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

+ O.M.P. (COMM.) 202/2016

Date of Decision : 16th January, 2019

FITNESS FIRST INDIA PRIVATE LIMITED ('FFIPL')

..... Petitioner

Through: Mr.Darpan Wadhwa, Sr. Adv.
with Mr.Akshaya Dhaundiyal,
Mr.Suveer Dhyani &
Mr.Toeyesh Tewari, Advs.

versus

**AMBIENCE DEVELOPERS AND INFRASTRUCTURE
PRIVATE LIMITED**

..... Respondent

Through: Mr.P.K.Agrawal, Ms.Mercy
Hussain, Ms.Tannya Sharma,
Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 03.02.2015 passed by the Sole Arbitrator adjudicating the disputes that have arisen between the parties in relation to the "Agreement For Taking Possession for Fit Outs" dated 22.12.2007 (hereinafter referred to as the 'Agreement') executed between the parties.

2. The Arbitrator by the Impugned Award has passed the following directions:-

“Accordingly, I allow the statement of claim and proceed to pass the following award

(a) For recovery of licence fee, interest and CAM from September 2013 to January, 2015 total Rs.14,49,15,237.21 (Licence fees and interest Rs.10,03,34,438/31/- and CAM Rs.4,45,80,799/-) in favour of the claimant and against the respondent.

(b) Within 30 days from the date of the award, the respondent shall hand over physical, vacant and peaceful possession of the space/premises by removing all its goods and on failure to handover physical and vacant possession of the space in question within 30 days from the date of passing the award, the respondent is held liable to pay double the amount of agreed licence fee at the rate of Rs.50,77,960.53/- per month and CAM charges of Rs.22,01,576/- besides the other charges, every month from the date of passing of award till possession is retained by the respondent.

(c) The respondent is also directed to make payment of the amount of the licence fee due and payable within 30 days from the date of passing award including licensee fees and CAM charges for the Month of February, 2015 failing which the respondent will be liable to pay interest at the rate of 12% per annum on the principal amount of the licence fee and CAM charges.

(d) The respondent shall pay an amount of 4 Lakh towards the costs of the arbitration.”

3. The parties had entered into the Agreement dated 22.12.2007, some of the relevant Clauses whereof are reproduced hereinbelow:-

*“F. **Fitness First** is engaged in the business of running Health Club and Fitness Centre under the brand name of "**FITNESS***

FIRST" which has acquired considerable goodwill in the international market and is a well known brand.

G. Fitness First has approached Ambience for the purpose of taking on lease/license Commercial Space No. **Nil** on Fifth Floor at **Ambience Mall, Ambience Island, NH-8, Gurgaon.**

H. Fitness First has agreed and represented that it shall enter into a mutually agreed agreement to lease or license, as the case may be, as and when called upon by **Ambience**. Provided however that the lease/license agreement, whichever is decided to be executed by Ambience, shall not affect the rights of **Fitness First** under this Agreement in any manner.

I. Fitness First has carried out due diligence and has fully satisfied itself with regard to the competence of **Ambience** to lease / license the premises in question, approvals granted and plans approved by the competent authorities and the quality and the extent of the construction made by **Ambience**.

J. Fitness First has entered into this agreement with **Ambience** for the purpose of taking on lease/license Commercial Space No. **Nil** on Fifth Floor admeasuring 4234.88 sq.mtrs. (45567.32 square feet) of super area at **Ambience Mall, Ambience Island, NH-8, Gurgaon** and as earmarked in **Annexure 'A'** hereto, hereinafter referred to the '**Demised Premises**'.

K. Fitness First shall enter into a Lease deed/License Agreement on the terms and conditions as may be agreed to between the parties including but not limited to terms and conditions stated herein.

L. In the present case lease/licence would be deemed to have commenced with effect from date of handover of the Demised Premises to **Fitness First**, i.e. 28th December 2007 or such other date as may be mutually decided by the parties hereto (such date is hereinafter referred to as the "**Handover Date**").

