

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Original Side

Present:- Hon'ble Mr. Justice I. P. Mukerji
Hon'ble Mr. Justice Aniruddha Roy

APO 120 of 2019

With

AP 1502 of 2015

AP 1341 of 2015

Standard Chartered Bank & Anr.

Vs.

Tilak Mehra & Ors.

For the Appellant : **Mr. Jishnu Saha, Sr. Adv.**
Ms. Sulagna Mukerjee,
Ms. Surabhi Banerjee,
Mr. Ishaan Saha,
Mr. Himangshu Bhawsinghka,
Mr. Sandip Agarwal.

For the Respondent : **Mr. Jayanta Kumar Mitra, Sr. Adv,**
Mr. Dhruba Ghosh,
Mr. Anirban Roy,
Mr. Snehashis Sen,
Mr. Sourav Ghosh,
Mr. Abhishek Banerjee,
Ms. Aishwarya Chatterjee,
Mr. Aditya Sarkar.

Judgment on : **07.07.2022**

I. P. MUKERJI, J.

FACTS:

The first appellant is the successor-in-interest of Chartered Bank of India, Australia and China. The latter on 12th December, 1905 obtained by a deed of lease commencing from 12th February, 1906 for 100 years from one Maharaj Adhiraj Bijoy Chand Mahtab Bahadoorof Burdwan, a property measuring 3 bighas, 9 cottahs, 18 chittacks, what is now, premises No. 4, Netaji Subhas Road, Kolkata – 700001. The respondents are the successors of the Maharaj. By two supplementary leases executed on 20th April, 1927 and 31st December, 1934 some addition was made to the demised land and

the obligation to pay municipal taxes was spelled out, while maintaining the terms and conditions of the original lease.

The renewal clause in the lease is of paramount importance in this matter. It provided that the lessee had the option, on the expiry of the original lease, to take a fresh lease of another 100 years only, at a yearly rent of Rs.3,700/- and a monthly rent which would be "1/ 12th of 7^{1/2} % of the value of the property on the commencement of the renewed lease except the value of the private lane or road and the buildings standing on it."

In terms of the covenants in the deed of lease the appellant No.1 constructed a building on the demised land having a built up area of approximately 1,24,000 sq. ft.

What happened in or about July, 2003 is most interesting. The first appellant transferred its leasehold interest to the second appellant, describing it as an "assignment of its leasehold interest". In the same month on or about 24th July, 2003 the second appellant wrote to the respondents that they intended to exercise the right of renewal of the original lease, as the assignee of the first appellant. By their letter dated 10th September, 2003, the respondents did not approve of this assignment and refused to renew the lease in favour of the appellant no. 2. They contended that the appellant no. 1 had exercised its option to obtain renewal of the lease in July, 2003 for a further period of 100 years and that the respondents were entitled to obtain specific performance of this agreement. The respondents made it clear that they were agreeable to execute a lease from 12th February, 2006 for 100 years in favour of the appellant no. 1 in terms of their obligation under the original lease dated 12th December, 1905. With the letter dated 10th September, 2003 was enclosed a valuation report of M/ s. Talbot and Co. dated 9th September, 2003, valuing the property in terms of the said covenant in the lease at 41,01,49,000/-. Going by this valuation the monthly rent on renewal of the lease would be Rs.25,63,431.25/-.

When the question arose whether the appellant No. 1 was willing to pay the above rent, it contended that it had "assigned" the lease to the appellant No. 2 and that a fresh lease to be executed in favour of the latter on expiry of the original lease. To this, the respondents' reaction was that only the appellant No. 1 was entitled to claim a fresh lease of 100 years. They insisted that they would treat the appellant No. 1 as the lessee for the next 100 years commencing from 12th February, 2006 and to hold them responsible for performance of all covenants under the lease. The appellant No. 2 according to the respondents did not have the financial capacity to pay the rent under the lease. Moreover, they were not willing to enter into any legal relationship with the appellant No. 2.

On 20th May, 2004 the respondents filed a suit in this court (CS No. 136 of 2004) inter alia claiming specific performance of the lease agreement dated 12th December, 1905 together with a declaration that the assignment of the lease by the appellant No. 1 in favour of the appellant No.2 was invalid. The appellants, as a counterblast instituted a suit against the respondents in this court (CS No. 35 of 2006) inter alia seeking a decree for specific performance of the lease agreement dated 12th December, 1905 by execution of a fresh lease of 100 years by the respondents in favour of the appellant No. 2.

On or about 23rd March, 2006 the appellants wrote to the respondents through their advocates-on-record that according to the arbitration agreement in the deed of lease they had referred the matter to arbitration for ascertaining all the rent payable to the respondents after expiry of the original lease dated 12th December, 1905.

