

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 16.08.2021

+ **O.M.P. (COMM) 228/2021**

**EMAAR MGF CONSTRUCTION PRIVATE
LIMITED**

..... Petitioner

versus

DELHI DEVELOPMENT AUTHORITY

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Rajshekhar Rao, Senior Advocate
with Mr Susmit Pushkar, Mr Sudip
Mullick, Mr Anchit Oswal and Mr
Gaurav Sharma, Advocate.
For the Respondent : Ms Mrinalini Sen, Standing Counsel
with Mr Tanmay Yadav, Advocate.

**CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU**

JUDGMENT

VIBHU BAKHRU, J.

1. The petitioner (hereinafter 'Emaar') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter the 'A&C Act') impugning an arbitral award dated 28.04.2021 (hereinafter 'the impugned award'). The impugned award was rendered by an Arbitral Tribunal comprising of three members ('the Arbitral Tribunal') in the context of disputes that had arisen between

the parties arising out of the Project Development Agreement dated 14.09.2007 (hereinafter referred to as the '2007 Agreement').

2. In terms of the 2007 Agreement, the respondent (hereinafter 'DDA') agreed to provide land for construction of residential flats to be used for accommodation during the Commonwealth Games in 2010. Emaar had agreed to construct 1168 (One thousand, one hundred and sixty-eight) apartments on the land provided by DDA near Akshardham Temple. In consideration for the same, the parties had agreed that Emaar would retain 2/3rd of the number of apartments (790 apartments) and the remaining 378 constructed apartments would be retained by DDA.

3. Emaar could not raise the necessary finances for completion of the project. It therefore, sought financial assistance for completing the same within the time as stipulated. DDA agreed to provide financial assistance to Emaar and entered into another agreement dated 05.05.2009 (hereinafter 'the 2009 Agreement'). In terms of the 2009 Agreement, DDA agreed to purchase Emaars' rights pertaining to the additional apartments (333 in number) in consideration for a sum of ₹766,89,25,000/- (Rupees Seven hundred sixty-six crores, eighty-nine lacs and twenty-five thousand only).

4. The disputes between the parties are centered around Emaar's claim for reimbursement of a proportionate share of the Value Added Tax (hereinafter 'VAT') in respect of the 711 (seven hundred and eleven) apartments, the rights of which are vested with DDA in terms of the two agreements – the 2007 Agreement and the 2009 Agreement.

Emaar had paid VAT amounting to a sum of ₹24.67 crores on the 1168 apartments constructed by it, under the Delhi Value Added Tax Act, 2004 (hereinafter the 'DVAT Act') and it claimed reimbursement of ₹11,34,81,874/- from DDA as the amount of VAT attributable to 711 apartments vested with DDA. Emaar also claimed interest at the rate of 18% per annum on the aforesaid amount with effect from 21.02.2014, in addition to costs for the arbitration.

The Factual Context

5. Emaar is a wholly owned subsidiary of Emaar MGF Land Limited and was incorporated as a Special Purpose Vehicle for the purpose of constructing and developing the Commonwealth Games Village Residential Complex (hereinafter 'the CWG Village'). The CWG Village was to be developed on 11 hectares of land located off National Highway No. 24, adjacent to Akshardham Temple (hereinafter the 'project site') provided by DDA, on a Public Private Partnership (PPP) Model. The CWG Village, was required to be constructed for accommodating athletes, officials and other delegates, during the Commonwealth Games scheduled to be held in the year 2010.

6. On 14.09.2007, Emaar and DDA entered into a Project Development Agreement (the 2007 Agreement). In terms of the 2007 Agreement, Emaar was obliged to construct 1168 residential apartments on the project site and develop the CWG Village prior to commencement of the 2010 Commonwealth Games. Emaar was required to bear the entire cost of the project and also pay an upfront

amount of ₹321 crores to DDA, being the amount bid by Emaar. In consideration for the same, Emaar acquired rights pertaining to 2/3rd of the residential apartments to be constructed on the project site along with undivided interest in the underlying land. The CWG Village would be used for accommodation during the Commonwealth Games in 2010 and the flats falling to the share of Emaar, could thereafter, be transferred to various allottees. Emaar was entitled to negotiate and enter into Agreements with flat buyers, in respect of apartments falling to its share and also realise funds from them.

