

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

% *Judgment Reserved On : November 04, 2016*
Judgment Delivered On : November 07, 2016

+ **FAO (OS) (COMM) 64/2016**

HOTEL LEELA VENTURE LIMITEDAppellant
Represented by: Mr.Rajiv Nayar, Sr.Advocate
instructed by Mr.Abhimanyu
Mahajan, Mr.Milan Deep Singh
and Ms.Anubha Goel, Advocates

versus

AIRPORTS AUTHORITY OF INDIARespondent
Represented by: Mr.Sandeep Sethi, Sr.Advocate
instructed by Mr.Vaibhav Kalra
and Mr.Jasbir Bidhur, Advocates

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE PRATIBHA RANI

PRADEEP NANDRAJOG, J.

1. Airports Authority of India (hereinafter referred to as AAI) was the owner of 29000 square meter land near Mumbai International Airport, out of which 2 parcels ad-measuring 9000 square meters each were leased to Leela Scottish Lace Ltd. and Leela Venture Limited, (hereinafter referred to as LEELA) leaving behind 11000 square meters land, which initially was given on a license to LEELA.

2. Dispute concerns said 11000 square meters land which, vide lease-deed dated February 07, 1996, was demised in favour of LEELA for a period of 30 years on the terms and conditions contemplated therein. A supplemental agreement of even date was also executed, and the reason thereof was that clause 3 of the lease-deed had to be given effect to.

3. The lease-deed mandated LEELA to construct a wing to the existing hotel building housing therein 150 rooms and for which entire cost to render the building fit to be used for lodging had to be spent by LEELA. At the expiry of the period of lease, the structure, fittings, fixtures, plant and machinery were to vest with AAI without payment of any compensation. The lease was to commence on April 01, 1994 and duration being 30 years, by efflux of time would expire on March 31, 2024. Clauses 2, 3 and 3(a) of the lease-deed being relevant are noted.

They are as under:-

“2. The lessee shall pay @ ₹200.00 per sq. mtr. per annum as lease money subject to 10% compound escalation per annum for use and occupation of the land per year in advance, in each year. The first of such payments to be made before taking over the land on lease. The rate of lease money payable by the lessee shall be subject to revision by the authority from time to time and the lessee agrees to pay such revise lease money without any protest.

3. In addition to the lease money mentioned hereinabove and as revised from time to time, the lessee shall pay to the Authority; Royalty as minimum guaranteed amount as mutually decided between the parties and in absence of any decision, as decided by Chairman of Airports Authority of India. For this purpose gross turnover will be arrived at after excluding Government taxes/levies on turnover.

3(a). The amount on royalty shall become payable from the date of commencement of the hotel or after the expiry of 3 years gestation period allowed for construction of the hotel block commencing from 1.6.1995 whichever is earlier.”

4. It is apparent that the term of the grant was that LEELA would possess 11000 square meters land as lessee for a period of 30 years and in consideration would pay the amount stipulated in clause 2 of the lease-deed and clause 3 thereof. Whereas the amount as per clause 2 was determined at ₹200/- per square meter per annum escalation by 10% (compounded) each year, the amount as per clause 3 (which was titled ‘Royalty’) was to be mutually agreed by the parties and in the absence of an agreement by a decision taken by the Chairperson of the AAI. The supplemental agreement of even date recorded the royalty mutually decided between the parties to be paid by LEELA to AAI. Clauses 1 and 2 of the supplemental agreement record the agreement between the parties and have to be read in conjunction with Schedule A to the supplemental agreement. The two clauses and Schedule A of the supplemental agreement read:-

“1. In addition to the payment of lease rental as provided in the said agreement to lease dated the 7th day of February, 1996, the lessee shall also pay to the authority royalty as minimum guaranteed amount, as specified in Schedule A annexed hereto or at the rate of 7.5% of the gross turnover of the new Hotel Block, whichever is higher. For the purpose of determination of gross turnover, government taxes/levies on turnover will be excluded.

2. The amount of royalty shall be payable from the date of the commencement of the hotel or after the expiry of three years gestation period allotted for the hotel commencing from 1.6.1995 whichever is earlier.

