IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 22.11.2021

\+ **O.M.P. (COMM) 211/2021 & I.A. 9158/2021, 9159/2021 & 14771/2021**

DELHI METRO RAIL CORPORATION LTD ..... Petitioner

versus

M/S KONE ELEVATORS INDIA PVT. LTD ..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Tarun Johri, Advocate.

For the Respondent : Mr E.R. Kumar, Mr S. Mohan, Ms Sonal Gupta, Ms Tanya Chaudhry, Mr Raghav Bansal, Mr Paritosh Arora and Ms Nitika Pandey, Advocates.

AND

\+ **O.M.P. (COMM) 227/2021**

M/S KONE ELEVATORS INDIA PVT. LTD ..... Petitioner

versus

DELHI METRO RAIL CORPORATION LTD ..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr E.R. Kumar, Mr S. Mohan, Ms Sonal Gupta, Ms Tanya Chaudhry, Mr Raghav Bansal, Mr Paritosh Arora and Ms Nitika

Pandey, Advocates.

For the Respondent : Mr Tarun Johri, Advocate.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The parties have filed these petitions impugning an arbitral award dated 15.03.2021 delivered by an Arbitral Tribunal comprised of three arbitrators ('the Arbitral Tribunal').

2. The impugned award was rendered in the context of disputes that have arisen between the parties in connection with the contract whereby Kone Elevator India Private Limited (hereafter 'Kone') had agreed to supply, install and commission elevators, and Delhi Metro Rail Corporation (hereafter 'DMRC') had agreed to purchase the same.

The Factual Context

3. In December 2012, DMRC had issued a notice inviting tenders for supply and installation of elevators. Kone had participated in the tendering process pursuant to the aforesaid notice and was successful in securing the contract. The parties entered into a 'Contract Agreement CE-3-LOT-1' dated 23.01.2013 (hereafter 'the Contract Agreement') whereby Kone agreed to design, manufacture, supply, install, test and

commission 143 numbers of heavy duty machine room-less elevators for Delhi MRTS Project Phase III for an aggregate price of ₹54,50,64,298/-.

4. In terms of the Special Conditions of Contract (SCC) as applicable to the Contract Agreement, it was agreed that the contract price would be inclusive of all taxes, levies duties, cess, freight, insurance and other incidental charges including statutory deductions towards income tax works, contract tax etc. except the following: "*(a) concessional customs duty as applicable for project imports under Chapter 98.01 of Customs Tariff Act; (b) Excise Duty; and (c) VAT/GST*".

5. It was agreed that the aforesaid levies would be reimbursed by DMRC on actual basis and on submission of documentary proof. It was also agreed that any new taxes or other statutory variations in customs/excise duty and sales tax on finished products would be to the account of DMRC. However, Kone was required to submit relevant documents to prove the same.

6. Kone completed its obligations under the Contract Agreement in certain stages.

7. Out of the 143 lifts to be supplied and commissioned, Kone supplied and installed 10 lifts that were made operational for public use in October 2015. Kone raised invoices for the supply, erection and commissioning of the said elevators and charged Value Added Tax (VAT) at the rate of 12.5% on 85% of the total value of invoices so

raised. This was because, admittedly, no service tax was payable in respect of commissioning and installation of the said elevators as it was exempted in terms of the notification dated 20.06.2012.

8. The controversy essentially relates to 85 elevators that were supplied by Kone for installation of the "JICA Section" prior to 30.06.2017. Against the aforesaid supplies, DMRC released a sum of ₹23,11,47,304/- as per the Running Account Bills raised by Kone till 30.06.2017.

9. There is no dispute that the Running Account Bills were raised on the basis of the agreed milestones regarding manufacture, dispatch, delivery and installation of the said lifts.

10. Kone raised tax invoices against the aforesaid supply of 85 elevators after 01.07.2017 under the GST regime. Admittedly, GST at the rate of 18% was payable at the material time when the invoices were raised. Accordingly, Kone claimed that it was entitled to ₹4,16,06,515/- being the GST payable on the aggregate value of ₹23,11,47,304/- of the invoices raised by it. DMRC reimbursed an amount of ₹2,88,76,473/- against Kone's claim for reimbursement of GST, in terms of the tax invoices but declined to pay the balance amount of ₹1,27,30,042/-. Prior to 30.06.2017, DMRC had already reimbursed a sum of ₹1,27,30,042/- as Excise duty on the said supplies and it claimed that Input Tax Credit for the said amount was available to Kone against its GST liability of ₹4,16,06,515.