The parties constituted an arbitral tribunal. Its first sitting was held on 9th September, 2006. During the progress of the arbitration by mutual agreement, the scope of reference before the tribunal was enlarged by including all the disputes and differences between the parties in the above suits and the date from which the rent would be payable in terms of the lease dated 12th December, 1905, after its expiry.

The respondents valued the property as on 11th February, 2006 at Rs.50,63,279.00/-. Applying the method for calculation of monthly rent based on such valuation mentioned at the original lease, the lease rental worked out to Rs.31,25,000/- per month from 12th February, 2006. The respondents/claimants in the arbitration claimed inter alia the following reliefs in their statement of claim:-

"(a) An award of declaration that the said purported assignment by the Respondent No.1 of its leasehold interest in the said premises in favour of the Respondent No.2 as intimated by the Respondent No.1 by its letter dated July 22, 2003 is illegal, null and void, of no effect whatsoever, and in any event, not binding on the Plaintiffs;

(b) An award of perpetual injunction restraining the respondents and each of them from asserting and/or contending that the Respondent No.2 is an assignee of the leasehold interest in respect of the said premises and restraining the Respondent no.2 from exercising any obligation under the said Indenture of Lease dated 12th December, 1905 read with the Indenture dated 20th April, 1927, being Annexures A and B hereto, and/or from compelling the claimants to execute and register a fresh Lease for 100 years with effect from 12th February, 2006 in terms of the said Indenture dated 12th December, 1905;

(c) An award of perpetual injunction restraining the Respondent no.2 from exercising any right as an assignee of the Respondent no.1 in respect of the said premises and/or from claiming tenancy right under the Claimants dealing with or interfering with the said premises;

(e) An award fixing the rent for the said premises for the fresh term of 100 years commencing from 12th February, 2006 at Rs.31,25,000/ - per month or at such other rate as may be ascertained by this Learned Arbitral Tribunal;

(f) In the alternative, an enquiry into the monthly rent payable in respect of the said premises for 100 years commencing from 12th February, 2006 and an Award for the sum found due upon such enquiry;

(g) An award directing the Respondent No.1 to accept and execute and a fresh lease for 100 years commencing from 12th February, 2006 in terms of the provisions of the lease dated 12th December, 1905 paying a monthly rent of Rs.31,25,000/ - or at such rate as will be ascertained by this Learned Arbitral Tribunal."

An arbitral tribunal of three very experienced senior advocates of the Calcutta High Court framed the following issues in the arbitral reference:-

"(a) What should be the monthly rent for the period of renewal?

(b) From which date should this rent be payable?

(c) Which party is liable to pay such rent?

(d) Is the alleged assignment of lease by Standard Chartered Bank in favour of Cold Gold Syntex Ltd. binding on the claimants?

(e) Is Cold Gold Syntex Ltd. as alleged assignee entitled to exercise option of renewal?

(f) Are the claimants entitled to an award of eviction?

(g) What sum, if any, are the claimants entitled to on account of arrears of rent?

(h) What sum, if any, are the claimants entitled to by way of mesne profits, damages or compensation?

(i) Is the respondent No.1 obliged to pay the monthly taxes with penalty as demanded by the Kolkata Municipal Corporation?

(j) Are the respondents entitled to an award of Specific Performance against the claimants directing the claimants to execute and register Deed of Lease for 100 years in respect of premises No.4, N.S Road, Kolkata - 700 001, in favour of the respondent No.2?

(k) To what relief or reliefs, if any, are the parties entitled?"

It seems that during the arbitral proceedings the respondents agreed to execute a lease of 100 years in favour of the appellant No. 2 according to the terms of the 1905 lease. Hence reference in this judgment to lessee (appellant No.1) would also include the assignee (appellant No.2).

An award was made and published on 23rd April, 2015.

One of the three arbitrators, Mr. Pradip Kumar Dutta made and published a separate award. The other two arbitrators namely, Mr. P.C. Sen and Mr. Adhir Chowdhury published a separate joint award agreeing on some matters with Mr. Dutta but disagreeing on others. According to the award of Mr. Dutta, the assignment of the lease made by the appellant No.1 in favour of the appellant No. 2 by the registered deed of assignment dated 18th July, 2003 was valid. The respondents/claimants were entitled to an award directing specific performance of the agreement by the respondents/claimants by executing a fresh lease in favour of the second appellant for 100 years @ Rs.25,63,431.25/- per month.

Mr. Pradip Kumar Dutta, learned arbitrator in his award has held on the basis of the authorities cited therein that a lease could be said to commence at a date anterior to the date thereof only to determine the date of termination of the lease. The obligation and liability to pay lease rent in terms of a lease deed would only arise from the date of proper execution thereof.

On the question of the date from which the enhanced rent was payable, the other two learned arbitrators differed with Mr. Dutta and held that the lease rent for the fresh period of 100 years would be paid immediately after expiry of the original lease and not from the date of execution of the new lease.

