

Bombay High Court

Earnest Business Services ... vs The Government Of The State Of ... on 6 September, 2019

Bench: R.D. Dhanuka

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMMERCIAL ARBITRATION PETITION NO. 758 OF 2019
ALONG WITH
NOTICE OF MOTION (LODGING) NO. 1359 OF 2019

Earnest Business Services Private Limited
a company incorporated under the Indian
Companies Act, 1956 and having its registered
office at 17th Floor, Earnest House, Nariman Point,
Mumbai - 400 021.

... Petitioner/
Applicant

Versus

The Government of the State of Israel
through the Consul General of Israel
having its office at Marathon Futurex,
1301, 'A' Wing, N.M. Joshi Marg, Lower Parel,
Mumbai - 400 013.

... Respondent

.....

Mr. Haresh Jagtiani, Senior Counsel along with Mr. Simil Purohit, Mr. Siddhant Chhabria, Mr. Suprabh Jain, Mr. Vishal Maheshwari, Ms. Kamini Pansare and Ms. Jharna Shah i/by M/s. V.M. Legal, Advocates for the Petitioner/Applicant.

Dr. Birendra Saraf along with Mr. Gautam Ankhad, Ms. Shruti Maniar, Ms. Spardha Sharma i/by M/s. Solomon & Co., Advocates for the Respondents.

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CORAM : R.D. DHANUKA, J.

RESERVED ON : 16th AUGUST, 2019 PRONOUNCED ON : 6th SEPTEMBER, 2019

-: J U D G M E N T :-

. By this petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for short "the Arbitration Act"), the petitioner has impugned the arbitral award dated 3rd December, 2018 passed by the learned Arbitrator allowing the claim made by the respondent and directing the petitioner to pay an amount of Rs.1,17,00,000/- along with interest @ 2 carbp-758.2019.doc 12% p.a. from 9th April, 2013 on amount of Rs.1,17,00,000/- till payment/realization. The learned Arbitrator also directed the petitioner to pay actual costs quantified at Rs.38,75,000/- being the costs mentioned in the statement of costs filed by the respondent inclusive of arbitral fees within a period of 120 days from the date of communication of award dated 3rd December, 2018. It was made clear that in the

event of the petitioner not paying the said amount and actual costs within the time prescribed, the petitioner shall be liable to pay simple interest @ 9% p.a. on the said amount till payment/realization. The learned Arbitrator also rejected the claim for set off and counter claim made by the petitioner as time barred. Some of the relevant facts for the purpose of deciding this petition are as under:-

2. The respondent herein was the original claimant whereas the petitioner herein was the original respondent in the arbitral proceedings. The respondent is the Government of the State of Israel having its office also at Mumbai. On 2nd March, 2010, the petitioner and the respondent entered into two separate agreements i.e. Business Centre Facility Agreement and Support Services Agreement whereby the petitioner agreed to provide business centre facilities and support services to avail business centre facilities with respect to the Office units being unit nos. 16A and 16B consisting of cabins, work stations, table spaces, reception, exclusive cloak room located on the 16th floor of Earnest House, Nariman Point, to the petitioner. The said agreements were for a period of 37 months commencing from 1st June 2009 to 30th June 2012.

3. The respondent had deposited an interest free refundable security deposit of Rs.64,80,000/- and an amount of Rs.52,20,000/- with the petitioner under the said Business Centre Facility Agreement and Support Services Agreement respectively as interest free deposit. The respondent had also agreed to pay monthly charges of Rs.7,20,000/- per month under 3 carbp-758.2019.doc the Business Centre Facilities Agreement and Rs.5,80,000/- per month under the Support Services Agreement to the petitioner.

4. The said two agreements expired on 30th June, 2012. It was the case of the petitioner that under Clause 6 of the Business Centre Facilities Agreement, if the respondent fails to handover vacant and peaceful charge of the office units back to the petitioner on the agreement coming to an end by efflux of time or termination or sooner determination thereof for any reason whatsoever, the respondent was under a legal obligation to pay compensation of Rs.58,500/- per day to the petitioner in addition to the normal Business Centre charges. Similarly, under the Supplies Services Agreement, respondent was required to pay compensation @ Rs.58,500/- per day to the petitioner in addition to the normal Business Centre charges. It is the case of the petitioner that the said amount of Rs.1,17,000/- per day was liable to be paid by the respondent to the petitioner irrespective of any other agreement entered into between the parties.

5. It is the case of the petitioner that the said two agreements came to an end by efflux of time on 30th June, 2012. However, the respondent continued to remain in possession of the office units illegally from 1 st July, 2012 until 27th November, 2012. On 27th November, 2012, the parties entered into a Memorandum of Extension appropriating the terms and conditions of the agreements. Under the Memorandum of Extension, the petitioner permitted the respondent use of the said premises till 30 th March, 2013. There was correspondence exchanged between the parties. It is the case of the petitioner that the petitioner specifically demanded the moneys for the period from 1st July, 2012 till 27th November, 2012 during which the respondent had continued to stay in the said premises though the said two agreements had come to an end by efflux of time on 30 th June, 2012. The petitioner was thus entitled to adjust the security deposit and also to recover an

additional amounts including loss suffered on account of loss of 4 carbp-758.2019.doc business/damages to the property from the respondent. The respondent demanded the refund of security deposit from the petitioner.

6. Sometime in the year 2016, the respondent filed Arbitration Petition bearing No. 799 of 2016 under Section 9 of the Arbitration Act before this Court inter-alia praying for various interim measures. During the pendency of the said arbitration petition filed by the respondent, the parties exchanged the names for appointment of the sole arbitrator. It is the case of the respondent that both the parties agreed to the name of Mr. Vishal Kanade, Advocate as the sole arbitrator on 14th September, 2016. This Court appointed Mr. Vishal Kanade, Advocate as the sole arbitrator by consent of parties to decide the dispute between the parties arising out of the agreements along with the extensions.

7. The learned Arbitrator filed a statement of disclosure under Section 11(8) read with Section 12(1) of the Arbitration Act before this Court, which was taken on record. This Court recorded that by consent of parties the said petition filed under Section 9 of the Arbitration Act by the respondent shall be treated as petition under Section 17 of the Arbitration Act and shall be decided by the learned Arbitrator on or before 31 st October, 2016. All contentions of the parties were kept open. It was also decided between the parties that the venue of the arbitration shall be at Mumbai.

8. The respondent filed its statement of claim against the petitioner before the learned Arbitrator and prayed for an award of around Rs.1,95,00,000/- on account of refund of security deposit and also claimed refund of security deposit made by the respondent to BEST authorities. The respondent however restricted his claim to the extent of recovery of security deposit along with interest and cost of arbitration during the course of hearing. The petitioner filed its written statement, set off and counter 5 carbp-758.2019.doc claim against the respondent on the ground that the respondent was in unauthorized use or occupation of the office units from 1st July, 2012 till 27th November, 2012 and had caused loss of business earnings and profit to the petitioner. The respondent was liable to pay damages caused to the subject premises, which the petitioner was required to repair. It was also pleaded that the petitioner was entitled to set off and adjust the dues of the petitioner the amount of Rs.1,17,00,000/- being the security deposit towards losses aggregating to Rs.11,58,09,527/- and recover the balance amount from the respondent.

9. The respondent filed an application under Section 17 of the Arbitration Act before the learned Arbitrator against the petitioner. By an order dated 20th December, 2016, the learned Arbitrator directed the petitioner to maintain an amount of Rs.1,17,00,000/- with one Frank Merchant Bankers till the passing of the arbitral award. Both the parties filed their respective written statements, led evidence, filed written submissions and made oral arguments before the learned Arbitrator.

10. On 3rd December, 2018, the learned Arbitrator passed an award directing the petitioner to pay an amount of Rs.1,17,00,000/- along with interest @ 12% p.a. from 9th April, 2013 on amount of Rs.1,17,00,000/- till payment or realization. The learned Arbitrator directed the petitioner to pay costs quantified at Rs.38,75,000/- inclusive of arbitral fees within a period of 120 days from the date

of the communication of the arbitral award and failing which with interest @ 9% p.a. thereon. The learned Arbitrator also rejected the claim for set off and counter claim filed by the petitioner as time barred. This arbitral award is impugned by the petitioner in this arbitration petition.

