<u>IN THE HIGH COURT OF JUDICATURE AT BOMBAY</u>

ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL ARBITRATION PETITION NO. 112 OF 2016
ALONGWITH
NOTICE OF MOTION NO. 67 OF 2016

Wadhwa Groups Holding Pvt. Ltd. ….. Petitioner

VERSUS

Vivek Chopra ….. Respondent

ALONGWITH
COMMERCIAL ARBITRATION PETITION NO. 113 OF 2016
ALONGWITH
NOTICE OF MOTION NO. 72 OF 2016

Wadhwa & Associates Realtors Pvt. Ltd. ….. Petitioner

VERSUS

Vivek Chopra ….. Respondent

Mr.Chirag Balsara, a/w. Ms.Usha Gadagkar, Ms.Anulata Saundankar, Hamza Tatli, i/b. Diamondwala & Co. for the Petitioner.

Mr.Sanjay Jain, a/w. Mr.Kalpesh Joshi, Mr.Bhojraj Baral, Mr.Shailesh Prajapati for the Respondent.

CORAM : <u>R.D. DHANUKA, J.</u>

DATE : 15th DECEMBER, 2016

<u>P.C</u>.

By these two petitions filed by the petitioner under section 34 of the Arbitration and Conciliation Act, 1996, the petitioner has impugned the arbitral awards both dated 14th July, 2016 allowing the claims made by the respondent. By consent of parties, both the petitions were heard together and are being disposed of by a common order.

2. The petitioner in Arbitration Petition No.113 of 2016 and in Arbitration Petition No.112 of 2016 are sister concern forming part of Wadhwa Groups of Companies.

3. The respondent is a sole proprietor of the firm Beuno Ventura and is carrying on business of locating premises on lease and leave and licence basis for his clients and charging brokerage/service charges/commission for the service rendered.

4. It was the case of the petitioner that the respondent was making enquiries of availability of premises in the building 'Capital'. Various e-mails were exchanged between the parties. On 2nd December,2010, the respondent sent e-mail to the petitioner recording what transpired in the meeting held between the parties. It was stated in the said e-mail that there was a requirement for office premises of one of the client of the respondent at Platina, 704 which was occupied by another client, for a period of one year and thereafter the client of the respondent would acquire the premises at the Capital. By the said e-mail, the respondent requested the petitioner to confirm by e-mail in respect of the service charges of the respondent for each of the transactions as 2% on deposit along with two months rent plus service tax as confirmed and agreed by the parties in the meeting.

5. It was mentioned that the respondent could arrange for site inspection immediately within 24 hours, once they receive a confirmation mail in respect of the service charges for each of the transactions and that both the parties would immediately close both the transactions. In response of the said e-mail of the respondent to the petitioner, the petitioner vide their e-mail dated 2nd December,2010 enquired about the client of the respondent. On 2nd

December,2010, the petitioner confirmed that their agreement to the brokerage terms was subject to the achieving the price points and terms mentioned in mithili's e-mail.

6. By e-mail dated 11th December, 2010 from the respondent to the petitioner, the petitioner placed on record the confirmation of the petitioner that the petitioner was agreeable to refurbish the office premises at Platina as per the requirements of the client of the respondent at the cost of the petitioner. It was made clear that on receiving the confirmation of all the terms, the respondent would arrange for a meeting and proceed with the documentation process. The respondent further informed that he was waiting for a confirmation of the other terms quoted in e-mail dated 7th December, 2010 alongwith confirmation of the service charges, if the client continues the lease at Capital for the next two terms of 3 years each after initial lock in period of 3 years.

7. The respondent vide their e-mail dated 14th December,2010 confirmed the brokerage terms of the proposed office space to the client of the respondent.

8. There is no dispute that leave and licence agreement came to be entered into between the petitioner and the client of the respondent viz.TPG Capital India Private Limited in respect of the Platina premises. The said agreement was for a period of 3 years with a lock in period of one year. A separate amount of deposit was made by the client of the respondent with the petitioner under the said agreement.

9. The petitioner entered into a separate agreement with the client of the respondent in respect of the Capital premises on 18th March, 2012. The said leave

and licence agreement was for a period of five years with lock in period of three years with a renewal clause. A separate amount of deposit was made by the client of the respondent to the petitioner under the said leave and licence agreement.

10. It is not in dispute that both the agreements were registered on 22nd March, 2012. The respondent thereafter raised invoices in respect of both the agreements upon the petitioner in view of the agreement entered into between the parties by exchanging e-mail.

11. It is the case of the respondent that since the petitioner did not make the payment of the brokerage payable to the respondent, the respondent filed a company petition before this court against the petitioner. The petitioner paid a sum of Rs.60 lacs to the respondent and deposited a sum of Rs.40 lacs in this court. This court directed the Prothonotary and Senior Master to invest the said amount and referred the dispute between the parties to the sole arbitration of a counsel of this court.

