would have no jurisdiction to proceed with an action under Section 179 of the Act.

(5) After notice was issued to the respondents, the respondent Nos.1 and 2 came to file an affidavit-in-reply dated 16.02.2021 to which are attached certain documents, which the petitioner averred, are supplied to the respondents by one Mr.Samir Savjani, a Director of the said company. A further affidavit-in-reply was filed by the respondents on 26.02.2022 which the petitioner also submits as documents attached to it, which are supplied by the said Mr.Samir Savjani, who the petitioner claims has been instigating the respondents to proceed against the petitioner without any cause.

The petitioner has filed an affidavit in rejoinder dated 01.02.2022 controverting facts stated by the respondents in their affidavit-in-reply dated 16.02.2021. Thereafter, the

respondents have filed an affidavit in sur-rejoinder attempting to bring on record various steps taken by the department of recovery tax dues from the company. Pursuant to this Court's observations that the revenue was required to explain the steps taken to recover the tax dues from the company, affidavit dated 21.04.2022 was filed by the respondents through one Juliet Ravichandran, ITO-5(3)(1)(Mumbai) 570, setting out the steps taken by the department from 2016 until the year 2020 to recover the dues from the said company.

(6) Whilst the petition was pending, two interim applications came to be filed before this Court. The first of these applications is Interim Application IA(L) No.24778/2022 filed by M/s. White Water Park India Private Ltd. (the Company), through its authorized signatory Jigar Chheda on 01.08.2022, seeking intervention and leave to make submissions with respect to the petition. In this interim application (IA), the company has also sought dismissal of the writ petition, and an order to prevent the petitioner from disposing of any of his personal assets so as to protect the interest of the respondent revenue ; it has also sought an order to maintain *status quo* till conclusion of the

intervention application. The interim application has further sought setting aside of the interim order dated 16.12.2020 passed by this Court in favour of the petitioner. The company alleged in the IA, that the petitioner had averred false facts in the petition and had approached this Court with unclean hands by suppressing material facts. The applicant further avers that the petitioner has committed fraud upon the company and that the petitioner had actually attended all the Board meetings, signed its annual return, and was infact a Director of the Company and therefore, liable.

(7) The second Interim Application bearing IA(L)No.26761/2022 has been filed by Samir B. Savjani, praying for intervention in the petition and for leave to make his submissions with respect to the petition. In addition, the applicant – Samir, opposes the petition supporting the impugned orders passed against the petitioner under Section 179 and seeks an order of restraint against the petitioner to prevent him from disposing of any of his personal assets so as to protect the interest of the respondent revenue and to maintain *status quo*. This applicant also seeks setting aside of order dated 16.12.2020

passed by this Court granting interim relief to the petitioner.

The applicant Samir Savjani, in Interim Application IA(L) No.26761/2022, in substance has reiterated in his application the averments made by the Company in its Interim Application IA(L) No.24778/2022.

(8) We have heard Shri Rahul Gaikwad, learned counsel for the petitioner, Shri Suresh Kumar, learned counsel for respondent and Shri Asim Nafde, learned counsel for applicant in IA(L) No.24778/2022 filed by the company.

(9) Shri Samir Savjani, argued at length before us in person in Interim Application IA(L)No.26761/2022 and was also heard at length while opposing grant of any relief in the petition.

We have also recorded the consent of Samir Savjani, for disposal of the petition finally at the stage of admission whilst hearing the intervention application along with petition.

(10) Shri Rahul Gaikwad, learned counsel for the

petitioner has submitted before us that it is the petitioner's case that he was not a Director of the Company much prior to the issuance of the impugned show cause notices and the impugned order, by virtue of the fact that he had not attended a single Board meeting of the company. He further submits that in terms of the provisions of Section 283 of the Companies Act, 1956 (old Act) and in terms of the provisions of Section 167 of the Companies Act, 2013 (new Act), the petitioner is deemed to have vacated the Office of the Director since he was absent for all the meetings of the Board of Directors during any period prior to the issuance of the show cause notices. As such, he submits that the petitioner not being a Director of the Company, he is not liable for any notice from the respondents under Section 179 of the Act.