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*“3. On and from the Rent Commencement Date which has been defined hereinafter, **Fitness First** shall pay a lease rental / license fee calculated @ Rs. 75/- (Rupees Seventy Five Only) per sq.ft. of super area of the Demised Premises per month and service tax at the applicable rates in advance on or before 10th day of each month. Provided always that **Ambience** shall provide a certified copy of its service tax registration number on or before the hand over of the Demised Premises. Such lease rent/license fee would be inclusive of Municipal taxes payable to the government or any local authorities. However, **Fitness First** as Lessee/Licensee shall also pay any other taxes which shall be levied by the State, Central Government or any other authority from time to time in respect of usage of the Demised Premises provided such taxes are not payable by Ambience as owner of the Said Building and/or the Demised Premises.*

4. The lease rental or license fee as the case may be shall be subject to an increase of 15% (fifteen per cent) over the last paid lease rental/license fee after a block of every 3 (three) years .

*5. That the term of the lease or license shall not exceed Fifteen (15) years of which initial period of three (3) years shall be a lock-in-period. The parties may agree to enter into lease/license agreement initially for a shorter duration of three (3) years. However, the lease/license shall be renewed at the sole option of **Fitness First** subject to the maximum period of fifteen (15) years, provided that **Fitness First** complies with all the terms and conditions of this agreement, Tenant Handbook, which is annexed hereto as **Annexure 'B'** or such other terms and conditions uniformly applicable to other tenants of the Mall as may be intimated by Ambience from time to time. The total Lease/License period shall consist of five (5) terms of three (3) years each.”*

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*“25. **Fitness First** and **Ambience** shall execute the Lease/License Agreement with respect to the Demised Premises on the terms and conditions as may be mutually agreed to*

*between the Parties on or before expiry of ninety (90) days of the completion of the Fit out Period, or till such period as may be mutually decided by both the parties hereto. Provided however/that in the event the lease/license agreement is not mutually agreed between the Parties till such, period, then **Ambience** and **Fitness First** shall execute the standard lease/license agreement / most suitable of such lease/license agreement which has been executed by **Ambience** with any other tenant/occupant/user of any space of the said Building, with provisions stipulated in this Agreement being specifically incorporated in such lease/license agreement.*

*26. In case **Fitness First** does not execute the Lease/License agreement in accordance with Clause 25 above, and such fault/delay is attributable to **Fitness First** alone, then **Ambience** shall be entitled to terminate this Agreement by giving **Fitness First** a prior notice (in writing) specifying the breach or default and calling upon **Fitness First** to remedy or make good the same. If **Fitness First** fails or neglects to remedy or make good the breach or default within an additional period of thirty (30) days from the date of receipt of such written notice, then the License herein and this Agreement shall stand terminated and cancelled on the expiry of such additional period of thirty (30) days. It is further clarified that **Ambience** will be entitled to recover/get back possession of the Demised Premises from **Fitness First** only in the event of termination of this Agreement in accordance with this Clause 26 or in accordance with Clause 9 above.”*

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*“36. Any dispute or difference between the parties hereto concerning the construction, interpretation or application arising out of this Agreement shall be referred to a sole arbitrator to be appointed by **Ambience**. Provided however that such arbitrator must be a retired High Court/Supreme Court Judge of standing and repute. Further, such person should not have represented **Ambience** in any matter directly or indirectly prior to the date of appointing him as an arbitrator under this Clause. Provided further that such person shall also not have*

*any interest in the subject matter of dispute, or any other vested interest with **Ambience** in any, manner whatsoever. Any decision of the arbitrator shall be final and binding on the Parties.”*

4. Admittedly, the parties did not execute a formal Lease / Licence Agreement with respect to the premises as contemplated in the abovementioned Agreement. On the other hand, the petitioner by its letter dated 01.06.2011 requested the respondent to reduce the lease rent / licence fee. The parties thereafter entered into further correspondence and ultimately by the letter dated 28.03.2013 the respondent conveyed its acceptance to the deduction in the lease rent / licence fee.

