

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 09.04.2019

Delivery on : 30.04.2019

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

O.P.No.416 of 2014

&

A.No.8711 of 2018

3i Infotecbh Limited
Represented by Mr.Dinesh R Miranda
Having its registered office at
Tower No.5, 3rd to 5th Floors
International Infortech Park
Vashi, Navi Mumbai- 400 703

.. Petitioner

Vs.

1.Mrs.Romila Bajaj
2.Mr.P.B.Ramanujam
3.Mr.S.L.Sudarsanam
4.Ms.Nirmal Kariappa

.. Respondents

Original Petition filed under Section 34 of Arbitration and Conciliation Act, 1996 (Act 26 of 1996) to set aside the award dated 05.12.2013 and Additional Award dated 18.02.2014 passed by the Respondents 2 to 4.

For Petitioner : Mr.Anirudh Krishnan
for Mr.Keerthikiran Murali

For Respondents : Mr.P.S.Raman
Senior Counsel
for Mr.M.S.Bharath
of M/s.Anand and Anand for R-1

ORDER

Instant 'Original Petition' ('OP' for brevity) has been filed under Section 34 of 'The Arbitration and Conciliation Act, 1996' ('A & C Act' for brevity) assailing an arbitral award dated 05.12.2013 and corrected arbitral award dated 18.02.2014 (hereinafter collectively referred to as 'impugned award' for the sake of convenience and clarity made by a three member 'Arbitral Tribunal' (hereinafter 'AT' for brevity) constituted by Respondents 2, 3 and 4 in instant OP.

2. Petitioner in instant OP before this Court was the claimant before AT and first respondent in instant OP before this Court was the sole respondent before AT. As mentioned supra, 'impugned award' is a collective reference to an arbitral award dated 05.12.2013 and a corrected version of the arbitral award dated 18.02.2014. This corrected version of arbitral award has been referred to as 'Additional Award' in instant OP. In the considered opinion of this Court, it cannot be referred to as an 'additional arbitral award'. A perusal of Sub-section (7) of Section 33 of A & C Act brings to light that any change made to an arbitral award post making of the arbitral award fall in three categories and they are (a) correction, (b) interpretation and (c) addition. For the purpose of

clarity, this Court deems it appropriate to extract sub-section (7) of Section 33 of A & C Act and the same reads as follows:

'33. Correction and interpretation of award;

additional award.-

(1).....

(2).....

(3).....

(4).....

(5).....

(6).....

'(7) Section 31 shall apply to a correction or interpretation of the arbitral award or to an additional award made under this section'

To be noted, caption to Section 33 itself contains a clear adumbration of aforesaid three categories of post award addenda as caption reads 'Correction and interpretation of award; additional award'.

3. Therefore, a perusal of the 18.02.2014 proceedings of AT post making of the award dated 05.12.2013 reveals that it would be appropriate and apt to refer to 18.02.2014 award as 'Corrected Arbitral Award' rather than referring to the same as 'Additional Arbitral Award'. This will not be a mere matter of semantics or different nomenclatures, as the statute itself perceives three kinds

of changes to an arbitral award post making of the same and therefore, it is a matter of appropriate statutory description. Considering the nature of the matter before this Court, it may not be necessary to delve into this aspect of the case any further and it would suffice to say that arbitral award dated 05.12.2013 made by AT and the corrected arbitral award dated 18.02.2014 shall be collectively referred to as 'impugned award'.

4. Essential facts necessary for appreciating this order are set out infra under the caption 'FACTUAL MATRIX'.

5. FACTUAL MATRIX:

5(i) The case file placed before this Court consists of Original Petition, one typed-set of papers filed by the petitioner, two volumes of typed-set of papers filed by the first respondent, a compilation of case laws and several other papers. This Court had to embark upon an exercise of wading through all these constituents and other papers placed before this Court as part of case file to appreciate and relate to the submissions made by learned counsel and learned senior counsel to cull out facts. One convenience set containing most relevant, crucial and critical papers in cases of this nature, will serve the purpose better.

5(ii) A super built up area admeasuring 29500 sq.ft or thereabouts in 5th Floor of a building, which goes by the name 'Prince Techno Park' at No.10, Old Mahabalipuram Road, Thoraipakkam, Chennai – 600 096 shall hereinafter be referred to as 'demised premises' for the sake of convenience and clarity.

5(iii) This Court is informed that this demised premises is entire 5th floor in the said building i.e., 'Prince Techno Park'.

5(iv) First respondent in instant OP is the lessor and petitioner in the instant OP is a lessee qua demised premises on a monthly rent of Rs.40/- per sq.ft, which translates into Rs.11,80,000/- (Rupees Eleven Lakhs Eighty Thousand Only) or in other words Rs.11.80 lakhs per month. This Court is informed that rent was computed in accordance with English Calender month from the first to end of every English calendar month. 'Petitioner' in the instant OP shall henceforth be referred to as 'lessee' and 'first respondent' in the instant OP shall henceforth be referred to as 'lessor', both for the sake of convenience and clarity. As mentioned supra, Respondents 2 to 4 in the instant OP are the three individuals, who constituted the three member Arbitral Tribunal. Considering the nature of instant O.P., it was not necessary to array the three learned Arbitrators who constituted the AT as co-respondents in the instant O.P. However, as the instant O.P being of the year 2014, is

already half a decade old in this Court and as the main instant O.P itself is now being heard out, this court refrains itself from embarking upon the exercise of directing deletion of respondents 2 to 4 as that will cause further delay owing to procedural requirements in this regard.

5(v) Demised premises was originally owned by a Company which goes by the name Prince Foundations Ltd., (formerly Prince Foundations Private Ltd.,).

5(vi) Considering the nature of the matter, from hereon it is deemed appropriate to give a chronicle of sorts before proceeding further.

