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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 30th August, 2018.

+ **O.M.P. 389/2009**
INDIA TOURISM DEVELOPMENT CORPORATION
LIMITED Petitioner
Through: Mr. Ravi Sikri, Senior Advocate with
Mr. Neelesh Sinha and Ms. Sishani
Singh, Advocates. (M:9717462905)
versus
M/S MAYAR HEALTH RESORT LTD Respondent
Through: Ms. Manjula Gandhi, Mr. Shivanshu
Kumar and Mr. Aditya Kapoor,
Advocates. (M:9044888880)

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996, (hereinafter, “the Act”) challenging the award dated 6th April, 2009 passed by the learned Sole Arbitrator, Mr. L. C. Jain.
2. The brief background is that the Respondent had taken space in the Ashoka Hotel for setting up a Spa and Health Club in technical assistance with M/s. Serena Spa Pvt. Ltd., as per license deed dated 1st September, 2003 for a period of 10 years, commencing from 1st March, 2004. The premises, which measured approximately 20,000 square feet, was taken on an “as is where is” basis.
3. The Petitioner alleges that the Respondent violated various terms and conditions, which resulted in disputes between the parties. CS(OS) No. 1038/2007 came to be filed before this Court by the Respondent. A Local Commissioner was also appointed. Thereafter, a Section 8 application was filed and the matter was referred to arbitration before the Sole Arbitrator.

4. The primary grievance of both the parties is with regard to the exact area under occupation and possession of the Respondent. While the Petitioner contends that the area under occupation of the Respondent, measures approximately 24,000 sq. feet, it is the stand of the Respondent that area under their occupation is around 15,000 sq. feet. The learned Arbitrator has relied on the report of the Local Commissioner appointed by this Court in the suit, who carried out the measurements, and held that since the said report was not challenged, the area mentioned by the Local Commissioner should be taken to be correct. The Award has been passed on the said basis.

5. Mr. Ravi Sikri, learned Senior Counsel, who appears for the Petitioner submits that there were three reports, which were on record and the Arbitrator erred in taking into consideration the report of the Local Commissioner. His specific grievance is against the finding in the award at page 44, which reads as under:

“The third report is of the court commissioner who was appointed by the Hon’ble Delhi High Court in the matter of Mayar Health Resorts Pvt. Ltd. Vs. ITDC etc. in CS(O.S.) No. 1038 of 2007 and the court commissioner visited the spot along with the Draftman and inspected the site in presence of both the parties and both the parties have duly signed the measurements taken by the court commissioner. This petition was filed by the respondents before the Hon’ble Delhi High Court and subsequently the matter was directed to be referred to Arbitration as there is a specific clause in the licence deed for reference of the matter to Arbitration in case of any dispute and i.e. why these arbitration proceedings have taken place.

The court commissioner in his report dated 14.11.2007 has submitted that the total area in

possession of respondents excluding the common area comes to 19569 sq. ft. which is approximately to 20,000 sq.ft. area as contemplated in the license deed dated 01.09.2003 for a period of 10 years commencing from 01.04.2004 till 28.02.2014. The report of the Court Commissioner has not been challenged by the claimants either before the Hon'ble Delhi High Court who appointed the Court Commissioner for taking the measurements and where the Court Commissioner has filed the report or either in the present arbitration proceedings. So in absence of non- challenge of the report of the Court Commissioner either before the Hon'ble Delhi High Court or before the Arbitral Tribunal in the present Arbitration Proceedings has attained finality and is binding on both the parties.”

6. His submission is that the learned Arbitrator's finding that the Petitioner did not challenge the report of the Local Commissioner, and hence it has attained finality and is binding between the parties, is erroneous. It is his submission that the Petitioner never had an occasion to challenge the said report, inasmuch as the suit was filed on 29th May, 2007 and the Local Commissioner was appointed on 31st May, 2007. Thereafter, the local commission was executed on 12th June, 2007. However, the matter was referred to arbitration on 28th April, 2008. The report of the Local Commissioner is dated 14th November, 2007. However, since the Respondent had moved an application under Section 8, neither party went into the correctness of the Local Commissioner's report. Thus, at the time of reference to arbitration, the Local Commissioner's report was neither accepted nor rejected by either party. Thus, the finding of the Arbitrator that the Local Commissioner's report had attained finality is incorrect.

