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

\+ CONT.CAS(C) 141/2015 & CM APPL. 3662/2016

TEN DESIGN GROUP LIMITED ..... Petitioner

Through: Mr. Ankur Mahindroo, Mr. Aditya Kapur and Ms Yashika Arora, Advocates

versus

RAMESH CHANDRA AND ORS ..... Respondents

Through: None.

% Reserved on: 29th May, 2023

Date of Decision: 18th July, 2023

CORAM:

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

<u>J U D G M E N T</u>

<u>MANMEET PRITAM SINGH ARORA, J:</u>

1. This petition has been filed by the Petitioner aggrieved by the wilful non-compliance by the Respondents of the consent order dated 08.12.2014 passed by this Court in Company Petition No. 57 of 2014, which takes on record the settlement agreement dated 03.12.2014 and the undertaking of the Respondents to abide by the terms of the agreement. Pursuant to the above-said order the Company Petition was disposed of in terms thereof.

1.1 The amended memo of parties dated 27.10.2016 in terms of order dated 27.07.2016 is on record. *Vide* the said order this Court directed the Reserve Bank of India to file its reply affidavit placing on record the procedure by which monies can be remitted to the Petitioner from the Registrar General's account.

Arguments of Petitioner

2. Mr. Ankur Mahindroo, learned counsel for the Petitioner made the following submissions:

3. The Petitioner is a Limited Liability Firm of Architects having its registered office at Hong Kong and holds an Indian Permanent Account Number ('PAN') bearing PAN No. AADCT6154C.

3.1 He states that the Petitioner was appointed as a consultant for architectural and landscape services in various projects undertaken by Unitech Limited ('Unitech') and in terms of such agreements, Petitioner rendered its services and sent invoices to Unitech from time to time.

3.2 He states that an amount of USD 383,749.75/- (US Dollar Three Hundred Eighty-Three Thousand Seven Hundred and Forty-Nine and Seventy-Five cents Only) became due and payable by Unitech to the Petitioner. He states that on account of non-payment of such amounts, the Petitioner was constrained to approach this Court *vide* Company Petition No. 57 of 2014.

3.3 He states that during the pendency of the said company petition, a settlement agreement dated 03.12.2014 was arrived at between parties. The relevant paragraph of the settlement agreement dated 03.12.2014 reads as under:

> *"1. In lieu of Ten Design waiving its claim towards interest on the invoiced amount of USD 383,749.75, Unitech agrees and undertakes to pay US$ 383,749.75 ("Settlement Amount") to Ten Design in following installments:*
> *i. 15% of the Settlement Amount i.e. USD 57,562.46 within 21 days of execution of this Agreement.*
> *ii. payment of balance Settlement Amount i.e. USD 326,187.28 (after the initial payment, as above) will be made in 4 equal quarterly installments of USD 81,546.82; the first instalment being due and payable on 31st January, 2015, the second instalment being due and payable on 30th April*

2015, the third instalment being due and payable on 31st July 2015 and the final instalment being due and payable on 31st October 2015."

3.4 He states that a joint Application, was filed by the parties under Order 23 Rule 3 Code of Civil Procedure, 1908 ('CPC') bearing C.A. No. 2847 of 2014 in the Company Petition No. 57 of 2014, for bringing on record the aforesaid settlement agreement. This was followed by Unitech giving an undertaking to the Court that it shall make payments in terms of the settlement to the Petitioner in five (5) instalments. He states that the undertaking was duly recorded in order dated 08.12.2014 in the said company petition which reads as under:

"I have examined the terms of settlement agreement dated 03.12.2014 and find them to be lawful. The undertaking given by the parties is accepted and the settlement agreement dated 03.12.2014 is taken on record."

3.5 He states that the Respondent made payment in respect of the first (1st) instalment but wilfully failed to make payments thereafter. As such, on account of the wilful breach of the undertaking by the Respondents, the Petitioner was constrained to file the instant contempt petition.

4. He states that *vide* Order dated 04.03.2016 (passed in this petition), this Court directed the Respondents to deposit an amount equivalent to USD 201,395/- (US Dollar Two Hundred and One Thousand Three Hundred and Ninety-Five Only), being the amount due and payable to the Petitioner, with the Registrar General of this Court. As such, the Respondents deposited an amount of Rs. 45,16,035/- (Rupees Forty-Five Lakh Sixteen Thousand and Thirty-Five Only) with the Registrar General of this Court.

4.1 He states that out of the amount deposited with the Registrar General, 74% amount was released in favour of the Petitioner, through its counsel, in terms of Orders dated 13.01.2017 and 03.05.2017.

5. He states that the only issue which remains for consideration is the release of the balance 26% of the total amount lying with the Registrar General of this Court.

5.1 He states that the Respondents have orally asserted before this Court that 26% taxes on this amount deposited in Court is liable to be withheld on account of Tax Deducted at Source ('TDS'). He states that the Respondents alleged that the Petitioner is only entitled to receive 74% of the amount since 26% should be deposited with the authorities.

