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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 2362 OF 2011

Bhupatlal J. Sheth
Jeevan Smruti
24, Bhatwadi, 2nd Lane,
Mumbai- 400 004

..Petitioner

Vs.

1. Income Tax Officer,
Ward-6(3)(3),
office at: Aayakar Bhavan
Room No. 524, M. K. Road,
Mumbai- 400 020
2. Commissioner of Income Tax-6
Office at: Room No. 507,
Aayakar Bhavan, M. K. Road,
Mumbai
3. Union of India through
Ministry of Finance,
Aayakar Bhavan, 2nd floor,
M.K. Road, Mumbai- 400 020

..Respondents

Mr. Vipul Joshi i/by Mr.Jitendra Singh for the
Petitioner.

Ms. Suchitra Kamble for the Respondent.

CORAM :- **S. J. VAZIFDAR &
M. S. SANKLECHA, JJ.**

DATE :- **JULY 10, 2012.**

JUDGMENT (Per M. S. Sanklecha, J)

1. Rule; By consent Rule returnable forthwith. The Respondents waives service. At the instance and request of the advocates for both sides, the petition is taken up for final hearing.

2. The Petitioner now 77 years old, challenges:

(a) an order dated 6 January, 2010 of the Income Tax Officer, holding that the petitioner is liable under Section 179 of the Income Tax Act, 1961(hereinafter referred to as the "said Act") to pay the tax dues of a private limited company, in which he was a Director ; and

(b) an Order dated 30th March, 2011 passed in Revision under Section 264 of the said Act by the

Commissioner of Income Tax upholding the said order dated 6th January 2010, Both the orders have been challenged on merits as well as on account of a breach of the principles of natural justice.

3. The facts leading to this petition are as under:-

(a) The petitioner was till his verification on 29th April, 1994 a non-executive Director on the Board of Directors of M/s. Metroni Drugs Pvt. Ltd. (hereinafter referred to as "said company"). He contends that he was not involved with the day to day management of the company and was never informed of any tax demands or that the tax dues of the said company were outstanding.

(b) On 27 September, 2006, the Income Tax officer by notice called upon the petitioner to show cause as to why, an amount of Rs.2.19

crores being the tax dues of the said company for the Assessment years 1986-87 to 1993-94 should not be recovered from him under Section 179 of the said Act. The petitioner responded to the above notice pointing out that he was a non-executive Director of the said company and had resigned as far back as April 1994. Further as he was not looking after the day to day management of the said company he could not be liable for any neglect, malfeasance or breach of duty and therefore the notice should be withdrawn.

(c) By an order dated 25th January, 2007, the Income Tax Officer confirmed the show cause notice dated 27th September 2006 and held the petitioner liable to pay the tax arrears of Rs.2.19 crores owed by the said company. Against this order the petitioner filed a Revision Application under Section 264 of the

said Act, with the Commissioner of Income Tax.

On 5th November, 2007, the Commissioner of Income Tax aside the order and remanded the matter for fresh adjudication by the Income Tax Officer with the following directions:

"Under the circumstances, the A. O. was bound to give a specific finding regarding non-recovery of demand and the extent to which it cannot be recovered from the company. In the absence of any such categorical finding by the A. O., order passed u/s. 179 holding the petitioner as liable to pay demand in the case of the company cannot be sustained and therefore the said order u/s. 179 of the Income Tax Act is hereby cancelled. However, the A. O. shall be at liberty to pass a fresh order u/s. 179 against the petitioner after making all efforts to recover the demand pertaining to the company from the company itself and recording a finding indicating the extent of the demand which cannot be recovered from the company before passing such order u/s. 179, if deemed necessary. The petitioner shall be allowed adequate opportunity of being heard, before passing any such fresh order u/s. 179 of the Income Tax Act."

(d) The Income Tax Officer issued a fresh show

cause notice on 20th July, 2009 to the petitioner. The notice did not set out any particulars with regard to the efforts made and the extent of non recovery of the tax dues from the properties of the said company.

(e) By his reply dated 27th July, 2009, the petitioner reiterated what he had stated in response to the earlier show cause while pointing out from the Balance Sheet of the said company for the year ending 31st March, 1995, that it owned immovable properties in the form of plots of land with factory building thereon, residential flats and office premises in the name of M/s. Deven's Pharmaceuticals, a partnership firm in which the said company had a 98% share along with its Director one J.D. Kale and J. C. Gohil who had 1% share each.

(f) On 2nd December 2009, the Income Tax

Officer informed the petitioner that the flats and the two factory plots had been sold by the liquidator in the course of winding up. The letter however makes no mention of the status of the office premises. The petitioner was called to pay the said tax dues along with interest thereon within seven days.