(11) It is further the submission of learned counsel for the petitioner that in terms of the requirement of under Section 179 of the Act, the revenue can assume jurisdiction to proceed only if it has initiated action against the company to recover its tax dues, and on its failure to recover such dues from the private company, it can initiate action against the Directors.

He submits that in the present case, the absence of any reference to the attempts made by the revenue to recover tax dues from the company, the respondents would not be vested with any jurisdiction to proceed against the Directors of the company. He argues, that notwithstanding the fact that the petitioner is not the Director of the company, the revenue could not proceed against him in terms of Section 179 of the Act, without specifically averring in the show cause notice the various steps taken by it to proceed against the company to recover its dues. He further argues that since the notice under Section 179 of the Act is totally silent on this aspect and does not record the satisfaction of the concerned Officer, after considering the steps taken against the company for recovery, the recovery would not be permissible. He submits that the notice does not comply with the pre-requisites and necessary conditions to be fulfilled before action under Section 179 of the Act, can be initiated.

(12) Learned counsel for the petitioner and for the respondents also filed written notes of arguments. The petitioner has relied upon the judgment of this Court dated 24.06.2019 in Writ Petition No.1083/2019 in the case of ***Vanraj V. Shah Vs. Dy.***

Commissioner of Income Tax -10(1)(1) & anr., wherein this Court has considered the requirements of a show cause notice issued under Section 179 of the Act and the *sine quo non* for proceeding with an action under that provision. It is argued that in **Vanraj V. Shah** (*supra*), this Court has held that action of an Assessing Officer to order recovery of unpaid tax dues of a private company from its Director, was without jurisdiction, if the notice under Section 179 of the Act did not disclose necessary averments that the dues of the company could not be recovered from the said company. It further hold that this foundational fact was a necessity of the law before the Officer could proceed to recover the tax from the Director.

(13) Learned counsel for the petitioner further refers to the judgment of the Gujrat High Court dated 20.01.2020 in R/Special Civil Application No.3947/2019 in *Sonal Nimish Patel Vs. Assistant Commissioner of Income Tax, Circle 4(1)(2)*, where it was held that the first requirement to attract liability of a Director, of a private limited company is that the revenue was unable to recover the tax from the company itself. It is held in that judgment that such a requirement was a

pre-requisite and a necessary condition to be fulfilled before any action under Section 179 could be taken and that, it was necessary for the revenue to establish these facts in the notice itself, as also for the Officer to record his satisfaction on such material that was considered by him to conclude that recovery against the company was not possible.

(14) Learned counsel for the petitioner then referred to the judgment of this Court dated 26.07.2022 in Writ Petition No.3590/2019 in *Rajendra R. Singh Vs. Assistant Commissioner of Income Tax Act-9(2)(2), Mumbai and others*, in which this Court has held that orders under Section 179 of the Act, are unsustainable if the Assessment Officer has not enumerated in the notice the steps taken towards recovery of tax dues from the private company or there is a lack of recording his satisfaction that such tax cannot be recovered from the company. The learned counsel for the petitioner, therefore, submits that a lack of these jurisdictional facts being stated in the show cause notice would render the impugned order dated 14.12.2020 contrary to the provisions of Section 179 of the Act and therefore, not sustainable in the eyes of law.

(15) Shri Suresh Kumar, learned counsel for the respondents has opposed the petition and submitted that though the impugned show cause notices did not state the details and facts which constitute the steps taken by the revenue for recovery of the tax dues from the company, the revenue had filed a detailed affidavit before this Court setting out all steps taken by it, from the year 2016 till year 2020 for making efforts to recover the dues from the company. It is his contention that a reading of the aforementioned affidavit would leave no manner of doubt that the Officer who has issued the show cause notices was satisfied that there was enough material to conclude that the revenue was unable to recover taxes from the company and was left with no choice but to proceed against the Directors of the company.

