

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 12961 of 2019****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR. JUSTICE N.V.ANJARIA****and****HONOURABLE MR. JUSTICE BHARGAV D. KARIA**

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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DEVENDRA BABULAL JAIN
Versus
INCOME TAX OFFICER, WARD 1(1)(4)

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Appearance:

MR. JAIMIN R DAVE(7022) for the Petitioner(s) No. 1,2

MR NIKUNT RAVAL FOR MS KALPANA K RAVAL for the Respondent(s) No. 1,2

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CORAM: HONOURABLE MR. JUSTICE N.V.ANJARIA**and****HONOURABLE MR. JUSTICE BHARGAV D. KARIA****Date : 16/12/2022****CAV JUDGMENT**

(PER : HONOURABLE MR. JUSTICE BHARGAV D. KARIA)

1. Heard learned advocate Mr. Jaimin Dave for the petitioners and learned advocate Mr. Nikunt Raval for the respondents.

2. The petitioners have challenged the order dated 26.10.2017 passed by respondent no.1 under section 179 of the Income Tax Act, 1961 (For short "the Act") fastening the liability upon the petitioners to pay the outstanding dues of M/s. Nakoda Syn-tex Private Limited (here-in-after referred to as "the said company") as the petitioners are the Directors of the said company for the assessment year 2014-2015. The petitioners have also challenged order dated 29.01.2018 passed under Rule 48 of the Second Schedule to the Act attaching the residential property of the petitioners and notice of demand dated 11.01.2018 under section 222 of the Act as a

consequence of order dated 26.10.2017.

3. Brief facts of the case are that the petitioners were appointed as the Directors of M/s. Nakoda Syn-tex Private Limited.

3.1) Respondent no.1 carried out assessment under section 143(3) of the Act against the said company for the Assessment Year 2014-2015 and passed the assessment order dated 23.12.2016 making addition of Rs. 7,00,00,000/- on account of bogus unsecured loans. Consequently demand notice dated 23.12.2016 under section 156 of the Act was issued upon the said company raising a demand of Rs.3,06,63,860/-.

3.2) Being aggrieved by the said assessment order and demand notice, the said company preferred an appeal before the Commissioner of Income Tax Appeal-1, Surat on

17.01.2017.

3.3) On 9.02.2017, respondent no.1 issued a recovery notice demanding payment of the outstanding dues from the said company.

3.4) Pursuant to such recovery notice, the said company filed a stay application on 22.02.2017 before the respondent no.1 appraising about the appeal filed by the said company.

3.5) It is the case of the petitioner that respondent no.1 rejected the stay petition of the said company vide order dated 17.03.2017 without affording any opportunity of hearing to the Directors of the said company.

3.6) Respondent no.1 thereafter issued show cause notice dated 6.7.2017 under

section 179 of the Act.

3.7) The petitioners vide individual letters dated 16.08.2017 submitted reply to the said show cause notice.

3.8) Respondent no.1 thereafter passed the impugned order dated 26.10.2017 under section 179 of the Act.

3.9) On 11.01.2018, respondent no.2 issued a certificate under section 222 of the Act and notice of demand calling upon the petitioners to pay the outstanding dues of the company within 15 days of receipt of notice.

3.10) The petitioner did not have adequate means to pay such a huge demand and therefore, could not comply with the said notice. Respondent no.2 therefore, passed an

order dated 29.01.2018 under Rule 48 of the Second Schedule to the Act.

3.11) Being aggrieved by the impugned action of the respondents, the petitioners have preferred the present petition.

4. The coordinate Bench of this Court by order dated 29.07.2019 issued the notice and granted the order of status-quo vis-a-vis the properties of the petitioners which are attached by the respondents.

5. Learned advocate Mr. Jaimin Dave for the petitioners submitted that the impugned order passed under section 179 of the Act and consequential orders are without jurisdiction as the basic condition for invoking section 179 of the Act are not satisfied in the facts of the case.

