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**(2004) 09 AHC CK 0191**

**In the Allahabad High Court**

**Case No :** Civil Miscellaneous Writ Petition (Tax) No's. 1502 of 2002 and 911 of 2003

Arvind Kumar Gupta

APPELLANT

Vs

Tax Recovery Officer

RESPONDENT

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**Date of Decision :** 14-09-2004

**Acts Referred:**

Companies Act, 1956 — Section 43A  
Constitution of India, 1950 — Article 265  
Income Tax Act, 1961 — Section 179, 179(1), 220(2)

**Citation :** (2005) 199 CTR 36 : (2005) 276 ITR 373

**Hon'ble Judges :** R.K. Agrawal, J;K.N. Ojha, J

**Bench :** Division Bench

**Advocate :** R.P. Agarwal and S.P. Gupta, for the Appellant; Bharat Ji Agrawal and Shambhu Chopra, for the Respondent

**Final Decision :** Allowed

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## **Judgement**

R.K. Agrawal, J.—Both these writ petitions have been filed by the same petitioner challenging the proceedings and the order passed u/s 179 of the Income Tax Act, 1961, hereinafter referred to as the Act. While in writ petition No. 1502 of 2002, the petitioner has sought a writ order or direction in the nature of certiorari quashing the notice dated 26-3-2002 issued by the Tax Recovery Officer, Noida, respondent No. 1, filed as Annexure No. 1 to the writ petition in respect of the alleged outstanding income tax dues against M/s. Shashank Polyplast Limited formerly Shashank Polyplast Private Limited, respondent No. 3 and other consequential reliefs, in writ petition No. 911 of 2003 the petitioner seeks a writ, order or direction in the nature of certiorari quashing the order dated 29th May, 2003 passed by the Assistant Commissioner, Income Tax, Circle Noida, respondent No. 1, filed as Annexure No. 1 to the writ petition and other consequential reliefs.

2. Briefly stated the facts giving rise to the present writ petitions are as follows:

According to the petitioner, after doing post graduation in Commerce from Gorakhpur University he got a job on 12th February, 1979 in M/s. Prestige Engineering India Private Limited at its factory at Noida. It is a sister concern of M/s. Shashank Polyplast Limited respondent No. 3. He worked there upto 31st March, 1992. Thereafter he was transferred to another sister concern of respondent No. 3, namely, M/s. Prestige H.M. Polycontainers Limited where he served till 30th June, 1997. He left the company on 30-6-1997. The Managing Director of Prestige H.M. Polycontainers Limited issued a certificate on 30th June, 1997 stating therein that there was no financial liability against the petitioner. Thereafter he started his own business at Noida. According to the petitioner, all the three companies, namely, Prestige Engineering India Private Limited, Prestige H.M. Polycontainers Limited and Shashank Polyplast Limited are being managed by one Sri P.K. Gupta, resident of A-7 Maharani Bagh, New Delhi. He has been Managing Director of M/s. Prestige H.M. Polycontainers Limited. In M/s. Shashank Polyplast Limited, Sri P.K. Gupta has been holding 9994 shares of Rs. 100 each out of total issued and paid up capital of 10000 shares of Rs. 100 each through his proprietorship firm Paribhas Investment & Finance Company. Out of the remaining six shares of Rs. 100 each, four shares are held by Sri Shashank Gupta son of Sri P.K. Gupta, one share is held by Mrs. Gauri Shriya, daughter of Sri P.K Gupta and the remaining one share is held by Sri Brij Narain Agarwal, an employee of the company. Thus, the petitioner was not even a shareholder in M/s. Shashank Polyplast Limited. The affairs of M/s. Shashank Polyplast Limited were being looked after by Sri P.K. Gupta who was director and major shareholder. As an employee of M/s. Prestige H.M. Polycontainers Limited he was asked to sign some forms by Sri P.K. Gupta wherein he was made Director of M/s. Shashank Polyplast Limited w.e.f. 3rd April, 1993. However, he was a director just for the namesake and being an employee of a group company he had no option but to sign the required forms pertaining to his appointment in respondent No. 3. According to the petitioner, he was neither an employee of the said company nor had received any remuneration whatsoever from the respondent No. 3 in the capacity of a director or otherwise. It is further alleged by the petitioner that M/s. Shashank Polyplast Limited was incorporated on 20th November, 1984 as a private limited company. It became a public limited company u/s 43A of the Companies Act, 1956 w.e.f. 9th February, 1992. The petitioner had resigned from the directorship of respondent No. 3 vide letter dated 20th September, 1997.

