

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 02.05.2014
Pronounced on : 23.05.2014

+ W.P.(C) 2774/2014, C.M. NO. 5741/2014

EMAAR MGF LAND LTD.

.....Petitioner

Through: Mr. Parag. P. Tripathi, Sr. Advocate with
Mr. Satyen Sethi, Mr. Kunal Bahri and Mr. Arta
Trana Panda, Advocates.

Versus

TAX RECOVERY OFFICER-2 AND ORS. Respondents

Through: Mr. Balbir Singh, Sr. Standing Counsel.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE VIBHU BAKHRU

MR. JUSTICE S. RAVINDRA BHAT

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1. The petitioner, in these proceedings under Article 226 of the Constitution of India, is aggrieved by an order under Section 226(3)(x) of the Income Tax Act, 1961 ("the Act") of the Tax Recovery Officer, Hyderabad- the first respondent here ("TRO, Hyderabad"), against it, requiring it to pay ₹32,82,79,787/-, alleged to be due from the fourth respondent M/s Emaar Hills Township Pvt.Ltd., Hyderabad ("EHTPL"), the assessee-in-default in this case.

2. EHTPL is a Special Purpose Vehicle (SPV) constituted by agreement between Andhra Pradesh Industrial Infrastructure Corporation Ltd. ("APIIC"), holding 74% and Emaar Properties, PJSC Dubai ("Emaar, Dubai"), holding 26%, for the purpose of

establishing an integrated project comprising golf course, convention centre-cum-exhibition complex, residential and commercial complexes, hotels, etc. This was done pursuant to a collaboration agreement entered into between the two parties on 19 August 2003 in furtherance of an MoU between APIIC and Emaar-Dubai entered into in November 2002. The petitioner in this case, Emaar MGF Land Ltd. (“EMGF”), engaged in the business of construction/land development for industrial projects and residential townships, entered into a development agreement on 03-11-2006 with the fourth respondent, EHTPL, for the development 258.36 acres of land owned by EHTPL. Subsequently, on 25-07-2007, the earlier agreement of November 2006 was cancelled and a new development agreement-cum-GPA was entered into between EHTPL and EMGF, with an addendum dated 23-7-2008. EMGF was to receive consideration of 75% of the gross revenue derived from sale of buildings constructed on EHTPL’s land and 25% was to remain EHTPL’s share. The second respondent is the Tax Recovery Officer, Delhi (“TRO, Delhi”), having jurisdiction to recover the tax demand due from the petitioner; the third respondent is the administrative body in charge of the second respondent.

3. Three years after the execution of the July 2007 agreement, the Government of Andhra Pradesh, on the recommendation of APIIC, by a notification dated 08-10-2010, prohibited the registration of documents in the integrated project being developed by EMGF. APIIC then issued notice, dated 29-10-2010 to EHTPL requiring it to terminate the July 2007 development agreement-cum-GPA claiming that the same was entered into without APIIC’s approval. The same

day, APIIC also issued a notice to Emaar, Dubai to terminate the collaboration agreement. The move to terminate the agreement with Emaar led to a series of litigation in the Andhra Pradesh High Court at the instance of Emaar, Dubai as well as the Association of Allottees of Properties in the integrated project, and appeal proceedings in respect of some of the matters are pending. Resultantly, registration of the properties in the integrated project has come to a stand-still. APIIC also filed a civil suit against EHTPL and EMGF seeking rendition of accounts and a permanent injunction on the transfer of properties to third parties, in which *status quo* was ordered on 15-12-2010. In respect of revision proceedings moved at the instance of the petitioner to reject the plaint in the original suit, a further stay was granted on 16-12-2010 by the Andhra Pradesh High Court. Finally, public interest litigation was taken up by the said High Court, in which the CBI was directed to conduct inquiry into allegations of irregularity in the development agreement of July 2007.

4. On 13-06-2013 and 01-07-2013, the TRO, Hyderabad issued notice under Section 226(3) of the Act requiring the Petitioner, EMGF to pay the amount owed to EHTPL, in respect of the tax arrears on part of EHTPL. EMGF responded in a letter dated 28-08-2013, stating that the on-going various litigation led to the integrated project coming to a standstill, that existing customers who had booked properties had stopped making payments, and that since no collections could possibly be made under the agreement, no moneys were owed from EMGF to EHTPL. The TRO, Hyderabad rejected this objection of EMGF and named it a deemed assessee-in-default by its order of 28-08-2013, thus

leading to the TRO, Delhi, issuing two more notices on 05-09-2013 as well as 06-01-2014, restraining EMGF from making any payment to EHTPL, as tax arrears of ₹1,15,68,00,000/- were due and payable from EHTPL.