7. On the other hand, learned counsel for Respondent submits that the

Arbitrator has recorded that there were three reports on record i.e. the first being that of M/s. Semac Pvt. Ltd., dated 28th April, 2006, second report being of a team of the CTE (Chief Technical Examiner), Central Vigilance Commission, dated 10th August, 2006 and the report of the Court Commissioner in CS (OS) 1038/2007, dated 14th November, 2007. According to the learned counsel for the Respondent the report of the Local Commissioner, though not accepted by the Respondent, was placed on record by the Respondent. The Respondent took the stand that the actual area in occupation was approximately 15,000 Sq. Feet but at the same time, without prejudice, the report of the Local Commissioner was placed on record. Learned counsel for the Respondent relies upon the affidavit in evidence of Shri Neeraj Puri (page 573), who filed his witness statement. She specifically relies upon paragraph 37 of the counter claim, which reads as under:

“It is pertinent to mention here that the Hon'ble Delhi High Court in CS (O.S.) No. 1038 of 2007 titled as Mayar Health Resorts Ltd. Vs. Indian Tourism and Development & Ors. Was pleased to appoint a Court Commissioner vide its order dated 31.05.2007 for the purpose of inspection of the licensed premises. The said premise was inspected by the Court Commissioner on 12.06.2007 at 11:10 A.M. along with the draftsman Mr. Dharmendra and representatives of the parties. It is submitted that as per the report dated 14.11.2007 submitted by the Court Commissioner, the total area allocated to the Counter Claimant was calculated as 19,569 sq. ft.

However, it is most respectfully submitted that the said calculation is incorrect since as per the joint inspection/measurements report prepared on 28.04.2006, the total area allocated to Counter

Claimant was only 15,194 Sq. ft. That without prejudice to the rights of the Counter Claimant, even if the measurement figure of 19,569 sq. ft. provided by the Court Commissioner is taken to be correct, the stand of the Respondents that Counter Claimant is in occupation of excess area is falsified. Copy of the report dated 14.11.2007 filed by the Court Commissioner is annexed herewith and marked as Annexure C/32.”

8. Ms. Gandhi further submits that there was no denial to this report and the Petitioner never challenged it, and accordingly the approach of the learned Arbitrator cannot be faulted with. She further submits that the Semac report is inconclusive, inasmuch as it records the stands of both the parties but does not give a conclusion.

9. This Court has heard the submissions on behalf of the parties. Keeping in mind the limited scope of challenge in a Section 34 petition, it is seen that the Respondent, though not agreeing fully with the Commissioner's report, did place the Commissioner's report on record. The Local Commissioner's report dated 14th November, 2007 gives the following findings:

“5. That the measurement of the areas which are in the exclusive use and occupation of the plaintiff as well as those being put to common use was carried out in presence of the representatives of the parties with the assistance of the draftsman, Sh. Dharmender and the draftsman prepared a sketch plan of the measured area on the spot.

The handwritten proceeding sheets prepared on the spot on 12.06.07 bearing signatures of the representatives of the parties present at the time of execution along with its true typed copies are annexed herewith as Annexure-B colly.

...

8. That the areas which are in the exclusive use and occupation of the plaintiff are about 19569 sq. ft, as per the site plan prepared by the draftsman in terms of the measurement of the area carried out on 12.06.07. The areas in the exclusive use and occupation of the plaintiff have been shown in colour red in the site plan annexed herewith as Annexure-C. In the site plan (Annexure-C) the portions colored red Electricity Control area marked as A comprises 1368 sq. ft., storage area marked as B comprises 2365 sq. ft., Service Lane area marked as C comprises 791 sq. ft, Amatra Service Passage marked as D comprises 354 sq. ft, Amatra. Service Passage marked as E comprises 741 sq. ft, Amatra Service Passage marked as F comprises 341 sq. ft, LilyPool Area with Juice Bar marked as G comprises 2700 sq. ft, Amatra SPA area marked as H comprises 381 Sq. ft, Amatra SPA area marked as I comprises 374 sq. ft, Amatra SPA area marked as J comprises 374 sq. ft, Amatra SPA area marked as K comprises 305 sq. ft., Amatra SPA area marked as L comprises 4746 sq. ft, Amatra SPA area marked as M comprises 417 sq. ft, Amatra SPA area marked as N comprises 341 sq. ft, Amatra SPA area marked as O comprises 486 sq. ft, Amatra Administrative Office Space marked as P comprises 292 sq. ft, Amatra Administrative Office Space marked as Q comprises 1073 sg. ft, Amatra Administrative Office Space marked as R comprises 260 sq. ft, Amatra Reception marked as S comprises 164 sq. ft, Amatra Guest Room (Lifestyle Room) marked as T comprises 430 sq. ft, Amatra SPA Area marked as U comprises. 754 sq. ft, and Amatra Yoga Center marked as V comprises 512 sq. ft. The marked area A to V in the site plan is in exclusive use and occupation of the plaintiff.

