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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on : July 24, 2018

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Judgment pronounced on decision : August 27, 2018

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FAO (OS) (COMM) 40/2018 & CM APPL. 9333-9334/2018

SPICEJET LTD. Appellant

Through Mr. Samrat Nigam, Mr. Amit
Punj & Mr. Shaurya Kuthiala,
Advs.

versus

SIESTA HOSPITALITY SERVICES LTD. Respondent

Through Ms. Awantika Manohar and
Mr. Dhawesh Pahuja, Advs.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A. K. CHAWLA

J U D G M E N T

A.K. CHAWLA, J.

1. In this appeal under Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 read with Section 37 of the Arbitration and Conciliation Act, 1996 (in short 'the Act') the appellant SpiceJet Ltd. (in short 'SpiceJet') impugns the order of 07.12.2017 by a learned Single Judge. The impugned order

allowed a Section 34 petition challenging the arbitration award of a Tribunal dated 06.12.2014.

2. Briefly, the facts for this appeal are that SpiceJet, which operates air carriage services to and from various destinations in India, needed residential accommodation for its crew in various cities. In the year 2007, it had contacted Siesta (which provides hospitality services). SpiceJet wished to avail Siesta's corporate residency facilities. After negotiation, inspection and exchange of e-mail, SpiceJet started availing the facilities provided by Siesta to it, at two locations i.e. Malad and Powai, Mumbai. Later, on 14.02.2008, SpiceJet and Siesta, signed a Service Agreement for supply of corporate residence facilities at Bangalore/Mumbai/Chennai/Gurgaon/ Delhi and other locales in India, on agreed terms and conditions stipulated, in the Service Agreement ("the service agreement" hereafter). The service agreement contained an arbitration clause. Due to disputes, a reference came to be made to a sole Arbitral Tribunal.

3. Siesta claimed a sum of ₹2,27,38,059/- for the alleged unpaid rentals from 31.12.2007 to 28.02.2010 besides interest, in all amounting to ₹3,33,18,913/- with interest. The claim proceeded on the ground that the properties at Powai and Malad were covered by the Service Agreement. This was disputed to by SpiceJet. The parties led rival evidence on whether the properties at Powai and Malad were governed by the Service Agreement. The Tribunal held that the properties at Powai and Malad were

not subject matter of the Service Agreement. The reasons and the conclusions so given in the award are, as follows:

"23. The main controversy between the parties which requires adjudication is as to whether the Agreement dated 14.02.2008 (Exhibit C-2) between the parties was in respect of the properties at Powai and Malad also or that it was for the properties to be made available by the claimant to the respondent in future only. The determination of this question is important for the reason that according to the claimant, the properties at Powai and Malad also were covered by the terms and conditions of Exhibit C-2 and as such the claims being raised by the claimant in terms of the said Agreement are made out. However, according to the Respondent, the properties at Powai & Malad were only a short term arrangement between the Parties much prior to the execution of the Exhibit C-2 and as such the Claims being raised by the Claimant on the basis of Exhibit C-2 are not maintainable. According to the Respondent, the properties at Powai and Malad were provided by the Claimant to the Respondent on the basis of the e-mails dated 02.11.2007 and 06.11.2007 only (Exhibit C1).

24. The witnesses examined by the Parties have supported the respective pleas of the Claimant and the Respondent. The Agreement Exhibit C-2 dated 14.02.2008 had mentioned in the recitals that the Respondent required Corporate Residence Facilities at Bangalore, Mumbai, Chennai, Gurgaon, Delhi and other locations in India and the Supplier (Claimant) had agreed to provide the same on the terms and conditions mentioned in the Agreement. It was nowhere recorded that the two properties already provided by the Claimant to the Respondent at Powai and Malad were also covered by the terms and conditions contained in Exhibit C-2. It is not at all understandable as to why it could not be recorded in Exhibit C-2 that the earlier arrangement in regard to the aforesaid two properties was a temporary arrangement as the Parties

had agreed to enter into a format Agreement later on and as such this Agreement and its terms would be applicable to the aforesaid two properties also. The plea of Claimant that at the time of providing these two properties the parties had agreed that a formal agreement would be entered into soon was not recorded in the two E-mails.

