



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

WRIT PETITION NO.1672 OF 2021

1. Manjula D. Rita)
)
2. Bhavya D. Rita)
Legal heirs of Shri Dinesh Shamji Rita both)
having address at 202, 2nd Floor, Shree Shail)
CHS, Ram Mandir Road, Behind Paton Shop,)
Vile Parle (East), Mumbai – 400 057)Petitioner

V/s.

1. Principal Commissioner of Income Tax 12,)
Mumbai having his office at Room No.127,)
Aayakar Bhavan, M. K. Road, Mumbai –)
400020.)
2. Assistant Commissioner of Income Tax-)
12(1)(2), Mumbai having his office at Room)
No.128-D, Aayakar Bhavan, M. K. Road,)
Mumbai – 400020.)
3. The Tax Recovery Officer – 12, Mumbai)
having his office at Room No.142-F, Aayakar)
Bhavan, M. K. Road, Mumbai - 400020.)
4. Additional Commissioner of Income Tax)
12(1), Mumbai having his office at Room)
No.128-1, Aayakar Bhavan, M. K. Road,)
Mumbai - 400020.)
5. Union of India through the Secretary,)
Department of Revenue, Ministry of Finance,)
Government of India, New Delhi – 110 001.)Respondents

Mr. Ranit Basu a/w. Ms. Maitri Malde and Ms. Nikita Ghungarde i/b.
Ms. Sheela Mistry for petitioners.
Mr. Suresh Kumar for respondents.

**CORAM : K. R. SHRIRAM AND
FIRDOSH P POONIWALLA, JJ.
DATED : 19th JUNE 2023**

ORAL JUDGMENT : (PER K.R. SHRIRAM, J.) :

1 Petitioners are impugning an order dated 9th March 2020

passed by respondent no.1 under Section 264 of the Income Tax Act, 1961 (the Act) rejecting petitioners' application.

2 The order impugned came to be passed while rejecting an application filed by petitioners impugning an order dated 7th May 2018 passed under Section 179(1) of the Act.

3 Petitioners are two out of the four legal heirs of one late Dinesh Shamji Rita (the deceased), who was a Director of Bhavya Infrastructure India Private Limited (the company) during the Assessment Year 2012-2013. The other two legal heirs are married daughters of the deceased and petitioner no.1.

4 The company had filed its return of income for Assessment Year 2012-2013 on 29th September 2012 declaring an income of Rs.62,47,290/-. The return of income was processed under Section 143(1) of the Act and was selected for scrutiny assessment and accordingly, notice under Section 143(2) of the Act was issued. An assessment order under Section 143(3) of the Act came to be passed on 30th March 2015 by which several additions were made, i.e., a sum of Rs.18,37,21,188/- under Section 68 of the Act for unexplained cash credit, interest on loan of Rs.1,21,11,106/- and disallowance under Section 14A of the Act of Rs.2,06,642/-. A demand of Rs.8,66,76,960/- was also made under Section 156 of the Act.

5 The deceased applied for stay before the Assessing Officer and filed an appeal before the Commissioner of Income Tax (Appeals) [CIT(A)].

The Assessing Officer rejected the application for stay by an order dated 16th July 2015. An application was moved by the deceased before the Additional Commissioner of Income Tax for grant of stay of the demand, which application also came to be rejected. The company, though had not accepted the additions/disallowance, voluntarily paid various amounts in October/November 2017. Certain properties were attached but the attachment order was later vacated. Petitioners' revision application under Section 264 of the Act also came to be rejected.