9. That the areas which are in common use have been demarcated and shown in the site plan (Annexure-C) in

yellow colour. The passage leading to the swimming pool and the area in and around the swimming pool, which is maintained as green area by the plaintiff appears to be the common area because the guests / visitors/ members of defendants also use the said area. The visitors/ guests of the defendants using the lift shown at point MX in the site plan approaches the area in and around the Swimming Pool for swimming and the facilities attached to the Swimming Pool and the Gymnasium (XX and YY in the site plan Annexure-C). At the time of execution of the commission I found one guest of the defendant using swimming pool and using the passage leading to the swimming Pool which is also evident from the Photographs annexed herewith. Therefore, the passages leading to the swimming pool, Gymnasium and the area in and around the swimming pool are the common area.

10. That the guests/visitors of the defendants by using the lift shown at point MX in the site plan approach the Juice bar / Lilypool area and the Gymnasium using the passage without any hindrance. The total common area comes to around 27417 sq. ft. as per the site plan (Annexure -C). The total area outlined in green colour in the site plan Annexure-C is 46986 sq. ft.”

10. This report was annexed as Annexure C-32, with the counter claim in paragraph 37. What is interesting is that in the pleadings filed by the Petitioner in respect of paragraph 37, the Petitioner merely stated, **“Contents of paragraph 37 are matter of record and need no reply”**. Moreover, the report of the Local Commissioner having not been dealt with by the Petitioner, either in the pleadings or evidence in the arbitration proceedings, the same having been relied upon by the Respondent in its pleadings and evidence, the Ld Arbitrator has chosen to accept the said report. Though the finding of the Arbitrator, that the Petitioner had not challenged the report

and hence it has attained finality, may not be completely accurate, the Petitioner always had an option to challenge the report of the Court Commissioner in the arbitration proceedings. The Petitioner did not file any report of any independent architect to support its case that the area under occupation was around 24,000 sq. feet. The Court Commissioner delayed the filing of the report i.e. from June, 2007 to November, 2007, but at the time when the reference was made, the report of the Commissioner was on record.

11. A perusal of the Semac report shows the difference in the stand of the Petitioner and the Respondent in respect of common areas, which are under the occupation of the Respondent. The Petitioner claims that the exact area under occupation as per the Semac report was 24,289.62 sq. feet whereas the Respondent claimed that the same was 15,194 sq. feet. The said report is duly signed by both the parties. However, there is no conclusion or unanimity with respect to the area under occupation. Thus, the only independent report on record was the report of the Court Commissioner. Admittedly, the commission was executed in the presence of the representatives of both the parties. Further, even under Order XXVI Rule 10 CPC, the report of the Commissioner shall be evidence in the suit and shall form the part of the record. In the present case, the report of the Court Commissioner having been pleaded and also having been relied upon by the Respondent (*while also raising a limited challenge to the same*), there being no rebuttal in the arbitration proceedings to the said report, the conclusion of the Arbitrator does not warrant any interference though the reasoning may not be completely accurate.

12. Further, Ms. Gandhi, Ld Counsel has rightly placed reliance on the

decision of a Division Bench of this Court in *Naveen Garg v. Rajrani Garg & Ors., R.F.A (OS) No. 163/2014 (Decided on 19th August, 2015)*, wherein it was held that a pleading that averments in a plaint are a matter of record would amount to an admission that documents referred to therein are admitted. The Court observed as under:

“10. To plead that paragraphs 1 to 7 of the plaint are a matter of record amounts to an admission that reference made in the record in the corresponding paragraphs of the plaint is admitted. It means that such record i.e. document referred to in the plaint is admitted. At best the pleading would mean that if a document is interpreted by the plaintiff in the plaint the defendant does not admit the same interpretation. In such case it is incumbent upon the defendant to plead as to why the pleading concerning interpretation of a document is incorrect followed by a pleading as to how does the defendant interpret the document?”

13. Thus, the Court Commissioner’s report was not seriously denied by the Petitioner and in any case, going by the dictum in *Naveen Garg* (supra), it should be taken to be admitted. Further, in view of the fact that there is no independent evidence relied upon by the Petitioner to show the area under occupation of the Respondent, and the Court Commissioner’s report being valid in law, the award of the Arbitrator is upheld.

14. OMP is accordingly dismissed. All pending IAs are also disposed of.

PRATHIBA M. SINGH
JUDGE

AUGUST 30, 2018/dk