5(vii) There was a Lease Deed dated 02.04.2007 between the lessee and Prince Foundations Private Limited. To be noted, this Lease Deed was with an entity which went by the name Datacons Private Limited and this Court is informed that this Datacons Private Limited is a subsidiary of lessee and it subsequently merged with the lessee company. There are no disputes or disagreements on this aspect of the matter and therefore, further elaboration of facts in this regard is not necessary for the purposes of this order. Suffice to say that vide this Lease Deed dated 02.04.2007, the lease period was agreed to be three years commencing from 01.06.2007, at a monthly rent of Rs.40/- per sq.ft, which as mentioned supra, translates to Rs.11.8 lakhs per month. Interest free Security

Deposit of Rs.1,41,60,000/- (Rupees One Crore Forty One Lakhs Sixty Thousand Only) or in other words little over Rs.1.41 Crores was paid by the lessee. Thereafter lessor (first respondent in the instant OP) purchased the demised premises from Prince Foundations Pvt. Ltd., on 02.04.2007. Suffice to say that tenancy was attained. A fresh Lease Deed dated 01.08.2007 came to be executed between the lessor and lessee and this can aptly be described as the fulcrum of the instant lis.

5(viii) Vide this fresh Lease Deed dated 01.08.2007, the effective date of commencement of lease was held to be 01.04.2007. In other words, the period of lease continued to remain as three years, but from 01.04.2007. There was a lock-in period of three years and the monthly rent continued to be Rs.40/- per sq.ft translating to Rs.11.8 Lakhs per month and interest free Security Deposit of Rs.1,41,60,000/- (Rupees One Crore Forty One Lakhs Sixty Thousand Only) paid by lessee to Prince Foundations Pvt. Limited was transferred to lessor (first respondent) in the instant OP i.e., Mrs. Romila Bajaj, to be precise.

5(ix) Aforesaid lease commenced and the lessor-lessee relationship qua demised premises was operating. Under such circumstances, lessee wrote a letter dated 01.01.2010 to the lessor stating that it would be vacating the demised premises by 31.03.2010. When this letter was written, lessee admittedly had

paid rent upto 31.10.2009 and rent was due from 01.11.2009. Therefore, lessee requested the lessor to adjust and deduct rent for the period from 01.11.2009 to 31.03.2010 (five months) from the Security Deposit of Rs.1,41,60,000/- and refund the balance of Rs.82,45,085/- while taking possession of the demised premises on 31.03.2010. To be noted, if rent for five months at the rate of Rs.11.8 lakhs per month is computed, the same is Rs.59,00,000/- and if this is deducted from the interest free Security Deposit of Rs.1,41,60,000/-, Rs.82.60 lakhs remains. However, the lessee requested for refund of Rs.82,45,085/- only as mentioned supra. There is no explanation in this regard in the OP and in any event as refund sought is little lesser than the computation, this does not present any real problem and this can be safely ignored, more so as learned counsel for lessee on instructions submitted that this is an inadvertent arithmetical error and requested that the same may please be ignored. To be noted, the three year lock-in period expired on 31.03.2010.

5(x) It is not in dispute that the lessor did not take possession of demised premises by 31.03.2010. Later on 12.04.2010, the lessor wrote a letter to the lessee alleging that the lessee had not vacated by 31.03.2010. In this letter, besides demanding arrears of rent from November of 2009 to March 2010, lessor also demanded increased rent at the rate of Rs.46/- per sq.ft with effect

from 01.04.2010. To be noted, increased rent of Rs.46/- per sq.ft translates to Rs.13,57,000/- (Rupees Thirteen Lakhs Fifty Seven Thousand only) per month. In other words, it translates to Rs.13.57 lakhs per month. Lessor followed this up with a notice through lawyer dated 30.04.2010, which was on similar lines. Thereafter, the lessee sent a reply dated 26.05.2010 reiterating its earlier stand. In other words, lessee called upon the lessor to refund the interest free Security Deposit (after deducting five months rent) and to take possession of the demised premises. It was pointed out that refund of interest free Security Deposit (after deducting five months rent, which is admittedly payable) and handing over of possession should be simultaneous. However, lessor issued another notice through lawyer dated 18.06.2010 to which lessee replied vide letter dated 30.06.2010.

5(xi) This led to a deadlock. An attempt to resolve the disputes by mutual consultation was made by holding a meeting of lessor (lessor's spouse) and lessee on 01.07.2010 followed by exchange of communication, inspection of demised premises on 31.07.2010 and another inspection of demised premises with a Civil Engineer on 16.08.2010. Thereafter also correspondence was exchanged between the lessor and lessee on 18.08.2010, 18.09.2010 and 06.10.2010. Ultimately vide letter dated 23.11.2010 from lessee to lessor, the arbitration clause in the Lease

Deed was invoked stating that attempts to resolve the disputes by mutual consultation have not yielded results to the satisfaction of the parties. This letter dated 23.11.2010 was sent by Courier and there is no dispute or disagreement before this Court that this letter was duly received by the lessor. In the impugned award and the submissions made before this Court, 23.11.2010 was referred to as the date of commencement of arbitral proceedings. In the considered view of this Court, this cannot be the actual and accurate date of commencement of arbitral proceedings owing to the language in which Section 21 of A & C Act is couched. Section 21 of A & C Act reads as follows:

*'21. **Commencement of arbitral proceedings.**—Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.'*

(underlining made by Court to supply emphasis and highlight)

A perusal of the language in which Section 21 of A & C Act particularly the underlined portion is couched will bring to light that the date of commencement of arbitral proceedings is not the date of the notice/communication, but it is the date of receipt of the notice/communication by the noticee/addressee. Though these two

dates may not be far apart, it is not just dates, but the receipt, is a significant event. To be noted, the statute uses the term 'respondent', but it would be pragmatic to construe the same as 'noticee' / 'addressee' in this context.