This part of the majority award was in issue in the application under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the award taken out by the appellants. It is also in issue in this appeal. It was dismissed by a learned single judge of this court on 12th July, 2019.

According to the majority award, the original lease expired in 2006 and immediately upon its expiry the renewed period came into operation and by that principle, the appellant No. 2 was obliged to pay rent @ Rs.25,63,431.25/- per month from 12th February, 2006.

An application to set aside the award under Section 34 of the Arbitration and Conciliation Act, 1996 was filed by the appellants as well as the respondents before a learned single judge of this court. The appellants challenged the award with regard to the rate of rent and the date from which it was payable whereas the respondents assailed it on the ground that it did not provide for eviction of the appellants in case there was default in payment of arrear rent. The learned judge by a judgment and order dated 12th July, 2019 held as follows:-

- (i) The arbitral tribunal had published the award on proper appraisal of evidence before it with regard to the rate of rent. This evidence was on the basis of evidence adduced by valuers, engineers and surveyors on the valuation of the property as in February, 2006.
- (ii) There had been valid assignment of lease by the appellant No. 1 in favour of the appellant No. 2.
- (iii) The appellant No.2 as the assignee had "stepped into the shoes of the assignor/lessee" and had agreed to abide by all the terms and conditions of the existing lease and also of the new lease to be granted.
- (iv) They bound themselves to pay the monthly rent assessed by the arbitral tribunal and payable from the date immediately after expiry of the existing lease.
- (v) The award was reasonable, fair and equitable.
- (vi) Nobody can think that the award was shocking to the conscience of a person because the assignee had all through remained in enjoyment of the property and is liable and has obligation to pay assessed rent from the date of assignment.
- (vii) Ultimately, the learned judge dismissed both the applications.

Hence, this appeal.

CONTENTIONS:

To cut a long story short, I say that the only substantial point which was canvassed in this appeal was with regard to the date from which the increased rent for the premises was payable. The assignment of the appellant No. 1 in favour of the appellant No. 2 is not challenged. The valuation of the property and the consequent rent per month is also unchallenged. The point of challenge is the period for which the appellants would be entitled to pay the increased rent.

Mr. Saha, learned senior advocate for the appellants with all the experience at his command argued that a valid lease may be executed or renewed with effect from a date anterior to it. If otherwise properly executed, the demise takes place from the date of execution. All terms and conditions become operative from that date. If the deed is to be registered on execution, all terms and conditions become operative from the date of its execution and registration. An anterior date of commencement of the lease would only determine its date of termination. Therefore, the obligation to pay enhanced rent would only commence from the date of execution and registration of the lease.

Mr. Saha cited **Roberts v. Church Commissioners for England** reported in **(1971) 3 All ER 703** in support of his argument that the demise, commences from the date of execution of the lease. An anterior date of commencement of the lease could only be referred to calculate the date when the lease comes to an end. Mr. Saha also cited **Dipak Sen & Anr. Vs. Smt. Lakshmi Rani Das** reported in **(2000) 1 CHN 365**, **Makali Engg. Works Pvt. Ltd. vs. Dalhousie Properties Ltd.** reported in **(2006) 1 CHN 419**, **Binny Ltd. vs. Alliance Properties & Industries Ltd.** reported in **(2006) 3 CHN 322**.

It was also argued that the respondents had obtained a status quo order from the court which was operative from 2003 till 2015 as a result of which the appellants were prevented from making proper commercial utilization of

the property. Having obtained an enforcement order, it was unjust and inequitable on the part of the respondents to claim enhanced rent according to the terms of the original lease.

In directing payment of enhanced rent from the date of commencement of the lease, which was anterior to the actual date of execution and registration of the lease deed, the arbitral tribunal had committed a patent error of law. This error was not one which an arbitrator was permitted to commit, within the bounds of its jurisdiction. This was such an error which went to the very root of the matter. It rendered the award perverse. The award was so vitiated that it was liable to be set aside, Mr. Saha contended. He cited **Associate Builders vs. Delhi Development Authority** reported in **(2015) 3 SCC 49** and **PSA SICAL Terminals Pvt. Ltd. vs. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin and Ors.** reported in **2021 SCC Online SC 508** to define the law for setting aside the impugned award.

Learned counsel also submitted that Section 108 of the Transfer of Property Act, 1882 began with the phrase "in the absence of a contract" to the contrary while specifying the rights and liabilities of the lessor and lessee. Section 108 (q) enjoined the lessee with a duty to put the lessor into possession of the property on determination of the lease. He argued that this was subject to contract between the parties. When the lease agreement between the parties provided for an initial 100 years lease to be followed by another 100 years at the option of the lessee, it was to be implied from the contract between the parties that on determination of the first lease the lessee would not be obliged to deliver possession to the lessor but would wait for execution of a fresh lease, on the exercise of his option, to continue as lessee from the expiry of the first lease. He relied on **Nabha Power Ltd. (NFL) vs. Punjab State Power Corporation Ltd. (PSPCL) and Anr.** reported in **(2018) 11 SCC 508** and a division bench judgment of our court in **Bhagaban Biswas Vs. Bijoy Singh Nahar** reported in **(1979) 2 CHN 378** to explain the law relating to implied terms in a contract.