5. The petitioner, by its letter dated 14.09.2013, terminated the Agreement and called upon the respondent to accept the handing over of the possession of the premises, subject to refund of the balance security deposit. The relevant extract from the letter is as under:-

“In compliance with Clause 35 of the said Agreement, we are ready to handover peaceful possession of the Premises to you within thirty (30) days from today or any earlier day after 14.09.2013 subject to full refund of our balance security deposit”

6. The respondent by its letter dated 31.10.2013, contended that even after adjusting the security amount, an amount of Rs. 15,12,00,540/- would remain due and payable by the respondent to the petitioner. The respondent further called upon the petitioner to vacate and handover the vacant and physical possession of the premises to

the respondent forthwith, and also make the payment of the said amount. The relevant extract from the letter is as under:-

“We, therefore, request you to kindly vacate and handover vacant and physical possession of the retail space on the 5th floor admeasuring 45567.32 sq.ft. of super area at Ambience Mall, Ambience Island, NH-8, Gurgaon, Haryana to us forthwith and also make the payment of Rs. 15,12,00,540/- towards the arrears of license fee/lease rentals/electricity/water/CAM and interest charges as per details annexed. You are also requested to make the payment of Rs.172.50 per day besides CAM, electricity and water charges w.e.f 15.10.2013 till the date you handover vacant and peaceful possession of the entire premises to us in the same original condition as it was handed over to you.”

7. The petitioner, by its letter dated 20.11.2013, denied the claim of the respondent and stated as under:-

“We specifically deny that we failed/delayed handing over possession of the Premises and we are liable to pay any damages on that account. Without prejudice to the foregoing, in this regard, we state that as per Clause 35 (ii), we could become liable to pay the liquidated damages only in the event of our failure to handover the vacant and peaceful possession of the Premises provided you were ready and willing to refund the security deposit held by you to us. Vide our notice dated 14.09.2013, we notified immediate termination of the Agreement in compliance with law and asked you to immediately refund our balance security deposit and come forward to accept the handover of the vacant and peaceful possession of the Premises within 30 days from 14.09.2013 or any earlier day. However, you have neither refunded our balance security deposit nor have you come forward to take the possession of the Premises. Therefore, beyond 13.10.2013, we are not liable to pay for rent and CAM Charges. In fact, due to your delay/refusal to accept possession of the Premises on or before 13.10.2013, you are liable to reimburse our watch and

ward and other costs including those for our time, effort and risk.

In view of the above, we state here that as per Clause 35 (iii) of the Agreement, since you have defaulted/refused/neglected to refund the security deposit to us, while we have been ready and willing to handover the vacant and peaceful possession of the Premises to you since 14.09.2013, we are entitled to remain and continue in possession of the Premises without carrying out any business/activity from the Premises and without being liable to pay any rental/license fee/charges or any other amount towards facilities or maintenance, etc. Therefore, in view of the fact that we have already stopped our commercial operations in/from the Premises and offered to give you its possession on 14.09.2013, your not refunding our balance security deposit based on false and baseless claims amounts to a breach under the Agreement, and therefore we are not liable to pay any rent, charges and or any amount towards maintenance, etc. post 13.10.2013.

We further state that in view of your aforesaid default/refusal, you are liable to pay us liquidated damages @10% per annum on the balance security deposit calculated from the date of termination till the receipt of the said security deposit by us.

In light of the above, we hereby call upon you to immediately refund our balance security deposit less rent and CAMM Charges for the notice period and unpaid electricity and water charges till 13.10.2013 along with the aforesaid liquidated damages and come forward to accept the vacant and peaceful possession of the Premises.”

8. The respondent by its legal notice dated 21.12.2013 invoked the Arbitration Agreement between the parties as contained in the abovementioned Agreement dated 22.12.2007. In the said notice, the respondent *inter alia* asserted as under:-

“13. It is pertinent to mention here that our Client is ready to take physical and vacant peaceful possession of said Space from You the Addressee, however you the addressee are hereby informed that the possession should be handed over / restored to us in the shape/condition it was leased out to you and also make the payment of due amounts and interest to us.”

9. The petitioner by its letter dated 10.01.2014, while refuting the existence of the Arbitration Agreement, reiterated that it was the respondent who had failed to take over the vacant physical possession of the premises from the petitioner and refund the security amount to the petitioner.