5(xii) However, there is no dispute or disagreement between the parties before this Court that this notice sent by the lessee/petitioner was received by the first respondent/lessor, but both parties are not able to give the exact date of receipt. Therefore 23.11.2010 can be safely taken as the date of commencement of arbitral proceedings, albeit as a notional date of commencement of arbitral proceedings in the light of the undisputed position that this letter was received by the lessor as obviously this letter could not have been received by the lessor prior to 23.11.2010 and it could have at best been received on the same day i.e., 23.11.2010 as it was sent by courier and both the parties are in Chennai. The acknowledgement evidencing the exact and precise date on which first respondent/lessor received this communication is not available in the case file and therefore, 23.11.2010 is deemed and accepted as notional date of commencement of arbitral proceedings.

5(xiii) AT was constituted, AT entered upon reference and there were oral hearings before AT. In other words, there was full

contest before AT.

5(xiv) Lessee, as claimant before AT, filed a claim statement before AT claiming a sum of Rs.90,45,085/- together with interest at the rate of 24% p.a from 01.04.2010 till date of realization.

5(xv) First respondent/lessor, as sole respondent before AT, filed a Statement of Defence dated 29.11.2011 and also made a counter claim therein. The counter claim made by the lessor was for a sum of Rs.4,06,19,728.60 *inter alia* towards alleged damages to demised premises, future rents at the rate of Rs.13,57,000/- per month and interest at the rate of 18% per annum.

5(xvi) To this lessee, as claimant, filed rejoinder and reply to the counter claim vide a rejoinder and reply statement dated 16.12.2011. This completed pleadings before AT. Post completion of pleadings, AT on 01.02.2012 framed issues. The eight issues framed by AT on rival pleadings, as can be culled out from the impugned award are as follows:

1. *Whether claimant is entitled to a sum of Rs.90,45,085?*
2. *Whether the claimant is entitled to interest @ 24% per annum?*
3. *Whether the Claimant is liable to pay Rs.4,06,19,728/-*

to Respondent?

4. *Whether the Claimant is liable to pay rents till the date of handing over possession to the Respondent?*
5. *Whether the Claimant is liable to handover vacant possession of the leased premises to the Respondent? If so, within what period?*
6. *Whether the Claimant is liable to pay interest @ 18%?*
7. *Which of the party is liable to bear the cost of this Arbitration Proceedings?*
8. *Whether the unregistered Lease Deed dated 01.08.2007 can be looked into as an admissible evidence?*

5(xvii) On the side of the lessee, which was claimant before AT, one person, namely one Mr.S.Rathina Kumar was examined and 15 documents being Exhibits C1 to C15 were marked on the side of lessor, who was sole respondent before AT, lessor's spouse one Mr.Dilip Bajaj was examined and as many as 21 documents were filed and 11 documents were marked as exhibits i.e., Exs.R1 to R11. To be noted, proof affidavit of Mr.S.Rathina Kumar is dated 16.08.2012 and he was cross examined on 01.09.2012. Proof Affidavit of Mr.Dilip Bajaj (spouse of lessor) is dated 12.02.2013 and he was cross examined on 13.02.2013.

5(xviii) After oral evidence and documentary evidence and arguments or in other words, after full contest, AT made the award

dated 05.12.2013 holding that lessee is liable to pay a sum of Rs.1,29,80,000 (Rupees One Crore Twenty Nine Lakhs Eighty Thousand only) to lessor towards arrears of rent after adjustment of interest free Security Deposit. In the interregnum, it is submitted by both sides (without any dispute or disagreement) that physical possession of demised premises was taken by the lessor in the presence of all three members of AT on 01.04.2012.

5(xix) Post award dated 05.12.2013, lessor sent a letter dated 18.12.2013 to AT seeking some corrections in the award dated 05.12.2013. It was forwarded to the lessee for comments, but the lessee did not respond. AT, therefore, drew the presumption that lessee has no comments to make. AT noticed that a typographical error had crept into the award dated 05.12.2013, corrected the same and passed a corrected arbitral award dated 18.02.2014. As already mentioned supra, arbitral award dated 05.12.2013 and the corrected award dated 18.02.2014 are being collectively referred to as 'impugned award' in this order. To be noted, in the corrected award, AT did not in any manner change the ultimate conclusion that lessee, who was claimant before AT, has to pay a sum of Rs.1,29,80,000/- to the lessor towards what has been described as 'arrears of rent' after adjusting Security Deposit. Thereafter, lessor filed a petition being O.P.No.343 of 2014 in this Court assailing the

impugned award. Vide order dated 30.06.2014, this O.P.No.343 of 2014 filed by the lessor came to be dismissed after full contest.

5(xx) This Court is of the considered view that under normal circumstances that would have been end of anybody's campaign with regard to the assailing of impugned award. The reason is fairly simple and straight forward. O.P.No.343 of 2014 filed by the lessor assailing the impugned award came to be dismissed after full contest by another Hon'ble Judge. When impugned award has already been tested at the instance of one of the parties to the proceedings i.e., by the lessor, who was sole respondent before AT, and when the challenge to the impugned award has been negated by one Hon'ble Judge, it is not desirable to examine another challenge to the same impugned award though at the instance of adversary before AT on different set of grounds. However, in this case, while dismissing O.P.No.343 of 2014, this Court had made it clear that the lessor will not be precluded from raising any contention in the petition filed by the lessee challenging the very same award. In other words, both learned counsel for petitioner/lessee and learned senior counsel for respondent/lessor before me submit in unison that this presupposes a full fledged hearing in the instant OP and therefore, the rights, liberties and contentions of the rival parties have been left open for being

adjudicated in the instant OP. In other words, it is the common submission made in unison by both sides that vide order dated 30.06.2014 made in O.P.No.343 of 2014, this Court had made it clear that if there is any petition by the lessee assailing the impugned award, it will be open to the petitioner to raise any contention without being precluded by the said order. Relevant portion of the said order reads as follows:

3.That however, this order does not preclude the petitioner from raising any contention in the petition filed by the first respondent herein, if any, challenging the very same award.'

