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

% *Date of decision:* 23.08.2017

+ O.M.P. (COMM) 308/2017

PCR WAREHOUSING LIMITED Petitioner
Through Mr. Jivesh Kumar Tiwari, Adv.

versus

CENTRAL RAILSIDE WAREHOUSE
COMPANY LTD Respondent
Through None.

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

I.A.No.9365/2017(*exemption*)

Allowed subject to all just exceptions.

I.A.No.9366/2017(*condonation of delay*)

This application is filed under Section 5 of the Limitation Act seeking condonation of delay of 13 days in re-filing the accompanying petition. For the reasons stated in the application, the same is allowed and the delay of 13 days in re-filing the accompanying petition is condoned.

O.M.P. (COMM) 308/2017 & I.A.No.9364/2017(*stay*)

1. This petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter to be referred as "the Act") seeking to impugn the award of the learned Arbitrator dated 04.03.2017. Some of the background facts are that the respondent is a Government of India undertaking incorporated under the Companies Act, 1956. It is stated that the respondent came into existence pursuant to an MOU between Ministry

of Railways and Central Warehousing Corporation for the development of warehousing complexes near railway terminals to provide various services to Rail Borne Cargo. On 04.06.2015, respondent invited online tenders, from professionally competent and financially sound parties for utilising covered storage space at RWC, Mysore on "Dedicated Warehousing Basis" on payment of monthly warehousing fees. Pursuant to the tender, the contract was awarded to the petitioner vide Letter of Award dated 16.07.2015. The warehousing fees agreed upon was Rs.5,02,000/- plus applicable service tax. Two months' security deposit was also paid in advance by the petitioner. Vide its joining report dated 17.08.2015, petitioner took over possession of the site and formally executed the agreement dated 17.08.2015. The advance warehousing rent for the month of August, 2015 of Rs.5,22,080/- including service tax was deposited.

2. The case of the petitioner is that after they entered the work site, they noticed that the work site is not fit for taking possession because of heavy roof leakages. It was the grievance of the petitioner that the respondent refused to look into the leakages. Hence, it is urged that on 09.11.2015, the petitioner repudiated the contract and demanded the payback/ refund of Earnest Money Deposit (E.M.D.) and advance rent.

3. On 04.03.2016, the respondent appointed the sole arbitrator Mr. S. Krishanan I.A.S. (Retd.). The petitioner filed preliminary objections before the learned arbitrator which were heard and dismissed on 31.08.2016. The petitioner had raised objection that there was no valid appointment of the arbitrator. Further it was pleaded that the arbitration agreement was invalid on account of the non-registration of the agreement between the parties which was compulsorily registrable and was also not on proper stamp paper.

The order of 31.08.2016 was challenged before this court in OMP No.80 of 2016. The same were dismissed on 05.12.2016. The petitioner also filed SLP before the Supreme Court being No.37685 of 2016 challenging the order of this court dated 05.12.2016. The SLP was also dismissed.

4. The learned Arbitrator has now passed a final award on 04.03.2017. The respondent was held entitled to the licence fees from 17.08.2015 to 31.01.2016 being a total of Rs.25,61,204/- along with simple interest @ 12% per annum and pendente lite interest. A sum of Rs.18,388/- was awarded on account of electricity charges. Cost was also awarded being the share of the arbitrator's fees and towards secretarial expenses and conveyance. The claim of the respondent seeking a sum of Rs.86,90,850/- being Warehousing Fees for 15 months and other expenses was accordingly disposed of.

5. I have heard the learned counsel for the petitioner. The main contention raised by the learned counsel was that the learned arbitrator had wrongly fixed the venue as New Delhi. He submits that no part of cause of action arose in Delhi. The godown in question is located in Mysore and hence, the learned Arbitrator wrongly held proceedings in Delhi. Reliance was placed on the judgment of Division Bench of Madras High Court in ***Central Warehousing Corporation v. A.S.A. Transport & Anr. 2007(Suppl.) Arb. LR 347 (Madras) (DB)***. It is urged that this judgment was passed in a case also relating to the respondent. It was further pleaded that the learned Arbitrator has wrongly concluded that the agreement in question does not require registration. As the Agreement was mandatorily registrable, the same could not be looked into even for purpose of the arbitration agreement. It is further pleaded that the learned Arbitrator has

wrongly concluded that the godown in question could be used by the petitioner and did not have problems relating to leakages.