11. The dispute between the parties essentially relates to Kone's claim for ₹1,27,30,042/- being the balance amount payable on account of GST as stated in the tax invoices raised by Kone. There is no dispute that Kone had paid a sum of ₹4,16,06,515/- as GST. And therefore, Kone claimed that it was entitled to be reimbursed in respect of the said amount. DMRC disputed the aforesaid claim as it had paid Excise duty to the extent of ₹1,27,30,042/- and according to it, the said amount would be available as Input Tax Credit to Kone.

Arbitral Proceedings

12. In view of the above dispute, Kone issued a notice invoking the arbitration agreement and sought reference of the dispute to arbitration. Before the Arbitral Tribunal, Kone filed its Statement of Claims claiming an amount of ₹1,27,30,042/- along with interest at 21% per annum from 24.10.2017 till the date of payment. In addition, Kone also claimed costs and expenses.

13. DMRC filed its Statement of Defence disputing Kone's claims. DMRC also filed its counter-claim. DMRC claimed that since the milestones leading up to delivery of the elevators at site had been achieved prior to 30.06.2017 and the elevators had been incorporated at its site, Kone was required to issue VAT invoices in respect of the said elevators and GST was not chargeable on the said supplies. Accordingly, DMRC claimed that it was entitled to refund of ₹2,88,76,473/-, which was paid to Kone against reimbursement of GST. Based on the aforesaid premises, DMRC made a counter-claim for the

aforesaid amount of ₹2,88,76,473/- along with interest at the rate of 24% per annum.

14. At this stage, it is relevant to refer to the contentions advanced by DMRC to dispute the claims raised by Kone. Before the Arbitral Tribunal, DMRC contended that the elevators in question had been incorporated as a part of works prior to the GST regime coming into force with effect from 01.07.2017 and therefore, the taxable event for levy of VAT under the Delhi Value Added Tax Act, 2004 (hereafter the 'DVAT Act') had occurred. According to DMRC, Kone was required to pay VAT under the DVAT Act and the rules made thereunder, and not GST. Kone had countered the aforesaid contention and claimed that the taxable event was the transfer of property of the lifts in question. It claimed that the property in the elevators was transferred to DMRC after 30.06.2017 and therefore, GST was applicable on the sale and installation of the elevators in question.

15. DMRC advanced an alternate contention to counter Kone's aforesaid stand. DMRC stated that it had issued Taking Over Certificates for 31 numbers of lifts on 10.05.2018; 11 numbers of lifts on 15.11.2018; 41 numbers of lifts on 01.02.2019; and 2 numbers of lifts on 02.09.2018. The applicable rate of GST on the date of issuance of Taking Over Certificates had reduced to 12% instead of 18% as claimed by Kone. Therefore, if DMRC's taking over of lifts was considered as the taxable events, DMRC would be liable to pay only ₹2,77,37,676/- as GST computed at the rate of 12% and not ₹4,16,06,515/- as claimed by Kone.

16. In addition to the above, DMRC also submitted, in the alternative, that even if GST was applicable on the supply and installation of elevators under the Contract Agreement, Kone would be entitled to Input Tax Credit for the Excise duty paid by it on manufacture of the lifts in question.

17. In view of the rival contentions, the Arbitral Tribunal, *inter alia*, framed the following issues to be decided:

> "Issue 1 (a): Whether as per the terms of this Contract Agreement CE-3-Lot-1 for the design, manufacturing, supply, installation, testing and commissioning of Heavy Duty Machine Room-less Elevators for Delhi MRTS Project – Phase III ("Contract Agreement") the Respondent is liable to reimburse the amount of Rs. 1,27,30,042/- being the Goods and Services Tax ("GST") paid by the Claimant to the relevant authorities?
>
> Issue 1(b): Whether claimant has not erred in complying with the provisions of the GST law by not claiming Input Tax Credit of the excise duty paid on inputs which is held in its stock as on 30.06.2017.
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> Issue 1(c): Whether the claimant has not contravened the provisions of Section 171 of CGST Act, 2017 and has not erred in not passing the benefit of the increased input tax credit under GST regime to the respondent?, and
>
> Issue 2: Whether the counter claim of the Respondent is maintainable and/or within the jurisdiction/scope of authority of the Hon'ble Arbitral Tribunal as per the provisions of the Arbitration and Conciliation Act, 1996? If Yes, whether the Respondent is entitled to award of the counter claim?

