

* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ O.M.P. 143/2015
AND
O.M.P. 301/2015 & IA 9926/2015

Reserved on: 27th February, 2018
Date of decision: 20th March, 2018

O.M.P 143/2015

M/S CLASSIC MOTORS PVT LTD Petitioner
Through Mr. Tahir Ashraf Siddiqui and Mr.
B. Anand, Advs.

versus

M/S GOYAL M.G GASES PVT LTD Respondent
Through Mr. Harish Malhotra, Sr. Adv.
with Mr. Simran Mehta, Adv.

O.M.P 301/2015 & IA 9926/2015

M/S GOYAL M.G GASES PVT LTD Petitioner
Through Mr. Tahir Ashraf Siddiqui and Mr.
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Through Mr. Harish Malhotra, Sr. Adv.
with Mr. Simran Mehta, Adv.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

1. These petitions under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') have been

filed by the parties challenging the Arbitral Award dated 25th September, 2014 read with the correction of the same vide order dated 22nd November, 2014 published by the Sole Arbitrator (hereinafter collectively referred to as the 'Impugned Award'). As both parties have challenged the Impugned Award, they are being disposed of by way of this common order. M/s Classic Motors shall be referred to as 'Petitioner', while M/s Goyal M.G Gases Pvt. Ltd. shall be referred to as the 'Respondent'.

2. The relationship between the parties had commenced with the signing of the Leave and License Agreement dated 18th September, 2006, which is also the bone of contention and dispute between the two parties. The Agreement was with respect to First Floor at A-38, Mohan co-operative Industrial Estate, Main Mathura Road, New Delhi-11004, admeasuring covered area of 10,625 sq. ft. and service area of 600 sq. ft. (hereinafter referred to as the 'Premises').

3. Some of the terms of the said agreement relevant for the purpose of the present adjudication, are reproduced hereinbelow:

"NOW THIS AGREEMENT WITNESSETH AS UNDER:

1. That the Licensor in consideration for a monthly license fee of Rs. 6,73,500/- (Rupees Six Lacs Seventy three thousand five hundred only) herein agreed and payable by the Licensee, in advance for every month has agreed to give to the Licensee the demised premises for its office use. The Leave and License Agreement shall be in initially for a period of 11 months commencing from 25-9-2006.

2. That the Licensee has the option to renew the Leave and License Agreement for two more terms of 11 months each without any increase license fee i.e. uptill 25-6-2009 by giving two months notice in advance to the Licensor before the expiry of the agreement. The Leave and License Agreement can be extended after 33 months from 25-9-2006 as mutually discussed and agreed by the Licensor and Licensee with an increase of 25% license fee last paid i.e. w.e.f. 25-6-2009 the license fee will be Rs. 8,41,875/- per month from 25-6-2009 and a fresh Leave and License Agreement will be executed by the parties in that regard. It is also agreed that the Agreement can be extended for another three years on an increase of license fee of 25% of the last rent paid for every three years after 25-6-2009.

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8. (c) The Licensor represents to the Licensee that it is the legal owner and landlord of the demised premises and is duly authorized as an owner of the demised premises to give on leave, rent or license for running office and such usage is permissible under the applicable laws.”

4. Upon the completion of the initial period of eleven months, the respondent sought extension of the agreement vide its communication dated 16th May, 2007, which was acceded to by the petitioner, though no formal agreement in this regard was executed.

5. The respondent by way of its letter dated 29th December, 2007 raised certain disputes with respect to the seepage of water from the roof top and sought to deduct a sum of Rs. 10,00,000/- from the rent payable by it to the petitioner towards loss and damage suffered by it. This was

not agreed to by the petitioner and certain complaints to the police were also filed, reference to which is not relevant for the purpose of the present petition. Suffice it to say that the respondent paid the admitted license fee/rent and the matter stood resolved between them.

6. The respondent vide its letter dated 7th May, 2008 sought extension of the Leave and License Agreement for a further period of eleven months in terms of the original agreement. This was again agreed to by the petitioner, however, again no formal agreement in this regard was executed between the parties.