10. On the Arbitrator entering reference and issuing notice to the parties to appear before him on 25.02.2014, the petitioner addressed a letter dated 26.04.2014 to the Arbitrator *inter alia* bringing to his notice that the petitioner had filed a suit before the District Court at Gurgaon which was pending adjudication and in such suit the respondent had filed an application under Order 7 Rule 11 of the Code of Civil Procedure seeking rejection of the plaint. The petitioner reiterated that there is no validly executed Lease Agreement between the parties containing the Arbitration Agreement and therefore, the arbitration proceedings were not maintainable.

11. It is relevant to note that the petitioner did not file a copy of the plaint filed by it in the District Court, Gurgaon before the Arbitrator. This is relevant as most of the submissions made by the learned senior counsel for the petitioner rely on the fact that in the said plaint one of the prayers made by the petitioner was to seek mandatory injunction against the respondent to take over the vacant physical possession /

keys of the premises from the petitioner. It is further relevant to note at this stage that the petitioner chose not to appear before the Arbitrator and was therefore proceeded *ex parte*.

12. The Arbitrator, by the Impugned Award has considered the plea of the petitioner on the enforceability of the Arbitration Agreement and has held as under:-

“The agreement is on a non-judicial stamp of Rs. 100/- and is not registered under the Registration Act. Be that as it may this is not a lease deed but is only an agreement for taking possession for fit outs. The letter under which possession was handed over by the claimant and taken over by the respondent is Ex.CW-1/3 dated 22nd December, 2007, which specifically says that pending execution of licence agreement, the claimant has agreed to hand over possession for the purposes of fit outs and other works. The agreement also recites that the respondent has agreed and represented that it shall enter into mutually agreed agreement to lease as and when called upon to do so by the claimant and the same had to be executed on the terms and conditions as may be agreed to between the parties, including but not limited to the terms and conditions stated in agreement Ex CW-1/2. Such an agreement will not require registration as the same would be covered by clause (v) of Sub-Section (2) of Section 17 inasmuch as it merely created a right to obtain another document which when executed would create such a right. The agreement Ex CW-1/2 has certain clauses as regards the period of the lease, the lock-in-period and enhancement of rent after every three years, which terms, of course, cannot be enforced by the claimant.

*Learned counsel for the claimant has relied upon a decision of the Supreme Court of India in **Food Corporation of India v. Babu Lal Aggarwal - AIR 2004 SC 2926**. It has been held therein that agreement when it merely creates a right to obtain another document which will, when created would create a right which would require registration. If agreement is of such a*

nature, which may amount to a present demise even though the document may be contemplated to be executed later on, it may be a document or agreement creating the rights. There must be demise of the property in presenti. But an agreement for securing another agreement or deed in future would not be such an agreement or document which may require registration. It is only an executory agreement. Under the said agreement, the respondent was entitled to do the fit outs and other works on the premises and had agreed to execute licence, which when executed would have other clauses as mentioned in CW-1/2. The parties agreed upon what they contemplated, the terms and conditions which were to be incorporated in the lease agreement but no such lease agreement was executed. As per the terms contemplated under the agreement, there was three years lock-in-period but that period is not in dispute now. However, learned counsel for the claimant pointed out that in continuance to the agreement, when the respondent requested for reduction in rental, it was on the respondent's assurance that the respondent would continue its business till December 2016 and on that premise has claimed rental and other charges for the period up to December 2016. This, in my view, will not be permissible, in the absence of any lease agreement executed between the parties in accordance with law, on a proper stamp paper and duly registered. Such rights cannot be claimed under agreement Ex.CW-1/2.

At the most even if Ex.CW-1/2 is considered to be a document requiring registration, it can be looked into for collateral purpose i.e. the nature of respondent's possession. The respondent otherwise has admitted its occupation in the premises as a lessee. A lease from month-to-month will be deemed to have been created and as per the respondent's own admission is liable to pay agreed amount of lease money. But the claimant cannot enforce its claim of recovering the same beyond the period of respondent's occupation. Admittedly, the respondent terminated the lease by notice dated 14th September, 2013. Till that date, the respondent is bound to pay the amount as agreed in the correspondence exchanged between the parties

referred to above particularly Ex.CW-1/9 and CW-1/11. Thereafter it will be a claim for damages.”