Issue 3(a): Whether GST or DVAT is applicable for the transaction between the parties under the Contract Agreement?

Issue 3 (b): Whether claimant has not caused financial loss to respondent by raising an invoice under GST law instead of VAT Law.

Issue 4: Whether there have been any violations of the provisions of the Central Goods and Service Tax Act, 2017 or Delhi Value Added Tax Act, 2004 (as the case may be) by the Claimant or the Respondent?

Issue 5: Whether claimant has not enriched himself at the cost of the respondent by not claiming input tax credit of the excise duty and claiming the excise duty as an expense for the purpose of Income Tax?

Issue 6: Whether the Claimant or Respondent is entitled to interests and/or costs?

Issue 7: To what other reliefs are the Parties entitled to."

Findings of the Arbitral Tribunal

18. The Arbitral Tribunal accepted that the incidence of tax under the DVAT Act would arise on incorporation of the goods in the works. However, the Arbitral Tribunal did not accept DMRC's contention that the lifts in question (85 in number) were incorporated into the works during the DVAT regime; that is, prior to 01.07.2017. It held that Kone used to raise Tax Invoices at the stage of handing over of the elevators and DMRC would reimburse VAT at the time of issuance of Taking Over Certificate and thus, both the parties had deferred the liability of VAT till handing over of the elevators. It is important to note that the Arbitral Tribunal also held that if according to DMRC, GST was not

payable, it should have denied reimbursement of GST on the invoice raised under the GST regime instead of partly reimbursing the same. The Arbitral Tribunal concluded that DVAT invoices could not have been raised in respect of 85 lifts in question and accordingly decided Issue nos. 1 and 3a as framed, in favour of Kone.

19. The question whether Kone had erred in not complying with the provisions of GST by not claiming Input Tax Credit in respect of the Excise duty paid in respect of the lifts in question, the Arbitral Tribunal held that both the parties had erred in this regard. It held that Kone ought to have applied to the Authority for Advance Ruling (AAR) for seeking a specific clarification whether it was entitled to Input Tax Credit on account of Excise duty paid by it on the lifts in question. The Arbitral Tribunal held that since Kone had claimed reimbursement of Excise duty and DMRC had granted the same, it was a joint responsibility of both the parties to avail Input Tax Credit in respect of Excise duty paid by Kone. It held that both the parties shared equal responsibilities in respect of the same.

20. The Arbitral Tribunal also concluded that Kone had not contravened the provisions of Section 171 of CGST Act, 2017 and had not caused any financial loss to DMRC by raising an invoice under the GST law instead of the VAT law.

21. Insofar as the counter-claims are concerned, the Arbitral Tribunal found that the same were maintainable and it had the jurisdiction to decide the same. However, in view of its finding that Kone had rightly

raised the invoice under the GST regime, DMRC's counter-claim for refund of the amount of ₹2,88,76,473/- was rejected. The issues whether there was any violation of the Central Goods and Services Tax Act, 2017 (hereafter the 'CGST Act') or the DVAT Act and, whether Kone had enriched itself at the cost of DMRC, were decided in favour of Kone.

22. Kone's claim for pre-award interest was denied. However, the Arbitral Tribunal granted future interest at the rate of 9% per annum if the awarded amount was not paid within a period of ninety days from the date of the award.

23. The Arbitral Tribunal awarded 50% of the amount claimed, that is, ₹63,65,021/-, in favour of Kone in view of its finding that both the parties were responsible for not availing the Input Tax Credit in respect of the Excise duty paid on the lifts in question.