7. The respondent again, vide its letter dated 2nd September, 2008 raised certain issues, this time *inter alia* regarding the area of the roof top as also to a sign board installed by the petitioner. The petitioner refuted the same vide its letter dated 18th September, 2008, to which the respondent again replied reiterating its complaint vide letter dated 17th October, 2008. I am intentionally not dealing with the contents of the said letters in detail, as the parties eventually signed and executed an “Addendum to the Leave and License Agreement dated 18th September, 2006” on 29th May, 2009. Suffice it to say that the Arbitrator has found no merit in such complaints of the respondent.

8. The terms of the Addendum are important for the purpose of the present adjudication and are, therefore, reproduced herein under:

“1. That a leave and license agreement was executed on 18th day of September, 2006 between M/s Classic Motors Pvt. Ltd., 5 Bhikaji Cama Place, New Delhi and M/s Goyal

MG Gases Pvt. Ltd., A-38 Mohan Co-operative Industrial Estate, Main Mathura Road, New Delhi-110044.

2. *As per the terms of the said agreement, it can be extended after 33 month from 25th September, 2006 as mutually discussed and agreed by the Licensor and Licensee with an increase of 25% on last leave and license fee paid w.e.f. 26th June 2009 and a fresh leave and license agreement will be executed by the parties in that regard.*

3. *In view of the recession in the Real Estate Market and falling rentals, it has been mutually decided and agreed by the both the parties that the tenure of leave and license agreement has been extended w.e.f. 26th June, 2009 till 31st December, 2009 with a marginal increase of 5% on last leave and license fees paid.*

4. *All other terms and condition of the leave and license agreement dated 18th September, 2006 remain the same.”*

9. The respondent, however, before the commencement of the Addendum, vide its letter dated 24th June, 2009 again raised certain issues, including the issue of the area at the rooftop and the signboard. The respondent also sought to withhold the license fee on the basis of these issues.

10. The petitioner vide its letter dated 27th June, 2009 refuted the allegations of the respondent and in fact, raised allegations of fraudulent conduct on the part of the respondent stating that it was only as a matter of concession that the agreement was extended for a further period of six months on a nominal increase in license fee by 5% instead of 25%, as was agreed in the original Leave and License Agreement.

11. The petitioner further vide its letter dated 2nd July, 2009 demanded from the respondent, the payment of the license fee as agreed upon. The petitioner also filed some police complaint, contents whereof are again not relevant for the purpose of the present adjudication.

12. On 7th July, 2009, the respondent addressed a letter to the petitioner claiming that the Leave and License Agreement was actually an Agreement of Lease. The respondent further contended that the petitioner is bound by the terms of the Leave and License Agreement dated 18th September, 2006 as also the Addendum dated 29th May, 2009.

13. The above chain of correspondence is being referred to by me in detail only to show that till this date of 7th July, 2009 i.e. almost three years after the initial Leave and Licence Agreement, there was no issue raised by the respondent with respect to the permission from MCD for usage of the premises for office purpose. In fact, the claim of the respondent was that the parties are bound by the terms of the Leave and Licence Agreement and the Addendum.

14. It is only vide letter dated 21st July, 2009 that the respondent, for the first time, demanded from the petitioner a copy of the MCD permission which allows the premises to be used for office purpose. Though this letter states that earlier requests to similar effect have been made to the petitioner, the senior counsel for the respondent has not been able to draw my reference to any letter prior to this date whereby a demand for a copy of the MCD permission was made by the respondent to the petitioner. In fact, I have referred to in detail the correspondence between the parties only to show that while various issues were being

raised by the respondent from time to time, this certainly was not one of the issues raised by it.

15. The petitioner vide its letter dated 17th August, 2009, replied to the above letter and on the issue of MCD, while alleging that this was a new issue being raised by the respondent only to somehow justify the non-payment of the license fee, reiterated that the respondent had been using the premises for commercial purposes for last three years and even today there was no written communication from the MCD showing that the MCD was objecting to such usage by the respondent. The petitioner further alleged that it was duly authorized to permit such usage by the respondent, and such usage is permissible under the applicable law.

16. The petitioner again vide its letter dated 22nd August, 2009 called upon the respondent to immediately pay the license fee which it was withholding. The respondent, however, vide its letter dated 19th September, 2009 reiterated its complaints, which included demand of a copy of permission of MCD allowing use of the premises for office purpose. It also sought to adjust various amounts against the license fee on the ground of expenses incurred and losses suffered by it on account of electricity, differential in rate of rent between industrial premises and official premises, as also installation of capacitors.