13. The learned senior counsel for the petitioner, placing reliance on the judgment of the Supreme Court in ***SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd.***, (2011) 14 SCC 66, submits that even if the Arbitration Agreement in an unregistered Lease Deed has to be considered as a severable Agreement, in the present case, the Arbitration Agreement being restrictive in nature, providing that only the disputes in relation to the said Agreement being arbitrable, the dispute raised by the respondent, insofar as it sought enforcement of the purported oral understanding between the parties arrived at in letters dated 01.06.2011 and 28.03.2013, could not be made the subject matter of arbitration proceedings. As the respondent was making a claim only on basis of this oral understanding, the arbitration proceedings were not maintainable.

14. On the other hand, the learned counsel for the respondent has placed reliance on the letter dated 01.06.2011 addressed by the petitioner to the respondent wherein the petitioner, while requesting for reduction in the rental / licence fee had further claimed that such deduction will not amount to novation of the Agreement dated 22.12.2007 and the terms thereof shall remain binding on the parties. The relevant extract from the said letter are as under:-

“We affirm that your acceptance of the above terms in good faith, shall not amount to a novation of the aforesaid agreement dated 22nd December, 2007 and the entire agreement and all its terms and conditions shall continue to remain in force.”

15. There is another copy of the said letter now placed on record with the objection petition in which the same paragraph reads as under:-

*“We affirm that your acceptance of the above terms in good faith, shall not amount to a novation of the aforesaid agreement dated 22nd December, 2007 entire agreement and all its terms and conditions shall **NOT** continue to remain in force.”*

16. It is not clear as to whether the word “NOT” was erased with the consent of the parties, however, in my opinion, the same would not have much relevance inasmuch, as the paragraph quoted above clearly states that the acceptance of the terms shall not amount to the novation of the Agreement dated 22.12.2007. Further, in any case, the plea of the petitioner before the Arbitrator was that as the Agreement dated 22.12.2007 was not registered, the Arbitration Agreement contained therein cannot be enforced. It was further asserted with the termination of the Agreement by the letter dated 14.09.2013 the Arbitration Agreement ceased to exist. The petitioner did not take the plea before the Arbitrator that the claim filed was not maintainable in the arbitration proceedings inasmuch as it was based on an oral understanding claimed by the respondent. Further, in the absence of the petitioner from the arbitration proceedings, the Arbitrator was not called upon to answer the question as to whether the oral understanding amounts to novation of the Agreement dated 22.12.2007, leading to discharge of the Arbitration Agreement as well. I therefore, find no merit in the contentions raised by the learned senior counsel for the petitioner in this regard.

17. The learned senior counsel for the petitioner has further submitted that the Arbitrator has erred in awarding rent / damages in favour of the respondent for the period beyond 14.09.2013 when the petitioner had terminated the Agreement dated 22.12.2007. He submits that by this letter the petitioner had called upon the respondent to take over the possession of the premises and it was the respondent who refused to do so making the claim that the petitioner must pay rent till December 2016. He further submits that the petitioner had thereafter not only reiterated its request to the respondent to take over possession of the premises by subsequent correspondence but has also filed a suit before the District Court, Gurgaon *inter alia* praying for mandatory injunction against the respondent for the respondent to take over the possession of the premises. As the respondent had failed to take over the possession, the respondent was not entitled to claim any rent / damages beyond the period of 14.09.2013 and, in any case, beyond the date of filing of the suit. In support of his contention, he relies upon the judgment of this Court in ***Tata Finance Ltd. v. P.S. Mangla & Ors***, ILR (2011) III Delhi 682.

