IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 01.12.2020

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

<u>O.P.No.532 of 2020</u>

M/s.N.S.Automotive Spares Pvt. Ltd.,
A private limited company
having its registered office at
Mount Road Extension, Sadar
Nagpur - 440 001.
Rep. by its Authorised Signatory
Mr.Bharat Sheth ... Petitioner

vs.

M/s.Ashok Leyland Limited
A private limited company
Rep. by its Director
having its registered office at
No.1, Sardar Patel Road, Guindy
Chennai-600 032. ... Respondent

Original Petition filed under Section 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996, to call for the records of the case titled as "M/s.N.S.Automotive Spares Pvt. Ltd., Vs. M/s.Ashok Leyland Limited", from the Arbitral Tribunal comprising of Hon'ble Sole Arbitrator and set aside the impugned Arbitral Award dated 06.03.2020, insofar as the same pertains to the reliefs not granted to the claimant/petitioner and order for allowing all claims of the claimant/petitioner as claimed by it along with future interest, and direct the payment of costs of the petition by the respondent.

For petitioner : Mr.H.Karthik Seshadri
for M/s.Iyer and Thomas

ORDER

Captioned 'Original Petition' ['OP' for the sake of brevity, convenience and clarity] has been filed assailing an 'arbitral award dated 06.03.2020' [hereinafter 'impugned award' for the sake of convenience and clarity] made by a sole arbitrator, who constituted the 'Arbitral Tribunal' ['AT' for the sake of brevity, convenience and clarity].

2. Captioned OP is an application under Section 34 of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)', which shall hereinafter be referred to as 'A and C Act' for the sake of brevity, convenience and clarity.

3. To be noted, sole arbitrator who constituted the AT has been appointed by an order dated 30.11.2018 made by a Hon'ble single Judge of this Court in O.P.No.568 of 2018, which obviously is under Section 11 of A and C Act.

4. In this web hearing on a video conferencing platform i.e., virtual hearing today, Mr.H.Karthik Seshadri of M/s.Iyer and Thomas (Law Firm) on behalf of sole petitioner was before me. Learned counsel submitted that the impugned award is liable to be set aside for reasons which I shall capture infra elsewhere in this order. Before I do that it is necessary to advert to facts.

5. Owing to the limited legal landscape and short statutory perimeter of a legal exercise under Section 34 of A and C Act, factual matrix in a nutshell containing essential facts imperative for appreciating this order will suffice. Factual matrix in a nutshell is that the respondent vide a Letter of Intent dated 07.10.2004 appointed petitioner as distributor for sale of spare parts manufactured by the respondent; this Court is informed that respondent is an automobile manufacturing company and petitioner-Company is *inter-alia* carrying on business pertaining to automobiles in Nagpur and other parts of Central India; that the distributorship was initially for a period of 12 months with effect from 01.11.2004 for 9 districts of Vidarbha region in the State of Maharashtra; that thereafter, the appointment of dealership was

confirmed with effect from 01.04.2005; that initially the dealership was for the territory of Vidarbha, but subsequently, it was extended to whole of Maharashtra, excluding Mumbai and this was in the year 2009, in accordance with a dealership agreement dated 08.12.2009; that the dealership agreement was renewed for a period of 3 years sometime on or about 26.09.2012; that thereafter, certain arbitrable disputes erupted between petitioner and respondent owing to which petitioner in captioned OP filed aforementioned O.P.No.568 of 2018 *inter-alia* under Section 11 of A and C Act and a Hon'ble learned single Judge of this Court disposed of the OP after full contest, vide an order dated 30.11.2018, appointing a former Hon'ble Judge of this Court as sole arbitrator, who constituted the AT; that AT entered upon reference; that oral and documentary evidence was let in before AT by both sides; that before AT, respondent had made a counter claim; that after full contest, AT made the impugned award partly allowing one head of claim of the petitioner with interest albeit for a period lesser/shorter than the one for which it was claimed and AT rejected the counter claim of respondent Company in its entirety; that petitioner has now assailed the impugned award vide captioned OP, which has been presented in this Court on

31.08.2020.

6. To be noted, in the factual matrix in a nutshell supra, I have also captured the trajectory which the matter has taken in reaching this Court vide captioned OP, which is listed under the caption 'MOTION CASES' before me today.