5. EMGF, in its response to TRO, Delhi (Annexure P-11) stated that EHTPL could not be considered as having any right to recovery of sale proceeds against it since it had incurred more expenses than the amount it had collected. The same was conveyed to EHTPL as well by a letter dated 15-01-2014, and liability was sought to be refuted on the ground of pendency of litigation on the validity of the development agreement.

6. The TRO, Hyderabad, nevertheless, by notice dated 23-01-2014 required EMGF to pay an amount of ₹ 30 crore. The authorised representative of EMGF went to TRO, Hyderabad and objected to this demand by refilling the letter dated 15-01-2014; the same was rejected by the TRO, Hyderabad and EMGF was directed to make payment of ₹ 30 crore by 07-02-2014 failing which it would be liable to coercive measures. EMGF then filed an affidavit on 11-02-2014 under Section 226(3)(vi) disputing the existence of a liability towards EHTPL before the TRO in Hyderabad and Delhi (first and second respondents).

7. EMGF, then moved this Court in an earlier proceeding under Article 226 of the Constitution (W.P(C) No. 1074/2014) seeking that the notices issued by TRO, Hyderabad under Section 226(3) dated 13-06-2013 and 01-7-2013 be quashed. By order dated 20-02-2014, the Court directed the TRO to consider the judgment of this Court in *AAA Portfolios Pvt. Ltd. v. DCIT*, (2013) 261 CTR 239 (Delhi), and

examine whether the affidavit of EMGF under Section 226(3)(vi) was false. On 28-02-2014, another affidavit was filed stating that no money was owed to, or held on the account of EHTPL by EMGF.

8. After calling for books of account etc., the TRO, Hyderabad issued the impugned order dated 21.4.2014 directing MGF to pay ₹ 32,82,79,787/- towards the outstanding demand of EHTPL, while rejecting EMGF's objections on the affidavit. The impugned order of the TRO, in relevant part, reads as follows:

"In light of the above, it is clear that the affidavit filed by EMGF is false because

a) the money shown as due from EMGF to EHTPL in its books of account is crystallized and tax suffered amount belonging to EHTPL,

b) There is no contractual sanction for retaining the amounts to adjust against the future losses of EMGF, if any, nor there is any dispute between the two parties as on the date of notice u/s 226(3),

c) The claim of more expenditure vis-a-vis the receipts on projects related to EHTPL is contrary to the facts recorded in Notes to the accounts of EMGF,

d) the conduct of EMGF has been evasive throughout and it is only an afterthought to deny the liability with a view to avoid payment of tax to suit the convenience of the Emaar group,

e) the versions presented to share holders and the Department are contradictory and

f) the litigation relied upon by EMGF is not related to and does not alter the nature of debt to EHTPL.

Therefore, the affidavit filed by EMGF is hereby rejected and EMGF is declared again as defaulter under section 226(3)(x) of the I.T Act, 1961. EMGF is also directed to remit the amount of Rs.32,82,79,787/- due as on 13-6-2013 to EHTPL to the Government Account as part of tax dues outstanding from EHTPL."

9. Learned Senior Counsel, Shri Parag Tripathi, appearing on behalf of the petitioner argues, placing reliance on this Court's decision in *AAA Portfolios* (supra), particularly paragraph 19 of the judgment, that the TRO under Section 226(3) of the Act has the power to proceed against a garnishee only when the debt is admitted. Unlike the power of an executing Court under Order XXI, Rule 46C of the Civil Procedure Code where the judgment debtor's indebtedness, if disputed during execution proceedings, must be tried by the executing court per Rule 46C, under the Income Tax Act, when a third-party-noticee disputes indebtedness to the assessee-in-default, the AO has no jurisdiction to proceed further against this third party. Learned senior counsel also relied on the Supreme Court's ruling in *Surinder Nath Kapoor v. Union of India*: AIR 1988 SC 1777, where it was observed as follows:

"15. The object of serving a notice under clause (3)(vi) of section 226 is to give the garnishee an opportunity to admit or deny his liability for the amount mentioned in the notice. Under clause (i) of section 226(3), if the garnishee objects to the notice by a statement on oath that the sum demanded or any part thereof is not due to the assessee, then the garnishee will not be required to pay any such sum or part thereof, as the case may be."