17. The petitioner vide its notice dated 16th October, 2009 finally terminated the Leave and License Agreement and called upon the respondent to hand over the vacant possession of the premises to the petitioner.

18. As the respondent failed to hand over the possession of the premises to the petitioner, the disputes were referred to the Sole Arbitrator for adjudication.

19. The Arbitrator, on an application under Section 17 of the Act, vide his order dated 03.05.2010 directed the respondent to pay a sum of Rs. 4,00,000/- per month with effect from July, 2009 and during the pendency of the arbitration proceedings. This order was challenged by the petitioner before this Court, and this Court vide its order dated 03.12.2010 set aside the order of the Arbitrator and directed the respondent to pay the agreed license fee as per the agreement between the parties.

20. The order passed by this Court was challenged by the respondent before the Supreme Court by way of SLP (C) No.11105/2011, and vide its order dated 21.04.2011, Supreme Court stayed the operation of the order passed by this Court and directed the respondent to go on paying the damages at the rate assessed by the Arbitrator in terms of order dated 03.05.2010

21. During the pendency of the above Special Leave Petition, the Impugned Award was published and the SLP was, therefore, dismissed as having become infructuous on 24.03.2017.

22. The Arbitrator vide his impugned award has directed the respondent to hand over the physical possession of the premises to the petitioner and has further directed that as the premises were not allowed to be used for office purpose, the respondent shall pay usage and

occupation charges @ Rs. 20 per sq. ft for the period commencing from September, 2006 to April, 2011 and thereafter, as the petitioner had deposited the conversion charges as demanded by MCD, @ Rs. 60 per sq. ft till the date of handing over of the possession.

23. The counsel for the parties submit that during the pendency of the present petition, the premises were sealed by MCD on 28th March, 2016 and the respondent has, therefore, handed back the possession of the premises to the petitioner.

24. The learned counsel for the petitioner submits that the Arbitrator, in passing the Impugned Award, has not only completely ignored the evidence led before him in form of correspondence exchanged between the parties, but has also acted contrary to the law and in contravention with the fundamental policy of the Indian Law. Drawing attention to Section 19 of the Contract Act, 1872, it is submitted by the counsel for the petitioner, that even assuming that fraud was committed by the petitioner on the respondent, the agreement at best, would have become voidable at the option of the respondent. The respondent having insisted on retaining the property in question, is estopped from challenging the said agreement. In any case, the fraud alleged is of such a nature that the respondent would have always discovered the truth with ordinary diligence. He submits that the respondent is not only a commercial entity having vast experience but is also the owner of another property in the same locality and would have known the requirements of the change of user from industrial to commercial and if it felt that the same was necessary, would have demanded the same from the petitioner at the time

of the execution of the agreement or at least at the time of seeking the renewal thereof. He submits that the petitioner cannot, while retaining the property, claim to pay the license fee at a lesser rate. He submits that the Arbitrator, in the Impugned Award has in fact re-written the Contract between the parties, which he could not have done in law.

25. On the other hand, the learned senior counsel for the respondent submits that the agreement between the parties was on an express representation of the petitioner that it has the requisite permission for the use of the property for office purpose. This representation was false to the knowledge of the petitioner and therefore, the agreement was obtained by fraud. He submits that upon discovery of such fraud, the innocent party i.e. the respondent herein, has an option either to rescind the contract and claim damages or seek restitution, or to confirm the contract without prejudice to its right to seek damages by way of restitution for the loss caused by the misrepresentation. The respondent chose to confirm the agreement and claim damages. The Arbitrator by directing that the respondent shall pay the license fee only at a rate of Rs. 20 per Sq. ft., which was the prevalent rate for the industrial use of the premises, from the inception of the agreement has in fact, awarded damages to the respondent. He further submits that the issue, whether the agreement in question was obtained by exercise of fraud on the respondent, is a question of fact and the opinion of the Arbitrator in this regard cannot be challenged before this Court in the form of a petition under Section 34 of the Act.

26. As far as the petition filed by the respondent is concerned, the learned senior counsel for the respondent fairly submits that as the premises have been handed over to the petitioner, the same has been rendered infructuous.