In those circumstances, the lessee continued to occupy the premises awaiting renewal of the lease which did not happen. The lease deed of 1905 clearly provided that upon renewal of the lease, the lessee would be bound to pay enhanced rent at the rate specified in the document. Therefore, the obligation to pay enhanced rent would be from the date of actual execution and registration of a fresh lease of 100 years. This renewal was never made within time. The lessee occupying the premises in anticipation of such renewal would not be thrust with the obligation to pay enhanced rent from the date of expiry of the original lease but from the date of its actual renewal or grant of a fresh lease. In making such an award, the arbitral tribunal had committed patent illegality.

In the intervening period, the lessee would be holding over on a month to month lease or tenancy on the same rent as the original lease, under Section 116 of the Transfer of Property Act, 1882, it was also argued.

Mr. Jayanta Kumar Mitra, learned Senior counsel appearing for the respondents began his argument by emphasizing that arbitration was a form of redressal of legal disputes between the parties of their choice. The parties having faith and confidence in a person or by all persons appointing him or the body as the arbitrator or the arbitral tribunal. Ordinarily the court should not interfere with the award published by the arbitral tribunal. It can only interfere with such an award under extra ordinary circumstances. Such was the law. In this no such ground had been made out to justify interference by this court with the impugned award. Learned counsel highlighted the scope of reference before the learned arbitrators, covering the issues of assignment of the original lease by the lessee, its renewal, eviction of the lessee or the assignee, payment of rent or occupation charges after the expiry of the lease and of all other matters connected to it.

Mr. Mitra placed before us a letter dated 14th July, 2003 by the appellant No.1 to the respondents. It exercised its right of renewal of the said lease upon payment of the monthly rent. However, on 22nd July, 2003 they wrote

to the respondents that they had assigned their leasehold interest in favour of the appellant No.2. On 24th July, 2003 the appellant No. 2 wrote to the respondents referred to the letter of the appellant No. 1 dated 22nd July, 2003 and asked the respondents to renew the lease for 100 years in their favour.

Ultimately the respondents agreed to renew the lease or execute a fresh lease in favour of the appellant No.2. Learned counsel placed Section 105 of the Transfer of Property Act and also a passage from Mulla on the Transfer of Property Act, 11th Edition, 2013 at Pg. 791. The passage from Mulla is set out below:-

"When a document, though in the form of an agreement to lease, finally ascertains the terms of the lease, and gives the lessee a right of exclusive possession either immediately or at a future date, the document is said to effect an actual demise, and it operates as a lease. Whether it operates as a lease or as an agreement to lease, is a matter of construction and intention. The transferee need not be put in actual possession. The transfer of the right to be in possession amounts to the transfer of possession. So also, the transfer of a right to the usufruct of the property without possession may amount to a lease.

Words of present demise are generally conclusive of a lease. There is a present demise even if the leasehold interest is to commence in the future. This is because a transfer may operate not only in the present, but in the future. In this connection, the note 'In present or in future' under s 5 may be referred. In other words, the agreement must create an immediate right in the party to be a tenant either from that day or from a future day and before the execution of any formal lease."

The argument of learned counsel was that although in the original lease there was a clause for its renewal at the option of the lessee, by the appellant's said exercise of option for renewal of the lease by payment of rent under it and retention of possession after expiry of the original lease,

the agreement for renewal did not remain an agreement to lease but became a demise. In other words, it resulted in creation of a fresh lease. The principles relating to the difference between an agreement to lease and an agreement of lease were elaborated. Upon delivery of possession and payment of rent, there was a present demise or agreement of lease was explained by learned counsel by citing **Trivenibai and Anr. vs. Smt. Lilabai** reported in **AIR 1959 SC 620**. He also referred to **State of Maharashtra and Ors. vs. Atur India Pvt. Ltd.** reported in **(1994) 2 SCC 497** and **Anthony vs. K.C. Ittoop & Sons and Ors.** reported in **(2000) 6 SCC 394**. The later decision relied on **Biswabani Pvt. Ltd. vs. Santosh Kumar Dutta and Ors.** reported in **(1980) 1 SCC 185** and **Technicians Studio Pvt. Ltd. vs. Smt. Lila Ghosh and Anr.** reported in **(1977) 4 SCC 324**.

Discussion:

At this point of time, it is of paramount importance to ascertain what the courts have ruled on the basic grounds of challenge to the award before us i.e. whether rent can be claimed from a date anterior to the actual date of commencement of the lease and whether the award is vitiated on any of the grounds of challenge?