10. On facts, is argued that since the project has been stalled in the litigation and no collections have been made from it, no money could be said to be owed to EHTPL. This assertion is based on the argument that if the development agreement is upheld in the litigation, then the money received by EMGF would be “revenue”; if not, then EHTPL would owe EMGF money on a “cumulative basis”, to compensate the difference between the amount invested by EMGF and the collections received by it. Thus, EMGF argues that the TRO in this matter has in fact adjudicated on the question of a debt that is disputed.

11. The Petitioner also challenges each of the grounds of the TRO’s order as follows:

(i) Ground (a) is misguided as neither crystallisation of the amount nor the payment of tax should be the criteria to decide if there is a debt due from petitioner to fourth respondent since the source of revenue sharing i.e. the Development Agreement-cum-GPA between EMGF and EHTPL is itself contested in the ongoing litigation. EMGF has, since the financial year 2010-11, in the note in its accounts maintained that the liability is under serious dispute and consequently will need to be computed on a cumulative basis and not annually; presently, nothing was due and payable.

(ii) Ground (b) is untenable because the absence of contractual sanction to withhold payments to adjust against possible future loss is irrelevant, in the face of EMGF’s argument that the ramifications of the dispute are too diverse for the TRO,

Hyderabad to assume that a liability will continue to exist even after the litigation ends.

(iii) Grounds (c) and (e) were mistaken since the amount incurred as expense was greater than the amount collected, in fact, when marketing, sales and other expenses are computed. *Status quo* on the project and prohibition on execution and registration of sale deeds translates to EMGF being unable to sell the properties, thus being unable to make payments to EHTPL. Thus the debt due from EMGF to EHTPL is not enforceable debt. If the agreement is found to be invalid, then all the collections of the petitioners will have to be returned to third parties.

(iv) Ground (d) that EMGF is behaving evasively is untrue as the accounts from the financial year 10-11 maintain the same stance that EMGF finally voices in the letter dated 15th January 2014.

(v) Ground (f) of the TRO's order ignores the fact that the project has been halted in the litigation on the validity of the agreement. That EHTPL has not disputed the development agreement is irrelevant since the validity of the agreement hinges as much on the consent of external agencies like the Government of A.P.

12. The learned Counsel for the Revenue, on the other hand, argues in favour of the TRO's order, stating that money was owed from EMGF to EHTPL on an annual basis under the agreement, and that this debt is even admitted by EMGF in its books of account. The litigation, it is argued, can only possibly affect the future liability of

EMGF to EHTPL, and not the debts presently due and payable to EHTPL.

13. The question that arises for determination by this Court is whether the TRO's, in its attempt to discern whether there is an apparent falsity in EMGF's affidavit objecting to the alleged liability to EHTPL, has actually adjudicated on the question of a disputed debt, thus exceeding his jurisdiction.

14. There can be no question of the TRO adjudicating on the question of a disputed debt if there *is, in existence*, an enforceable debt between the parties. This Court notes EMGF's ledger account details as enclosed with the notice of the TRO to EMGF dated 23-01-2014 (pages 159-165). The entries against the dates 30th April to 31st October, 2012 indicate that EMGF admits a liability to EHTPL, each month, as part of the 25% consideration owed under the development agreement. The existence of this liability is also admitted in the note to the accounts for the year ending 31.3.2013 at Annexure P-5 (p. 129) by referring to "*EHTPL's share of Rs. 482.62 million*". Thus, EMGF's debt to EHTPL is in existence, and the fact that the project has been brought to a standstill can only negate the *future liability* to make payments, since no collections are being made on the project.

15. The provisions of Section 226(3) of the Act state as follows:

"226. - Other modes of recovery.

