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

+ O.M.P. 147/2011

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Judgment dated 27.02.2013

ADIDAS INDIA MARKETING PRIVATE LTD

..... Petitioner

Through : Mr.Rakesh Tiku, Sr. Adv. with Mr.Vijay
Srivastava, Adv.

versus

HICARE INDIA PROPERTIES PVT LTD

..... Respondent

Through : Mr.Arun Kathpalia, Mr.Santosh Kumar,
Mr.Shoeb Alam and Mr.Vaibhav
Choudhary, Advs.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

1. Present objection petition has been filed by the petitioner under Section 34 of Arbitration and Conciliation Act, 1996, for setting aside the Award dated 10.12.2010 passed by a former Judge of this Court. The impugned award was rendered by the learned Arbitrator on a claim filed by the respondent/claimant against the petitioner company for alleged breach of Agreement to Lease dated 02.08.2007.
2. The facts, necessary to be noticed for disposal of the present petition, are that on 02.08.2007 an Agreement to Lease was executed between one Uppal Housing Limited and the petitioner company with respect to the lease of the premises bearing no.G-03 in Uppal's Centra Mall, Chandigarh, the ground floor of the property bearing no.177-D, Industrial Area, Phase I, Chandigarh. As per clause 3 of the Agreement to Lease dated 02.08.2007, the lease of the premises was to commence on the date of offer of the possession of the demised premises to the petitioner

company. The Lease was initially for a term of three years. Clause 3 of the lease agreement dated 02.08.2007 is being reproduced for ready reference as below:

“..... That the “Lease Commencement Date” or for that purpose the “Effective Date” for commencement of the lease for the initial term of three years, in respect of the Demised Premises shall be in effect from the date of offer of possession of the Demised Premises by the intending lessor to the intending lessee for fit outs; However, the possession of the demised premises will be delivered to the intending lessee subject to the simultaneous execution and registration of the lease deed, cost of registration and stamp duty shall be borne and paid by the intending lessee only. The intending lessee shall be liable to take possession of the demised premises within thirty days of such offer made by the intending lessor.....”

3. That thereafter on 02.05.2008, the demised premises were offered for possession to the petitioner company by “Uppal Housing Limited” and the petitioner company took the peaceful possession of the same on 07.07.2008. All the transactions and negotiations related to the leasing of the premises were carried out between “Uppal Housing Limited” and the petitioner company herein.
4. That thereafter vide sale deed dated 01.10.2008 the impugned premise was sold by “Uppal Housing Limited” to the Respondent company. As per the petition, intimation regarding change of ownership was not communicated by Uppal Housing Limited to the petitioner. Vide an email dated 3.11.2008 Uppal Housing Limited granted the petitioner company waiver of rent till 30.11.2008. Vide email dated 11.11.2008 Director of the respondent company wrote to the petitioner company intimating them that the said property had been transferred to the respondent and the petitioner is required to pay rent to the respondent. The Director of the respondent company also called upon the petitioner for completion of

formalities of transferring the lease in the name of the respondent and getting it signed. By another communication dated 15.12.2008 Petitioner Company wrote to the respondent offering them a proposal for a profit sharing agreement which was declined by the respondent.

5. Thereafter vide termination notice dated 06.03.2009 the Petitioner Company issued a statutory notice to the respondent under Section 106 of Transfer of Property Act, 1882 by which the Agreement of 02.08.2007 was terminated and fifteen days notice was given.
6. It is the case of the petitioner that the Agreement was unregistered and insufficiently stamped. It is also the stand of the petitioner that accounts were finally settled and petitioner took into account the rent free period which was granted and the security deposit of Rs.7,23,200/- towards two months' rent was paid.
7. On 23.3.2009, the petitioner handed over vacant and peaceful possession of the premises to the respondent. The petitioner also paid Rs.4, 84,990/- to the respondent towards rent for the remaining period in full and final settlement as per them.
8. Subsequently, the respondent invoked the arbitration clause of the Agreement dated 2.8.2007 and filed a petition under Section 11 of Arbitration and Conciliation Act, 1996. On 27.4.2010, while disposing of the said petition, a former Judge of this Court was appointed by this Court as an Arbitrator. On 31.05.2010 the respondent/claimant company filed a claim of Rs.1,03,51,562/- before the learned Arbitrator for the alleged breach of the Agreement to Lease dated 02.08.2007 and bifurcated its claim under the following heads:
 - a) Towards wrongful termination of the agreement to lease during the lock-in-period as per clause 9 read with clause 48 of the agreement to lease, a sum of Rs.86,78,400/- i.e. 24 months rent.

- b) Towards forfeiture of security deposit of three months rent being the sum of Rs.10,84,800/- (3 months rent);
- c) Less the sum of Rs.4,84,990/- towards rent and Rs.7,23,200/- towards security deposit Rs.85,55,010/- and;
- d) Interest of Rs.17,96,552/- being interest at the rate of 18% per annum on the amount in clause c;
- e) 18% *pendente lite* interest;
- f) 18% interest on the awarded sum from the date of award.

9. By the impugned award the petitioner has been saddled with the following liabilities:

“(1) Rs.86,78,400/- (24 months rent) under clause 48 of the agreements;

(2) Balance rent from October, 2008 to March, 2009 = Rs.16,84,610, Total = Rs.1,03,63,010/-
The above amount of Rs.1,03,63,010/- the respondent is liable to pay on account of breach of contract.

(3) In addition to Rs.1,03,63,010/- interest @12% p.a. on the said amount from April 31, 2009 till the date of the award i.e. 31.11.2010 = Rs.20,72,602/-.

(4) In addition to the above Rs.3 lacs as costs of arbitration.

The sum total of the above three amounts awarded are as under:

Liability on account of breach of contract Rs.1,03,63,010/- Interest towards the above amount @ 12% p.a. Rs.20,72,602/- costs of Rs.3,00,000/- = Total Rs.1,27,35,612/-”

10. The Award passed by learned Arbitrator has been assailed by the petitioner herein on the ground that the same is patently illegal, contrary to the substantive provisions of law, and judicial precedents as the learned

arbitrator has failed to appreciate that the purported “Agreement to lease dated 02.08.2007” is in essence a “lease agreement” which being unregistered and insufficiently stamped, creates a tenancy from month to month and has been rightly terminated by the petitioner by giving notice under Section 106 of the Transfer of Property Act, 1882.

11.Mr.Rakesh Tiku, learned senior counsel for the petitioner, submits that the Award passed by the learned Arbitrator is contrary to the fundamental policy of Indian law, and the interest of justice and the illegality goes to the root of the matter. The learned Arbitrator has failed to consider the fact that from a combined reading of Sections 17 and 49 of the Transfer of Property Act, 1882, it is abundantly clear that the unregistered Agreement to Lease dated 2.8.2007, which in essence and substance a lease deed and is not admissible in evidence. The unregistered lease deed cannot be read in evidence and the terms of the same cannot be enforced between the parties. Thus the arbitrator has traversed beyond the pleadings and evidence on record, rendering the award erroneous.

12.Learned senior counsel further submits that the reasoning given by the Arbitrator is perverse and is contrary to the public policy on the face of the award. Senior counsel next submits that the Arbitrator has wrongly arrived at a finding that it is a case not under Section 17(i)(b) but under Section 2(v) of Section 17 of the Registration Act, 1908, which contemplates another document, which when executed will create, declare, assign, limit or extinguish such right or title or interest in the immovable property and will require registration.

13.Learned senior counsel for the petitioner contends that the Arbitrator has ignored the legal proposition that in considering the effect of a document it is to be enquired whether it contains unqualified and unconditional words of present demise and includes the essential terms of the lease. It is

also submitted that in the given facts of this case and a reading of the agreement to lease would show that it amounts to a present demise even though the parties had contemplated to execute a more formal document in future. Counsel also contends that if the rent is made payable under an agreement from the date of its execution or any other specified date, it may be said to create a present demise.

14.Mr.Tiku, learned senior counsel for the petitioner submits that the impugned agreement to lease dated 02.08.2007 has all the ingredients of a lease and it clearly defines the quantum, duration, date of commencement of rent, and thus, in essence and substance it is a lease agreement. Mr.Tiku, learned counsel for the petitioner also submits that the reasoning of the arbitrator is perverse and is contrary to public policy as he has stated “no doubt essential terms of the lease are fixed, but execution and registration is the only method to grant lease for three years..” Counsel contends that it is settled law that a document has to be read as a whole and in entirety, to find out the character and nature of the document. It is next contended that reading of the impugned agreement would show that it refers to the rent, date of payment of rent, security deposit, right to terminate the rent agreement, sub-letting, maintenance charges and interest. It also talks about the method of termination i.e. how notice of termination was to be issued and, thus, the document is a lease deed.

15.Mr.Tiku, learned senior counsel for the petitioner contends that it is also well settled that one of the relevant tests in deciding the effect of a document is the intention to deliver possession. Counsel further contends that if the possession is handed over under an agreement and other terms of the tenancy have been set out then the agreement can be taken to be a lease deed. In the present matter, admittedly, the possession was handed over to the petitioner company which can limit only to one conclusion that

parties had intended to treat the document dated 02.08.2007 to be a lease deed. It is further submitted by the learned counsel for the petitioner that the award is based on an erroneous and illegal propositions that a memorial in writing duly executed and registered is essential for creation of a demise, whereas the creation of a demise is not subject to a document in writing and registration but the demise can be created even otherwise.

16. It is contended by learned senior counsel for the petitioner that by holding that the petitioner company is liable to pay rent of Rs.3,61,600/-, per month, for 24 months (lock in period under clause 48 of the Agreement dated 2.8.2007), the learned Arbitrator has committed a grave error in law for the reason that the impugned document dated 2.8.2007 is in essence and substance a lease deed and being an unregistered document it is not admissible in evidence. It is further contended that the learned Arbitrator has granted damages of Rs.86,78,400/- on account of 24 months' rent (lock in period) under clause 48 and, thus, ignored the well settled principles laid down in Section 73 read with the explanation of the Indian Contract Act, 1872. It is also contended that the Award of Rs.86,78,400/- is unreasonable. In support of his submission that the document in question is not an agreement to lease, but in fact a lease deed, Mr.Tiku, has drawn the attention of the Court to various clauses of the lease deed. Mr.Tiku, has particularly referred to the following clauses of the agreement to lease dated 02.08.2007, which are reproduced below:

“Clause E of the lease agreement states that intending lessor is the absolute and lawful owner and in possession of the said plot of the land including the mall and has full right, authority and power to let, lease, sell the same.

Clause I states that intending lessee has agreed to take from the intending lessor the shop/ commercial establishment locally numbered as G-03 having an approx area of 167.96 sq. meter and

approx covered area of 104.9 sq. meter located on the ground floor hereinafter referred to as demised premises on lease basis for an initial term of three years for the purpose of running the business of retain outlet under the brand/ trade name “adidas”.

Clause 2 mentions that the intending lessee will have the option to renew the said demised premises for further two terms.

Clause 3 states the lease commencement date for commencement of the lease for the initial term of three years shall be with effective from the date of offer of possession of the demised premises by the intending lessor to the intending lessee for fit outs.