7. Before proceeding further by capturing the submissions of learned counsel for petitioner and dealing with the same, this Court deems it appropriate to extract and reproduce the heads of claims made by the petitioner before AT, counter claim made by the respondent before AT, issues framed by AT, operative portion of the impugned award, and this Court also deems it appropriate to set out two other salient features of the impugned award relevant to this order. To be noted, one salient feature pertains to finding of AT regarding the existence of arbitration agreement between the parties and the other feature pertains to quantum and kind of evidence that was before AT.

8. Claims of petitioner/claimant before AT under 8 heads read as

follows:

'i	*Claim Toward TOD and repayment of amount for which goods not supplied*	*Rs.1,24,35,819/-* *Rs. 18,08,853/-* *Rs.1,19,65,523/-* *(interest @ 21%)* *Rs.2,62,10,195/-*
	Total	
ii	*Loss suffered due to illegal termination of the agreement*	*Rs.1,36,26,753/-*
iii	*Claim towards storing the goods*	*Rs.1,41,73,880/-*
iv	*Claim towards the unsold stock*	*Rs.1,82,95,376/-*
v	*Claim towards insurance of the stock lying with the claimant*	*Rs.1,45,674/-*
vi	*Compensation on account of breach of contract*	*Rs.5,00,00,000/-*
vii	*Cost of litigation*	*Rs.40,00,000/-*
viii	*Claim for interest*	*Rs.1,45,05,568/-*
	Total Claim	***Rs.14,09,57,447/-'***

9. Counter claims made by the respondent before AT read as follows:

'Reversal CST discount extended a/c CST billing	*Rs.7,66,464.63*
Tax difference due to non receipt of C Form	*Rs.44,74,780.37*
Interest	*Rs.3,83,923.42*
Penalty payable to the sales tax department for not furnishing C Forms	*Rs.67,12,170.57*
Total to be recovered from Claimant	*Rs.1,23,37,338.99*

> *The above sum is payable with subsequent interest at commercial rates'*

10. Five Issues framed by AT read as follows:

'In the sitting held on 27th April 2019, with the consent of both the learned counsels, the following issues were framed:

1. Whether the termination of the Claimant's Dealership is valid and enforceable?

2. Whether the Claimant is entitled for the claims made in the claim petition?

3. Whether the Respondent is entitled for the counter claim made in the counter statement?

4. Whether the parties are entitled for interest? If it is so, at what rate, on what period?

5. Any other relief, including the costs, the parties are entitled.'

11. Operative portion of the impugned award reads as follows:

'In the result, the following AWARD is made in these proceedings:

AWARD

A. The Tribunal directs the respondent, to pay a sum of Rs.1,24,35,819/- with interest at 18% from 01.04.2019 and Rs.18.08 lakhs with interest at 18% from 01.04.2015 as claimed, to the Claimant, till the date of actual payment of the entire amount or unpaid portion thereof. The other claims and counter claim are rejected.

B. No order as to costs and so the parties should bear their own costs.'

12. First salient feature, as alluded to supra in the impugned award, is regarding the finding returned by AT vide impugned award regarding existence of arbitration agreement between the parties. Though no specific issue was framed in this regard, this finding regarding existence of arbitration agreement is articulated in Paragraph Nos.11.1 to 11.4 of the impugned award, which read as follows:

'11.1 Before dealing with the issues framed, it is necessary to deal with the defence taken by the respondent, saying that the agreement dated 26.09.2012 (Ex,C8) is not an enforceable Agreement as the same was not signed by the respondent and it is undated. Such a defence has been specifically taken in para 8 of the Defence Statement. According to the respondent, after the expiry of the Agreement dated 07.12.2009, by efflux of time, the business relationship continued, only in terms of incentive letter and the sales targets were on month-to-month basis. On that basis, the respondent has come forward with the case that as there is no agreement between the parties available before the Tribunal, the claims are to be rejected.