7. In terms of the 2007 Agreement, 790 (seven hundred and ninety) apartments fell to the share of Emaar and 378 (three hundred and seventy eight) apartments would be retained by DDA. Apparently, Emaar could not raise the necessary finances and considering the necessity of constructing the CWG Village prior to the Commonwealth Games in 2010, DDA agreed to purchase 333 apartments out of Emaar's shares of 790 apartments at a consideration of ₹7,66,89,25,000/- (Rupees Seven hundred sixty-six crores, eighty-nine lacs and twenty-five thousand only). The parties entered into a separate agreement dated 05.05.2009 for the aforesaid transaction (the 2009 Agreement). Thus, in all, 457 (four hundred and fifty seven) apartments remained with Emaar and rights in respect of 711 apartments vested with DDA.

8. Emaar was registered as an assessee under the DVAT Act. The Department of Trade and Tax, Delhi (hereinafter the 'Tax Department') raised a demand of ₹314.42 crores towards VAT for the Assessment Years 2008-09 and 2009-10 and, passed an order dated 13.02.2012 to

the aforesaid effect. The said order was challenged by Emaar before this Court by filing a Writ Petition – W.P.(C) 2448/2012. Emaar also filed an appeal before the Appellate Authority (Commissioner VAT) impugning the said order on merits. Emaar contended that the VAT was not payable on construction of immovable property.

9. The petitioner claims that the question whether any VAT was payable on construction of immovable property was finally settled by the Supreme Court by a judgment dated 26.09.2013 delivered in the case of *M/s Larsen and Toubro Limited v. State of Karnataka: (2014) 1 SCC 708*.

10. The appeal preferred by Emaar before the Appellate Authority (Commissioner VAT) against the Assessment Order dated 13.02.2012 was dismissed. Emaar preferred an appeal against the said order before the Appellate Tribunal, VAT.

11. While the petitioner's appeal before the Appellate Tribunal was pending, the Tax Department floated an Amnesty Scheme enabling assesseees to pay the VAT at specified rates, without any interest and penalty. Under the said Scheme, VAT was payable at the rate of 1% of the total turnover including the value of land and/or at the rate of 3% of the total turnover in case the cost of land was excluded.

12. Desirous of availing the benefit of the said Amnesty Scheme, Emaar sent a letter dated 10.01.2014 requesting the Tax Department to communicate its liability under the Amnesty Scheme if it decided to pay the same. The Tax Department responded by a letter dated 21.01.2014,

informing Emaar that its liability under the Amnesty Scheme was assessed at ₹24.67 crores in respect of the 1168 apartments.

13. Emaar availed of the benefits of the Amnesty Scheme. However, before making the final payment to the Tax Department, it made a representation to DDA, calling upon DDA to pay its share of liability towards the VAT, which was quantified at ₹11,34,81,874/-. The said liability was calculated at 1% of the consideration of ₹766,89,25,000 paid by DDA for purchasing the rights pertaining to the 333 residential flats in terms of the 2009 Agreement plus ₹3,67,92,624/-, which was calculated at the rate of 3% of the proportionate construction cost of 378 apartments that fell to the share of DDA in terms of the 2007 Agreement.

14. DDA did not respond to Emaar's representation. Emaar contends that since the opportunity to avail the Amnesty Scheme would lapse, it proceeded to pay the amount of ₹24.67 crores, as assessed by the Tax Department in respect of the entire 1168 apartments.

15. Since DDA did not accede to Emaar's request for reimbursement of the VAT paid in respect of the apartments that fell to the share of DDA or were purchased by it, Emaar invoked the Disputes Resolution Clause (Clause 17 of the 2007 Agreement) and requested DDA to resolve the disputes amicably. However, DDA denied the claims made by Emaar as inadmissible. The parties also did not concur on the appointment of an Arbitral Tribunal.

16. In the circumstances, Emaar moved this Court under Section 11

of the A&C Act and, the Arbitral Tribunal was constituted.

Reasons and Conclusion

17. The principal dispute before the Arbitral Tribunal centered around Emaar's claim for reimbursement of VAT quantified at ₹11,34,81,874/-. Emaar also claimed interest on the said amount at the rate of 18% per annum and costs of the arbitral proceedings quantified at ₹50,00,000/-.

18. As noticed above, Emaar's claim for reimbursement of VAT quantified at ₹11,34,81,874/- is comprised of two components; one in respect of 333 apartments, the rights in respect of which were acquired by DDA for a consideration of ₹766,89,25,000/- in terms of the 2009 Agreement; and, the second being the reimbursement of VAT on the cost of construction of 378 apartments, which were the subject matter of the 2007 Agreement. Emaar was entitled to sell and transfer 790 apartments under the 2007 Agreement, which included 333 apartments that formed the subject matter of the 2009 Agreement. Thus, the consideration paid by DDA for 333 apartments pursuant to the 2009 Agreement also included the cost of land. In respect of these apartments, Emaar paid VAT at the rate of 1% of the total consideration of ₹766,89,25,000/- and accordingly, sought reimbursement of ₹7,66,89,250/- from DDA. VAT paid on the 378 apartments that remained with DDA pursuant to the 2007 Agreement was paid at the rate of 3% of the cost of construction as DDA had not parted with any rights in respect to the undivided share of the underlying land relating

to the said 378 apartments. Emaar quantified its claim in regard to VAT relating to the said 378 apartments at ₹3,67,92,624/-. A tabular statement indicating the breakup of the Emaar's claim of ₹11,34,81,874/- as set out in Emaar's Statement of Claims, is reproduced below:-