5(xxi) Ideally in the considered opinion and view of this Court, it would not only be convenient, but also apt and appropriate for both the parties and all concerned to have had the instant OP tagged with O.P.No.343 of 2014 and to have had both the OPs heard out together as both OPs are directed against the same impugned award albeit by different parties i.e., adversaries (obviously on different sets of grounds of challenge) and the OPs are akin to cross appeals. However, that had not happened and owing to the aforesaid rider and owing to the aforesaid rights being reserved in the order dismissing the earlier OP, instant OP at the instance of lessee is being heard out.

5(xxii) In this regard, this Court deems it appropriate and pertinent to set out that with regard to time frame for filing an O.P under section 34, it starts ticking on receipt of arbitral award by the parties. Invariably, receipt of arbitral award by parties to arbitral proceedings is on the same day or it can at best be couple of days later. Be that as it may, from this date, if parties to arbitral proceedings want to assail the arbitral award, they have to necessarily do it within a maximum time period of 3 months and 30 days. To be noted, none of the parties to arbitral proceedings can present a O.P under section 34 assailing the arbitral award thereafter. Therefore, in cases where there are multiple petitions by more than one party to arbitral proceedings assailing the same award, all OPs will have to be filed within a maximum of three months and thirty days from the date of receipt of award by respective parties. The dates of receipt of award by the parties cannot be very wide apart in the light of Section 31(5) mandate read with Section 18 requirement. In this view of the matter, two O.Ps assailing the same award cannot be presented on dates which are too far apart. Therefore, it would not be very difficult to have such cross O.P tagged and heard out together.

5(xxiii) This court finds a situation in the case on hand appropriate and apt for such elucidation and therefore, this Court

has embarked upon the exercise of this elaboration. In the considered view of this court, this elaboration is necessary as two separate orders of a High Court with regard to challenge to the same arbitral award can cause predicaments in the consequent proceedings, particularly in the executing Court. In a case where one O.P is dismissed refusing judicial intervention qua arbitral award and when another O.P is allowed setting aside the arbitral award, it can lead to an anomalous situation, i.e., anomalous situation, which is conflicting, resulting in conundrums that cannot be cracked and can lead to situations where confusions abound in the executing court. It is for this reason that this court considers it appropriate to observe that it would be a sound rule to direct one of the parties to expedite its O.P (if it is at a diary number stage) and have both O.Ps heard out together in one Court. As this is part of a judicial order, which will have a impact on other Benches of co-equal strength in this Court while hearing Section 34 petitions, this can be taken as a suggested course, more so as this court is informed that rules under section 82 of A & C Act regarding proceedings before this Court under A & C Act are yet to be made.

6. Having set out the factual matrix as well as a chronicle of events, this Court now proceeds to examine the grounds on which the impugned award were assailed under the caption 'DISCUSSION

AND DISPOSITIVE REASONING' infra.

7. DISCUSSION AND DISPOSITIVE REASONING

7(i) Mr.Anirudh Krishnan, learned counsel representing Mr.Keerthikiran Murali, learned counsel on record for petitioner/lessee and Mr.P.S.Raman, learned senior counsel, instructed by Mr.M.S.Bharath, learned counsel of M/s.Anand and Anand (Law Firm), counsel on record for the contesting first respondent / lessor are before this Court. As already mentioned supra, Respondents 2, 3 and 4 are individuals, who constituted the three member Arbitral Tribunal.

7(ii) At the outset, aforesaid learned counsel and senior counsel submitted in unison that there is nothing polemic inasfar as the facts or trajectory, which has brought this litigation to this Court are concerned. In other words, there are no controversies and there are no disputations qua factual matrix and trajectory in this litigation which has brought this litigation to this Court all of which have been captured and set out supra under the caption 'Factual Matrix'.

7(iii) In the aforesaid backdrop, learned counsel for petitioner submitted that the lessee's challenge to the impugned award is two

fold. One limb of challenge is that the dispute being one between lessor and lessee is not arbitrable and the other limb of attack is that the impugned award is in conflict with public policy of India owing to being in contravention with fundamental policy of Indian law. While it was submitted that the disputes, which have been dealt with by the AT are, essentially between lessor and lessee, and therefore not arbitrable disputes or in other words, they are disputes which are not capable of settlement by arbitration, with regard to the second limb, it was submitted that the obtaining legal position is that when a lessee offers to handover possession to a lessor and when the lessor does not take possession, constructive possession is deemed to have been handed over by the lessee to the lessor and the lessor, therefore, cannot claim rent as if the tenancy is continuing. Saying so, the impugned award runs contrary to this obtaining legal position, which is clearly traceable to fundamental policy of Indian law was the argument that was propelled and projected. It was also the pointed submission of learned counsel for petitioner that disregarding of orders of Superior Courts in India would be regarded as being contrary to the fundamental policy of Indian law. It was also submitted that there are a long line of authorities laying down the proposition that when a tenant offers to hand over and when the landlord does not take possession of the demised premises, landlord thereafter, cannot

claim rent as if tenancy is continuing. It was also argued that contravention of substantive law of India would result in an arbitral award being vitiated.

7(iv) With regard to these principles, strong reliance was placed on the oft-quoted judgment of Hon'ble Supreme Court in ***Associate Builders Vs. Delhi Development Authority*** reported in **(2015) 3 SCC 49**. In the instant case, as mentioned supra, the arbitral proceedings commenced on 23.11.2010 (notional date though), impugned award came to be passed on 05.12.2013/18.02.2014 and the instant OP itself is dated 03.03.2014 and it was filed/presented in 2014 itself. All these are prior to 23.10.2015 when amendments were brought to the A & C Act originally by way of an Ordinance and subsequently by way of an amendment Act being Act 3 of 2016. Pointing out this, learned counsel for petitioner submitted that in the light of Section 26 of the amending Act i.e., Act 3 of 2016, he is entitled to argue the instant OP under Section 34 as it existed prior to 23.10.2015. However, the instant OP is being heard out in March of 2019 i.e., post 23.10.2015 and therefore, it was submitted on behalf of lessor that Section 34 as it exists today should be applied for testing the instant OP. As the grounds that are being urged were in any event available for the petitioner/lessee, both prior to and post

amendment i.e., pre and post 23.10.2015 regimes, considering the kind of submissions and considering the nature of this matter, besides the factual matrix, this Court leaves this question open in this case. It will be tested in an appropriate case where there is serious contest in this regard.

