

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

Judgment reserved on: 22.08.2013

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Judgment delivered on: 25.10.2013

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OMP 637/2012

EGON ZHENDER INTERNATIONAL PVT. LTD. Petitioner

Versus

M/S NAMGAYAL INSTITUTE FOR RESEARCH
ON LADAKHI ART & CULTURE (NIRLAC) & ORS. Respondents

Advocates who appeared in this case:

For the Petitioner: Mr Sanjay Parikh & Ms Mamta Saxena, Advocates.

For the Respondent: Mr J.P. Sengh, Sr. Adv. with Mr Sumeet Batra & Ms Ankita
Gupta, Advocates for R-2 & 3.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER,J

1. The captioned petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (in short the Act) is directed against award dated 31.12.2011/07.02.2012 passed by the sole arbitrator.

1.1 The challenge is laid to that part of the award whereby the learned Arbitrator declined to grant reliefs prayed for by the petitioner qua liquidated damages and aggravated / exemplary damages.

1.2 The learned arbitrator allowed the petitioner's claim with respect to security deposit and interest thereof demanded by the petitioner. Towards refund of security deposit, the petitioner was awarded a sum of Rs.25,44,000/-. On this amount, the petitioner was also awarded interest at the rate of 9% p.a. from the date the refund of the security deposit became

due till the date of the award. The award thus freezes the period as : 01.02.2007 to 07.02.2012. Therefore, interest at the rate of 9% per annum has been crystalized as, a sum of Rs.11,25,720/-. The total amount thus, awarded, in favour of the petitioner, which includes interest, is a sum of Rs.36,69,720/-. Future interest is also awarded at the rate of 9% per annum from the date of the award till the date of its payment. In addition, costs in the sum of Rs.2,50,000/- are also awarded in favour of the petitioner.

1.3 It is common ground that the petitioner has been paid the amounts awarded in its favour.

1.4 Therefore, the only issue that requires examination is whether the learned Arbitrator rightly declined the reliefs prayed for by the petitioner vis-à-vis liquidated damages and aggravated / exemplary damages.

1.5 In so far as liquidated damages are concerned, the learned arbitrator has declined the same on the ground that it is based on a term in the lease agreement, which was not registered and hence, could not be admitted in evidence.

1.6 As regards, aggravated / exemplary damages are concerned, the learned Arbitrator came to the conclusion that no amount could be awarded under this head in favour of the petitioner as nothing was placed on record to demonstrate as to how the petitioner was entitled to exemplary damages.

2. The background in which the challenge arises to the aforesaid two findings of the learned Arbitrator thus requires to be briefly noticed. These facts are largely not in dispute.

3. Respondent no.1, was accorded lease hold rights by virtue of a perpetual lease deed dated 22.11.1995, by the President of India, through the aegis of Delhi Development Authority (DDA) in respect of plot no.B-25, South of IIT, Institutional Area, New Delhi, admeasuring 5234.40 sq. mtrs.

(in short the plot). The said perpetual lease deed was registered with the Sub Registrar of Assurances, New Delhi on 23.11.1995.

3.1 Respondent no.1 entered into a construction agreement with Turner Morrison Land Limited i.e., respondent no.2. This construction agreement was executed on 11.12.1995. The said agreement was assigned in favour of respondent no.2 by respondent no.1 vide agreement dated 02.08.1996. Evidently, by virtue of this agreement, respondent no.2 was conferred with a right to give on lease a part of the built up portion with the right vested in it, to receive the rent qua such part.

3.2 The super structure built on a plot comprised of basement and four floors.

3.3 By a registered lease deed dated 17.10.2001 (in short 2001 lease), respondent no.1, along with respondent no.2, conferred leasehold rights on the petitioner vis-à-vis the second floor of the super structure built on the said plot. Under the lease, petitioner was granted rights to a super area admeasuring 5122 sq. ft. The area occupied was shown as 3610 sq. ft., while an area admeasuring 1783 sq.ft., was described as the area comprising of the terrace, built on the second floor.

3.4 The tenure of this lease was three (3) years commencing with effect from 20.10.2001.

3.5 The rent payable was Rs.2 Lakh per month. In addition, the petitioner was also required to pay interest free refundable security deposit of Rs.12 Lakh equivalent to six (6) months' rent. The said security deposit was required to be refunded to the petitioner simultaneously with the petitioner handing over vacant possession of the demised premises. Failure to pay security deposit was to result in respondent no.2 being called upon to pay interest from the date it became due till the date of actual payment, apart

from the lessee's (i.e., the petitioner's) right to continue in the demised premises until such time the security deposit along with interest was refunded. The lessee i.e., the petitioner was free to take any other action against respondent no.2 in the event of its failure to refund the security deposit. The aforesaid are part of clause 4.2(a) of the 2001 lease.

4. Apart from the above, the other pertinent clause in 2001 lease was that it conferred an "*option*" on the petitioner to "*renew*" the lease for a further term of three years at an enhanced rate of rent. The enhancement provided for was, at the rate of 12% over the last paid rent. The provisions with regard to renewal of the lease tenure are contained in clauses 4.1(a), 5.1 and 5.2.