25. The Contact Schedule also did not mention the aforesaid two properties and to the contrary the e-mails dated 02.11.2007 and 06.11.2007 (Exhibit C-1), which were in respect of "Quiescent Heights" at Malad had enumerated all the necessary terms and conditions regarding the supply of the residential accommodations by the Claimant to the Respondent. It is seen that the Claimant in its e-mail dated 02.11.2007 had specifically stated that it was a short-term arrangement. Not only, Tariff per Room was mentioned the other services were also enumerated which were to be provided by the Claimant to the Cabin Crew of the Respondent. Some of the services were included in the Tariff and some services were to be paid for separately. In para 3(g) of the Statement of Claim, the Claimant itself admitted that the Respondent engaged the services of the Claimant only for Powai and Malad Properties.

26. The most important aspect of the e-mail dated 02.07.2007 sent by the Claimant to the Respondent was that it contained terms of Cancellation also. The Master Services Agreement referred to in this e-mail has not been placed on record. The Respondent sent a Reply dated 06.11.2007 to this e-mail and confirmed that it was taking property at Malad (West) till further notice. It appears that the Property at Powai was also taken by the Respondent on similar terms and conditions but these e-mails did not convey that the Parties had agreed to enter into these arrangement subject to entering into a of formal Contract Later. Therefore, the fact that the Agreement (Exhibit C-2) dated 14.02.2008 does not mention the aforesaid two properties and the e-mails dated 02.11.2007

and 06.11.2007 do not contain any recital that the formal Contract would be entered into later; shows that the two properties at Malad and Powai were not subject to the terms and conditions of the Agreement dated 14.02.2008 as alleged by the Claimant. Denied E-mails are not proved on record and as such cannot be read.

27. The statement of RW-2 in this regard has remained unshaken. It appears that inspite of the fact that no property was provided by the Claimant to the Respondent in terms of Exhibit C-2, the Claimant is trying to cover the aforesaid two properties by the terms of the said Agreement, although these were provided by the Claimant to the Respondent much before the Agreement Exhibit C-2 and were governed by the terms and conditions of the two e-mails (Exhibit C-1). The Statement of Claim itself reveals that no property was taken from the Claimant after Exhibit C-2 as the Respondent's Crew had started making complaints regarding services being provided by the Claimant in the properties at Powai and Malad.

28. Since the Agreement Exhibit C-2 does not cover the properties at Malad and Powai, the Termination Clause No.10 as contained in Exhibit C-2 and the Lock-in period of 24 months as stipulated therein does not apply to these properties. The evidence on record shows that the Rooms in these properties were being made available by the Claimant to the Respondent on per-day basis and included various services. It is not at all the case of the Claimant that the rooms were put at the disposal for the Respondent for a particular period for the exclusive use of its Crew. The stipulation regarding cancellation charges militates against the plea of the lock-in period as raised by the Claimant.

29. The effective date as mentioned in Clause 1(v) of the Exhibit C-2 cannot be interpreted so as to cover the two properties in as much as it was in relation to the properties to be provided by the Claimant to the Respondent in future only which were never obtained by

the Respondent from the Claimant. Clause 3 of the Agreement speaks of dedicated Corporate Residences which was not the situation in respect of the two properties at Powai and Malad.

30. The Termination Clause No.10 as contained in Exhibit C-2 was also contrary to the terms and conditions contained in emails (Exhibit C-1) in as much as it provided for atleast 30 days prior written Notice to the Claimant whereas the arrangement under the emails (Exhibit C-1) was till further Notice only and there was no such stipulation that a 30 days or 90 days Notice was required to be issued by the Respondent to the Claimant before stopping the use of the property. RW-2 has stated on oath that the rooms in these properties were being provided by the Claimant to other Airlines and Guests also which could not be controverted and as such I have not hesitation in holding that the properties at Powai and Malad were not made available to the Respondent by the Claimant under the Agreement dated 14.02.2008 (Exhibit C-2) and as such the terms and conditions of the said Agreement are not applicable to these two properties."