7(v) In this regard, this court deems it appropriate, relevant and pertinent to notice that public policy and patent illegality were available as grounds of attack both prior to and post 23.10.2015. While public policy was available as a ground of attack in the statute itself, patent illegality was added as a ground by way of judgment of Hon'ble Supreme Court in **ONGC Ltd. Vs. Saw Pipes Ltd.**, reported in **(2003) 5 SCC 705**. Now, post 23.10.2015, patent illegality as a ground has found expression in sub-section (2-A) of section 34. However, what is of relevance is both these grounds were available both prior to and post 23.10.2015. What has changed post 23.10.2015 is the manner in which tests qua these two grounds are to be applied. Post 23.10.2015, public policy has been statutorily explained and it has been made clear that while testing whether an award is in contravention with the fundamental policy of Indian law, it shall not entail a review on the merits of the dispute. Likewise, with regard to patent illegality, while applying the test, it has been made clear that an award cannot be set aside merely on the ground of erroneous application of law and there shall

be no reappraisal of evidence. While former is by way of Explanation 2 to section 34(2)(b)(ii), the latter is by way of proviso to section 34(2-A). To put it differently, two grounds are available, but tests have been narrowed down / circumscribed.

7(vi) Now this Court proceeds to examine the two pronged attack/challenge to the impugned award. As mentioned supra, it was argued by learned counsel for petitioner that the dispute which AT has decided vide impugned award is one arising out of a lease deed. There is a special statute in this regard and disputes arising out of lease agreements are not arbitrable is learned counsel's say. In support of his contention, learned counsel pressed into service a judgment of Hon'ble Supreme Court in **Himangni Enterprises Vs. Kamaljeet Singh Ahluwalia** reported in **(2017) 10 SCC 706**.

7(vii) A careful analysis of the factual matrix, in the light of the submissions made before this Court, reveals that there is a special statute i.e., Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 (Act 18 of 1960)(hereinafter referred to as 'Rent Control Act').

7(viii) It was argued before this Court that the prayer is not for eviction and therefore it cannot be said that the disputes are those for which special statute has been made applicable. It was also argued that even under the special Statute, only when there

are prayers pertaining to fair rent fixation under Section 4, eviction under Section 10, recovery of possession by landlord for repairs or for reconstruction under Section 14 or for restoration of amenities under Section 17, Rent Control Act will apply and when it is a simple case of refund of Security Deposit or a claim for arrears of rent, remedy is by way of civil suit and therefore, Rent Control Act will not apply. Though such an argument was projected before this Court, a careful perusal of the counter claim made by the lessor reveals that the lessor has sought for a prayer to direct the lessee to hand over vacant possession of the demised premises. There are five limbs to the prayer, which are in the form of counter claim made by lessor. These five claims have been articulated in sub-paragraph (a) to (e) in the prayer paragraph. Sub-paragraphs (a) to (e) of the prayer of the lessor reads as follows:

a) pass an award for a sum of Rs.4,06,19,72.60 being the counter claim of the respondent with future rents at Rs.13,57,000/- per month with interest rate of 18% p.a till the handing over of possession;

b) direct the claimant to hand over vacant possession of the premises to the respondent immediately;

c) direct the claimant to bear all the costs of this arbitration;

d) pass such further or other orders as this Tribunal may deem fit in the facts and circumstances of this matter and render justice; and

e) dismiss the claim with exemplary cost.

7(ix) As already recorded supra, physical possession of the demised premises was taken by the lessor from the lessee in the presence of the members who constituted the AT on 01.04.2012 pending arbitration.

7(x) Therefore, it cannot be gainsaid that there is no prayer for eviction or possession and therefore Rent Control Act does not apply. Be that as it may, in the light of peculiar facts i.e., trajectory which this lis took before AT, this argument gets neutralized. In other words, this argument gets neutered owing to possession being taken by lessor pending proceedings before AT. However, in the considered view of this Court there is another reason owing to which the argument that the dispute is not arbitrable owing to it being a dispute arising out of a lease deed need not be sustained in the instant case on hand. That reason is both sides admitted before this Court that the demised premises is a building which was less than 5 years old or in other words, it was a brand new construction and therefore it is exempt from the Rent Control Act by operation of Section 30(1) of the Rent Control Act.

7(xi) To be noted, with regard to Section 30(1), the reckoning date is date of commencement of the arbitral proceedings. Date of

commencement of the arbitral proceedings is 23.11.2010. The earliest lease deed is dated 29.12.2006 being lease deed between the lessee and the aforesaid Prince Foundations Pvt. Ltd., It is not in dispute that as on 29.12.2006, the demised premises was a brand new building and 29.12.2006 can be construed as the date on which the construction was completed and notified to local Authority within the meaning of Section 30(1) of Rent Control Act. As this is a petition under Section 34 of A & C Act, further examination on facts is impermissible owing to the fact that there is no dispute or disagreement in this regard. Demised premises was a building which was less than 5 years old, on the reckoning date i.e., 23.01.2010 and therefore, the demised premises is fully exempt from the Rent Control Act. When the demised premises is exempt from the Rent Control Act, the argument that the dispute within the exclusive purview of Rent Control Act does not hold water.

7(xii) This takes us to the **Kamaljeet Singh Ahluwalia** case (**Himangni Enterprises Vs. Kamaljeet Singh Ahluwalia** reported in **(2017) 10 SCC 706**).