(g) On 21st December 2009 the Petitioner addressed a communication to the Income Tax Officer reiterating his earlier contention and sought inspection of the records of the case available with him and information about the action taken against other Directors of the said company and the amounts, if any, realized from them.

(h) The petitioner was thereafter awaiting an appointment for inspection of records and a date for personal hearing, when he was shocked to receive the impugned order dated 6th January

2010 passed under Section 179 of the said Act by the Income Tax Officer. By the above order the Petitioner as a Director of the said company, was held liable under Section 179 of the said Act, to pay the tax dues of Rs.2.19 crores along with interest thereon payable by the said company during the financial years 1st April, 1985 to 31st March, 1993 and assessment years 1985-86 to 1993-94. The aforesaid order was passed without giving the petitioner any inspection of the records nor an opportunity of a personal hearing.

(i) Being aggrieved by the order dated 6th January, 2010, the petitioner preferred a Revision Application under Section 264 of the said Act, with the Commissioner of Income Tax. In its Revision Application, the petitioner has specifically mentioned that the order dated 6th January, 2010 had been passed without giving

inspection of record as prayed for or even a personal hearing. The petitioner also made a grievance that though there was a property available at Mahim, Mumbai in the name of a partnership firm, in which the said company had a 98% share and its value was substantial yet the same was not being proceeded against before making the petitioner liable under Section 179 of the said Act. He also contended that the order was contrary to the directions contained in the order of remand dated 5th November 2007 passed by the Commissioner of Income Tax.

(j) By the impugned order dated 30th March, 2011, the Commissioner of Income Tax dismissed the petitioner's Revision Application. The order in its entirety is as under:

“Order u/s.164 of the Income Tax Act,1961.

In the present case, original order under section 179 was passed on 25/01/2007. Against the said order,

the assessee had preferred revision U/s.264. In the order u/s.264 dated 05/11/2007 the A. O. was directed to provide to the assessee adequate opportunity of being heard, before passing fresh order u/s. 179.

2 The order u/s. 179 dated 6/1/2010 and the submissions made by the assessee are perused. The assessee has grossly failed to substantiate before the Assessing Officer that he was not liable, as a Director for the outstanding income-tax dues of the company i.e. M/s. Metroni Drugs Pvt. Ltd.

3 In view of the facts mentioned hereinabove, I decline to interfere in the order passed u/s.179."

(k) It is against the aforesaid orders dated 6th January, 2010 and 30 March, 2011 passed by the Income Tax Officer and Commissioner of Income Tax respectively that the petitioner has filed the present petition. The Respondents have filed an Affidavit in reply dated 16th December 2011 opposing the Petition and praying that it be dismissed.

4. Mr. Vipul Joshi in support of the petition submits that a) the orders dated 6th January, 2010 and 30th March, 2011 have been passed in breach of principles of natural justice. The order dated 6th January, 2010 was passed without giving the petitioner a personal hearing, while the order dated 30th March, 2011 is without reasons; b) the order dated 6th January, 2010 was passed in total disregard of the order dated 5th November, 2007 of Commissioner of Income Tax which had directed him to give a personal hearing to the petitioner before passing of any order under Section 179 of the said Act; and c) inspection asked for by the petitioner was not given and yet the order dated 6th January 2010 relies upon evidence in the form of the report dated 9th November 2009 pointing out why recovery is allegedly not possible from the said company. He

submits therefore that the orders be set aside and the matter be remanded for *de novo* adjudication by the Income Tax Officer after following the principles of natural justice. On merits, he submitted that Section 179 of the said Act, would not apply in the case of a non-executive Director on the Board of the company and particularly in view of the fact that failure to pay tax or the outstanding tax demands was never brought before the Board of Directors with the result that in such a case a non-executive Director not being aware of the non payment of taxes cannot be held liable for any neglect or breach of any duty in relation to the affairs of the said company.

5. As against the above submissions, Ms. Suchitra Kamble, the learned counsel appearing for the respondents submits that a) the order dated 6th January, 2010 passed by the Income Tax Officer

after considering in detail the representations made by the petitioner cannot be considered to be an order without hearing particularly when non-grating of personal hearing has not caused any prejudice to the petitioner; b) the order dated 30th March, 2011 of the Commissioner of Income Tax, was an order which merely affirmed the order dated 6th January, 2010 of the Income Tax Officer and therefore did not have to contain detailed reasons dealing with each and every submission of the petitioner. Ms. Kamble submits that there has been no breach of the principles of natural justice. On merits, the learned counsel submits that Section 179 of the said Act makes no distinction between a non-executive Director and a working Director insofar as the obligation to pay the tax dues not paid by a private limited company are concerned. Therefore the petitioner is liable to pay the tax dues of the said company under Section 179 of the

said Act. She further submitted that the petitioner has failed to prove that non-recovery of tax cannot be attributed to his neglect in relation to the affairs of the company and therefore the present petition be dismissed.