11.2. Even according to the respondent, in Para 5 of the Defence Statement, that the draft of the 'Part Dealer

Agreement' was sent to the Claimant under covering letter dated 14.06.2013 for the signatures of the claimant. But they have also stated that the same was never executed or signed by the respondent, as the same was not received back from the claimant. Even in para 3 of the reply, the respondent has reiterated its case regarding the non-existence of the agreement and contended that the original of Ex.C8 was not signed and concluded the agreement. But the claimant has come forward with the case that the original of Ex.C8 was signed by the claimant and sent it back to the respondent through its Branch Office for their execution. Though the claimant sought for the production of the original of Ex.C8, the respondent informed that the same is not available with them. But the claimant has not discharged the burden in proving the fact that the original agreement executed by both the parties, is available. Ultimately, only the unsigned and undated agreement Ex.C8 is before this Tribunal. The learned counsel for the claimant submitted that as the respondent has not produced the signed agreement before this Tribunal, in spite of a Memo to produce the same was filed and direction was given to produce, it should be presumed that the original of Ex.C8 is in existence. Such a submission cannot be accepted in view of non-applicability of Evidence Act, as per Section 19 of the Arbitration and Conciliation Act to proceed with this proceeding, on presumptions. As the claimant wants to get the relief under an agreement, it has to establish the existence of such agreement, especially when the respondent has come forward with the *specific case that there is no such agreement signed by the respondent as alleged by the claimant. This Tribunal is constraint to sum up the above facts only because the parties have pleaded, adduced evidence and argued elaborately regarding the same before this Tribunal.*

11.3 In spite of the above, this Tribunal cannot go into and decide the said controversy in view of the specific finding given by the Hon'ble Judge in the order dated 30.11.2018 passed in O.P.No.568 of 2018 filed under Section 11 of the Act that ".....there exists an agreement. Further the agreement was renewed by the respondent for a period of three years. These transactions show that there was an agreement between the parties. On the basis of the finding, the Hon'ble Judge, relying on the arbitration clause, found that the dispute is arbitrable dispute and appointed the sole arbitrator to adjudicate the disputes interse the parties". The respondent did not challenge the said order by filing appeal before the Appropriate Forum.

11.4 In view of the above order of the Hon'ble Judge, the Tribunal cannot have any jurisdiction to go into the sustainability of the defence taken by the respondent regarding Ex.C8. This view is taken on the basis of the decision reported in 2005 (8) SCC 618. Though the learned counsel for the claimant referred to the judgements to sustain his submission regarding the existence of original of Ex.C8, the same are not dealt with, in view of the scope of the order passed by the Hon'ble Judge as mentioned above. So the Tribunal is constrained to deal with the dispute on the basis of the terms *contained in Ex.C8, though the same is not the copy of Agreement signed by both the parties and undisputed agreement by both the parties.'*

13. The order dated 30.11.2018 made by a Hon'ble learned single Judge of this Court in O.P.No.568 of 2018 (Section 11 OP) has not been placed before me as part of the case file. Therefore, this Court took it upon itself to locate the said order in the official website of this Court. Paragraph Nos. 6 & 7 of the said order are relevant and the same read as follows:

'6. From a perusal of these materials, it is clear that there exists an agreement between the parties and also an arbitration clause in the agreement entered into between the parties which is extracted hereunder:

"In the event of differences / disputes, the parties will resolve the same by mutual negotiations. Any unresolved disputes shall be referred for arbitration under Indian Arbitration and Conciliation Act, 1996 to a suitably appointed arbitrator under mutual consent. The decision of the arbitrator will be final and binding on both parties and the venue of such arbitration shall be in Chennai. The language shall be English."

Therefore this Court is of the view that the dispute is an arbitratable dispute. In so far as the contention of the respondent regarding limitation is concerned, it is always open to the respondent to raise the issue before the arbitrator.

7. Under such circumstances, this Court appoints Mr.Justice.K.Govindarajan (Retired), New No.8, Old No.5, Justice Ramanujam Street, Malavya Avenue, Shastri Nagar, Chennai~600041. Phone No.24913403, Mobile No.9444403403, as the Sole Arbitrator to enter upon reference and adjudicate the disputes inter se the parties. He may, after issuing notice to the parties and upon hearing them, pass an award as expeditiously as possible, preferably within a period of six months from the date of receipt of the order. The learned Arbitrator is at liberty to fix his remuneration and other incidental expenses. The proceedings may be conducted under the aegis of the Madras High Court Arbitration Centre and in accordance with the Madras High Court Arbitration Rules.'