7(xiii) In the considered opinion of this Court, as rightly pointed out by learned senior counsel for lessor, Kamaljeet Singh Ahluwalia case is clearly distinguishable on facts as that arises out of a case wherein a suit was filed by the landlord seeking eviction of the tenant from a shop. This factual aspect of the matter is

articulated in Paragraph 7 of the Kamaljeet Singh Ahluwalia, which reads as follows:

'7. The suit is filed essentially to seek appellant's eviction from Shop No. SF-2 measuring around 317.29 Sq. ft. situated at 2 nd floor in a Commercial Complex known as "Omaxe Square" in Block No.14, Non-Hierarchy Commercial Center, District Center Jasola, New Delhi (hereinafter referred to as "the suit premises") and for recovery of unpaid arrears of rent and grant of permanent injunction.'

7(xiv) This is not a suit which was filed for eviction. This is clearly a claim for refund of Security Deposit by the lessee after offering to hand over possession. Even the claim of the lessor is with regard to repairs and expenses thereto as mentioned supra. There is certainly one limb of prayer made as a counter claim directing the lessee to hand over possession but that was not put in issue qua impugned award. As already mentioned, physical possession was taken in the presence of the members of the AT by the parties on 01.04.2012 and the question of eviction or recovery of possession was never put in issue before AT. What was put in issue is that the lessee offered possession and the landlord did not take possession, but claimed rent as well as expenses for repairs. To be noted, terms 'landlord' and 'lessor' as well as 'tenant' and 'lessee' are being used interchangeably owing to the interplay

between various Acts. For the purpose of clarity, it is made clear that as far as Transfer of Property Act is concerned, the terms would be 'lessor' and 'lessee,' while under the special statute, i.e., Rent Control Act, the terms would be 'landlord' and 'tenant'. Be that as it may, Kamaljeet Singh Ahluwalia case is clearly distinguishable on facts as pertains to eviction per se from a demised shop. The principle in Kamaljeet Singh Ahluwalia case will not apply to the instant case. Therefore, the first ground of attack by the petitioner that the disputes are not arbitrable fails and the same does not carry the matter through for the petitioner.

7(xv) In this context, for the sake of completion of the obtaining legal position, it is to be mentioned that this Court has noticed that vide an order dated 28.02.2019 in *Vidya Drolia and others Vs. Durga Trading Corporation*, a two member Bench of Hon'ble Supreme Court has referred the matter to a Bench of three Hon'ble Judges. A perusal of this order in *Vidya Drolia* reveals that ***Himangni Enterprises Vs. Kamaljeet Singh Ahluwalia [(2017) 10 SCC 706]***, ***Booz Allen and Hamilton Inc. Vs. SBI Home Finance Limited and others [(2011) 5 SCC 532]***, ***Olympus Superstructures Pvt. Ltd. Vs. Meena Vijay Khetan and others [(1999) 5 SCC 651]*** and ***Vimal Kishor Shah and others Vs. Jayesh Dinesh Shah and others [(2016) 8 SCC 788]***, all touching upon certain kinds of disputes not being

arbitrable, have been alluded to and thereafter the two member Bench of Hon'ble Supreme Court in *Vidya Drolia* case referred the matter to a Bench of three Hon'ble Judges for further clarity on this aspect. However, in the instant case, as this court has come to the conclusion that *Himangni Enterprises* is distinguishable on facts, it may not be necessary to delve any further on this and as already mentioned, this is being set out only for completing the narration of obtaining position of law.

7(xvi) This takes us to the second ground of attack made by the petitioner. The second ground of attack is that impugned award is vitiated by patent illegality and it is also in contravention with fundamental policy of Indian law. Elaborating on this, learned counsel for petitioner referred to three different judgments and they are as follows:

1. *ICRA Limited Vs. Associated Journals* [ILR 2008 I Delhi 684]
2. *AC Raman V. Mathuvally* [AIR 1953 Mad 1996]
3. *HS Bedi Vs. National Highways Authority of India* [2015 220 DLT 179]

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7(xvii) The aforesaid judgments were pressed into service for the proposition that when a lessee offers to hand over vacant possession and landlord does not take possession, constructive possession is deemed to have been handed over on the date

possession was offered to be handed over by the tenant and the landlord cannot claim rent thereafter as if the tenancy is continuing.

7(xviii) With regard to the ICRA case, the same was penned by Hon'ble Mr. Justice Sanjay Kishan Kaul sitting as a Hon'ble single Judge of the Delhi High Court as his Lordship then was. In ICRA case, there was a scenario which was identical to the instant case wherein lessor had not taken possession of the demised premises though the lessee offered possession of the same. The principle that lessor should act upon it when possession of the demised premises is offered, landlord cannot refuse to take possession and thereafter claim rent was laid down in ICRA case after referring to one judgment of Delhi High Court and another judgment of Rajasthan High Court. This aspect of the matter is articulated in Paragraphs 20 and 21 of ICRA judgment, which read as follows:

'20. Learned Counsel for the plaintiff has relied upon the judgment of Onida Finance limited v. Mrs. Malini Khanna 2002 III AD (Delhi) 231 wherein it was held that although the plaintiff had taken appropriate steps by offering the possession of the premises to the defendant, it is the defendant who did not take possession. The plaintiff therefore discharged its obligation under law. Hence, if the defendant avoided to take possession, the defendant cannot be permitted to take advantage of its own wrong. This position has been reiterated in the case of [Raja Laxman Singh v. State of Rajasthan](#) AIR 1998 Raj 44.

21. Taking into consideration the aforesaid, I am of the view that when possession of the tenanted premises is offered upon termination of the lease, the landlord/Lesser must act upon the same and cannot refuse to take the possession. If the Lesser/landlord refuses to take the possession or act upon the offer being made, the lease would not continue and therefore the contention of the defendant that the plaintiff had been in continued possession of the demised premises making him liable to pay the rent for the same would not stand. In such a case, the plaintiff who has done the needful on this part is left with no other option but to remain in possession of the said premises. D.W. 1 in fact admitted in his cross examination that he was aware that the plaintiff had shifted their operational work to different offices at Kailash Building, Kasturba Gandhi Marg. The defendant has tried to take advantage of a letter dated 28.05.1998 sent on behalf of the plaintiff asking the air conditioning services to be restored. The said letter cannot be of much assistance since the plaintiff was compelled to remain in the premises for security reasons and had deputed a person and naturally the air conditioning should be functioning for the same.'

