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O.S.A(CAD)No.14 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.06.2024

CORAM
THE HONOURABLE MR.JUSTICE M.SUNDAR
and
THE HONOURABLE MRS.JUSTICE K.GOVINDARAJAN
THILAKAVADI

O.S.A(CAD)No.14 of 2022
and
C.M.P.No.2147 of 2022
in
O.S.A(CAD)No.14 of 2022

M/s.Rattha Holding Company Pvt. Ltd.,
Rep. by its Director Mr.Gurmeet Sidana
No.37, TTK Road, Alwarpet
Chennai-600 018.

... Appellant

Vs.

1. M/s.Global Talent Tract Pvt. Ltd.,
Represented by its CCDO
Mr.Siva Sankar Kalive
'Reginsis' 6th Floor, Delta II Building
Giga Space
Viman Nagar, Pune - 411 014.
2. Mr.Justice T.Somasundaram
Former Judge, High Court Madras
New No.1, 15th Street, H-Block
Anna Nagar West, Chennai-600 040

... Respondents

* 2nd respondent is deleted vide order dated 03.06.2024 made in
O.S.A(CAD)No.14 of 2022 and C.M.P.No.2147 of 2022.



O.S.A(CAD)No.14 of 2022

OSA(CAD)No.14 of 2022 filed under Section 13 of the Commercial Courts Act, 2015 read with Section 37 of the Arbitration and Conciliation Act, 1996, praying to set aside the impugned order dated 16.09.2021 passed in O.P.No.936 of 2015 on the file of the Hon'ble Court.

For Appellant : Mr.Keerthikiran Murali

For Respondent : Mr.C.T.Mohan
Senior Counsel
for Mr.B.Sudarshan

J U D G M E N T

[Judgment of the Court was made by M.SUNDAR, J.,]

This judgment / order will now dispose of the captioned OSA and 'Civil Miscellaneous Petition' {hereinafter 'CMP' for the sake of brevity} thereat.

2. Captioned matter is listed under the cause list sub-caption 'PART-HEARD' today as it was heard in part in the listing on 10.06.2024 on which day, the following proceedings were made:

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and***

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M.SUNDAR,J.,
and
K.GOVINDARAJAN THILAKAVADI, J.,

(Order of the Court was made by M.SUNDAR, J.)

Captioned intra-court appeal i.e, 'Original Side Appeal' ['OSA' for the sake of brevity] has been presented in this 'Commercial Appellate Division' [CAD] on 03.01.2022 assailing an 'order dated 16.09.2021 made in O.P.No.936 of 2015' ['impugned order' for the sake of brevity] made by a Section 34 Court i.e., Hon'ble Single Judge of this Court presiding over Section 34 Court.

2.In the Section 34 Court, an Arbitral Award dated 03.10.2015 made in Arbitration Case No.01/2013 by 'a former Hon'ble Judge of this Court as sole arbitrator' [hereinafter 'AT' denoting Arbitral Tribunal for the sake of brevity and convenience] was assailed.

3.Two companies which are adversaries are 'Global Talent Tract Pvt. Ltd.', and 'Rattha Holding Company Pvt. Ltd.', ['Global' and 'Rattha' respectively for the sake of brevity]. Global was the claimant before AT and Rattha was the respondent.

4.Two lease deeds dated 25.11.2010 and 29.09.2011 constitute the nucleus of the matter.

5.Though dispute resolution clauses in the aforementioned



*two lease deeds provide for settlement of disputes through Arbitration, contracting parties i.e., Global and Rattha entered into a separate agreement dated 10.09.2013 appointing a former Hon'ble Judge as sole arbitrator i.e., AT. It has become necessary to record this as the questions as to two lease deeds being insufficiently stamped and not registered [both lease deeds are for five years period] arose. Therefore, **SMS Tea Estates Private Limited** reported in (2011) 14 SCC 66 rendered on 20.07.2011 which was the obtaining position on the date of the impugned award [03.10.2015] and the line of authorities which followed do not come into play in the case on hand. To put it differently, there is no disputation or contestation either about the existence or about validity of the arbitration agreement i.e., arbitration agreement within the meaning of Section 2(1)(b) read with Section 7 of the 'Arbitration and Conciliation Act, 1996' [hereinafter 'A and C Act' for the sake of brevity].*

6.Before the AT, to put it in simple terms, the claim of Global [lessee] is primarily for refund of security deposit and counter claim of Rattha [lessor] is primarily for damages qua breach.