Schedule 'A'

M/s.Hotel Leelaventure Limited shall be liable to pay the minimum guaranteed amount as under:

		(₹ in lakhs)
<i>Year</i>	<i>Projected turnover</i>	<i>Minimum guaranteed amount payable</i>
1.	---	---
2.	---	---
3.	---	---
4.	₹1725	₹129.37
5.	₹2242	₹168.15
6.	₹2915	₹218.62
7.	₹3789	₹284.17
8.	₹4926	₹369.45
9.	₹6403	₹480.22
10.	₹8324	₹624.30
11.	₹10821	₹811.57
12.	₹14067	₹1055.02

13.	₹18287	₹1371.52
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The turnover for the remaining period of the agreement shall be worked out on the basis of 17% (seventeen percent) compound growth per year.”

5. A comment upon clause 3 of the lease-deed. A case of extremely bad draftsmanship. It has two sentences. The first commencing from the words ‘*In addition*’ and ending with the words ‘*of India*’. The second sentence reads : For this purpose gross turnover shall be arrived at after excluding Government taxes/levies on turnover. Read with the tools of grammar the first sentence would mean to the reader that Royalty by way of minimum guarantee amount as mutually decided has to be paid. Ex-facie it would mean a fixed guaranteed sum. The second sentence makes it clear that while taking the mutual decision to determine the Royalty as the minimum guaranteed amount the parties would base it on the gross turnover which would be the receipts excluding Government taxes/levies. But, while giving effect to clause 3 of the lease-deed the parties agreed that the Royalty would be @ 7.5% of the gross turnover which shall exclude Government taxes/levies on turnover, or as specified in Schedule A, whichever is higher. The Schedule evinces that from the fourth year onward, the projected turnover commencing from ₹1725 lakhs per annum rose to ₹18287 lakhs per annum; and the minimum guaranteed amount was arrived at, as a percentage of the projected turnover.

6. Highlighting the fact, which is evident from clause 2 of the supplemental agreement, liability to pay royalty was with effect from

June 01, 1995. Three years period was to enable LEELA to construct the hotel building contemplated by the lease-deed.

7. After the lease-deed and the supplemental agreement were signed on February 07, 1996, LEELA submitted a building plan on June 10, 1996 to AAI for its approval, proposing to amalgamate the area ad-measuring 18000 sq.mtr. already leased to LEELA and its group company Leela Scottish Lace Ltd. and the 11000 sq.mtr. land leased to LEELA under lease-deed dated February 07, 1996 i.e. to utilize the permissible FSI for the 11000 sq.mtr. land to expand the existing building of the hotel on the land leased earlier and use the land demised under the lease-deed dated February 07, 1996 for a swimming pool and other recreational facilities. The reason being that the Municipal Laws in the city of Mumbai permit transfer, sale and exchange of FSI and thus it is permissible to construct a lesser or even a nil area on an existing plot and utilize this FSI on another plot. The proposal was rejected resulting in a second proposal submitted which was also rejected and hence a third which was accepted by AAI. But LEELA did not construct a building as per said proposal submitted by it and chose to submit a fourth proposal which was accepted. Here the facts get a little blurred. But it is the admitted case of parties that LEELA utilized the FSI for the 11000 sq.mtr. land on the land leased to it on the earlier occasion and this was by the year 2002.

8. A dispute between the parties relating to rejection of LEELA's building plans by AAI, with LEELA claiming discharge from the liability to pay Royalty was referred to arbitration resulting in an award dated

May 17, 2008 which was accepted by LEELA and thus it agreed to pay not only the lease rent but even the minimum Royalty contemplated by the supplemental agreement on the basis of estimated projected gross turnover.

9. Soon after the award dated May 17, 2008, vide its letter dated August 13, 2008, LEELA again invoked the arbitration clause, claiming that the projected gross turnover of the proposed hotel building as recorded in Schedule A of the supplemental agreement dated February 07, 1996 was highly inflated and unachievable and therefore LEELA ought to be discharged from liability to pay minimum guaranteed amount (MGA) calculated on the basis of these projected gross turnover, and instead should be made liable to pay royalty @ 7.5% on the actual gross turnover of the proposed building. It pleaded that when the lease-deed and the supplemental agreement were executed on February 07, 1996, the economic climate in India and globally envisaged a tremendous growth in tourism, which climate suddenly turned cold and there was global recession in tourism industry. In the alternative, LEELA pleaded that if its liability to pay the MGA could not be discharged, the projected gross turnover contained in Schedule A of the supplemental agreement dated February 07, 1996, ought to be revised and made in pari materia with the minimum guaranteed amount being paid by A.B. Hotels Ltd. for the Radisson Hotel in New Delhi. LEELA also claimed an extension of the agreement for a further period of 14 years. Vide letter dated August 27, 2008, LEELA raised another dispute for reference to the arbitrator, claiming a fresh period of 3 years for construction of the hotel building

during which time no minimum guarantee amount would be payable by it.