He further argues that the impugned order dated 14.12.2020 is passed in accordance with the provisions of Section 179 of the Act, as the order concludes that the petitioner was infact the Director of the company and therefore, liable to pay taxes in terms of notice issued under Section 179 of the Act, in default of the company.

(16) Shri Suresh Kumar, learned counsel for the respondents refers to judgments of this Court in *Union of India Vs. Manik Dattatreya Lotlikar*, reported in (1987) 35 Taxman 526 (Bombay), and in *Mehul Jadavji Shah Vs. Deputy Commissioner of Income Tax-11(2) (1)*, reported in (2018) taxmann.com 401 (Bombay) and submits that in the event this Court concludes that the notices are unsustainable, the course followed by this Court in these judgments which was to set aside the impugned notices and order, and to allow the respondents to start proceedings under Section 179 of the Act afresh, by stating all the jurisdictional facts required, should be followed.

(17) Shri Aseem Naphade, learned Advocate for the Company in Interim Application IA (L)No.24778/2022 has taken us through the application for intervention of the Company in this petition and contended that perusal of the documents annexed to the application, including Form DIN-2, which is intimation of allotment of Director Identification Number (DIN) would show that the petitioner was appointed as a Director as on 01/04/2001; he further submits that the Director's report of the Company and the correspondence between various Government

Departments and the Company would bear out that the petitioner was in fact Director of the Company; he submits that when show causes notices were issued to the petitioner, he has fraudulently sought to portray a picture that he was no more at the helm of the affairs of the Company by virtue of his claim that he had not attended the requisite number of meetings in terms of the Companies Act. He further submits that the whole purpose of filing of this petition was to prevent the Tax Authorities from moving against his personal assets, which according to the Intervenor includes the immovable properties listed in the Intervention Application. He further argues that on this ground, the petitioner is required to be restrained from disposing of any of his personal assets to protect the interest of Revenue.

(18) Shri Samir Savjani, applicant in Interim Application IA(L)No.26761/2022 argued in person and adopted the arguments of the Revenue and of the Company in Interim Application IA(L)No.24778/2022. He also took us through various documents annexed to his Interim Application to contend that the petitioner has come to this Court with unclean hands and has not disclosed various criminal proceedings which were

pending against him in the State of Gujarat and at Mumbai. He reiterated the arguments for the Company, that this Court ought to restrain the petitioner from disposing of any of his personal assets to enable the Revenue to recover dues from the Company.

(19) We have considered the submissions of the parties before us and the entire record of the petition; we have also perused the record of the two Interim Applications with their annexures. We have also considered the Notes of Arguments placed by the parties before us.

(20) Before we proceed to decide the legality of the impugned show cause notices and the impugned order dated 14/12/2020, it would be apposite to quote the provisions of Section 179 of the Income Tax Act, 1961 :-

Liability of directors of private company in liquidation.

179. (1) Notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), [where any tax due from a private company in respect of any income of any previous year or from any other company in respect of any income of any previous year during which such other company was a private company] cannot be recovered, then, every person who was a director of the private company at any time during the relevant previous year shall be jointly and severally liable for the payment of such tax unless he proves 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.

[(2) Where a private company is converted into a public company and the tax assessed in respect of any income of any previous year during which such company was a private company cannot be recovered, then, nothing contained in sub-section (1) shall apply to any person who was a director of such private company in relation to any tax due in respect of any income of such private company assessable for any assessment year commencing before the 1st day of April, 1962.]

[Explanation - For the purposes of this section, the expression "tax due" includes penalty, interest or any other sum payable under the Act.]

(21) From a perusal of these provisions, it is clear that the Assessing Officer is vested with jurisdiction to recover the tax from a Director of a Private Company only when the officer is unable to recover such dues from that Company. It is also clear from this provision that the Assessing Officer assumes jurisdiction under Section 179 of the Act only when there is failure to recover dues from the Private Company after efforts have been made by the Revenue to recover such dues.

(22) The argument that the petitioner was not a Director of the Company would be irrelevant at this stage, if the petitioner was able to demonstrate from the contents of the show

cause notices and the impugned order that there was no compliance with the mandate of Section 179 of the Act.