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(3) (i) *The Assessing Officer or Tax Recovery Officer may, at any time or from time to time, by notice in writing require any person from whom money is due or may become due to the assessee or any person who holds or may subsequently hold money for or on account of the assessee to pay to the Assessing Officer or Tax Recovery Officer either forthwith upon the money becoming due or being held or at or within the time specified in the notice (not being before the money becomes due or is held) so much of the money as is sufficient to pay the amount due by the assessee in respect of arrears or the whole of the money when it is equal to or less than that amount.*

(ii) *A notice under this sub-section may be issued to any person who holds or may subsequently hold any money for or on account of the assessee jointly with any other person and for the purposes of this sub-section, the shares of the joint holders in such account shall be presumed, until the contrary is proved, to be equal.*

(iii) *A copy of the notice shall be forwarded to the assessee at his last address known to the Assessing Officer or Tax Recovery Officer, and in the case of a joint account to all the joint holders at their last addresses known to the Assessing Officer or Tax Recovery Officer.*

(iv) *Save as otherwise provided in this sub-section, every person to whom a notice is issued under this sub-section shall be bound to comply with such notice, and, in particular, where any such notice is issued to a post office, banking company or an insurer, it shall not be necessary for any pass book, deposit receipt, policy or any other document to be produced for the purpose of any entry, endorsement or the like being made before payment is made, notwithstanding any rule, practice or requirement to the contrary.*

(v) xxxxxxxxxxxxxxxxxxxxx

(vi) Where a person to whom a notice under this sub-section is sent objects to it by a statement on oath that the sum demanded or any part thereof is not due to the assessee or that he does not hold any money for or on account of the assessee, then nothing contained in this sub-section shall be deemed to require such person to pay any such sum or part thereof, as the case may be, but if it is discovered that such statement was false in any material particular, such person shall be personally liable to the Assessing Officer or Tax Recovery Officer to the extent of his own liability to the assessee on the date of the notice, or to the extent of the assessee's liability for any sum due under this Act, whichever is less."

16. The decision of this Court in *AAA Portfolios* (supra), does not come to the aid of the petitioners since in that case, the question before the court was *whether* any money was held on behalf of, or on the account of the assessee company, by the bank, by the terms of the escrow agreement in question. *In other words, the existence of the debt itself was in question.* The background of the dispute in that case was a share purchase transaction in relation to the shares of the assessee company. The court found that the bank did not hold any money on the account of the assessee on the ground that the company/assessee was not concerned with the transaction of a share- purchaser:

"A transaction relating to sale and purchase of shares is a transaction inter-se the selling shareholders and purchasers and a company cannot stake claim to any part of the consideration as shares of a company are not the assets of the company but those of its shareholders. The assessee company is neither a party to the Share Purchase Agreement or the Escrow Agreement nor can claim any sum from the parties to the Escrow Agreement. No money is due to the assessee company by respondent

No.2 or is held by or may subsequently be held by Respondent no. 2 on account of the assessee company. The conclusion of the Assessing Officer that the amount of money kept with respondent no. 2 in escrow is available to the assessee for meeting its income-tax demand is thus erroneous."

17. In that context, the Court preliminarily, had found that Section 226(3) does not confer any jurisdiction to adjudicate the indebtedness of a third party to the assessee and was only confined to *first*, cases where the third party "*admits to owing money or holding money on account of the assessee*" and *second*, cases where it is "*indisputable that the third party owes money or holds money on the account of the assessee*". The Court held in para 19:

"19. It is well settled that even in cases of garnishee proceeding under Order 21 Rule 46 of the Code of Civil Procedure (hereinafter referred to as the "CPC"), the Court may pass a garnishee order enabling a judgment creditor to obtain satisfaction of his claim only in those cases which are similar in scope as to judgments on admission under Order 12 Rule 6 of the CPC. A Court cannot issue garnishee order under Order 21 Rule 46 of the CPC against a debtor of the judgment debtor who disputes his indebtedness unless an issue in this regard is struck and tried as provided under Order 21 Rule 46C of the CPC. Unlike the CPC, Section 226(3) of the Act does not have any provision similar to Order 21 Rule 46C of the CPC which confers jurisdiction on the Assessing Officer to adjudicate the question regarding indebtedness of a third party to an assessee who disputes the same. Once the third party noticee has disputed that he owes any money or holds any money on account of the assessee, the Assessing Officer would not have any jurisdiction to proceed further against the third party.

This is also abundantly clear from the language of clause (vi) of Section 226(3) of the Act."

18. The Court noted in that decision, that when liability itself is disputed by the third party, Section 226(3) was no source of power to the AO to adjudicate on that question. The only latitude permitted to the AO, once the affidavit is filed, is to facially satisfy himself or herself that the assertion made is not false. This latitude or flexibility is evident from the words "*but if it is discovered that such statement was false in any material particular, such person shall be personally liable to the Assessing Officer or Tax Recovery Officer to the extent of his own liability to the assessee on the date of the notice, or to the extent of the assessee's liability for any sum due under this Act, whichever is less...*" in Section 226(3)(vi) itself. It thus merely empowers the AO to discover falsity in the objections filed by the garnishee, in cases where it is an admitted or an indisputable debt.

