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

WRIT PETITION NO. 3129 OF 2019
WITH
INTERIM APPLICATION NO. 2150 OF 2021
WITH
INTERIM APPLICATION NO. 744 OF 2019

Prakash B. 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,)
Maharashi Karve Road, Mumbai-400020.)

2. Income Tax Officer -10(1)(3), having his office)
at Aaykar Bhavan, Maharashi Karve Road,)
Mumbai-400020.)

3. Union of India, through the Secretary,)
Department of Revenue, Ministry of Finance)
Government of India, North Block,)
New Delhi- 110001.) … Respondents

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Mr. J.D. Mistri, Sr. Advocate a/w Mr. Madhur Agarwal, Mr. Jas Sanghavi and Mr. Fenil Bhatt i/b PDS Legal for the Petitioner.

Mr. Suresh Kumar for Respondents.

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CORAM: K.R.SHRIRAM &
M.M.SATHAYE JJ.
Date : 12th June 2023

JUDGMENT [PER M.M.SATHAYE, J.]

1. Rule. Rule made returnable forthwith. Learned Counsel Mr. Sureshkumar waives service for Respondents. Taken up for final disposal with consent.

2. By this Petition filed under Articles 226 and 227 of the Constitution of India, Petitioner is seeking a writ of Certiorari for quashing and setting aside (a) order dated 22nd December 2017 passed by Income Tax Officer-10(1)(3), Mumbai under Section 179 of the Income Tax Act, 1961 ("the Act" for short) holding Petitioner liable for taxes allegedly due from Company Kaizen Automation Pvt. Ltd. ("KAPL" for short) for Assesment Year 2008-09 & 2009-10 and (b) Order dated 18th March 2019 passed by Chief Commissioner of Income Tax(OSD) holding charge of Pr. Commissioner of Income Tax-10, Mumbai, under Section 264 of the Act in Petitioner's revision against aforesaid order dated 22nd December 2017. Petitioner is also seeking a writ of mandamus directing Respondents to withdraw, revoke and cancel the said impugned orders.

3. Heard Mr. Mistry, learned senior counsel for Petitioner and Mr.

Suresh Kumar for Respondents - Revenue. Perused the record.

CASE

4. Petitioner has come with following case :

4.1) Petitioner is a mechanical Engineer who had developed a smart card based ticketing solution in the year 2000, which could be used for various public transport like BEST and suburban trains on both central and western railway-lines of Mumbai. It was agreed between Petitioner and said transport organisation that he would run a test project to check its utility and viability. After the successful trial run, BEST as well as Central Railway gave their consents to go ahead with implementation of the smart card ticketing system on built, operate and transfer (BOT) basis. Since implementation of the said scheme required huge funds to the tune of Rs. 50 to 60 crores as initial investment, one Khaleej Finance and Investment, a Company registered in Bahrain ("KFI"for short) agreed to make an investment and MOU was executed between Petitioner and KFI. The said KFI invested in said project through its Mauritius based Company AFC system Limited ("AFC" for short) and thereafter a Joint Venture Agreement, Deed of Pledge and Irrevocable Power of Attorney (JVA,

DP and IPOA for short) were executed in June 2006. Managing Director Agreement (MDA for short) was also executed in February 2007. Thus the assessee company KAPL came to be incorporated on 30th March 2006.

4.2) The clauses of the aforesaid documents provided that the Management and real control of the assessee Company was in the hands of 6 Directors appointed by KFI (out of 8) the other two being Petitioner and his wife Geeta P. Kamat and decision in respect of Company's accounts and/or audits were solely in the control of Board of Directors of KFI. The important decisions could not be taken without approval of Directors of KFI. In the JVA it was clearly provided that management of the Company KAPL was under full power, authority and control of Board of Directors where the voting rights were with KFI to the extent of 74%. Said documents also provided that KFI had not only reserved the absolute right, power and control over the decision taken in respect of its 74% shareholding but had also taken right over power, control and authorisation of Petitioner and his wife's share holding in the company aggregating 26%. It is, therefore, case of Petitioner that he

and his wife were name-sake Directors and were at the mercy of the decision of KFI and they did not have any real control over any of KAPL's decision. It is Petitioner's further case that till his removal from the Company, composition of the Board did not change.