3. It appears that there were Income Tax dues of Rs. 70, 14,000 outstanding against respondent No. 3. The Tax Recovery Officer, respondent No. 1, issued a notice dated 26th March, 2002 calling upon the petitioner to appear before him on 3rd April, 2002 and to show cause as to why the warrant of arrest be not issued against the petitioner for non payment of outstanding dues. The petitioner appeared before the respondent No. 1 on the date fixed and explained in great detail that for the first time on 3rd April, 1993 when he became a director from 9th February, 1992 the respondent No. 3 had already become a public limited

company u/s 43A of the Companies Act, 1956. He further stated that he was a director for namesake only and had signed the relevant forms regarding his appointment as director on the dictates of the owners. The recovery proceedings should have been initiated against Sri P.K. Gupta who was a de facto director of the company during all the relevant previous years. According to the petitioner, he was not aware about the steps taken by the Department for recovery of the alleged dues from the company and how the Department had failed to recover the said dues. Moreover, he had never signed or filed Income Tax return for respondent No. 3 nor had ever attended any assessment proceedings. The Tax Recovery Officer appeared to be not satisfied with the explanation given by the petitioner. He did not furnish requisite documents/information sought by the petitioner and issued an order of attachment on 5th April, 2002 under rule 48 of the II Schedule of the Income Tax Act attaching the residential House No. A-71, Sector 30, Noida, which is owned by the petitioner's wife. The notice dated 26th March, 2002 and the consequent recovery proceedings are under challenge in writ petition No. 1502 of 2002.

While the aforesaid writ petition was pending before this Court, and the interim order was operating wherein the operation of the notice dated 26th March, 2002 and the recovery proceeding pursuant thereto had been stayed, the Assistant Commissioner of Income Tax, Circle Noida, sent a show-cause notice on 27th June, 2002 purporting to be u/s 179 of the Act requiring the petitioner to show cause as to why a sum of Rs. 60,04,614 said to be due from M/s. Prestige Cops. Limited along with interest u/s 220(2) be not recovered from him. On receipt of the notice the petitioner submitted his reply vide letter dated 24th July, 2002 pointing out that he was never a director of M/s. Prestige Cops. Limited and the recovery of dues of Shashank Polyplast Limited has been stayed by this Court. Thereafter, the respondent No. 1 issued another show-cause notice dated 21st January, 2003 again purporting to be u/s 179 of the Act calling upon the petitioner to show cause as to why a sum of Rs. 70,13,514 due from M/s. Shashank Polyplast Private Limited be not recovered from him along with interest u/s 220(2) of the Act. The show-cause notice was replied by the petitioner vide letter dated 28th March, 2003 giving the same explanation as was given by him to the show-cause notice dated 26-3-2002 issued by the Tax Recovery Officer. The Assistant Commissioner of Income Tax, Circle Noida, respondent No. 1, however, did not accept the explanation given by the petitioner and passed an order on 29th May, 2002 holding the petitioner liable to pay dues of M/s. Shashank Polyplast Pvt. Ltd. as mentioned in the notice, which is under challenge in Civil Misc. Writ Petition No. 911 of 2003.

4. We have heard Sri S.P. Gupta, learned Senior Counsel, assisted by Sri R.P. Agarwal, Advocate on behalf of the petitioner and Sri Shambhu Chopra, learned counsel appearing for the respondents.