10. AAI had a claim towards outstanding MGA. LEELA's claim and AAI's counter claim were referred to arbitration.

11. LEELA filed a statement of claim in which after narrating the backdrop facts as above, it pleaded in paras 8, 9, 10(I) and 19 as under:-

“8. However, LEELA has been unable to proceed further in that direction because the Minimum Guaranteed Amounts payable by LEELA as Royalty as per the said Supplemental Agreement have become obsolete and unworkable. More than 13 years have elapsed out of the total tenure of the Lease Agreement of 30 years including the construction period of three years, since the execution of the said Lease Agreement and the Supplemental Agreement, and there has been a phenomenal increase in the project cost of the proposed hotel as envisaged by the parties. There is no time left for LEELA to construct the hotel, set it up and recoup its investment during the remaining part of the term of the lease.

9. Market conditions for the hotel industry have deteriorated and are continuing to deteriorate in the context of the recession, which is a global phenomenon, and the threat of terrorist attacks of the kind that Mumbai witnessed on 26th November 2008. LEELA made several representations to Airports Authority pointing out that it is not possible for LEELA to go ahead with the construction of the proposed hotel if the Minimum Guaranteed Amounts as mentioned in the said Supplemental Agreement are treated as binding on LEELA. LEELA reiterated that if was prepared to pay 7½% of the Gross Turnover of the proposed hotel as Royalty to Airports Authority as stated in the Supplemental Agreement, but it cannot possibly pay the Minimum Guaranteed Amounts and that LEELA was

exonerated from payment of the Minimum Guaranteed Amounts as stipulated in the Supplemental Agreement in the context of the drastic change in circumstances. LEELA expressed its willingness to pay Minimum Guaranteed Amounts on par with another Lessee of Airports Authority, namely A.B.Hotels Limited, New Delhi to which Airports Authority had granted a lease for construction of a hotel near the Delhi Airport around the time when the aforesaid lease in favour of LEELA was executed. However Airports Authority arbitrarily and unreasonably insisted that LEELA should pay the same Minimum Guaranteed Amounts as mentioned in the said Supplemental Agreement.

10.

(I) Whether the Projected Turnover of the Hotel and the resultant Minimum Guaranteed Amount set out in the Supplemental Agreement dated 7th February, 1996 is not unconscionable, arbitrary and an impossibility not capable of being achieved in the circumstances prevailing in the hotel.

x x x

19. *LEELA states that it is unable to proceed with the construction of the hotel and pay a royalty of 7½% on the gross turnover of the hotel and minimum guaranteed amounts as stipulated in the said Supplemental Agreement in the changed economic scenario, which is entirely different from what it was when LEELA agreed to execute the said Supplemental Agreement. LEELA states that the euphoria generated by the economic liberalization that commenced in the early 90s has evaporated and the viability of any new hotel project has to be evaluated in the context of the changed circumstances. LEELA states that the projected turnover set out in the Supplemental Agreement has become unconscionable, totally out of proportion to reality and therefore unworkable. The Minimum Guaranteed Amounts of Royalty as stated in the Supplemental Agreement are*

based upon ever increasing turnovers to the extent of 30% (compounded) every year for the subsequent years of the lease period. Such an increase in turnover is, not capable of being achieved in any market in the world. It follows therefore that it is not possible for LEELA to pay the Minimum Guaranteed Amounts as stated in the Supplemental Agreement as they are calculated on the basis of such unachievable turnovers.”

12. The four reliefs claimed by LEELA read as under:-

“(a) That the Minimum Guaranteed Amounts as Royalty which are contained in the Supplemental Agreement dated 7th February, 1996 executed between Airport Authority and LEELA and unconscionable, arbitrary and an impossibility not capable of being achieved in the circumstances prevailing in the hotel industry;

(b) That it will be in the interest of justice, equity and good conscience to, finalize the Minimum Guaranteed Amounts payable by LEELA to Airport Authority in pari material with that of A.B. Hotels Ltd. for the Radisson, New Delhi with effect from the date of the reference;

(c) That the lease agreement between Airports Authority and LEELA in respect of the said 11,000 sq. mtr. of land which is scheduled to expire on 31st March, 2024 stands extended by a period of 14 years;

(d) That LEELA will not be liable to pay any Minimum Guaranteed Amount towards Royalty for a period of three years which is meant for the construction of the 150 room hotel on the said 11,000 sq. mtr. of land and LEELA will be entitled to a further additional construction period of one year after payment of an additional charge of 50% of the

ground rent, such a provision may be given in the Agreement.”