12. The respondent herein filed two separate claims before the learned arbitrator, one in respect of the brokerage in respect of the Platina Building and another in respect of the Capital premises. The learned arbitrator made two separate awards arising out of two separate references.

13. Mr.Balsara, learned counsel for the petitioner in Arbitration Petition No.113 of 2016 invited my attention to some of the e-mail exchanged between the parties and submits that insofar as the leave and licence agreement with the client of the respondent in respect of Platina premises is concerned, the said agreement was required to be entered into since the Capital premises was not ready. He submits

that the said leave and licence agreement in respect of Platina premises was as and by way of transit arrangement and within the short span, the petitioner had entered into a separate agreement with the client of the respondent in respect of the Capital premises. He submits that since the transaction between the parties was one and the same transaction, the respondent was not entitled to claim a brokerage in respect of both the transactions. In support of this submission, the learned counsel invited my attention to the aforesaid e-mails exchanged between the parties.

14. It is submitted by the learned counsel that the fact that there was no separate provision for payment of brokerage recorded in the leave and licence between the petitioner and the client of the respondent in respect of the Platina premises and at the same time there was a separate provision for payment of brokerage in respect of the Capital premises, it would clearly indicates that the petitioner was liable to make payment to brokerage only in respect of Capital premises and not in respect of Platina premises.

15. It is submitted by the learned counsel for the petitioner that though there was no separate agreement in respect of the brokerage for Platina premises, the learned arbitrator has awarded separate brokerage in respect of both these premises and has decided contrary to the terms of the contract. He submits that the award is thus in violation of section 28(3) of the Arbitration and Conciliation Act, 1996 and thus deserves to be set aside on that ground alone.

16. It is submitted by the learned counsel for the petitioner that since the period of occupation of the client of the respondent in respect of the Platina premises was for a very short period, the learned arbitrator could not have awarded separate brokerage for both the transactions. He submits that the occupation of the client of

the respondent in respect of the Platina premises was less than six months.

17. The next submission of the learned counsel for the petitioner is that if according to the respondent the petitioner was liable to pay a separate brokerage for both the transactions, the respondent ought to have issued a separate invoices immediately upon execution of the leave and license agreement and not after registration of both the agreements. He submits that the fact that the invoices were issued only after registration of the documents itself would indicate that the claim for brokerage made by the respondent in respect of the Platina premises was an afterthought and not in accordance with the terms and conditions agreed upon by and between the parties.

18. Insofar as the dispute arising out of the Capital premises is concerned, Mr.Balsara learned counsel for the petitioner invited my attention to the two e-mails exchanged between the parties and would submit that there was an oral agreement between the parties by which the respondent had agreed that the cost of renovation in Capital premises would be borne by the respondent and the same would be deducted from the brokerage payable by the petitioner to the respondent. He submits that the learned arbitrator has erroneously interpreted the terms of the agreement and has allowed this claim by overlooking the oral evidence led by the parties.

19. Mr.Jain, learned counsel for the respondent on the other hand led emphasis on the aforesaid e-mails exchanged between the parties and would submit that it was made clear by the respondent in their e-mail dated 2nd December,2010 that the respondent would be entitled to claim a separate brokerage at the rate of 2% of the deposit and two months rent in respect of both the transactions and had called

upon the petitioner to confirm the terms and conditions. He submits that the petitioner had confirmed the said agreement vide their e-mail dated 2nd December,2010 and also subsequent correspondence. He submits that the leave and licence agreement in respect of Platina premises was not for 6 months or for a shorter period but was for three years with a lock in period of one year. He submits that since there was no occupation certificate granted by the MMRDA in respect of Capital premises, the client of the respondent continue to occupy the Platina premises for a period of not less than 18 months. He submits that in respect of both the agreements, there was a separate deposit made by the client of the respondent with the petitioner. He submits that the leave and licence agreement in respect of the Capital premises was for 5 years with a lock in period of 3 years with renewal clause.

20. It is submitted by the learned counsel that the learned arbitrator has interpreted the correspondence exchanged between the parties and has after considering the oral and documentary evidence has rightly awarded the claims made by the respondent. He submits that this court cannot re-appreciate the evidence evaluated by the learned arbitrator in this petition filed under section 34 of the Arbitration and Conciliation Act, 1996.

21. The next submission of the learned counsel for the respondent is that the invoices were issued by the respondent in accordance with the agreement between the parties after both the documents were registered. He submits that when the invoices were issued by the respondent, no objections of any nature was raised by the petitioner.

22. It is submitted by the learned counsel that since the learned arbitrator has

interpreted the terms of the contract entered into between the parties by exchange of e-mail, the interpretation of the learned arbitrator being a possible interpretation, this court cannot substitute the possible interpretation of the learned arbitrator by another interpretation.