18. On the other hand, the learned counsel for the respondent had placed reliance on the letters dated 31.10.2013 and 21.12.2013 addressed by the respondent to the petitioner asking the petitioner to handover vacant possession of the premises. He further submits that though the petitioner filed the abovementioned suit, the copy thereof was not filed before the Arbitrator and therefore, cannot be relied upon. He further submits that in the suit also, the petitioner never

deposited the keys of the premises. In fact, even before the Arbitrator, though a prayer for possession was made by the respondent, the petitioner chose not to appear before the Arbitrator or deposit the keys of the premises before the Arbitrator. Further, relying upon the orders passed in the present proceeding as also in the connected Enforcement Petition, being OMP (ENF.) (COMM.) 68/2016 titled Ambience Developers & Infrastructure Pvt. Ltd v. Fitness First India Pvt. Ltd., and specifically orders dated 25.10.2016, 04.11.2016, 07.12.2016, 24.12.2016 and 13.02.2017, he submits that even during the pendency of the present petition, the petitioner was not ready and willing to handover the possession of the premises to the respondent and eventually handed over the same only on or around 13.02.2017. He submits that the plea of the petitioner that it was willing to handover the possession of the premises to the respondent and it was the respondent who refused to take over the same is totally false.

19. I have considered the submissions made by the learned counsels for the parties. As noted above, the petitioner was calling upon the respondent to take over the possession of the premises while also claiming the refund of the security deposit. On the other hand, the letters dated 31.10.2013 and 21.12.2013 from the respondent indicate that the respondent also called upon the petitioner to handover the possession of the premises while making a claim of further amounts due from the petitioner. However, what is most relevant is that the petitioner chose not to appear before the Arbitrator and offer handing over of the possession of the premises to the respondent. In the

absence of the petitioner, the Arbitrator accepted the plea of the respondent that the petitioner has failed to handover the possession of the premises to the respondent and has therefore, awarded rent / licence fee / damages in favour of the respondent. The said finding of the Arbitrator, therefore, cannot be faulted. The petitioner took a chance by not appearing before the Arbitrator and offering the possession of the premises to the respondent before the Arbitrator. Therefore, the Arbitrator was not called upon to adjudicate whether the petitioner was infact, intending to handover the possession of the premises to the respondent or not.

20. In *Tata Finance Ltd.* (Supra), the Court found that the Defendant / Lessor had refused to take over the possession of the premises in spite of offer being made by the lessee, on the ground that the Lease had not been properly terminated. The Court found that once the Lessee had offered the possession, the Lessor has to accept the same. The Court further found that there was no evidence that the Lessee was using the premises or carried out any activity in the tenanted premises after the termination of the Lease. The judgment would therefore, have no application to the facts of the present case inasmuch as the respondent had clearly called upon the petitioner to handover the possession of the premises to it and also, subsequent orders passed by this Court in the present petition clearly evidence that the premises was occupied by the petitioner and its equipment was lying in the premises till the date of the handing over of the possession

in the present proceedings. I therefore, find no merit in the contentions raised by the learned senior counsel for the petitioner.

21. Learned senior counsel for the petitioner has further challenged the final quantification of the amount awarded by the Arbitrator in favour of the respondent. He submits that the Arbitrator having earlier concluded that the liability of the petitioner was to pay the amount as agreed in the correspondences exchanged between the parties, that is, letters dated 01.06.2011 and 28.03.2011 till the date of the termination of the Lease, could not have thereafter arrived at the amount of Rs. 7,33,34,924.15/- as the licence fee due for period from September 2013 to January 2015. He submits that the quantification of the amount is therefore, totally incorrect.

22. On the other hand, the learned counsel for the respondent submits that the Arbitrator has arrived at the above amount on the basis of the Agreement between the parties, which provides for initial rate of rent to be at Rs. 75/- per sq. ft. The Agreement further obliged the petitioner to pay the service tax and enhancement of rent at the rate of 15% every three years. The Arbitrator in awarding the damages for the period of September 2013 to January 2015, has calculated the said amount by taking the initial rent and adding the Service Tax and periodic enhancement of rent thereto.

23. I have considered the submissions made by the learned counsels for the parties. The only paragraph in the Award dealing with the issue of award of damages in favour of the respondent in the Impugned Award is as under:-

“The claimant has also prayed for awarding damages @ double the amount of licence fee for the aforementioned period on the premise that after termination of the lease agreement, the possession of the respondent is illegal and respondent is liable to pay double the amount, as per the terms of agreement CW-1/2. It has been held that such terms, as mentioned in agreement CW-1/2 had to be incorporated in the lease agreement, including term of payment of double the amount of rent after termination. On execution of the lease agreement it would have required to be compulsorily registered. In the absence thereof, the claimant cannot enforce such terms of the agreement CW-1/2, being an unregistered document. Therefore, the said amount as reflected in the other statement for recovery of licence fee, interest and CAM from September 2013 to January, 2015 total Rs.23,91,89,064/- [licence fees and interest Rs.19,46,08,265/- and CAM Rs.4,45,80,799/-] cannot be allowed.”