5. The 2001 lease also provided for payment of liquidated damages at the rate of Rs.4 Lakh per month subject to a maximum of Rs.40 Lakhs; in the event the lessee (i.e., the petitioner) was precluded from or not permitted or estopped or by whatever means described – a quiet, exclusive and peaceful possession and/or enjoyment or use of the demised premises, on account of, any action taken by any governmental authority as a result of defective title or authority of the lessors (i.e., respondent nos.1 and 2). This provision was incorporated in clause 7.8 of the 2001 lease. The petitioner, relied upon this clause to establish its right to claim liquidated damages.

6. In so far as the petitioner's other claims are concerned, i.e., claim for aggravated / exemplary damages, reliance was placed on clauses 7.16, 7.20 to 7.23. These clauses in the 2001 lease generally provided for the lessors' obligations and representations qua their right to lease out the demised premises, and that, while doing so, they were obliged to record that they had made disclosure of all material facts. The reliance placed by the petitioner on this clause would become clearer as I continue with the narration.

7. This apart, the petitioner also entered into a facilities and maintenance agreement. Under this agreement, a deposit in the sum of Rs.12 lacs was made over to respondent no.3.

8. Undisputedly, the petitioner executed a renewal of the 2001 lease deed vide an unregistered, though a written lease agreement dated 24.11.2004 (hereinafter referred to as 2004 lease). The 2004 lease was made effective from 18.10.2004 for a period of three (3) years. The date of expiry was stipulated as 19.10.2007. It is a short document, which adverts to three important aspects. First, that the monthly rent stood enhanced to Rs. 3,57,750/- per month from a figure of Rs. 2 lacs per month. Second, the petitioner was called upon to pay additional security deposit of Rs. 1,44,000/- in addition to Rs. 12 lacs which already stood deposited with respondent nos. 2 and 3. Third, the maximum amount of liquidated damages payable under clause 7.8 of the 2001 lease deed were reduced from Rs. 40 lacs to Rs. 20 lacs. The 2004 lease thus, indicated that all other terms and conditions stipulated in the 2001 lease would remain unaltered and shall continue to apply as between the parties up to the date of its expiry or determination of the second term of the lease, i.e., till 19.10.2007.

8.1 Along with the lease of 2004, an agreement dated 24.03.2005 was also executed, as in the previous tenure of the demised premises, for provision of facilities and maintenance.

8.2 It appears that on 14.11.2006, the building in which the demised premises were located, was sealed by the Municipal Corporation of Delhi (MCD). This action of the MCD resulted in the petitioner's business coming to a sudden halt. The petitioner claims that it was unable to access its documents, computers etc. as they lay confined within the sealed premises.

8.3 The petitioner being aggrieved filed a writ petition being: CWP No. 4582/2003. A Division Bench of this court, while refusing to de-seal the premises permanently, granted time, vide order dated 17.11.2006, for vacating the demised premises on an undertaking being furnished by the petitioner that it would handover vacant and peaceful possession within two months to the Delhi Development Authority (in short the DDA).

8.4 Apparently, in January, 2007 the petitioner filed a yet another application for extension of time which was rejected. Being aggrieved, the petitioner moved the Supreme Court, whereupon the petitioner was asked to move this court vide order dated 18.01.2007. Evidently, the petitioner was granted, by order dated 14.01.2007, two weeks to vacate the premises, whereupon MCD was directed to re-seal the same.

8.5 The petitioner claims that its inquiries led it to discover that respondent no. 2 had filed a writ petition bearing no. CWP 14645-46/2006, for quashing letter dated 01.05.2006, issued by the Dy. Director (L) of the DDA as also for quashing proceedings dated 24.05.2006, initiated by the DDA. In these proceedings, apparently, DDA had filed a counter affidavit, which led the petitioner to discover that while the perpetual lease deed executed in favour of respondent no. 1 permitted it to lease only 25% of the area, an inspection carried out in the year 2000, had revealed that respondent no. 1 had sub-let 75% of the built-up area. Consequently, a show cause notice dated 29.09.2000 was issued to respondent no. 1, which culminated in an order dated 31.10.2000 cancelling the allotment made in favour of respondent no.1. The petitioner claims that DDA vide communication dated 01.05.2006 had directed respondent no.1 to handover physical possession of the premises in issue by 05.05.2006. It is also the stand of the petitioner that on 24.05.2006 a notice under Section 4 of the Public Premises

(Eviction of Unauthorised Occupants) Act, 1971 was despatched by the DDA to respondent no.1 and that site inspection by DDA on 02.06.2006 had revealed that more than 90% of the built up area had been sub-let by respondent no .1 to various commercial organizations.

8.6 It is, therefore, the case of the petitioner that the aforementioned facts, pertaining to cancellation of perpetual lease deed and the consequent actions taken by the DDA, were not revealed and thus a fraud was played upon the petitioner.

8.7 The petitioner avers that it suffered irreparable loss and damages with the sealing of the demised premises on 14.11.2006 by MCD; an act which required it to look for alternative accommodation, albeit at considerable costs, inconvenience and disruption of business.