14. This Court finds that AT has held that existence of arbitration agreement has been concluded by a judicial order. AT vide paragraph No.11.4 of the impugned award has referred to 2005 (8) SCC 618. This is ***Patel Engineering case law being Patel Engineering Ltd. Vs North Eastern Electric Power Corporation Ltd. (NEEPCO) reported in 2020 SCC Online SC 466.*** This is obviously a principle that an order made

under Section 11 of A and C Act is a judicial order. There is no disputation that the order under Section 11 was made after full contest and the same has been given legal quietus by both parties. However more than ***Patel Engineering case law,*** this Court is of the considered view that ***Duro Felguera, S.A. [Duro Felguera, S.A. versus Gangavaram Port Limited*** reported in ***(2017) 9 SCC 729I]*** and ***Mayavati Trading [Mayavati Trading Pvt. Ltd., Vs. Pradyuat Deb Burman*** reported in ***(2019) 8 SCC 7961]*** are of relevance. In these two case laws, Hon'ble Supreme Court elaborating and elucidating on Sub-Section 6A of a Section 11 of A and C Act has held that scope of a Section 11 petition will necessarily turn on existence of an arbitration agreement. In any case, there is no challenge in this regard before me and learned counsel very fairly and as a matter of good order, drew the attention of this Court to this aspect of the impugned award and therefore, this Court has considered it appropriate to set out the same. The second salient aspect of the impugned award which needs to be set out, as mentioned supra, is the nature of evidence before AT. From the impugned award, more particularly, paragraph No.8 of the impugned award, it comes to light that four witnesses were examined on the side of claimant (petitioner before me) i.e., CW1 to CW4, as many as 42 exhibits were marked on the side of claimant (petitioner before me) i.e., Ex.C1 to Ex.C42. Likewise, on the side of respondent before me (who was also respondent before AT), oral evidence in the form of RW1 has let in and as many as 17 exhibits i.e., Ex.R1 to Ex.R17 were marked.

15. This Court has now captured the essential facts, trajectory of the matter thus far and the broad features of the impugned award which are necessary to appreciate this order.

16. Notwithstanding the OP in its written form before me as part of case file, learned counsel for petitioner took a very professional approach and made pointed submissions in an attempt to bring the matter within the statutory perimeter of Section 34 of the A and C Act and summation of the arguments of learned counsel which is twofold is follows:

(a) AT vide the impugned award has held that termination is bad and having held so the consequence of termination ought not to have been denied.

(b) Vital evidence has been ignored as AT has held that two of the four witnesses through whom oral evidence was let in on the side of claimant i.e., CW3 & CW4 are interested witnesses purportedly on the basis of suggestion to this effect while there is none.

17. This Court, before dealing with the pointed and focussed submissions made by learned counsel for petitioner, deems it appropriate to observe that out of 8 heads of claim, claim No.1 turning on TOD alone was partly allowed. This Court is informed that TOD is an abbreviation and that it stands for 'Turn Over Discount'. This head of claim extracted and reproduced supra will reveal that the claim is for Rs.2,62,10,195/- together with interest at the rate of 21% per annum. As against this, AT has allowed Rs.1,24,35,819/- albeit with interest at the reduced rate of 18% per annum from 01.04.2015 on 8.09 Lakhs till the date of payment. Learned counsel submitted that he is not much on the rate of interest. However, learned counsel submitted that the period for which interest has been awarded needs to be looked into in this Section 34 exercise.

The other heads of claim namely, 2 to 6 were rejected in its entirety. With regard to heads 7 and 8 i.e., cost of litigation and claim for interest, while cost of litigation was held to be borne equally both parties, regarding interest the details have already been set out supra. The entire counter claim was rejected and what is of relevance is, it comes to light from the impugned award that the respondent itself made only a faint attempt or faint effort qua the counter claim. This is articulated in Paragraph No.15.1 of the impugned award, which reads as follows:

> *'15.1. It is admitted by RW1 that the claimant has furnished 'C' Form certificates. The learned counsel for the respondent has also not argued much on this claim except narrating as to why the respondent made such counter claim. Even in the Bullet point (Notes for arguments) submitted by the learned counsel for the respondent, nothing is mentioned about counter claim. Hence, the same is rejected.'*

18. With regard to only a part of claim under claim head No.1 being allowed, this Court carefully considered how the AT has dealt with this claim. This is articulated under the caption 'claim No.1' in paragraph Nos.14.1 to 14.6 of the impugned award which read as follows:

> *'Claim No.1*
>
> *Claim towards TOD and repayment of amount for*

which goods not supplied: Rs.1,24,35,819.00 and Rs.18,08,000.00.