7(xix) In **A.C.Raman** case reported in **AIR 1953 Mad 996**, a learned single Judge of this Court negatived a claim for rental arrears by holding that the plaintiff has willfully not taken possession though it was offered to plaintiff/ lessor. To be noted, in A C Raman's case the plaintiff/lessor did not take possession of the demised property on the ground that demised property was damaged and it should be repaired and put in a tenantable condition

for the plaintiff / lessor to take possession.

7(xx) As far as **HS Bedi case [H.S.Bedi Vs. National Highways Authority of India [2015 220 DLT 179]**, is concerned, a similar principle was laid down by a learned single Judge of the Delhi High Court.

7(xxi) This takes us to the impugned award. The most relevant finding of AT in the impugned award in this regard reads as follows:

'It is crystal clear that the Claimant is offering vacant possession and the Respondent for some reason or the other, is not ready to take up possession. However, the Respondent in her communication dated 02.08.2010 is evident that she has taken a loan from financial institution, depending on the rent payable by the Claimant and since she is liable to pay interest to the financial institution, she is claiming interest from the Claimant for arrears of rent.'

Anyhow the respondent has not been very serious to take vacant possession, which can be inferred from the exchange of communications referred above.

7(xxii) Thereafter, AT has gone on to hold that at one stage of the arbitral proceedings it was suggested that physical possession of the premises shall be handed over to the lessor and that did happen in the presence of the three arbitrators who constituted the AT on

01.04.2012. This aspect is articulated in the impugned award of AT and the same reads as follows:

'At the same time, the Claimant, though has been communicating their readiness to vacate and handover possession, they have also not taken effective steps to hand over vacant possession, till arbitration proceedings started.

At one state of arbitration proceedings, the Tribunal suggested to the Claimant to hand over physical possession of the subject property to the Respondent.

This suggestion was well taken by both the parties and on 01.04.2012, the Arbitrators visited the subject premises and in their presence, the Respondent took physical possession of leased premises.'

7(xxiii) Therefore, it comes to light very clearly from the impugned award of AT that the lessee offered vacant possession of the demised premises as of 31.03.2010 and the lessor did not take vacant possession of the demised premises are undisputed facts. In this regard, it is to be noted that a faint attempt was made by learned senior counsel for lessor to say that lessee offered to give vacant possession is a conditional offer. This court is unable to persuade itself to accept the argument that this in any way alters the position in the instant case. The reason is straight and simple. The lessee has merely said that refund after deducting the rent payable should be simultaneous with taking over vacant possession.

There is no reason much less tenable reason as to why the lessor did not agree to this course. In any event, even if it is presumed that lessor did not agree to this course because further deductions of damages, if any to the demised premises have to be made, there was no communication to this effect from lessor to lessee on or before 31.3.2010. Lessor could have responded asking for inspection of demised premises and made this position clear if this was an impediment. Therefore, this court is convinced that this is merely an afterthought.

7(xxiv) To be noted, the lessor's claim towards repairs and alleged damage to the demised premises, which was made by way of counter claim, has already been rejected and the petition being O.P.No.343 of 2014 filed by the lessor assailing that part of the impugned award made by AT was dismissed on 30.06.2014. The campaign of the lessor qua impugned award ended there. In other words, it is not in dispute before this Court that there was no further appeal and the dismissal of OP No.343 of 2014 on 30.06.2014 was given a legal quietus. In the impugned award, as far as instant OP is concerned, all that the AT has directed the lessee to pay is Rs.1,29,80,000/- (Rupees One Crore Twenty Nine Lakhs Eighty Thousand only) towards rental arrears after adjusting the Security Deposit. If the landlord / lessor cannot claim rental arrears after

lessee has offered vacant possession of the demised property, particularly as lessor has not taken possession of the same and when it has to necessarily be construed that the date on which lessee offered possession is the date on which constructive possession of the demised property should have been deemed to have been handed over to the lessor owing to which the lessor cannot claim rent as if the lease is subsisting, the conclusion of the AT in the impugned award as far as the lessee is concerned is clearly a patent illegality.

7(xxv) In the considered view of this Court, patent illegality is one which can be readily seen on a plain reading or in other words patent illegality is something which can be seen and need not be detected by resorting to an inferential process. As already set out supra, possession has been taken by the lessor on 01.04.2012 in the presence of three member arbitral tribunal and this has been recorded in the impugned award. After having recorded such a finding, AT, has, thereafter, directed the lessee to pay rental arrears.

7(xxvi) A reading of the impugned award brings into sharp focus the position that conclusion is contrary to the finding returned and this is clearly in contravention with fundamental policy of Indian law if the obtaining legal position is applied, besides being patent

illegality.

7(xxvii) This takes us to the Associate Builders case wherein it has been laid down by the Hon'ble Supreme Court that disregarding principles laid down by superior courts is also one of the facets of contravention with fundamental policy of Indian law.

7(xxviii) This Court has already held elsewhere in this order, that the question as to whether Section 34 of A & C Act as it existed prior to 23.10.2015 or post 23.10.2015 is to be applied is left open. In the considered opinion of this Court, even if impugned award is tested within the constricted contours and confines of Section 34, it is vitiated by patent illegality. To be noted, elaboration in this regard has been made infra.

7(xxix) Before proceeding further with this discussion and dispositive reasoning, making a short leap from the legal sphere to the literary arena, this Court deems it appropriate to describe the reference to 'constricted contours and confines' of Section 34 as it exists today as a panopticon of sorts akin to 'Bentham's proposed circular prison with cells round warders' well in centre. Principle of minimum judicial intervention which is a legal philosophy qua ADR mechanism in its' codified form is a panopticon of sorts if one may say so. However in the instant case, impugned award does not pass

the muster of Section 34 of A & C Act in spite of this panopticon.