9. It is in this background, that the petitioner served a notice dated 14.11.2007 on the respondents claiming exemplary damages/ compensation. The said notice was responded to vide reply dated 01.12.2007, by the advocate for respondent no. 2, to which a rejoinder dated 06.05.2009, was sent by the petitioner. This was followed by a reply dated 30.05.2009 of respondent no.2.

9.1 Apparently, the petitioner vide notice dated 27.08.2009 called upon respondent no. 3 to return the security deposit of Rs. 12 lacs paid to it along with interest. The petitioner informed respondent no. 3 that it proposed to array respondent no. 3 as a party to the present proceedings.

10. The petitioner being aggrieved by the fact that the respondents had not refunded the security deposit of Rs. 24.44 lacs, along with interest, which was claimed at 18% per annum, and the liquidated damages calculated at the rate of Rs. 4 lacs per month for the period 14.11.2006 to 19.10.2007; initiated arbitration proceedings.

11. As indicated above, though the security deposit along with interest has been awarded and paid to the petitioner, what presently, ails the petitioner is the fact that the learned arbitrator has declined the claims for liquidated damages and exemplary/ aggravated damages.

Submissions of Counsels

12. In the background of these facts, submissions were advanced by Mr Sanjay Parikh on behalf of the petitioner, while those on behalf of the respondents, were made by Mr J.P. Sengh, senior advocate assisted by Mr Sumit Batra.

13. Mr Parikh, broadly, made the following submissions:

13.1 That the award in so far as it declined the petitioner's claims was contrary to the substantive provisions of law, terms and conditions of the lease agreements in issue and the pleadings on record. Reliance in this behalf was placed on the judgment of the Supreme Court in *ONGC Ltd. vs Saw Pipes Ltd. (2003) 5 SCC 705* and *DDA vs R.S. Sharma & Co. (2008) 13 SCC 80*.

13.2 The above, was elaborated by recourse to following submissions:

(a) The 2004 lease was part and parcel of the 2001 lease deed, and thus, did not require registration. He contended that since it was a case of renewal, in terms of the option provided in the 2001 lease, the 2004 lease was not required to be registered. Mr Parikh submitted that the arbitrator committed a patent error in ignoring the terms pertaining to : the period, provision of rent, and security deposit, in the 2001 lease. Therefore, according to him, denial of liquidated damages on the ground that the 2004 lease could not be admitted in evidence, was erroneous.

(b) The arbitrator, failed to take cognizance of the fact that, the respondents', in their statement of defence had not denied either the

existence of the 2001 lease or the 2004 lease. The terms of the renewed lease were plainly admitted by the respondents in their statement of defence. For this purpose, he drew my attention to the legal notice dated 14.11.2007 and the corresponding reply dated 01.12.2007, issued on behalf of respondent no. 2; the averments made in paragraph 1 to 5, of the statement of claim and the reply to the said paragraphs in the statement of defence; and lastly, similar admissions made in the reply filed by the respondents qua paragraph 6.7 of the present petition preferred under Section 34 of the Act.

(c) He thus contended, that the respondents, had admitted in pleadings that the 2004 lease stood executed, by virtue of which, rent was enhanced to Rs. 3,57,750/- per month, additional security of Rs. 1.44 lacs was paid by the petitioner, and lastly, that the cap vis-à-vis liquidated damages was reduced from Rs.40 lacs to Rs.20 lacs. It is submitted that these being admissions in pleadings, the provisions of Section 58 of the Evidence Act, 1872 (in short the Evidence Act), got triggered. In other words, since assertions made by the petitioner were admitted, qua the execution of the 2004 lease, and the necessary consequences, which entailed thereof; the issue of registration of the 2004 lease agreement was irrelevant and inconsequential. In support of this submission, learned counsel relied upon the judgments of the Supreme Court in the case of *Nagindas vs Dalpatram AIR 1974 SC 471* and *Bishwanath Prasad & Ors. vs Dwarka Prasad & Ors. (1974) 1 SCC 78*.

13.3 The 2004 lease did not create any right in the property *in praesenti*, it only described a pre-existing right, conferred on the petitioner vide 2001 lease deed. Therefore, the 2004 lease, did not require a registration under the provisions of the Registration Act, 1908 (in short Registration Act). In support of this submission, reliance was placed on the following judgments:

Gita Ram vs Sadhu Singh (1967) Punjab Law Report 572 and Bhoop Singh vs Ram Singh Major & Ors. 1995 (5) SCC 709.

13.4 It was never the stand of the respondents that the 2004 lease had to be registered. The respondents are thus estopped from raising any plea based on non-registration of the 2004 lease.

13.5 The arbitrator, contrary to the law, and the terms and conditions of clause 7.8 of 2001 lease deed, declined the claim for award of liquidated damages, though while doing so recognized the fact that under the said clause, the petitioner, was prima facie entitled to the said amount.

13.6 In so far as award of exemplary/ aggravated damage is concerned, it was submitted that in the instant case they ought to have been granted, as respondent no.2 had failed to disclose the factum of cancellation of perpetual lease deed and the consequent actions taken by the DDA which, according to him, led to the sealing of the premises in issue by the MCD. It was contended that once the malafide conduct of the respondents was established, no proof was required for award of exemplary/ aggravated damages.