*7.In this regard, it has also become necessary to say that there is no disputation or contestation about arbitrability of disputes as recovery of possession was not subject matter of arbitration. It has become necessary to set out this in the light of **Himangni Enterprises v. Kamaljeet Singh Ahluwalia** reported in*



(2017) 10 SCC 706 and Vidya Drolia and Others v. Durga Trading Corporation reported in (2021) 2 SCC 1 though they were rendered post impugned award. However, it is not necessary to enter into that territory.

8.Now a very interesting scenario emerges.

9.The AT after full contest acceded to the claimant's [lessee] plea of refund of security deposit and negated the counter claims of the respondent [lessor] i.e., damages. The lessor [respondent before AT] assailed the impugned award in the Section 34 Court vide aforementioned O.P.No.936 of 2015 and the Section 34 Court in and by the aforementioned impugned order dated 16.09.2021 dismissed the challenge to the Award and sustained the Arbitral Award. Aggrieved, Rattha [lessor] has presented the captioned intra-court appeal in this CAD. The interesting scenario alluded to supra is the protagonist of the petition in the Section 34 Court has not raised any plea regarding the two lease deeds being insufficiently stamped or being unregistered. In other words, the question as to the two documents [two lease deeds] being inadmissible has not been neither raised in the memorandum of Grounds qua Section 34 petition nor argued but learned counsel for appellant Mr.Arun C.Mohan now wants to predicate his campaign against the impugned order inter alia on this ground.

10.Mr.C.T.Mohan, learned Senior Counsel appearing on behalf of Mr.B.Sudarshan, learned Counsel on record for the



*respondent submits that the appellant should not be permitted to raise the issue now. In this regard, **Lion Engineering** principle being **Lion Engineering Consultants Vs. State of Madhya Pradesh** reported in (2018) 16 SCC 758 wherein Hon'ble Supreme Court held that a point not raised before the Arbitral Tribunal can be raised in Section 34 proceedings for the first time holding **MSP Infrastructure Ltd.** principle reported in (2015) 13 SCC 713 to be no more good law may have to be looked into (though not pressed into service by both sides). Learned Senior Counsel pointed out that the two lease deeds were marked by consent before the AT [paragraph 6 of the impugned award]. Therefore, the neat question as to whether a document which is otherwise inadmissible can be marked by consent of parties in Arbitral proceedings is being projected.*

11.Both sides requested time and agreed for listing tomorrow in the additional list. List under the cause list caption 'PART HEARD' tomorrow.

List on 11.06.2024.'

3. Aforementioned proceedings dated 10.06.2024 shall now be read as an integral part and parcel of this order. This also means that short forms, abbreviations and short references used in the aforementioned earlier proceedings shall continue to be used in the instant judgment / order.



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4. Aforementioned proceedings captures the crux and gravamen of the issue, the trajectory the matter has taken and legal drill before us.

5. Today, when the hearing continued, the first question that fell for consideration was whether the ground of patent illegality vide Section 34(2A) of A and C Act can now be raised in this 37 Court when the same has not been raised before Section 34 Court. Learned counsel for appellant (Rattha) pressed into service *Sal Udyog* principle i.e., *State of Chhattisgarh and another Vs. Sal Udyog Private Limited* reported in (2022) 2 SCC 275. *Sal Udyog* principle on facts pertains to an agreement between State of Chhattisgarh and a private limited company (Sal Udyog) for supply of 10,000 tonnes of Sal seeds per annum for a period of 12 years. Some time in 1987, when the State of Chhattisgarh was still part of State of Madhya Pradesh, Government of Madhya Pradesh decided to annul all agreements relating to forest produce and enacted a Legislation and this was owing to loss of revenue but this Legislation kicked in a decade later on 01.01.1997.