24. Both the parties are aggrieved by the impugned award and have assailed the same.

Submissions

25. Mr Johri, learned counsel appearing for DMRC had restricted the challenge to the impugned award on three fronts. First, he submitted that the Arbitral Tribunal's decision to hold DMRC jointly responsible for not availing Input Tax Credit in respect of the Excise duty paid on the manufacture of the 85 lifts is *ex facie* erroneous as Kone was the assessee and it was its obligation to claim the said deduction. Next, he

submitted that the Arbitral Tribunal had not considered DMRC's alternate submission that if the Tax Invoice was to be raised on the date of handing over of the lifts in question, that is, the dates on which the Taking Over Certificates were issued, the GST applicable would be lower than as claimed by Kone because the applicable rate of GST was reduced from 18% to 12%. Third, he submitted that GST was not payable on the supply of the lifts in question as substantial payments for the same were made prior to 01.07.2017 and the Arbitral Tribunal had erred in not allowing DMRC's counter-claim for the GST reimbursed to Kone.

26. Mr Kumar, learned counsel appearing for Kone submitted that the Arbitral Tribunal had accepted that Kone had paid the GST and there is no dispute that DMRC was obliged to reimburse the GST paid on the lifts in question. Accordingly, Kone was entitled to the amount as claimed. He submitted that the Arbitral Tribunal had failed to appreciate that Section 140 of the CGST Act, 2017 was not applicable and therefore, the impugned award to the extent that Kone's claim has been denied, is required to be set aside.

Reasons and Conclusion

27. The principal dispute between the parties is regarding the applicability of GST on the supply of the elevators in question. If so, whether Input Credit Tax for the Excise duty paid was available to Kone. As noted above, it was DMRC's contention before the Arbitral Tribunal that GST was not applicable in respect of the supply and

installation of the elevators in question. DMRC had also raised a counter-claim seeking refund of the GST reimbursed to Kone. Kone on the other hand claimed that it was entitled to an amount of ₹1,27,30,042/- which was not reimbursed by DMRC.

28. The Arbitral Tribunal found that the issue whether DMRC would be entitled for reimbursement for an amount of ₹1,27,30,042/- being the GST payable by Kone to the relevant authorities, and whether GST or VAT was applicable in respect of the transaction between the parties, were interrelated and these issues were considered together.

29. According to DMRC, the lifts supplied by Kone were liable to DVAT under the DVAT Act as the said supplies constituted 'sale' within the meaning of Section 2(zc) of the DVAT Act, 2004. According to DMRC, transfer of the lifts involved in execution of the works had taken place prior to 30.06.2017; that is when the lifts were incorporated in the buildings.

30. The Arbitral Tribunal did not accept the aforesaid contention. The Arbitral Tribunal found that the dates on which the lifts were incorporated in the works were not ascertainable from any of the documents provided by the parties and there was insufficient material to accept that the lifts had been incorporated in the building prior to 30.06.2017. Accordingly, the Arbitral Tribunal held as under:

> "41. In absence of any evidence, the AT is not inclined to accept the contention of the respondent that 85 lifts were incorporated during the DVAT regime, and therefore, the question of tax invoice in DVAT

regime does not arise. It is observed that in DVAT regime, the claimant used to raise tax invoice at the stage of handing over of the elevators and the respondent was reimbursing the DVAT invoice at the time of issue of Taking Over Certificate' (a milestone determined in the Agreement). AT has no hesitation to conclude that liability of DVAT was deferred by both the parties till handing over of the elevators and issue of Taking Over Certificate, as there was no provision of maintaining records of date of incorporation/installation and only the record of Taking Over Certificate.

42. The respondent has tried to sail on many boats at the same time about the action that should have been taken by the claimant in avoiding the tax liability on respondent. If invoices were to be raised in the DVAT regime or later (when benefit of reduction of GST was available with the respondent), the respondents should have denied the reimbursement of the GST based on the invoices raised in GST regime. Instead the respondent has reimbursed the GST to the claimant after adjusting the amount of excise duty already reimbursed in DVAT regime. From this it appears that the respondent has relied upon the action that should have been taken for input tax credit as per the provisions of GST Act. In case the input tax credit was available on the transaction, whether the claimant failed to avail the same and the same is discussed in Issue no. 1(b).