(23) In **Vanraj Shah** (*supra*), a Division Bench of this Court has set out the legal requirements contained in Section 179 of the Act, for the Assessing Officer to acquire jurisdiction to proceed under that provision against a Director of a Defaulting Private Company. This Court in **Vanraj V. Shah Vrs. Dy. Commissioner of Income Tax - 10(1)(1) and another** in Paragraph Nos.4 and 5 has held as under :-

"4. In terms of sub-section (1) of Section 179, from every person who was a director of a private company during the time when the tax dues arose, such tax could be recovered from such director holding him jointly and severally liable for payment of such tax. However, the same cannot be recovered from him unless he proves that non-recovery cannot be attributed to any gross negligence, misfeasance or breach of duty on his part in relation to the affairs of the Company. First requirement for application of sub-section (1) of Section 176, therefore, is that the tax dues in question could not be recovered from private company. Even if this requirement is satisfied, it is open for the concerned director to prove that such non-recovery cannot be attributed to any gross negligence, misfeasance or breach of duty on his part in relation to the affairs of the company. On all these counts, therefore, the petitioner had a right to oppose and resist the proposal of the Assessing Officer.

5. In the show-cause notice, it is not even averred that the dues of the company should not be

recovered from the said Company and that therefore, the onus would be on the director to prove that the same could not be attributed to his gross neglect, misfeasance or breach of duty. The action of the Assessing Officer to order recovery of the unpaid tax dues of the company from the petitioner, thus, was without the foundation of the necessary facts in show-cause notice."

(24) Following on similar lines, another Division Bench of this Court in **Rajendra R. Singh** (supra) which considering the scope of Section 179 of the Act has held as under :-

"5. By virtue of the order impugned dated 13th February 2018, the objections and contentions raised by the petitioner were rejected. It was held that the allegation that the proceedings under section 179 were directly initiated was baseless. It was held that after the tax demand, several phone calls were made to the ARs of the assessee which did not elicit any response whereafter the bank account of the assessee was attached for recovery of dues and further that proceedings under section 179 was initiated because the assessee was unwilling and non-co-operative to pay its tax dues.

16. The orders impugned are also unsustainable on another ground. Power under section 179 of the Act can be exercised against the Directors upon satisfaction of certain conditions only if the tax dues cannot be recovered from the private company. To justify that the tax dues cannot be recovered, the Assessing Officer has to enumerate the steps taken towards recovery of tax dues from the company. For example, attachment of the accounts of the company as also, its movable and immovable assets, efforts made by the Assessing Officer in identification of the various movable and immovable assets of the company, and so on and so forth.

The Show cause notice under section 179 of the Act,

dated 24th January, 2018, on the other hand, reads as under :-

"1 In the case of M/s. Crest Paper Mills Limited (PAN : AAACCC4343D), the demand of Rs.3,98,19,430/- is outstanding.

2 The aforesaid demands have been raised vide order giving effect to the order of CIT (A) u/s 250 of the IT Act and have been outstanding since long but the same has not been paid by the assessee company so far"

17. A reading the show cause notice would therefore clearly suggest that there was no satisfaction recorded that the tax cannot be recovered. It needs to be understood that recovery procedure under section 179 of the Act against the directors is not to be resorted to casually and only because it is convenient to do so far affecting recovery of the tax dues.

18. With a view to show that the respondent No.1 had mechanically resorted to the provisions of section 179 of the Act, the petitioner has relied upon an order of attachment, dated 6th March 2019, whereby the Tax Recovery Officer-2, Thane has ordered the attachment of land at Village Kalivali, Taluka Panvel, Dist. Raigad to show that if respondent had made an effort, the tax dues could be recovered from the company. An additional affidavit has also been filed by the petitioner.

In response to this additional affidavit, an affidavit in reply has also been filed by the Deputy Commissioner of Income Tax-1(2)(1), Mumbai in which a stand is taken that steps for sale of the property attached would be initiated after getting the fair market value determined. This statement itself has the effect of nullifying the action initiated under section 179 of the Act against the petitioner rendering the order impugned unsustainable in law."