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In **Sal Udyog** case law qua facts, in the *interregnum* i.e., between 1987 and 1997, State renewed (on 30.04.1992) the agreement with Sal Udyog and the same was valid till 29.04.2004. Under the renewed agreement, the State had agreed to supply 10,000 tonnes of Sal seeds to Sal Udyog but when the Legislation was ultimately notified, invoking relevant provision of the Legislation that came into force in the year 1997, State terminated the agreement on 21.12.1998, leading to invocation of arbitration clause in the agreement or in other words, leading to eruption of arbitrable disputes, the Arbitral Tribunal allowed the claim of Sal Udyog to the tune of a little over Rs.7.43 crores, State assailed this award in Section 34 Court (Court of learned District Judge, Raipur), Section 34 Court declined to interfere with the award but modified the same {to be noted, this was prior to **Hakeem** Era / Regime [**Project Director NHAI Vs. M.Hakeem** reported in (2021) 9 **SCC 1**]} to the extent of interest, State assailed this Section 34 order by preferring a Section 37 of A and C Act appeal. Sal Udyog has also filed cross appeal. Several pleas were raised including the plea that there is patent illegality on the face of the award but Section 37 Court took the view that the plea cannot be raised, as the same has not been spelt out in the



grounds in Section 34 application. The matter was carried to Hon'ble Supreme Court and Hon'ble Supreme Court in the aforementioned **Sal Udyog** principle held that once the appellant has taken the ground of patent illegality in Section 37 petition legal drill and once it has been duly noted by High Court, the High Court ought to have applied Section 34(2A) of A and C Act in testing the award, to be noted, relevant paragraph in **Sal Udyog** case law is paragraph No.24 and the same reads as follows:

'24. We are afraid, the plea of waiver taken against the appellant-State on the ground that it did not raise such an objection in the grounds spelt out in the Section 34 petition and is, therefore, estopped from taking the same in the appeal preferred under Section 37 or before this Court, would also not be available to the respondent-Company having regard to the language used in Section 34(2A) of the 1996 Act that empowers the Court to set aside an award if it finds that the same is vitiated by patent illegality appearing on the face of the same. Once the appellant-State had taken such a ground in the Section 37 petition and it was duly noted in the impugned judgment, the High Court ought to have interfered by resorting to Section 34(2A) of the 1996 Act, a provision which would be equally available for application to an appealable order under Section 37 as it is to a petition filed under Section 34 of the 1996 Act. In other words, the respondent-



Company cannot be heard to state that the grounds available for setting aside an award under sub-section (2A) of Section 34 of the 1996 Act could not have been invoked by the Court on its own, in exercise of the jurisdiction vested in it under Section 37 of the 1996 Act. Notably, the expression used in the sub-rule is “the Court finds that”. Therefore, it does not stand to reason that a provision that enables a Court acting on its own in deciding a petition under Section 34 for setting aside an Award, would not be available in an appeal preferred under Section 37 of the 1996 Act.'

6. Considering the importance of ***Sal Udyog*** case, we have delved into the facts (of ***Sal Udyog*** case law) in greater detail than we normally do, owing to declaration of law by Hon'ble Supreme Court in ***Padma Sundara Rao*** case [***Padma Sundara Rao Vs. State of Tamil Nadu*** reported in (2002) 3 SCC 533] and immense relevance of ***Sal Udyog*** principle in the case on hand. As regards placing reliance on case laws, declaration of law in ***Padma Sundara Rao*** case (Constitution Bench) is paragraph No.9 and the same reads as follows:

'9.Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is



always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in Herrington v. British Railways Board [(1972) 2 WLR 537 : 1972 AC 877 (HL) [Sub nom British Railways Board v. Herrington, (1972) 1 All ER 749 (HL)]] . Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases.'