However the possession of the demised premises will be handed over to the intending lessee subject to execution and registration of the lease deed.

Clause 4 is the monthly rental clause saying that during the initial period of three years of lease rental at the rat of Rs.200 per square feet of the super area per month is payable. It further talks of increments in rent in subsequent years.

Clause 5 talks of the renewal of the lease term and states that the lease shall be renewed on expiry of the prevailing lease period.

Clause 6 states that lessee shall not create any encumbrance.

Clause 7 states that the demised premises let out shall be in bare shell condition.

Clause 8 states that the rental shall be charged on super area.

Clause 10 talks of refundable security deposit.

Clause 11 states the mode of termination of the lease in case of breach.

Clause 12 states that possession of the demised premises shall be handed over by the intending lessor for fitout before August 31st 2007.

Clause 13 states that the premises shall be used for specific

commercial purposes.

Clause 14 states that the purpose of the lease shall not change without prior written approval.

Clause 15 states that the lessee shall pay charges for consumption of electricity water power etc.

Clause 16 states that demised premises shall have electricity supplied at single point source.

Clause 17 discusses subletting, under letting and assignment.

Clause 18 states that demises shall be kept in proper condition.

Clause 19 states that no addition or alteration shall be carried in the demised premises.

Clause 20 states that all approval for running business shall be obtained by the lessee.

Clause 21 states that no hazardous or inflammable material shall be kept around premises.

Clause 22 states that demised premises shall be maintained in proper condition and adequate insurance policy shall be obtained.

Clause 23 states that business hours shall be as per prevailing norms.

Clause 24 states that intending lessor has the right of inspection.

Clause 25 states that the lessee shall not encroach.

Clause 26 states that lessee shall not install gensets.

Clause 27 states that no illegal act shall be carried out from the premises.

Clause 28 states that lessee shall not subdivide the demised premises.

Clause 36 to 43 are obligations on part of lessor.

Clause 36 states that the lessor shall deliver the possession for fit outs before 31st August, 2007.

Clause 37 talks of the property tax to be paid by the lessor and

Clause 39 talks of the various facilities to be given by lessor to the lessee.

Clause 43 states that if the intending lessor upon signing of this agreement transfers or sales the demised premises the intending lessor shall attorn the same.

Clause 44 to 54 discusses various obligations of lessor and lessee.

Clause 55 and 56 talks of mode and manner of surrender of possession.”

17. Mr.Tiku, learned senior counsel for the petitioner next submits that the Arbitrator has also traversed beyond the pleadings and evidence on record while awarding Rs.7, 23,200/- for forfeiture of security deposit on account of breach of the agreement. It is also submitted that the such a forfeiture is illegal and unjustified as the same is beyond the terms of the contract and even the claimant/respondent has admitted in its pleadings that the said security deposit was refundable and has sought in his prayers for adjusting the same against other claims. That such a forfeiture is patently illegal and against the principles of Section 73 of the Indian Contract Act, 1872 and is in the form of a penalty.
18. Mr. Rakesh Tiku submits that the Arbitrator has erroneously recorded a finding that “*on becoming the owner the respondent asked the petitioner to execute and register the lease whereas the agreement contemplated that possession of the demised premises will be delivered to the intending lessee subject to simultaneous execution and registration of the lease deed.....*” It is pointed out by Mr.Tiku that in fact Uppal Housing Limited

delivered the peaceful possession of the impugned premises without any formal execution and registration of a lease deed and the respondent after buying the impugned property sought for transfer of lease in its name and not execution and registration, as contemplated in the agreement to lease dated 02.08.2007. Mr.Tiku has also submitted that initially M/s.Uppal Housing Limited had entered into an agreement to lease with the petitioner. Subsequently vide e-mail dated 11.11.2008 Mr.Satnam Singh Nanua, Director of the respondent company wrote to the petitioner company informing them that the property has been transferred in the name of respondent company and the petitioner company is required to pay the rent to the respondent company. Mr.Tiku has relied upon an email dated 11.11.2008 sent by the respondent to the petitioner. Relevant portion of the email dated 11.11.2008 reads as under:

“As you are tenant in the said property you are now liable to pay the agreed rent to us directly and not Uppal Housing Ltd. who no longer own the property.

For your information, our solicitor Mr.R.K. Rana shall be in contract with you soon to complete the formality of transferring the lease in our name and getting it signed by yourselves and my attorney in India. Can you please co operate him at your best and get the lease completed....”

19.It is submitted by Mr.Tiku, learned senior counsel for the petitioner, that the Arbitrator has wrongly noted that the respondent asked for execution of lease and its registration while the petitioner evaded this obligation on one pretext or the other whereas in the email dated 11.11.2008 the respondent sought the formality of transferring the lease in its name and not execution and registration of the formal lease and, thus, the conclusion that the petitioner evaded from its obligation is based on surmises and conjectures. It is further submitted by Mr.Tiku that the finding of the

Arbitrator is perverse and is contrary to the public policy as the question of termination of lease did not arise because the lease never came into effect. This finding is against the settled proposition of law that where a person holds over under an unregistered lease and continues in possession by paying monthly rent the holding over must be held as a tenancy from month to month and the only way to terminate such a lease is to give 15 days' notice under Section 106 of Transfer of Property Act, 1882.

20. It is also submitted that the Award is also assailed on the ground that the Arbitrator committed an error apparent on the face of the record by ignoring the law laid down in the case of ***Time Broadband Services Pvt. Ltd. v. Colombian Software Solutions Pvt. Ltd.***, OMP No.180/2009 whereas the said judgment squarely covers the Petitioners case on facts and on point of law as well as the law laid down in the case of ***Hemanta Kumar Devi v. Midnapore Zamindari Co.***, reported at (1919) 47 Calcutta 485.
21. Learned senior counsel for the petitioner submits that while holding that the Agreement to Lease dated 2.8.2007 did not create a present demise and it was an executory agreement, the learned Arbitrator has completely ignored the fact that the Agreement to Lease dated 2.8.2007 has clearly defined the rent, the date of payment of rent, the security deposit, the right to terminate the rent agreement, subletting, maintenance charges and other rights and liabilities of the lessor and the lessee. Learned senior counsel further submits that the impugned agreement also talks about the method of termination i.e. how the notice of termination was to be issued. The Arbitrator has failed to appreciate that the agreement to lease had effected an actual demise and is not an agreement that in certain contingencies a lease will be granted. It is also submitted that merely because the parties have expressly stipulated that thereafter a formal agreement shall be

prepared, embodying the terms, which shall be signed by the parties does not by itself show that they continue merely in negotiations. Learned senior counsel next submits that to determine whether an agreement to lease amounts to a lease within the meaning of Section 2(7) of Registration Act the test is to see whether the agreement itself would confer a legal right or whether the execution of another instrument which would give a legal right was in the contemplation of the parties. It should be construed to be a lease if the present demise is to be inferred from the language employed. The fact that it contains a stipulation for the execution of a formal document subsequently would not make any difference if the covenants mentioned therein are to become binding at once. It is the dominant intention of the parties that should be gathered from the language in which the document is couched that should be the criterion in deciding whether a particular instrument is an agreement to lease or merely an agreement to grant a lease in future creating a right in a party to obtain a document under certain circumstances or on the happening of a certain contingency.

22. Mr.Tiku submits that it has been incorrectly held by the learned Arbitrator that the intending lessee took possession on his giving an assurance that he will execute the lease and register the same subsequently as the same is beyond the pleadings and evidence. It is next submitted that there is an error on the part of the learned Arbitrator in holding that the agreement was conditional. That while stating that the important words are “subject to” learned Arbitrator has ignored all other clauses of the agreement and put over emphasis on a single term. That the learned Arbitrator instead of reading all the terms of the agreement in entirety while deciding the nature of the agreement dated 02.08.2007 has given undue importance to clause 3 of the agreement and has ignored the fact that the said clause has

to be read along with the other clauses and no part of the document is a surplus.

23. Mr.Tiku further submits that there is an error on the part of the learned Arbitrator in holding that agreement dated 02.08.2007 is a prospective executor agreement providing for getting the lease executed and registered on a future date when the jural relationship of lessor and lessee will be established. It is further submitted that reading of the entire document makes it amply clear that the same is nothing but a lease deed and registration of a lease deed is compulsory under the Registration Act. Counsel next submits that the Arbitrator has erred in giving a finding that after taking over the possession in July, 2008, the petitioner remained only an intending lessee.
24. Mr.Tiku also submits that the learned Arbitrator has wrongly placed reliance on *Themi P. Sidhwa & Ors. v. Shib Banedee & Sons Pvt. Ltd.*, AIR 1974 SC 1912 as the petitioner never made any promise to execute and register the lease deed and the correspondence relied upon by the Arbitrator is out of context. The Arbitrator has committed an apparent error on the face of the Award and erred in holding that the facts of the case in *Food Corporation of India & Ors. v. Babu Lal Aggawral*, reported at (2004) 2 SCC 712, are identical to the facts of the present case, whereas the said judgment is entirely on different facts. It is also submitted that the learned Arbitrator has erroneously applied the principle of promissory estoppel laid down in *Union of India v. Anglo Afghan Agencies*, reported AIR 1968 SC 718; *Moti Lal Padampal Sugar Mills Ltd. v. Union of India*, reported at (1979) 2 SCC 409; and *Delhi Cloth and General Mills Ltd. v. Union of India*, reported at (1988) 1 SCC 86, to the facts of the present case. It is also submitted that the finding of the learned Arbitrator that delivery of possession on 7.7.2008 is not of any

significance because it did not pass any right or title in *praesenti* in the immovable property is erroneous as it is well settled that one of the relevant tests in deciding the effect of a document is the intention to deliver possession. If possession is handed over under an agreement and other terms of tenancy have been set out then the agreement can be taken as a lease agreement. It is next submitted by Mr.Tiku that the award is based on erroneous and illegal prepositions. The learned Arbitrator has erred in holding that it was a license, a personal privilege granted to the respondent to go into possession with the ultimate intention that he will execute the formal lease and, thus, this possession during the transitional period is not an indicia of lease. It is next submitted by Mr.Tiku that the difference between a lease and license is a well settled preposition and the learned Arbitrator has committed an error on the face of the record in holding the petitioner to be a licensee while there was a demise in presenti and a right was created in the property in favour of the petitioner with the impugned document dated 2.8.2007.

25. It is contended by Mr.Tiku that the learned Arbitrator has wrongly and erroneously applied the case of ***Vinod Sethi v. Davendra Bajaj***, reported at (2010) 8 SCC 1, which is not applicable to the facts of the present case.
26. Mr.Tiku has further relied upon ***Pradeep Oil Corporation v. Municipal Corporation of Delhi and Anr.***, reported at 2011 (4) SCALE 422, more particularly paras 24, 32 and 35 in support of his contention that a deed must be read in its entirety and reasonably and the intention of the parties may be gathered upon reading of the same. The same decision has also been relied upon in support of his plea that where exclusive possession is granted, the presumption that the instrument is that of the lease becomes stronger. Paras 24, 32 and 35 read as under:

“24. It is well settled legal position that a deed must be read in its entirety and reasonably. The intention of the parties must also as far as possible be gathered from the expression used in the document itself.