5.2 He states that the said oral stand taken by the Respondents is misconceived and despite taking two (2) opportunities (ref: Orders dated 11.11.2016 & 13.01.2017) to place on record relevant documents, nothing has been placed on the record of this Court by the Respondents to substantiate the said plea.

5.3 He states that on the other hand, the Petitioner has placed on record true copies of four (4) agreements executed between the parties (under the index dated 06.04.2018) and these agreements establish that the Petitioner is entitled to the invoiced payment net of taxes; and the deposit of taxes was the obligation of the Respondent. He relies upon Clause 9.2 (a) of these agreements and states that the Respondent's oral plea is inconsistent with Clause 9.2(a) of the agreements executed between the parties, which read as under:

> "9.2 Exclusions to Scope of Architectural Work
>
> "…
>
> a. *All India Taxes, including withholding tax. (PAN number to be provided)*
>
> …"

5.4 He relies upon a tabulation in respect of invoices raised and remittance made by the Respondents to contend that the same establishes a pattern that payments were to be made by the Respondent on invoiced amounts, exclusive of taxes. A tabular representation of the invoices / remittance particulars relied upon by the Petitioner is as under:

S. No.	**Invoice Number**	**Remittance Amount ($)**	**Commission by bank ($)**	**Credited Amount ($)**
1.	11147/ 02/ 12	159,999.50/-	7.75/-	159,991.75/-
2.	11154/ 01/ 12	50,990.60/-	8.4/-	50,981.60/-
3.	11147/ 01/ 11	191,999.18/-	5.42/-	192,004.60/-

5.5 He states that the Respondents have been dragging their feet in the present proceedings and have caused inordinate delay in the disposal of the instant petition. He has drawn this Court's attention to the Orders dated 31.08.2017, 09.04.2018, 15.05.2018, 18.10.2018, 12.11.2018, 11.03.2019, 17.11.2020, 25.02.2021 and 22.03.2021.

5.6 He summarised his submissions as under:

(i) Clause 9.2(a) of the agreements (supra) between the parties clearly provides that services rendered by the Petitioner were exclusive of taxes.

(ii) The past conduct of the parties fortifies that payments made to the Petitioner were exclusive of taxes.

(iii) Respondents cannot be allowed to benefit from their wilful abstention in these proceedings.

(iv) The tax liability (as and when determined by the Income Tax Officer) can be recovered from the Respondents, Unitech Limited.

(v) By way of affidavit dated 09.02.2016, the Respondents admitted that TDS was separately deposited by the Respondent with the taxation department and this amount was over and above the payments made to the Petitioner.

(vi) It is settled law that parties by contract can shift the burden of payment of taxes upon the contracting party, who is otherwise not liable to pay such taxes.

(vii) Further, amounts to be paid to the Petitioner are under a judgment debt, wherein there arises no question of withholding tax i.e., TDS.

(viii) The stand of the Respondent cannot be sustained in law or contract nor on their undertaking.

5.7 He concluded by praying that the balance amount lying with the Registrar General of this Hon'ble Court may be released in favour of the Petitioner.

6. None appeared on behalf of the Respondent and there is no pleading filed by the Respondent objecting to the release of the payment of the 26% amount, which continues to remain deposited with the Registrar General. There is no explanation on record by the Respondent for justifying the oral submission and there is also no rebuttal to the stand taken by the Petitioner.

Analysis and Conclusion

7. This Court has considered the submissions of the Petitioner and perused the record.

7.1 After the settlement agreement dated 03.12.2014 was filed along with C.A. No. 2847/2014, the Company Court after examining the terms of the settlement agreement and satisfying itself that the same are lawful, passed the

Order dated 08.12.2014, taking the said settlement on record and accepting the undertaking of the Respondent to abide by the said terms in Company Petition No. 57 of 2014.

7.2 In C.A. No. 2847/2014, the Respondent set out the terms of the settlement agreement and undertook to the Court to make the entire payment of USD 383,749.75 in five (5) tranches on the specific dates mentioned therein. In the said application there was no right reserved by the Respondent to withhold any amount from the said instalments towards TDS.

7.3 In fact, the payment towards the first tranche was duly made on 24.12.2014 and there was no concern raised by the Respondent with respect to withholding tax.

7.4 It is a matter of record that the Respondents defaulted in payment of the second instalment which led to the filing of this contempt petition.

7.5 In these proceedings on 03.09.2015, the Respondents appeared and gave a fresh undertaking to this Court that the pending instalments will be paid within the extended period along with interest. The Court bound the Respondents to the said undertaking and granted extension of time. The order dated 03.09.2015 reads as under:

> *"Mr. Nayar admits that there has been a delay in repaying the four equal quarterly installments. He states that the instalment of 31st January, 2015 has been paid on 16th April, 2015. <u>He, on instructions of respondent No. 3 who is personally present in Court, assures this Court that the last-instalment of 31st October, 2015 shall be paid in time. He, however, states that the installments which were due and payable in April and July shall be paid on or before 31st December, 2015 and 31st January, 2016 along with the interest as stipulated by the learned Single Judge vide order dated 08th December, 2014.</u>*
> *The statements/assurances given by Mr. Nayar are accepted by this Court and the respondents are held bound by the same.*
> *List on 09th February, 2016."*

7.6 The Respondents thereafter even made payment towards the second instalment belatedly on 08.12.2015; however, again no plea with respect to TDS was raised while making the said payment.