7. Now, we would straight away plough into patent illegality ground as there is no disputation or contestation before us that it has been raised in captioned 37 appeal (though faintly). As regards patent illegality, the simple point is two lease deeds which are for five year periods and are compulsorily registrable vide Section 17(d) of 'The Registration Act, 1908' {hereinafter 'Registration Act' for the sake of brevity} have not been registered and therefore, the same cannot be looked into. Interestingly and intriguingly, this plea was raised by Global as claimant before AT. This plea was framed as an issue though not as a standalone issue but an issue that was rolled into the question of 3 years lock in period but this was taken up as Issue No.1 and Issue No.1 reads as follows:



'1. Whether the lock in period of 3 years as specified in the Deeds of Lease & Maintenance entered between the claimant and the respondent are valid in law in the absence of registration of such deeds?'

8. Issue No.1 was answered by AT in paragraph No.7.13 of the award and the same reads as follows:

'7.13 In view of the legal principles laid down by Courts, as stated above, the claimant who has accepted the lease deeds (Ex R1 and R3) and invoked several clauses in the lease deeds and relied on them in support of their case and their claim as well as for resisting the counter claims in their pleadings and evidence as pointed out earlier, cannot be permitted to repudiate and reject the same lease deeds specifying the lock in period of 3 years of lease, because as per law the claimant cannot be permitted to approbate and reprobate or accept and reject the same instruments viz., the lease deeds (Ex R1 and R3). The claimant cannot as observed by Courts, "at the same time blow hot and cold". In view of the principles of law as stated above and for the reasons stated above, it has to be held that the claimant is precluded from contending that the lock in period of 3 years specified in the lease deeds and maintenance deeds entered into between claimant and respondent is not valid in law in the absence of registration of the lease deeds. Issue No.1 is answered in the above terms against the claimant. In



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view of my finding recorded as stated above, it is not necessary to refer and deal with the decisions relied on by the learned counsel for the claimant in this regard. In view of my finding on Issue No.1 as stated above, I will proceed to consider the claims and counter claims of parties in the light of and taking into consideration all the terms and conditions in the lease deeds Ex R1 and R3, the pleadings and evidence, both oral and documentary available on records in this case. Issue No.1 is answered in the above terms.'

{Underlining made by this Court for ease of reference}

9. AT has said that Rattha cannot be permitted to repudiate and reject lease deeds after relying on same for making counter claims in their pleadings. In other words, AT rendered a finding that lease deeds (Ex.R1 and Ex.R3) not being registered do not come in the way qua looking at the same.

10. If the AT on the above basis has merely, concluded that there is jural relationship of lessor and lessee between Rattha and Global, there would be no difficulty. The reason is, Section 106 of 'The Transfer of Property Act, 1882 (4 of 1882) {hereinafter 'TP Act' for the sake of brevity} makes it clear that in the absence of a contract, lease of immovable property



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shall be deemed to be a lease from month to month (to be noted, it is nobody's case that lease of immovable property in the case on hand is either for agricultural or manufacturing purpose). The difficulty arises in a different form as AT has not stopped with saying that there is jural relationship of lessor and lessee as between Rattha and Global. AT has gone into various clauses of unregistered lease deeds (insufficiently stamped too) to answer the other issues. As an illustration, Issue No.7 reads as follows:

'7. Whether the claimant is liable to pay rent to the respondent / counter claimant for the period from February 2013 to August 2013?'

In an answering Issue No.7 (along with Issue No.4) in paragraph No.10.15, AT has held as follows:

'10.15 For all the reasons stated above, it has to be held that the claimant had offered actual vacant possession of the leased premises and expressed their readiness and willingness to hand over the keys of the lease premises to respondent upon the refund of security deposit by respondent, and it was the respondent without any justification refused to refund the security deposit and take possession of the leased premises and therefore the respondent who has committed breach of their part of reciprocal



promises specified in clause IV and VII (xi) is not entitled to claim rent for the period from Feb 2013 to August 2013. Issue No.7 is answered accordingly against the respondent.'

11. Likewise, Issue No.3 reads as follows:

'3. Whether the claimant is entitled to terminate the Deeds of Lease and Maintenance for the reason of non provision of cafeteria space?'