32. In *Street v. Mountford*, 1985 Appeal Cases 809, it was held that when exclusive possession is granted in lieu of only rent payable therefore, the presumption that the instrument is that of a lease becomes stronger. In the present case the Administration has also option to revise the rent. Had it been a case of mere right to use the property, such provision would not have been there. Further, the manner in which the rent is to be paid is also important. It is to be paid annually in a case of a license pure and simple, the indenture would not normally contain a claim that rent would be paid annually.

35. We may also notice the undisputed fact that in the present case the parties have agreed that for the purpose of determination of the agreement three calendar months' notice had to be given. Undoubtedly, such clause in the document in question has a significant role to play in the matter of construction of document. Clearly, if the parties to the agreement intended that by reason of such agreement merely a license would be created such a term could not have been inserted.”

27. Reliance has also been placed on *Manju Bagai Vs. Magpie Retail Ltd.* reported in MANU/DE/2913/2010 to show that the damages could not have been awarded and more particularly paragraphs 7, 9, 10 & 11, which are reproduced below:

“7. I have examined and read Agreement to Lease dated 5th September, 2006. The said document cannot be regarded as Agreement to Lease in spite of the nomenclature or the heading given to the document. The petitioner has placed reliance on the introductory clauses which refer to the discussions between the parties prior to execution of the documents. On reading of the main or recital clauses it is apparent that the said document is a lease deed in itself in praesenti which was executed on 5th September, 2006 but the lease was to begin with effect from 1st November,

2006. Clause 13 no doubt refers to execution of another document but this clause is not to be read in isolation. Other clauses indicate that the document dated 5th September, 2006 is a lease deed. No other document was executed between the parties. It is well settled that the document has to be read as a whole in entirety to find out the character/nature of the said document. The main clauses of the lease refer to the rent, the date of payment of rent, the security deposit, the right to terminate the rent agreement, subletting, maintenance charges and interest. It also talks about the method of termination i.e. how notice of termination was to be issued.

9. Thus the petitioner did not regard the said document as an agreement to lease but a lease deed in itself. The document dated 5th September, 2006 being an unregistered lease deed cannot be relied upon by the petitioner. The tenancy in question was a monthly tenancy and nothing more. The petitioner cannot rely upon Clause 5 of an unregistered document. In these circumstances, reliance placed by the counsel for the petitioner on the decision of the Supreme Court in Food Corporation of India and Others (Supra) is misplaced and cannot be accepted.

10. Even otherwise the claim for 'liquidated' damages is not sustainable. It may be noted that Clause 5 relied upon by the petitioner uses the term 'liquidated' damages in case the tenant vacates the property during the lock-in-period of first three years. It is a contention of the petitioner that the respondent company, as a tenant, is liable to pay the balance rent for the unexpired period of the lease of three years. The distinction between 'liquidated' and 'un-liquidated' damages is well settled. Mere use of the term 'liquidated' damages in a document cannot be the criteria to determine and decide whether the amount specified in the agreement is towards 'liquidated' damages or 'un-liquidated' damages. Amount specified in an agreement is liquidated damages; if the sum specified by the parties is a proper estimate of damages to be anticipated in the event of breach. It represents genuine covenanted pre-estimate of damages. On the other hand 'un-liquidated' damages or penalty is the amount stipulated in terrorem. The expression 'penalty' is an elastic term but means a sum of money which is promised to be paid but is manifestly intended to be in excess of the amount which would fully compensate the other party for the loss sustained in consequence of the breach. Whether a clause is a penalty clause or a clause for payment of liquidated

damages has to be judged in the facts of the each case and in the background of the relevant factors which are case specific. Looking at the nature of the Clause and even the pleadings made by the petitioner, I am not inclined to accept the contention of the petitioner that Clause 5 imposes liquidated damages and is not a penalty clause. No facts and circumstances have been pleaded to show that Clause 5 relating to lock-in-period was a genuine pre-estimate of damages which by the petitioner would have suffered in case the respondent company had vacated the premises. No such special circumstances have been highlighted and pointed out.

11. The decision in the case of Food Corporation of India and Others (supra) is distinguishable. In the said case a civil suit was filed and there was evidence to show that the plaintiff therein had performed his part of the contract and altered his position, having constructed the plinths according to specifications of the defendant i.e. FCI. The defendant had promised to plaintiff that on completion of the construction, they would hire the premises for a period of three years but later on backed out. The trial court and the finding of the Supreme Court was that the construction was made in accordance with the design and specification prescribed by the defendant. Therefore, it was held that the defendant cannot back out from the promise held out and escape from the liability.”

28. In support of his plea that an unregistered document is not admissible in evidence strong reliance is placed by Mr.Tiku in the case of **Time Broadband Vs. Colombian Software [O.M.P. No. No.180/2009]** and more particularly paragraph 7 & 8, which are reproduced below:

“7. It is an undisputed fact that the so-called lease deed between the parties is an unregistered document and it is not on stamp paper. It is only a lease agreement between the parties and a registered lease deed was yet to be executed between the parties. In view of this fact, the lease cannot be considered to be for a fixed period of five years or of a period more than a year and has to be considered as a month to month lease. Any lease which creates a right in the property in favour of lessee for a period of more than a year is required to be registered and it has to be made on an appropriate stamp paper. The Lessee had entered into the premises in January 2008 and till filing of the petition under Section 9, the Lessor had

not taken any steps for specific performance of the lease agreement and had not initiated any action against the Lessee for execution of the lease deed. Thus, it is presumed that the Lessor and the Lessee were quite happy with the month to month lease between them. The lease agreement which has been placed on record being an unregistered document, cannot be looked into by the Court and has to be considered only as a piece of junk except that it can be seen for collateral purposes. However, an arbitration agreement entered into between the parties for resolution of disputes is a separable contract and is a valid arbitration agreement and these petitions under Section [9](#) of the Act filed by the parties would be maintainable.

8. In view of the fact that the lease was a month to month lease, the contention of the Lessor that there was a lock-in-period and the Lessee was bound to retain the premises for a minimum period of five years, prima facie cannot be entertained. A month to month lease is terminable by 15 days' notice and it is admitted by the Lessor that 15 days' notice was received by the Lessor through an e-mail which was duly accepted by the Lessor. Thus, I prima facie find that the Lessee was not liable to pay rent after 31st March 2009 and the Lessor was liable to take the possession of the premises from midnight on 31st March 2009 and was liable to refund the security after adjusting the rent for January, February and March 2009.

29. Reliance has also been placed on *State of Maharashtra & Ors. Vs. Atur India Pvt. Ltd.* (1994) 2 SCC 497, and more particularly paragraphs 2, 9, 30 & 31, which are reproduced below:

“2. In the year 1968, the Government of Maharashtra started reclamation work in the area known as Backbay Reclamation area abutting Bombay City on the Cuffee Parade and Nariman Point. The object of reclamation was to provide for construction of multi-storied buildings, The reclaimed land was divided into five blocks; each was given number; for block No. V, the appellant (State of Maharashtra) issued the invitation to the public to make offers for purchase of plot of land for putting up multi-storied buildings. The plots and structures were to be given on 99 years lease at a specified rates.

9. On February 24, 1983, the Superintendent of Stamps addressed to the respondent inter alia reciting that by virtue of certain correspondence between the respondent and the Government of Maharashtra, the respondent had agreed to abide by certain terms and conditions of lease to be executed in respect of plot No. 101. The letter further recited that the lease had not been executed by the respondent. Therefore, the Superintendent claimed that the agreement arrived at by correspondence between the respondent and the Government of Maharashtra amounted to lease falling under Article 36 of the Bombay Stamp Duty Act, 1958. On that basis, a demand for stamp duty for a sum of Rs. 1,86,175/- was made. Failing to do so, it was suited that the same would be recovered as arrears of land revenue. It was this which led to filing of Writ Petition No. 2494 of 1983 before the High Court of Bombay.

30. If it is merely an agreement to lease as to whether it requires registration has come up for discussion of this Court in *Tiruvani Bai and Anr. v. Smt. Lilabai*, 1959(2) Suppl. SCR 107 it was held as under:

Before dealing with these points, we must first consider what the expression "an agreement to lease" means under Section [2\(7\)](#) of the Indian Registration Act. hereinafter referred to as the Act. Section [2\(7\)](#) provides that a lease includes a counterpart, Kabuliyat, an undertaking to cultivate and occupy and an agreement to lease. In *Hemanta Kumari Debi v. Midnapur Zamindari Co. Ltd.* 1919 L.R. 46 IA. 240, the Privy Council has held that "an agreement to lease, which a lease is by the statute declared to include, must be a document which effects an actual demise and operates as a lease". In other words, an agreement between two parties which entitles one of them merely to claim the execution of a lease from the other without creating a present and immediate demise in his favour is not included under Section [2](#), Sub-section (7). In *Hemanta Kumari Debi's* case (supra) a petition setting out the terms of an agreement in compromise of a suit stated as one of the terms that the plaintiff agreed that if she succeeded in another suit which she had brought to recover certain land, other than that to which the compromised suit related, she would grant to the defendants a lease of that land upon specified terms. The petition was

recited in full in the decree made in the compromised suit under Section 375 of the CPC, 1882. A subsequent suit was brought for specific performance of the said agreement and it was resisted on the ground that the agreement in question was an agreement to lease under Section [2\(7\)](#) and since it was not registered it was inadmissible in evidence. This plea was rejected by the Privy Council on the ground that the document did not effect an actual demise and was outside the provisions of Section [2\(7\)](#). In coming to the conclusion that the agreement to lease under the said section must be a document which effects an actual demise the Privy Council has expressly approved the observations made by Jenkins, C.J., in the case of *Panchanan Bose v. Chandra Charan Misra*, I.L.R. 1910, 37 Cal. 808 in regard to the construction of Section [17](#) of the Act. The document with which the Privy Council was concerned was construed by it as "an agreement that, upon the happening of a contingent event at a date which was indeterminate and having regard to the slow progress of Indian Litigation, might be far distant, a lease would be granted"; and it was held that "until the happening of that event, it was impossible to determine whether there would be any lease or not". This decision makes it clear that the meaning of the expression "an agreement to lease" "which, in the context where it occurs and in the statute in which it is found, must relate to some document that creates a present and immediate interest in the land". Ever since this decision was pronounced by the Privy Council the expression "agreement to lease" has been consistently construed by all the Indian High Courts as an agreement which creates an immediate and a present demise in the property covered by it.

31. Examining in the light of above, we hold that the notice of the appellant dated 30.11.1970, the offer of the respondent dated 15.12.1970 and the acceptance of the Collector of the tender of respondent for lease dated 1.1.1971 would merely constitute an agreement to lease. Clause 13 clearly contemplates that the licensee will be put in possession of plot on his executing the agreement to lease. Therefore, it is clear that by the respondent accepting the offer on 15.12.1970, the relationship of lessor and lessee between the appellant and the respondent had not come to be established. Further as pointed out earlier there was no actual demise on the

date of the accepting of tender. Therefore, it is only an agreement to lease. It will not fall under Section [2\(n\)](#) of the Act in which case, it is not an instrument chargeable to duty and the question of impounding does not arise. Much less, there could be a demand for stamp duty.”