(25) The Gujarat High Court in the case of **Sonal**

Nimish Patel(supra) has held that it is prerequisite and necessary

condition to be fulfilled before action under Section 179 of the Act can be taken, that the Revenue must establish, if such recovery from the Private Company cannot be made. While considering the scope of Section 179 of the Act and the facts required to be considered by the Assessing Officer before assuming jurisdiction under that provision, the Gujarat High Court has held thus :-

"20. 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.

21. There is no escape from the fact that the perusal of the Notice under Section 179 of the Act, 1961, reveals that the same is totally silent as regards the satisfaction of the condition precedent for taking action under Section 179 of the Act, 1961, viz. that the tax dues cannot be recovered from the Company. In the show-cause notice, there is no whisper of any steps having been taken against the Company for recovery of the outstanding amount. Even in the impugned order,

no such details or information has been stated."

(26) We take note of the fact that in that case, an additional affidavit-in-reply was filed to demonstrate the steps taken by the Revenue against the Company for recovery of dues. The Gujarat High Court has further considered whether the absence of facts required to be stated in the show cause notices could be supplanted by filing of an affidavit-in-reply stating such facts, and has observed in Paragraph No.22 as under :-

"22. In such circumstances, referred to above, the question is, whether such an order could be said to be sustainable in law. The answer has to be in the negative. At the same time, in the peculiar facts and circumstances of the case and more particularly, when it has been indicated before us by way of an additional affidavit-in-reply as regards the steps taken against the company for the recovery of the dues, we would like to give one chance to the department to undertake a fresh exercise so far as Section 179 of the Act, 1961, is concerned. If the show-cause notice is silent including the impugned order, the void left behind in the two documents cannot be filled by way of an affidavit-in-reply. Ultimately, it is the subjective satisfaction of the authority concerned that is important and it should be reflected from the order itself based on some cogent materials. However, with a view to protect the interest of both, the writ applicant as well as Revenue, we are inclined to quash the impugned order and give one opportunity to the Revenue to initiate the proceedings afresh by issuance of fresh show-cause notice with all necessary details so that the writ-applicant can meet with the case of the Revenue. We are inclined to adopt such measure keeping in mind the statement made by the learned counsel Mr. Soparkar that till the fresh

proceedings are not completed, his client will not operate the bank account."

Notice may be taken of the fact that the Gujarat High Court in Sonal Nimish Patel (supra) has chosen to adopt the course of allowing the Revenue to initiate fresh proceedings after setting aside the original show cause notices and order, only on the basis of the statement made by learned counsel for the petitioner therein, that till fresh proceedings were completed, the petitioner would not operate his bank account.

(27) We take further note of this Court's Judgment in **Mehul Jadhavji Shah** (supra) which considered the requirements of Section 179 while issuing show cause notices and consequent order under that provision. This Court held that setting out particulars of the efforts made by the Revenue and its failure to recover tax dues from the Private Company form the sine qua non for proceeding against the Director. It also considered that stating of such facts in the notice before assuming jurisdiction to proceed, was required in order to give opportunity to the Director against whom such a notice was issued, to point out why the efforts made by the Revenue to recover from the Company were inadequate or improper. **Mehul Jadhavji Shah** (supra) refers to an earlier Judgment passed by this Court in **Madhavi Kerkar Vrs. Assistant CIT**, reported in **(2018) 90 taxmann.com 55/253 Taxman 288 (Bom.)** and has held in

Paragraph Nos.7 and 8 as under:-

*"7. 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.*

8. 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."