11. Mr. Haresh Jagtiani, learned Senior Counsel for the petitioner invited my attention to the relevant provisions of the agreement, the 6 carbp-758.2019.doc correspondence exchanged between the parties, some of the paragraphs from the pleadings filed by the parties, the order passed by S.J. Kathawalla, J. on 14th September, 2016 appointing the sole arbitrator in the petitioner filed by the respondent under Section 9 of the Arbitration Act and some of the findings rendered by the learned Arbitrator. It is submitted by the learned Senior Counsel that the respondent who was party to the agreements entered into with the petition is admittedly the Government of State of Israel and being a Foreign County, the arbitration between the parties being "International Commercial Arbitration" within the meaning of Section 2(f)(iv) of the Arbitration Act, application for appointment of arbitral tribunal could be made only before the Hon'ble Supreme Court of India under Section 11(9) of the Arbitration Act and not under Section 11(6).

12. It is submitted that though the petitioner did not raise this issue before this Court in the petition filed under Section 9 of the Arbitration Act and though no proceedings were filed by the respondent under Section 11(6) of the Arbitration Act, this Court even while exercising powers under Section 9 of the Arbitration Act could not have appointed the learned Arbitrator, in view of the arbitration being International Commercial Arbitration. He submits that the appointment of the learned Arbitrator thus was ex-facie beyond the jurisdiction of this Court. Even by consent of the parties, this Court could not confer jurisdiction on itself and thus the appointment of the learned Arbitrator by this Court was a nullity and void ab-initio. The entire proceedings thus filed by the respondent before the learned Arbitrator was totally without jurisdiction.

13. It is submitted that since the order passed by this Court appointing an Arbitrator being illegal and goes to the root of matter, the petitioner is entitled to raise this issue even for the first time in this petition filed under Section 34 of the Arbitration Act. He submits that the entire award is thus 7 carbp-758.2019.doc in conflict with the Public Policy of India and thus deserves to be set aside on this ground itself. In support of this submission, learned Senior Counsel placed reliance on the Judgment of this Court in the case of Roptonal Ltd. v/s. Anees Bazmee 2016 SCC OnLine Bom 3555 and in particular paragraphs 42, 43 and 45 to 52 and would submit that in identical facts considered by this Court in the said Judgment, this Court having appointed the arbitrator by exercising powers under Section 11(6) of the Arbitration Act in case of dispute falling within the expression international commercial arbitration recalled the said order on the ground that order appointing arbitrator was beyond the jurisdiction of this Court.

14. Learned Senior Counsel for the petitioner invited my attention to prayer clauses A and B of the counter claim/set off filed by his client on 19th December, 2016 before the learned Arbitrator. He submits that the petitioner had prayed for a declaration that the petitioner was entitled to set off the amount of security deposit lying with the petitioner i.e. Rs.1,17,00,000/- towards losses incurred by the petitioner aggregating to Rs.11,58,09,527/-. In para B, the petitioner had prayed for order and directions against the respondent herein to pay the petitioner an amount of Rs.10,41,09,527/-

towards damages/compensation as per particulars of claim annexed at Exh.A, B and C to the said counter claim/set off filed by the petitioner. Learned Senior Counsel invited my attention to paragraphs 50 to 67 of the arbitral award and would submit that the learned Arbitrator has erroneously rejected the claim for set off and counter claim made by the petitioner on the ground of limitation and did not decide those claims on merits at all.

15. Learned Senior Counsel placed reliance on Section 3(2)(b)(i) of Limitation Act, 1963 and would submit that in view of the said provision the claim for set off filed by the petitioner was deemed to have been instituted on the date of filing statement of claim filed by the respondent. Learned Senior Counsel placed reliance on clause 4(f) of the agreement 8 carbp-758.2019.doc entered into between the parties and submits that the learned Arbitrator has allowed interest on refund of security deposit @ 12% p.a. contrary to the said clause of the agreement which clause provides for payment of interest on the refund of security deposit at the rate on Short Term Deposit in Nationalized Banks. He strongly placed reliance on Section 31(7)(a) of the Arbitration Act and would submit that since in this case there was a specific agreement entered into between the parties, interest could be awarded only at a particular rate. The learned Arbitrator could not have awarded interest contrary to the said provision. He submits that this part of the award is contrary to the terms of the agreement and thus deserves to be set aside on this ground itself.

16. Learned Senior Counsel invited my attention to para 66 to 67(b) of the arbitral award and would submit that the learned Arbitrator has not recorded any reasons as to why the exorbitant amount of costs quantified at Rs.38,75,000/- was awarded in favour of the respondent and against the petitioner. He submits that the costs of arbitration awarded by the learned Arbitrator comes to around 40% of the claim awarded at Rs.1,17,00,000/-. The impugned award is in violation of the provision of Section 31A(3) of the Arbitration Act and thus deserves to be set aside on that ground itself.

17. Dr. Birendra Saraf, learned Counsel for the respondent on the other hand invited my attention to the letter dated 12th September, 2016 addressed by the petitioner's advocate to the respondent's advocate regarding the oral agreement arrived at between the parties on 8 th September, 2016 when the Arbitration Petition No. 799 of 2016 had appeared on board of S.J. Kathawalla, J. without prejudice to the right and contentions of the petitioner herein. The petitioner had suggested three names for appointment of one of them as the sole arbitrator. It was mentioned in the said letter that if the respondent herein was not agreeable then both by consent to appoint one of these names as the sole arbitrator.

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18. Learned Counsel also invited my attention to the email dated 13 th September, 2016 sent by the respondent through its advocate to the petitioner's advocate in response to the letter dated 12 th September, 2016 and recorded that as discussed orally and by consent, agreed and confirmed to the appointment of Mr. Vishal Kanade, Advocate as the sole arbitrator for resolving and adjudicating the dispute without prejudice to the rights and contentions of the respondent. The respondent called upon the petitioner to acknowledge and confirm the appointment of the arbitrator referred in the

said letter.

19. Learned Counsel for the respondent invited my attention to the email dated 13th September, 2016 sent by the petitioner's advocate to the respondent's advocate in response to the said email dated 13 th September, 2016 recording that the petitioner had no objection and confirmed the appointment of Mr. Vishal Kanade, Advocate as the sole arbitrator in the matter. Learned Counsel invited my attention to the order dated 14 th September, 2016 passed by this Court in Arbitration Petition No. 799 of 2016 and would submit that the name of the learned Arbitrator which was already agreed by both the parties was informed to the Court on 14 th September, 2016.

20. This Court accordingly passed the said order by consent, appointing Mr. Vishal Kanade as the sole arbitrator to decide the dispute between the parties arriving out of the agreements along with the extensions. He submits that the said petition filed by the respondent was under Section 9 of the Arbitration Act. He submits that even at that stage the petitioner did not raise any objection about appointment of Mr. Vishal Kanade as the sole arbitrator before this Court. The learned prospective Arbitrator at that stage had filed his statement of disclosure under Section 11(8) read with Section 12(1) of the Arbitration Act, which was taken on record.

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21. Learned Counsel for the respondent invited my attention to clause 35 of the agreement to provide Business Centre Facilities and would submit that under the said clause both the parties had agreed that the said agreement shall be subject only to the Laws of Union of India and only this Court shall have exclusive jurisdiction over all causes of action arising from and as a result of this contract including disputes arising due to and/or as a result of this contract.

22. It is submitted by the learned Counsel that the petitioner all through out voluntarily participated in the arbitration proceedings before the learned Arbitrator without any protest at any stage and has raised this issue only after the date of receipt of the arbitral award allowing the claim made by the respondent. He submits that since in this case the parties had already agreed to appoint an Arbitrator and had subjected to exclusive jurisdiction of this Court only in accordance with the arbitration agreement, there was neither any necessity to file any application under Section 11(9) of the Arbitration Act nor such application was filed by the respondent. The petitioner is thus precluded from raising that issue for the first time in this petition.