The first issue:

In **Trivenibai and Anr. vs. Smt. Lilabai** reported in **AIR 1959 SC 620**, the Supreme Court opined that a lease had to be a present demise which would be evident from the terms for payment of rent from the date of its execution or a specified date and delivery of possession.

In **Roberts v. Church Commissioners for England** reported in **(1971) 3 All ER 703**, the Court of Appeal of England and Wales while interpreting a "long tenancy" ruled that a tenancy could not take effect before the date of execution of the lease and delivery of possession. The lease was executed on 29th October, 1952 to commence from 25th March, 1950 till 25th June, 1971. A long tenancy had to be for a term exceeding 21 years. The law laid down by the court was that, the lease executed on 29th October, 1952 for

21 years commencing from 25th March, 1950 till 25th June, 1970 was from the date of its execution, less than 21 years and could not be termed as a long tenancy.

In **Dipak Sen & Anr. vs. Smt. Lakshmi Rani Das** reported in **(2000) 1 CHN 365** Mr. Justice Bhaskar Bhattacharya writing the judgment of a division bench opined:-

"12. In our opinion, in view of section 5 of the Transfer of Property Act, a lease can be effective either from the date of execution or from a date specified in the body of lease provided such date is a future date. But if in a lease deed an anterior date is given, for all practical purposes, the relationship will commence from the date of execution thereof. The anterior date can be taken into consideration only for the purpose of calculating the date of termination of lease. Therefore, in the instant case it should be presumed that the lease started from March 10, 1966 and came to an end on February 28, 1986 because 20 years time should be calculated from March 1, 1966 as provided in the lease deed. If that be the position, the lease in question should be held to be one for less than 20 years and as such in view of proviso to section 3(2) of the West Bengal Premises Tenancy Act, the tenancy should be governed by the provision contained in the aforesaid Act. In our opinion, if the view taken by the Division Bench in the case of Ranjit Kumar Dutta v. Tapan Kumar Shaw (supra) is accepted, in that event one can easily bypass the provision contained in the West Bengal Premises Tenancy Act by executing a lease deed thereby giving its effect from anterior date and making it in reality for a period shorter than 20 years thus frustrating the provision of the Act."

A single judge bench of this court of Mr. Justice Bhaskar Bhattacharya in **Bazaz Construction & Mining (P) Limited vs. Adhish Chandra Sinha and Ors.** reported in **(2001) 2 CHN 579**, considering a lease executed and

registered on 12th July, 1958 stated to be commencing from an anterior date 1st February, 1958 said:

"14. that part of the deed by which relationship is created from a date anterior to the date of execution should be ignored. But there is no impediment in giving effect to the terms of the agreement from the date of execution thereof till 21 years from February 1, 1958 i.e. till January 31, 1979.

18. In other words, the rights and liabilities of the lessor and lessee for the purpose of carrying out the terms and conditions of the valid part are in no way dependent upon anything mentioned in the void part."

In **Makali Engg. Works Pvt. Ltd. vs. Dalhousie Properties Ltd.** reported in **(2006) 1 CHN 419** Mr. Justice Satyabrata Sinha pronouncing the judgment of the division bench remarked:-

"24. All the authorities and decisions cited at the Bar emerge on one point, viz. although for the purpose of computing the tenure of the lease, a deed of lease in writing may commence from an anterior date but the rights and obligations of the parties would arise only from the date of execution thereof It is profitable to note section 5 of the Transfer of Property Act which defines Transfer of Property. It is further to be noted that section 47 of the Indian Registration Act merely states that in relation to a registered instrument, the same shall take effect from the date of execution thereof and not from the date of registration."

In **Binny Ltd. vs. Alliance Properties & Industries Ltd.** reported in **(2006) 3 CHN 322** Mr. Justice Bhaskar Bhattacharya for the division bench reiterated the same view:-

"12..... In view of Section 5 of the Transfer of Property Act, any transfer of property provided in the said Act can be given effect to either from the date of execution and registration or from a future

date but there is no scope of giving effect to any transfer from an earlier date."

Therefore, the rights and liabilities of the parties arise from the date of execution of the lease and not from any anterior date. To my mind, the view of the law taken by Mr. Justice Bhattacharya in **Dipak Sen & Anr. vs. Smt. Lakshmi Rani Das** reported in (2000) 1 CHN 365, **Bazaz Construction & Mining (P) Limited vs. Adhish Chandra Sinha and Ors.** reported in (2001) 2 CHN 579 and **Binny Ltd. vs. Alliance Properties & Industries Ltd.** reported in (2006) 3 CHN 322 that a date specifying the commencement of lease anterior to the date of its execution can only denote the date of termination of the lease is correct on principles. Since rights and liabilities are not created from an anterior date but from the date of the demise, in my view, an anterior date of commencement of a lease cannot also determine its duration, as it has a bearing with the rights and liabilities of the parties. It can only indicate the date of termination of the lease. I do not think the view of Mr. Justice Satyabrata Sinha in **Makali Engg. Works Pvt. Ltd. vs. Dalhousie Properties Ltd.** reported in (2006) 1 CHN 419 that such an anterior determines the duration of the lease is tenable.