In answering Issue No.3, AT in paragraph No.8.20.2 has held as follows:

'8.20.2 I have found in para 8.19 for the reasons stated in the earlier paras 8.1 to 8.18 that the respondent had committed breach of the terms of the lease agreements by not providing the furnished AC cafeteria space in the basement of the building to the claimant as per the terms in the lease deeds. Therefore, consequently it has to be held that as per the last part of clause X of the lease agreements the claimant is entitled to terminate the lease agreements even during the lock in period of leases on the ground of breach of the terms of lease agreements by the respondent, not providing the cafeteria space in the basement to the claimant.'

{Underlining made by this Court for ease of reference}



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12. We refrain from going into the exhaustive list of various parts of award wherein AT has relied on various clauses of lease deeds.

13. In this judgment / order, for the sake of specificity, we clarify on a demurrer that if AT had stopped with holding that there is jural relationship of lessor and lessee as between Rattha and Global qua demised property in the light of Section 106 of TP Act, it would be a plausible view and this being a Section 37 legal drill, in the light of ***Ssangyong*** principle [***Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India*** reported in (2019) 15 SCC 131] we would not interfere. As AT has relied on various clauses of unregistered lease deeds, we are looking into patent illegality. We are acutely conscious that Evidence Act, 1872 and 'the Code of Civil Procedure, 1908 (5 of 1908)' [hereinafter 'CPC' for the sake of brevity, convenience and clarity] do not apply to arbitral proceedings before AT owing to Section 19 of A and C Act. The point is not one of being inadmissible as evidence but it is one of looking into a document that is compulsorily registrable when it is not registered and insufficiently stamped. Though insufficiency qua stamp is



curable, non-registration is not and therefore, looking into such a document would tantamount to patent illegality being opposed to fundamental policy of Indian Law. To be noted, Sections 17 and 49 of Registration Act read as follows:

Section 17 of Registration Act :

'17. Documents of which registration is compulsory.—(1)

The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866 (XX of 1866), or the Indian Registration Act, 1871 (VIII of 1871), or the Indian Registration Act, 1877 (III of 1877), or this Act came or comes into force, namely:—

- (a) instruments of gift of immovable property;*
- (b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;*
- (c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and*



(d) leases of immovable property from year to year, or for any term exceeding one year; or reserving a yearly rent;

1[(e) non-testamentary instruments transferring or assigning any decree or order of a Court or any award where such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property:]

[(f) instruments of agreement relating to construction of building as referred to in clause (i) under Article 5 of Schedule I to the Indian Stamp Act, 1899 (Central Act II of 1899);

(g) instruments of agreement relating to sale of immovable property of the value of one hundred rupees and upwards;

(h) instruments of Power of Attorney relating to immovable property other than those executed outside India;

(i) instruments evidencing an agreement relating to the deposit of title deeds:]

Provided that the 2[State Government] may, by order published in the Official Gazette, exempt from the operation of this sub-section any leases executed in any district, or part of a district, the terms granted by which do not exceed five years and the annual rents reserved by which do not exceed fifty rupees.

[(1-A) The documents containing contracts to transfer for consideration, any immovable property for the purpose of Section 53-A of the Transfer of Property Act, 1882 (4 of 1882) shall be



registered if they have been executed on or after the commencement of the Registration and Other Related laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, then, they shall have no effect for the purposes of the said section 53-A.]

(2) Nothing in clauses (b) and (c) of sub-section (1) applies to—

(i) any composition deed; or

(ii) any instrument relating to shares in a joint stock Company, notwithstanding that the assets of such Company consist in whole or in part of immovable property; or

(iii) any debenture issued by any such Company and not creating, declaring, assigning, limiting or extinguishing any right, title or interest, to or in immovable property except in so far as it entitles the holder to the security afforded by a registered instrument whereby the Company has mortgaged, conveyed or otherwise transferred the whole or part of its immovable property or any interest therein to trustees upon trust for the benefit of the holders of such debentures; or

(iv) any endorsement upon or transfer of any debenture issued by any such Company; or

(v) 1[any document other than the documents specified in sub-section (1-A)] not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immovable property, but merely creating a right to obtain another document which will,



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when executed, create, declare, assign, limit or extinguish any such right, title or interest; or