6. I may first have a look at the order of the learned Arbitrator dated 31.08.2016 on the main submission of the petitioner namely that the arbitration should not have been held in Delhi. By order dated 31.08.2016, the learned Arbitrator had disposed of various preliminary objections raised by the petitioner including the contention that the appointment of the arbitrator is not valid and about the validity of the arbitration agreement as it is contained in an unregistered document. The learned Arbitrator also concluded that as per the agreement between the parties, the arbitration venue is to be determined by the arbitrator at his sole discretion. Accordingly, the arbitration had been held in New Delhi.

7. I may also have a look at the arbitration clause of the agreement dated 17.08.2015. Relevant clause 39 reads as follows:

“39. Arbitration Clause:-

All disputes and differences arising out of or in any way touching upon or concerning this agreement whatsoever shall be referred to the sole Arbitration of any person appointed by the Managing Director, Central Railside Warehouse Company limited, New Delhi. The award of such arbitrator shall be final and binding on the parties to this agreement. It is a term of this agreement that in the event of such arbitrator to whom the matter is originally referred/being transferred or vacating his office or being unable to act for any reason, the Central Railside Warehouse Company Ltd. at that time shall appoint any other person to act as Arbitrator in accordance with

the terms of this agreement. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessors. It is also a term of this contract that no person other than a person appointed by the Managing Director, Central Railside Warehouse Company Ltd New Delhi as aforesaid should act as Arbitrator and if for any reason that is not possible the matter is not to be referred to arbitration at all. The Arbitrator shall give a reason of his award.

Provided further that any demand for arbitration in respect of any claim (s) of the party or of the Company under the contract shall be in writing and made within one year of the date of termination or completion (expiry of the period) of the contract and where this provision is not complied with, the claim (s) of the party shall be deemed to have been waived and absolutely barred and the CRWC shall be discharged and released of the liabilities under the contract.

The venue of Arbitration shall be at such place as may be fixed by the Arbitrator at his sole discretion.

The arbitral proceedings in respect of dispute shall commence on the date on which the Arbitrator calls upon the parties to file their claim and defence statement.

The work under the contract shall, if reasonably possibly, continue during the arbitration proceedings and no payment due or payable to the contractor shall be withheld on account of such proceedings.

The cost of arbitration shall be borne by parties as per the decision of the Arbitrator.

The arbitrator shall give separate award in respect of each dispute of difference referred to him.

Subject as aforesaid, the Arbitration & Conciliation Act, 1996 shall apply to the arbitration proceedings under this clause.”

8. Hence, as per the afore-noted clause of the agreement, the venue of the arbitration should be such place as may be fixed by the arbitrator at his sole discretion.

9. Section 20 of the Act reads as follows:

“20. Place of arbitration.—

(1) The parties are free to agree on the place of arbitration.

(2) Failing any agreement referred to in sub-section (1), the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(3) Notwithstanding sub-section (1) or sub-section (2), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property”

10. Hence, as per the afore-said provision, the parties are free to agree on the place of the arbitration. In the eventuality that there is no agreement regarding the place of arbitration, the place of arbitration has to be determined by the arbitrator having regard to the facts and circumstances of the case including the convenience of the parties. Reading of the arbitration clause in the present case would show that the parties had agreed to leave the venue at the sole discretion of the arbitrator. Hence, what is applicable to the facts of this case is Section 20(1) of the Act.

11. The Supreme Court in ***Indus Mobile Distribution Pvt. Ltd. V. Datawind Innovations Pvt. Ltd. & Ors. (2017) 3 Arb.LR 1*** noted with

approval the judgment of the Supreme court in ***Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc., (2012) 9 SSC 552*** and held as follows:

“10. We are of the opinion, the term “subject-matter of the arbitration” cannot be confused with “subject-matter of the suit”. The term “subject-matter” in Section 2(1)(e) is confined to Part I. It has a reference and connection with the process of dispute resolution. Its purpose is to identify the courts having supervisory control over the arbitration proceedings. Hence, it refers to a court which would essentially be a court of the seat of the arbitration process. In our opinion, the provision in Section 2(1)(e) has to be construed keeping in view the provisions in Section 20 which give recognition to party autonomy. Accepting the narrow construction as projected by the learned counsel for the appellants would, in fact, render Section 20 nugatory. In our view, the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place. This was necessary as on many occasions the agreement may provide for a seat of arbitration at a place which would be neutral to both the parties. Therefore, the courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process. For example, if the arbitration is held in Delhi, where neither of the parties are from Delhi, (Delhi having been chosen as a neutral place as between a party from Mumbai and the other from Kolkata) and the tribunal sitting in Delhi passes an interim order under Section 17 of the Arbitration Act, 1996, the appeal against such an interim order under Section 37 must lie to the courts of Delhi being the courts having supervisory jurisdiction over the arbitration proceedings and the tribunal. This would be irrespective of the fact that the obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only arbitration is to take place in Delhi. In such circumstances, both the courts would have jurisdiction i.e. the