4. Siesta, in its petition under Section 34, objected to the award. The learned Single Judge set aside the award by the impugned order. The Single Judge observed that the Tribunal did not consider SpiceJet's reply dated 17.12.2008 to the notice issued by Siesta and that the reply suggested that the Service Agreement governed the relationship between the parties with regard to the properties at Malad and Powai and that, the other material and evidence led to that effect was not adverted to by the Tribunal.

5. The reasons and the conclusions of the learned Single Judge in the impugned order dated 07.12.2017, are as follows:

“5. I have considered the submissions made by the parties. The learned Arbitrator has placed reliance on the e-mails dated 02.11.2007 and 06.11.2007 to conclude that the properties in disputes would be governed by these e-mails and not by the Service Agreement. E-mail dated 02.11.2007 suggests that a “Master Service Agreement” was attached thereto. This email was in relation to the property at Malad. There is another e-mail dated 06.11.2007 from the petitioner to the respondent which states that the parties would be entering into a “Pan India Tie Up”. E-mail dated 15.11.2007 from the respondent to the petitioner speaks of premises at Mumbai, Ahmedabad, Kolkata and Chennai. There are other e-mails also exchanged between the parties. These e-mails pre-date the Service Agreement dated 14.02.2008. Clearly, the parties were negotiating for hiring of corporate residence facility by the respondent from the petitioner in various cities and this eventually culminated into the ‘Service Agreement’ dated 14.02.2008. A few terms of the Service Agreement, relevant for the purpose of present adjudication, are reproduced herein:-

“RECITALS

SpiceJet requires Corporate Residence’s facility at Bangalore/ Mumbai/ Chennai/ Gurgaon/ Delhi and other locations in India. The Supplier has agreed to provide such Corporate Residence facility on the terms and conditions as mentioned in the Agreement.

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(XIV) Dispute Resolution

This Contract shall be governed by the laws of India. All disputes arising out of, in connection with or in relation to this Agreement shall in the first instance be

settled through mutual discussions between the Parties. Failing resolution of such disputes within a period of 15 days from the first written notice of dispute from either Party, all such disputes shall be referred for Arbitration which shall be governed under the Arbitration and conciliation Act, 1996. Each party shall appoint one person as its Arbitrator and the two Arbitrators so appointed shall appoint a third Arbitrator. The seat of Arbitration will be New Delhi and the language shall be English. The Parties agree to submit to the exclusive jurisdiction of the Courts located in Delhi, India as regards any disputes, claims or matters arising under or in relation to this Agreement.

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Annexure I

Details of Corporate Residence

LOCATION : MUMBAI

ADDRESS OF THE PREMISES

1. Flat No. 102, Quiscent Heights, Mind Space, Malad (W), Mumbai-4 rooms.

2. Flat No(s) 201, 204, 205, 206, Panchsmruti Apartments, Andheri (E), Mumbai aggregating upto 7 rooms”.

6. Perusal of the above clause would suggest that the Service Agreement was executed to formalize the “Pan India” relationship between the parties including the properties at Powai and Malad, which were the subject-matter of dispute between the parties before the Sole Arbitrator. The above quoted Annexure-1 of the agreement has not been adverted to by the Arbitrator. The learned counsel for the respondent could not deny that the two properties mentioned in the Annexure-1 quoted above are

the properties at Malad and Powai, that were the subject matter of the claim before the Arbitrator.