13. In the reply filed by AAI it pleaded that the award dated May 17, 2008 foreclosed all issues which were raised by LEELA. In reply to paragraph 8 of the claim, AAI inter-alia pleaded:-

“8. Moreover, the fact remains that the FSI/FAR for 11000 sq.mtr. of area was utilized by the Claimant for construction of additional floors in the hotel in the year 2002. This is as per the local laws where transfer of development rights is permissible. Hence the claim of the Claimant stating that they were not allowed to construct at 11000 sq.mtr. is not true.”

14. Before the learned Arbitrator LEELA gave up prayers (b) to (d) as per its statement of claim and pressed only prayer (a).

15. LEELA examined two witnesses : (i) Vijay Premji Thacker (CW-1) and (ii) M.S.Belakar (CW-2); and relevant would it be to note that as per CW-1 he was a Chartered Accountant with 27 years experience. With reference to passenger footfall at Mumbai Airport, he brought out the fact that whereas footfall at the Airport increased as per projected estimates till the year 2002, it started falling drastically thereafter. Meaning thereby, persons visiting Mumbai and lodging in hotels decreased. With reference to occupancy in 5 star hotels such as Grand Hyatt, ITC Grand Maratha, Hyatt Regency, Renaissance, Inter Continental Grand and Taj Lands End, he brought out the decrease in occupancy; and hence the revenue. With reference to the balance sheet of LEELA he brought out that the gross revenue realized over the last 10 years was less than the money payable as lease rental and minimum

guaranteed royalty. The second witness, a Registered Architect and Town Planner, brought out that the demised land would not be rendered sterile upon its FSI being utilized in the adjoining land.

16. AAI examined its Deputy General Manager (Law) as RW-1 who deposed, if we may use the expression, legal point in favour of AAI.

17. The claim of LEELA brings out; notwithstanding LEELA not pleading frustration of the agreement, that the projected figures of turnover were premised on the expectation by the parties that tourism would grow in the city of Mumbai and that it was not in the contemplation of the parties that there would be global recession in the tourism industry by the year 2004 and the tourist footfall in the city of Mumbai would drastically fall. Couched with a sugar coating, the case in essence pleaded, is one of frustration; notwithstanding the use of the expression such as *‘unconscionable, arbitrary, and an impossibility incapable of being achieved’*.

18. The learned Arbitrator rightly focused on the law relating to *Frustration of a contract*. In paragraph 6 of the award dated August 29, 2012 the learned Arbitrator has rightly noted that pleadings in support of the prayer were *‘somewhat defused’* and that during arguments learned counsel for LEELA urged that *‘it was entitled to this relief on account of the combined effect of two frustrating events, namely the worldwide recession which hit the hotel industry in India from June, 2008 and the terrorist attack on five star hotels in Mumbai which took place on November 26, 2008’*.

19. The learned Arbitrator notes correctly, in para 25 of the award, that the concept of frustration of a contract enshrined under Section 56 of the Indian Contract Act, 1872, is not applicable to a lease. Recognizing, and we may refer to para 10 of the award, that the royalty as per clause 3 of the lease-deed was the additional consideration payable, the learned Arbitrator has proceeded to hold that frustration pleaded was not that of the lease-deed but of a term of the supplemental agreement. With reference to the testimony of CW-1, the learned Arbitrator has held that the twin events i.e. a recession in the hotel industry and the terrorist attack in Mumbai, with five star hotels targeted, could not be in the contemplation of the parties in the year 1996 and therefore has held that since the supplemental agreement (and we refer to paragraph 26 of the award) stands on a different footing from the lease-deed, frustration of the latter would have no bearing on the former. Taking this forward, the learned Arbitrator has held that the estimates of turnover envisaged by the supplemental agreement and the resultant minimum guaranteed amount were no longer binding; being not commercially possible for the lessee to pay the same. As per the learned Arbitrator (and we refer to para 23 of the award), the unforeseen change in circumstances have knocked the bottom out of the understanding between the parties regarding future turnover.