TABLE-A

S. No.	Name of the project	Financial Year	Turnover including labour & services and value of land	Amount of Tax @1% (Rs.)
1.	CWG Village (333 Flats sold to DDA)	2009-2010	7668925000	7,66,89,250.00

TABLE-B

S. No.	Name of the Contract	Financial Year	Turnover (for which amnesty is applied for other than assessed captured in 6C) Rs.	Value of land as per Rule 3 (Rs.)	Contract amount including labour but services excluding value of land (Rs.)	Amount of Tax @3% (Rs.)
1.	CWG Village (378 flats constructed for DDA)	2007-2008	1226420800	0	1226420800	3,67,92,624.00/-
Total of Table A + B				11,34,81,874.00/-		

19. The Arbitral Tribunal found that Emaar's claim with regard to VAT in respect of the 333 apartments, which formed the subject matter of the 2009 Agreement was not arbitrable as it did not include an Arbitration Clause.

20. Mr Rajshekhar Rao, learned senior counsel appearing for Emaar, submitted that the conclusion of the Arbitral Tribunal is patently erroneous as the subject matter of the 2007 Agreement covered the construction of all the apartments – the 1168 apartments. The rights in respect of the 333 apartments that were transferred to DDA in terms of the 2009 Agreement were also a part of the 1168 apartments, which formed the subject matter of the 2007 Agreement. The said contention is clearly unmerited. Emaar had paid VAT under the Amnesty Scheme pertaining to 333 apartments at the rate of 1% of the consideration paid by DDA for acquiring the rights in respect of those apartments in terms of the 2009 Agreement. Emaar had sought to impute the liability of VAT in respect of these 333 apartments on DDA on the basis of the transaction of sale and purchase, which was the subject matter of the 2009 Agreement. There is no agreement between the parties to refer the disputes pertaining to the 2009 Agreement to arbitration. Thus, the Arbitral Tribunal rightly concluded that the dispute raised by Emaar in respect of reimbursement of VAT on the 333 apartments, which were the subject matter of the 2009 Agreement, was not arbitrable. The contention that this conclusion is patently erroneously, is bereft of any merit.

21. Before the Arbitral Tribunal, Emaar contended that the

Arbitration Clause included in the 2007 Agreement was incorporated by reference in the 2009 Agreement since the parties had reiterated in the 2009 Agreement, that they would continue to be bound by the terms and conditions of the 2007 Agreement. The 2009 Agreement, *inter alia*, records that the parties had agreed that “*all other stipulations, liabilities, duties and responsibilities of either party under the DDA [2007 Agreement] shall remain unaffected by this Agreement. [2009 Agreement]*” But this did not in any manner indicate that the parties had agreed to incorporate by reference, the agreement to refer the disputes to arbitration in terms of the Arbitration Clause in the 2007 Agreement, in the 2009 Agreement.

22. Insofar as Emaar’s claim for reimbursement of VAT in respect of cost of construction of the 378 flats is concerned, the Arbitral Tribunal found that the said claim was unsustainable as there was no clause under the Agreement, which required DDA to discharge the said liability. The Arbitral Tribunal also noted that the DVAT Act came into force in the year 2004, which was prior to the parties entering into the 2007 Agreement and therefore, it was not possible to accept that Emaar was not aware of its liability to pay the VAT in respect of the project. However, the 2007 Agreement did not include any clause under which Emaar could claim reimbursement against the said liability.

23. Mr Rao contended that the Arbitral Tribunal’s decision that the liability in respect of VAT was that of Emaar is manifestly erroneous. He submitted that it is well settled that VAT is an indirect tax and therefore, the ultimate consumer (in this case, DDA) would be liable for

the same. Thus, Emaar was entitled to recover VAT in respect of construction of 378 flats, which fell to the share of DDA under the 2007 Agreement from DDA.

