

**In the High Court at Calcutta
Civil Appellate Jurisdiction
Appellate Side**

**The Hon'ble Justice Sabyasachi Bhattacharyya
And
The Hon'ble Justice Uday Kumar**

F.M.A.T. No. 57 of 2021

**Star Track Agency Private Limited
Vs.
Efcalon Tie Up Private Limited**

For the appellant	:	Mr. Anindya Kumar Mitra, Mr. Zeeshan Haque, Mr. Chunky Agarwal, Ms. Abhismita Goswami, Mr. Ram Maroo
For the respondent	:	Mr. Sabyasachi Chowdhury, Mr. Mainak Bose, Mr. Siddhartha Banerjee, Mr. Dwipayam Basu Mullick, Mr. Naman Chowdhury, Mr. Rajesh Upadhyay, Mr. Akshay Jain Sukhani
For the Kolkata Port Trust	:	Mr. Ashok Kumar Jena
Heard on	:	03.03.2025, 06.03.2025, 13.03.2025, 25.03.2025, 26.03.2025, 27.03.2025
Hearing concluded on	:	07.04.2025
Judgment on	:	22.04.2025

Sabyasachi Bhattacharyya, J.:-

1. The present appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (for short, "the 1996 Act") has been preferred against a

judgment passed by the Commercial Court at Alipore under Section 34 of the said Act, affirming an interim award dated July 15, 2017, subsequently amended on July 22, 2017, passed by the learned Arbitrator in A.P. No.595 of 2016.

2. The genesis of the dispute is an agreement dated December 26, 2004, purporting to create a license between the parties, namely Star Track Agency Private Limited and Efcalon Tie Up Private Limited. The purported licensee, namely Star Track (the present appellant) had previously referred the matter to arbitration, seeking to cancel the said agreement. In the said proceeding, the purported licensor Efcalon had filed a counter claim seeking recovery of possession, arrears of license fees and other consequential reliefs.
3. The previous learned Arbitrator disposed of the said proceeding by declaring the agreement dated December 26, 2004 null and void and directing it to be delivered up to and cancelled, as well as passing an award of Rs.1,51,44,208/- to be paid by Efcalon to the claimant along with simple interest at the rate of 15 per cent per annum from the date on which the respondent had realized the amount to the date of refund, with costs of arbitration assessed at Rs.1,00,000/-.
4. The said award was challenged under Section 34 and thereafter under Section 37 of the 1996 Act, which culminated in a Division Bench judgment of this Court allowing the challenge, thereby setting aside the award, *inter alia* with the observation that the present appellant Star Track could not be permitted to stay in possession without paying occupation charges.

5. Thereafter, Efcalon sought to initiate a fresh arbitral proceeding seeking recovery of possession and consequential reliefs against Star Track. Upon the parties being unable to agree upon an Arbitrator, an application under Section 11 of the 1996 Act was preferred, which was decided, thereby appointing the present learned Arbitrator. In connection with the dispute, there was a previous order passed under Section 9 of the 1996 Act as well.
6. Upon the matter being referred to arbitration for the second time, an application under Section 31(6), for interim award of recovery of possession, was also made by the claimant Efcalon, which was initially decided by the interim award dated July 15, 2017, whereby the prayers made in paragraph 39, sub-paragraphs A, B, C, D, E, F and G of the Statement of Claim were allowed in their entirety. Subsequently, the initial interim award was amended *vide* the corrected award dated July 22, 2017, restricting the interim award only to eviction in terms of the prayers made under Section 31(6) of the 1996 Act.
7. Being thus aggrieved, a challenge was preferred by Star Track under Section 34 of the 1996 Act, which met with dismissal on contest on January 5, 2021, being aggrieved by which the interim award debtor Star Track has preferred the present appeal under Section 37 of the 1996 Act.
8. Learned senior counsel appearing for the appellant argues that the learned Arbitrator committed a perversity and acted contrary to the provisions of Section 28(3) of the 1996 Act, which mandates the

Arbitrator to adhere to the terms of the contract between the parties, by culling out Clauses H and I, and a part of Clause 4 of the habendum clause of the agreement arbitrarily, and passed the impugned interim award on the basis of the same, without appreciating the legal effect of the rest of the agreement in its entirety.