(vi) any decree or order of a Court 2[except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding]; or

(vii) any grant of immovable property by the Government; or

(viii) any instrument of partition made by a Revenue Officer; or

(ix) any order granting a loan or instrument of collateral security granted under the Land Improvement Act, 1871 (XXVI of 1871), or the Land Improvement Loans Act, 1883 (XIX of 1883); or

(x) any order granting a loan under the Agriculturists, Loans Act, 1884 (XII of 1884), or instrument for securing the repayment of a loan made under that Act; or

[(xa) any order made under the Charitable Endowments Act, 1890 (VI of 1890), vesting any property in a Treasurer of Charitable Endowments or divesting any such Treasurer of any property; or]

(xi) any endorsement on a mortgage-deed acknowledging the payment of the whole or any part of the mortgage-money, and any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage; or

(xii) any certificate of sale granted to the purchaser of any property sold by public auction by a Civil or Revenue Officer.

*[***]*

(3) Authorities to adopt a son, executed after the 1st day of



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January, 1872, and not conferred by a Will, shall also be registered.'

Section 49 of Registration Act :

'49. Effect of non-registration of documents required to be registered.—No document required by section 17 1[or by any provision of the Transfer of Property Act, 1882 (IV of 1882)], to be registered shall—

- (a) affect any immovable property comprised therein, or*
 - (b) confer any power to adopt, or*
 - (c) be received as evidence of any transaction affecting such property or conferring such power,*
- unless it has been registered:*

*1[Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (IV of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (I of 1877) 2[***] or as evidence of any collateral transaction not required to be effected by registered instrument.]'*

14. Before we proceed further, we need to look at patent illegality ground that has been projected before us by protagonist of captioned appeal.

The award is dated 03.10.2015 which is prior to 23.10.2015. This means

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that there was no sub-section (2A) of Section 34 of A and C Act when the award was made. In other words, patent illegality was not codified as one of the grounds of challenge qua an arbitral award i.e., challenge vide Section 34 of A and C Act. This further means that patent illegality was available as a ground vide **Saw Pipes** principle i.e., **Oil and Natural Gas Corporation Ltd., Vs. Saw Pipes Ltd.**, reported in (2003) 5 SCC 705. In **Saw Pipes** principle, on facts, ONGC which is a public sector undertaking had floated a tender and saw pipes which is engaged in the business of supplying equipment of offshore oil exploration succeeded in the bid as regards contract for supply of casing pipes of certain specified diameter. The dispute was that equipments were not supplied within the agreed time. This thumbnail sketch of facts qua **Saw Pipes** case law will suffice. As regards patent illegality, which was added as a ground of challenge to an Arbitral Award, relevant paragraph is paragraph No.31 of **Saw Pipes** principle and the same reads as follows:

'31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the



public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term “public policy” in Renusagar case [1994 Supp (1) SCC 644] it is required to be held that the award could be set aside if it is patently illegal. The result would be — award could be set aside if it is contrary to:

- (a) fundamental policy of Indian law; or*
- (b) the interest of India; or*
- (c) justice or morality, or*
- (d) in addition, if it is patently illegal.*

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.'

15. Therefore, proviso to Section 34(2A) of A and C Act was not



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available. On a demurrer, even if we take it that we are testing the award in this Section 37 legal drill by applying obtaining legal position today as the ground of patent illegality has been raised for the first time before this 37 Court, we are of the considered view that proviso does not preclude us from applying patent illegality test because the aforementioned approach of AT in relying on various clauses / covenants 'para and verse' {'para and verse' in every sense of the expression} of unregistered five year lease deeds cannot pass muster as a 'mere' erroneous application of law. On the contrary, it is erroneous application of law which goes to the root of the matter as the foundational dispositive reasoning of the entire award is various clauses / covenants of unregistered five year lease deed.

16. Mr.C.T.Mohan, learned Senior Counsel, instructed by Mr.B.Sudarshan, counsel on record for Global drew our attention to a recent judgment of Hon'ble Supreme Court in a curative petition vide Arbitration Petition No.25 of 2023 (judgment dated 13.12.2023). Learned Senior Counsel placed before us a download from official website of Hon'ble Supreme Court (Neutral Citation : 2023 INSC 1066). We are also aware



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that this judgment has been reported in 2023 SCC Online SC 1666. We are mentioning this as some times there are differences in paragraph numbers.