23. Learned Counsel for the respondent distinguished the Judgment of this Court in case of Roptonal Ltd. (supra) relied upon by the learned Senior Counsel for the petitioner on the ground that in the said matter before this Court, an application was filed for appointment of Arbitrator under Section 11(6) of the Arbitration Act instead of filing an application under Section 11(9) of the Arbitration Act before the Hon'ble Supreme Court. The Arbitrator was not appointed by any of the party though the arbitration agreement existed. He submits that in this case both the parties had already agreed to appoint Mr. Vishal Kanade, Advocate as the sole arbitrator even prior to the date of this Court passing the formal order on 14th September, 2016 in the proceedings filed under Section 9 of the Arbitration Act.

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24. Learned Counsel also placed reliance on the Judgment of Supreme Court in case of ZEE Sports Ltd. v/s. Nimbus Media PTE Ltd., 2018(1) Mh.L.J. 349 and in particular paragraphs 3 and 9 to 11 and would submit that the similar issue of jurisdiction belatedly raised by the appellant in that matter was negated by the Division Bench of this Court.

25. In so far as the claim for interest awarded by the learned Arbitrator @ 12% under Section 31(7) of the Arbitration Act on the claims for refund of security deposit in favour of the respondent from 9 th April, 2013 till payment/realization is concerned, learned Counsel for the respondent could not dispute that the parties had agreed to payment of interest on the refund of security deposit at the specified date i.e. interest payable on deposits on short term deposit in nationalized banks. He submits that if this Court comes to the conclusion that part of the award is contrary to the terms of the agreement entered into between the parties, this Court can reduce the rate of interest from 12% to the prevailing rate of interest on short term deposit in the nationalized bank at the relevant time.

26. In so far as the claim for set off rejected by the learned Arbitrator is concerned, it is submitted that under Section 3(1)(b)(i), the claim for set off is deemed to have been instituted on the same date as the statement of claim in which the set off is pleaded. He submits that the limitation for filing such claim for set off thus stopped on the date the statement of claim was filed by the respondent. He submits that the security deposit was made by the respondent with the petitioner on 2 nd March, 2010. The original agreement entered into between the parties expired on 30 th June, 2012. On 27th November, 2012, a Memorandum of Extension was executed by and between the parties. Few clauses of the original agreement were substituted. It was agreed that the leave and licence agreement was extended upto 31st March, 2013. The petitioner had filed the claim for set 12 carbp-758.2019.doc off for the period 1st July, 2012 to 27th November, 2012. The respondent had invoked the arbitration agreement on 4th April, 2016, which date would be the date when the arbitral proceedings had commenced. In so far as the statement of set off filed by the respondent is concerned, the same was deemed to have been filed on the date of filing statement of claim by the respondent. He submits that even if the said date of invocation of arbitration agreement by the respondent is considered as the date of commencement of the arbitration proceedings i.e. 4th April, 2016, the claim for set off for the period 1st April, 2012 to 27th November, 2012 was ex- facie barred by law of limitation.

27. Dr. Birendra Saraf, learned Counsel for the respondent placed reliance on the Judgment of Calcutta High Court in case of Rai Harendra Nath Chaudhury v/s. Rai Sourindra nath Choudhury and Ors., AIR (29) 1942 Calcutta 559 and in particular on pages at 559 to 561 and would submit that though under Order VIII, Rule VI the word set off only is used and not the word counter claim, the claim to the ascertained sum of money which the Code permits the defendant to set up in the plaintiff's action for money may not only be what is strictly termed set off but what is also a counter claim.

28. Learned Counsel for the respondent placed reliance on the Judgment of Travancore High Court in case of Aiyappan Pillai Krishna Pillai v/s. Narayanan Padmanabhan and Ors., 1956 TRAV-CO 239

(AIR V 43 C 91 NOV) and in particular paragraph 6 and would submit that both the claims made in prayer clause A and B made by the petitioner were arising out of the same agreements. Both the agreements were entered on the same date. The petitioner had claimed damages/compensation in prayer clause B on 1 st April, 2012 to 27th November, 2012, on 31st December, 2016 and thus claims for set off and counter claim were barred by limitation.

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29. Learned Counsel for the respondent invited my attention to various findings of fact rendered by the learned Arbitrator in the impugned award on the issue of limitation raised by the respondent in respect of the claim for set off and counter claim made by the petitioner and more particularly paragraphs 50 to 65 of the impugned award. He submits that the respondent had already vacated the said premises and handed over possession to the petitioner on 29th March, 2013. The written statement and counter claim were filed on 29th December, 2016, which clearly indicates that on the date of filing of counter claim, the counter claim was ex-facie barred by law of limitation. Learned Counsel for the respondent submits that the learned Arbitrator has rejected both the claims made by the petitioner not only on the ground of limitation but also on merits.

30. Learned Counsel for the respondent invited my attention to the averments made by the petitioner in paragraphs 13 and 14 of the counter claim/set off filed by the petitioner before the learned Arbitrator and would submit that it was the case of the petitioner itself that the cause of action in respect of the amounts payable in terms of the particular claim at Exh.A to the counter claim first arose in the month of July 2012 when the respondent failed to vacate and handover possession of the suit premises to the petitioner and unauthorisedly continued to be in occupation of the said premises. It is further pleaded that the cause of action continued during the period of unauthorized occupation of the said premises by the respondent, which unauthorized use ceased only in November, 2012.

31. It is also alleged by the petitioner in paragraph 14 that the expenses incurred for repair and renovation of the suit premises due to damages caused to the same on account of the respondent were incurred in the month of June 2013 and entire losses/damages to the premises was computed. It is also alleged in paragraph 14 that the respondent herein was put to notice of the claims of the petitioner by letter dated 7 th November, 14 carbp-758.2019.doc 2012, 23rd May, 2013 and 24th July, 2013. He submits that from the pleadings filed by the petitioner itself it is clear that the claim for set off and counter claim are ex-facie barred by limitation and are thus rightly dismissed by the learned Arbitrator.

32. Learned Counsel for the respondent invited my attention to the paragraph 64 of the arbitral award and would submit that the petitioner had contended before the learned Arbitrator that it was entitled to a defense of equitable set off which would be affected by the provisions of Limitation Act. He submits that there was no such plea in the written statement and counter claim filed by the petitioner before the learned Arbitrator. It is submitted by the learned Counsel that in so far as the counter claim is concerned, period for filing the counter claim would not be covered under Section 3(2)(b)(i) but would be covered by Section 3(2)(b)(ii) of the Limitation Act, 1963, which would be

the date on which the counter claim was lodged before the learned Arbitrator. The date of lodging the counter claim i.e. 19th December, 2016 would be the date on which the limitation for making the counter claim would stop.

33. In so far as the claim for arbitration costs allowed by the learned Arbitrator is concerned, learned Counsel placed reliance on Section 31A of the Arbitration Act and would submit that the learned Arbitrator has rendered various findings about the conduct of the petitioner and also about the frivolous defence raised by the petitioner while opposing the genuine claims made by the respondent for refund of security deposit against the petitioner and the cost incurred by the respondent. Both the parties had quantified arbitration costs by submitting their respective statement of costs. He submits that the arbitration costs demanded by the petitioner was almost identical. He submits that under Section 31A of the Arbitration Act, the learned Arbitrator is empowered to award cost under different heads of expenses including arbitrator's fees incurred by a party. He submits that the 15 carbp-758.2019.doc learned Arbitrator has allowed the claim for refund of security deposit made by the respondent against the petitioner and thus was justified in awarding the costs of arbitration quantified at Rs.38,75,000/-, which was incurred by the respondent in the arbitral proceedings. He submits that the learned Arbitrator has recorded the reasons in the impugned award while allowing the said claim.