5. Sri S.P. Gupta, learned Senior Counsel submitted that even if the petitioner is treated to be a Director of M/s. Shashank Polyplast Limited (formerly Shashank

Polyplast Pvt. Ltd.), respondent No. 3, the recovery of Income Tax and other dues outstanding against the respondent No. 3 cannot be made from the petitioner as admittedly he became director on 3rd April, 1993 when the said respondent No. 3 had already become a public limited company by virtue of the provisions of Section 43A of the Companies Act, 1956 w.e.f. 9th February, 1992. He, thus, submitted that the notice to show cause dated 26-3-2002 as to why warrant of arrest should not be issued, the attachment order dated 5th April, 2002 attaching the House No. A-71, Sector 30, Noida, District Gautam Budh Nagar owned by the petitioner's wife as also the order passed by the Assistant Commissioner of Income Tax Circular NOIDA dated 29-5-2003 holding the petitioner liable for the dues of respondent No. 3 u/s 179 of the Act cannot be sustained and are liable to be quashed. He submitted that from a perusal of the order dated 29-5-2003 passed u/s 179 of the Act it has nowhere been recorded nor any finding has been given that the tax due from a private limited company cannot be recovered and, therefore, in its absence the recovery of tax dues u/s 179 of the Act from the petitioner is not permissible under law. He referred to the following decisions:--

1. Jagdish Jagmohandas Kapadia Vs. Commissioner of Income Tax and others, .
2. M. Rajamoni Amma (Smt) and Another Vs. Deputy Commissioner of Income Tax (Assessment) Trivandrum and Others, .
3. K.V. Reddy and Another Vs. Assistant Commissioner of Income Tax, Hyd. and Another, .
4. Bhagwandas J. Patel Vs. Deputy Commissioner of Income Tax, .

6. Sri Shambhu Chopra, learned counsel for the respondents, however, submitted that whether the petitioner was director for namesake or otherwise under the provisions of the Companies Act, 1956 or under the provisions of the Act, he would be treated as a Director of respondent No. 3 and would be liable for all the consequences which follow under the Act. According to him, as the dues outstanding against respondent No. 3 could not be recovered from the company, the authorities have rightly taken the steps to recover the dues from the petitioner by resorting to the provisions of Section 179(1) of the Act.

7. Having heard the learned counsel for the parties we find that in paragraph 7 of the Civil Misc. Writ Petition No. 1502 of 2002 the petitioner has stated as follows:--

"That M/s. Shashank Polyplast Limited was incorporated on 20-11-1984 as a private limited company. However, the said company became a public company u/s 43A of the Companies Act, 1956 with effect from 9-2-1992. Thus on the date the petitioner became a director for the company, it was a public company and not a private company. The company has continued to remain a public company since then.

The petitioner is annexing hereto a copy of the duly audited Accounts of the

above company for the Financial Year ended 31-3-1996 marked as Annexure-3, which shows that the said company has been a deemed public company."

8. In paragraph 9 of the writ petition the petitioner has stated that he had resigned from the directorship of the respondent No. 3 vide letter dated 30th September, 1997. The averments made in paragraph 9 of the writ petition No. 1502 of 2002 are reproduced below:--

"That immediately after leaving the employment of M/s. Prestige H. Polycontainers Limited, the petitioner resigned from directorship of Respondent No. 3 by his letter dated 30-9-1997, a copy of which was sent by registered post to the Registrar of Companies, Kanpur.

A copy of the above resignation letter is annexed hereto marked as Annexure-4."

9. In the counter affidavit filed by Yogendra Nath Pandey on behalf of the respondents the reply to paragraphs 7 and 9 is contained in paragraphs 8 and 10 of the counter affidavit, which are reproduced below:--

"8. That the content of para 7 of the writ petition are matters of record, and require no specific response at this stage.

10. That the contents of para 9 of the writ petition are denied. The petitioner cannot absolve or exclude himself for the liability of the company upto period ending 31-3-1997 (April 1997 to March 1998) by disassociating himself from the Company after 30-9-1997 which fact is also not supported by any evidence or documentary proof at all."

Thus, the fact that the respondent No. 3 became a public company on 9th February, 1992 is not being disputed by the respondents. The present outstanding dues of respondent No. 3 which is sought to be recovered from the petitioner u/s 179 of the Act relates to the assessment years 1983-84 to 1990-91 and 1992-93. It is for the period prior to induction of the petitioner as director in respondent No. 3 - company, i.e., prior to 3rd April, 1993.

10. Section 179 of the Act under which the petitioner has been saddled with the liability of the outstanding dues of respondent No. 3 reads as follows:--

" Liability of directors of private company in liquidation.--(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.