30. Counsel for the petitioner further relied on *Tiruveenibai and Anr. Vs. Lilabai* reported in AIR 1959 SC 620 and more particularly paragraphs 14, 15 & 16, which are reproduced below:

“14. Let us now proceed to deal with the question as to whether the document (Ex. P-1) constitutes "an agreement to lease". It purports to be a receipt executed in favour of the respondent by defendant 1 and bears a four anna revenue stamp. "I have this day given to you", says the document, "the land described below which is owned by me. Now you have become occupancy tenant of the same. You may enjoy the same in any way you like from generation to generation. My estate and heirs or myself shall have absolutely no right thereto. You shall become the owner of the said land from date 1-6-1944. I will have absolutely no right thereto after the said date". Then the document proceeds to mention the properties and describes them in detail, and it adds "all the above fields are situate at Mouza Mohammadpur, mouza No. 312, tehsil Arvi, district Wardha. The estate described above has been given to you in lieu of your Rs. 8,700 due to you, subject to the condition that in case your amount has not been paid to you on date 1-6-1944, you may fully enjoy the estate described above in any way you like from generation to generation". The question for our decision is : Does this document amount to an agreement to lease under s. [2\(7\)](#) of the Act ?

15. In construing this document it is necessary to remember that it has been executed by laymen without legal assistance, and so it must be liberally construed without recourse to technical considerations. The heading of the document, though relevant, would not determine its character. It is true that an agreement would operate as a present demise although its terms may commence at a future date. Similarly it may amount to a present demise even though parties may contemplate to execute a more formal document in future. In considering the effect of the document we must enquire whether it contains unqualified and

unconditional words of present demise and includes the essential terms of a lease. Generally if rent is made payable under an agreement from the date of its execution or other specified date, it may be said to create a present demise. Another relevant test is the intention to deliver possession. If possession is given under an agreement and other terms of tenancy have been set out, then the agreement can be taken to be an agreement to lease. As in the construction of other documents, so in the construction of an agreement to lease, regard must be had to all the relevant and material terms; and an attempt must be made to reconcile the relevant terms if possible and not to treat any of them as idle surplusage.

16. The learned Attorney-General contends that this document is not a contingent grant of lease at all. According to him it evidences a grant of lease subject to a condition and that shows that a present demise is intended by the parties. He naturally relies upon the opening recitals of the document. According to him, when the document says that defendant 1 has given to the respondent the land described below and that the respondent has become occupancy tenant of the same, it amounts to a clear term of present demise. A similar recital is repeated in the latter part of the document where it is stated that the estate described above has been given to the respondent in lieu of Rs. 8,700 due to her. In our opinion, it would be unreasonable to construe these recitals by themselves, apart from the other recitals in the document. We cannot lose sight of the fact that the document expressly states that the respondent shall become the owner of the land from 1-6-1944 and that defendant 1 would have no title over it after that date. This recital also is repeated in the latter part of the document; and it makes the intention of the parties clear that it is only if the amount of debt is not repaid by defendant 1 on the date specified that the agreement was to come into force. In other words, reading the document as a whole it would be difficult to spell out a present or immediate demise of the occupancy rights in favour of the respondent. In this connection the fact that the document is described as a receipt may to some extent be relevant. It is clear that by executing this document the defendant wanted to comply with the respondent's request for acknowledging the receipt of the amount coupled with the promise that the amount would be repaid on 1-6-1944. The defendant also wanted to comply with the respondent's demand that, if the amount was not repaid on the said date, he would convey the occupancy

rights in his lands to her. Besides, it is significant that the document does not refer to the payment of rent and does not contemplate the delivery of possession until 1-6-1944. If the document had intended to convey immediately the occupancy rights to the respondent it would undoubtedly have referred to the delivery of possession and specified the rate at which, and the date from which, the rent had to be paid to her. The stamp purchased for the execution of the document also incidentally shows that the document was intended to be a receipt and nothing more. Under s. 2 of the Central Provinces Land Revenue Act, 1917 (C.P. II of 1917) an agricultural year commences on the first day of June and it is from this date that the agreement would have taken effect if defendant 1 had not repaid the debt by then. It is clear that the respondent was not intended to be treated as an occupancy tenant between the date of the document and June 1, 1944. During that period the agreement did not come into operation at all. In other words, it is on the contingency of defendant's failure to repay the amount on June 1, 1944, that the agreement was to take effect. We have carefully considered the material terms of the document and we are satisfied that it was not intended to, and did not, effect an actual or present demise in favour of the respondent. In our opinion, therefore, the High Court was right in holding that the document was not an agreement to lease under s. [2\(7\)](#) of the Act and so did not require registration.”

31. Mr.Tiku submits that the case of *Food Corporation of India & Ors.* (supra), which has been relied upon by the respondent and accepted by the Arbitrator, is not applicable to the facts of this case. Paras 3, 5 and 10 read as under:

“3. The Food Corporation of India (for short 'FCI') invited tenders for hiring plinths for storing foodgrains. The plaintiff submitted his tender which was ultimately accepted vide letter dated 11.6.1985. The rent was to be @40 paisa per sq.ft. The acceptance of tender and the conditions of contract had again been confirmed by the letter dated 19.8.1985 written by the Regional Manager, An agreement dated 12.2.1986 was entered into between the parties. The case of the plaintiff is that the defendant had given out to hire the plinths for a period of three years with an option to the defendant to extend by another year. The construction of plinth etc.

could not be constructed within the time as agreed- However, ultimately it is undisputed that the same were completed and handed over to the defendant on 24.1.1987. No formal lease deed was executed. The defendant on 26.9.1988 gave 15 days' notice for vacating the plinths and vacated the same on 10.10.1988. The rent upto the said period was paid. According to the plaintiff it amounted to breach of the terms of the contract by the defendant, hence filed a suit for damages for an amount of Rs. 17 lacs and odd. The Trial Court decreed the suit for a total sum of Rs. 17,32,709/- with an order for refund of the security and interest thereon. The plaintiff was also allowed interest on The decretal amount @6% p.a. from the date of suit namely, 4.10.1991 till the date of payment.

5. The case of the plaintiff was that the claim of the plaintiff for damages is based on breach of conditions of the agreement dated 12.2.1986 since the defendant instead of occupying the plinth/platform for a period of three years, vacated the same on 10.10.1988 after having taken the possession only on 24.1.1987. Therefore, the defendant was liable to damages at the same rate as the rent for the plinth. The case of the defendant has been that no registered lease deed, as envisaged in the agreement was executed for a period of three years, hence it was only a tenancy for month to month and under the provisions of Section 106 of the Transfer of Property Act it was legally open for the defendant to terminate the tenancy on fifteen days' notice and vacate the premises. On the pleadings of the parties the court framed issues. We are concerned with only issue Nos. 3 and 4 in respect of which arguments have been advanced before us, which are reproduced below:-

"3. Whether in the absence of the registration of the alleged lease for three years the tenancy between the parties was monthly and it was liable to termination by notice?

4. Whether the defendants were bound to pay rent for three years on the principle of 'Promissory Estoppel'?"

On both issues noted above the Trial Court has recorded findings in affirmative but in respect of issue No. 3 it has been further held

that there was a breach of contract on the part of the defendant. The Trial Court has made a detailed discussion while recording the findings as indicated above and came to a conclusion that once the plaintiff had performed his part of the contract and altered his position, namely, having constructed the plinth according to specification of defendant, on a condition given out by the defendant that on completion of the construction they would hire the premises for a period of three years, the defendant could not later on back out from such a promise. It has been noted, and rightly so, that in the tender notice as well as in the correspondence it had been clearly given out time and again that the defendant would utilize the plinths constructed by the plaintiff for a period of three years. As a matter of fact, on completion of the construction the defendant did occupy the plinth and had been paying rent as agreed but terminated the tenancy by serving a notice of 15 days' as per the provisions of Section 106 of the Transfer of Property Act and vacated the premises on 10.10.1988. In connection with this point it may be worthwhile to notice that the defendant itself had admittedly written a letter dated 16.10.1986 to the United Commercial Bank mentioning therein that the lease was a period of three years and the rent payable to the plaintiff would be directly remitted to the bank as against the loan advanced to the plaintiff.

10. The next submission made on behalf of the respondent is that the agreement dated 12.2.1986 which provided for execution and registration of lease for a period of three years, was itself required to be registered according to Section 2(7) of the Registration Act, 1908. Sub-section (7) of Section 2 is quoted below:

"2. Definitions- In this Act unless there is anything repugnant in the subject or context,-

XXX XXX XXX

(7) "lease" includes a counterpart, kabuliyat an undertaking to cultivate or occupy, and an agreement to lease,"

It is submitted that since, there was an agreement for lease it was therefore, liable to be registered. In this connection two other provisions, Section 17(1)(d) and Section 17(2)(v), which may be

relevant for the purposes of dealing with this point may also be perused. Section 17(1)(d) reads as under :

"17. Documents of which registration is compulsory. (1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and it they have been executed on or after the date on which. Act No. XVI of 1864, or the Indian Registration Act 1866, or the Indian Registration Act. 1871. or the Indian Registration Act, 1877, or this Act came or comes into force, namely,

XXX XXX XXX

(d) lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent;"

"The other relevant provision is clause (v) of Sub-section (2) of Section 17, which reads as under :

"17(2) Nothing in clause (b) and (c) of Sub-section (1) applies to-

XXX XXX XXX

(v) "any document other than the documents specified in Sub-section (1A)" not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immovable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest; or..."

The agreement dated 12.2.1986 would squarely be covered by clause (v) of Sub-section (2) of Section 17 quoted above. Since it merely creates a right to obtain another document which will when executed would create such a right. It would be necessary to refer to the conditions of the agreement at this juncture. Clause 8 of the agreement quoted earlier is clear, in providing that upon completion of the plinths' etc. the premises would be handed over to the defendant under a lease agreement to be executed between

the parties in the prescribed proforma. Thus clause 8 only talks of execution of a lease deed between the parties in a prescribed proforma under which the defendant would be entitled to get possession of the premises on completion. The necessary stamp duty was to be borne by the plaintiff. It is thus clear that agreement dated 12.2.1986 itself is not a lease deed requiring registration. It only creates a right of getting another document executed creating rights and liabilities in respect of immovable property. The Trial Court as well as the High Court, has, in this connection placed reliance upon a decision reported in AIR 1959 SC 620, *Trivenibai and Anr. v. Smt. Lilabai*. Paragraph 15 of the judgment reads as under :

"15. In construing this document it is necessary to remember that it has been executed by laymen without legal assistance, and so it must be liberally construed without recourse to technical considerations. The heading of the document, though relevant, would not determine its character. It is true that an agreement would operate as a present demise although its terms may commence at a future date. Similarly it may amount to a present demise even though parties may contemplate to execute a more formal document in future. In considering the effect of the document we must enquire whether it contains unqualified and unconditional words of present demise and includes the essential terms of a lease. Generally if rent is made payable under an agreement from the date of its execution or other specified date, it may be said to create a present demise. Another relevant test is the intention to deliver possession. If possession is given under an agreement and other terms of tenancy have been set out, then the agreement can be taken to be an agreement to lease. As in the construction of other documents, so in the construction of an agreement to lease, regard must be had to all the relevant and material terms; and an attempt must be made to reconcile the relevant terms if possible and not to treat any of them as idle surplusage."

