

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

+ OMP(COMM) No. 449/2018

% 29th October, 2018

PANKAJ DAYAL

..... Petitioner

Through: Mr. Manoj Arora, Advocate
(9811038641), Mr. Siddharth
Shankar, Ms. Pallavi and Ms.
Daksha Arora, Advocates

versus

YOGESH GUPTA & ANR.

..... Respondents

Through: Mr. Manish Sharma, Mr. Krish
Gandhi, Mr. Nivad Dogra and
Mr. Pranay Raj Singh,
Advocates (9810105226)

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

**I.A.Nos. 114783/2018 (delay in filing of 10 days) & 14784/2018
(delay in re-filing of 127 days)**

There is no opposition to these applications which are therefore
allowed.

IAs stand disposed of.

I.A.No. 14782/2018 (Exemption from filing true copies of dim Annexures)

Exemption allowed and clear copies of the dim Annexure be now filed.

I.A stands disposed of.

OMP(COMM) No. 449/2018

1. This is a petition under Section 34 of the Arbitration and Conciliation Act, 1996. The impugned Award is dated 28.01.2018.
2. There are three parties to the Award, first being petitioner/Sh. Pankaj Dayal, second being respondent no.1/Sh. Yogesh Gupta and third being respondent no.2/Sh. Rajiv Behl. The Award in question though is a 453 paragraphs award running into 144 pages, whereas the actual issue to be decided in this petition under Section 34 of the Arbitration and Conciliation Act is a very limited one with respect to the incidence of tax liabilities of some of the companies of the Realtech Group of Companies, of which the three parties to the present litigation were the three owners/Shareholders-cum-Directors.
3. The three parties to the Award had entered into a Shareholders Agreement on 11.08.2008, and which governed their

relationship as shareholders of various companies in the Realtech Group. Thereafter disputes and differences arose between the parties and hence three common friends were appointed as Mediators/Arbitrators, resulting in the three parties entering into two Memorandum of Understandings (MoUs) on 02.06.2011. One MoU was entered into in the morning and second MoU was entered into in the evening.

4. The sum and substance of the MoUs was the division of the companies of the Realtech Group between the three parties. The companies were categorized into three categories A, B and C. I need not narrate in detail the different companies of the categories A, B and C, inasmuch as on behalf of the petitioner/Sh. Pankaj Dayal, a very limited dispute is raised with respect to tax liabilities of some of the companies of the Realtech Group of Companies which were subject matter of the MoUs dated 02.06.2011.

5. As per the MoUs, the incidence of tax liabilities of the companies were in terms of clause 3.2.5 of the second MoU entered into in the evening, and this clause 3.2.5 reads as under:-

“3.2.5 The party taking over City Emporio Mall will be responsible for the assessment of Group Companies namely Realtech Construction Pvt. Ltd, Realtech Projects Pvt. Ltd., Vivid Builders Pvt. Ltd. upto assessment year 2010-2011 and the taxes upto the aforesaid period will be met by the person taking over City Emporio Mall, Chandigarh. Income tax assessment liability/responsibility of M/s Realtech Infrastructure Ltd. will be of Sh. Yogesh Gupta. Any Income Tax Liability/other liabilities beyond Assessment Year 2010-2011 will be handled by and responsibility of the parties taking over their respective project.”

6(i). A reading of the aforesaid clause 3.2.5 shows that the petitioner/Sh. Pankaj Dayal who took over the City Emporio Mall, Chandigarh was to be exclusively liable for the tax liabilities up to the Assessment Year 2010-11 qua the companies being M/s Realtech Construction Pvt. Ltd, Realtech Projects Pvt. Ltd. and Vivid Builders Pvt. Ltd. Whereas with respect to the Income Tax Assessment and liabilities of another company M/s Realtech Infrastructure Ltd, the tax liability was fastened upon respondent no. 1/Sh. Yogesh Gupta.