(2) Where a private company is converted into a public company and the tax

assessed in respect of any income of any previous year during which such company was a private company cannot be recovered, then, nothing contained in Sub-section (1) shall apply to any person who was a director of such private company in relation to any tax due in respect of any income of such private company assessable for any assessment year commencing before the 1st day of April, 1962."

11. In the case of Union of India and others Vs. Manik Dattatreya Lotlikar, the Bombay High Court has held that Section 179, prior to its amendment, for the first time provided that the directors of a private limited company in liquidation would be liable jointly and severally with the company for payment of arrears of tax and there was no corresponding provision in the Indian Income Tax Act, 1922. This section, foisting liability on the directors of a private limited company, operated only in the cases of a private company in liquidation prior to October 1, 1975, and subsequent to that date, the provisions are extended to all private companies, whether in liquidation or not, and to companies converted into public companies in respect of the period during which they were private companies. Section 179 is a departure from the provisions of the Companies Act, where a director is not personally liable for the company's debts unless the Company Court finds him guilty of misfeasance or of any other wrong. Section 179 imposes a vicarious liability on the directors of private limited companies, even though a private limited company is a separate entity. The liability is co-extensive with the company and the director is liable only in respect of arrears of tax for the assessment year when he was functioning as a director.

12. For invoking the provisions of Section 179(1) of the Act for thrusting upon the director the vicarious liability, it is a sine qua non that the Assessing Officer must record a finding that the tax due from the company cannot be recovered from the company. In the absence of such a finding, the Assessing Officer has no jurisdiction to invoke Section 179(1) of the Act as held by Andhra Pradesh High Court in the case of K. V. Reddy (supra), the Gujarat High Court in the case of Bhagwandas J. Patel (supra) and the Madras High Court in the case of C. Rajendran and Another Vs. Income Tax Officer, .

13. In the case of M. Rajamoni Amma (supra) the Apex Court has held that where the company has become deemed public company by virtue of Section 43A of the Companies Act, 1956 with effect from October 1, 1975 and arrears sought to be recovered relate to assessment years 1977-78 to 1982-83 obviously, the company being a public company, the proceedings against the directors for recovery of the tax due from the company cannot be taken, and certainly not proceeded with u/s 179 of the Income Tax Act, 1961.

14. The Apex Court has further held that they need hardly say Article 265 of the Constitution clearly prohibits any attempt to recover taxes except under the authority of law.

15. In the case of Jagdish Jagmohandas Kapadia (supra) the Bombay High Court

has held that in the absence of an order u/s 179 of the Act passed legally, it was not open to the Income Tax Officer or the Tax Recovery Officer to issue a demand notice to the petitioner and/or to take further proceedings in pursuance thereto and the demand notice was illegal and without jurisdiction.

16. As already mentioned hereinbefore that there was no order u/s 179 of the Act when the notice to show cause as to why the warrant of arrest be not issued to the petitioner was issued. The notice to show cause as to why warrant of arrest be not issued had been issued on 26-3-2002 whereas the order u/s 179 of the Act has been passed on 29-5-2003. Thus, the notice dated 26-3-2002 is itself illegal and without jurisdiction and is hereby quashed. Further, it is an admitted case of the Income Tax Department that the petitioner was made a director only on 3rd April, 1993 and the outstanding tax dues of respondent No. 3 relates to assessment years 1983-84 to 1990-91 and 1992-93 i.e., when the petitioner was not even a director of the respondent No. 3, thus, the recourse to Section 179(1) of the Act could not have been taken at all. Moreover, it is also an admitted position that the respondent No. 3 became a deemed public company under the provisions of Section 43A of the Companies Act, 1956 with effect from 9th February, 1992. Thus, in view of the decision of the Apex Court in the case of M. Rajamoni Amma (*supra*) the outstanding tax dues of respondent No. 3 which relates prior to 9th April, 1992 cannot be recovered u/s 179(1) of the Act from the petitioner.

17. In view of the foregoing discussion, we are of the considered opinion that the order passed u/s 179 of the Act is contrary to the well settled principles discussed above and, therefore, cannot be sustained. It is hereby quashed. However, it will be open to the Income Tax Department to recover the outstanding amount of tax from the company or its directors who were there at the relevant time.

18. In this view of the matter, both the writ petitions succeed and are allowed. However, the parties shall bear their own costs.