If you look at it from this angle, then there is lot of support for the contention of Mr. Saha that the lease of 100 years came to an end in February, 2006. A fresh lease as conceptualized by the original lease of 1905 could not be executed and registered. The lease stood renewed from month to month with the lessee holding over. As a month to month lessee the appellant No.2, as the assignee of the appellant No. 1 would continue to pay the same rent as they paid at the time of expiry of the original lease. The rent according to the fresh lease was only payable from the date of its execution and not an anterior date mentioned there.

Another powerful counter argument is possible, as will be evident from the argument of Mr. Jayanta Kumar Mitra, Senior Advocate recounted below. Section 105 of the Transfer of Property Act, 1882 states as hereunder:-

"105. Lease defined.—A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

Lessor, lessee, premium and rent defined.—The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent."

The Supreme Court had to deal with void leases in **M/s. Technicians Studio Private Ltd. vs. Smt. Lila Ghosh and Anr.** reported in (1977) 4 SCC 324 and **Biswabani Pvt. Ltd. vs. Santosh Kumar Dutta and Ors.** reported in (1980) 1 SCC 185. In the above cases the lessee was in possession of the property on expiry of the original lease. A fresh lease or a renewed lease was executed but not registered. Admittedly it was void. However, the court held that Section 105 of the said Act conceived of an implied lease. There was demise of the property, enjoyment of possession by the lessee and payment of rent which the lessor accepted. The lease deed being void could not be valid for the purpose of duration of the lease mentioned in the lease deed but nonetheless, a month to month lease had been created.

In **M/s. Technicians Studio Private Ltd. vs. Smt. Lila Ghosh and Anr.** reported in (1977) 4 SCC 324 the court had said:-

".....Such a view would be incorrect and encourage attempts to circumvent the protection of the Rent Acts given to the tenants. Whether the relationship of landlord and tenant exists between the parties depends on whether the parties intended to create a tenancy, and the intention has to be gathered from the facts and circumstances of the case. It is possible to find on the facts of a given case that payments made by a transferee in possession were really not in terms of the contract but

independent of it, and this might justify an inference of tenancy in his favour. The question is ultimately one of fact "

In **Biswabani Pvt. Ltd. vs. Santosh Kumar Dutta and Ors.** reported in **(1980) 1 SCC 185**, the Supreme Court remarked:

"10. If, as it clearly transpires from the facts of this case, the appellant was a tenant on the date on which the second lease, which is found to be void, was to commence what would be the nature of possession of the appellant during the period of 5 years, the period sought to be reserved under the second lease and on the expiration of such period?In such a situation even during the period of 5 years for which the second lease was to be created the appellant continued to be in possession as tenant and this is evidenced by the further fact that rent was accepted from the appellant by respondents 1 and 2..... The appellant continues to be in possession as tenant and no cloud is created over its title to remain in possession as tenant merely because the appellant and Respondents 1 and 2 attempted to enter into a fresh lease which did not become effective.

11. Even if it is assumed that the appellant was put in possession for the first time under a lease which turns out to be void, the appellant came into possession of the premises with the consent of the landlords and paid rent from month to month. As the lease was to be for a period of 5 years, for want of registration no operative lease came into existence. In almost identical circumstances in Ram Kamar Das v. Jagdish Chandra Deb Dhabal Deb (AIR 1952 SC 23 : 1952 SCR 269, 280 : 1951 SCJ 813] an inference of tenancy was made and the duration of the tenancy in such circumstances was held to be from month to month."

In **Anthony vs. K.C. Ittoop & Sons and Ors.** reported in **(2000) 6 SCC 394**, the Supreme Court recognized a lease which could be created by implication, even though the formalities of its creation like execution and registration had not taken place. The court held:-

"12.A transfer of a right to enjoy a property in consideration of a price paid or promised to be rendered periodically or on specified

occasions is the basic fabric for a valid lease. The provision says that such a transfer can be made expressly or by implication. Once there is such a transfer of right to enjoy the property a lease stands created.

13. *When lease is a transfer of a right to enjoy the property and such transfer can be made expressly or by implication, the mere fact that an unregistered instrument came into existence would not stand in the way of the court to determine whether there was in fact a lease otherwise than through such deed."*

The argument of Mr. Jayanta Kr. Mitra, learned Senior Advocate seemed to be that there was for all practical purposes a demise of the property in favour of the appellant No. 2 after expiry of the original lease. Possession was retained by them. They paid rent. Only the lease deed could not be executed and registered. Therefore, expressly or by implication the parties had agreed to renew the lease on payment of enhanced rent as mentioned in the 1905 agreement on a month to month lease pending execution of the fresh lease.