It is thus clear that if the agreement is such 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 praesenti*. But

an agreement for securing another agreement or deed in future would not be such an agreement or document which may require registration. Clause 8 of the agreement did not create any right *in praesenti* nor there was any immediate demise of the property. It was only an executory agreement. The construction of the plinth it seems had yet to start with other facilities and amenities. On completion, such a certificate was to be obtained from the defendant. It was thereafter that the possession was to be handed over under the lease agreement which was to be executed between the parties. The construction was to be strictly in accordance with the directions and specifications of the defendant. Condition No. 9 also contemplated that if the structure was found defective or workmanship was faulty the defendant could refuse to take possession of the premises and the earnest money was liable to be forfeited. Hence it is evident that no possession, right or title had passed on *in praesenti* at the time of execution of the agreement, and there were many prior conditions attached thereto. Such an agreement, in our view, has been rightly held to be only an executory agreement and not an agreement creating rights in the immovable property, hence not compulsorily required to be registered. It was a mere agreement between the parties which was not registered but was admissible in evidence.”

32. Per contra, Mr.Kathpalia, learned counsel for the respondent, submits that the present petition is totally outside the scope of interference by the Hon’ble Court under Section 34 of the Arbitration and Conciliation Act 1996 and the only ground available to the petitioner is that the award is in violation of public policy of India which the petitioner has not been able to make out. Mr.Kathpalia further submits that even under Section 30 of the Old Act where the courts have wider power to interfere, a view of the arbitrator on the contract could not be reinterpreted by the court. A possible view in the award could not be set aside by the court merely because it would have taken a different view. The appreciation of evidence was held to be the domain of the arbitrator and the court could not reappraise the evidence. Reasonableness of reasons could not be challenged and the court should not sit in appeal and decide on merits.

33. Mr.Kathpalia has drawn the attention of the Court to the judgments rendered by the Apex Court in the case of *State of Rajasthan v. Puri Construction Co. Ltd.*, reported at (1994) 6 SCC 485, more particularly Paras 26 to 28, which read as under:

“26. The arbitrator is the final arbiter for the dispute between the parties and it is not open to challenge the award on the ground that the arbitrator has drawn his own conclusion or has failed to appreciate the facts. In *Sudarsan Trading Co. v. Govt. of Kerala*, 11 (1989) 2 SCC 38 it has been held by this Court that there is a distinction between disputes as to the jurisdiction of the arbitrator and the disputes as to in what way that jurisdiction should be exercised. There may be a conflict as to the power of the arbitrator to grant a particular remedy. One has to determine the distinction between an error within the jurisdiction and an error in excess of the jurisdiction. Court cannot substitute its own evaluation of the conclusion of law or fact to come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. (emphasis supplied) Whether a particular amount was liable to be paid is a decision within the competency of the arbitrator. By purporting to construe the contract the court cannot take upon itself the burden of saying that this was contrary to the contract and as such beyond jurisdiction. If on a view taken of a contract, the decision of the arbitrator on certain amounts awarded is a possible view though perhaps not the only correct view, the award cannot be examined by the court. Where the reasons have been given by the arbitrator in making the award the court cannot examine the reasonableness of the reasons. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisal of evidence. The arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for the court to take upon itself the task of being a judge on the evidence before the arbitrator.

27.In *Municipal Corpn. of Delhi v. Jagan Nath Ashok Kumar* (1987) 4 SCC 497, it has been held by this Court that appraisal of evidence by the arbitrator is ordinarily never a matter which the court questions and considers. It may be possible that on the same evidence the court may arrive at a different conclusion than the one arrived at by the arbitrator but that by itself is no ground for setting

aside the award. It has also been held in the said decision that it is difficult to give an exact definition of the word 'reasonable'. Reason varies in its conclusions according to the idiosyncrasies of the individual and the time and circumstances in which he thinks. In cases not covered by authority, the verdict of a jury or the decision of a judge sitting as a jury usually determines what is 'reasonable' in each particular case. The word reasonable has in law prima facie meaning of reasonable in regard to those circumstances of which the actor, called on to act reasonably knows or ought to know. An arbitrator acting as a judge has to exercise a discretion informed by tradition, methodized by analogy, disciplined by system and subordinated to the primordial necessity of order in the social life. Therefore, where reasons germane and relevant for the arbitrator to hold in the manner he did, have been indicated, it cannot be said that the reasons are unreasonable.

28. In this case, claims before the arbitrators arise from the contract between the parties. It is well settled that if a question of law is referred to arbitrator and the arbitrator comes to a conclusion, it is not open to challenge the award on the ground that an alternative view of law is possible. In this connection, reference may be made to the decisions of this Court in *Alopi Parshad & Sons Ltd. v. Union of India*, AIR 1960 SC 588, and *Kapoor Nilokheri Coop. Dairy Farm Society (1973) 1 SCC 708*. In *Indian Oil Corpn. Ltd. v. Indian Carbon Ltd. (1988) 3 SCC 36*, this Court has held that the court does not sit in appeal over the award and review the reasons. The court can set aside the award only if it is apparent from the award that there is no evidence to support the conclusions or if the award is based upon any legal proposition which is erroneous.”

34. Counsel has further relied upon *G. Ramachandra Reddy v. Union of India*, reported at (2009) 6 SCC 414, more particularly para 19, which reads as under:

“19. We may, at the outset, notice the legal principles governing the dispute between the parties. Interpretation of a contract may fall within the realm of the arbitrator. The Court while dealing with an award would not reappreciate the evidence. An award containing reasons also may not be interfered with unless they are found to be perverse or based on a wrong proposition of law. If two views are

possible, it is, trite, the Court will refrain itself from interfering .
[See State of U.P. V. Allied Constructions, (2003) 7 SCC 396].”

35. Counsel has also relied upon ***H.P. SEB v. R.J. Shah and Co.***, reported at (1999) 4 SCC 214, more particularly paras 10, 25 to 28; and ***Ravindra Kumar Gupta and Company v. Union of India***, reported at (2010) 1 SCC 409, more particularly para 6 to 8.
36. It is further contended by learned counsel for the respondent that as far as the Arbitration and Conciliation Act, 1996, is concerned the Apex Court in ***ONGC v Saw Pipes*** (2003) 5 SCC 705 has held that the court would interfere only when the award is patently illegal which means that the bare reading shocks the conscience of the Court. It is further contended that in ***McDermott international Inc. v Burn Standard Co. Ltd. and Others*** (2006) 11 SCC 181, more particularly in paras 52 and 58 the Apex Court has held that the Scope of interference by the court in an award is very narrow under Section 34 of the 1996 Act and much less than the Section 30 of the Old Act. Paras 52 and 58 read as under:

“52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.

58. In ***Renusagar Power Co. Ltd. v. General Electric Co.***, (1994) Supp (1) SCC 644, this Court laid down that the arbitral award can be set aside if it is contrary to (a) fundamental policy of Indian Law, (b) the interests of India; or (c) justice or morality. A narrower meaning to the expression 'public policy' was given therein by confining judicial review of the arbitral award only on

the aforementioned three grounds. An apparent shift can, however, be noticed from the decision of this Court in *Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd.* (for short 'ONGC'), (2003) 5 SCC 705. This Court therein referred to an earlier decision of this Court in *Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguly*, (1986) 3 SCC 156 wherein the applicability of the expression 'public policy' on the touchstone of Section 23 of the Indian Contract Act and Article 14 of the Constitution of India came to be considered. This Court therein was dealing with unequal bargaining power of the workmen and the employer and came to the conclusion that any term of the agreement which is patently arbitrary and/ or otherwise arrived at because of the unequal bargaining power would not only be ultra vires Article 14 of the Constitution of India but also hit by Section 23 of the Indian Contract Act. In *ONGC (supra)*, this Court, apart from the three grounds stated in *Renusagar (supra)*, added another ground thereto for exercise of the court's jurisdiction in setting aside the award if it is patently arbitrary.”

37. The Apex Court has further held in *McDermott versus (supra)* that the new Act makes provision for the supervisory role of courts for review of the arbitral award only to ensure fairness and intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc., so the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified in case parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.
38. Mr.Kathpalia has drawn the attention of the Court to a judgment rendered by a Division Bench of Bombay High Court in *Vijaya Bank v. Maker development Services Pvt Ltd*, reported at (2001) 3 Bom CR 652, to show that merely erroneous decision is not in violation of public policy of India and the same would not be set aside under Section 34 of Arbitration and Conciliation Act.

39. Learned counsel for the respondent, without prejudice to the above submissions, contends that the agreement dated 02.08.2007 does not create a demise *in praesenti* and is therefore not required to be compulsorily registered under Section 17(1)(b) of the Registration Act. Counsel further contends that even if it is assumed, without admitting, that the agreement dated 2.8.2007 has created a present demise and the same is required to be registered compulsorily, it would not deprive the respondent of the damages arising out of breach of Clause 48 of the agreement as such action would relate to a breach of contract pure and simple and would not relate to any transaction affecting immovable property. Counsel also contends, without prejudice and in alternative, that having admitted by the petitioner in its pleadings, the execution, contents and relevant clauses of the agreement dated 2.8.2007, there was no need for any evidence. Counsel next submits that once the terms of the agreement dated 2.8.2007 were admitted in the pleadings there was no need to lead evidence and admissibility or otherwise of the agreement dated 2.8.2007 would have no effect and a decree/award should follow on the basis of the admission.
40. Mr.Kathpalia further submits that on 28-02-2007 the respondent cancelled its previous bookings with the builder of the mall (under construction), Uppal Housing Limited, and booked the present property in view of the fact that after construction it was going to be leased out to the petitioner or some similar brand of repute. Subsequently, on 28.3.2007, an agreement to sell with respect to the present property, unit G-03 in the mall under construction, was entered into by the Respondent and Uppal Housing Society. The said agreement expressly acknowledged that the unit under construction is in the process of being leased out in future to the petitioner for opening of a retail outlet. On 2.8.2007 the agreement from which the

present claim arises was entered into between the Petitioner and the Uppal Housing Society (predecessor in interest of the Respondent). Mr.Kathpalia points out that as the Mall was still under construction the parties were described as intending lessor and intending lessee. The future lease also was to commence later from an uncertain date. The intending lessor had no power to terminate the lease to be signed for nine years and for the intending lessee there was a lock-in period of two years and in case intending lessee was to terminate the lease, to be signed before the two years, then the intending lessee was to pay the rent of the two years lock-in-period as damages. A subsequent lease deed was to be executed and registered and the document dated 2.8.2007 did not require registration since it was not a demise in praesenti and, thus, the same was not registered. The intending lessor had the power to assign its rights. Mr.Kathpalia next submits that the petitioner made a promise through this agreement of taking the property, when construction is completed, on lease. Mr.Kathpalia has relied upon relevant clauses of this agreement which are: (*Recital A and F (page 138, 139); Cl. 3 @ pg. 139-140; Cl. 10 @ Pg. 141 and 142; Cl. 48 @ pg. 148; Cl. 43 @ pg. 147*).