4.3) Since disagreement arose between the J V Partners, Petitioner was forcibly removed from the post of Managing Director in January 2009 and his wife as Director, pursuant to which though arbitration clause was invoked, since KFI did not co-operate, arbitration proceedings never took place. Finally, directorship of Petitioner and his wife in KAPL was terminated in September 2009. After removal of Petitioner and his wife, they had no idea as to what was the status of KAPL and its main Directors. Petitioner was never given any access to KAPL-assessee company's premises, data or any thing else associated therewith including accounts, audits and income tax filing etc.

4.4) It is specific case of Petitioner that during the time when he was Director of Company, there were no outstanding demand of tax / duty from Income Tax Department. It is contended that after a

long period of 8 years, Petitioner was served with a show cause notice dated 12th January, 2017 directing him to reply as to why proceedings under Section 179 of the Act should not be initiated against him for outstanding demand against KAPL the assessee Company. The notice recorded name of Petitioner and his wife only and no other Directors of the Company for Assessment Year 2008-09 and 2009-10. It was learnt that assessment has been made and penalties to the tune of Rs. 14 Crores levied on KAPL. No copies of any orders or proceedings pursuant to which demand has arisen, were provided to Petitioner.

4.5) It is contended that Petitioner had filed detailed reply and supplied all the documents, agreements etc contending that non recovery of tax from KAPL cannot be attributed to any gross neglect or misfeasance or breach of duty of Petitioner or his wife. It is contended that during the course of hearing Respondent No. 2 directed Petitioner to produce information available with him in respect of present Directors of KAPL which he duly supplied pointing out that at the relevant time KFI had merged with Idbar Bank. However, inspite of said information, Respondents have not

apparently taken any action against the present Directors of KFI or KFI's directors at the relevant time of assessment and Respondents have not even made them party.

5. Petitioner made various submissions to Respondents in October and November 2017, copies whereof are annexed to the Petition. Ultimately, Respondent No. 2 passed first impugned order dated 22nd December 2017 under Section 179 of the Act holding that Petitioner, as a Director of KAPL-assessee Company, was jointly and severally liable for outstanding tax-dues of KAPL amounting to Rs. 14,37,29,716/-. Accounts of Petitioner and his wife were freezed.

6. Petitioner and his wife were required to move this Court. By order dated 16th March, 2018 passed in Writ Petition Nos. 643 of 2018 and 645 of 2018, Petitioner and his wife were permitted to withdraw the Petitions, with liberty to prosecute revisional remedy available under Section 264 of the Act. On written instructions from Respondents, defreezing of the bank accounts of Petitioner and his wife was directed on humanitarian grounds.

7. Petitioner then filed Revision Application under Section 264 of the Act, which was heard. By second impugned order dated 18th March 2019, it was rejected, thereby confirming first impugned order dated 22nd December 2017 holding Petitioner liable for the amount stated therein. In these set of facts, Petitioner has approached this Court.

SUBMISSIONS

8. Learned Senior counsel Mr. Mistry for Petitioner, submitted that impugned orders are passed solely on the ground that Petitioner was a Director during relevant Assessment Years of KAPL- the assessee Company. It was submitted that impugned orders have been passed in complete disregard to the later part of Section 179(1) of the Act, which provides for an exception that if the concerned Director proves that "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, then such Director cannot be held liable. It was further submitted that the impugned orders were passed without considering the true and correct purport and interpretation of Section 179(1) of the Act.

9. Mr. Mistry further urged that citizens like Petitioner or his wife cannot be subjected to arbitrary and unreasonable powers as wielded by Respondents while passing the impugned orders. It was submitted that true purport of Section 179(1) of the Act is that a person must not only be a Director at the relevant assessment year but also a director at the time when the demand was raised and such Director can be held responsible only and only when "non recovery" is attributable to gross neglect, misfeasance or breach of duty on the part of such Director. Mr. Mistry further urged that strictly speaking, question of non recovery being attributable to conduct of Petitioner would be relevant only if he was a Director when the demand has been raised. He submitted that in the present case Petitioner was admittedly not a Director when the reassessment proceedings were initiated in the year 2017 and hence there is no question of Section 179(1) of the Act being attracted. Even otherwise, according to Mr. Mistry, the aspect of gross neglect, misfeasance etc has not been properly considered or dealt with by the Authorities. It was further submitted that if the relevant clauses of documents under which Petitioner was Director of the assessee Company are considered, it

would show that Petitioner had no control or very limited control in KAPL- the assessee company and real power to run the affairs thereof, vested with the other 6 Directors appointed by KFI.

