

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 3159 OF 2019

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Geeta P. Kamat, adult, Indian Inhabitant, |
Currently residing at Plot No.69, Laxmi Gruh, |
Flat No.701, 7th Floor, Hindu Colony, |
Lane No.1, Dadar (East), Mumbai-400014. |... Petitioner

Versus

1. Principal Commissioner of Income-tax-10, |
having his office at Aaykar Bhavan, |
Maharshi Karve Road, Mumbai-400020. |
|
2. Income Tax Officer-10(1)(3), |
having his office at Aaykar Bhavan, |
Maharshi Karve Road, Mumbai-400020. |
|
4.Union of India through the Secretary, |
Department of Revenue, Ministry of Finance, |
Government of India, North Block, |
New Delhi-110 001. |..Respondents

WITH
INTERIM APPLICATION NO. 752 OF 2019
IN
WRIT PETITION NO. 3159 OF 2019

Geeta P. Kamat, adult, Indian Inhabitant, |
Currently residing at Plot No.69, Laxmi Gruh, |
Flat No.701, 7th Floor, Hindu Colony, |
Lane No.1, Dadar (East), Mumbai-400014. |... Applicant

In the matter between :

Geeta P. Kamat, adult, Indian Inhabitant, |
Currently residing at Plot No.69, Laxmi Gruh, |
Flat No.701, 7th Floor, Hindu Colony, |
Lane No.1, Dadar (East), Mumbai-400014. |... Petitioner

Versus

1. Principal Commissioner of Income-tax- 10,	]
having his office at Aaykar Bhavan,	]
Maharshi Karve Road, Mumbai-400020.	]
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2. Income Tax Officer- 10(1)(3),	]
having his office at Aaykar Bhavan,	]
Maharshi Karve Road, Mumbai-400020.	]
	]
4.Union of India through the Secretary,	]
Department of Revenue, Ministry of Finance,	]
Government of India, North Block,	]
New Delhi-110 001.	]
	]. Respondents

Mr.J.D. Mistri, Senior Advocate with Mr.Madhur Agrawal, Mr. Fenil Bhatt, Mr. Jas Sanghavi and Mr.Viraj Y. Bhate i/b PDS Legal, Advocates for petitioner.

Mr.Suresh Kumar, Advocate for respondents.

**CORAM : DHIRAJ SINGH THAKUR &
ABHAY AHUJA, JJ.**

PRONOUNCED ON : 20th FEBRUARY, 2023

J U D G M E N T

PER DHIRAJ SINGH THAKUR, J.

1. The petitioner challenges the order dated 22nd December 2017 passed by the Income Tax Officer under section 179 of the

Income Tax Act, 1961 ('the Act') treating the petitioner liable for taxes allegedly due from the company M/s. Kaizen Automation Pvt. Ltd. (KAPL) for the assessment years 2008-09 and 2009-10. Order dated 18th March 2019 passed by the Principal Commissioner of Income-tax, Mumbai dismissing the revision petition under section 264 of the Act is also challenged in the present petition.

2. Briefly stated the material facts are as under :

2.1 A show cause notice dated 12th January 2017 was served upon the petitioner in terms of section 179 of the Act requiring the petitioner to show cause as to why recovery proceedings be not initiated against her in her capacity as a director of KAPL inasmuch as the assessee company was not traceable on the available addresses and further that the tax dues could not be recovered despite attachment of the bank accounts as the funds available were insufficient. An amount of Rs.1404.42 lacs was thus sought to be recovered from the petitioner.

2.2 With a view to prove that the non-recovery of the taxes due could not be attributed to any gross neglect, misfeasance, breach

of duty on her part, in relation to the affairs of the company, the petitioner in her response to the show cause noticed dated 23rd October 2017, took a stand that the petitioner, as a director in the company had no liberty, authorization or independence to act in a particular manner for the benefit of KAPL and that she did not have any control over the company's affairs. It was stated that the petitioner did not have any authority to sign any cheque independently or take any decision on behalf of the company nor did KAPL provide any operational control or space to the petitioner to perform her duties. It was also stated that the petitioner did not have any functional responsibility assigned to her and no one from KAPL reported to her or her husband Shri Prakash Kamat, who was also a shareholder and director in the company.