6. In a writ proceedings, the Court is concerned more with the decision making process rather than the merits of the decision per se, unless the same is arbitrary or the decision itself reveals that the decision making process was bad in law. This is essentially so because in judicial review, the Court does not sit in appeal over the decisions of the quasi judicial authority, but essentially ensures that the decision making process is in accordance with law. Therefore before considering the merits of the matter viz. whether Section 179 of the said Act, is at all applicable in respect of the non-executive Director on the

board of a Private Limited Company it would be appropriate to consider whether there has been any failure in the decision making process which would render the impugned orders dated 6th January 2010 and 30th March 2011 bad in law.

7. One of the fundamental principles of Natural Justice is the Rule of Audi alteram Partem which means hear the other side or that no man shall be condemned unheard. *The Apex court* in the matter of Assistant Commissioner, Commercial Tax Department, Works Contract and Leasing v. Shukla and Brothers, (2010) 4 SCC 785, at page 790 has described the ingredients of the Rule of Audi alteram partem as under :

“The doctrine of audi alteram partem has three basic essentials. Firstly, a person against whom an order is required to be passed or whose rights are likely to be affected adversely must be granted an opportunity of being heard. Secondly, the authority concerned should provide a fair and transparent procedure and lastly, the au-

thority concerned must apply its mind and dispose of the matter by a reasoned or speaking order. This has been uniformly applied by courts in India and abroad."

Therefore a fair hearing postulates making known to the other side the evidence being relied upon in support of the notice. In fact the Supreme Court in the matter of Natwar Singh v. Director of Enforcement, (2010) 13 SCC 255, at page 269 :

"The right to fair hearing is a guaranteed right. Every person before an authority exercising the adjudicatory powers has a right to know the evidence to be used against him. This principle is firmly established and recognised by this Court in *Dhakeswari Cotton Mills Ltd. v. CIT*. However, disclosure not necessarily involves supply of the material. A person may be allowed to inspect the file and take notes. Whatever mode is used, the fundamental principle remains that nothing should be used against the person which has not been brought to his notice. If relevant material is not disclosed to a party, there is prima facie unfairness irrespective of whether the material in question arose before, during or after the hearing. The law is fairly well settled if prejudicial allegations are to be made against a person, he must be given particulars of that before hearing so that he can prepare his defence. However, there are various exceptions to this general rule where disclosure of evidential material might inflict serious harm on the person directly concerned or other persons

or where disclosure would be breach of confidence or might be injurious to the public interest because it would involve the revelation of official secrets, inhibit frankness of comment and the detection of crime, might make it impossible to obtain certain clauses of essential information at all in the future."

Besides the order passed consequent to the hearing should be an order with reasons i.e. speaking order. In fact in the matter of Shukla Brothers(supra) the Apex Court has observed as under:

"At the cost of repetition, we may notice, that this Court has consistently taken the view that recording of reasons is an essential feature of dispensation of justice. A litigant who approaches the court with any grievance in accordance with law is entitled to know the reasons for grant or rejection of his prayer. Reasons are the soul of orders. Non-recording of reasons could lead to dual infirmities; firstly, it may cause prejudice to the affected party and secondly,

more particularly, hamper the proper administration of justice.”

The principles which can be culled out from the above decisions are as under:

(a) Notice be given to the other side and also the evidence being relied upon in support of the notice be made known to the other side ;

(b) Personal hearing be given to the affected party; and

(c) An order be passed with reasons i.e. speaking Order.

8. Keeping in mind the above tests, we shall now examine the breach of natural justice complained of by the Petitioner in respect of Orders dated 6 January 2010 and 30 March 2011 passed by the Income Tax Officer and the Commissioner of Income Tax respectively. In the first round of the proceedings under Section 179 of the said Act, the

Commissioner of Income Tax by order dated 5th November, 2007 set aside the order dated 25th January, 2007 of the Income Tax Officer. However whilst setting aside the order, the Commissioner of Income Tax directed the Income Tax officer that before any order under Section 179 of the said Act is passed against the petitioner, the Assessing Officer must give a specific finding to the effect that efforts made to recover the tax dues from the said company had failed and that the petitioner should be heard before any order is passed under Section 179 of the Income Tax Act. It is pertinent to note that before passing the order dated 6th January, 2010 the petitioner was never informed of the efforts made by the department to recover the amounts from the said company. In the order dated 6th January, 2010 reliance is placed upon a report dated 9th November 2009 of the Tax Recovery Officer submitting a detailed report of the efforts made to recover the