20. Concerning utilization of FSI, in paragraph 34 of the award, with reference to the testimony of CW-2, the learned Arbitrator has recorded:-

“His evidence was that the FSI for the commercial building came from the total area of the amalgamated plots which included the 11,000 sq.mtr. and as such, the FSI that was

utilized for the commercial building cannot be attributed to any particular part of the amalgamated area. Although as per the lease-deed the claimant is entitled to utilize only one FSI on the 11,000 sq.mtr. of land, there is no such restriction on the balance of the amalgamated area, and the claimant has written approval from the Government of Maharashtra to enhance the FSI to two on the remaining part of the amalgamated area subject to payment of premium to the Government. The witness produced a letter dated 25th June, 1991, issued by the Government of Maharashtra, Urban Development Department under reference No.FSI 1184/4519/CR.933-UD-11 in support of this position. In the light of these facts; it cannot be said that the Claimant has no FSI left to construct the hotel as contemplated by the lease-deed in respect of 11,000 sq.mtr.”

21. The award terminates with the finding and the declaration as under:-

“38. To conclude, on the basis of the evidence led before me I have no difficulty in holding that the agreement between the parties that the Claimant would pay minimum guaranteed amounts as stipulated in Schedule A to the Supplemental Agreement dated 7th February, 1996 became impossible of performance in a commercial sense on account of the frustrating events that occurred during the second half of 2008. This of course does not mean that the Claimant has ceased to be bound by the requirement of Clause 3 of the Lease Deed to pay an additional amount as minimum guaranteed amount which may be mutually agreed upon, and failing such mutual agreement, as determined by the Chairman of the Respondent. I agree with the submission of the learned Counsel for the Claimant that there is nothing in Clause 3 of the Lease Deed to suggest that such mutual agreement or determination by the Chairman of the Respondent is a one-time act or event. Since I am holding that the Supplemental Agreement dated

7th February, 1996 has become impossible of performance from June 2008 on account of two supervening events over which the parties had no control, it will now be necessary for them to arrive at mutually acceptable figures, failing which the Chairman of the Respondent will have to determine what those minimum guaranteed amounts should be. In the absence of a specific arbitration agreement between the parties to that effect, this Tribunal refrains from expressing any opinion on what those figures should be. However, I am recording the fact that the learned Counsel for the Claimant stated before me that the Claimant is not challenging the obligation of the Claimant to pay 7.5% of the gross turnover of the hotel as stipulated in Clause 1 of the Supplemental Agreement dated 7th February, 1996, whatever be that amount.

ORDER

(A) It is declared that the minimum guaranteed amounts which are stated as payable by the Claimant in Schedule A to the Supplemental Agreement dated 7th February, 1996 executed between the parties became impossible of performance with effect from 1st June 2008. As already observed above in the absence of a specific arbitration agreement between the parties to that effect, this Tribunal refrains from expressing any opinion on what those figures should be. The parties are, however, at liberty to enter into a new appropriate arbitration agreement and make a fresh arbitration seeking fixation of the amount payable as that I cannot do in the present Arbitration as that would be beyond the scope of the existing arbitration agreement between the parties.”

22. Aggrieved by the award AAI preferred objections under Section 34 of the Arbitration and Conciliation Act, 1996. The award has been set aside; and holding that LEELA had raised a false claim - an offence under Section 209 of the Penal Code, the learned Single Judge has

additionally held that upon LEELA undertaking to pay the arrears of MGA to AAI and not to initiate frivolous proceedings in the future the matter would be closed, but if no such undertaking is filed action would be initiated under Section 340 Cr.P.C.