3. With a view to elucidate that the operational control and the decision making authority did not lie with the petitioner, certain details were referred to in the said reply to the show cause notice. Averments have also been made in that regard in the present writ petition. It would be worthwhile to briefly advert to them for purposes of clarity. This would also give the background in which the assessee company was formed and the agreements that were executed between various entities in that regard.

Brief Background :

4. The petitioner's husband, Shri Prakash Kamat is stated to have developed a smart card based ticketing solution for being used at various public transport organizations like BEST, Central and Western Suburban trains etc. Trials were run successfully and an agreement was entered into between Shri Prakash Kamat and BEST and Central Railways in 2006.

The projects with BEST and Railways were to be implemented on "BOT" model and required funds to the tune of Rs.50 to 60 Crores as initial investment. Khaleej Finance and Investment, a company registered in Baharain (hereinafter referred to as "KFI") agreed to make an investment in the said project subject to certain conditions, according to which a Special Purpose Vehicle was to be incorporated to carry on the said project which lead to incorporation of KAPL on 30th March 2006. Investment was made by KFI in the said project through its Mauritius based company "AFC System Ltd. (hereinafter referred to as "AFC")".

A Joint Venture Agreement dated 21st June 2006 ("JVA"), Deed of Pledge dated 21st June 2006 ("DP") along

with Irrevocable Power of Attorney dated June 2006 (“IPOA”), was between into among Shri Prakash Kamat, the petitioner, KFI and the said company-KAPL.

5. Some of the clauses of the JVA were referred to by Mr.Mistri, learned counsel for the petitioner. It was stated that as per clause 7.2.1 in Article 7, the Auditor of the JVC had to be nominated by the investor i.e., majority shareholding directors as long as KFI held 50% shares in the JVC, and had be to appointed by the Board. Clause 7.2.2 in Article 7 envisaged that the internal Auditors of the JVC were to be nominated by the investors. Reference was made to clause 8.1 in Article 8 to show that the management of the JVC had to be vested with the Board, which would exercise all such powers and do all such things as would be exercised or done by the JVC. Reliance was placed upon Clause 8.2.1 in Article 8 to highlight the fact that maximum strength of the Board was to be eight directors out of which 6 were of KFI. Clause Clause 8.4 in Article 8 was referred to show that the Chairman of the Board, at all times was to be from the Directors nominated by the investor and finally Clause 8.5.4 in Article 8 was referred to show that the decisions of the Board were to be

taken by a simple majority till such time the investor held more than 50% of the total paid up share capital of the JVC.

6. In the reply to the show cause notice, the petitioner also stated and highlighted the fact that due to some differences that had cropped up with KFI since January 2009 the petitioner's husband was removed as Managing Director of KAPL in September 2009 along with the petitioner herein. It was also stated that while the petitioner was a director during the financial year 2007-08, since the petitioner stood removed as such director in September 2009, she could not be held liable for the liability of KAPL for the financial year 2008-09 relevant to assessment year 2009-10. It was also stated that the petitioner was not at all aware till after she had been removed that there was any tax liability which was due and payable by KAPL, and therefore, it was stated that she could not have been held guilty of any gross neglect, malfeasance or breach of duty on her part in relation to the affairs of the company.

7. The Assessing Officer ('AO'), by virtue of the order impugned dated 22nd December 2017 passed under section 179 of the Act

rejected the contention of the petitioner. It was held that not only had the petitioner failed to establish that she was not actively involved in the management of the company during the financial year 2007-08 and 2008-09 and further that she had failed to establish that there was no gross neglect, malfeasance or breach of duty on her part. The AO held that there was not a 'shred of doubt' that Mrs.Kamat was actively involved in the day-to-day affairs of the company till she was removed in September 2009. As regards the disputes between the petitioner and KFI, the AO held that it was normal to have such disputes during the working of an enterprise.