27. I have considered the submission made by the counsel for the parties. It is not disputed that the parties had entered into the relationship by way of Leave and License Agreement dated 18th September, 2006. The said agreement provided for a monthly license fee of Rs. 6,73,500/- to be paid by the respondent to the petitioner. The period of the agreement was initially for eleven months commencing from 25th September, 2006 and could be renewed at the request of the respondent for two more terms of eleven months each without any increase in the license fee i.e. up till 25th June, 2009. After 25th June, 2009, the agreement could be extended for a further period of 33 months with an increase of 25% in the license fee last paid.

28. It is also not disputed that the respondent has been using the premises for office purpose right from the inception till the vacation of the premises, for which the Leave and License Agreement had been executed. It is further not disputed that this agreement was renewed on two occasions for a period of eleven months each, as provided in Clause 2 of the agreement, without increase in the license fee. It is also not disputed that such renewal was at the request of the respondent. It is also not disputed that by way of an Addendum executed between the parties on 29th May, 2009, the Leave and License Agreement was extended with effect from 26th June, 2009 till 31st December, 2009 with an increase of

5% in the license fee, instead of and in place of, for the period of 33 months and with an increase of 25% in the license fee. The respondent has paid the license fee as per the Leave and Licence Agreement till June, 2009. Before 21st July, 2009, there is no letter on record from the respondent asking the petitioner for the permission from the MCD regarding the change of the user of the premises from industrial to commercial use. There is also no letter or notice from the MCD to the parties objecting to the use of the premises for the office purpose by the respondent. It was during the arbitration proceedings that the MCD for the first time, vide its letter dated 25th March, 2011 issued a demand for payment of conversion charges and such conversion charges were duly paid by the petitioner in April, 2011.

29. The respondent contends that a notice dated 14.02.2009 had been issued by MCD to another tenant in the property complaining of misuser. However, in this regard, it may be noted that not only was this notice not issued to the respondent with respect to the premises in its possession, but was also issued prior to the respondent entering into the Addendum. Therefore, in my opinion, reliance on this notice by the respondent is totally ill-founded and, in fact, against its own interest.

30. The learned Arbitrator in the Impugned Award, while considering the question of rate at which the license fee is to be paid by the respondent to the petitioner has held as under:

“59. After considering the submissions made by the Learned Counsel for the parties and going through the Evidence on Record, this Tribunal has no hesitation in

holding that the Claimant had misrepresented to the Respondent, in Clause 8 (c) of the Leave and License Agreement dated 18.09.2006; that the premises could be used for Office purposes and this user was permissible under the existing laws. The Respondent's Witness has deposed on Oath that the License Fee for "industrial use" was about Rs. 20/- per Sq. ft. PM but the Claimant made the Respondent agree to pay about Rs. 60 per sq. ft. PM CW-1 has not been able to say anything against these allegations while appearing as a Witness for the Claimant. Even otherwise, it is well known that the rental for "commercial premises" is much more than the rental for "industrial premises" and as such it has to be held that the Claimant is not entitled to claim License Fee in terms of the Agreement dated 18.09.2006 as the same was induced by a falsehood and misrepresentation in regard to permissible user.

60. The Respondent has placed on record a copy of the Lease Deed in regard to some other premises in the area in which the rental was fixed at Rs 20/- per Sq. ft. PM. The Claimant's Witness CW-1 was unable to say anything in regard to prevalent rate of Rent. It is therefore held that the Claimant is entitled to License Fee @ Rs.20/- Sq.ft. P.M. w.e.f. September 2006 to 31st December 2009 on which date the Leave and License Agreement between the parties and its extension through the Addendum came to an end. For the period starting from 1st January 2010 upto April, 2011 also, the Claimant is entitled to damages/charges for use and occupation of the said premises @ Rs. 20/- per sq.ft. PM as the premises continued to be for industrial use. The question is not of actual user but the market rate of rent for premises in question.

61. However, after April 2011, when the premises were converted into “commercial premises” and the conversion charges were paid by the Claimant, the Claimant is entitled to damages/charges for use and occupation @ Rs. 60/- per sq. Ft. PM, was the market rate of rent for commercial purposes in the area and which was agreed to by the Respondent at the time of taking the premises on Leave and License basis from the Claimant.