41. Learned counsel for the respondent submits that the offer of possession was made by Uppal Housing Society to the petitioner much later on 20.5.2008. Subsequently possession was taken over by the petitioner. Counsel further submits that as per the agreement, the first seventy five days, after the offer of possession, was to be rent free fit out period and after that the rent would become payable. However it is the case of the petitioner that Uppal Housing Society had extended the rent free period till 30.11.2008 and the rent would become payable from 1.12.2008. Learned counsel for the sake of argument and for the sake of narrowing

down the dispute has argued accepting this position that the rentals and lock-in-period of 24 months would start from 1.12.2008.

42. Mr.Kathpalia, learned counsel for the respondent, submits that on 1.10.2008, based on the prospects that there was an assured tenant of repute, the respondent purchased the property from Uppal Housing Society through a registered sale deed. This assurance emerged from the representations made by the petitioner. After the sale deed the respondent stepped into the shoes of Uppal Housing Society. The petitioner took loans to complete this transaction and is still paying the EMIs. The communication dated 22-10-2008 was sent by the respondent to the petitioner informing them that the respondent was the new owner. The respondent kept insisting that as contemplated in the agreement dated 2.8.2007 a lease deed should be executed, and the same be registered and rent should be paid to them by the petitioner. The execution of the lease deed, as per the agreement, was the responsibility of the petitioner which the petitioner refused to do. Counsel further submits that the Monthly rental was Rs.3,61,600 for the property. The petitioner did not pay any rent at all and made a preposterous suggestion that the respondent should agree to a profit sharing model and not demand rent. This being contrary to agreement dated 2.8.2007 was refused by the respondent. On 6.3.2009 the petitioner sent a notice of termination to the respondent and on 24.3.2009 they vacated the premises after paying a meager sum of Rs.4,84,990/- to the respondent which payment was accepted by the respondent under protest. Counsel next submits that the respondent approached the High Court for appointment of an arbitrator. The High Court, in a petition filed by the respondent, under Section 11 of the Arbitration & Conciliation Act recorded a finding on the valid assignment in favour of the respondent and appointed the arbitrator with the joint

consent of both the parties. The award of the arbitrator is under challenge before this Court in a Section 34 proceeding.

43. Learned counsel for the respondent submits that the agreement dated 2.8.2007 does not create a demise *in praesenti* and the same is thus not required to be compulsorily registered under Section 17(1)(b) of the Registration Act. Counsel further submits that since no possession, right or title had passed on *in praesenti* at the time of execution of the agreement on 02-08-2007 and such an agreement was only an executory agreement and not an agreement creating rights in the immovable property, hence, the same is not compulsorily required to be registered and, thus, the agreement dated 02-08-2007 was a mere agreement between the parties which was not registered but was admissible in evidence. Learned counsel for the respondent has relied upon ***V.B. Dharmyat v. Shree Jagadguru Tontadrya***, reported at (1999) 6 SCC 15, more particularly Paras 7-10; ***State of Maharashtra v. Atur India (P) Ltd.***, reported at (1994) 2 SCC 497, more particularly Paras 27-29; ***Food Corporation of India Vs. Babulal Agrawal***, reported at (2004) 2 SCC 712, more particularly para 10.
44. Learned counsel for the respondent contends that on the basis of a careful interpretation of the agreement dated 2.8.2007 the learned Arbitrator has taken a view that this was not a demise *in praesenti* but an executory document and it was the only view possible. Counsel without prejudice further contends that even if two views were possible and it was one of the possible view even then no interference is called for. The Court will not set aside an award merely because it would have taken a different view. In support of this submission, counsel has relied upon ***State of Rajasthan v. Puri Construction Co. Ltd.***, reported at (1994) 6 SCC 485, more particularly paras 26 and 28; ***H.P. SEB v. R.J. Shah and Co.***,

reported at (1999) 4 SCC 214, more particularly para 25. Counsel also contends that construction and misconstruction of a document is not a ground for interfering with the arbitration award by the Court. Counsel has relied upon *State of Rajasthan v. Puri Construction Co. Ltd.*, reported at (1994) 6 SCC 485, more particularly para 32 .

45. Para 25 of *H.P. SEB* (supra) reads as under:

“25. From the aforesaid decision of this Court. and the last one in particular. it is clear that when the arbitrator is required to construe a contract then merely because another view may be possible the court would not be justified in construing the contract in a different manner and then to set aside the award by observing that the arbitrator has exceeded the jurisdiction in making the award.”

46. Para 32 of *State of Rajasthan* (supra) reads as under:

“32. The contentions about factual errors and omissions apparent on the face of record as raised in the written argument are essentially errors and omissions in not properly considering the materials on record, in misreading and misconstruing such materials and consideration of some documents and statements out of their contexts. The arbitrators have given the award by referring to various documents and statements available on record and indicating the reasons for basing the findings. Even if it is assumed that on the materials on record, a different view could have been taken and the arbitrators have failed to consider the documents and materials on record in their proper perspective, the award is not liable to be struck down in view of judicial decisions referred to hereinbefore. Error apparent on the face of the record does not mean that on closer scrutiny of the import of documents and materials on record, the finding made by the arbitrator may be held to be erroneous. Judicial decisions over the decades have indicated that an error of law or fact committed by an arbitrator by itself does not constitute misconduct warranting interference with the award. It does not appear to us that the findings made by the arbitrators are without any basis whatsoever and are not referable to documents relied upon and such findings are so patently unjust or perverse that no reasonable man could have arrived at such findings. Hence, on the score of alleged misreading, misconstruction, misappreciation

of the materials on record or failure to consider some of the materials in their proper perspective, the impugned award is not liable to be set aside. It has been urged that computation of lump sum damage in the absence of any material showing actual loss suffered by the contractor is patently unjust and improper warranting interference by this Court. Lump sum award by itself is not illegal as held in a number of decisions of this Court. The contractor's case was that because of delay in handing over the site and for non-supply or delayed supply of materials essential for the construction work thereby putting obstacles and hindrances to execute the work within the stipulated time and ultimately repudiating the contract and seizing machines etc. of the contractors, he not only suffered huge loss but was practically reduced to bankruptcy. It is the case of the contractor that on account of illegal seizure of costly machines by the appellant, he was prevented from undertaking other works of contract. A part of machines seized by the appellant have been sold for Rs 20 lakhs. In the award, the arbitrators have recorded that the appellant admitted that the remaining machines would cost about Rs 5 lakhs. That apart, constructions of labour quarters, laying of roads etc. at substantial cost incurred by the contractor have been utilised by the appellant after repudiation of contract. It may be stated here that the first part of construction work of Mahi Bajaj Sagar Dam was given to M/s R.S. Sharma. A lump sum award of Rs 75,41,755 was awarded in favour of M/s R.S. Sharma. The machines of M/s R.S. Sharma were not seized by the appellant. Such lump sum award of more than Rs 75 lakhs without indicating how such quantum was determined has been upheld by this Court and the decision is reported in *State of Rajasthan v. R.S. Sharma & Co.* The respondent contractor has urged that the machines including those seized and sold at depreciated value will now cost about Rs 2.5 crores of rupees. Considering the magnitude of work involving costly machines and materials, if the two arbitrators in their wide experience have quantified the total damage and have given the award for Rs 1 crore in favour of the respondent, it cannot be held that such award is so patently unjust and irrational and shocking to the conscience of the court, that the same should be interfered with. As already indicated, in the case of other contractor concerning first part of the work in Mahi Bajaj Sagar Dam, namely, R.S. Sharma & Co. the arbitrators quantified damages to the extent of over Rs 75 lakhs without indicating how such damages had been quantified. But challenge to such award by the State of Rajasthan failed and

the award has been upheld by this Court. We, therefore, dismiss the petition of objection and additional objection challenging the validity of the award.”

47. It is submitted by Mr.Kathpalia that the above view being a possible view on the document should not be interfered with by this Court under Section 34 of Arbitration and Conciliation Act. However counsel for the respondent has pointed out and relied upon the following clauses of the agreement dated 2.8.2007, which are as under, in support of his arguments:

- Description of the Parties as intending lessor and intending lessee;
- The mall was under construction, which is clear from the Recital A and F and also from the fact that the agreement was entered into on 2.8.2007 and possession was offered in the middle of 2008, which shows that there could not be a present demise of something which was yet to be constructed;
- The lease was to commence from an uncertain date in future;
- Possession was to be given in future on an uncertain date;
- A subsequent execution and registration of lease deed was contemplated of;
- The expression “hereby granted” was never used. The document always used the expression “shall give”;
- The possession was to be given later on an uncertain date;
- Parties themselves understood that it was an executory contract and further execution of a lease deed was necessary.

48. Learned counsel for the respondent submits that in the alternative, even if it is assumed, without admitting, that the agreement dated 2.8.2007 created a present demise and is required to be compulsorily registered, it would not deprive the respondent of damages arising out of breach of Clause 48 of the agreement since such action would relate to a breach of contract pure and simple and would not relate to any transaction affecting immovable property thus not hit by Section 49 of the Registration Act . Counsel further submits that Section 49 of the Registration Act does not

make an unregistered document, which is required to be registered, void but merely makes it inadmissible as evidence of any transaction affecting immovable property. Since a claim for damages is not a transaction affecting immovable property an unregistered document can be the base for a claim for damages. Counsel further submits that the claim for damages in the present case emanates from Clause 48 of the agreement and this clause clearly is not sought to be received in evidence of any transaction *affecting* immovable property and therefore the same is not hit by Section 49 of the Registration Act. Counsel next submits that the liability to pay damages for breach of contract under the agreement will not get defeated by mere non-registration as has been laid down in ***Muruga Mudaliar (Deceased) & Ors. v. Subba Reddiar***, reported at AIR 1951 MADRAS 12, more particularly paras 7, 12, 14, 23-24, 27, 33-34 and ***Food Corporation of India Vs. Babulal Agrawal***, reported at (2004) 2 SCC 712, more particularly paras 8-10.

49. Learned counsel for the respondent submits that the petitioner did not contend that ***FCI Vs. Babulal Agrawal***, reported at (2004) 2 SCC 712, is inapplicable but simply tried to distinguish it. But the fact that they have to attempt to distinguish it makes it a possible view of the arbitrator with which this Hon'ble Court ought not to interfere with merely because another view can be agitated. Counsel further submits that as has been established before the arbitrator that the respondent purchased the property because of the promises held out by the petitioner, therefore the claim of the respondent for damages would survive on the basis of principal of promissory estoppel. ***Food Corporation of India and others Vs. Babulal Agrawal***, (2004) 2 SCC 712.