23. The impugned decision by the learned Single Judge, dated July 15, 2016, notes a plethora of judgments on the scope of judicial intervention under Section 34 of the Arbitration and Conciliation Act, 1996, as also judgments interpreting Section 56 of the Indian Contract Act, 1872. The learned Single Judge then proceeds to note Section 108 of the Transfer of Property Act, 1882. The learned Single Judge has thereafter noted a host of judgments holding that the doctrine of frustration does not apply to leases, but has held that a facet of frustration, which is embodied in Section 108(e) of the Transfer of Property Act, 1882, would be applicable to leases. The learned Single Judge has held that the facts did not attract clause (e) of Section 108 of the Transfer of Property Act, 1882. The learned Single Judge has referred to a large number of judgments holding that a contract is not discharged merely because its performance turns out to be onerous. The learned Single Judge has thereafter noted judgments holding that a party cannot approbate and reprobate i.e. cannot retain part benefit under a transaction and repudiate a part thereof. The learned Single Judge has then noted judgments holding that a contract which has been acted upon cannot be varied except by consent of parties. The learned Single Judge has noted various judgments holding that an Arbitrator cannot re-write a contract between the parties. On the assumption that the doctrine of frustration applied, the learned Single

Judge has held that LEELA could not claim the relief granted by the learned Arbitrator and its right would be to determine the contract after paying the dues till the date it determined the contract and return possession of the leased land. The learned Single Judge has made a reference to more than 50 judgments to cull out as above.

24. Learned senior counsel for LEELA and AAI were in agreement that the points which were urged before the learned Single Judge have not been captured properly and the basis on which impugned judgment is premised would thus not be sound, inasmuch as the legal issues on which the award has been set aside were not the ones on which the parties debated.

25. In view of the fact that the learned Arbitrator had recognized that doctrine of frustration of a contract embodied in Section 56 of the Indian Contract Act, 1872 would not apply to leases, the learned Single Judge has obviously strayed in the journey. This is in spite of the fact that in paragraph 8.2 of the impugned decision, the learned Single Judge has noted (quote) : *‘It was common ground between the parties before the learned Arbitrator that the lease-deed dated 07th February, 1996 was never frustrated and both parties affirm its validity and enforceability’*.

26. Learned senior counsel for LEELA and AAI conceded to the fact that, on account of being a creature of the agreement between the parties, an Arbitrator cannot re-write the terms of the agreement between the parties. Learned counsel were also in agreement with the law that construction of the terms of a contract is primarily for an Arbitrator to decide and he is entitled to take the view which he holds to be correct

after considering the material before him and a Court while considering challenge to an arbitral award does not sit in appeal over the findings and decisions unless the Arbitrator construes the contract in such a way that no fair-minded or reasonable person could do or proceeds to interpret a contract on fundamentally wrong legal premises.

27. It being common ground between the parties that the doctrine of frustration does not apply to lease of immovable property and the learned Arbitrator had not applied the doctrine of frustration as strictly understood, but had held the supplemental deed to be distinct and separate from the lease-deed and therefore such terms thereof which had become commercially oppressive on account of change of circumstances statedly not within the contemplation of the parties, liable to be modified, the question which had to be posed and answered by the learned Single Judge was : Whether it was permissible for the learned Arbitrator to do so? Was such an understanding of the lease-deed and the supplemental agreement perverse? Whether the perversity was of a kind which would render the award patently illegal?

28. The finding is crystallized in paragraph 26 of the impugned award, which reads:-

“26. The Claimant continues to remain in possession of the leased land and is paying the lease rent stipulated in Clause 2 of the lease-deed. The learned Counsel for the Claimant repeatedly stated before me that the Claimant accepts and abides by all the terms of the registered lease-deed. But the unregistered Supplemental Agreement dated 7th February, 1996 was a subsequent agreement between the parties to give effect to Clause 3 of the lease-deed and stands on a different

footing from the lease-deed. Frustration of the latter has no bearing on the former.”

29. The finding aforesaid is preceded by a discussion on the lease-deed and supplemental agreement in paras 10 to 15 of the award, as per which the learned Arbitrator has held that there was a fundamental distinction between clause 2 and clause 3 of the lease-deed; the former embodying a fixed lease rent, to be increased annually by 10% on compounding basis, and the latter contemplating an additional consideration for the lease in the form of a percentage of the gross turnover subject to a minimum guaranteed amount. As per the learned Arbitrator, when the lease-deed was executed the parties had not agreed on the additional consideration which was subsequently agreed as per the supplemental agreement.

30. What stares in the face of the award and its reasoning on said aspect, is the omission to note that the lease-deed and the supplemental agreement were executed simultaneously on the same day being February 07, 1996. We find it strange that having agreed on the minimum guaranteed sum (having an element of revenue sharing apart from a fixed consideration for grant of the lease) the parties chose to simultaneously execute two separate contractual documents, one being the lease-deed and the other supplemental agreement.