10. Learned Senior counsel Mr. Mistry relied upon a Judgment dt. 20/02/2023 passed by co-ordinate Bench of this Court in Writ Petition No. 3159 of 2019 in the matter between Petitioner's wife (Geeta P. Kamat) and Revenue, challenging identical orders passed in her case and has also produced the impugned orders therein. He also relied upon a Judgment of this Court in the matter of ***Mukesh D. Ramani Vs. State of Maharashtra***[1] which is a Judgment considering Section 18 of the Central Sales Tax Act, 1956 and Section 89 of the Maharashtra Goods and Services Tax Act, 2017 which are *pari materia* to section 179 of the Act.

11. *Per contra,* Mr. Suresh Kumar for the Revenue submitted that during the the Assessment Years under consideration, the assessee Company, being a private Company, had received large sums of money as share application money or share premium, which would not have been possible without involvement of its Directors. He

[1] [2022]144 taxmann.com 135(Bombay)

submitted that Petitioner being Director of the private company at the relevant assessment years, wass jointly & severally liable for the payment of tax by the assessee company. He vehemently argued that Petitioner despite being given ample opportunities, has failed to established that non recovery cannot be attributed to his gross negligence, misfeasance, breach of duty in relation to the affairs of assessee company and therefore impugned orders are justified.

REASONS AND CONCLUSIONS

12. At the outset, for ready reference, section 179(1) of the Act is reproduced below:-

> *"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 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 the proves that the non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affiars of the company."*

13. This Court in ***Mukesh D. Ramani's case*** *(supra)* has considered various judgments of this Court as well as other High Courts. As

noted in judgments of ***Satish D. Sanghavi v. Union of India***[2] *and* ***Narinder Singh v. Union of India***[3] *,* it is settled position of law that in absence of any specific provisions in the statute, duty or penalty liability of the company cannot be recovered from its Director, who is not personally liable towards liability of the Company. Perusal of Section 179(1) of the Act shows that it provides for an escape route to the Director. It says that where a Director proves that non recovery of tax dues cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the Company, he shall not be liable for payment of tax dues. Of course, the responsibility of establishing such fact is upon the Director. Once the Director places before the authority his material and reasons why it should be held that non-recovery cannot be attributed to any of the three factors on his part, the Authority is bound to examine such grounds and come to a reasoned conclusion in this respect.

14. We are alive to the fact that the legislature in its wisdom has used the words “gross neglect” and not mere neglect on the part of the Director. This view finds support in the judgment of the Gujrat

[2] (2012) 25 taxmann.com 328(Bombay)
[3] 2019 (367) ELT 775

High Court in ***Maganbhai Hansrajbhai Patel v. Assistant.CIT [2012] 26 taxmann.com 226*** where the said High Court has dealt with the same present provision of Section 179 of the said Act. In the said judgment it is further held that gross negligence etc is to be viewed in the context of non recovery of tax dues of the Company and not with respect to general functioning of the company. Useful reference can be made to paragraph 15 and part of paragraph 21 from the said judgment reproduced below.

> *"15. …… Section 179(1) of the Act thus statutorily provides for lifting of corporate veil under given set of circumstances. The liability of tax dues which is basically fastened on the company, is permitted to be recovered from its Director in case of private company, provided the conditions set out in said section noted above are fulfilled"*
>
> xxxx
>
> *"21. ….. 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, 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……"* *(emphasis supplied)*

15. Same view is also taken by Gujarat High Court in the case of ***Gul Gopaldas Daryani v. ITO***[4] wherein it is held in paragraph 14 as under:

[4] [2014] 46 taxmann.com 35

> *"14. It can thus be seen that once it is established that the taxes of a private company cannot be recovered from the said company, the directors of the company at the relevant time would be jointly and severally liable for payment of such taxes, unless, it is proved that non-recovery cannot be attributed to any gross negligence, misfeasance or breach of duty on their part in relation to the affairs of the company. The burden cast by statute is thus in the negative and is on the director concerned as is observed in case of Maganbhai Hansrajbhai Patel (supra). However, once in defence, the director places necessary facts before the Tax Recovery Officer to establish that non-recovery cannot be attributed to gross negligence, misfeasance or breach of duty on his part, the Tax Recovery Officer is required to apply his mind and come to definite findings……"*
>
> *(emphasis supplied)*

16. Viewed from the aforesaid settled position of law, now let us examine the material produced by Petitioner before the authorities passing the impugned orders.