50. Learned counsel while relying upon *S. Kaladevi Vs. V. R. Somasundram & others*, (2010) 5 SCC 401, without prejudice contends that it is equally well settled that the terms of such agreement can always be looked into as evidence of any collateral transaction under Section 49 of the Act and the same can be received as evidence. Counsel further contends that the petitioner has vaguely attempted to suggest in its written submissions the issue of stamping. It is submitted that this point was not argued either before the learned Arbitrator or before this Court and their vague suggestion in the written submissions cannot be allowed. However without prejudice it is submitted that the agreement dated 2.8.2007 was admitted in evidence as an exhibit by the learned Arbitrator. It is also submitted that as per Section 36 of the Stamp Act once a document is admitted in evidence then it is not open to the court to reject it on the ground that it is not duly stamped. Counsel further, without prejudice and in alternative, submits that the execution, contents and relevant clauses of the agreement dated 2.8.2007 having been admitted by the petitioner in its pleadings, there was no need for any evidence. Once the terms of the agreement dated 2.8.2007 were admitted in pleadings there was no need to lead evidence and admissibility or otherwise of the agreement dated 2.8.2007 would not affect the respondent and a decree/award should follow on the basis of the admission.

51. Learned counsel for the respondent submits that the terms of the agreement dated 2.8.2007 were set out in respondent's claim and the petitioner responded by saying that they were matters of record. In the absence of a specific denial the agreement was deemed to be admitted which was admitted, there was no occasion to lead evidence and therefore the admissibility of the agreement dated 2.8.2007 became irrelevant. Counsel further submits that Section 49 of the Registration Act provides

that a document which requires registration, but is not registered, cannot be received as evidence of any transaction affecting the property. However, this section does not apply if the contents of the document are admitted in pleadings, whether it be a plaint or a written statement; the reason being, that in such a case it is unnecessary to prove the document. Thus, if the terms of an unregistered agreement which requires registration are set out in the plaint, and they are admitted by the defendant in his written statement, the admission made by the defendant is sufficient, and the plaintiff need not prove the document. Learned counsel for the respondent has relied upon *Gurdas Mal V Baij Nath*, reported at AIR 1928 Lah 662 and *Ude Chand and Ors V Mst. Rajo*, reported at AIR 1966 P&H 329.

52. Learned counsel for the respondent submits that the petitioner did not raise any argument on interest before the learned Arbitrator and this cannot be allowed to urge it for the first time. Mr.Kathpalia, however, submits that without prejudice to the aforesaid objections, the amount of the lock-in-period became payable when the premises were vacated i.e. 24.3.2009 and the interest would be payable from that date and accordingly interest has been rightly awarded from April' 2009. Counsel further submits that Section 31(7)(a) of the Arbitration and Conciliation Act provides that the Arbitrator has the power to award interest from the date of cause of Action. In the present case the cause of action is the date of breach i.e. 24.3.2009 and the Arbitrator had the power to grant interest from that date. Counsel next submits that, without any factual foundation, the petitioner during arguments before this Court, made submissions that they had stayed for 10 months and cleared the dues for 10 months and, thus, would be liable for the remainder of 14 months only (24 months lock-in-period minus 10 months dues allegedly cleared). Counsel also

submits that this clearing of dues for 10 months was completely false and contrary to record.

53. It is submitted by learned counsel for the respondent that on 6.3.2009 the petitioner sent a notice of termination to the respondent and on 24.3.2009 they vacated the premises after paying a small sum of Rs. 4,84,990/- to the respondent which payment was accepted by the respondent under protest. Apart from this Rs.7,23,200/- towards two months security deposit was earlier received by the respondent. No other payment was made by the petitioner. The monthly rental was Rs.3,61,600/- and dues for 10 months would be Thirty Six Lakhs Sixteen Thousand (Rs.36,16,000/-) and not the small amount paid above. The learned Arbitrator has awarded the following amount to the respondent

- a) Rs. 86,78,400/- (amount of 24 months rent for lock-in-period as damages) under clause 48.
- b) Rs.7,23,200/- already paid towards two months security deposit liable to be forfeited.
- c) Rent/ damages amount for use and occupation from October 2008 to March 2009 (six months) which comes to Rs.3,61,600 multiplied by 6 = Rs.21,69,600/- Minus the amount of Rs.4,84,990/- paid = Rs.16,84,610/-.
- d) Interest @12% from April 2009 till the date of award 31.11.2010 on the amount of (a) and (c) above = Rs. 20,72,602/-.
- e) Future interest @ 12% on the awarded amount till the date of actual payment.
- f) Costs of Rs 3 Lakhs.

54. Learned counsel for the respondent submits that to settle the issue the respondent is willing to give up the amounts awarded at (c) above i.e.

amount for use and occupation from October 2008 to March 2009 (six months) which comes to Rs.3,61,600 multiplied by 6 = Rs.21,69,600/- Minus the amount of Rs.4,84,990/- paid = Rs.16,84,610600/-. Further the respondent would also in the same spirit submit that the amount paid so far by the petitioner i.e. Rs. 4,84,990/- towards rent/damages and Rs.7,23,200/- towards two months security deposit may be adjusted against the award of Rs. 86,78,400/- (amount of 24 months rent for lock-in-period as damages) under clause 48 and the rest of the amount may be paid with interests and costs as granted by the Ld Arbitrator.

55. Learned counsel for the respondent submits that the cases of ***Pradeep Oil Corporation*** (supra) relied upon by learned counsel for the petitioner is not applicable to the facts of this case as this is a case on the difference between lease and license. The petitioner is not relying upon license and this case has no relevance. Further the case of ***Manju Bagai*** (supra) is a case on winding up where the debts have to be admitted debts and, thus, the same is not applicable to the facts of the present case.
56. I have heard counsel for the parties in details and carefully perused the Award of the learned Arbitrator. The bone of contention between the parties is the issue of demise of the premises in question. The short question which came up for consideration before the learned Arbitrator and this Court is whether the instrument dated 2.8.2007 was intended to operate as an actual lease or is merely an agreement to grant one.
57. The first submission of Mr.Tiku, learned senior counsel for the petitioner, is that the Award is patently illegal and contrary to the substantive provisions of the law. Senior counsel further submits that the learned Arbitrator has failed to appreciate that the purported “Agreement to lease dated 02.08.2007” is in essence a “lease agreement” which being unregistered and insufficiently stamped, creates a tenancy from month to

month and has been rightly terminated by the petitioner by giving notice under Section 106 of the Transfer of Property Act, 1882. Senior counsel also submits that an unregistered Agreement to Lease dated 2.8.2007 is not admissible in evidence and, thus, the terms of the unregistered lease cannot be enforced.

58. Mr.Tiku submits that it is the case of the petitioner that the Arbitrator has wrongly arrived at a finding that this case does not fall under Section 17(i)(b) of the Registration Act but it falls under Section 17(2)(v) of the Act, which contemplates execution of another document, which when executed will create, declare, assign, limit or extinguish such right or title or interest in the immovable property and that would require registration. It has been vehemently submitted by Mr.Tiku that the impugned Agreement to Lease clearly defines all the necessary ingredients, which include the quantum, duration, date of commencement of rent, and thus, in essence and substance it is a lease agreement.
59. Strong reliance is placed by Mr.Tiku that in deciding the effect of a document is the intention to deliver the possession. Mr.Tiku further contends that in this case the possession was handed over to the petitioner, which can only lead to a single conclusion that the parties had intended to treat the document to be a Lease Deed.
60. Reliance is also placed by Mr.Tiku on various clauses of this document in support of his contention that on a complete reading of the aforesaid clauses it would show that the document was a Lease Deed. In response to this submission of Mr.Tiku, Mr.Kathpalia, learned counsel for the respondent, has submitted that the award of the learned Arbitrator is fair and just; the objections, sought to be raised, are beyond the scope of interference by this Court under Section 34 of the Arbitration and Conciliation Act; and a view taken by the Arbitrator cannot be

reinterpreted by this Court. Mr.Kathpalia further submits that assuming two views are possible merely because the Arbitrator has taken a different view it would not be open for the Court to reappraise the evidence and look into the reasonableness of reasons as the Court should not sit in appeal and re-decide the matter on merits. Various judgments have been relied upon and there is no quarrel with the proposition sought to be raised by Mr.Kathpalia. It is not in dispute that it has been repeatedly held by the Apex Court that the scope of interference by the Court in an Award is very narrow. The intervention of the Court is envisaged in few circumstances including in the case of fraud, bias by the Arbitrator, violation of the principles of natural justice or in case the Award is patently illegal and would shake conscience of the Court on a bare reading of the Award. The aim and objective is to keep the supervisory role of the Court at a minimum level as the parties have decided amongst themselves to exclude the court's jurisdiction.

61. On the merits of the matter, it has been contended by Mr.Kathpalia that the Agreement dated 2.8.2007 does not create a demise in *praesenti* and is therefore not required to be compulsorily registered under Section 17(i)(b) of the Registration Act. In the alternate it has been contended that even if it is compulsorily registerable document it cannot deprive the respondent of the damages arising out of the breach of Clause 48 of the Agreement on the ground that the Agreement has been admitted by the petitioner and more so the Agreement can be looked into for collateral purposes.
62. There is force in the submission of Mr.Kathpalia. The view taken by the Arbitrator is based on the complete reading of the agreement and the intention of the parties. In the Award the Arbitrator has referred to various clauses of the Agreement to arrive at a decision that the Agreement falls

under Section 17(2)(v) of the Registration Act and not under Section 17(i)(b) of the Act. The Arbitrator has also correctly placed reliance in the case of *Food Corporation of India* (supra).

63. The Court cannot lose track of the fact that the document has been termed as “Agreement to Lease”. The recital defines the ‘Lessor’ as an ‘intending Lessor’ and the ‘Tenant’ as an ‘intending Lessor’. It is extremely relevant to note that the agreement in question could not have been a demise in *praesenti*, firstly, on the ground that when the agreement was executed the demised premises was not fully ready, which is evident on reading of the Agreement. If the property was not fully ready could it be a demise in *praesenti* on the date of signing of the agreement? There has been no answer to this question by the petitioner. Clause A of this Agreement is extremely relevant as it shows that the ‘*intending Lessor is in the process of developing/has developed a shopping mall and multiplexes.....*’. Repeated clauses in this agreement including various clauses in the recital and in the agreement talk about the ‘intending Lessor’ or the ‘intending Lessee’.

64. Relevant clauses of the Agreement to Lease read as under:

(A) The INTENDING LESSOR is in process of developing / has developed a Shopping Mall and Multiplex under the name and style of “Uppal’s CENTRA MALL” (hereinafter referred to as the “said MALL”) upon its freehold Plot of land bearing no.177-D, Industrial Area Phase-I, Chandigarh admeasuring approximately 5699.15 sq. yds. (4750 sq. mts.) (hereinafter referred to as the “said Plot of Land”) purchased from one Mr.Sanjay Passi (hereafter referred to as “Previous Owner”) vide Sale Deed dated 05.07.2006 duly registered as document No.1304 in Book No.1 Volume No.155 in the office of Sub-Registrar, Chandigarh together with all sanctions and approvals accorded thereon.

- (F) The said Mall has Shop(s)/ Commercial space(s) on the ground floor, first floor and second floor and its third floor shall have restaurants, while the fourth, fifth and sixth floors shall have four multiplexes. The Mall shall be provided with modern facilities, services etc. including passenger lifts, fire fighting and air conditioning system.