34. Mr. Haresh Jagtiani, learned Senior Counsel for the petitioner in rejoinder invited my attention to the letter dated 28 th May, 2013 sent by the respondent through its advocates to the petitioner demanding refund of security deposit. He placed reliance on letter dated 23 rd May, 2013 from the petitioner to the respondent alleging that no amount whatsoever was due and payable by the petitioner to the respondent under those two agreements. He submits that by the said letter the petitioner had put to the notice of the respondent that large sums of money were due and payable by the respondent to the petitioner in terms of those agreements, the details of which would be intimated to the respondents separately. Learned Senior Counsel invited my attention to the averments made in para 6 (ix) of the written statement filed by the petitioner and would submit that it was specifically contended by the petitioner that the petitioner was to adjust the amount of security deposit lying with it towards the losses and damages incurred by it. The petitioner had accordingly adjusted and set off of Rs.11,58,09,527/- against the security deposit of Rs.1,17,00,000/- allegedly payable by the respondent to the petitioner.

35. It is submitted by the learned Senior Counsel that since the petitioner had already adjusted its amount due and payable to the petitioner towards the compensation and the losses and damages incurred by the petitioner from the security deposit made by the respondent and lying with the petitioner, there was no question of any limitation for filing the claim for set off. Learned Senior Counsel placed reliance on the prayers clauses A 16 carbp-758.2019.doc and B of the counter claim/set off and would submit that the learned Arbitrator has placed the claim for set off and counter claim under the same pedestal. The learned Arbitrator has not appreciated the difference between the claim for set off and counter claim made by the petitioner.

36. It is submitted that the claim for set off is in the realm of defence whereas claim for counter claim was in the realm of an offence. If the respondent would not have filed any claim, the petitioner

had already adjusted the security deposit lying with the petitioner towards the claim for set off made by the petitioner against the respondent. He submits that the learned Arbitrator has not considered the claims for set off and counter claim on merits at all and has clubbed both the claims together though both the claims had different connotation. He submits that the claim for set off was already adjusted by the petitioner three years back. Learned Senior Counsel distinguished the Judgment of Calcutta High Court in case of Rai Harendra Nath Chaudhury (supra) relied upon by Dr. Birendra Saraf, learned Counsel for the respondent on the ground that the facts before the Calcutta High Court were different.

37. Learned Senior Counsel placed reliance on the Judgment of Karnataka High Court in case of The State Trading Corporation of India Limited v/s. Vanivilas Co-operative Sugar Factory Limited, 2001 SCC OnLine Kar 239 and in particular paragraph no.31 in support of the submission that there is a qualitative difference between the claim for set off and counter claim. Learned Senior Counsel placed reliance on the Judgment of the Supreme Court in case of Punjab National Bank and Ors. v/s. Surendra Prasad Sinha, 1993 Supp (1) SCC 499 and in particular paragraphs 1 and 5 and would submit that the rules of limitation are not meant to destroy the rights of the parties. Section 3 of the Limitation Act only bars the remedy, but does not destroy the right which the remedy relates to. He submits that the petitioner has right to adjust the 17 carbp-758.2019.doc claims for set off and counter claim even after such claims would have become time barred.

38. Learned Senior Counsel placed reliance on the Judgment of Panjab and Haryana High Court in case of First National Bank Ltd. (in Liqn.) v/s. Seth SantLal, AIR 1959 P&H 328 and in particular paragraph 22 in support of the submission that even if the debt had become statute barred, a creditor's right still subsists although the remedy is no longer available. He submits that the learned Arbitrator has not allowed himself to go into the merits of the claim or the set off.

39. In so far as the award of arbitration costs is concerned, it is submitted by the learned Senior Counsel that the learned Arbitrator has accepted the claim for arbitration costs made by the respondent in toto without any evidence. Such claim for arbitration costs awarded by the learned Arbitrator is disproportionate and without any evidence and reasons and thus deserves to be set aside on that ground itself.

40. Learned Senior Counsel placed reliance on the Judgment of the Supreme Court in case of Sanjeev Kumar Jain v/s. Raghubir Saran Charitable Trust, (2012) 1 SCC 455 and in particular paragraphs 23 to 25 and would submit that the arbitration costs could not be exorbitant and has to be realistic.

41. Mr. Gautam Ankhad, appearing with Dr. Saraf, learned Counsel for the respondent invited my attention to the letter dated 12 th February, 2013 from the respondent to the petitioner informing the petitioner that the respondent would be vacating the said premises on or before 31 st March, 2013 and called upon the petitioner to inspect the premises and confirm the receipt of quite, vacant and peaceful possession of the premises in good order and condition and called upon to refund the security deposit within 7 18 carbp-758.2019.doc days from the date of the respondent vacating the suit premises. He also invited my attention to the letter dated 25 th March, 2013 from the

respondent to the petitioner calling upon the petitioner to refund the security deposit. He submits that there was no response to the letter dated 12th February, 2013 calling upon the petitioner to take inspection of the premises though the respondent had fixed a meeting at the premises on 25 th March, 2013 at 12:00 noon. He invited my attention to the letter dated 28 th March, 2013 from the petitioner to the respondent confirming the receipt of possession of the suit premises.

42. Learned Counsel for the respondent invited my attention to the letter dated 28th May, 2013 from the advocates of the respondent to the petitioner calling upon the petitioner to immediately return the security deposit amount. He also placed reliance on the letter dated 23rd May, 2013 from the petitioner to the respondent alleging that no amount was due and payable to the respondent and alleging that large sum of rupees were allegedly due and payable by the respondent to the petitioner. He submits that the said letter dated 23rd May, 2013 was obviously not addressed by the petitioner in response to the notice sent by the respondent through its advocate on 28 th May, 2013.

43. It is submitted that there was no ascertained sum mentioned in the letter dated 23rd May, 2013 sent by the petitioner to the respondent while alleging that large sum of money was due and payable by the respondent to the petitioner and thus the question of any adjustment of the security deposit lying with the petitioner therefore did not arise. It is submitted that till the written statement and counter claim were filed by the petitioner, it was not the case of the petitioner that any specific amount was allegedly due from the respondent to the petitioner and was adjusted. He submits that counter claim was admittedly filed on 12th December, 2016 when the claim for set off and counter claim both had become ex-facie barred by law of limitation. In the evidence of the petitioner, it was the case of the petitioner 19 carbp-758.2019.doc that the set off may have taken prior to 2012. In support of this submission, learned Counsel invited my attention to the cross-examination of the witnesses examined by the petitioner and more particularly to the question nos. 58 to 63 at pages 536 of compilation of documents (volume-III).

44. Learned Counsel for the respondent invited my attention to the findings rendered by the learned Arbitrator in paragraphs 40 to 49 of the arbitral award on the plea of set off raised by the petitioner and would submit that the said plea has been rightly rejected by the learned Arbitrator in the impugned award. It is submitted by the learned Counsel that paragraphs 42 to 52 of the arbitral award are to be read together while dealing with the claim of set off and counter claim. There was no separate bifurcation of claim for set off and counter claim in the written statement and the counter claim. The learned Arbitrator had also thus rightly framed issue as to whether "the claim made by the parties were barred by law of limitation or not."

45. In so far as the arbitration costs awarded by the learned Arbitrator is concerned, learned Counsel invited my attention to the paragraphs 61 to 64 and would submit that learned Arbitrator has rightly rendered various findings about the conduct of the petitioner also in opposing the genuine claim for refund of security deposit made by the respondent and has rightly allowed the costs incurred by the respondent in the impugned award.

46. Learned Counsel for the respondent submits that in so far as the Judgment of the Karnataka High Court in case of The State Trading Corporation of India Limited (supra) relied upon by the

petitioner is concerned, there is no dispute about the proposition of law laid down in the said Judgment. He submits that however the facts before this Court are totally different and thus the said Judgment would not assist the case of the petitioner.

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47. Learned Senior Counsel for the petitioners distinguished the Judgment of the Supreme Court in case of Punjab National Bank and Ors. (supra) relied upon by the learned Senior Counsel for the petitioner on the ground that in that case the petitioner bank has adjusted the debt from the fixed deposit lying with the bank. The facts in this case are totally different. Learned Counsel for the respondent distinguished the Judgment of the Supreme Court in case of Sanjeev Kumar Jain (supra) on the ground that the facts before the Supreme Court were totally different and are clearly distinguishable in the facts of this case.