Now, if you see the facts, the respondents had refused to acknowledge the appellant No. 2 as the entity in whose favour the lease could be renewed. There was also no agreement between the parties at that point of time as to the enhanced rent payable.

If one goes by a strict legal view of the relationship of the parties, a new lease could not have been created even by implication, in the absence of agreement between the two parties on these two fundamental points. The parties subsequently agreed that the lease could be renewed in favour of the appellant No. 2 and as to the amount of rent payable on execution of a fresh lease.

Can or to what extent the impugned award can be supported?

At this point of time one must have a look at the law governing the power of the courts to enquire into the validity of an award.

When the parties appoint an arbitrator or constitute an arbitral tribunal, they entrust the adjudicator with the duty of deciding the disputes between them with the faith and conviction that he would be able to do so in a fair and just manner. There is an express or implied understanding at the time of his appointment that his award would be final and binding on the parties.

It has always been the policy of lawmakers that the agreement between the parties should be respected and that there should be least interference with the award by the courts.

Nevertheless, parliament in the interest of the parties and the society at large to prevent miscarriage of justice has reserved to the courts a very limited power to set aside an award.

The jurisdiction of an arbitral tribunal has been circumscribed by various sections of the Arbitration and Conciliation Act, 1996 namely, Sections 34, 28, 31 and 16.

In the said Act grounds were introduced for challenging an award. They were not initially fully understood but became more comprehensible on their interpretation by the courts. Again, on the basis of interpretations made by the Supreme Court, the Act was amended to add to the grounds or to clarify the existing grounds.

Let me give you some examples. Section 34(2)(b)(ii) enacted that the court could set aside an award if it was "in conflict with the public policy of India". An amendment to the Act was made in 2016 with effect from 23rd October, 2015 to explain what kind of an award was in conflict with such a public policy. Explanation 1(ii) and (iii) were added to the said sub-section stipulating that an award was in conflict with the public policy of India if it was in contravention with the fundamental policy of Indian law or was in conflict with the most basic notions of morality or justice. Then again, sub-section 2A was inserted to add "patent illegality appearing on the face of the award" as one of the grounds to set aside an award with an explanation

that an award would not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence.

The grounds for setting aside an award are very limited. The grounds for setting aside the impugned majority award of the arbitral tribunal are even more limited, considering the premises on which this award has been challenged. We are only called upon to adjudge whether the arbitral award is in contravention of the fundamental policy of Indian law or is in conflict with the most basic notions of morality or justice or vitiated by patent illegality on the face of the award or is perverse or so unreasonable that no reasonable man could support it.

The standards that an award should fulfill as well as the grounds available to challenge it, in the said Act, were defined and interpreted by the Supreme Court in **Associate Builders vs. Delhi Development Authority** reported in **(2015) 3 SCC 49**. It categorized awards in violation of Indian statutes, apparent on the face of the award as against the fundamental policy of Indian law. So were awards ignoring the binding effect of a judgment of a superior court. The arbitrator was required to have a judicious approach. He could not act in an arbitrary, capricious or whimsical manner. He must be fair, reasonable and objective. The decision should not be coloured by any extraneous consideration. Non-compliance with the rules of natural justice would also offend public policy. "Application of mind is best demonstrated by disclosure of the mind and disclosure of the mind is best done by recording reasons in support of the decision which the court or authority is taking." This together with the audi alteram partem principle was required to be followed by the arbitrator. The award must satisfy the Wednesbury concept of reasonableness. A finding based on no evidence or the arbitral tribunal taking into account irrelevant materials or ignoring the vital evidence would lead to a perverse award. An award should not be such which is so irrational that no reasonable man could have made the award. An award would also be vulnerable if there was

patent illegality on the face of the award. It could also be liable to be set aside if it was in contravention with the substantive law of the country.

In the case of **MMTC Ltd. vs. Vedanta Ltd.** reported in **(2019) 4 SCC 163**, the Supreme Court said:-

"11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e., if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the "fundamental policy of Indian law" would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury [Associated Provincial Picture Houses v. Wednesbury Corpn., [1948] 1 K.B. 223 (CA)] reasonableness. Furthermore, "patent illegality" itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.

12. It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(b)(ii), but such interference does not entail a review of the merits of the dispute, and is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts. (See Associate Builders v. DDA [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204]. Also see ONGC Ltd. v. Saw Pipes Ltd. [ONGC Ltd. v. Saw Pipes Ltd.,

(2003) 5 SCC 705]; Hindustan Ziric Ltd. v. Friends Coal Carbonisation [Hindustan Zinc Ltd. v. Friends Coal Carbonisation, (2006) 4 SCC 445]; and McDermott International Inc. v. Burn Standard Co. Ltd. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181])"

In **Ssangyong Engineering and Construction Company Limited. vs. National Highways Authority of India (NHAI)** reported in **(2019) 15 SCC 131**, the Supreme Court, inter alia, said:-

"34.However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204].