62. The aforesaid Claims are therefore disposed of by holding that from September 2006 to April 2011, the Claimant is entitled to recover License Fee/Damages for use and occupation of the demised premises @ Rs. 20/- per sq. Ft. PM and from May 2011 till the possession is handed over by the Respondent to the Claimant, the Claimant is entitled to damages/charges for use and occupation @ Rs. 60/- per sq. Ft. PM. It would however be subject to deduction; adjustment of the amounts already paid by the Respondent to the Claimant till date.

The claims are disposed of accordingly.”

31. A reading of the above finding would clearly show that the Arbitrator had not discussed the effect of the agreement between the parties; subsequent renewals of the agreement at the request of respondent; as also the signing of the Addendum and most importantly the admitted use of the premises by the respondent for the purpose for which it was taken. The Arbitrator has also not discussed the effect of the usage of the premises by the respondent for “commercial purpose”. The Arbitrator merely holds that as the rent for ‘commercial user’ is much more than the rental for “industrial premises”, as such the

petitioner is not entitled to claim license fee in terms of the agreement dated 18th September, 2006, as the same was induced by a falsehood and misrepresentation regarding the permissible user. The Arbitrator has not even discussed the effect of such purported falsehood or misrepresentation on the Respondent's actual usage of the property.

32. It is true that by way of Clause 8(c) of the Leave and License Agreement, the petitioner had represented to the respondent that the usage of the premises by the respondent for commercial purpose is permissible under the applicable laws, the respondent, however, cannot plead ignorance of law. In any case, it is not an illiterate or the *pardasheen* lady who would not know the nature of the premises being taken on lease/license or the requirement of the law with respect to its user. The respondent is a commercial entity and as claimed by the petitioner, has another premises in the same locality and would be well aware of the restriction on the user of the premises and/or the requirement for obtaining change of user in case the same are to be used for commercial purpose. It could not, therefore have been said that the respondent had been misled in any manner by the representation as contained in Clause 8(c) of the Leave and License Agreement or with due diligence could not have found that the said representation is false.

33. In any case, the effect of the use of the premises by the respondent for the purpose for which it had been taken for the entire period right from the execution of the Leave and License Agreement till the actual vacation of the premises is not denied by the respondent. It is therefore, not understood as to what loss it suffered due to such misrepresentation

and what restitution it was seeking in the claim before the Arbitrator. While the Arbitrator has applied the license fee rate as applicable for industrial purpose, it is not as if the respondent was actually using the premises during the period, or even a small portion thereof, for industrial purpose.

34. It is also of relevance to note here, and this aspect has completely escaped the attention of the Arbitrator, that the MCD, by its letter dated 25.3.2011, had demanded conversion charges effective from 2007 – 2008, and the same were duly paid by the petitioner. Therefore, even assuming that there was any mis-representation attached to the Leave and Licence Agreement, the same could not have come to the aid of the respondent from 01.4.2007. The Arbitrator also does not note that in its letter dated 07.07.2009 and in fact, all times thereafter, the petitioner has wanted to take benefit under agreement dated 18.9.2006. The respondent, therefore, could not have been allowed to approbate and reprobate at the same time.

35. Section 19 of the Indian Contract Act, 1872 gives the effect of an agreement caused by fraud. Section 19 is reproduced herein under:

“19. Voidability of agreements without free consent.—
When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

A party to contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

Exception —If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation.—A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.”

36. In ***Ganga Retreat & Towers Ltd. & Anr. Vs. State of Rajasthan & Ors.*** (2003) 12 SCC 91, the Supreme Court after analyzing the effect of Section 19 held as under:

“28. According to Section 19 of the Contract Act when consent to an agreement is caused by misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused. The latter may, if he thinks fit, insist that the contract shall be performed and that he shall be put in the position in which he would have been if the representations made had been true. According to Section 2 clause (i), an agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract. It is not necessary for us to record a clear finding whether there was a misrepresentation on the part of the respondents or not. Suffice it to observe that a voidable contract confers the right of election on the party affected to exercise its option to avoid the legal relations created by the contract or to stand by the contract and insist on its performance. However, his election to stand by the contract once exercised would have the effect of ratification of the contract with the knowledge of misrepresentation on the part of the other party and that would extinguish its power of avoidance. In the very nature of the right conferred on the

party affected, the law expects it to exercise its option promptly and communicate the same to the opposite party; for until the right of avoidance is exercised, the contract is valid, and things done thereunder may not thereafter be undone.