7.7 The Respondents subsequently failed to make payment towards the remaining three (3) instalments within the extended time granted by this Court *vide* order dated 03.09.2015. The Respondents in these circumstances filed an affidavit on 09.02.2016 before this Court seeking further extension of time to pay the balance amount of USD 86,322.64 along with unpaid interest in eight (8) equal weekly instalments to the Petitioner commencing from 16.02.2016. In this affidavit as well, once again the Respondents did not seek to reserve any right to withhold facts from the amount payable to the Petitioner. [A copy of this affidavit has been enclosed by the Petitioner with its written submission dated 05.06.2023.]

7.8 In these circumstances on 04.03.2016, this Court after taking note of the default in making of payments directed the Respondents to deposit USD 201,395 with the Registrar General within the time granted in the said order. A further order for deposit of the next instalment by the Respondent with the Registrar General was passed on 08.07.2016.

8. This Court thereafter *vide* orders dated 13.01.2017 and 03.05.2017 directed the Registrar General to release 74% of the amount deposited by the Respondent in favour of Rajinder Narain & Co., New Delhi, who in turn was directed to remit the same to the Petitioner through normal banking channels, after obtaining necessary permission from the Reserve Bank of India or its authorised dealer.

8.1 With respect to the balance 26% amount, this Court granted liberty to the Respondent No. 1 and 3 to file a reply affidavit with respect to the issue of payment to the Petitioner being net of taxes. The Respondents failed to file their reply and a further opportunity was granted on 13.01.2017. However, no reply has been by the Respondents till date, in support of their contention that they are entitled to withhold 26% amount towards taxes (TDS).

8.2 A perusal of the order sheet shows that the Respondents have been duly represented in these proceedings right until 22.03.2021, however, despite seeking opportunities on several dates as pointed out by the Petitioner, the Respondents have not come forward to either file a reply or address arguments on their objection with respect to release of the balance 26% amount deposited with the Registrar General in favour of the Petitioner.

9. A perusal of the settlement agreement, order dated 03.12.2014 passed in Company Petition No. 57 of 2014 and the orders passed by this Court on 03.09.2015 and 04.03.2016 show that the Respondents did not reserve any right to withhold taxes (TDS) on the amounts agreed to be paid to the Petitioner. In fact, payments towards the first tranche and second tranche were made by the Respondents directly to the Petitioner on 17.04.2015 and 08.12.2015 and at that stage no amount towards withholding tax was deducted from the said tranches.

10. This is evident from the affidavit dated 09.12.2016 affirmed by the Respondents and the pleading in CM. APPL. 3662/2016 filed by the Petitioner. In the affidavit of the Respondents, they have admitted that while remitting the payment towards the first tranche and the second tranche the withholding tax was deposited separately by them with the tax authorities and the said amount was exclusive of the amount paid towards the respective tranche.

11. In this view of the matter, it is evident to the Court that the Respondents

categorically agreed that the payment to be made to the Petitioner under the settlement agreement dated 03.12.2014 was without reserving any right to withhold tax; and the entire amount enlisted in the settlement agreement was due and payable to the Petitioner.

12. Subsequently, after a default was committed, during these proceedings an oral plea appears to have been raised objecting to release of the 26% of the amount lying with the Registrar General. However, the Respondents by electing to not file any reply to substantiate the said stand and having absented themselves from the proceedings have failed to justify their stance that the 26% amount deposited with the Registrar General is liable to be withheld.

13. In these contempt proceedings, this Court is concerned only with the compliance of the undertaking of the Respondent recorded in the consent order dated 08.12.2014. The contentions with respect to inter-se shifting of liability of payment of taxes between the parties is not being adjudicated by this Court, especially in the absence of the Respondent.

14. It is accordingly, directed that the Registrar General release the entire amount lying deposited along with interest accrued thereon to Rajinder Narain & Co., New Delhi, who in turn is directed to remit the same to the Petitioner through normal banking channels, after obtaining necessary permission from the Reserve Bank of India or its authorised dealer.

15. The Petitioner as noted hereinabove holds an Indian PAN Card bearing PAN No. AADCT6154C. It is clarified that the burden of bearing the tax liability which arises on account of the payments, which has been made to the Petitioner under the settlement agreement dated 03.12.2014 in pursuance to the order dated 08.12.2014 in Company Petition No. 57 of 2014 and in these proceedings has not been determined by this Court. It is clarified that the said

issue if raised by the Income Tax Department will be decided by the competent authority under the Income Tax Act, 1961.

16. No other relief has been pressed for by the Petitioner.

17. With the aforesaid directions, the present petition stands disposed of.

18. Pending applications, if any, stand disposed of.

MANMEET PRITAM SINGH ARORA, J

JULY 18, 2023/*rk/sk/ms*