REASONS AND CONCLUSION :-

48. I shall first refer to some of the relevant provisions of agreements entered into between the parties. Clause 2(III)(b) of the 'Agreement to Provide Business Centre Facilities' provided that the respondent will avail of the facilities provided by the petitioner for a minimum period commencing from 1st June, 2009 to 30th June, 2011 and shall not have the right or be at liberty to terminate the said agreement for any reason whatsoever during the period the said period of 1st June, 2009 to 30th June, 2011. Clause 2(III) (c) provided that the said agreement may be renewed by the parties through fresh agreements at mutually agreed terms and conditions on expiry of the said period i.e. 1st June, 2009 to 30th June, 2011. The respondent had agreed to pay a consolidated sum of Rs.7,20,000/- as Business Centre charges per month to the petitioner.

49. In Clause 2(IV)(d), the respondent had agreed to deposit and keep deposited for the entire term of the said agreement with the petitioner free of interest an amount aggregating to Rs.64,80,000/- towards due performance of the said agreement, in addition to all other payments under the said agreement or any other agreement or arrangement between the 21 carbp-758.2019.doc petitioner and the respondent including payments towards Business Center charges set out in the said agreement. It was further provided that in the event of any default committed by the respondent of those clauses under the said agreement, the respondent shall not be entitled to any rights or benefits under the said agreement or any other agreement or arrangement with the petitioner. Clause 2(IV)(f) provided that the amount deposited by the respondent shall be refunded without interest by the petitioner subject to deductions/adjustments/set-offs as provided for in the said agreement to the respondent within 7 working days of expiry of the term of the said agreement only after the respondent having ceased to avail of all and any benefits under the said agreement including use of the Business Centre unit and facilities offered in any manner whatsoever and having vacated and checked out of the Business Centre unit along with their belongings, their representatives and agents and having handed over the vacant and peaceful charge of the said premises bearing unit 16A and B to the petitioner.

50. It was provided that the petitioner shall be entitled to adjust/deduct/set-off all costs or charges or compensation or any other amounts whatsoever due and payable by the respondent to the petitioner against and from the said security deposit. In case of the petitioner delaying the refund of the said security deposit payable to the respondent after such deductions/adjustments/set-offs, the petitioner shall be liable to pay interest on the said security deposit amount refundable at the rates offered for such an amount by nationalized banks in India on short term deposits. The dispute if any arising between the parties concerning the refund or adjustments/deductions/set-offs of the security deposit or any part thereof was made subject to arbitration agreement contained in the said agreement.

51. Clause 2(VI) provided that the recovery of damages @ Rs.58,500/- per day may be made by the petitioner in addition to the normal Business Centre charges as well as other charges or amount or costs in the event of 22 carbp-758.2019.doc the respondent not vacating the Business Centre unit in any manner whatsoever including storage and/or any other facilities with all belongings, representatives and agents etc. on the said agreement coming to an end by efflux of time or termination or sooner determination thereof or in the event the respondent committing any breaches of the terms and conditions contained thereon. Clause 2(VIII) provided the right to the petitioner to terminate the said agreement by giving a notice of 30 days to the respondent on the happening of the eventualities provided therein.

52. The petitioner and the respondent also entered into a separate writing 'Agreement for Support Services' on 2nd March, 2010 on the terms and conditions recorded in the said agreement. The duration of the said agreement was for the period commencing from 1st June, 2009 to 30th June, 2012. The respondent agreed to pay an amount of Rs.5,80,000/- per month to the petitioner as service charges for the benefits referred to in the said agreement and made refundable interest free security deposit of Rs.52,20,000/- with the petitioner. In so far as the other clauses of the said agreement are concerned, the same were almost identical to the 'Agreement to Provide Business Centre Facilities'. It is not in dispute that the parties entered into an agreement 'Memorandum of Extension to the Business Centre Facilities dated 2nd March, 2010' on 27th November, 2012. Under the said agreement the parties referred to the earlier two agreements dated 2nd March, 2010 and extended the principal agreement dated 2 nd March, 2010 upto 31st March, 2012. The parties agreed that the principal agreement shall continue to be binding upon the parties. The respondent agreed to pay to the petitioner an amount of Rs.80,00,000/- exclusive of service tax upon execution of the said agreement amounting to Rs.8,88,888/- per month for the extended period. It was further provided in the said agreement that the respondent shall be entitled to the refund of security deposit in terms of the principal agreement.

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53. Similarly, the parties entered into a separate writing 'Memorandum of Extension to the Agreement for Support Services dated 2nd March, 2010' on 27th November, 2012 extending the period under the principal agreement dated 2nd March, 2010 upto 31st March, 2013 on payment of Rs.70,00,000/- exclusive of service tax upon execution of the said agreement of extension amounting to Rs.7,77,777/- per month.

54. A perusal of the record indicates that by letter dated 12 th February, 2013, the respondent informed the petitioner that the respondent would be vacating the Business Centre units 16A and 16B on or before 31 st March, 2013. The respondent called upon the petitioner to inspect the said premises and to confirm in writing the receipt of quiet, vacant and peaceful possession of the premises in good order and condition. The respondent informed the petitioner that as per the terms of the agreements, the respondent is entitled to receive the refund of the interest free refundable security deposit in the sum of Rs.64,80,000/- and Rs.52,20,000/-.

55. The respondent addressed a letter to the petitioner on 25 th March, 2013 informing the petitioner that the respondent was ready and willing to handover vacant and peaceful charge of the premises to the petitioner on 25th March, 2013 and to handover keys to the petitioner. The respondent also made it clear that upon the respondent handing over the possession of the premises to the petitioner and the petitioner handing over the refund of the security deposit amount to the respondent, the said agreement would stand terminated forthwith. The respondent requested the petitioner to handover the cheques for refund of security deposit simultaneously upon receiving possession of the premises from the respondent. It is not in dispute that on 28th March, 2013 the petitioner received possession of the said units. By letter dated 28th March, 2013, the petitioner confirmed having received charge of the Business Centre units 16A and B from the respondent. However, in the said letter, it was mentioned that the same was 24 carbp-758.2019.doc without prejudice to their all rights, remedies, claims, contentions under executed agreements, memorandums or in law.

56. On 28th May, 2013, the respondent through its advocate addressed a letter to the petitioner and called upon the petitioner to immediately return and refund the said security deposit amount of Rs.1,17,00,000/- and demanded interest @ 18% p.a., if the said amount was not refunded within 7 days from the date of receipt of the said letter. A perusal of the letter dated 23rd May, 2013, addressed by the petitioner to the respondent indicates that the petitioner alleged in the said letter that no amounts whatsoever were due and payable by the petitioner to the respondent under those agreements and on the contrary the large sum of money were allegedly due and payable by the respondent to the petitioner in terms of those agreements, the details of which would be intimated to the respondent separately.

57. A perusal of the said letter clearly indicates that no demand of any specific amount was made by the petitioner against the respondent. Even prior to 23rd May, 2013 or on handing over the possession of the said units by the respondent, the petitioner did not raise any demand for any amount from the respondent towards any losses alleged to have been suffered by the petitioner or towards damages or compensation. The said letter dated 23rd May, 2013 also does not indicate that the petitioner had already adjusted the alleged dues of the petitioner against the respondent or had set-off any amount allegedly due from the respondent against the amount of security deposit of Rs.1,17,00,000/- lying with the petitioner as sought to be canvassed by the learned Senior Counsel for the petitioner in his rejoinder arguments.

58. The respondent issued a notice dated 4th April, 2016 invoking arbitration agreement through its advocate to the petitioner and called upon 25 carbp-758.2019.doc the petition to give consent to the

appointment of any one of the three names suggested by the respondent to act as sole arbitrator including the name of a retired Judge of this Court. A perusal of the email dated 7th April, 2016 from the respondent's advocate to the petitioner which is placed on record indicates that the notice dated 4 th April, 2016 was sought to be served upon the petitioner, which was returned with the remarks "refused" and "not accepted". Though, the respondent's advocate was attempting to deliver the said notice by hand at the address of the petitioner, the same was again refused. The respondent's advocate thus sent the said notice by email to the petitioner on 7th April, 2016 at 4:37p.m.