19. What then is the true nature of the power of an AO when confronted with an affidavit disclaiming any liability on the part of the garnishee to the assessee? In line with the holding in *AAA Portfolio* (supra) that power clearly does not extend to adjudicating upon the *nature or existence of the liability* by a proceeding akin to adjudication or judicial determination. However at the same time, the exercise of the AO has to partake of some adjudicatory flavour since he has the power to probe and satisfy himself that the garnishee's assertion is not false. Therefore, if there is *facial invalidity of or falsity in* the assertion of the garnishee as to absence of its liability to the assessee, the AO is entitled to disregard the affidavit. Any inquiry which requires

elaborate reasoning, application of law, or the taking evidence, cannot be an exercise of facial determination of falsity. It may be profitable here to draw inspiration from the ruling in [*Hari Vishnu Kamath v. Syed Ahmad Ishaque*](#), (1955) (1) SCR 1104, where a Constitution Bench of the Supreme Court quoted the observations of Chagla, C.J. in *Batuk K. Vyas v. Surat Municipality* (AIR 1953 Bom 133) that "*no error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it.*" The language of the statute and the structure of the provision is unique in the sense that whilst acceptance of the garnishee's word, on the basis of a sworn statement is generally the rule, there is no preclusion of the AO's authority to scrutinize that statement to see whether it is false and take the proceeding to another direction, if it is false.

20. This Court notices that in the present case, contrary to EMGF's claim that the consideration of 25% would be due on a cumulative basis, the disbursement is to be done annually as indicated in Clause 5 of the Addendum to the Development Agreement (Annexure P-2 of the impugned order, at p. 85):

"The revenues/profit share will be distributed after the completion of Audit and adoption of Audited Accounts by the Board of Directors of the Owner and the Developer cum General Power of Attorney. Thus the distribution of the revenue/profit share for the previous financial year ended 31st March, will be done on or before 30th November of the succeeding calendar year."[emphasis supplied]

21. EMGF's attempt to retain ₹ 32 crores to adjust against prospective losses on the ground that it has spent more than it has collected thus leading to the possibility of it being unable to recover its expenses should the agreement be cancelled, also does not find favour with this Court, for two reasons, *first*, the submission seeks to negate an existing and indisputable debt and *second*, the TRO has found that in fact, EMGF has collected more than it has spent.

22. This Court also notes that there is no challenge to the existence of the debt itself since it is nobody's case that the agreement stands cancelled. The petitioner EMGF merely claims that the agreement is likely to be cancelled or annulled as a consequence of the pending litigation between the parties. This submission does not find favour with this Court as the *potential* or *possible* cancellation of an existing debt, depending on the outcome of on-going litigation is too distant a contingency to make the dues unenforceable. With any agreement, there are several contingencies that can come to fruition in the future, to affect an existing debt. Within the realm of the law of contracts, the ramifications of any such contingency are itself several and diverse, and not open to prediction by a court not called upon to pronounce upon issues that might arise in the future in relation to those particular facts. That an existing debt *may* cease to exist at some point in the future if one of several contingencies plays out, cannot affect the debt *in praesenti*.

23. The TRO, in the impugned order, held that none of the litigation calls into question the validity of the development agreement, and thus, in any event, the debt is not susceptible to being cancelled. This Court differs from the TRO on this limited ground because it would neither be appropriate nor possible for this Court (or the AO) to predict the outcome of any such litigation. Any number of outcomes could ensue from the litigation through several contractual and other possibilities. Thus, this Court reiterates that any potential effect that the litigation may have on the debts *in existence*, is too distant a contingency to account for, given the need to only decide the existence of an admitted or indisputable liability in this case. Incidentally, the TRO's own observations, that the consequence of APIIC revoking consent could very well be considered "*force majeure*", thus resulting in the EMGF debt continuing to be owed to EHTPL, is consistent with this line of reasoning.

24. For the above reasons, the writ petition has to fail; it is therefore dismissed without any order as to costs.

**S. RAVINDRA BHAT
(JUDGE)**

**VIBHU BAKHRU
(JUDGE)**

MAY 23, 2014