14. On behalf of respondents, Mr J.P. Sengh, while broadly confirming the dates and events referred to hereinabove, with regard to the execution of the 2001 lease deed and 2004 lease, and the monies received as security deposit under the aforementioned lease agreements, as also, under the facility management agreement; made the following brief submissions in response to the submissions made on behalf of the petitioner.

14.1 First and foremost, it was the contention of Mr Sengh that, when the 2004 lease deed was executed, the DDA had not taken out any proceedings to enter upon the premises in issue. The sealing of the premises in issue, which included the demised premises, was on account of orders passed by

this court, generally. The premises in issue, were sealed on account of misuser by the occupants, and not, as contended by the petitioner, because of cancellation of the head-lease/perpetual lease.

14.2 Mr Sengh submitted that, though with regard to the use of the demised premises, respondent nos.2 and 3 had issues; they, in deference to the orders passed by the learned arbitrator, deposited the entire amount of the security deposit, both under the lease agreement and under the facility agreement, amounting to Rs.24.44 lacs with them, in the form of a fixed deposit receipt (in short FDR). He submitted that, at the time the premises in issue were let out to the petitioner, only 25% of the entire area was leased out for commercial purposes, which was, well within the terms of the perpetual head-lease, executed with the DDA. Therefore, in that sense, there was no fraud or breach of any covenant committed by respondent nos.2 and 3.

14.3 Mr Sengh submitted that the award was in consonance with the law of the land, therefore this court need not interfere with the award under Section 34 of the Act. It was the requirement of law, that any lease of immovable property which ran from year to year or a term exceeding one year, or reserved a yearly rent, was compulsorily registerable. In this behalf Mr Sengh relied upon Section 17(1)(d) of the Registration Act.

14.4 Mr Sengh submitted that a document such as a lease, of the nature described in Section 17(1)(d) of the Registration Act, would require compulsory registration. He contended that in the absence of registration, the said document was not admissible in evidence in order to enable the parties to rely upon it to prove the terms of the lease. At the highest, such an unregistered document could only be relied upon, to prove the “character of possession” qua the property in issue. He submitted that renewal of lease

deed was really a grant of fresh lease, which recognized the existence of a prior lease conferring an option on parties wanting such a renewal.

14.5 In support of his submissions Mr Sengh relied upon following judgments: *TPI Ltd. vs Union of India (2001) 2 AD (Del) 21*; *Satellite Cables (P) Ltd. vs Union of India (1999) 77 DLT 735*; *ONGS vs Saw Pipes Ltd.* and *Modern Food Industries (India) Ltd. vs I.K. Malik & Ors. 98 (2002) DLT 593*.

Reasons

15. I have heard the learned counsels for the parties and perused the record. What emerges from the record is as follows:

- (i) the petitioner, along with respondent nos. 1 and 2, had executed the 2001 lease deed, which was registered and contained a tenure clause of three (3) years;
- (ii) contemporaneously, parties had also entered into a facility and maintenance agreement;
- (iii) under the 2001 lease deed, the petitioner was required to pay a monthly rent of Rs. 2 lacs, in addition to, an interest free, refundable security deposit of Rs 12 lacs;
- (iv) similarly, under the facility and maintenance agreement, the petitioner paid a sum of Rs. 12 lacs as security deposit to respondent no.3;
- (v)(a) under clause 4.1(a) of the 2001 lease deed, the lease deed of 2001 could be “*renewed*” at the “*option*” of the lessee albeit at an enhanced rate of 12% over the last paid rent. Likewise, under clause 4.2(b), the security deposit was required to be “*increased by 12% on each renewal of the lease deed for a period of three years each*”. Consequently, the enhanced security deposit was to be deposited by the petitioner with respondent no. 2, simultaneously, on the option being exercised for renewal of the lease.

Failure to make payment of additional amount towards security deposit was to be construed as a breach of the said lease.

(v)(b) similarly, under clause 5.1 of the 2001 lease, a provision was made for conferment of right of renewal of the lease at the sole option of the petitioner as envisaged in clause 4.1 subject to enhancement of rent as detailed out therein. The petitioner was required to give notice of its intention of exercising the option in writing “**three months prior the expiry of the initial tenure of the lease**”. This aspect was provided in clause 5.2 of the 2001 lease. What is significant is that the term used in this clause is “**extend**” as against “**renewal**”.

(v)(c) under clause 7.8 of the 2001 lease, a provision was made for imposition of liquidated damages on respondent no. 2, i.e., the lessor, in the event the petitioner, i.e., the lessee, was precluded; not permitted; estopped; or; by whatever word described, disallowed : quiet, exclusive and peaceful possession, enjoyment of the demised premises due to any action taken by any governmental authority, as the result of, defective title or due to lack of authority vested in the lessors/ respondents, to permit the lease of the demised premises on or account of non-payment of statutory damages. The liquidated damages conceived under the said clause were pegged at Rs. 4 lacs per month, subject to a maximum of Rs. 40 lacs;

(vi) the 2001 lease expired on 17.10.2004. After a hiatus of one month, the 2004 lease was executed on 24.11.2004. The lease agreement was titled as: “**Renewal of Lease Deed**”. The 2004 lease though provided that the 2001 lease deed shall stand revised w.e.f. 18.10.2004 for a period of three years ending on 19.10.2007. Undisputedly, the 2004 lease was not registered.