tax dues from the said company and the results of that effort. However, no copy of the said communication of the Tax Recovery Officer was ever made known to the petitioner and in spite of the petitioner seeking inspection of all the documents on record, no such inspection was ever given to the petitioner. This furnishing of material to the Petitioner is important, in the present facts as it would enable the petitioner to point out whether some other properties of the said company are still available and also ensure that the department has exhausted all avenues of recovery from the said company before proceeding against the petitioner under Section 179 of the said Act. It is not the case of the Respondents that non disclosure of the Report dated 9th November 2011 of the Tax Recovery Officer or the other records to the petitioner were governed by the known exceptions to law. In this case the Petitioner had sought inspection of

the record from the Income Tax officer and if the same was made available the Petitioner could have pointed out the flaws in it and/or the fact that some other property of the said company is available and no efforts have been made to recover the same.

9) Further the giving of a personal hearing in the facts of the present case would not be an empty formality. Therefore the contention of the Respondent that no prejudice was caused to the petitioner due to non giving of a personal hearing cannot be countenanced.

10) In the circumstances, the order dated 6th January, 2010 is an order which has been passed not only on the basis of the material viz. Tax Recovery Officer's letter/report dated 9th November, 2009 that was not disclosed to the petitioner,

but also passed without a personal hearing, as directed by the order dated 5th November, 2007 of the Commissioner of Income Tax. Therefore the order dated 6th January 2010 is liable to be quashed and set aside and the matter ought to be remanded to the Tax Officer for de novo adjudication.

11) The order passed by the Commissioner of Income tax on 30th March, 2011, under Section 264 of the said Act, is an order without reasons. The order has been reproduced in its entirety above and it speaks for itself. However the advocate for the respondents may be correct in her submission that an order in revision while affirming the order of a lower authority need not be an elaborate order discussing all the issues which had already been discussed by the order passed by the original authority. Even so some reason, howsoever brief, should

be indicated even in the order affirming the order under challenge as it would ensure due application of mind. However, as observed by the Supreme Court in the matter of Divisional Forest Officer, Kothagudem v. Madhusudhan Rao, (2008) 3 SCC 469, at page 473 :

“It is no doubt also true that an appellate or revisional authority is not required to give detailed reasons for agreeing and confirming an order passed by the lower forum but, in our view, in the interests of justice, the delinquent officer is entitled to know at least the mind of the appellate or revisional authority in dismissing his appeal and/or revision. It is true that no detailed reasons are required to be given, but some brief reasons should be indicated even in an order affirming the views of the lower forum.”

Similarly in the matter of Chairman, Disciplinary Authority, Rani Lakshmi Bai Kshetriya Gramin Bank v. Jagdish Sharan Varshney, (2009) 4 SCC 240, at page 242

“In our opinion, an order of affirmation need not contain as elaborate reasons as an order of reversal, but that does not

mean that the order of affirmation need not contain any reasons whatsoever. In fact, the said decision in *Prabhu Dayal Grover case* has itself stated that the appellate order should disclose application of mind. Whether there was an application of mind or not can only be disclosed by some reasons, at least in brief, mentioned in the order of the appellate authority. Hence, we cannot accept the proposition that an order of affirmation need not contain any reasons at all. That order must contain some reasons, at least in brief, so that one can know whether the appellate authority has applied its mind while affirming the order of the disciplinary authority."

Therefore an appellate or revisional authority has to very briefly indicate the reasons which have led to him affirming the order being challenged before him. Mere conclusion in the order that the petitioner has not substantiated his case, and therefore, the order of the Income Tax Officer calls for no interference shows a complete lack of application of mind to the revision application filed by the petitioner.

12) In view of the above, we set aside the order dated 6th January, 2010 passed by the Income Tax Officer as well as the order dated 30th March,

2011 passed by the Commissioner of Income Tax under Section 264 of the said Act. However, we remand the matter to the Assessing Officer for a fresh consideration of the show cause notice dated 20th July, 2009 after giving the petitioner a copy of the Tax Recovery Officer's report dated 9th November, 2009 and any other relevant evidence. Further, the Income Tax Officer shall also furnish an opportunity to the petitioner to inspect the records available with the respondents with regard to the said company, so as to enable the petitioner to make the submissions in response to the show cause notice dated 20th July, 2009. Needless to mention, the Income Tax Officer shall pass an order on the show cause notice dated 20th July, 2009 after following the principles of natural justice including granting the petitioner a personal hearing.

13) In view of the above, the petition is made absolute in terms of prayer clause (a). However, the respondents are at liberty to fresh adjudicate de novo upon the show cause notice dated 20th July, 2009 after following the principles of natural justice.

14) The petition is disposed of in the above terms. No order as to costs.

(M. S. SANKLECHA, J.) (S. J. VAZIFDAR, J.)