Clause 3

3. That the “Lease Commencement Date” or for that purpose the “Effective Date” for commencement of lease for the initial term of three years, in respect of the DEMISED PREMISES shall be with effect from the date of offer of possession of the DEMISED PREMISES by the INTENDING LESSOR to the INTENDING LESSEE for fit outs. However, the possession of the Demised Premises will be delivered to the INTENDING LESSEE subject to the simultaneous execution and registration of Lease Deed, cost of registration and stamp duty shall be borne and paid by the INTENDING LESSEE only. The INTENDING LESSEE shall be liable to take possession of the DEMISED PREMISES within thirty (30) days of such offer made by the INTENDING LESSOR.

NOTWITHSTANDING the “Lease Commencement Date” or “Effective Date” for the purpose of lease of the Demised Premises, it is agreed by and between the parties hereto that the monthly rent in respect of the “Demised Premises” shall become payable by the INTENDING LESSEE to the INTENDING LESSOR upon expiry of 75 (seventy five) days from “Effective Date/Lease Commencement Date”. The intervening period between the “Effective Date” and the rent commencement date shall be rent free and will be considered as the “fit out period”.

Clause 10

10. That the INTENDING LESSEE shall pay to the INTENDING LESSOR interest-free Refundable Security Deposit equivalent to three (3) months prevailing rent amounting to Rs.10,84,800/- (Rupees Ten Lacs Eighty Four Thousand Eight Hundred only) to the INTENDING LESSOR and which has been paid / shall be paid in the following manner:

(i) Rs.3,61,600/- (Rupees Three Lacs Sixty One Thousand Six Hundred only) already paid vide cheque no.100418 dated 17.05.07 drawn on Standard Chartered Bank payable at par upon signing of Letter of Intent (LOI) receipt whereof the INTENDING LESSOR hereby admits and acknowledges.

(ii) Rs.3,61,600/- (Rupees Three Lacs Sixty One Thousand Six Hundred only) payable at the time of signing of this Agreement.

(iii) Rs.3,61,600/- (Rupees Three Lacs Sixty One Thousand Six Hundred only) which shall be payable by the INTENDING LESSEE TO THE INTENDING LESSOR at the time of execution of lease deed simultaneously with the INTENDING LESSOR offering possession of the DEMISED PREMISES to the INTENDING LESSEE.

This Interest Free Security Deposit shall be refundable to the INTENDING LESSEE at the expiry or sooner determination of the Lease and subject to the INTENDING LESSEE handing over vacant physical possession of the DEMISED PREMISES in the same condition excepting normal wear and tear. Further, the amount of said Security Deposit shall stand increased in accordance with the enhanced rate of Rent payable upon each renewal of the Lease term and such increased amount shall be deposited by the INTENDING LESSEE with INTENDING LESSOR simultaneously upon the INTENDING LESSEE exercising its option of renewal of the Lease Term. Non-payment of the additional Security Deposit will be treated as breach of the terms and conditions of the Lease.

Clause 48

48. The Lease term shall be non-terminable for a period of 24 months excluding the 75 (seventy five) days rent free period (hereinafter referred to as the “lock in period”). However, if the INTENDING LESSEE desires to terminate the lease before the lock-in period, the INTENDING LESSEE shall surrender the monthly rent herein before reserved for the entire lock-in period of 24 months or any balance period which may be remaining therefrom at the time of such termination. After expiry of lock-in period, INTENDING

LESSEE may terminate the Lease Agreement by giving three (3) months notice in writing to the INDENDING LESSOR.

Clause 43

43. That if the INDENDING LESSOR, upon signing of this agreement, transfers, sells or assigns its rights in the Demised Premises as a whole or in part thereof to any person or persons then in such event the INDENDING LESSOR shall attorn to such transferee or transferees on the same terms and conditions as contained herein and to which the INDENDING LESSEE shall have no objection whatsoever and shall be bound to pay the monthly rent to the new Transferee(s)/ Assignee(s). At the same time, a letter shall also be issued by the prospective new Transferee(s) in favour of the INDENDING LESSEE confirming and acknowledging all amounts paid by the INDENDING LESSEE to the INDENDING LESSOR, whose benefit shall be transferred to the new Transferee(s). The INDENDING LESSOR, shall however, ensure that the transferee confirms to remain bound and adhere to the terms and conditions provided in this Agreement to Lease and the Lease Deed, to be executed, so as to ensure uninterrupted and peaceful enjoyment of the Demised Premises by the INDENDING LESSEE during the lease period provided herein including extensions, if any.”
65. Strong reliance has been placed by learned senior counsel for the petitioner that handing over of possession would by itself shows that the demise was not *praesenti*. This fact cannot be considered in isolation as the intention of the parties, which is evident from Clause 12, show that the possession of the premises would be handed over by the intending Lessor to the intending Lessee for fit-outs.
66. This concept of handing over possession for fit-outs is highly prevalent in malls where a builder normally hands over a bare room to an intending Lessor and would also grant sufficient time for him to modify the same as per his necessity for wiring for computers, electricity fittings, wall panelling, etc., as per his requirements and it is for this reason that this

period, as in this case, which was more than three months, was rent free, therefore handing over the possession by itself cannot be a ground in the facts of the present case to reach a conclusion that the demise of the premises was in *praesenti* and cannot be of any advantage to the petitioner as it was only a conditional handing over of possession without any payment of rent, and it is not as if that during this period the petitioner was carrying on any business. On the other hand possession was not handed over to the petitioner at the time of signing of the agreement nor it could have been handed over as the area was still under construction.

67. Much cannot be read into the fact that various clauses have been included which would ordinarily be included in a Lease Deed for the reason that an intending Lessor may under the fear or ignorance that the intending Lessee as in the present case may not sign a formal lease.
68. Initially the Agreement was entered into by the petitioner with the builder, Uppal Housing Limited. It is the case of the petitioner that the subject property was purchased by the petitioner keeping in mind the agreement entered into between the builder and the petitioner herein as the properties with tenants fetch a better price and moreover as the respondent has assured that the premises is tenanted he purchased the property so that the loan could simultaneously be repaid.
69. Mr.Tiku has submitted that the Arbitrator has wrongly reached a conclusion that the petitioner was avoiding execution of the formal lease. The communications exchanged between the parties clearly support the view and the decision arrived at by the Arbitrator. A view which has been extracted in the Award and a definite conclusion has been reached by the learned Arbitrator.

70. There is no reason for this Court to take a different view in the matter. The learned Arbitrator has in fact commented on the conduct of the petitioner. In the Award, the learned Arbitrator has extracted an email dated 23.12.2008, relevant portion of which reads as under:

“Dear Mr.Satnam,

We can have the same letter resent to you in case you have not received it. Kindly go through the same and let me know when is it a convenient time to discuss the issues. I do agree that the lease agreement needs to be executed but before we go ahead with the same we would like to resolve the issues on hand. At this point I would also like to communicate that we would not be in a position to release the dues (if any) till such time that the issues are resolved to our satisfaction. I hope you will appreciate the same.

Rachna, please send another copy of the letter thru courier and a scanned copy too on Mr.Satnam’s email address.

Mr.Satnam, please do confirm receipt of the same.

Regards,
Amit Gugnani.”

71. On reading of the email, extracted above, it is clear that the petitioner herein had clearly stated that a Lease Agreement needs to be executed. The learned Arbitrator has rightly stated that these words were not honoured and promise was not fulfilled. If the understanding of the petitioner was that the Agreement dated 02.08.2007 is in fact a lease and no other document was to be executed in future there was no occasion for the petitioner to have stated that a Lease Agreement needs to be executed. The petitioner cannot be permitted to blow hot and cold at the same time and it is the petitioner, who had defaulted. Even the possession was handed over on a condition of fit-outs and formal execution of the lease.

72. Clause 3 of the Agreement makes it abundantly clear that “*possession of the demised premises will be delivered to the intending Lessee subject to simultaneously execution and registration of the Lease Deed*”. At the time of taking possession or carrying out fit-outs the understanding of the petitioner was that he would execute a formal Lease Agreement. This was the understanding of the petitioner even uptill 23.12.2008 when an email was written to the respondent. The email by itself is an un-refutable proof of the intention of the parties that a formal document was to be executed.
73. Learned Arbitrator has rightly relied upon ***Triveni Bai v. Lila Bai***, reported at AIR 1959 SC 620, more particularly at page 625, wherein it has been held that “*the regard must be had to all the relevant and material terms, and an attempt must be made to reconcile the relevant term if possible and not to treat any of them as idle suprlusage*”. This aspect of the matter has also been discussed by the learned Arbitrator in detail.
74. Another aspect which cannot be ignored that initially as per the Agreement the petitioner was entitled to 75 days’ rent agreement as a fit-out period. The petitioner wrote to the respondent that Uppal Housing Limited had granted rent waiver upto November, 2008, and sought further rent waiver till December, 2008. This factor also goes to show the intention of the parties and even at that stage the understanding of the petitioner was that a formal agreement would be executed. It is only when the petitioner found that the business prospects were not viable that the petitioner offered another arrangement to the respondent in the form of partnership by a communication dated 15.12.2008. Reading of the letter dated 15.12.2008 suggests that the petitioner had written that “*the Indian economy is currently undergoing a slow down which has resulted in a huge impact on the business all around. Retailers across the country are*

either closing down or not expanding their business. The business has also been impacted by the negative sentiment, which is causing losses to our franchises. The key element of those losses is the high cost of rental”.

75. The reason for change in heart is evident on a bare reading of this letter, which also brings out the intention of the petitioner to wriggle out of the Agreement in one way or the other. This offer of the petitioner was declined by the respondent sighting the reasons amongst others that assurances of rent from the petitioner was one of the key reasons to invest in the property. To reach a conclusion that the agreement does not create a demise in *praesenti* and therefore not required to be compulsorily registered would include the following :

- Description of the parties as intending Lessor and intending Lessee;
- The mall was under construction, which is evident from a reading of the recitals, and the fact that the Agreement was entered into on 2.8.2007 and possession was offered in the middle of the year 2008 and, thus, there could not have been a demise of something, which was yet to be constructed.
- The lease was to commence from an uncertain date in future;
- There was also no date fixed for handing over the possession;
- A subsequent execution and registration of the Lease Deed was contemplated;
- Parties had clearly understood the terms of the lease and even after handing over of possession, which is evident from the email dated 23.12.2008 sent by the petitioner to the respondent.

76. The Arbitrator has rightly arrived at a finding that the Agreement dated 02.08.2007 is an Agreement to Lease, which does not require registration.

There is no merit in the submission made by learned senior counsel for the petitioner that the Arbitrator was not entitled to award interest. Section 31(7)(a) of the Arbitration and Conciliation Act grants the Arbitrator the power to award interest from the date of cause of action. The objections are dismissed except and as agreed by the respondent the amount awarded towards Rent/damages for use and occupation from October, 2008, to March, 2009, (six months), which comes to Rs.3,61,600/- multiplied by 6 = Rs.21,69,600/- Minus the amount of Rs.4,84,990/- paid = Rs.16,84,610/- is set aside and further the amount paid so far by the petitioner i.e. Rs.4,84,990/- towards the rent/damages and Rs.7,23,200/- towards two months security deposit adjusted against the award of Rs.86,78,400/- (amount of 24 months' rent for lock-in-period as damages) under Clause is set aside.

G.S.SISTANI, J

FEBRUARY 27, 2013

msr