43. Therefore, AT decide that for the transaction in respect of 85 lifts, the DVAT invoice couldn't have been raised in view of the above findings of the Tribunal."

31. This Court finds no infirmity with the aforesaid conclusion. Indisputably, DMRC had not objected to the petitioner raising the Tax

Invoices under the GST regime. It had in fact conceded that GST was payable and had accordingly, reimbursed the entire GST except the amount of ₹1,27,30,042/- as according to DMRC, Kone was entitled to Input Tax Credit for the said amount. Thus, the Arbitral Tribunal found the same in favour of Kone. The said view cannot be stated to be *ex facie* patently illegal or one that falls foul of the fundamental policy of Indian law.

32. This Court is unable to accept the contention that the Arbitral Tribunal had grossly erred in rejecting DMRC's counter-claim.

33. DMRC had contended in the alternative, that if it is Kone's stand that GST invoices were to be raised on transfer of property of the lifts, the tax invoices were required to be raised on the dates of the Taking Over Certificates. The GST rate as applicable on the said dates was 12% and therefore, DMRC was liable to pay GST at the lower rate of 12% instead of 18%. In view of the Arbitral Tribunal's finding that DMRC had raised no objections regarding the issuance of tax invoices and had substantially paid the same; this Court finds no ground to fault the decision of the Arbitral Tribunal not to accept the aforesaid contention.

34. Thus, the principal question to be addressed by the Arbitral Tribunal was whether Kone was entitled to Input Tax Credit for the Excise duty paid on the lifts in question and, whether the failure on the part of Kone to avail of the Input Tax Credit entitled DMRC to withhold an amount equivalent to the said amount.

35. In view of the said dispute, the Arbitral Tribunal had framed the following issue – "*1(b) Whether claimant has not erred in complying with the provisions of the GST law by not claiming Input Tax Credit of the excise duty paid on inputs which is held in its stock as on 30.06.2017.*"

36. According to DMRC, Kone was entitled to avail of the benefits of the transitional provisions under Section 140 of the CGST Act. DMRC had also relied on Section 140(3) of the CGST Act, which reads as under:

> "140(3) A registered person, who was not liable to be registered under the existing law, or who was engaged in the manufacture of exempted goods or provision of exempted services, or who was providing works contract service and was availing of the benefit of notification No. 26/2012—Service Tax, dated the 20th June, 2012 or a first stage dealer or a second stage dealer or a registered importer or a depot of a manufacturer, shall be entitled to take, in his electronic credit ledger, credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day subject to the following conditions, namely:—
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> (i) such inputs or goods are used or intended to be used for making taxable supplies under this Act;
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> (ii) the said registered person is eligible for input tax credit on such inputs under this Act;
>
> (iii) the said registered person is in possession of invoice or other prescribed documents evidencing payment of duty under the existing law in respect of such inputs;

(iv) such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointed day; and

(v) the supplier of services is not eligible for any abatement under this Act:

Provided that where a registered person, other than a manufacturer or a supplier of services, is not in possession of an invoice or any other documents evidencing payment of duty in respect of inputs, then, such registered person shall, subject to such conditions, limitations and safeguards as may be prescribed, including that the said taxable person shall pass on the benefit of such credit by way of reduced prices to the recipient, be allowed to take credit at such rate and in such manner as may be prescribed."

37. According to DMRC, Kone was entitled to Input Tax Credit under the aforesaid provisions. Kone had disputed the same. It claimed that it was not entitled to avail of the benefits of Section 140(3) of the CGST Act, as it was not engaged in the manufacture of exempted goods or provision of exempted services. It also claimed that it was not entitled to any benefit under Notification No. 26/2012 dated 20.06.2012 as it was availing exemption from Service Tax under Notification No. 25/2012 dated 20.06.2012 and the said notification was applicable to the contract between the parties. DMRC had disputed the same.

38. Kone had stated that it had made a representation before the Principal Chief Commissioner, Central GST and Excise, *inter alia*, seeking clarification in respect of Section 140(3) of the CGST Act. Kone had received a response issued by the Joint Commissioner, GST [Government of India, Ministry of Finance Department of Revenue

CBEC, GST (Police Wing)] clarifying that since Kone had not availed of the benefits of Notification No. 26/2012 dated 20.06.2012, it was not eligible for the sanction credit.