8. The petitioner preferred a revision petition under section 264 of the Act against the order dated 22nd December 2017 passed under section 179 of the Act, which too, came to be dismissed vide order dated 18th March 2019 simply on the ground that the petitioner was a director for the relevant assessment years and hence was liable.

9. Mr.Mistri, learned senior counsel for the petitioner urged that the entire approach adopted by the AO in passing the order

under section 179 of the Act was misplaced and the mistake was perpetuated by the revisional authority in dismissing the revision petition filed by the petitioner against the said order. Reliance was placed upon the judgment in *Maganbhai Hansrajbhai Patel Vs. Assistant Commissioner of Income-tax & Anr.*¹ and *Ram Prakash Singeshwar Rungta & Ors. Vs. Income-tax Officer*²

10. It was urged that the order passed by the AO was perverse inasmuch as based upon the facts on record, no proceedings under section 179 of the Act could have been initiated against the petitioner for the purposes of recovery from the petitioner the liability of the company for the assessment years 2007-08 and 2008-09. It was urged that even when the petitioner had placed enough material on record reflecting that the petitioner was not the Managing Director of the company and was not at the helm of affairs as such, and that she had not any independent authority to take any decision on behalf of the company nor did she have any independent operational control, yet the AO proceeded to hold that the petitioner had failed to prove that there was no gross neglect, malfeasance or breach of duty on her part in relation to

1 [2013] 353 ITR 567 (Guj.)

2 [2015] 370 ITR 641 (Guj.)

the affairs of the company.

11. In the reply affidavit filed by the revenue, it is reiterated that the petitioner was an important working director of the assessee-company and was bestowed with many important responsibilities in order to run the day-to-day affairs of the company and her claim that she did not hold any important position for purposes of day-to-day affairs of the company was incorrect. This statement was sought to be made based upon the minutes of the Board Meeting which was referred to by the AO. It was, therefore, urged that the proceedings under section 179 of the Act were rightly initiated against the petitioner.

12. Heard learned counsel for the parties.

13. Section 179 of the Act *inter-alia* envisages that the where any 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 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. It therefore follows that if tax dues from a private company cannot be recovered then the same can be recovered from every person who was a director of a private company at any time during the relevant previous year. However, such a director can absolve himself if he proves that the non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty in relation to the affairs of the company.

14. In so far as the requirement of the first part of the section is concerned, it can be seen from the order passed under section 179 of the Act that steps were taken for recovery against the company M/s. Kaizen Automation Pvt. Ltd. (KAPL) including attachment of its bank accounts which did not yield any results. The company is also stated to be not traceable on the addresses available with the AO, and therefore, according to the AO, the only course left was to proceed against the directors in terms of section 179 of the Act.

15. The stand of the petitioner is that she could not be proceeded against, inasmuch as there was no gross neglect, malfeasance or breach of duty on her part in relation to the affairs

of the company. The AO, however, did not accept this assertion. It laid emphasis on the fact that the petitioner had actively participated in the affairs of the company atleast till the date of her removal in September 2009 and proceeded to hold that the petitioner had failed to prove that there was any gross neglect, misfeasance or breach of duty on her part as regards the affairs of the company.

However, in the order impugned dated 22nd December 2017 passed under section 179 of the Act, although the AO did make a reference to various Board meetings which were attended by the petitioner from time to time from 2006 till 8th January 2008, there was no material highlighted by the AO, contrary to the material on record placed by the petitioner, based upon which the petitioner could be held to be guilty of gross neglect, malfeasance or breach of duty in regard to the affairs of the company. The petitioner having brought on record material to suggest lack of financial control, lack of decision making powers in the light of her stand that she had a very limited role to play in the company as a director and that the entire decision making process was with the directors appointed by the investors, i.e., KFI which was the single largest shareholder of the JVC had, in our opinion,

sufficiently discharged the burden cast upon her in terms of section 179 to absolve herself of the liability of the company.