5.1) It was submitted that for invoking jurisdiction under section 179 of the Act, twin conditions with regard to the amount of tax dues from a private limited company which is not recovered from such company is attributable to the gross neglect, misfeasance or breach of duty of the Director, is not satisfied in the present case. It was submitted that in the facts of the case there is nothing on record to suggest that the respondent authorities have been satisfied before invoking powers under section 179 of the Act vis-a-vis the recovery of the outstanding dues of the private limited company and there is no finding that such non recovery of taxes is attributable to the gross neglect, misfeasance or breach of duty of the petitioners. It was submitted that except issuance of recovery notice dated 9.02.2017, respondent no.1 has neither issued any notice of demand nor taken any assertive

steps for the purpose of recovering the outstanding tax dues from the private limited company. In support of his submissions, reliance was placed on the following decisions:

- 1) In case of **Bhagwandas J. Patel v. Deputy Commissioner of Income-tax** reported in (1999) 238 ITR 127 (Gujarat).
- 2) In case of **Indubhai T. Vasa v. Income Tax Officer, Ward 4(3)** reported in (2006) 282 ITR 120 (Gujarat).
- 3) In case of **Amit Suresh Bhatnagar v. Income-tax officer** reported in (2009) 308 ITR 113 (Gujarat).
- 4) In case of **Mehul Jadavji Shah v. Deputy Commissioner of Income Tax** reported in (2018) 403 ITR 201 (Bombay).

5) In case of **Sadhna Ramchandra Jeswani v. Income Tax Officer** (judgment dated 27.08.2019 in Special Civil Application No.5354/2018 and allied matter).

6) In case of **Susan Chacko Perumal v. Assistant Commissioner of Income-tax** reported in (2017) 399 ITR 74 (Gujarat).

7) In case of **Gul Gopaldas Daryani v. Income Tax Officer** reported in (2014) 367 ITR 558 (Gujarat).

6. On the other hand, learned advocate Mr. Nikunt Raval for the respondents submitted that the compliance of the provisions of section 179 of the Act are made prior to passing of the impugned order. It was submitted that the private limited company of which the petitioners are the Directors is

liable to pay the demand of more than Rs. 3 crores since 2016 and the said company did not make any payment of the outstanding demand within the due time inspite of giving recovery notice by the Recovery Officer. It was submitted that the stay petition filed by the private limited company was also not entertained by the competent authority inspite of disposal of the stay application on 17.03.2017.

6.1) Further opportunity was also given to make payment of outstanding demand by notice dated 20.03.2017. However, no payment is made by the petitioners or by the private limited company and there was total non compliance with regard to the recovery steps taken by the respondent authority. It was pointed out that the bank account of the petitioners with Canara bank was also attached under section 226(3) of the Act on

2.05.2017. It was submitted that as per the provisions of section 179 of the Act, the petitioners are liable to pay the outstanding tax in capacity of the Directors of the assessee company who have neglected to make the payment of outstanding demand.

6.2) Learned advocate Mr. Raval in support of his submissions relied upon the following averements made in the affidavit in reply:

"11. Further from the balance-sheet of the assessee, it is seen that its investment was mostly in Nakoda Limited. From the submission of the assessee dated 22/02/2017 (Annexed herewith and marked as Annexure : R-V Colly. is copies of Submission) it was seen that huge income tax demand in the case of Nakoda Limited was also outstanding and no recovery was possible from this company also. Nakoda Limited is also assessed in this Range. From the record of this case it is seen that this company has closed down its business and E.D has registered a case of money laundering against this company. Moreover from the income-tax record

of the assessee company it is seen that no business activity in the assessee company from F.Y.2014-15 onwards. In this case, ample opportunity was given to the assessee to make payment of the demand but no payment was made by the assessee and even attachment of the bank account did not yield any result. Further, the assessee company is not doing any business activity. From the annual account of the assessee and outcome of various efforts made by this office, it is apparent that recovery of income-tax demand couldn't be made from the assessee company. Therefore the department resorted to the provision of section 179 of the income-tax act and initiated proceeding to recover demand from director. Therefore it is evident that in this case sufficient efforts were made to recover the outstanding demand from the assessee company, before passing order u/s 179 of the IT Act).

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14. However in the instant case it is seen that show-cause notice u/s.179 of the income-tax act was issued on 06/07/2017 and as per the terms of the notice the directors were required to submit their reply on or before 13/07/2017 but it is seen that there was no response from them till the date mentioned above. Later on after laps of 45 days of the due date, reply was filed. In their reply they did not submit any

evidence to prove that non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on their part in relations to the affairs of the company. It was merely submitted that they were vigilant in tax matters and appeal before Ld. CIT (A) was pending. It is important to mention here that it is necessary to pay 20% of the demand outstanding in case appeal is pending before the Ld. CIT(A) as per the Guidelines of the CBDT, which the assessee company has not complied with. Annexed herewith and marked as Annexure: R-VI is a copy of the guidelines of the CBDT. It is the duty of the directors of the company to comply with the statutory provisions and the Directors of the assessee company could have applied for stay of the existing demand after paying minimum 20% of the demand, however, the Directors of the assessee company have failed to do so. Therefore it is apparent that the directors have completely failed to establish that non-recovery of tax dues cannot be attributed to any gross neglect on their part.