court within whose jurisdiction the subject-matter of the suit is situated and the courts within the jurisdiction of which the dispute resolution i.e. arbitration is located.” [para 96]

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20. A conspectus of all the aforesaid provisions shows that the moment the seat is designated, it is akin to an exclusive jurisdiction clause. On the facts of the present case, it is clear that the seat of arbitration is Mumbai and Clause 19 further makes it clear that jurisdiction exclusively vests in the Mumbai courts. Under the Law of Arbitration, unlike the Code of Civil Procedure which applies to suits filed in courts, a reference to “seat” is a concept by which a neutral venue can be chosen by the parties to an arbitration clause. The neutral venue may not in the classical sense have jurisdiction - that is, no part of the cause of action may have arisen at the neutral venue and neither would any of the provisions of Section 16 to 21 of the CPC be attracted. In arbitration law however, as has been held above, the moment “seat” is determined, the fact that the seat is at Mumbai would vest Mumbai courts with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties.”

12. Hence, the seat of the arbitration need not be at the place where the subject matter of the suit arises. Merely because the godown in question was located at Mysore would not mean that the seat of arbitration could not be in Delhi. The arbitration clause of the agreement specifically leaves it to the discretion of learned Arbitrator. The learned Arbitrator had chosen to hold the arbitration proceedings in Delhi. Merely because the godown in question which is the subject matter of the arbitration proceeding was located at Mysore would not be a ground to hold that the said decision of the learned arbitrator to hold arbitral proceeding in Delhi was illegal or contrary to the terms of the agreement or the provisions of the Section 20(1) of the Act.

There are no cogent reasons to find fault in the said decision of the learned arbitrator.

13. The reliance of the learned counsel for the petitioner on the judgment of the Division Bench of the Madras High Court in ***Central Warehousing Corporation v. A.S.A. Transport and another (supra)*** is misplaced. That was the case in which the award of the arbitrator was set aside on account of non-consideration of claims 2 to 7 made by the respondent before the learned Arbitrator which was said to go to the root of the matter. No doubt, the said agreement which was subject matter of arbitration had a similar clause as the one which is subject matter of the present arbitration proceedings namely that the arbitrator has the discretion to choose the venue. The Division Bench of the Madras High Court held as follows:

“16. In respect of the other point - venue of the arbitration proceedings, it is not as if the appellant Corporation is having office or officers only at Delhi. When the dispute has arisen at Chennai, there is no valid or acceptable reason for appointment of an arbitrator at Delhi directing the contractor, the respondent herein to appear before him at Delhi or bear the travelling and boarding expenses of the arbitrator, who is stationed at Delhi. It is not only against Section 20(1) of the Act, but against the very purpose of the enactment. The cause of action arose at Chennai. The parties as well as the witness are at Chennai. The appellant is also having office and officers to adjudicate the dispute at Chennai. The appellant would have very well appointed an arbitrator who is stationed at Chennai. That would have given a real opportunity as intended in law to the respondent to have his dispute adjudicated In this case, the award passed is one against the last limb of Section

34(2)(a)(iii) of the Act. Hence, the award is liable to be set aside on that ground also.”

14. It is clear that the Division Bench has gone on the basis of the fact that cause of action arose in Chennai. Clearly this decision has been passed much prior to the judgment of the Supreme Court in the case of ***Indus Mobile Distribution Pvt. Ltd. V. Datawind Innovations Pvt. Ltd. & Ors.(supra)*** and would have no application to the facts of the case.