59. In so far as the issue raised by the petitioner that the appointment of the learned arbitrator by this Court on 14th September, 2016 in Arbitration Petition No.799 of 2016 is nullity on the ground that the respondent being the Government of State of Israel and being party to the arbitration agreement, the arbitration proceedings would fall under Section 2(1)(f) of the Arbitration Act and thus only Chief Justice of India or his designated could appoint an arbitration under Section 11(9) of the Arbitration Act is concerned, I shall now refer to some of the correspondence exchanged between the parties prior to the date of the order dated 14 th September, 2016 passed by this Court appointing Mr. Vikas Kanade, Advocate as the sole arbitrator. It is not in dispute that the respondent through his advocate's notice dated 4th April, 2016 while invoking arbitration agreement recorded in clause 19 suggested three names. In the said notice, the respondent had not suggested the name of Mr. Vishal Kanade, Advocate as one of the arbitrator to the petitioner. The petitioner did not annexe all the correspondence exchanged between the parties regarding appointment of a sole arbitration in the arbitration petition.

60. A perusal of the documents annexed to the affidavit in reply filed by the respondent indicates that the petitioner through its advocates addressed 26 carbp-758.2019.doc a letter dated 12th September, 2016 to the respondent's advocates recording that the arbitration petition was listed on 8th September, 2016 before Shri Justice S.J. Kathawalla. It was orally agreed upon by the advocates of both the parties that without prejudice to the rights and contentions of the petitioner herein, the said pending dispute shall be referred to a sole arbitrator for adjudication. The petitioner suggested the names of three retired Judges of this Court to the respondent with a request to agree to appoint any one of them as the sole arbitrator.

61. The respondent through its advocates sent an email on 13 th September, 2016 at 4:59 p.m. to the petitioner advocate and recorded that as discussed orally and by consent, the respondent agreed and confirmed to the appointment of Mr. Vishal Kanade, Advocate as the sole arbitrator for resolving and adjudicating dispute without prejudice to their rights and contentions. The petitioner through its advocates email dated 13 th September, 2016 sent at 5:13 p.m. conveyed to the respondent's advocates about its no objection and confirmed the appointment of Mr. Vishal Kanade, Advocate as the sole arbitrator in the matter.

62. On 14th September, 2016, by consent of parties, Shri Justice S.J. Kathawalla appointed Mr. Vishal Kanade, Advocate as the sole arbitrator to decide the disputes between the parties arising out of the agreements. The learned prospective arbitrator had also filed his statement of disclosure under Section 11(8) read with Section 12(1) of the Arbitration Act before this Court, which was taken

on record. This Court issued further directions in the said letter to the petitioner and treated the said petition as petition under Section 17 of the Arbitration Act. This Court kept all the contentions open. It is not in dispute that the said order was passed by this Court in the said arbitration petition filed under Section 9 of the Arbitration Act. It is also not in dispute that the said order was not challenged by any of the parties.

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63. It is not in dispute that respondent thereafter filed statement of claim before the learned Arbitrator. The petition filed written statement and also counter claim both dated 19th December, 2016. At no point of time, the petitioner raised any issue challenging the appointment of the learned arbitrator made by this Court under Section 9 of the Arbitration Act. The petitioner also had admittedly filed a claim for set off and counter claim before the learned arbitrator.

64. A perusal of clause 35 of the 'Agreement to Provide Business Centre Facilities' clearly indicates that the parties had agreed that the said agreement was subject only to the Laws of the Union of India and that only the Courts at Mumbai shall have exclusive jurisdiction over all causes of action arising out the result of the said agreement including disputes arising due to and/or as a result of the said agreement. It is not in dispute that the petitioner has raised the issue of alleged illegality of the order passed by this Court appointing the learned arbitrator on the ground that one of the party being a foreigner, the arbitrator could be appointed by the Supreme Court or its designated under Section 11(9) of the Arbitration Act only in this petition for the first time.

65. A perusal of the record clearly indicates that in the arbitration petition, the petitioner did not disclose all the correspondence entered into between the parties prior to the date of the order dated 14 th September, 2016 passed by this Court in Arbitration Petition No.799 of 2016 including the letter dated 12th September, 2016 issued by the petitioner through their advocates to the learned advocates representing the respondent, letter sent by email by the respondent's advocate to the petitioner's advocate on 13 th September, 2016 and by the petitioner's advocate to the respondent's advocate on the same date confirming the appointment of Mr. Vishal Kanade, Advocate as the sole arbitrator. It is thus clear that the parties had 28 carbp-758.2019.doc already agreed to the appointment of Mr. Vishal Kanade, Advocate as the sole arbitrator prior to the date of 14 th September, 2016 when the said order was passed by this Court in Arbitration Petition No. 799 of 2016.

66. It is not in dispute that respondent had filed the said Arbitration Petition No. 799 of 2016 against the petitioner in this Court for interim measures under Section 9 of the Arbitration Act and had not filed any arbitration application under Section 11(6) of the Arbitration Act for appointment of an arbitrator. There is no dispute that the arbitration agreement was recorded in the agreement entered into between the parties. There is also no dispute that the parties had agreed that the dispute between the parties would be subject to the exclusive jurisdiction of the Courts at Mumbai. Since there was no dispute about the name of the arbitrator between the parties, there was no requirement of filing any arbitration application under Section 11(9) of the Arbitration Act by the respondent before the Hon'ble Supreme Court.

67. In my view, the parties can agree for appointment of an arbitrator in any proceedings in Court without filing an application under Section 11(6) or 11(9) as the case may be including in petition under Section 9 or even without intervention of Court. The provisions of Section 11(9) of the Arbitration Act in this case thus had not attracted in view of there being an agreement on the name of the learned Arbitrator between the parties in the correspondence exchanged between the parties prior to the order dated 14 th September, 2016 passed by this Court in Arbitration Petition No.799 of 2016.

68. In am not inclined to accept the submission of Mr. Jagtiani, learned Senior Counsel for the petitioner that though the proceedings in Arbitration Petition No.799 of 2016 were filed by the respondent for interim measures under Section 9 of the Arbitration Act, this Court while passing an order 29 carbp-758.2019.doc dated 14th September, 2016 exercised the powers under Section 11(6) of the Arbitration Act.

69. In so far as the Judgment of this Court in case of Roptonal Ltd. (supra) relied upon by the learned Senior Counsel for the petitioner is concerned, the said Judgment was delivered by this Court in a Review Petition filed by one of the party to the Arbitration Application (97 of 2013) in which this Court had appointed the sole arbitrator under Section 11(6) of the Arbitration Act by consent of parties though the Review Petitioner was a foreign company. This Court in the said Judgment held that since one of the party to the arbitration agreement was incorporated outside India, the arbitration being "International Commercial Arbitration" within the meaning of Section 2(1)(f) of the Arbitration Act, the application for appointment of an arbitrator in case of breach of the agreed procedure for appointment of an arbitrator could be filed only before the Chief Justice of India under Section 11(9) of the Arbitration Act and not before this Court under Section 11(6). This Court accordingly held that in the facts of that case only the Chief Justice of India or his designated Judge could appoint an arbitrator under Section 11(9) of the Arbitration Act and not Chief Justice of this Court or his designate. This Court also held in the said Judgment that the said arbitration application for appointment of arbitrator under Section 11(6) of the Arbitration Act itself was without jurisdiction and thus the order passed by the designate of the Hon'ble Chief Justice under Section 11(6) of the Arbitration Act in the facts and circumstances of that case was without jurisdiction and thus was required to be recalled.