6(ii). Therefore a reading of Clause 3.2.5 appears in some way to suggest that the tax liabilities of the companies which were subject matter of Clause 3.2.5 of the MoU would be in terms of what is stated in Clause 3.2.5 up to the Assessment Year 2010-11, with the tax liability being the liability of the petitioner/Sh. Pankaj Dayal for the three companies i.e. Realtech Construction Pvt. Ltd., Realtech Projects Pvt. Ltd. and Vivid Builders Pvt. Ltd., and of respondent no. 1/Sh.

Yogesh Gupta for one company Realtech Infrastructure Ltd., and for all other companies of the Realtech Group obviously therefore the tax liabilities were to be equally shared by the three parties to the MoU.

6(iii) However, there is a Clause 3.2.5 in the morning MoU and which provided with respect to incidence of income tax liabilities and consequent marking of 17000 sq. feet of area in the City Emporio Mall at Chandigarh as lien for the tax liabilities, and this clause 3.2.5 reads as under:-

“3.2.5 The area that approx. 17000 sq. ft. area has been marked lien in this property to meet all the determined income tax liabilities of the group as on date. The party ultimately taken over this project will be liable to clear all the demands for income tax as on today. However, after depositing a sum of Rs.4 Crores to 5 Crores by November,2011 and another Rs.4 Crores will be deposited by February, 2012, this amount of Rs.9 Crores may be realized from sale of the area marked as lien. After depositing of Rs.9 Crores total the entire area of 17000 sq. fts. become free from lien available to the party handling the project to be used/sold as per his convenience. The other two parties shall have no interference or question on the same.”

7. So far as this petition is concerned there is no requirement to interpret in detail the two different Clauses 3.2.5 inasmuch as the present disputes arises because of a Settlement Term Sheet/MoU/Agreement dated 16.12.2015 entered into between two of the three parties namely the petitioner/Sh. Pankaj Dayal and

respondent no. 2/Sh. Rajiv Behl. As per para 3(A) (i) of this Settlement Term Sheet/MoU/Agreement dated 16.12.2015, the petitioner/ Sh. Pankaj Dayal in addition to the companies as specifically mentioned in clause 3.2.5 of the evening MOU dated 02.06.2011, also agreed to take over all income tax liabilities of three other companies namely, Realtech Sports Academy Private Limited; Realtech Maintenance Pvt. Ltd. and Realtech Infrastructure Ltd., i.e. in addition to the three companies as mentioned in Clause 3.2.5 of the evening MoU dated 02.06.2011, and also qua these companies additionally for the next Assessment Year i.e. 2011-12 i.e. Financial Year 2010-11. This para 3(A)(i) reads as under:-

“3. That during the arbitral proceedings, the parties have arrived at a mutual amicable settlement and both the parties hereto confirm and declare that they have voluntarily and of their own free will arrived at this Settlement Agreement, as enumerated under different Headings as follows:

A. Income Tax-Assessment of Group Companies

- (i) PD agrees with the propositions regarding income tax as envisaged in the MOU dated 02.06.2011 and accepts his responsibility to get the income tax assessments for the Realtech Group companies, i.e Realtech Constructions Private Limited; Realtech Sports Academy Private Limited; Realtech Project Private Limited; Realtech Maintenance Private Limited, Realtech Infrastructure Limited and Vivid Builders Private Limited till 31.3.2011 for which sufficient cushion was provided in the said MOU, wherein an area of 17,000/-sq. ft. was reserved in the City Emporium Mall, Chandigarh to meet all expenses and liabilities relating to the Income tax of the Realtech Group of Companies, which now stands changed to 14,000 square feet as per mutual understanding between

the parties. As and when the liabilities are met and Income Tax demands reduces, PD will be entitled to reduce the proportionate area under lien after showing the relevant proof of the same to RB.”