17. Petitioner had produced all the documents in support of his case that he was not in the controlling capacity of KAPL the assessee company specially its financial affairs. It is not the case of Respondent that the tax dues (which is subject matter of the impugned orders) were demanded when Petitioner was Director of the assessee Company. Perusal of the documents produced on record shows that after Petitioner's removal from the directorship which has taken place in the year 2009 itself, Petitioner had no connection with the said company or any access to its affairs. Perusal of the impugned Orders further show that both the ITO as well as revisional Authority have mainly proceeded on the basis that the

Petitioner was director during the assessment years and do not really consider whether there was any gross neglect or misfeasance for breach of duty on his part in relation to affairs of the company “in the context of non recovery of tax dues”. In such situation it is difficult to sustain the impugned Orders, which without any basis, simply says that Petitioner (Director) has failed to prove that non-recovery cannot be attributed to any gross neglect or misfeasance or breach of duty on his part. It is important to note that the first impugned Order dt. 22/12/2017, in para 9, in fact re-iterates all the submissions made by Petitioner. Therefore the authority certainly was aware of the case of Petitioner. Still the ITO in a cryptic manner in para 10(vi) and (vii) simply says that Petitioner has not been able to establish requirements of later part of section 179(1) of the Act. Also both the Authorities have not considered the role of Petitioner during the relevant Assessment Years “in the context of non recovery of tax dues”as mandated in caselaw discussed above. No material is highligted by the ITO contrary to material placed on record by Petitioner, based on which he can be held to be guilty of gross neglect or misfeasance or breach of duty in the context of non-recovery of tax dues. Having brought on record material to show lack of financial control, lack of decision making power and having very limited role in the assessee company even as director and entire decision making process being with the directors appointed by KFI (Being single largest share holder of the assessee company), in our opinion, Petitioner has sufficiently discharged the burden cast upon him in terms of section 179(1) of the Act to absolve him from the liability thereunder.

18. Although the burden cast upon the director of a private company in the later part of Section 179(1) of the Act is a negative burden of proving that non-recovery "cannot be attributed" to any gross neglect misfeasance or breach of duty on his part, in the present case, as observed above, Petitioner has discharged such burden by placing on record his specific case and supporting material. It was therefore imperative for the Authorities to consider the same and come to a reasoned conclusion in terms of section 179(1) of the Act. The same is awfully lacking in the impugned Orders.

19. In the circumstances, we are of the view that petitioner is squarely covered by the exception carved out by the later part of Section 179(1) of the Act and as such he cannot be held liable. For such conclusion, we also draw support from a judgment of Gujarat High Court in *Ram* ***Prakash Singeshwar Rungta v. ITO***[5]. In para 14 thereof, it is held:-

> *"14..... 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*

[5] [2015] 59 taxmann.com 174.

section 179(1) of the Act, cannot be sustained."
(emphasis supplied)

20. There is one more reason why the impugned orders cannot be sustained. Time and again this Court has held that the action of the state must be conducted within a reasonable period of time. The Division Bench of this Court in ***Parle International Limited Vs. Union of India***[6] , has held that delay in adjudication defeats very purpose of legal process and assessee as a taxable person must know where he stands and if there is no action from the departmental authorities for a long time, such delayed action would be in contravention of procedural fairness and thus violative of principles of natural justice. In the present case Respondent has initiated action after long period of about 8 years and therefore the said action resulting in impugned orders, is vitiated on the touchstone of procedural fairness too.

21. Also, perusal of the Judgment of the co-ordinate bench of this Court in Petitioner's wife case (W.P.No. 3159/19) shows that not only the dates of the impugned orders therein are same as the present impugned orders but the demand of money and basis for such demand is identical. This Court by Judgment dated 20/02/2023 passed in aforesaid writ petition filed by Petitioner's wife, has quashed and set aside those identical impugned Orders also, as being unsustainable.

22. In the result the petition succeeds. Impugned Order dated 18th March 2019 passed in Petitioner's revision, by Chief Commissioner of

[6] Writ Petition No – 12904 of 2019, Order dated- 26.11.2020.

Income Tax(OSD) holding charge of Pr. Commissioner of Income Tax-10, Mumbai is quashed and set aside. Consequently impugned order dated dt. 22nd December 2017 passed by Income Tax Officer-10(1)(3), Mumbai holding Petitioner liable for outstanding dues of M/s. Kaizen Automation Pvt. Ltd is also quashed and set aside. Rule is made absolute in above terms. No order as to cost

23. In view of disposal of main petition, all pending interim applications are disposed.

[M.M.SATHAYE,J.] **[K.R.SHRIRAM, J.]**