

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

WRIT PETITION NO. 3590 OF 2019

Rajendra R. Singh,
residing at A-301, Sunny Side,
Lokhandwala Complex, Andheri (W),
Mumbai 400 053
PAN : AAZPS0622B

....Petitioner

V/s

1. Assistant Commissioner Of Income
Tax -9(2)(2), Mumbai,
Room No. 665, 6th floor,
Aayakar Bhavan, M.K. Road,
Mumbai-400 020.

2. Principal Commissioner of Income Tax-9,
Room No.214, 2nd Floor,
Aayakar Bhavan, M.K. Road,
Mumbai-400 020.

4. Union of India,
Through the Secretary,
Ministry of Finance,
Government of India,
North Block, New Delhi – 110 001.

....Respondents

Mr. Madhur Agrawal with Mr. Harsh M. Kapadia for petitioner.
Mr.Suresh Kumar for respondents.
Mr Akhileshwar Sharma for the respondents-revenue

CORAM : DHIRAJ SINGH THAKUR AND
ABHAY AHUJA, JJ.

Judgment reserved on : 4th July 2022
Judgment pronounced on : 26th July 2022

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PER DHIRAJ SINGH THAKUR, J. :

1. In this petition, the petitioner who is the Chairman and Managing Director of one “Crest Paper Mills Limited (“CPML”), seeks the issuance of a writ of certiorari for quashing *inter-alia* the order dated 13th February 2018 passed under section 179 of the Income Tax Act, 1961 (“The Act”) holding the petitioner liable to pay a demand of Rs.3,98,19,430/- alongwith interest under section 220(2) of the Act which was otherwise due and payable by the company, CPML. The demand outstanding against CPML was for the assessment year 2010-11.

2. Briefly stated the material facts in the light of which the present controversy has arisen are as under :-

(a) A Show Cause Notice dated 24th January 2018 was served upon the petitioner by the Assistant Commissioner of Income Tax, Circle 9(2)(2), Mumbai informing the petitioner that tax dues for an amount of Rs.3,88,19,430/- were outstanding against M/s. Crest Paper Mills Ltd. for the assessment year 2010-11 and that the same had not been paid by the assessee company so far. The petitioner therefore was asked to show cause as to why proceedings under section 179 of the Act be not initiated against him in his

capacity as a Director of the said Company.

Reply to the Show Cause Notice :

3. The petitioner then submitted its response to the show cause notice taking a defence that jurisdiction under section 179 of the Act could be assumed as against a director of a private company and not against a public company.

4. A further stand was taken that proceedings against a Director could not have been initiated directly without first initiating recovery proceeding against the company. It was also stated that before action under section 179 is initiated against a Director, there has to be a proper finding that recovery of tax arrears was not possible from the company and further that in the show cause notice, there was no such averment that the tax due cannot be recovered from the company.

Order impugned :

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.

6. On the issue whether section 179 could be resorted to against the directors of the assessee company being a public company, it was held that no evidence had been furnished by the petitioner to prove that it was a public company.

7. It was further held that the assessee company having been delisted from the stock exchange as a penal measure for failure to comply with the requirements of the Listing Agreement did not warrant that the benefits attached to a public company should be accorded to the assessee company.

8. It was further held that assuming the assessee was a public company, yet by lifting the corporate veil, even the directors of such companies could be brought within the purview of section 179 especially where the affairs of the company were not conducted as a public limited company in its true sense. Reliance in this regard was placed upon *Pravinbhai M. Kheni Vs. Assistant*

Commissioner of Income-tax, Central Circle-2 & 2¹ .

9. With a view to show that the affairs for the assessee company were run more like a private enterprise. The following factors were highlighted :

(a) Employees benefit expense claimed by the assessee was mere 61,841 in contrast to director's remuneration at 2,88,000.

(b) A.O. has categorically concluded that the transactions undertaken by the assessee are nothing but accommodation entries in huge turnover recorded despite having practically no employees.

(c) Major share holder of the assessee company (above 5%) is M/s. Duteons Finvest Pvt. Ltd. whose directorship is held by Rajendra Ramlachhan Singh, who is also a director in the assessee company.