24. This Court is unable to accept the aforesaid contention. The question whether DDA would be liable for VAT in respect of the flats that fell to its share would depend on the terms of their agreement as there is no statutory provision imposing the liability on the purchaser. Admittedly, DDA was not an assessee under the DVAT Act and the Tax Department had not assessed DDA for any liability under the DVAT Act. Concededly, Emaar was registered under the DVAT Act and there is no dispute that it was liable to be assessed for the levy of VAT under the DVAT Act. The default assessment was also framed by the Tax Department on Emaar and not on DDA. Emaar had accepted its liability and had availed of the Amnesty Scheme. In terms of the said Scheme, Emaar had also withdrawn its challenge to the levy of VAT that was pending before this Court. It is, thus, clearly not open for Emaar to state that it was not liable for VAT under the DVAT Act. Emaar had rested its case on the premise that since VAT is an indirect tax, it is entitled to pass on the said liability towards DDA and is, therefore, liable to be reimbursed in respect of the VAT paid. The question whether Emaar could recover the liability from DDA is clearly a matter of agreement between the two parties and there is no principle or provision in law that mandates that the Purchaser is required to reimburse the VAT assessed on the Seller. The Arbitral Tribunal found that there was nothing in the 2007 Agreement to indicate that DDA had agreed to reimburse Emaar

any amount paid by it as VAT.

25. A plain reading of the 2007 Agreement indicates that DDA had agreed to provide land for the project and Emaar had undertaken to develop the same at its own cost and resources. In consideration for the same, it was granted the rights in respect of two-third of the developed property, which translated to 790 apartments. The structure of this transaction does not support Emaar's contention that it was entitled to reimbursement of any amount from DDA.

26. Paragraphs 48, 49 and 50 of the impugned award, which contains the conclusion of the Arbitral Tribunal in this regard are set out below:-

“48. Upon going through the various terms and conditions of the PDA it is evident that there is no clause expressly concerning the payment of any tax including VAT. It is also clear that when the PDA was entered into, the DVAT Act had already come into existence in 2004. Therefore, it will not be possible for us to hold that the Claimant was not aware of its liability to pay VAT in respect of the Project. Be that as it may, the fact remains that the liability to pay VAT is on the dealer (in this case, the Claimant). The said liability was not discharged by the Claimant at the relevant time. As a result, it invited default assessment orders under Section 32 of the DVAT Act in 2012 in respect of the years 2008-09 and 2009-10. Since there was a default, huge demands were raised in respect of interest and towards penalty under Section 33 of the DVAT Act.

49. It is therefore clear that the Claimant, although being liable to pay VAT did not do so. While the Claimant omitted to pay VAT, it did so of its own

volition without any reference to the Respondent. When the demands were raised by the Tax Department in 2012, the Claimant did not inform the Respondent. Moreover, when the Claimant challenged the said demands before the Hon'ble High Court of Delhi as also before the Appellate Authority by way of statutory appeals, it did not seek the consent of the Respondent, nor was the Respondent a party to those proceedings nor did the Claimant even inform the Respondent about them. Furthermore, when the Amnesty Scheme was introduced, the Claimant did not seek the permission or consent of the Respondent to avail the same. Even the first payment of Rs. 12.34 Crores under the said scheme was made on 22.01.2014 without any reference to the Respondent. It is only on 06.03.2014 that, for the first time, the Claimant requested the Respondent to release a sum of Rs. 11.34 Crores by way of reimbursement for its alleged proportionate share of the tax due under the scheme. In our view, all the circumstances leading up to the issuance of the letter dated 06.03.2014 clearly indicate that the request for reimbursement was an afterthought.

50. In so far as the question of the difference between direct and indirect taxes is concerned, we agree that indirect taxes are of such a nature that they can be passed on to the ultimate customer. That, however, does not imply that it must necessarily be passed on. The dealer may absorb the tax. However, in our view, this has no relevance in the present context inasmuch as upon considering all the clauses of the PDA we could not find any provision therein which required any payment to be made by the Respondent or any cost to be borne by the Respondent. The only obligation on the part of the Respondent was to provide the land

and facilitate the Project apart from ancillary obligations as stipulated in the PDA. While the learned counsel for the Respondent attempted to bring taxes within the fold of fees as appearing in Clause 8.7(c), such an attempt is futile because the concept of fees is different from the concept of taxes. However, this does not enable us to detract from the position that under the PDA there is no liability cast upon the Respondent to incur any costs or make any payment by way of reimbursement or otherwise to the Claimant.”

27. This Court finds no infirmity with the aforesaid conclusion.

28. In view of the above, the other claims raised by Emaar in respect of interest and costs do not arise.

29. The petition is unmerited and is, accordingly, dismissed.

AUGUST 16, 2021
RK

VIBHU BAKHRU, J