15. In this case Shri Devendra Babulal Jain and Smt. Pushpadevi Babulal Jain were directors of the company and as per the return of income filed for A.Y.2014-15 they were the principal officers of the assessee company, therefore it was their duty to ensure the payment of outstanding demand of the assessee company. However it is seen that

they have completely failed to prove that they have done their best to ensure that payment of demand be made. No provision for the income-tax demand was made in the books of the company. Nothing submitted before the AO to prove that the directors made any effort for the payment of outstanding demand. In view of the above all the conditions for passing order u/s.179 of the income-tax act was full filled, therefore the action of AO for passing order u/s.179 of the income-tax act is justified.

16. In view of the above facts, it is very much clear that the Assessing Officer had taken various steps to recover the outstanding demand from the assessee company. But due to non-cooperation or complete negligence by the assessee company and its directors, the recovery in this case could not be made. Therefore there was no option left but to make recovery from the director of the assessee company. So proceeding u/s.179 of the Income-Tax Act was initiated and after providing sufficient opportunity of being heard and considering the reply of the assessee order u/s.179 was passed against the directors of the assessee."

6.3) In support of his contention that despite all possible efforts, entire

outstanding tax dues could not be recovered from the company leaving department with no option but to recover the same from the Directors, reliance was placed on the judgment of Delhi High Court in case of **Rajeev Behl v. Principal Commissioner of Income-tax** reported in (2021) 132 taxmann.com 283 (Delhi).

6.4) It was further submitted that reliance placed by the petitioners on the various decisions of this Court are not applicable in the facts of the said case as it is for the petitioners to point out that the petitioners have not remained negligent for non recovery of the outstanding dues of the private limited company.

7. Having heard the learned advocates for the respective parties, it appears that the respondent authorities have failed to take

any action for recovery of the outstanding dues except issuing notice for recovery and attaching the bank account of private limited company. Section 179(1) of the Act reads as under :

"Liability of directors of private company⁴⁴ [*].**

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."

8. On perusal of the above provisions, it is clear that the Assessing Officer is required

to make efforts for recovery of the outstanding dues from the assessee private limited company which has committed default in payment of the outstanding demand. The petitioners have prima facie shown that non recovery cannot be attributed to any gross negligence, misfeasance or breach of duty as Directors of the assessee company. In the impugned order, the Assessing Officer has failed to consider the fact that the petitioners have tendered their explanation and contended that the petitioners have challenged the order of assessment before the appellate authority and the petitioners have not remained negligent nor there is any misfeasance or beach of trust on part of the petitioners and only because the petitioners have been unable to deposit 20% of the demand raised in the assessment order to get stay from the appellate authority, the petitioners cannot be said to be negligent and respondent

no.1 cannot therefore, invoke jurisdiction under section 179 of the Act.

9. This Court in case of **Sadhna Ramchandra Jeswani v. Income Tax Officer** (supra) in similar situation has held as under :

"8. Reverting back to the facts of the case, we notice that in showcause notice the Assessing Officer has not laid down sufficient foundation for invoking section 179 of the Act leave alone broadly pointing out he has not even alleged that non-recovery was on account of gross negligent, misfeasance or breach of duty on part of the petitioner in relation to the affairs of the company. His final conclusions in the impugned order are therefore based on the material at his command which was never shared with the petitioner.

9. In the result, impugned order is set aside only on this ground making it clear that nothing stated in the order would prevent the Assessing Officer from initiating fresh exercise for the same purpose, if so advised and, if the material at his command is sufficient to permit him to do so."

10. Similar view is also taken in decision in case for **Bhagwandas J. Patel v. Deputy Commissioner of Income-tax** reported in 238 ITR 127 (Guj).

11. Reliance placed by the learned advocate Mr. Nikunt Raval on the decision of Delhi High Court in case of **Rajeev Behl v. Principal Commissioner of Income-tax** (supra) is not helpful to the respondents inasmuch as the basic ingredients of section 179 are not complied with by the respondent authorities and therefore, impugned actions are without jurisdiction more particularly, when the petitioners have demonstrated that they have not remained negligent for non recovery of the outstanding dues.

12. In view of above foregoing reasons, petition succeeds and accordingly impugned order dated 26.10.2017 and consequential

order dated 29.01.2018 and demand notice dated 11.01.018 are hereby quashed and set aside.

13. Rule is made absolute to the aforesaid extent. No order as to costs.

(N.V.ANJARIA, J)

(BHARGAV D. KARIA, J)

RAGHUNATH R NAIR