10. Based upon the above reasoning and by holding that the petitioner during the relevant period, was a part of the decision making process which led to the crystallization of the demand for the assessment year 2010-11, the petitioner was held jointly and

¹ [2012]28 taxmann.com 111 (Gujarat)

severally liable for the entire demand of Rs.3,98,19,430/- along with interest under section 220(2) of the Act, outstanding in the name of M/s. Crest Paper Mills Limited. This order was challenged in revision under section 264 of the Act before the Deputy Commissioner of Income-tax which too was dismissed vide order dated 12th February 2019 in a summary fashion and hence the present petition.

Scope and ambit of section 179 :

11. Before we proceed to deal with the issues raised during the course of hearing and the arguments in support thereof, it would be beneficial to briefly refer to the provisions of section 179 of the Act which envisages that if the tax dues 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 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.

12. It, thus, follows that before the jurisdiction is assumed and

exercised under section 179 against the Director the Assessing Officer must feel satisfied that :

- a) tax was due from the Private Limited Company, and that
- b) the tax dues cannot be recovered from such a company

13. However, in *Delhi Development Authority Vs. Skipper Construction Company (P) Ltd. and another* ², it was held that in a case where it is found that the public company was incorporated only as a facade, for purposes of tax evasion and fraud, the corporate veil could be pierced to look at the reality behind the corporate veil.

Some of the aspects which are required to be gone into before applying the principle of 'lifting the corporate veil' for purposes of exercising jurisdiction under section 179 of the Act against the Directors of a public company, a Bench of this Court in *Kishan Lal Vs. Union of India* ³, held :

"11 We do not wish to express any opinion as to whether the corporate veil ought to be lifted in the present case even assuming that it is permissible to do so in matters under the Income Tax Act. Suffice it to state that even assuming that it is permissible to do so, there are several issues which ought to be taken into account before deciding whether or not to lift

² AIR 1996 SC 2005

³ [2016] 76 taxman.com 168 (Punjab & Haryana)

corporate veil. Neither the show cause notice nor the impugned order refers to certain crucial facts including as to the extent of share holding of the directors, the extent of control exercised by them regarding the affairs of the company and the extent of their representation on the board of directors. It would also be necessary to consider the Articles of Association of the company and any other agreements that may exist between the share-holders inter se. There are several other factors also which must be taken into consideration including as to whether the company was converted into a public limited company for the purpose of avoiding statutory liability benefiting the petitioners alone and/or conferring any other benefits upon the petitioners or any one or more of them alone. Lifting the corporate veil in a case such as this has drastic consequences. The impugned order does not consider the same in any detail.”

14. In the present case, it can be seen that the notice under section 179 of the Act issued by respondent No.1 did not at all inform the petitioner of its intention to treat the company, i.e., CPML as a public company by invoking the principle of ‘lifting the corporate veil’ much less did it refer to any material or conclusion based upon which it could assume jurisdiction under section 179 of the Act against the directors of a Private Company.

On the other hand, the respondent No.1 invoked the principle of lifting the corporate veil to hold that CPML was in fact a privately held enterprise under the garb of a public company only after the petitioner had taken an objection to the respondent No.1 assuming jurisdiction against a public company.

15. We do not wish to go into the question as to whether, the facts and circumstances of the case justified invoking the principle of lifting the corporate veil as in our opinion, the procedure adopted by respondent No.1 was clearly violative of the principles of natural justice and without affording to the petitioner, an opportunity of being heard on the question, as to why the principle of 'lifting the corporate veil' be not applied in the case of CMPL to justify the recovery of the tax dues from the directors.

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 for 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.

19. In the light of the discussion herein above, the Writ Petition is allowed. The impugned order dated 13th February 2018 as also the order dated 12th February 2019 passed under section 264 of the Act are quashed. However, in case, the tax dues are not fully satisfied upon sale of the property that has been attached, then the Assistant Commissioner can proceed in the matter afresh in accordance with law, after giving an opportunity of being heard to the petitioner, in the light of the observations made by us in the preceding paragraphs.

[ABHAY AHUJA, J.]

[DHIRAJ SINGH THAKUR, J.]