16. The AO appears to have applied himself more on the issue of the petitioner participating in the affairs of the company for purposes of pinning liability in terms of section 179 rather than discovering the element of 'gross neglect', misfeasance or 'breach of duty' on the part of the petitioner in relation to the affairs of the company and establishing its correlation with non-recovery of tax dues. The petitioner having discharged the initial burden, the AO had to show as to how the petitioner could be attributed such a gross neglect, misfeasance or breach of duty on her part. In

Maganbhai Hansrajbhai Patel (Supra), it was held :

“20.....Thus the responsibility to establish such facts are on the director. However, once the director places before the authority his reasons why it should be held that non recovery cannot be attributed to any of the three factors, the authority would have to examine such grounds and come to a conclusion in this respect. Significantly, the question of lack of gross negligence, misfeasance or breach of duty on part of the director is to be viewed in the context of non recovery of the tax dues of the company. In other words, as long as the director establishes that the non recovery of the tax cannot be attributed to his gross neglect, etc., his liability under section 179(1) of the Act

would not arise. Here again the legislature advisedly used the word gross neglect and not a mere neglect on his part. The entire focus and discussion of the Assistant Commissioner in the impugned order is with respect to the petitioner's neglect in functioning of the company when the company was functional. Nothing came to be stated by him regarding the gross negligence on part of the petitioner due to which the tax dues from the company could not be recovered. In absence of any such consideration, the Assistant Commissioner could not have ordered recovery of dues of the company from the director. We would clarify that in the present case the petitioner had putforth a strong representation to the proposal of recovery of tax from him under section 179 of the Act. In such representation, he had detailed the steps taken by him and the circumstances due to which non recovery of tax cannot be attributed to his gross neglect. It was this representation and the factors which the petitioner had putforth before the Assistant Commissioner which had to be taken into account before the order could be passed. It is not even the case of the department that the petitioner paid the dues of other creditors of the company in preference to the tax dues of the department. It is not the case of the department that the petitioner negligently frittered away the assets of the company due to which the dues of the department could not be recovered, To suggest that the petitioner did not oppose the GSFC's auction sale is begging the question. GSFC had sold the property after several attempts through auction. It is not the case of the department that proper price was not fetched.”

17. A similar view was expressed in *Ram Prakash Singeshwar Rungta & Ors.* (Supra) in the following words :

“12On a plain reading of the impugned order, it is apparent that nothing has been stated therein regarding any gross-negligence, misfeasance or breach of duty on the part of the petitioners due to which the tax dues of the Company could not be recovered. The respondent, has, therefore, passed the impugned order under section 179(1) of the Act against the directors in respect of alleged neglect on their part in the functioning of the Company due to which the demand in question has arisen and not on account of any gross neglect, misfeasance or breach of duty on their part in the non-recovery of the dues of the Company. Thus, the very basis on which the respondent has proceeded, suffers from non-application of mind to the requirements for exercise of powers under section 179(1) of the Act. In the absence of any finding that non recovery of the tax due from the company can be attributed to any gross-negligence, misfeasance or breach of duty on the part of the petitioners, no order could have been made under section 179(1) of the Act for recovering the same from the directors. The upshot of the above discussion is that the impugned order being inconsistent with the provisions of section 179(1) of the Act, cannot be sustained.....”

18. The ratio of the aforementioned judgments squarely apply to the present case as well. Even in the present case, the AO has not specifically held the petitioner to be guilty of gross neglect, misfeasance or breach of duty on part in relation to the affairs of the company. Not a single incident, decision or action has been

highlighted by the AO, which would be treated as an act of gross neglect, breach of duty or malfeasance which would have the remotest potential of resulting in non-recovery of tax due in future.

19. In our opinion, in the order impugned dated 22nd December 2017 as also the order dated 18th March 2019 in revision passed by respondent No.1 on similar grounds is unsustainable.

20. Be that as it may, the petition is allowed. The impugned orders dated 22nd December 2017 and 18th March 2019 are set aside.

21. In view of disposal of the petition, interim application does not survive and accordingly stands disposed of.

[ABHAY AHUJA, J.]

[DHIRAJ SINGH THAKUR, J.]