(vi)(a) As per clause 4.1 (a) and 4.2 of the 2001 lease deed, both the rent and the security deposit was enhanced by 12%. Thus, the rent payable was Rs.3,57,750/-, and an additional security deposit of Rs.1.44 lacs was deposited with respondent no.2. A new term was added in the 2004 lease, which restricted the payment of liquidated damages to Rs. 20 lacs under clause 7.8 of the 2001 lease deed. It was also provided that all other terms of the 2001 lease deed shall remain unaltered and continue to apply as between the parties up to the date of expiry or determination of the 2004 lease.

16. Given the aforesaid facts, in my view, the first aspect which requires to be addressed is: what is the nature of the 2004 lease. I had at very outset, during the course of argument, put this query to Mr Parikh. The reason for this was that both in the pleadings filed by the petitioner and the written submissions, the expression renewal and extension of lease has been used interchangeably, unmindful of the fact that, in law, there is a clear distinction between the two. As a matter of fact, even the 2004 lease fails to draw this distinction. What has, perhaps, introduced a measure of complexity in the matter is the fact that the parties by agreement chose not to lead any oral evidence. Not that oral evidence could be read in contradiction of what is stated in 2004 lease, but in view of the manner in which the document is drawn up, evidence of witnesses would have provided clarity on the issue. This position, however, cannot be reversed.

17. The documents, i.e., 2001 lease deed and the 2004 lease, would however provide some clue as to the intention of the parties. Let me, therefore, extract the relevant parts of the two documents, which in my view, when read together are indicative of the fact that the petitioner (i.e., the lessee) was conferred with an option to renew the tenure of the lease by a

further term of three years upon its expiry in October, 2004. The relevant extracts are set out hereinbelow:

“4. Rent and Security Deposit

4.1 Rent

"(a)....

....This lease shall be *renewed* for a further term of three (3) years, *at the opinion (sic option) of the lessee* and the rent for the *subsequent renewal* of three years shall be paid to the contractor at an enhanced rate of 12% over the last rent paid.....

(b).....

4.2 Security Deposit

(a). Upon the execution of this agreement, the lessee shall pay the contractor an interest free refundable "security deposit of Rs. 12,00,000/-.....

(b) The said security deposit shall be increased by 12% upon *each renewal* of the lease deed for a period of three years each and such increased amount shall be deposited by the lessee with the contractor simultaneously upon the lessee exercising its option of renewal of this lease deed. Non payment of the additional security deposit will be a breach of the terms of the lease deed.

(c).....

Clause 5. Duration of lease

5.1 This lease deed shall be for the initial term for a period of three (3) years from the Rent Commencement date or its sooner determination under the terms hereof, and is *renewable at the sole option of the lessee* for a successive terms of three (3) years as envisaged in Clause 4.1 above, object (sic subject) to escalation of the rent as detailed in Clause 4.1 above.

5.2 The lessee shall give to the lessors notice in writing in advance clear three (3) months before the expiry of the initial terms of its intention to *extend* the initial term for each further terms as described above.”

18. As would be clear, clause 4.1(a) and 4.2 as also clause 5.1 of the 2001 lease, clearly use the word “*renew*” or “*renewable*” as the context permits, giving an option to the lessee, i.e., the petitioner to enter into a lease agreement for a further period of three years subject to certain terms and conditions; these being, inter alia, enhancement of rent and security deposit by 12%. It is only in clause 5.2 of the 2001 lease, while prescribing the manner in which the option had to be exercised by the lessee, that the word ‘*extend*’, has been used.

18.1 That the option to renew the 2001 lease deed was exercised, is evident from the fact that a fresh lease was entered into between the parties, in November, 2004. It is, however, evident from the record that the manner in which the option was exercised was not in consonance with clause 5.2 of the 2001 lease which required the petitioner to give in writing, in advance, a clear three months notice before the expiry of the tenure provided in the 2001 lease deed.

18.2 Apart from the above, a reading of the correspondence exchanged between the parties, which includes the legal notice dated 14.11.2007, would show that, the petitioner continued to stress on the fact that the 2001 lease deed, was renewed. In this context, paragraph 2 of the legal notice dated 14.11.2007, issued by the petitioner, is relevant.

18.3 This apart, what is significant is that, though, the 2001 lease deed, made provision for the rate at which the rent had to be paid, and the amount by which security had to be enhanced qua the renewed period of lease - it made no provision for liquidated damages. Consequently, in the 2004 lease, while adverting to liquidated damages, it adopted clause 7.8 of the 2001 lease deed, with a significant change. The change being that in 2004 lease the maximum limit qua liquidated damages imposable, was brought down

from Rs.40 Lacs to Rs.20 Lacs. The fact that the petitioner treated the 2004 lease as an act of renewal of the earlier lease deed is evidenced from the clear averments made in paragraph 4 of the statement of claims filed by it.