As regards download from official website of Hon'ble Supreme Court, Neutral Citation : 2023 INSC 1066, our attention was drawn to paragraph No.198 which reads as follows:

'198. With regard to the first issue, the Court analysed Section 49 of the Registration Act. Section 49 of the Registration Act provides that an unregistered document cannot be received as evidence of any transaction affecting such property or conferring such power unless it has been registered. However, the proviso to Section 49 provides that an unregistered instrument can be used as evidence of any collateral transaction not required to be effected by such instrument. In view of the aforesaid provision, this Court held that an arbitration agreement contained in an unregistered instrument is a collateral term relating to the resolution of disputes, which was unrelated to the performance of the contract. Therefore, it was held that an arbitration agreement contained in an unregistered but compulsorily registerable document can be acted upon and enforced for the purpose of dispute resolution by arbitration.'

17. We are of the view that the aforementioned curative petition order



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does not save the day for Global for more than one reason. The first reason is, the curative petition order was on the question of what happens to arbitration agreement which is in the form of a clause in a deed which is otherwise registrable or in a deed which is insufficiently stamped. This issue starts from a long line of authorities starting from ***SMS Tea Estates Private Limited*** case reported in ***(2011) 14 SCC 66*** but in earlier proceedings vide paragraph No.5 (earlier part of this order) we have already made it clear that this question does not arise as the arbitration agreement in the case on hand is by way of a separate agreement dated 10.09.2013 and there is no dispute or contestation of any kind as regards this standalone arbitration agreement. In any event, ***SMS Tea Estates Private Limited*** case rendered on 20.07.2011, travelled via ***Garware Wall Ropes Limited*** case reported in ***(2019) 9 SCC 209*** (rendered on 10.04.2019), ***Vidya Drolia*** case [***Vidya Drolia & Ors. Vs. Durga Trading Corporation*** reported in ***2019 SCC OnLine SC 358***] rendered on 14.12.2020, ***N.N.Global (1)*** case reported in ***(2021) 4 SCC 379*** rendered on 11.01.2021, ***N.N.Global (2)*** case reported in ***(2023) 7 SCC 1*** rendered on 25.04.2023 and culminated in the curative petition order rendered on 13.12.2023 vide ***N.N.Global (3)*** case reported in



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(2023) SCC OnLine SC 1666. Thereafter, there is a report of an expert committee of Dr.T.K.Viswanathan wherein, the principle in curative petition can be codified by way of Section 7-A (report dated 22.08.1996) is the recommendation. In the curative petition, Hon'ble Supreme Court has held that ***SMS Tea Estates*** case and ***Garware Wall Ropes*** case are not good law, upheld ***N.N.Global (1)*** principle and said even if it is not sufficiently stamped, it is for the Arbitral Tribunal to look into it. Under Sections 33 and 35 of Stamp Act, 1899, insufficiently stamped document is only a curable irregularity and not an illegality was reiterated is the further part of the ratio. As regards ***N.N.Global (2)*** case law, it was made clear that such a document is not void and it is only inadmissible. Therefore, the curative petition order is on entirely different context and ***SMS Tea Estates Private Limited*** line of authorities does not arise in the case on hand.

There is one more important reason why the curative petition order does not save the day for Global and that is proviso to Section 49 of Registration Act which says that an unregistered instrument can be used as evidence and can be looked into only for 'collateral transaction'. As regards



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what is collateral transaction, in a long line of authorities, Hon'ble Supreme Court has repeatedly held that collateral purpose qua contract is purpose which is severable completely from the main contract and stands as a standalone issue. In the case on hand, the points adverted to by AT (some illustrations {issues 3 and 7} have been extracted and reproduced supra) are straight on the lease deed, lessor and lessee relationship and disputes arising therefrom. Therefore, it cannot be gainsaid that it is collateral purpose.