(28) Union of India Vrs. Manik Dattatreya Lotlikar

(supra) cited by the Revenue, was a case where the contention raised by the petitioner was whether provisions of Section 179 (1) of the Act, which came into operation on 01/10/1975, would operate retrospectively and make Directors of a Defaulting Private Company liable for payment of tax due from the Company from 01/04/1962 onwards. That Judgment does not decide the issue raised in this petition i.e. whether the jurisdictional facts are required to be stated in the show cause notice itself to allow the Assessing Officer to proceed against a Director. In our view, therefore, Union of India Vrs. Manik Dattatreya Lotlikar (supra) would not apply to the facts of the present case. B. Muralidhar Vrs. Deputy Commissioner of Income Tax Corporate Circle-1, reported in (2019) 110 taxmann.com 54 (Madras) cited by the Revenue was to support its arguments that the petitioner had an alternate efficacious remedy in terms of statutory revision under Section 264 of the Act.

(29) A perusal of the Judgment of the Madras High Court

in **B. Muralidhar** (*supra*) would reveal that in that case, the only question that arose was whether the petitioner had validly submitted his resignation from the delinquent Company and was, therefore, not liable to pay its taxes in terms of provisions of Section 179 of the Act. There were no jurisdictional issues raised in that petition of the nature and the grounds raised in the present petition. It is in that light that the Madras High Court held that Section 264 of the Act provided the petitioner with an adequate alternate remedy of filing Revision under Section 264 of the Act rather than invoking jurisdiction of the High Court under Article 226.

(30) In the present petition, the main ground of challenge is lack of jurisdiction of the Assessing Officer to proceed with the show cause notices issued by it under Section 179 of the Act and to pass impugned order in absence of stating the jurisdictional facts that were required under the provisions of the Act. The challenge therefore, is to the sustainability of the notice and the order on the touch stone of the provisions of Section 179 of the Act.

(31) Applying the ratio of the Judgments cited above, in *Vanraj V. Shah (supra)*, *Rajendra R. Singh (supra)* and *Mehul Jadavji Shah (supra)* to the facts of the present case, that the impugned show cause notices disclose no facts regarding the steps taken by the Revenue to recover tax dues from the delinquent Company. In fact, the show cause notices dated 24/02/2020, 19/03/2020 and 04/12/2020 are mere repetition of the contents of the show cause notice dated 15/10/2019.

An affidavit-in-reply dated 21/04/2022 filed before us by the Assessing Officer attempts to list out various steps taken by the Revenue to recover tax dues from the Company between the year 2016 until the year 2020. However, as held by this Court in *Mehul Jadavji Shah (supra)*, giving particulars of steps taken against the delinquent Company in an affidavit-in-reply or even in the impugned orders does not meet the requirements of a proper notice to the Director.

(32) A perusal of the impugned order dated 14/12/2020 discloses that it does not record any of the material which formed the basis for the Assessing Officer to conclude that all

steps have been taken to recover the tax dues from the Company. Further, the impugned order does not refer to the Assessing Officer's subjective satisfaction based upon material before it, to conclude that all steps had been taken to proceed against the delinquent Company and such steps had failed. This being a sine qua non for proceeding further, and for assuming jurisdiction under Section 179 of the Act, failure to disclose this material and to record the satisfaction of the Assessing Officer in the manner required by the provisions of Section 179 of the Act renders the impugned show cause notices and the impugned order dated 14/12/2020 unsustainable at law.

(33) We are therefore, of the considered opinion that the impugned show cause notices dated 24/02/2020, 19/03/2020 and 04/12/2020 and the impugned order 14/12/2020 issued under Section 179 of the Income Tax Act, 1961 are unsustainable and contrary to the Act; consequently, we quash and set aside three show cause notices dated 24/02/2020, 19/03/2020 and 04/12/2020 and the impugned order dated 14/12/2020.

(34) Needless to state, from the conclusions we have

arrived hereinabove, Interim Application IA(L)No.24778/2022 of the Company and Interim Application IA(L)No.26761/2022 of Shri Samir Savjani, Applicant-in-person are hereby rejected. The prayer contained in the I.A.'S. for an order of restraint against the petitioner from disposing of his assets are unsustainable.

(35) The petition is **allowed**. The Rule is made absolute in terms of Prayer Clauses (b) and (c1). No costs.

[VALMIKI SA MENEZES, J.]

[DHIRAJ SINGH THAKUR, J.]

Prity/Choulwar