14.1. According to the claimant, the said amounts of Rs.1,25,35,819.00 and Rs.18.08 Lakhs are due to the claimant from the respondent towards TOD, as per the terms of the agreement and towards refund of the amount paid by the claimant to purchase the goods, which were not supplied by the respondent.

14.2. The respondent has admitted its liability to pay a sum of Rs.97,59,000.00 towards TOD. The respondent has come forward with the defence that the claimant has not furnished 'C' Forms and so they are entitled to retain the said amounts. It is admitted before the Tribunal that the claimant had already submitted the "C" Forms. Even RW1 has admitted the same in his cross-examination. Though the respondent has mentioned the quantum of amount as Rs.97,59,000/- it is not explained as to how the said amount has been arrived at. But CW1, in his proof affidavit in Para 34 has not only mentioned about the claimant's claim for Rs.1,24,35,819/- towards TOD, but also disputed the quantum of amount mentioned by the respondent as Rs.97,59,000/-. But, no cross-examination was made, questioning the quantum of amount, as claimed. Similarly, with respect to the claim of Rs.18.08 lakhs, RW1 has admitted the liability of the respondent, in his answers to Q.Nos.221 to 224 in the cross-examination.

14.3. The TOD amount was withheld only for not furnishing "C" Forms. It is admitted that the said forms were submitted by *the claimant. Even in his answer to Q.257, RW1 has also admitted the same.*

14.4. Hence, it is held that the claimant is entitled to recover a sum of Rs.1,24,35,819/- and Rs.18.08 Lakhs from the respondent towards TOD and the unpaid amount.

14.5. Though the claimant has claimed interest on the said amounts at 21% from 01.04.2015, the claimant had furnished "C" Forms only in March, 2019 as deposed by RW1 in the answer to Q.No.257. As admitted by CW1, in the answer to Q59, the claimant agreed to withheld TOD amount. The respondent is entitled to retain the TOD amount payable to the claimant to safeguard their interest.

14.6. So, it is held that the claimant is entitled for interest at the rate of 18% from 01.04.2019 on Rs.1,24,35,819/- and at the rate of 18% from 01.04.2015 on Rs.18.08 Lakhs, till the date of payment.'

19. A perusal of the aforesaid paragraphs makes it clear that the entire matter turns on evidence before AT. C-Form issue as in any case has been sorted out and has been put to rest. While dealing with the claim for loss suffered on account of illegal termination under head claim No.2, AT has dealt with evidence before it and has come to the conclusion that this head of claim of the claimant deserves to be rejected. This is contained in Paragraph Nos.14.7 to 14.13 of the impugned award

under the caption 'claim No.2', which reads as follows:

'Claim No.2

Loss suffered due to illegal termination of the Agreement Rs.1,36,26,763/-

14.7. According to the claimant, as stated in the claim petition, due to termination of dealership, it will take more time to sell the stock, in the absence of cooperation from the side of the respondent company and having dumped huge quantity before termination, the respondent refused to cooperate with the claimant in disposing of the same. It is also stated that the representatives of the respondent were being a party in spreading the rumours in the market that the stock, which is lying with the claimant, may spurious and would not be backed up with warranty by the respondent. On that basis, the claimant has come forward with the case that they were compelled to make distress sale at 30% less and so suffered a loss of Rs.1,36,26,763/-.

14.8. The respondent denied the same in the defence statement, stating that the plea of the claimant regarding the rumour cannot be accepted, taking into consideration of the status of the company and there is no necessity for the respondent to spread such rumours against the claimant.

14.9. The claimant produced Ex.C32, to show that it sold the spares on discounted rate. The claimant has also examined CW3 and CW4, to establish that the executives of the respondent spread adverse information about the claimant. On perusal of the answers given by the said witnesses in the cross-

examination, it is clear that they are interested witnesses, as they have been doing business for a long number of years with the claimant and that too, on credit basis.

14.10. Though, CW1 himself admits in the answer to Q.No.49 that there was no force from the respondent regarding supply and in the answer to Q.No.50, it is admitted that achieving the target is voluntary one, the claimant has accused the respondent, as if, the respondent has dumped the stock just before the termination. Even in answer to Q.No.33, CW1 admits that the claimant purchased spares by placing the purchase orders and sending the payment in advance. Though the allegations that the respondent has dumped the goods, are made as a foundation to the claim, the same cannot be sustained in view of the admissions of CW1 as mentioned above.