39. Kone claimed that in view of the clarification, it was clear that the GST Department would not accept any claim for Input Tax Credit on account of Excise duty paid prior to 30.06.2017. DMRC disputed the same and submitted that the said clarification was not binding.

40. Kone had also relied on the following judgments in support of its contention: ***Kone Elevator India Private Limited v. State of Tamil Nadu and Ors., 2014 (202) ECR9173 (SC)***, paragraph 64; and ***Abel Space Solutions LLP v Shindler India Private Limited (2018) 68 GST 746***, paragraphs 3 to 6.

41. It is also relevant to note that DMRC had also relied upon Clause 11.1.2 of the General Conditions of Contract (GCC) as applicable to the Contract Agreement and, on the strength of the said clause submitted that Kone was obliged to avail Input Tax Credit in respect of Excise duty paid on stock held on 30.06.2017 in accordance with Section 140(3) of the CGST Act and pass on the benefit of such credit to DMRC. DMRC contended that 'Excise duty' was specifically mentioned in Clause 11.1.2 of the GCC and therefore, DMRC was entitled to claim benefit in respect of credit for such Excise duty.

42. The Arbitral Tribunal noted the rival contentions advanced by the parties. Insofar as the DMRC's reliance on Clause 11.1.2 of the GCC is concerned, the Arbitral Tribunal found that the said clause was

not applicable as there was no order exempting payment of Excise duty.

Clause 11.1.2 of the GCC is set out below:

> "Clause 11.1.2 of General Conditions of Contract
>
> (i), In the event of exemption of custom duties, excise duty, CST/VAT or any other cess/levy being granted by the government In respect of the works, the benefit of the same shall be passed on to employer. The contractor shall therefore maintain meticulous records of all the taxes and duties paid and provide the same as and when required by the employer, so that the employer is able to avail the reimbursement for which DMRC may issue a procedure order separately. Alternatively, the employer may direct the contractor to get the reimbursement based an exemption certificate/Govt. order and it shall be obligatory on the part of contractor to get the reimbursement from the statutory authorities and pass on the benefit to DMRC.
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> (ii) In case of contractor's failure in availing the exemptions as stipulated above, the recovery of equivalent amount will be made from contractor's dues"

43. The findings of the Arbitral Tribunal regarding applicability of the aforesaid clause are reproduced below:

> "96. The AT finds that clause 11.1.2 is regarding exemption of duties/taxes granted by the Govt to the work. Such exemption on duties/taxes was to be passed to the respondent. However, in this case, there is no exemption granted on excise duties/taxes. AT finds that in this case, the excise duty was reimbursable to the claimant, and there is no order exempting the excise duties in this work and therefore, this clause is not found to be applicable.

97. AT has gone through the rival submission of both the parties and find that the clause 11.1.1 of the Contract Agreement regarding CD/ED reimbursement has no relevance to the case. The requirement given in clause 11.1.1 was to be complied while seeking the reimbursement from the respondent. The present case is regarding excise duty paid in pre-GST regime and the argument put forth in para 95 to 98 above has no relevance to the Claim and counterclaim."

44. The aforesaid view expressed by the Arbitral Tribunal is a plausible one and this Court is unable to accept that the same warrants any interference.

45. Insofar as the clarification obtained by Kone regarding applicability of Section 140(3) of the CGST Act is concerned, the Arbitral Tribunal found that the same did not have any 'force of law'.

46. In regard to the question whether Input Tax Credit in respect of the Excise duty paid prior to 30.06.2017, the Arbitral Tribunal did not return any definite finding. The Arbitral Tribunal observed that Kone was required to take recourse to Section 97 of the CGST Act and seek an advance ruling in respect of the admissibility or non-admissibility of Section 140 of the CGST Act and, Kone had erred in not fully exploring the possibility of such an exemption. The relevant conclusion of the Arbitral Tribunal is reproduced below:

"93. In the absence of not having taken advance ruling and appeal (if required) and the non-availability of the such ruling from any of the party or any

precedence quoted by the party, in accordance with the Chapter XVII of the GST Act, AT finds that the Claimant has not fully explored the possibilities of GST Act either himself or in discussion with the Respondent.

xxxx xxxx xxxx

98. AT finds that the claimant has taken reimbursement of excise duty from the respondent and already submitted the relevant document in original to the Respondent on 21st Oct 2016 (pg. no. 27 of rejoinder), therefore, taking a input credit by the claimant for the amount already reimbursed becomes a joint responsibility of the Claimant and the Respondent.