70. In my view, the said Judgment of this Court in case of Roptonal Ltd. (supra) would not assist the case of the petitioner and is clearly distinguishable in the facts of this case. The learned designate of the Chief Justice of this Court had not passed any order in the application filed under Section 11(6) of the Arbitration Act in this Court. The order was passed by 30 carbp-758.2019.doc this Court under Section 9 of the Arbitration Act. In that matter, admittedly the parties had failed to appoint an arbitrator in accordance with the agreed procedure prescribed in the arbitration agreement. In this case, the parties had already agreed to the appointment the sole arbitrator in accordance with the procedure prescribed under the arbitration agreement. There was thus no occasion to file any application under Section 11(9) of the Arbitration Act. In my view, this Court was empowered to appoint the learned arbitrator on 14th September, 2016 by consent of parties based on the agreed names already decided between the parties prior to the date of said order dated 14th September, 2016. This Court did not exercise any powers under Section 11(6) of the Arbitration Act as sought to

be canvassed by the learned Senior Counsel for the petitioner. The Judgment of this Court in case of Roptonal Ltd. (supra) thus would not advance the case of the petitioner and is clearly distinguishable in the facts of this case.

71. The Division bench of this Court in case of ZEE Sports Ltd. (supra) has rejected the similar arguments, which are advanced by the learned Senior Counsel for the petitioner and held that it was not a case where the arbitrator had inherently lacked the jurisdiction to decide the dispute between the parties. It is not the case of the petitioner that the learned arbitrator was not appointed by consent of parties before 14 th September, 2016 or that parties could not have appointed any arbitrator by consent of parties outside the Court.

72. I shall now deal with the submission of the learned Senior Counsel for the petitioner on the issue of limitation in respect of counter claim and set off filed by his client and the issue as to whether the learned arbitrator was right in accepting the plea of limitation raised by the respondent in respect of such claim for counter claim and set off.

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73. It is not in dispute that the respondent had invoked the arbitration agreement by notice dated 4th April, 2016. The respondent herein had filed its statement of claim before the learned arbitrator on 20 th October, 2016. The petitioner filed the counter claim/set off on 19 th December, 2016. In so far as prayer clause A is concerned, the petitioner prayed for declaration that the petitioner was entitled to set off the amount of security deposit lying with the petitioner, towards the losses incurred by the petitioner aggregating to Rs.11,58,09,527/-. In so far as the prayer clause B is concerned, the petitioner prayed for order and direction against the respondent to pay the balance amount of Rs.10,41,09,527/- towards damages/ compensation as per particulars of claim annexure at Exh. A, and C after adjusting the sum of Rs.11,58,09,527/-.

74. Learned Counsel for both the parties placed reliance on Section 3(2)

(b)(ii) of the Limitation Act, 1963, in so far as counter claim in prayer clause B is concerned. It is common ground that under Section 3(2)(b)(i) of the Limitation Act, 1963, in claim by way of set off has to be treated as separate suit and shall be deemed to have been instituted, on the same date as the suit in which the set off is pleaded. It is thus clear beyond reasonable doubt in so far as prayer clause A is concerned, the date of filing statement of claim i.e. 20th October, 2016 would be considered as the date of institution of the claim for set off.

75. Learned Arbitrator in so far as the claim for set off is concerned has held that the limitation would stop on the date of receipt of notice invoking the arbitration agreement. The respondent had invoked the arbitration agreement by its advocate notice dated 4 th April, 2016. The claim for set off was made on the basis of the compensation claimed @ Rs.1,17,000/- per day from 1st July, 2012 till 27th November, 2012. It was contended by the petitioner before the learned arbitrator that the cause of action had arisen on 28th March, 2013, when the respondent had altered/ varied the 32 carbp-758.2019.doc agreement by asking for immediate refund on vacating premises. The learned

arbitrator rejected the said contentions raised by the petitioner. The learned arbitrator considered the date of filing the counter claim as 19 th December, 2016. It is accordingly held that the claim of Rs.1,17,000/- per day from 1st July, 2012 till 27th November, 2012 for alleged illegal occupation by the respondent was clearly barred by law of limitation.

76. It was the case of the petitioner that it had never given up its claim for respondent's use of the said premises from 1st July, 2012 till 27th November, 2012. The learned arbitrator rightly rendered a finding that there was no claim or cause of action accrued in favour of the petitioner after 19th December, 2013. All claims thus made by the petitioner were barred by law of limitation.

77. A perusal of the averments made in the counter claim/set off filed by the petitioner before the learned arbitrator indicates that it was the case of the petitioner that the respondent was required to handover the vacant and peaceful possession of the subject premises to the petitioner on or before 30th June, 2012. However, the respondent continued to use and occupy the subject premises unauthorizedly until 27th November, 2012. Pursuant to the discussion and negotiation between the parties a Memorandum of Extension was executed whereunder the respondent were again authorized to use and occupy the subject premises on the terms as set out therein. It was the case of the petitioner that however between 1 st July, 2012 and 27th November, 2012, the respondent was unauthorizedly using and occupying the subject premises and thus was liable to pay a sum of Rs.1,17,000/- per day as compensation/damages in addition to the monthly compensation payable under the principal agreements together with 15% interest thereon.

78. It was the case of the petitioner that during the period between July, 2012 and November, 2012, the petitioner had addressed various letters to 33 carbp-758.2019.doc the respondent placing on record that despite the principal agreements coming to an end by efflux of time, the respondent had not ceased to use the occupation of the subject premises and had not handed over the vacant and peaceful possession thereof to the petitioner. It was the case of the petitioner in the said counter claim/set off that after appropriating the amount of Rs.11,58,09,527/- by way of set off against the security deposit of Rs.1,17,00,000/- refundable by the petitioner to the respondent, the petitioner had to recover a sum of Rs.10,41,09,527/- from the respondent. In my view, since the learned arbitrator has rejected the claim for set off/counter claim itself on the ground of limitation, the learned arbitrator rightly did not deal with such claim for set off/counter claim on its merit.

79. A perusal of prayer clause A which was by way of set off in the said statement of set off/counter claim filed by the petitioner before the learned arbitrator clearly indicates that the same was filed only on 19 th December, 2016. However, in view of Section 3(ii)(b)(i) of the Limitation Act, 1963, the date of filing such claim for set off would be the date on which the statement of claim was filed by the respondent before the learned arbitrator. It is thus clear that the claim for set off made by the petitioner for the period three years prior to the date of filing statement of claim by the respondent is ex-facie barred by law of limitation. Even if date of receipt of notice invoking arbitration agreement issued by respondent is considered as the date for filing set off, still the claim for set off is ex-facie barred by law of limitation.

80. A perusal of the particulars of claim in the Exh. A, B and C annexed to the statement of counter claim/set off filed by the petitioner before the learned arbitrator indicates that the petitioner had claimed compensation @ Rs.1,17,000/- per day for the period from 1 st July, 2012 till 27th November, 2012. The entire claim for set off thus was for the period prior to three years of the date of filing statement of claim by the respondent, which 34 carbp-758.2019.doc would be the date for filing plea of set off, in view of Section 3(ii)(b)(i) of the Limitation Act, 1963. In my view, even if the date of invocation of the arbitration agreement by the respondent i.e. notice dated 4th April, 2016 is considered as the date of commencement of arbitration proceedings in respect of the claims made by the respondent against the petitioner and such date is considered as the date for stoppage of limitation in respect of claim for set off, since the entire period of claiming compensation @ Rs.1,17,000/- per day from 1st July, 2012 till 27th November, 2012 was three years prior to the date of issuing such notice invoking arbitration agreement, the entire claim for set off is ex-facie barred by law of limitation. The learned arbitrator thus rightly rejected the plea of set off raised by the petitioner as time barred.

81. In so far as the counter claim made in prayer clause B is concerned, the said counter claim was made by the petitioner on the premise that after adjusting the amount of Rs.11,58,09,527/- against the security deposit of Rs.1,17,00,000/-, the petitioner was entitled to recover the balance sum of Rs.10,41,09,527/- from the respondent. In my view, since the plea of set off itself made by the petitioner was ex-facie barred by law of limitation as has rightly been held by the learned arbitrator, the counter claim made in prayer clause B based on the alleged plea of set off is also time barred. Be that as it may, under Section 3(ii)(b)(ii) of the Limitation Act, 1963, it is clearly provided that in case of a counter claim, the date on which the counter claim is made in Court or in this case, arbitration petition shall be treated as a separate suit. Admittedly, the counter claim is dated 19 th December, 2016. The entire counter claim is also admittedly for the period, three years prior to the date of filing of counter claim and thus is ex-facie barred by law of limitation. The learned arbitrator has rightly rejected the counter claim also on the ground of limitation. I do not find any infirmity with the impugned award passed by the learned arbitrator rejecting the plea of set off as well as counter claim made by the petitioner.