18.4 A cumulative reading of the aforesaid, leads me to conclude that the 2004 lease was a fresh agreement and not an extension of the 2001 lease deed. The distinction between a fresh lease agreement and extension of a subsisting lease is clearly brought out by the Supreme Court in the case of *State of U.P. & Ors. vs Lalji Tandon (2004) 1 SCC 1*. The observations being apposite are extracted hereinbelow for the sake of convenience:

"....There is a difference between an *extension of lease* in accordance with the covenant in that regard contained in the principal lease and *renewal of lease*, again in accordance with the covenant for renewal contained in the original lease. In the case of extension it is not necessary to have a fresh deed of lease executed, as the extension of lease for the term agreed upon shall be a necessary consequence of the clause for extension. However, option for renewal consistently with the covenant for renewal has to be exercised consistently with the terms thereof and, if exercised, a fresh deed of lease shall have to be executed between the parties. Failing the execution of a fresh deed of lease, another lease for a fixed term shall not come into existence through the principal lease in spite of the expiry of the term thereof may continue by holding over for year by year or month by month, as the case may be...."

18.5 Having regard to the aforesaid principle, as indicated above, undoubtedly the 2004 lease was a fresh lease for more than one reason, as indicated above. The consequences of renewal of a lease is in substance, a grant of, a fresh lease. It is termed as a renewal as it postulates existence of a prior lease, which ordinarily provides for renewal as a matter of right. In every other respect, it is in substance a fresh lease. (see *DDA vs Durga Chand AIR 1973 SC 2609*; in paragraph 7 at page 2611).

19. The argument of Mr Parikh that the 2004 lease merely recognized the existence of right in praesenti, is untenable. A fresh lease would create a fresh interest in property. The 2004 lease, having admittedly, a tenure of three years would require registration in consonance with provisions of 107 of the Transfer of Property Act, 1882 (in short the T.P. Act) read with Section 17 (1)(d) and 49 of the Registration Act. The consequences of non-registration of the document clearly are that it is not admissible as evidence to prove the terms contained therein.

19.1 To counter this aspect, Mr Parikh emphasized both before the learned arbitrator, and this court, that since, the respondents, had admitted not only the factum of execution of the 2004 lease, but also the terms of the said lease, which had its genesis in the 2001 lease deed, the inadmissibility of the 2004 lease on account of non-registration was irrelevant. Mr Parikh, thus submitted, that as a matter of fact the petitioner, in view of the admissions made by the respondent, was not called upon to prove anything including aspects concerning liquidated damages. In this regard Mr Parikh relied heavily on Section 58 of the Evidence Act.

19.2 In my view, this argument is flawed for more than one reason.

(i) While Section 58 of the Evidence Act absolves a party from proving admissions in pleadings or judicial admissions made by the opposite party or their counter-part or their agents at or before the hearing of the case, which then can form the foundation of a right claimed by a party, it does not preclude the court from asking the party to prove its case despite such admissions. (See proviso to Section 58 of the Evidence Act).

(ii) The provisions of Section 58 of the Evidence Act cannot be invoked to override the provisions of Section 17(1) of the Registration Act, which as a matter of public policy require registration of documents which affect

immovable properties as described in sub clauses (a) to (d) of the said Section. As a matter of fact, the proviso to Section 58 of the Evidence Act, amongst other situations, would oblige the court to render inadmissible, such like, unregistered documents, in evidence as they would militate against public policy.

19.3 The latter reason given by me, finds reflection, in a number of precedents of the various courts including the Privy Council. In the case of ***G.H.C. Ariff vs Jadunath Majumdar Bahadur AIR 1931 PC 79***, the court was called upon to decide as to whether an appellant in an action to recover possession would succeed on the ground that there was no registered lease document executed between him and his tenant, i.e., the respondent. In this particular case, the respondent, i.e., the tenant had been inducted into the premises in issue based on an oral agreement. The appellant, however, treated the respondent as a month-to-month tenant as no lease was ever executed and, accordingly, issued a notice to quit. The Privy Council re-emphasized the fact that Section 107 of the T.P. Act required that a lease qua an immovable property from year to year or any term exceeding one year or reserving yearly rent, could only be made via a registered instrument. In answering the issue in favour of the appellant, it also rejected the defence of the respondent that in part performance of the oral agreement he had acquired possession of the premises. The relevant observations are contained in the following paragraphs, the relevant extracts of which are set out below for the sake of convenience:

“.....Now it is clear that the verbal agreement alone could confer upon the respondent no such right. By Section 107, T.P. Act, 1882, it is expressly enacted that a lease of immovable property from year to year, or to any term exceeding one year, or reserving yearly rent, can be made only by registered instrument. All other leases for

immovable property may be made either by an instrument or by oral agreement.

This amounts to a statutory prohibition of the creation of such a right as is claimed here by the respondent, otherwise than by a registered instrument. No registered instrument exists therefore the respondent can have no such right as he claims unless he can establish it by some means operating independently and in violation of the statute.....

..... It was stated in *Maddison v Alderson* (1883) 8 A.C. 467 that the equitable doctrine of part performance did not rest upon the view that equity will relieve against a public statute in cases, which fall within it....