29. *A right to rescind for misrepresentation can be lost in a variety of ways, some depending on the right of election. A representee on discovering the truth loses his right to rescind if once he has elected not to rescind. But he may lose even before he has made any election where by reason of his conduct or other circumstances it would be unjust or inequitable that he retains the right. For instance where third parties have acquired rights under the contract; again where it would be unjust to the representor because it is impossible to restore him to his original position. Restitutio in integrum is not only a consequence of rescission, its possibility is indispensable to the right to rescind. Again, delay in election may make it unjust that the right to elect should continue. For this reason the right to rescission for misrepresentation in general must be promptly exercised. (See, Indian Contract and Specific Relief Acts - Pollock and Mulla, Eleventh Edition, Vol. I. pp. 269-270).*

30. *Chitty on Contracts (Vol. I, 28th Edn., 1999, para 25-003) state:-*

"Once the innocent party has elected to affirm the contract, and this has been communicated to the other party, then the choice becomes irrevocable. There is no need to establish reliance or detriment by the party in default. Thus the innocent party, having affirmed, cannot subsequently change his mind and rely on the breach to justify treating himself as discharged".

37. In ***Ningawwa v. Byrappa Shiddappa Hireknrabar and Ors.*** (1968) 2 SCR 797, the Supreme Court held that an agreement induced or tainted by fraud is not void, but only voidable at the option of the party

defrauded and if it is shown that the party defrauded, after knowledge of the fraud, by express words or by unequivocal act, affirmed the contract, the election of such party is determined forever. Paragraph 4 of the above judgment is reproduced herein under:

“4. On behalf of the respondents Mr. Naunit Lal, however, stressed the argument that the trial court was wrong in holding that the gift deed was void on account of the perpetration of fraud. It was submitted that it was only a voidable transaction and the suit for setting aside the gift deed would be governed by Article 95 of the Indian Limitation Act. In our opinion, the proposition contented for by Mr. Naunit Lal must be accepted as correct. It is well-established that a contract or other transaction induced or tainted by fraud is not void, but only voidable at the option of the party defrauded. Until it is avoided, the transaction is valid, so that third parties without notice of the fraud may in the meantime acquire rights and interests in the matter which they may enforce against the party defrauded. "The fact that the contract has been induced by fraud does not make the contract void or prevent the property from passing, but merely gives the party defrauded a right on discovering the fraud to elect whether he shall continue to treat the contract as binding or disaffirm the contract and resume the property. If it can be shown that 'the party defrauded' has at any time after knowledge of the fraud either by express words or by unequivocal acts affirmed the contract, 'his' election is determined for ever. The party defrauded may keep the question open so long as he does nothing to affirm the contract.” (Clough v. L.& N.W.Ry.)”

38. In the present case, if one was to go by the letter dated 21st July, 2009 of the respondent, the respondent had been requesting the petitioner to provide a copy of the letter from MCD certifying that the premises can be used for commercial purpose. If this was correct, it was for the

respondent to have explained why it still entered into Addendum dated 29th May, 2009, in spite of the petitioner not giving a copy of such letter to the respondent. In any case, the remedy of the respondent would have been to rescind the contract and hand over the premises back to the petitioner while demanding damages, it may have suffered due to such misrepresentation. As discussed by me above, there is no question of any damages being suffered by the respondent as admittedly, the respondent had used the premises for commercial purpose throughout the period of its occupation of the premises.

39. In any case, the Addendum was to expire on 31st December, 2009 and therefore, the respondent could have continued in possession only till 31st December, 2009 and thereafter handed back the possession of the premises to the petitioner bringing the relationship to an end. The respondent certainly could not have, while enjoying the premises, excused itself from payment of the agreed license fee.