8. On behalf of the petitioner/Sh. Pankaj Dayal it is not disputed that between him and respondent no. 2/Sh. Rajiv Behl, the agreed Settlement Term Sheet/MoU/Agreement dated 16.12.2015 does bear the signatures of the petitioner/Sh. Pankaj Dayal and therefore entering into of this Agreement dt. 16.12.2015 is not disputed. This Settlement Term Sheet/MoU/Agreement runs into 11 pages, and each of the pages is signed by the petitioner/ Sh. Pankaj Dayal and therefore I reject the argument urged on behalf of the petitioner/ Sh. Pankaj Dayal, as was rejected by the Ld. Arbitrator, that the Settlement Term Sheet/MoU/Agreement dated 16.12.2015 cannot bind the petitioner/Sh. Pankaj Dayal. I may also note that at no point of time after entering into the Settlement Term Sheet/MoU/Agreement on 16.12.2015 did the petitioner/Sh. Pankaj Dayal ever challenge before any forum, except before the Ld. Arbitrator, this Settlement Term Sheet/MoU/Agreement dated 16.12.2015. In my opinion, therefore, this Memorandum of Understanding called as Settlement Term Sheet/Agreement dated

16.12.2015 will operate *inter se* petitioner/Sh. Pankaj Dayal and respondent no. 2/Sh. Rajiv Behl so far as the same modulates and modifies only as between the petitioner/Sh. Pankaj Dayal and respondent no.2/Sh. Rajiv Behl, the incidence of tax liabilities of companies as per para 3 (A)(i) of this Settlement Term Sheet/MoU/Agreement dt. 16.12.2015 and as per the earlier terms of the two MoUs dated 02.06.2011 and this has also so rightly been held by the Ld. Arbitrator in terms of the impugned award.

9. The Counsel for the petitioner/Sh. Pankaj Dayal argued that there cannot be an agreement only between two parties once originally the MoU dated 02.06.2011 was between three parties, however, in my opinion this argument does not have any valid basis inasmuch as the Settlement Term Sheet/MoU/Agreement dated 16.12.2015 will modify the terms of the MOU dated 02.06.2011 only as between petitioner/Sh. Pankaj Dayal and respondent no. 2/Sh. Rajiv Behl with respect to the income tax liability of the companies as mentioned in para 3(A)(i) above, and the effect thereof being that the 2/3rd of the Income Tax Liability of the company mentioned in para 3(A)(i) of the Settlement Term Sheet/MoU/Agreement dated

16.12.2015 would be upon the petitioner/Sh. Pankaj Dayal with remaining 1/3rd liability continuing to be that of respondent no. 1/Sh. Yogesh Gupta and which was the liability of respondent no. 1/Sh. Yogesh Gupta in terms of two MoUs dated 02.06.2011. The effect of para 3(A)(i) is that the 1/3rd liability of respondent no. 2/Sh. Rajiv Behl of the tax liabilities of certain companies in the Realtech Group would no longer be of respondent no. 2/Sh. Rajiv Behl but would be taken over as the liability of the petitioner/Sh. Pankaj Dayal. This court therefore affirms the findings given by the Ld. Arbitrator in paras 429-430 of the impugned award and which reads as under:-

“429. The settlement by and between PD and RB is accepted. The said settlement which is annexed hereto and marked with the letter 'A' shall form part of the Award.

430. The settlement between PD and YG as noticed heretofore is accepted and the same shall also govern this Award, i.e. all income tax liabilities shall be that of PD.”

(Please Note: PD is Pankaj Dayal, the petitioner in this petition, YG is Yogesh Gupta, the respondent no. 1 and RB is Rajiv Behl, the respondent no. 2 in the Arbitral Award)

10. An Award can only be set aside if the said award is against the law of the land or against the contractual provisions between the parties or the award is so grossly perverse that the same requires to be set aside. By the impugned award, the Ld. Arbitrator

has only upheld the agreements between the parties being the two original MoUs dated 02.06.2011, and as modified only between two persons being the petitioner/Sh. Pankaj Dayal and the respondent no.2/Sh. Rajiv Behl as detailed in the Award pursuant to the Settlement Term Sheet/MoU/Agreement dated 16.12.2015, and therefore there is no illegality in the impugned Award and the Impugned Award dated 28.01.2018 will thus operate and legally bind the parties.

11. This petition is therefore dismissed.

OCTOBER 29, 2018/ib

VALMIKI J. MEHTA, J