..... such a result as to create without any writing an interest which the statute says can only be created by means of a registered instrument, appears to their Lordships, in the absence of some binding authority to that effect, to be impossible whether any such authority, exists will be considered later....

.... Their Lordships do not understand these dicta to mean more than that equity may hold people bound by a contract which, though deficient in some requirements as to form, in nevertheless an existing contract Equity does this, as before stated, in the case of a verbal contract for the sale of land which has been partly performed. Their Lordships do not understand the dicta to mean that equity will hold people bound as if a contract existed where no contract was in fact made; nor do they understand them to mean that equity can override the provisions of a statute and (where no registered document exists and no registrable document can be procured) confer upon a person a right which the statute enacts shall be conferred only by a registered instrument.

..... Even if any such equity was established their Lordships are of opinion that it could not operate to nullify the provisions of the Indian Code relating to property and transfers of property....” (emphasis is mine)

19.4 The other significant judgment is of the Division of the Madras High Court in the case of *Kotam Reddi Seetamma v Vannelakanti Krishnaswami Rao, (1916) 31 MLJ 240* . This was a case in which the respondent/ the plaintiff had obtained from the courts below a decree of specific performance based on a alleged contract executed in his favour for grant of lease for a term of twelve years. The respondent, apart from the oral agreement, relied independently on a letter which contained the terms on which the lease was to be given. The appellant/ defendant before the court challenged the said decision on the ground that though the genuineness of the letter was admitted, its legal efficacy, was challenged on the ground of lack of registration. The Division Bench decided in favour of the appellant, by invoking the principle of public policy, which was independent of the fact that a challenge was laid to the legal efficacy of the document, though that provided an additional legal sinew to the court. As indicated above, the Division Bench in no uncertain terms stated that the proviso to Section 58 of the Evidence Act was intended to confer on the courts the power, albeit at their discretion, to ignore admissions, which, inter alia, sought to further a transaction which was legally inefficacious or would defeat the policy and provisions of enactment based on public policy. As a matter of fact, the Division Bench sought to draw a distinction between statutes such as the Stamp Act, which had the revenue implications, as against those which did not have an impact on revenue but furthered public policy, such as, the Registration Act. In this regard, Section 35 of the Indian Stamp Act, 1899 (in short the Stamp Act) is instructive which prohibits instruments from being tendered as evidence if, they are not stamped in accordance with the provisions of the said Act. The authority before which such a document is produced is empowered to impound such a document, under Section 33 of

the Stamp Act. The defect, however, is curable though in accordance with the provisions of law [See *SMS Tea Estates vs Chandmani Tea Co. (P) Ltd. (2011) 14 SCC 66*]. The relevant observations of the Division Bench in that behalf are extracted hereinafter:

“.....8. As regards admissions in pleadings, if the plaintiff relies on a document and mentions its contents but does not disclose that through want of proper stamp, through non-registration, through non-compliance with a statutory provision relating to attestation or through other similar defects, the writing is inadmissible in evidence and if the defendant does not set up in his defence that the document is so inadmissible and on the other hand admits the contents and the validity of the document, the court might possibly act upon the defendant's admission in the plaintiff's favour notwithstanding that during the course of the trial the court finds that the document is inadmissible in evidence, through the existence of such defect or defects. Even in such a case, if the legislative provision declaring such a document to be in-admissible in evidence or ineffectual for certain purposes (or both) was based on reasons of public policy, I think that a Court ought to go behind the admissions in the pleadings and refuse to act on the admitted facts in the plaintiff's favour. The very eminent Judge (West, J) whom I have already quoted says in Burjorji Cursetji Panthaki v. Muncherji Kuverji (1880) I.L.R. 5 B. 143, 153. " If the document being pronounced absolutely invalid for some purpose on considerations of public policy, it were sought to defeat the law through the effect usually given to an admission in pleading, such an attempt could not be allowed to succeed.....

.....When documents are made merely inadmissible in evidence by statutory law for the non-payment of proper stamp duty thereon, it may be a question whether public policy requires the admission in pleadings of their contents to be rejected by the courts, especially as the Stamp Act itself enacts that when a document is once admitted in evidence, though not properly stamped, the admission cannot be called in question after-wards in the suit, (see

Section 36) and that criminal courts might ignore the Stamp Act, (section 33 Clause 2(a)). Most unstamped and insufficiently stamped documents could also be made admissible in evidence on the payment of the proper duty and a penalty. The courts, again, are not usually inclined to treat enactments relating to revenue as involving such large and grave principles of public policy as govern enactments relating to registration and attestation of documents. But where a document is not merely made inadmissible in evidence (wholly or for certain purposes as in the Registration Act, Section 49 Clause (c), but the Legislature has further enacted that a document not registered shall not affect any immoveable property comprised therein or that a transaction of a particular nature in respect of immoveable property comprised therein (generally or of a particular description) can be legally effected, only by a document complying with prescribed conditions as to attestation, registration etc., (sections 54, 59, 107 etc., of the Transfer of Property Act), such provisions must be deemed to have been enacted on grounds of public policy and courts should not, in my opinion, be astute in creating loopholes for evading the plain intention of the legislature...”