99. In the changed scenario, after introduction of the CGST Act, the claimant and respondent were required to discuss the issues jointly, at the earliest opportunity, on the provisions in the GST Act and the procedure to be followed to avail benefit of input tax credit and making use of Advance Ruling if there is any doubt. This was not done as was evident from the pleadings and the arguments put forth, AT observed that both the parties has worked independently and confining in its own compartment. Claimant pays the admissible taxes to Government and Respondent reimburses it, therefore, both the parties shares equal responsibility.

100. Both the parties have not acted jointy, for exploring the possibility of input credit of excise duty, and therefore, AT decides that both the parties have equally erred in complying with the provisions of the GST law by not claiming Input Tax Credit of the excise duty paid on Inputs which is held in its stock as on 30.06.2017 i.e.

> Claimant not exploring the provisions of transitional credit in CGST Act, 2017 to avail input tax credit or seeking advance ruling and
>
> Respondent simply deducting the excise duty paid from the GST invoice amount without referring the provisions in the Contract Agreement or CGST Act, 2017 when making such deductions. ”

47. It is apparent from the above that the principal dispute before the Arbitral Tribunal remains unadjudicated. As noted above, the issue struck by the Arbitral Tribunal was whether Kone had erred in not claiming the Input Tax Credit. Thus, the Arbitral Tribunal was required to address the question whether Kone was entitled to claim Input Tax Credit in respect of the Excise duty paid for the lifts in question prior to 30.06.2017 and if so, whether DMRC was obliged to reimburse the GST, notwithstanding, that Kone had not availed of such benefits.

48. It is seen that the Arbitral Tribunal found both the parties wanting for not engaging in joint discussions for exploring the possibility of availing Input Tax Credit under the CGST Act. Accordingly, the Arbitral Tribunal reasoned that both the parties should equally bear the amount of Input Tax Credit that may have been possibly available.

49. This Court is of the view that since the impugned award does not address the dispute, the impugned award in this regard is liable to be set aside.

50. It is also relevant to refer to Section 28(2) of the A&C Act. The Arbitral Tribunal might decide “*ex aequo et bono or as amiable*

compositeur" only if the parties have expressly authorized it to do so and not otherwise. The phrase "*ex aecquo et bono*" means according to equity and conscience. It empowers the arbitrator to dispense with consideration of the law and to take decisions on notions of fairness and equity. The term '*amiable compositeur*' is a French term and means an unbiased third party who is not bound to apply strict rules of law and who may decide a dispute according to justice and fairness. In view of Section 28(2) of the A&C Act, the Arbitral Tribunal was required to decide the disputes in accordance with law and not render a decision in disregard of the same, in the interest of justice and equity.

51. It is relevant to note that there was no dispute that Kone had, in fact, paid the GST. It is also not in dispute that DMRC was required to reimburse the GST in addition to the price as fixed. The Arbitral Tribunal had rejected DMRC's contention that DVAT was payable. In view of the Arbitral Tribunal's findings, the onus to establish that Kone was entitled to an Input Tax Credit in respect of the Excise duty of ₹1,27,30,042/- rested with DMRC. In addition, DMRC was also required to establish that it was entitled to withhold the payment of GST in respect of the un-availed Input Tax Credit in order to successfully resist Kone's claim for payment of the balance amount of GST paid by it. As noticed above, the Arbitral Tribunal has not rendered any decision in respect of the aforesaid issues and has in fact left the disputes in this regard undecided.

52. The impugned award is, accordingly, set aside. The parties would be at liberty to initiate fresh proceedings in this regard.

53. The petitions are disposed of in the aforesaid terms.

VIBHU BAKHRU, J

NOVEMBER 22, 2021
RK