6 Thereafter, petitioners received an order dated 7th May 2018 passed under Section 179 of the Act against which petitioners filed another revision application under Section 264 of the Act. This revision application came to be rejected by the impugned order dated 9th March 2020. In the meanwhile, it is averred in the petition that the deceased took seriously ill and was ailing for almost six months before succumbing to multiple organ failures on 6th May 2018, a day before the order dated 7th May 2018 came to be passed under Section 179 of the Act. The order impugned passed by respondent no.1 under Section 264 of the Act also is a very brief order in the sense that the only ground on which the application under Section 264 of the Act came to be rejected is contained in paragraph 4.2 of the impugned order. Respondent no.1, without considering any of the submissions made by petitioners, has simply rejected the application under Section 264 of the Act noting that notice of the death of the deceased was

not brought to the Assessing Officer by anybody and before the order under Section 179 of the Act was signed by the Assessing Officer and, therefore, as on the date of the passing of the order, there was nothing invalid.

7 In our view, not only this order dated 9th March 2020 but also the order passed on 7th May 2018 under Section 179 of the Act require to be quashed and set aside. Considering the order dated 7th May 2018, there is no ground made out in the order for even commencing proceedings under Section 179 of the Act. The relevant paragraphs are paragraph 4 and paragraph 7, which read as under :

4. For A.Y.2012-13, order was passed u/s 143(3) dt 30.03.2015 resulting demand of Rs.8,66,76,960/- Demand notice u/s. 156 of the I.T. Act had been served on the assessee company and the assessee company was supposed to pay the demand within 30 days of receipt of demand notice from the department. As the assessee company has failed to comply with the demand notice, accordingly recovery proceedings had been started by the department. However the Assessing Officer is unable to recover anything from the company, as there are no known assets in the assessee company.

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7. In view of no reply from Shri. Dinesh Shamji Rita, it is held that he has nothing to say in this matter and the proceedings are decided on the basis of facts of the case and provisions of IT Act, 1961.

8 There is no evidence to indicate even any notice was issued to the deceased. In the affidavit in reply of respondents filed through one Liladhar Krishna Gaonkar affirmed on 21st October 2022 it only says that letters were issued through speed post and the same were not returned undelivered and hence, the Assessing Officer had attempted to find out the whereabouts of assessee from 27th April 2018 to 7th May 2018. There is no

evidence annexed to show that even such a letter was prepared or the letter was sent by speed post or a query was sent to the Post Master to find out the status of the delivery of the said letter. In the circumstances, we will have to proceed on the basis that no letter or notice was sent to the deceased before the order dated 7th May 2018 came to be passed. There is also nothing to indicate what steps were taken to trace the assets of the company. Moreover, the order dated 7th May 2018 passed under Section 179 of the Act does not satisfy any of the ingredients required to be met.

9 We should also note that the company is under Corporate Insolvency Resolution Process (CIRP) under the Insolvency and Bankruptcy Code (IBC) and the order admitting the petition under Section 7 of the IBC was passed, Mr. Basu states, on 17th February 2020. Therefore, before passing an order under Section 179 of the Act, the Assessing Officer should have made out a case as required under Section 179(1) of the Act that the tax dues from the company cannot be recovered. Only after the first requirement is satisfied would the onus shift on any Director to prove 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. We would also add that this Court has in *Prakash B. Kamat V/s. Principal Commissioner of Income Tax-10 and Ors.*¹ has held that the 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

1. Unreported judgment dated 12.06.2023 in Writ Petition No.3129 of 2019

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.

10 In this case, we also find that in view of non issuance of notice, the deceased has not been even given an opportunity to establish that the non recovery cannot be attributable to any of the three factors on his part, i.e., gross neglect or misfeasance or breach of duty. As held in *Maganbhai Hansrajbhai Patel V/s. Assistant CIT*², the 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. Once the Director after being given an opportunity places material on record 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.

11 Without going into the merits on the correctness of the assessment order passed or whether the time was ripe to issue notice under Section 179 of the Act, we hereby quash and set aside the order dated 9th March 2020 passed under Section 264 of the Act, so also the order dated 7th May 2018 passed under Section 179 of the Act.

12 Petition disposed. No order as to costs.

(FIRDOSH P. POONIWALLA, J.)

(K. R. SHRIRAM, J.)

2. [2012] 26 taxmann.com 226