7. *The Arbitrator has further not referred to the reply dated 17.12.2008 to the legal notice sent by the respondent to the petitioner. In the reply repeated reference was made to the Service Agreement dated 14.02.2008 to deny the claim of the petitioner. Clearly the respondent itself was of the view that the Service Agreement is governing the relationship between the parties with respect to the properties in question.*

8. *As noted above, the Service Agreement provided for Arbitration before the Arbitral Tribunal consisting of three arbitrators. This was mutually amended to a Sole Arbitrator when the claimant raised the disputes with respect to the above two properties and sought for reference of the same to arbitration. Such change was made without any reservation to the effect that the Service Agreement would not apply to the dispute raised by the petitioner. The effect of the above correspondence has again not been adverted to by the learned Arbitrator.*

9. *In view of the above, the submissions of the learned counsel for the respondent that the Arbitrator has merely interpreted the agreement between the parties and such interpretation cannot be interfered with by this court in exercise of its jurisdiction under Section 34 of the Act, cannot be accepted. The Arbitrator has, in my opinion, ignored vital evidence that was led before him. This was not a question of interpretation but of giving effect to the documents and evidence that had been led before the Arbitrator. It is not as if the Arbitrator after discussing these documents has come to a conclusion as, if that was the case, this Court, may not have interfered with such finding. As the Arbitrator has completely failed to consider these documents, this Court finds that the Arbitral Award is liable to be set aside.*

10. The submissions of the respondent that the above finding would have no effect on the final conclusion of the Sole Arbitrator as the Arbitrator has also held that the petitioner/claimant had not filed any statement of account in support of its claim and therefore, the Award can be sustained on this ground alone, also cannot be accepted. Reading of the Award clearly shows that, having come to the conclusion that the Service Agreement dated 14.02.2008 had no application to the claim of the petitioner/claimant, the learned Arbitrator proceeded on the basis that terms of this agreement need not be considered by him. I have already held that the Service Agreement would be applicable to the disputes between the parties, therefore, what would be the effect of the terms thereof had to be considered by the learned Arbitrator. As he has not considered the same, the Award cannot be sustained."

6. Importantly, the impugned order proceeds on the premise that the settlement agreement was the result of the emails exchanged *inter se* the parties and that, Annexure -I, which mentions the corporate residences in the agreement dated 14.02.2008, was a part of the settlement agreement and that was not considered or had escaped the attention of the learned Tribunal. The other issue considered by the learned Single Judge is with respect to the statements made in the reply dated 17.12.2008 given on behalf of SpiceJet on the receipt of Siesta's notice (dated 19.11.2008).

7. Siesta's argument was that for the facilities provided by it to SpiceJet prior to the execution of the Service Agreement, the emails exchanged had set out the terms and conditions. Siesta

urged that such terms and conditions of providing facilities, were never subject to review on the execution of the Service Agreement.

8. Counsel for SpiceJet argued that the Single Judge erred in law, in concluding that since the annexure was not referred to, the two properties were involved and further that two letters too were not adverted, the award could not be sustained, is clearly contrary to the record. It was submitted that the question of contract interpretation is within the exclusive domain of an arbitrator, which should rarely, if never, be interdicted under Section 34 proceedings and that there was no patent error of law, warranting interference with the award.

9. Counsel for Siesta on the other hand urged this court to not to interfere with the Single Judge's decision stating that the impugned judgment is well considered and soundly premised. It was argued besides that the terms of the agreement were not subject to any kind of review on execution of the service agreement.

10. The Tribunal adverted to several vital aspects of the matter elaborately; dealt with the diverse facts, circumstances and the aspects of the matter and made detailed observations in support of its findings. This Court notices at the same time, that the Service Agreement, which was undisputedly signed by the parties on 14.02.2008 and produced as Ex.C-2, contains a condition of

vital relevance to the subject. Clause 12 (xiii) of the Service Agreement Ex.C-2 reads, as under:

"This agreement constitutes the entire agreement and understanding between the parties relating to the subject matter. Except as may be expressly stated in this Agreement, it supersedes and cancels all prior agreements, statements, representations, understandings, negotiations and discussions, whether oral or written, between the parties.