24. The above paragraph merely rejects the claim of the respondent for payment of damages at double the rate of licence fee agreed upon under the Agreement. Thereafter, the only basis of arriving at the amount of damages awarded by the Arbitrator was a chart produced by the respondent during the course of the arbitration proceedings, which the Arbitrator took note of in the following words:-

“In the statement of account filed with the claim petition, the claim is for the period up to December 2016 as if the respondent was required to pay the said amount as reflected in the aforementioned two communications. The claimant cannot claim any amount beyond the period till which the respondent remained in occupation. During the arguments the claimant was asked to file a fresh statement for the amount becoming due and payable by the respondent for the period from September 2013 to January, 2015. The claimant has filed the same.

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In the notice of termination Ex.CW-1/13 dated 14.09.2013 it is mentioned that the respondent is ready to handover peaceful possession of the premises within 30 days or any earlier day, subject to full refund of the balance security deposit and called upon the claimant to come forward to accept the handing over of the premises. The claimant duly replied that vacant and peaceful possession of the space can be handed over only on making payment of the balance amount due and payable by respondent. The respondent did not pay the amount but insisted upon claiming refund of the security deposit. In letter dated 20.11.2013 the respondent questioned payment of certain dues which the claimant had duly notified to the respondent. The respondent reiterated that possession will be handed over only on receipt of the balance security deposit. Till date the respondent has not handed over possession. Possession continues with the respondent. Total amount due and payable by the respondent as per the statement of account filed by the claimant from September 2013 to January, 2015 towards licence fee, interest and CAM works out to Rs.14,49,15,237.21/Towards licence fees and interest Rs.10,03,34,438/31/-and towards CAM Rs.4,45,80,799/-]."

(emphasis supplied)

25. A bare reading of the above paragraphs would clearly show that the Arbitrator has not applied his mind on the quantum of damages to be awarded in favour of the respondent. The liability to pay damages is different from the quantum of such damages. The petitioner itself was claiming the amount of rent till December 2016 to be in terms of the reduced rental rate as agreed upon between the parties and as mentioned in the above communications. The Arbitrator therefore, gave no reason for accepting the plea of the respondent, if at all, that for the period of September 2013 to January 2015 the petitioner must pay at the earlier agreed contractual rate as provided in the Agreement

dated 22.12.2007 with enhancement as provided therein. The Arbitrator has also not relied upon on any other evidence such as corresponding Lease Deed of other similarly situated properties or otherwise in support of grant of such claim. It is apparent from reading the Award that the Arbitrator was not aware that in the fresh statement filed by the respondent, it had infact, claimed the amounts from September 2013 to January 2015 on the basis of the Agreement dated 22.12.2007, including the enhancement mentioned therein. Infact, in the Award, the Arbitrator had already rejected the claim of the respondent for such enhanced rate by stating that in the absence of the registration of the documents, the Clause in the Agreement providing for such enhancement cannot be relied upon. Having held so, the Arbitrator certainly would not have granted the same in favour of the respondent.

26. In view of the above the Award insofar as it awards the sum of Rs. 7,37,34,924.15/- as damages for the period September 2013 to January 2015 is set aside, leaving it open to the respondent to agitate the said claim by way of a fresh arbitration.

27. The Arbitrator has further stated that incase the petitioner fails to handover the possession of the premises to the respondent within a period of thirty days from the date of the passing of the Award, the petitioner shall pay double the amount of agreed licence fee at the rate of Rs. 50,77,960.53/- per month besides other charges. The amount of Rs. 50,77,960.53/- has again been arrived at on the basis of rent agreed in the Contract alongwith enhancements as provided in the

Agreement itself. The stipulation of payment of double the rental again flows from the Agreement itself. However, the Arbitrator in the Impugned Award has rejected the claim of the petitioner for payment of double the agreed rent as damages in the paragraph quoted hereinabove. Having himself rejected such claim of the respondent, I find no basis in the Award to award such damages in favour of the respondent. In any case, the amount of Rs. 50,77,960.53/- taken as a basis would suffer same infirmity as in relation to the award of the licence fee from September 2013 to January 2015 discussed hereinabove.