31. A lease of an immovable property means, as defined under Section 105 of the Transfer of Property Act, 1882, a right to enjoy immovable property for the duration specified in the lease agreement, in consideration of a price paid or promise which could be money, a share of

crops, service or any other thing of value to be rendered periodically by the transferee to the transferor.

32. The first patent error by the learned Arbitrator is to not even look at the definition of a lease of immovable property as defined in Section 105 of the Transfer of Property Act, 1882. Meaning thereby, the consideration for enjoyment of immovable property by the transferee could be a promise to pay a fixed price i.e. money or a share in the monetary benefit which may accrue to the transferee by use of the property. It could additionally be both. That is to say the consideration flowing from the transferee to the transferor may could have two elements and the two could be embodied in different documents. It is trite that a series of documents may form the contract between the parties. Terms of a contract may be found lying scattered in different documents. But that does not mean that the documents have separate legal entities and therefore subject to different principles of law. A contract is a single entity and de-jure is one albeit, de-facto can exist in different documents. If terms of an agreement lie scattered in different documents, all documents constitute one entity i.e. the contract.

33. Clause 2 and clause 3 of the lease-deed formed the consideration payable by the transferee to the transferor and are tied by the umbilical cord to each other and neither can be severed from each other for the reason the two clauses jointly embody LEELA's obligation to pay the consideration contemplated by the lease-deed to enjoy the immovable property belonging to AAI. The use of the two words '*In addition*' in clause 3 of the lease-deed leaves no scope for any argument to urge that

the royalty agreed to was not a part of the consideration. To give flesh and blood to clause 3 of the lease-deed the supplemental agreement was executed on the same day. The recitals thereto are the umbilical cord and so record it to be so, which binds the supplemental agreement to the lease-deed. It records that in addition to the lease rental the lessee shall also pay royalty as minimum guaranteed amount as specified in Schedule A annexed to the supplemental agreement or @ 7.5% of the gross turnover, whichever is higher. The date of commencement of the payment of the royalty being deferred for a period of 3 years; the time contemplated for the hotel building to be completed and operationalized. The other fundamental and jurisdictional error in the award is to ignore the fact that FSI for the demised plot have been utilized to construct additional floors on the existing hotel building constructed on the adjoining plot because the municipal law in the city of Mumbai permitted trading in FSI. Another fundamental jurisdictional error committed was to overlook a very important fact being the dispute was raised on August 13, 2008 simply pleading lack of growth in tourism due to recession in the global economy and not with reference to the terrorist attack where five star hotels were targeted in the city of Mumbai on November 26, 2008.

34. The consideration for the lease being one; albeit having two constitutive elements, the law declared by the Supreme Court in the decision reported as (1968) 3 SCR 339 Raja Dhruv Dev Chand Vs. Raja Harmohinder Singh & Anr would squarely be applicable; and if it was the claim by the lessee that the consideration for the lease failed or became

oppressed, the claim would fail because neither the doctrine of frustration applies to a lease nor broad principles thereof to a lease. The reason being that executory contracts alone are capable of being frustrated and not executed contracts. For example, 'A' a retailer of shoes purchases shoes from 'B' who is the manufacturer of shoes. The agreed quantities of shoes are delivered and part sale consideration paid. On account of change in import policy the market is flooded with imported shoes which are much cheaper vis-à-vis the price payable by 'A' to 'B'. 'A' cannot plead frustration requiring the Court to reduce the price and relieve him the obligation to pay the balance sale consideration to 'B'.

35. A contract for lease whereunder the lessee obtains possession from the lessor is an executed contract and during the duration of the lease, since it is a term of the agreement that consideration shall be rendered periodically, the agreed consideration has to be paid and it hardly matters that rents have fallen in the meanwhile. The result of a lease is the creation of a privity of estate inasmuch as lease is the transfer of an interest in immovable property within the meaning of Section 5 of the Transfer of Property Act, 1882, as was held in para 20 of the decision reported as 2003 (5) SCC 150 T.Lakshmipathi & Ors. Vs. P.Nithyananda Reddy & Ors. That apart, as held in the decisions reported as (1960) 2 SCR 793 Alopi Prashad Vs. UOI and (1975) 2 SCC 633 Panna Lal Vs. State of Rajasthan a contract is not discharged merely because it turns out to be difficult or onerous for one party to perform and none can resile from a contract for said reason.