15. The next point urged by the petitioner was that the agreement being a lease was compulsorily registerable. The learned Arbitrator concluded that the agreement dated 17.08.2015 is not a lease but permits the petitioner to enter and utilise the premises. The petitioner has to act under the overall supervision and guidance of the respondent. The award relies upon the judgment of the Supreme Court in ***Associated Hotels of India Ltd. Vs. R.N. Kapoor AIR 1959 SC 1262/(MANU/SC/0168/1959)***, to hold that the document is a Licence Deed. The Supreme Court had in the said judgment held as follows:

“33. Under the aforesaid section, if a document gives only a right to use the property in a particular way or under certain terms while it remains in possession and control of the owner thereof, it will be a licence. The legal possession, therefore, continues to be with the owner of the property, but the licensee is permitted to make use of the premises for a particular purpose. But for the permission, his occupation would be unlawful. It does not create in his favour any estate or interest in the property. There is, therefore, clear distinction between the two concepts. The dividing line is clear though sometimes it becomes very thin or even blurred. At one time it was thought that the test of exclusive possession was infallible and if a person was given exclusive possession of a premises, it would conclusively establish that he was a lessee. But there was a

change and the recent trend of judicial opinion is reflected in *Errington v. Errington* [1952] 1 All E.R. 149, wherein Lord Denning reviewing the case law on the subject summarizes the result of his discussion thus at p. 155:

"The result of all these cases is that, although a person who is let into exclusive possession is, *prima facie*, to be considered to be tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy."

16. A perusal of the agreement would show that there are various clauses putting restrictions on the utilisation of the space by the petitioner. Respondent has supervisory control over the godown. Clause 4 of the agreement dated 17.08.2015 provides that the respondent shall permit the petitioner to enter upon and use the facility for handling and transit storage of Rail Borne Cargo. Clause 22 of the agreement states that the petitioner was to carry out their transaction in the godown under the overall discipline of the respondent. Similarly, various other terms of the agreement places restriction on the user of the space by the petitioner. In the light of these clauses in the agreement, the interpretation of the document as a licence deed is a plausible interpretation by the learned arbitrator.

17. The settled legal position is that interpretation of the contract is within the domain of the arbitrator. Reference may be had to the judgment of the Supreme Court in case titled ***McDermott International Inc. vs. Burn Standard Co. Ltd. and Ors.*** (12.05.2006 - SC) : MANU/SC/8177/2006 it was held as follows:

"72. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement, is within the jurisdiction

of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot, be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [See Pure Helium India (P) Ltd. v. Oil & Natural Gas Commission MANU/SC/0803/2003: AIR2003SC4519 and D.D. Sharma v. Union of India MANU/SC/0419/2004: (2004)5SCC325]. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award.”

18. Accordingly, the interpretation of the document as a licence deed is a plausible interpretation. There are no reasons to interfere with the same.

19. Regarding plea of leakages as raised by the petitioner, the learned Arbitrator has recorded a finding of fact that as per the NIT documents, the petitioner ought to have exercised due diligence. The agreement clearly expressed that the petitioner took over on “as is where is basis”. There was a pre-bid conference scheduled for 23.06.2015 where the issue of alleged leakage, trade unions and site logistics could have been raised by the bidders. Hence, the Learned Arbitrator concluded that the petitioner cannot raise any dispute on the condition of the warehouse after entering into the agreement.

20. Clause 2 of the Agreement between the parties reads as follows:

“The second party shall take over the premises of the RWC on “as is where is basis” after full due diligence in respect of the said facilities within fifteen days (15 days) from the date of

award or a later date as decided by CRWC. He will ensure up keep and cleanliness of the warehouse/office premises and godowns to the satisfaction of Terminal Manager.”

Hence, the petitioner took over the premises on “as is where is basis” after full exercise of due diligence in respect of the said facility. As rightly noted in the award, the petitioner cannot now turn around and argue that the facility had leakages etc.

21. Even otherwise a perusal of the cross-examination of Sh.Rajesh Kumar Singh who had appeared on behalf of the respondent would show that he has withstood the cross-examination effectively. He has denied that there was any leak in the roof at the time of handing over the same to the petitioner. He has also clarified that there was an inspection that has taken place on the complaint of the petitioner and the leakage was minor in nature and only some droplets were found which could easily have been corrected. Hence, keeping in view the above facts and provisions of the agreement, the learned arbitrator has rightly concluded that the petitioner cannot wriggle out of its liability on the plea of so called leakage to the storage facility.

22. There is hence no merit in the plea of the petitioner. No grounds are made out to set aside the Award. The present petition is accordingly dismissed. All the pending applications, if any, are also dismissed.

JAYANT NATH, J.

AUGUST 23, 2017/raj/rk