14.11. CW1 himself has admitted that the warranty has come with the product. But CW3 and CW4 have deposed while answering Q.No.5 that they purchased spares from the claimant company at a discounted rate, as those spares came with no warranty. In view of this answers and the evidence of CW1 as mentioned above, it is clear that CW3 and CW4 have not purchased the spares of the respondent which has come with warranty.

14.12. Moreover, the claimant is trying to establish the case of the rumour seems to have spread out by the officials of the respondent, through CW3 and CW4 who are interested *witnesses as suggested by the learned counsel for the respondent. They had long-term relationship and enjoy the credit facilities from the claimant. Moreover, from the evidence of CW3 and CW4, it is clear that they want to say that the spares were sold by the claimant and they purchased on discounted rate because they did not have any warranty. When admittedly, the spares sold to the claimant by the respondent having warranty, there is no necessity for the claimant to sell the same on discounted rate, as if they were not having any warranty and so the claimant, on that basis, cannot sustain the claim. The claimant has not established that they had incurred loss by selling the product purchased from the respondent on discounted rate, due to the termination. It is not in dispute that in spite of the termination or end of the agreement period, the claimant can sell the unsold spares for which there is no prohibition under the agreement.*

14.13. Hence the claim No.2 is rejected.'

20. As this turns on evidence, this Court deems it appropriate to give dispositive reasoning with regard to the second ground of attack namely, CW3 and CW4 being held to be interested witnesses together with its dispositive reasoning qua the first ground of attack.

21. As already mentioned supra, captioned OP has been presented

in this Court on 31.08.2020 and therefore, it is governed by post 23.10.2015 regime of A and C Act or in other words, it is governed by A and C Act as amended by Act No.3 of 2016, which kicked in with retrospective effect on and from 23.10.2015. This is in accordance with ***Ssangyong*** principle.

22. Therefore, the patent illegality ground canvassed by learned counsel falls under Sub-Section (2A) of Section 34 of A and C Act. This patent illegality ground is circumscribed by a two limbed proviso. This two limbed proviso is to the effect that an arbitral award cannot be set aside merely on the ground of erroneous application of law and re-appreciation of evidence is forbidden. Therefore, this Court, considers the case on hand to be a fit case for applying ***Hodgkinson principle.*** This ***Hodgkinson principle*** is a principle laid down by a English Court in ***Hodgkinson Vs. Fernie*** case reported in ***140 ER 712*** way back in 1857 and it was subsequently reiterated by our Hon'ble Supreme Court in oft-quoted ***Associate Builders*** case i.e., ***Associate Builders Vs. Delhi Development Authority*** reported in ***(2015) 3 SCC 49.*** The sum and substance of ***Hodgkinson principle*** is to the effect that AT is the best

judge of the quantity and quality of evidence before it. The respondent, which cross-examined CW3 and CW4, may or may not have put a suggestion to the witnesses that they are interested witnesses. AT, coming to the conclusion that they are interested witnesses, is not dependent solely on this suggestion. AT, which had the benefit of seeing the demeanour of witnesses and the deposition as well as appreciating the documents marked through the witnesses as exhibits, can certainly come to the conclusion that they are interested witnesses. If this Court exercising Section 34 jurisdiction goes into this aspect of the matter and tests the impugned award that will tantamount to re-appreciation of evidence which is forbidden vide the second limb of proviso to Sub-Section (2A) of Section 34 of A and C Act. In this regard, this Court deems it appropriate to remind itself that this Court has laid down what is appreciation of evidence in ***14 reels case*** being ***14 Reels Entertainment Private Limited Vs.Eros International Media Limited*** reported in ***AIR Online 2020 Mad 1447.*** Relevant paragraphs are paragraph Nos.27 and 28 which read as follows:

'27. Solely for the sake of illustration, let us take a case where the issue to be tested is whether jural relationship between two parties is that of lessor and lessee or licensor and licensee.