Each of the parties acknowledges and agrees that in entering into this Agreement it does not rely on any statement representation, warranty or understanding made prior to this Agreement save to the extent that such statement, representation, warranty or understanding is incorporated into this Agreement."

11. The above stipulation in the Service Agreement, this Court observes, was not adverted to by the learned Single Judge nor did any party even canvass it before this Court during the course of hearing. Was this clause in the Service Agreement by itself not sufficient to make clear the intention of the parties entering into such agreement? Certainly, it was. This particular condition clarifies that the Service Agreement was to govern the services to be provided by Siesta subsequent to its execution, i.e. 14.02.2008 onwards and that, any earlier arrangements or business transactions, were severed therefrom. This clause also supports the conclusions arrived at by the learned Tribunal.

12. Another aspect that is apparent to this Court is the reference to Annexure-I in the impugned order of the learned

Single Judge. Annexure-I, as reproduced in the impugned order reads as follows:

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Annexure I

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ADDRESS OF THE PREMISES

1. Flat No. 102, Quiscent Heights, Mind Space, Malad (W), Mumbai-4 rooms.

2. Flat No(s) 201, 204, 205, 206, Panchsmruti Apartments, Andheri (E), Mumbai aggregating upto 7 rooms".

13. This Court notices that the service agreement does not incorporate in its recitals any Annexure-I. An apparent error appears to have therefore crept in, in the impugned order to that effect. On a careful scrutiny of the terms incorporated in the Service Agreement (Ex.C-2), this court notices that this contract had to be added with a separate annexure-*only as regards the rates applicable to be decided mutually on city basis from time to time*. This annexure does not appear to have been on record either before the learned Arbitrator or before the learned Single Judge nor anything to that effect, was canvassed before this Court. Be that as it may, the document (i.e. the annexure), which was in

relation to the rates of the facilities to be provided by Siesta, is not the Annexure-I, that was taken note of by the learned Single Judge, as a recital of the Service Agreement Ex.C-2. In these given circumstances, it cannot be said that such annexure/document was either not considered or had escaped the attention of the learned Arbitrator necessitating interference of the award by the learned Single Judge. It is sufficient to observe that if, none of the parties chose to either highlight or urge the absence of such document or omit to lead any evidence to prove it, the reasoning or the award of the Tribunal cannot be faulted with. The conclusions so drawn by the learned Arbitrator, in our considered view, were quite logical and reasonable.

14. The court is also of the opinion that any statement in the reply to the notice, could not change the original character of the agreement amongst the parties and therefore, in our considered view, any weightage given to that effect by the learned Single Judge, was not warranted in objections under Section 34.

15. The Supreme Court, in *Associate Builders vs. Delhi Development Authority*, (2015) 3 SCC 49 has reiterated the *ratio* of its judgment in *Steel Authority of India Ltd. vs. Gupta Brother Steel Tubes Ltd.*, (2009) 10 SCC 63 that an error by the Arbitrator relating to interpretation to contract is an error within his jurisdiction and is not an error on the face of the award and is not amenable to correction by the courts. The legal position is no longer *res integra* on this aspect; the Tribunal is the final arbiter

of resolution of disputes amongst the parties and the award is not open to challenge on the ground that the Arbitrator has reached at a wrong conclusion. Unless the award discloses a patent error of law or a manifest approach in the proceedings leading to reasoning that no reasonable individual in like circumstances could have adopted, the award cannot be interdicted. Consequently, this court is of the considered view that in the given facts and circumstances of the case, the impugned order of the learned Single Judge is not sustainable.

16. For the foregoing reasons, the appeal has to succeed. The impugned order dated 07.12.2017 of the learned Single Judge is set aside. Consequently, the objections filed by Siesta under Section 34 of the Act against the award dated 06.12.2014 stand dismissed. The appeal is allowed; there shall be no order as to costs.

A. K. CHAWLA, J

S. RAVINDRA BHAT, J

AUGUST 27, 2018

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