(emphasis is mine)

19.5 I am in respectful agreement with the dicta of the Division Bench of the Madras High Court in the aforementioned case, which infact disagreed with the view taken by several judgments of the single Judges of its court and other courts.

19.6 The other judgments in which the same view is adopted are as follows:

Ma Kyi vs Maung Thon & Anr. AIR 36 NULL 230; Maung Lu Pe & Ors. vs Maung Sun Mya AIR 1940 Rangoon 11; Ningappa Awwappa vs Danappa Sharnappa & Ors. AIR 1947 Bom 206; Bishun Singh & Ors. vs Sheodhari Das & Ors AIR 1947 Pat 110; and Kolathoor Variath & Anr. vs Paiaprakottoth Cheriya Kumhahammad Haji (1974) 1 SCC 590.

19.7 A Division Bench of this court in the case of ***Modern Food Industries (India) Ltd. Vs. I.K. Malik and Ors.***, has taken the view that if a lease on account on non-registration could not be admitted as evidence, then all its terms would be inadmissible in evidence, including those which relate to renewal of lease, and that use of such a document for said purposes, is not, a collateral purpose, referred to in proviso to Section 49 of the Registration Act. An unregistered document could at best be used for the purposes of demonstrating nature of possession, but it does not create any right in favour of the lessee to continue as such, for a period of a year or more. Creation of lease is not a collateral purpose nor are the terms of lease "collateral" within the meaning of Section 49 of the Registration Act. See observations made in paragraphs 11 to 14 at pages 596-597).

20. Therefore, in one sense, all arguments based on which it was contended that the learned arbitrator could have looked at the 2004 lease agreement stand closed by virtue of the said instrument not being registered.

21. Apart from the above, there are two other aspects, which propel me not to interdict the award. The view taken by the learned arbitrator is clearly a plausible view, and in my opinion, the correct view, and therefore, under Section 34 of the Act no interference is called for. Secondly, as is apparent from the record, the petitioner claimed damages under a clause which provided for liquidated damages, in respect of which no evidence was led. There was nothing on record to show that during the period in issue, i.e., between November, 2006 to October, 2007 the petitioner had to take another premises on lease at a rate higher than that which was being paid to respondent no. 2. Liquidated damages like ordinary damages require proof of injury and the application of principles of mitigation before they are quantified. (see ***UOI vs Raman Iron Foundry, (1974) 2 SCC 231***). The

state of record, as it existed before the arbitrator, even if he permitted the petitioner to rely upon the 2004 lease, would not have helped the cause of the petitioner. The possibility of the petitioner establishing its claim of liquidated damages was remote. I must make clear that I ventured to touch upon this aspect as Mr Parikh submitted before me that if this court was persuaded by his submissions advanced qua the petitioner's claim for liquidated damages having regard to the admissions made by the respondents – then, the matter ought to be remitted to the learned arbitrator for decision on the petitioner's claim.

21.1 According to me, as indicated above, even if I were to agree with the submissions led by Mr Parikh (though for the reasons given above by me, the said submissions are untenable), the entire exercise will be futile as no proof of injury has been placed on record by Mr Parikh to establish his claim for damages. It is no longer *res integra* that liquidated damages are no different from non-liquidated damages. Both require proof of injury or damage caused. It is only when in certain circumstances proof is difficult to obtain, that the measure provided for under the liquidated damages clause is adopted by courts to the extent it is reasonable subject to the maximum damages agreed to between the parties, under the liquidated damages clause. [See *UOI vs Raman Iron Foundry and Fateh Chand vs Balkishan Dass (1964)1 SCR 515*; and also the judgment of the Division Bench dated 30.11.2011 passed in FAO(OS) No. 204/2010 in the case titled *Vishal Engineers & Builders vs Indian Oil Corporation Ltd.*].

21.2 From the record it is evident that petitioner had placed no material before the arbitrator with respect to it having to take another premises on lease between the period 14.11.2006 and 19.10.2007 at a rate higher than that it was required to pay under the 2004 lease agreement. Therefore, even

if the matter was remitted to the arbitrator, no finding could have been returned by the arbitrator in favour of the petitioner.

22. This brings me to the last aspect of the matter, which is the petitioner's claim for exemplary/ aggravated damages. The learned arbitrator has rejected the same on the ground that no material was placed before him, in that behalf. Mr Parikh has argued that since a fraud was committed in not disclosing to the petitioner that the DDA had already cancelled the perpetual lease deed, the petitioner was entitled to exemplary/ aggravated damages. The defence of the respondents has been that, at the time when, the demised premises were let out to the petitioner only 25% of the super-structure had been let out, and therefore, there was no violation of the terms of the head lease. In other words, respondent nos. 2 and 3 were not called upon to make any disclosure as there was no violation of the terms of the head lease at that juncture. This was a matter which would have again required trial. Since, the parties, agreed that they would argue their respective cases based on the material on record, in my view, the learned arbitrator rightly came to the conclusion that there was no material before him to award the claim in favour of the petitioner.

23. For the foregoing reasons, in my view, there is no merit in the petition. The petition is, accordingly, dismissed leaving parties to bear their own costs.

RAJIV SHAKDHER, J

OCTOBER 25, 2013
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