40. The Arbitrator certainly does not have the power to rewrite the terms of the Contract. Section 19 does not entitle the party to insist on an entirely different contract being performed i.e. in the present case, use the premises for commercial purpose, however, pay the license fee for industrial purpose. In this regard, I may draw reference to the judgment in **(Haji) Mahomed Haji Wali Mahomed v. Ramappa**, AIR 1929 Nagpur 254, wherein it was held as under:

“Under S. 19, Contract Act, the rights given to a party, who has entered into a contract under fraud or misrepresentation, are to avoid the contract or to insist on the contract being performed. The Section does not entitle the party to insist on an entirely

different contract being performed. Moreover, the rights given by S. 19 are given only to a party whose consent to the contract was, in fact, caused by the fraud or misrepresentation. I agree with the trial Court that it is impossible to believe that the plaintiffs relied solely on the statement of the defendant as to the value of the property. They had materials or could have obtained them without much trouble on which to form an independent opinion of the value and I am convinced that it was not the statement of the defendant that induced the plaintiffs to enter into a contract and that any statement of the value made by the defendant does not entitle them to the decree that they claim. I dismiss the appeal with costs. I fix pleader's fee at Rs. 150/-."

41. In view of the above, I find that the Arbitrator has acted not only contrary to the agreement between the parties but has also ignored the evidence led before him, as also the law of the land and the Impugned Award, so far as it directs the payment of reduced license fee for the period of the contract, is unsustainable in law.

42. In *Associate Builders vs. DDA* (2015) 3 SCC 49, Supreme Court has held as under:-

"29. It is clear that the juristic principle of a "judicial approach" demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.

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31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

- (i) a finding is based on no evidence, or*
- (ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or*
- (iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.*

32. *A good working test of perversity is contained in two judgments. In Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons, it was held: (SCC p. 317, para 7)*

"7. ... It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."

In Kuldeep Singh v. Commr. of Police, it was held: (SCC) p. 14, para 10)

"10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."

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36. *The third ground of public policy is, if an award is against justice or morality. These are two different concepts in law. An award can be said to be against justice only when it shocks the conscience of the court. An illustration of this can be given. A claimant is content with restricting his claim, let us say to Rs. 30 lakhs in a statement of claim before the arbitrator and at no point does he seek to claim anything more. The arbitral award ultimately awards him 45 lakhs without any acceptable reason or justification. Obviously, this would shock the conscience of*

the court and the arbitral award would be liable to be set aside on the ground that it is contrary to "justice".

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42. *In the 1996 Act, this principle is substituted by the "patent illegality" principle which, in turn, contains three subheads:*

42.1. *(a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is a really a contravention of Section 28(1)(a) of the Act, which reads as under:*

"28. Rules applicable to substance of dispute.-(1) *Where the place of arbitration is situated in India-*

(a) in an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;"

43. In my opinion, the Impugned Award has to be set aside by applying the above very limited grounds for setting aside an Award under Section 34 of the Act.

44. This now brings me to the question of relief to be granted to the petitioner. It is true that the power of the Court under Section 34 of the Act would be confined to only setting aside the Arbitral Award and leave it open for the parties to take such other remedy as may be open to them in law, however, in the present case, in my opinion, following such a course would be doing injustice to the petitioner. As noted above, the Leave and License Agreement and the Addendum thereto are admitted

documents between the parties. The Addendum was to last till 31st December, 2009. In view of the above, the respondent must pay to the petitioner the admitted license fee for the period from 25th September, 2006 to 25th June, 2009 as per the Leave and License Agreement read with the Addendum dated 22.11.2007 and for the period from 26th June, 2009 to 31st December, 2009 in accordance with the Addendum to the Leave and License Agreement dated 29th May, 2009. As the respondent remained in possession of the premises till 28th March, 2016, for the period between 1st January, 2010 to 27th March, 2016, the petitioner would be entitled to the license fee at the same rate as was agreed between the parties vide the Addendum dated 29th May, 2009 as this reflects the last agreed Licence Fee and the petitioner had not led any evidence to support a claim for higher Licence Fee, even that agreed in Agreement dated 18.09.2006 read with the Addendum dated 22.11.2007 i.e. Licence Fee with increase of 25%. The respondent shall be entitled to adjustment of amounts paid by the respondent to the petitioner as License Fee under the above agreements or in terms of the interim order (s) of the arbitrator or of this court. The amount on the basis of this order shall carry interest @12% per annum as awarded by the Arbitrator in the Impugned Award. The petitioner would further be entitled to cost of the present proceedings quantified at Rs.2,00,000/-.

45. OMP No.143/2015 is allowed in the above terms, while OMP No.301/2015 is dismissed.

NAVIN CHAWLA, J

MARCH 20, 2018/nk