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82. In so far as the Judgment of Supreme Court in case of Punjab National Bank and Ors. (supra) relied upon by the learned Senior Counsel for the petitioner is concerned, it is held by the Supreme Court that Section 3 bars the remedy of suit, appeal or application but does not extinguish right to which the remedy relates. It is held by the Supreme Court that the creditor would be entitled to adjust, from the payment of a sum by debtor towards the time barred debt. The creditor when he has no possession of a adequate security, the debt due can be adjusted from the security deposit in his possession and custody. The alleged debt of the petitioner was not even crystallized and was not adjusted prior to the date of filing counter claim/set off before the learned arbitrator. The Judgment of the Supreme Court in case of Punjab National Bank and Ors. (supra) thus would not assist the case of the petitioner.

83. Calcutta High Court in case of Rai Harendra Nath Chaudhury (supra) has dealt with order VIII, Rule VI of the Code of Civil Procedure, 1908 and has held that set off is a plea in defence available to the defendant only. It is held that where the defendant pleads for a sum of money, which is in excess of plaintiff's claim, he occupies to the extent of the excess, the position of a plaintiff in a cross suit and in such a case and for the excess amount time is reckoned not from the date of the plaintiff suit but from the date when he filed his written statement. In my view the principles laid down by the Calcutta High Court in this case squarely applies to the facts of this case. A perusal of prayer clause B in the counter claim/set off clearly indicates that it was the case of the petitioner that the petitioner has to recover the amount of Rs.10,41,09,527/- after adjusting the set off amount of Rs.11,58,09,527/- against the security deposit of Rs.1,17,00,000/-. The claim of the petitioner was thus ex-facie more than the claim made by the respondent. I am in respectful agreement with the view expressed by the Calcutta High Court in the said Judgment. The counter claim filed by the petitioner is thus ex-facie barred by law of limitation.

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84. The Travancore High Court in case of Aiyappan Pillai Krishna Pillai (supra) has held that though in cases of defensive set off, the set off claimed must be recoverable on the date of plaintiff suit, in counter claim the sums claimed by the defendant must be legally recoverable when he files his written statement claiming set off. In my view, the principles laid down by the Travancore High Court squarely applies to the facts of this case. The claim for set off as well as counter claim were barred by law of limitation and were not legally recoverable by way of set off or counter claim. In this case, no separate notice for invocation of arbitration agreement was issued by the petitioner in respect of counter claim, thus the arbitral proceedings in respect of counter claims made by the petitioner commenced on the date of filing counter claim on 19 th December,2016. Limitation for counter claim stopped on 19th December, 2016.

85. A perusal of para 64 of the arbitral award indicates that it was urged by the petitioner before the learned arbitrator that the petitioner was entitled to a defence of equitable set off. In my view, the learned Arbitrator rightly rejected the said plea on the ground that there was no such plea in the written statement and counter claim filed by the petitioner before the learned arbitrator.

86. I am not inclined to accept the submission of the learned Senior Counsel for the petitioner that prior to the date of filing of counter claim/ set off before the learned arbitrator, the petitioner had already adjusted the amount recoverable by the petitioner from the respondent against the security deposit amount lying with the petitioner. Submission of the learned Senior Counsel is contrary to the correspondence exchanged between the parties forming part of the record before the learned arbitrator and the prayers in the claim for set off and counter claim.

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87. In so far as the Judgment of the Supreme Court in case of Punjab National Bank and Ors. (supra) relied upon by the learned Senior Counsel for the petitioner is concerned, in my view, the said Judgment would not apply to the facts of this case. The facts in the said Judgment were totally

different and are distinguishable in the facts of this case.

88. In so far as the submission regarding the award of arbitration cost made by the learned Senior Counsel for the petitioner is concerned, a perusal of the record indicates that the learned arbitrator has considered the claim for arbitration cost in para 66 of the arbitral award. Both the parties had filed their respective statements of cost before the learned arbitrator claiming almost identical amount. The learned arbitrator after recording various findings and also considering the conduct of the petitioner and that the respondent had succeeded in the arbitral proceedings directed the petitioner to pay sum of Rs.38,75,000/-, which is inclusive of arbitral fees. Under Section 31A of the Arbitration Act, Arbitral Tribunal is empowered to award cost relating to various expenses. The petitioner did not dispute the statement of cost submitted by the respondent before the learned arbitrator. In the facts and circumstances of this case, in my view, the learned arbitrator was justified in awarding cost of Rs.38,75,000/- by exercising powers under Section 31A of the Arbitration Act.

89. In so far as the Judgment of Supreme Court in case of Sanjeev Kumar Jain (supra) relied upon by the learned Senior Counsel for the petitioner in support of his submission that the arbitral cost awarded by the learned arbitrator was exorbitant and unreasonable is concerned, a perusal of the said Judgment indicates that the Supreme Court had considered the provision for payment of cost under Section 35, 35A and 35B of the Code of Civil Procedure, 1908 and not under Section 31A of the Arbitration Act. The said Judgment thus would not assist the case of the petitioner. The said Judgment is even otherwise distinguishable in the facts of this case.

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90. In so far as submission of the learned Senior Counsel that though the clause 4(f) of the Agreement provided for rate of interest on the security deposit amount refundable at the rates offered on short term deposit by the Nationalized Banks in India, contrary to the said provisions and in violation of Section 31(7)(a) of the Arbitration Act, the learned arbitrator has awarded interest @ 12% p.a. is concerned, in my view, learned Senior Counsel is right in his this submission. In view of the specific agreement providing for rate of interest on the refund of security deposit amount at the rates offered by Nationalized Banks in India on short terms deposits, in my view, the learned arbitrator could not have awarded interest @ 12% p.a. in the impugned award from 9th April, 2013 till payment/realization. The rate of interest awarded @ 12% p.a. is contrary to the terms of the agreement and more particularly clause 4(f) and contrary to the Section 31(7)(a) of the Arbitration Act. The rate of interest awarded by the learned arbitrator is thus reduced to 8% p.a.

91. The learned arbitrator rendered findings of fact after appreciating the evidence laid by both the parties. The learned arbitrator has interpreted the terms of the contract entered into between the parties. The findings rendered by the learned arbitrator are not perverse and thus cannot be interfered with by this Court in this petition filed under Section 34 of the Arbitration Act. The arbitral award does not show any patent illegality. The interpretation of contract by the learned arbitrator is possible interpretation and thus cannot be substituted by another possible interpretations in this petition.

92. In so far as claim for refund of the security deposit amount in the sum of Rs.1,17,00,000/- awarded by the learned arbitrator in favour of the respondent is concerned, the petitioner did not deny the receipt of the said security deposit amount and also its obligation to refund the said security 39 carbp-758.2019.doc deposit upon the respondent handing over the vacant and peaceful possession of the suit premises by the respondent to the petitioner. The learned arbitrator thus has rightly allowed the claim for refund of security deposit in the sum of Rs.1,17,00,000/- in view of the respondent already having handed over possession thereof before the due date.

93. I therefore pass the following order:-

a) Arbitral Award dated 3rd December, 2018 passed by the learned Arbitrator is upheld except the rate of interest, which is reduced to 8% p.a. payable from 9th April, 2013 on amount of Rs.1,17,00,000/- till payment/realization.

b) Commercial Arbitration Petition No. 758 of 2019 is dismissed except to the extent of rate of interest modified in para (a) aforesaid.

c) In view of the dismissal of the Commercial Arbitration Petition partly, nothing survives in the Notice of Motion (L) No. 1359 of 2019 and the same is accordingly dismissed.

d) There shall be no order as to costs.

(R.D. DHANUKA, J.)