36. In the decision reported as (2003) 5 SCC 705 ONGC Vs. Saw Pipes Ltd. the Supreme Court held in no unequivocal terms that if an award is patently illegal, it is the duty of the Court to set aside the same.

37. The learned Arbitrator has though noted that the FSI for the plot in question had been utilized in the adjoining plot, but we find he having not taken the same to its logical destination. From a perusal of the averments made in paragraph 8 of the claim petition it is apparent that LEELA claimed that on account of 13 years having lapsed and it not being in a position to construct a building on the demised 11000 sq.mtr. land there was hardly any remainder time left for it to recoup its capital investment. And it would be sufficient for us to note that the relevance of the said plea would be prayer (c) in the claim petition, which was ultimately given up. In reply to paragraph 8 of the claim petition, AAI brought out that since FSI for the 11000 sq.mtr. land had been utilized for construction of additional floors in the existing hotel building in the year 2002 because local laws permitted such a transfer, LEELA could not claim that it had not taken the benefit of the permissible construction relatable to the 11000 sq.mtr. land. As noted above, in the award the learned Arbitrator has rested, (noting in paragraph 34 of the award extracted by us in paragraph 20 above), that it cannot be said that the claimant has no FSI left to construct the hotel as contemplated by the lease-deed. Now, the learned Arbitrator has created a mirage by said reasoning. The claimant was LEELA and it was not its case that it has no FSI left to construct the hotel. The issue pertaining to the FSI arose because in the statement of claim LEELA did not make any reference to FSI relatable to the demised

plot being utilized by it in the adjoining plot and the tenor of the pleadings suggesting as if LEELA could not construct on the demised plot due to AAI repeatedly rejecting its plans and by the time it invoked arbitration the economic turmoil, which was global, resulted in decrease in footfall in the city of Mumbai and therefore the projected revenues being rendered unjust and unconscionable for enforcement of the obligation to pay the minimum guaranteed amount. In response to the statement of claim AAI pointed out that by the year 2002 LEELA had utilized the FSI for the plot in question to take advantage of additional construction on the adjoining land. The learned Arbitrator was thus obliged to note the correct reason and logic for an argument, and by giving a twist to the logic of the argument, has evinced a non-judicious approach. Needless to state, before the Arbitrator it was argued by LEELA that upon expiry of the lease by afflux of time it would return possession with benefit of FSI for the plot of land, and for which it was argued that the law in Mumbai permits trading in FSI. The learned Arbitrator has also overlooked the fact that dispute was raised in August, 2008 and by then there was no terrorist attack in the city of Mumbai. The terrorist attack in the city of the Mumbai took place on November 26, 2008 and thus the same had to be overlooked because while invoking the arbitration clause and raising the dispute, commercial hardship was premised only on one reason : global economic meltdown resulting in market conditions for the hotel industry deteriorating and therefore LEELA to be exonerated from payment of the minimum guaranteed amount.

38. The impugned award is premised on a reasoning which in law is patently illegal. It is not a case where a point was debatable; for if a point is debatable and there are merits and demerits in the competing views, the scales being in the hands of the Arbitrator would result in the learned Arbitrator opining as to which side of the scale is heavier; and this would not be subject to the Court picking up the scales again and reweighing the merits and demerits of the competing views. It is a case where there are no competing views and the premise on which the view is taken by the learned Arbitrator ignores the definition of lease and the rights and obligations flowing therefrom, as also the law of the land, and thus even within the narrow confines of judicial intervention the award is liable to be set aside.

39. We affirm the destination reached by the learned Single Judge notwithstanding the route taken not being reflective of the journey undertaken by the parties before the learned Single Judge. Correcting the path, we reach the same destination. The award is perverse and is liable to be set aside.

40. That takes us to a distinct limb of the impugned judgment. The threat of prosecution under Section 340 Cr.P.C. for the offence punishable under Section 209 of the Penal Code.

41. Now, Section 340 of the Cr.P.C. is not attracted to offences punishable under Section 209 of the Penal Code. A position of law was conceded to by learned senior counsel for AAI.

42. Thus, while dismissing the appeal insofar as LEELA wants the award to be restored, we partially allow the same and set aside paragraph 16.13 of the impugned order dated July 15, 2016.

43. Parties shall bear their own costs in the appeal.

(PRADEEP NANDRAJOG)
JUDGE

(PRATIBHA RANI)
JUDGE

NOVEMBER 07, 2016
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