18. As regards collateral purpose, this Court way back in 1997 in *Kausalya Ammal Vs. Valliammai Ammal* reported in *MANU/TN/1224/1997* has held that a unregistered lease deed can be looked into for collateral purpose. The point here is, AT has looked into two lease deeds not for collateral purpose but for the very main purposes for which lease deeds were executed. Another argument which learned Senior counsel projected was that Section 49 of Registration Act only forbids the document from being received as evidence. We are unable to agree as this is only vide Section 49(c) of Registration Act whereas Section 49(a) and 49(b) of Registration Act make it clear that no document, unless it is registered, shall confer any



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power to adopt or affect any immovable property comprised therein. Patent illegality has been elucidatively explained by Hon'ble Supreme Court in ***Saw Pipes*** case and more particularly paragraph No.31 thereof which has been extracted and reproduced supra. We find that patent illegality is a ground of challenge qua an arbitral award and definitely comes into play as the illegality goes to the root of the matter, it is not a trivial and it is opposed to fundamental policy of Indian Law. It is against the fundamental policy of Indian Law as the law mandates registration qua lease deed for a term exceeding one year is compulsorily registrable. This is vide Section 17(d) of Registration Act. To add clarity, we deem it appropriate to write that even a 99 years lease deed can be made without registration by simply adding a arbitration clause.

19. Before concluding, to be fair to the Hon'ble single Judge, we need to reiterate that the aforementioned points were not raised before Section 34 Court and therefore, this Section 37 Court setting aside Section 34 Court order is only on ***Sal Udyog*** principle i.e., on the ground that patent illegality has been projected in 37 Court for the first time. We also make it clear that



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notwithstanding very many grounds and very many averments in the appeal grounds and material in case file, the appeal was argued on the aforementioned points by both sides i.e., points which have captured supra, discussed and we have also given our dispositive reasoning on the same.

20. This will not be a precedent across the Board for all cases to say that point not raised in Section 34 Court can be raised in Section 37 Court for the first time. **Sal Udyog** principle is applied solely because case at hand is a case of patent illegality under Section 34(2A) of A and C Act. Larger public interest therefore can touch upon fundamental policy of Indian law as laid down in **Saw Pipes** principle [Paragraph No.31] because even registration of a 99 years lease of large demised property can be avoided by simply adding one arbitration clause as already alluded to supra. Illegality is patent because process of inference need not be applied. It is on the face of it. Reason is both sides agree that the two 5 years lease deeds dated 25.11.2010 and 29.09.2011 are unregistered, though under Section 17(d) of Registration Act, any lease exceeding one year is compulsorily registrable.



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21. Ergo, the sum sequitur of the narrative, discussion and dispositive reasoning thus far is that the appeal succeeds. Appeal is allowed. The consequence is impugned order of Section 34 Court being order dated 16.09.2021 in O.P.No.936 of 2015 is set aside in exercise of Section 37 legal drill and in the light of ***Sal Udyog*** principle, we also set aside the impugned award being award dated 03.10.2015 in Arbitration Case No.1 of 2013. Consequently, captioned CMP is closed. There shall be no order as to costs.

22. Though obvious, when an award is set aside, the consequence is re-arbitration vide ***Mcdermott*** case [***Mcdermott International INC Vs. Burn Standard Co. Ltd., and others*** reported in (2006) 11 SCC 181]. Though it tantamounts to stating the obvious, if the respondent choses to go for re-arbitration without assailing this order, AT can always resort to promoting settlement by applying Section 30 of A and C Act. We deem it appropriate to mention the consequence and also refer to Section 30 of A and C Act as it was indicated towards the end of the hearing that there is hope for exploring the possibility of a settlement. In other words, but for this submission, we would have refrained from writing this consequence



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paragraph.

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(M.S.,J.) (K.G.T.,J.)
24.06.2024

Index : Yes
Speaking order
Neutral Citation : Yes
mk

To
The Sub-Assistant Registrar
Original Side
High Court, Madras.

M.SUNDAR, J.,
and
K.GOVINDARAJAN THILAKAVADI, J.,

mk

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