35.Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the "most basic notions of morality or justice". This again would be in line with paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

38. Secondly, it is also made clear that reappreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

39. To elucidate, para 42.1 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Para 42.2 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.

45. To understand the test of perversity, it will also be appropriate to refer to paragraph 31 and 32 from the judgment of this Court in Associate Builders (supra), which read thus:

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 [1992 Supp (2) SCC 312], 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 [(1999) 2 SCC 10 : 1999 SCC (L&S) 429], 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."*

The law on setting aside of an arbitral award has been collated and expounded once again by the Supreme Court in **PSA SICAL Terminals Pvt. Ltd. vs. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin and Ors.** reported in **2021 SCC OnLine SC 508.**

On the grounds urged in this appeal, our scrutiny of the impugned award is limited to whether it is in contravention with the fundamental policy of Indian law or in conflict with our notions of justice or morality or there is

patent illegality on the face of the award or is perverse or so unreasonable that no reasonable person would support it.

Our legal framework consists of the Constitution as the basic law and the laws enacted by the parliament and state legislatures which are not incompatible with the Constitution. In addition to that there are judicial precedents of the superior courts which if not codified into statute or if not constituting interpretation of statute law, are the common law of the land. Some of these laws are considered as fundamental and form the bedrock on which our legal edifice stands. Others are ordinary law.

For example, the right to travel anywhere within the territory of India subject to reasonable restrictions is a fundamental right granted under Article 19 of the Constitution. Similarly is the right to practise any religion under Article 25 of the Constitution of India.

Now, suppose an award by an arbitral tribunal directs a person to be confined within his house or office till the arbitral debt is repaid by him it would be against Article 19 of the Constitution and against the fundamental policy of Indian law. Similarly, if an award restrains a person from visiting a temple indefinitely would be against his freedom of religion and also against the fundamental policy of Indian law. Compared to this is the law of contract containing rules which determine the relationship between the parties before, during or after execution of a contract. This may be considered as an ordinary law. If, while adjudicating whether there was breach of contract by a party, there is misinterpretation of the above rules by the arbitrator, it would be an error of law by the arbitrator but not such an error as would offend the fundamental policy of Indian law. The moment an award is against the fundamental policy of Indian law, the arbitrator goes beyond the bounds of his jurisdiction and the award is liable to be set aside. He is permitted to commit an error of law within his jurisdiction, if such errors are not evidence of patent illegality on the face of the award or render the award perverse or unreasonable. A patent error would be a statement in the body of the award which is so obviously erroneous in law

or on facts that the rest of the award proceeding on the basis of such statement could only be illegal or perverse or unreasonable.

CONCLUSION:

The 100 years lease came to an end in 2006. It was not renewed till much later. Nonetheless, the lessee or his assignee continued to be in possession enjoying the property till the execution of a fresh lease. The parties agreed for execution of a fresh lease in favour of the assignee, the appellant No. 2 at the enhanced rent stipulated in the original lease to be payable on its renewal. It is true that if the lease had been renewed right after its expiry, the rent as awarded by the learned arbitrator would have been payable by the lessee. For some reason, this lease was not so renewed. But the lessee continued to enjoy the property. Now, it says that it would not pay the rent but only pay the rent payable on holding over as a monthly lessee after expiry of the original lease at the same rent as in the original lease.

If in a court of law we were to adjudge this matter, we would had no option but to have accepted this legal premise. But Mr. Jayanta Kr. Mitra's argument which the majority of the learned arbitrators has accepted, is that there was an implied fresh demise by retention of possession by the lessee and his assignee and willingness to pay enhanced rent according to the lease deed. But the lease deed could not be executed. Therefore, the majority ordered enhanced rent to be paid after expiry of the lease, more, on the basis of an implied lease and implied contract of lease. Now, it cannot be denied that determination of the amount reasonably payable by the appellants for occupation of the premise from expiry of the lease till execution of a fresh lease was within the jurisdiction of the learned arbitrator. The award could also be interpreted as the view of the arbitral tribunal of the amount of occupation charges to be payable by the appellant No. 2 for this period, but described as arrear rent.

In whatever way you take it, this amount determined by the arbitrator for occupation by the appellant No. 2 is a plausible view. In no way, can I

describe it as illegal or perverse or unreasonable. In fact, it is a most reasonable view of the matter.

Being a plausible view, I do not think that the award calls for interference. This appeal is accordingly dismissed. The impugned judgment and order is affirmed.

No order as to costs.

Certified photocopy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

I agree.

(ANIRUDDHA ROY, J.)

(I. P. MUKERJI, J.)