7(xxx) Reverting to the legal sphere, as already alluded to supra, patent illegality is something that is so obvious that it comes to light on a plain reading or in other words, patent illegality is something which need not be detected by taking recourse to a inferential process. Further more, the conclusion arrived at by this Court that impugned award is vitiated by patent illegality has been arrived at without re- appreciation of evidence and on the clear/categoric ground that it is not a mere erroneous application of law. In other words, the conclusion is based on the premise that the findings and the ultimate directive run into each other and are clear contradictions qua obtaining legal position pertaining to lessor/lessee relationship and possession of demised property in such jural relationships. To elaborate further, absent the findings rendered by AT, which have been extracted from the impugned award and re-produced supra, if the AT had merely applied the obtaining legal position erroneously, dimensions and dynamics of instant OP would have been entirely different.

7(xxxi) Before drawing the curtains on discussion/dispositive reasoning, this Court deems it appropriate to make it clear that the impugned award made by AT has been tested not only by perambulating within the limited contours and confines of Section

34 of A & C Act, but it has also been done by this Court by reminding itself of the principle laid down by Hon'ble Supreme Court in Fiza Developers Case [***Fiza Developers and Inter-Trade Private Limited Vs. AMCI (India) Private Limited*** reported in (2009) 17 SCC 796]. To be noted, Fiza Developers principle is to the effect that proceedings under Section 34 of A & C Act are summary in nature. It is also to be noted that this Fiza Developers principle was subsequently reiterated by Hon'ble Supreme Court in Emkay Global [***Emkay Global Financial Services Ltd. v. Girdhar Sondhi*** reported in (2018) 9 SCC 49] wherein Hon'ble Supreme held that Fiza Developers is a step in the right direction for expeditious disposal of applications under Section 34 of A & C Act.

8. After hearing both sides, instant OP was first reserved for Orders on 25.03.2019. On that day, one learned counsel, who was before this Court, submitted that he is representing one of the Arbitrators, who constituted the three member AT and a memo pertaining to a part of Arbitrator's fee, which remains unpaid, has been filed. This was taken note of, but when the case file was examined at the time of preparing this order, it was noticed that there is no such memo. Therefore, this matter i.e., instant OP was directed to be listed under the caption 'For Clarification' and it was

listed on such caption on 02.04.2019. Though learned counsel on both sides were before this Court, there was no representation on behalf of the AT or any member, who constituted the AT. Therefore, the Registry was directed to verify, if any one has filed vakalatnama on behalf of AT or any member of AT and as to whether any memo has been filed. After examining the records, this Court was informed by the Registry that no one has filed vakalatnama on behalf of AT or any member of the AT and no memo has been filed. However, with the intention of giving one more opportunity, this matter was listed under the same caption i.e., 'For Clarification' again on 09.04.2019. In the interregnum, both the learned counsel i.e., counsel for petitioner/lessee and first respondent/lessor submitted that they will try and intimate the counsel who represented when the matter was first listed. Be that as it may, on 09.04.2019 also the position was no different. Therefore, this matter was reserved for orders.

9. This takes us to the conclusion and decision.

10. **Conclusion:**

Owing to all that have been set out supra, the impugned award made by AT is held to be vitiated by patent illegality and is, therefore, liable to be set aside by acceding to the prayer in instant

OP.

11. **Decision**

OP is allowed. However, considering the nature of the matter and trajectory of the hearing before this Court, parties are left to bear their respective costs. Consequently, the connected application is closed.

30.04.2019

Speaking order

Index: Yes

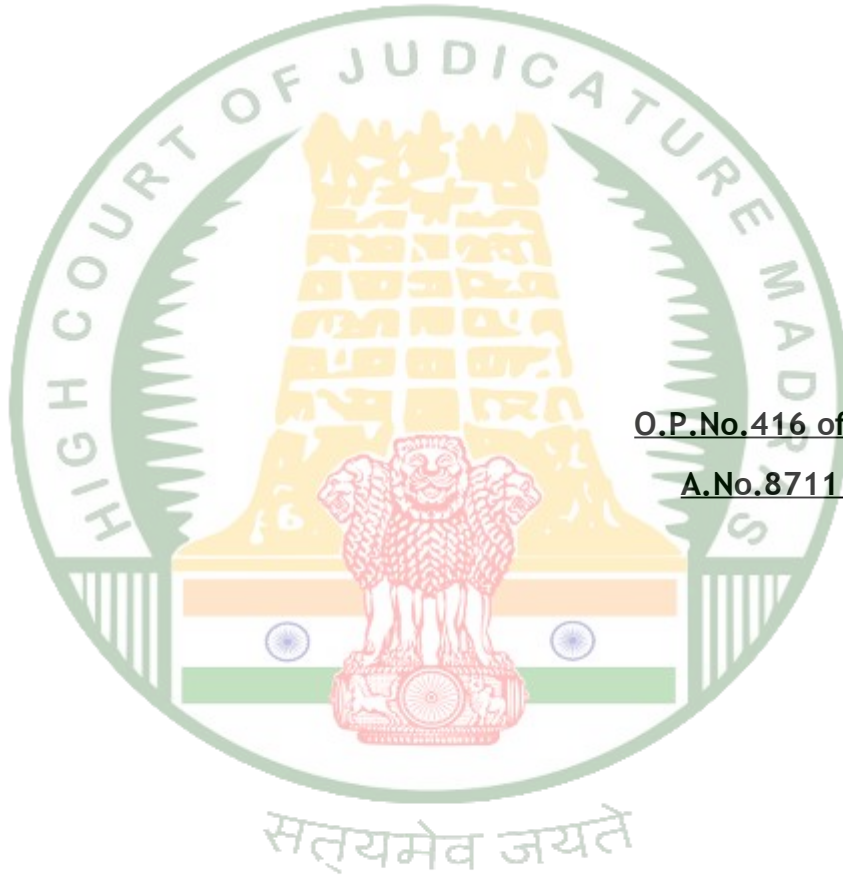
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M.SUNDAR.J.,

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30.04.2019