Let us assume that a document i.e., contract between parties which is inter alia an adumberation of covenants and clauses between the contracting parties is available before the Adjudicating Authority and that both sides have let-in oral evidence. The witnesses are inter alia the contracting parties and that deposition of these parties to the document turn on jural relationship between the parties. Proceeding with this illustration, one has to bear in mind that a mere caption to a document on hand will not conclusively decide the jural relationship between the parties. Likewise, one should also bear in mind that the contents of the document by themselves do not prove a fact. In this backdrop, the Adjudicating Authority, which has the task of decoding and deciphering this document in the light of the document itself, which is an exhibit before it in conjunction with oral evidence, which is the deposition inter-alia of contracting parties to the document, examines at the question of whether there has been transfer of possession of demised portion from one party to the other, as this would be one of the extremely critical questions to decide whether the jural relationship is one of lease or licence. Let us assume that the deposition is to the effect that the demised portion is part of a larger property and that the question as to who controls the ingress and egress to the demised property also forms part of deposition. Let us also assume that there are some other exhibits in the form of sketches / photographs besides a topography sketch, which describe these aspects of the matter and that witnesses, who are inter alia contracting parties to the contentious document, *speak about all this. If the Adjudicating Authority deploys a clinical, forensic approach, sifts through, analyses / scrutinizes all these oral/documentary evidence and comes to the conclusion that the ingress and egress to the immovable property (of which the demised portion is a part) is controlled by one party and that there is no transfer of possession by this party to the other party qua demised portion, the Adjudicating Authority may come to the conclusion that the jural relationship between the contracting parties is a license and not a lease. If sifting and scrutiny of oral/documentary evidence leaves the Adjudicating Authority with a contrary conclusion, the Adjudicating Authority may hold that the jural relationship between the parties is that of a lease. In this illustration, when the matter is carried in appeal, it may well be possible for the protagonist of the appeal to point out certain inconsistencies in the oral evidence and contradictions qua evidence before the Adjudicating Authority. While sifting and scrutinizing of oral and documentary evidence by the original Adjudicating Authority to come to a conclusion about jural relationship between the contracting parties can be described as 'appreciation of evidence', the exercise of Appellate Authority going into the inconsistencies and contradictions in evidence pointed out by the appellant and having a clinical, forensic relook at the oral/documentary evidence before original Adjudicating Authority can be described as 're-appreciation of evidence'. This is a second bite at the cherry by the protagonist.'*

23**.** Therefore, making any infraction into this arena for testing the impugned award will tantamount to making foray into forbidden arena qua Sub-Section (2A) of Section 34 of A and C Act. This Court also notices that the TOD claim of petitioner has been allowed substantially and that too, with 18% per annum interest and the counter claim has been rejected in its entirety.

24. In sum and substance, this Court is unable to convince itself that the case on hand is one where vital evidence has been ignored. Be that as it may, in this regard, this Court is of the considered view that if termination is held to be bad, it cannot be gainsaid that claim for loss suffered due to illegal termination is automatic. The reason is, this is not a case of liquidated damages. In this regard this Court reminds itself of ***Intercontinental Consultant and Technocrats case*** being ***National Highways Authority of India Vs. M/s. Intercontinental Consultant and Technocrats Pvt. Ltd. [2018 SCC Online Del 10328]*** *and a portion of Paragraph 8 thereat reads:*

> *'**8.** The learned Single Judge also relied upon the judgment of the Supreme Court in 'Mcdermott International Inc v. Burn Standard Co. Ltd.', (2006) 11 SCC 181 and the later judgment in 'Associate Builders v. Delhi Development Authority', (2015) 3 SCC 49 in both of which the Court held*

that the decision as to the construction or interpretation of the terms of the contract fall within the exclusive domain of the Arbitrator and that the error, if any, cannot, in our opinion, of such interpretation ordinarily ought not to be corrected or interfered with............'

25. In any case it is not a case where an implausible view has been taken by AT. To be noted, vide ***Ssangyong*** principle Hon'ble Supreme Court has made it clear that post 23.10.2015, while testing an impugned award under Section 34 of A and C Act, the same does not entail a review on merits and this Court will be slow to intervene judicially as long as there is nothing to demonstrate that the view taken by AT is an implausible view. To put it differently, it should be a view which no reasonable person would have taken and one which shocks the conscience of the Court. This is not one such case and therefore, owing to short statutory perimeter of Section 34 of A and C Act, this Court is unable to find any reason to issue notice.

M.SUNDAR.J.,

mk

26. In the result, this Original Petition is dismissed. There shall be no order as to costs.

01.12.2020

Speaking/Non-speaking order
Index : Yes / No
Internet : Yes / No
mk

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