23. Insofar as the dispute which is subject matter of Commercial Arbitration Petition No.112 of 2016 is concerned, it is submitted by Mr.Jain, learned counsel for the respondent that there was no agreement between the parties in respect of the reimbursement of the renovation charges alleged to have been incurred by the petitioner in respect of the Capital premises. In support of this submission, learned counsel invited my attention to the e-mails exchanged between the parties. He submits that the respondent had strongly raised objection when the petitioner demanded adjustment of Rs.40 lacs contrary to the agreement between the parties. He submits that the respondent had demanded the entire amount by raising an invoice and had issued a notice under the provisions of the Companies Act, 1956. There was no allegation made by the petitioner alleging oral agreement for reimbursement of Rs.40 lacs. He also invited my attention to the affidavit in reply filed by the petitioner in the company petition in support of his submission that even in the affidavit in reply, it was not the case of the petitioner that they were entitled to adjust a sum of Rs.40 lacs towards the amount allegedly incurred on renovation of the Capital premises.

24. A perusal of the award, which is subject matter of Arbitration Petition No.113 of 2016 clearly indicates that the learned arbitrator has discussed and dealt with various e-mails exchanged by and between the parties and has also referred to the oral evidence of the witnesses examined by the parties. The learned arbitrator has held that there was a independent licence agreement in respect of the Platina

premises having independent and separate terms and conditions. It is held that it could not be said that the transaction in relation to the Platina premises was not an independent transaction. The respondent has provided separate services in respect of both the transactions to the petitioner. The learned arbitrator has rendered a finding that the petitioner herein had agreed to pay to the respondent brokerage at the rate of 2% of the deposit and two months licence fees plus service charges for both the transactions i.e. Capital premises as well as Platina premises. The learned arbitrator also interpreted the agreement recorded in the e-mails and has held that the invoices raised by the respondent were rightly raised in accordance with the terms and conditions of the agreement.

25. The learned arbitrator has also rightly rejected the submission of the learned counsel for the petitioner that the claim made by the respondent was afterthought. It is held that the invoice was raised after leave and licence agreement was registered. The last payment was made as late on 3rd December,2010 when the transaction was in progress.

26. The learned arbitrator has also dealt with the oral evidence of both the parties. The witness of the respondent in his evidence while answering to question no.42 has deposed that the brokerage was payable in respect of the leave and licence transaction after the registration of the agreement was complete.

27. I have perused the documents to which my attention was invited by learned counsel for both the parties and have also perused the impugned award rendered by the learned arbitrator. In my view the learned arbitrator has rightly construed the agreement entered into between the parties recorded in various e-mails and has also rightly dealt with the oral evidence led by the parties. Various findings of

facts are based on the evidence appreciated by the learned arbitrator which findings are not perverse. This court under section 34 of the Arbitration and Conciliation Act, 1996 cannot re-appreciate the evidence which were appreciated by the learned arbitrator.

28. A perusal of the award also indicates that the learned arbitrator has interpreted the terms of the agreement recorded in various e-mails and has rightly held that the petitioner had agreed to pay a separate amount of brokerage in respect of two separate transactions. In my view the interpretation of the learned arbitrator being a possible interpretation, cannot be interpreted by another interpretation by this court in this petition filed under section 34 of the Arbitration and Conciliation Act, 1996.

29. Insofar as submission of Mr.Balsara, learned counsel for the petitioner that there was an oral agreement entered into between the petitioner and the respondent by which the petitioner was entitled to adjust the payment of Rs.40 lacs alleged to have been spent by the petitioner for renovation of the Capital premises is concerned, a perusal of the award rendered by the learned arbitrator indicates that this issue has been dealt with in great detail in the impugned award. The learned arbitrator has held that so called oral agreement was not proved by the petitioner. The petitioner a private limited company.

30. A perusal of the record further indicates that when the winding up notice was issued by the respondent upon the petitioner, no such plea was raised by the petitioner in response to the said notice or in the affidavit in reply filed before the company court alleging oral agreement between the parties for the reimbursement of the amount alleged to have been incurred on renovation of the Capital premises.

The findings of the fact rendered by the learned arbitrator is rendered after considering the oral and documentary evidence. The finding being not perverse cannot be interfered with by this court in this petition.

31. Both the petitions are devoid of merits and are dismissed with cost quantified at Rs.25,000/- in each of the petition which shall be paid by the petitioner to the respondent within two weeks from today.

32. Mr.Balsara, learned counsel for the petitioner seeks operation of stay of this order and prays that the respondent be not permitted to withdraw the amount deposited by the petitioner in this court pursuant to the order passed by the company court and also by this court which application is vehemently opposed by the learned counsel for the respondent. Considering the facts of this case, I do not propose to grant any stay of this order passed by this court.

33. Parties as well as Prothonotary and Senior Master to act on the authenticated copy of this order.

34. In view of dismissal of the petitions, notice of motions do not survive and are accordingly dismissed.

(R.D.DHANUKA, J.)