28. Even otherwise, the award of damages cannot be in the nature of penalty. Damages under Section 73 of the Contract Act, 1872 states that such damages can only be compensation for any loss/damages caused to the innocent party by the breach of the Contract, and which naturally arose in the usual course of things from such breach. The Arbitrator was therefore, required to consider the actual damages that would be suffered by the respondent due to unauthorized occupation of the premises by the petitioner.

29. Further, in the entire Award I do not find any reason given in support of award of quantum of such damages in favour of the respondent. Under Section 31(3) of the Act, the Arbitrator is obliged to give reasons for his Award. In the present case I do not find any reason given for the award of such damages in favour of the respondent.

30. The Award insofar as it directs payment of double the amount of agreed licence fee in case of failure of the petitioner to handover the possession to the respondent within thirty days of the passing of the Award, is liable to be set aside, leaving it open to the respondent to agitate such claim by way of an appropriate proceeding.

31. The learned senior counsel for the petitioner lastly challenges the award of interest at the rate of 12% per annum in favour of the respondent. I do not find any force in such challenge. The Arbitrator under Section 31(7)(b) of the Act is empowered to award the post award interest in favour of the successful party at such rate as he may deem reasonable. The Arbitrator having exercised such discretion, which in no manner can be said to be perverse or unreasonable so as to warrant any interference from this Court, the Award on rate of interest cannot be set aside.

32. While I was at the final stage of dictating the order in the court, the learned senior counsel for the petitioner, probably taking a clue from the order, further stated that even the CAM charges awarded by the Arbitrator have no basis. He submits that the amount being claimed by the respondent has not been justified on any basis before the Arbitral Tribunal. On the other hand, the learned counsel for the respondent submits that this plea has not been taken up in the petition filed before this Court and is merely being taken up as an afterthought. Further relying upon Clauses 11(a) and (c) of the Agreement, he submits that the basis of the CAM charges is mentioned in these Clauses of the Agreement and the amount claimed by the respondent

is strictly in accordance with the said Clauses. The same having not been challenged before the Arbitrator, cannot now be challenged before this Court in a petition under Section 34 of the Act.

33. I find merit in the objections raised by the learned counsel for the respondent. It is fairly admitted by the learned senior counsel for the petitioner that apart from a vague plea of challenging the CAM, there is no substantial challenge made to the award of CAM in favour of the respondent. Even otherwise, the petitioner having failed to appear before the Arbitrator and having failed to challenge the claim made by the respondent, cannot now challenge the same on the basis of lack of particulars for raising such a charge. The charge, as per the assertion of the respondent, is strictly in accordance with the Agreement between the parties. As this assertion was not challenged before the Arbitrator, the petitioner cannot now challenge the Award before this Court on the said basis.

34. The learned senior counsel for the petitioner further challenges the interest awarded on the CAM charges by the petitioner. He submits that the interest awarded by the Impugned Award is 2% compounded monthly. On the other hand counsel for the respondent submits that the interest that has been awarded is at the rate of 2% per month simple interest, that is, 24% per annum in accordance with the Agreement between the parties. In this regard he refers to the Clause in the “General Guidelines for payment” which forms part of the Agreement between the parties and which stipulates the interest being charged at the rate of 24% per annum in case of the default of the

petitioner to pay the CAM charges. He further submits that even in the chart relied upon by the Arbitrator, only simple interest has been charged and not compound interest as claimed by the learned senior counsel for the petitioner.

35. The interest having been awarded in favour of the respondent in accordance with the Agreement, I find no reason to interfere with the award of such interest.

36. In view of the above, the petition is partly allowed in the above terms, with no order as to cost.

NAVIN CHAWLA, J

JANUARY 16, 2019/rv