

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

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Decided on : 16.07.2015

+ **FAO(OS) 299/2014**

**DIRECTORATE GENERAL OF HYDROCARBONS MINISTRY
OF PETROLEUM & NATURAL GAS** Appellant

Through: **Mr.K.R.Sasiprabhu, Advocate**

versus

M/S AAMBIENCE EXIM (P) LTD. Respondent

Through: **Mr.D.N.Goburdhan, Mr.Prabal**

**Bagchi and Ms.Somya Rathore,
Advocates**

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

1. The appeal is directed against the order of the learned Single Judge dismissing the objections under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the Act”); the objections were registered as O.M.P.No.475/2014.

2. The disputes which were the subject matter of arbitration before Mr. D. P. Wadhwa (retired Judge, Supreme Court), arose out of the condition in the lease agreement dated 02.07.2007 executed by the parties i.e. the appellant and the respondent (hereinafter referred to as ‘the Claimant’ – the latter was the lessor of the premises. The tenure of the lease was three years; the premises in question was approximately 45,000 sq.ft. on a monthly rent of ₹ 41 per sq.ft. per month. The lease was registered. Within a few days i.e. in fact on 04.07.2007, the Claimant (lessor) wrote to

the appellant stating that with effect from 01.06.2007 the Central Government had imposed service tax liability at 12.36 per cent on the gross value of the service (rental received in respect of commercial premises) and that the same had to be borne by the lessee. The appellant's confirmation in this regard was sought. The appellant replied on 05.07.2007 stating as follows:

“Reference your letter No.AM-S tax/2007 dated 4th July, 2007, this is to inform you that applicable service tax on rent of C-139, Sector 63, Noida will be paid by DGH.”

3. Apparently, the tenure of the original lease ended whereupon the lessee was granted extension – which allowed to be continued up to 31.08.2011. The lessee/appellant had in the meanwhile discharged its commitment towards payment of lease rent as well as the service tax liability and had consistently made the same over to the lessor. During the extended period of time some time, however, the lessee refused to make any further payments towards service tax liability and also withheld that rental amounts for the extended period stating that the service tax liability had been wrongly discharged by it during the previous period. This led to disputes which were referred to arbitration. In the course of arbitration proceedings, the lessee relied upon the following condition in the lease deed:

“That the LESSOR shall be liable to pay any taxes, lease rent/Ground Rent/House Rent etc. regarding the above said property to the concerned authorities/department.”

4. The arbitrator rejected the lessee's contention basing himself upon its conduct. It was also held that the service tax liability- in law – fell upon the

lessee and therefore the payments made could not be characterised as illegal or contrary to contract. In any case, it was held that the lessee was not entitled to relief.

5. Before the learned Single Judge, the appellant relied upon the decision of the Supreme Court in ***Rashtriya Ispal Nigam Limited v. Dewan Chand Ram Saran, (2012) 5 SCC 306*** and contended that even though statutory tax liability may fall upon the lessee or a party, it is open through the contract to shift such liability upon the other party. It was thus emphasised that the insistence upon enforcement of clause 9 was warranted in the circumstances.

6. We have considered the submissions of the parties.

7. In ***Rashtriya Ispal Nigam Limited's case*** (supra) one of the issues which arose for consideration was the shifting of the tax burden upon one who is not subjected to it. In that case, the award of the arbitrator held that the deduction of service tax liability on account of a condition similar to Clause 9 in the instant case was unlawful. The High Court – and subsequently the Supreme Court held that shifting of tax burden was permissible in law.

8. The respondent had relied upon the subsequent judgment of Supreme Court in ***Swan Gold Mining vs. Hindustan Copper Ltd. (2015) 5 SCC 739***.

9. In the present case, the award would indicate that the arbitral tribunal took note of not only clause 9 but also conduct of the parties, especially, the letter exchanged between them on 4th and 5th July, 2007 by which the parties agreed that the burden of new imposed i.e. service tax which came into force in June, 2007 would be upon the lessee. The lessee agreed and paid out the

amounts as and when it fulfilled its contractual rental commitments to the lessor. The arbitral tribunal's determination in this regard by no means can be characterised as patently erroneous or so unreasonable as to warrant interference having regard to the overall circumspection of the facts i.e. acquiescence by the lessee in paying amounts as and when they were due. As a matter of fact, the law enjoins the service recipient to bear the burden of tax, the insistence that it be adhered to on the basis of conduct of parties cannot be characterised as patently illegal under Section 34.

10. The appeal being without any merit is dismissed by virtue of the above reasons.

**S. RAVINDRA BHAT
(JUDGE)**

**DEEPA SHARMA
(JUDGE)**

JULY 16, 2015
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