9. Furthermore, the learned Arbitrator, it is alleged, passed his interim award merely on the finding that counsel for the claimant rightly referred to only the said clauses, without adverting to the merits of the case as such and/or deciding specifically whether the agreement-in-question created a lease or a licence between the parties. Accordingly, the award is hit by contravention of Section 31(3) of the 1996 Act, which mandates the Arbitrator to assign reasons for the award.
10. Learned senior counsel appearing for the appellant next takes the court through several clauses in the agreement to argue that the same created a lessor-lessee relationship between the parties, in spite of the nomenclature of the agreement as one for “licence”, which term, by itself, is immaterial.
11. It is argued that Clauses 1 and 2 of the agreement, read together, provide that the lease was created for a period of six years and, as such, was not determinable at will prior to the said period, unlike a licence.
12. Clauses 14 and 16 of the agreement confer exclusive possession on the present appellant, whereas Clauses 2, 5, 6 and 7, read with Clause 11, create rights of making addition and alteration as well as to raise construction on the property in favour of the appellant/lessee.

13. Clause 14 clearly of the agreement, it is contended, provides for an advance notice of 3 months before terminating the *jural* relationship between the parties, which goes on to show that such *jural* relationship was a lease and not a licence.
14. Also, the very preamble and description of the parties in the agreement provide that the rights under the agreement were assignable and would devolve on the successors-in-interest of the parties, which can only happen in respect of a lease and not a licence.
15. Learned Senior Counsel places reliance on the judgment of *Associated Hotels of India Ltd. v. R. N. Kapoor*, reported at AIR 1959 SC 1262 and *Sohan Lal naraindas v. Laxmidas Raghunath Gadit*, reported at (1971) 1 SCC 276 in support of his argument regarding exclusive possession being an indicator of creation of a lease.
16. In connection with the ‘prior notice’ argument, learned senior Counsel cites *Pradeep Oil Corporation v. Municipal Corporation of Delhi and another*, reported at (2011) 5 SCC 270.
17. Learned Senior Counsel appearing on behalf of the interim award debtor/appellant next argues that the agreement for lease was compulsorily registrable under Section 107 of the Transfer of Property Act as well as the provisions of the Registration Act. Under Section 2(7) of the Registration Act, even if the agreement is an agreement “to lease”, as opposed to an agreement “for lease”, the same is compulsorily registrable.
18. Learned Senior Counsel also places reliance on *Avinash Kumar Chauhan v. Vijay Krishna Mishra*, reported at (2009) 2 SCC 532 and

Hasham Abbas Sayyad v. Unsman Abbas Sayyad and others, reported at (2007) 2 SCC 355 in support of the proposition that the court/Arbitrator cannot look into inadmissible evidence.

19. Learned Senior Counsel next submits that even if the defect regarding inadequate stamping of the document might have been arguably cured, the defect as to non-registration could not be, for which proposition counsel cites *K.B. Saha and Sons Private Limited v. Development Consultant Limited*, reported at (2008) 8 SCC 564. Learned Senior Counsel next relies on *Kotamreddi Seetamma v. Vennelakanti Krishnaswamy Row and another*, reported at AIR 1917 Mad 718 where it was held that registration under the 1908 Act is a matter of public policy.
20. It is argued that the Learned Arbitrator, while passing the impugned award, relied on Clauses 1 and 2 of the agreement to say that the period of six years has expired and as such looked into the agreement, which was inadmissible in evidence, contrary to law.
21. Learned Senior Counsel appearing for the interim award debtor/appellant next argues that although it has been the consistent case of the award holder Efcalon that Star Track, the award debtor, is required to give up possession in view of its stand that the agreement was a nullity, by taking resort to Sections 64 and 65 of the Indian Contract Act, such stand, despite being pleaded by Star Track, was neither proved nor argued by Star Track, the appellant in the second and current arbitral proceeding at any point of time. Even the learned Arbitrator, while passing the impugned interim award, proceeded on an

assumption that “even if” the award debtor contends that the agreement is void *ab initio* it was duty-bound to restore possession obtained in terms of the void agreement, and did not record that such argument was actually advanced by the appellant during its submissions. Thus, in the absence of the appellant arguing such point and/or the agreement being actually declared null and void, the award holder's argument regarding the possession being required to be delivered on the strength of Sections 64 and 65 of the Contract Act is not tenable in law.

- 22.** Moreover, since the impugned interim award was not passed on the ground of Sections 64 and 65 of the Contract Act, no such new ground can be taken for the first time under Section 34 or Section 37 of the 1996 Act, more so since Section 34 is not a regular appeal and Section 37 is still more restrictive.
- 23.** Learned senior counsel appearing for the appellant controverts the arguments of the respondent Efcalon that the second arbitral proceeding is a continuation of the first, on several counts. First, such an argument would be contrary to Section 32 of the 1996 Act, which terminates an arbitral proceeding on the passing of a final award, which happened in the case of the first arbitral proceeding. Moreover, the provisions of Section 29-A of the 1996 Act, which were introduced in the 1996 Act with effect from October 13, 2015, would then be applicable, since the reference under Section 11 of the 1996 Act was made on August 2, 2016, after the said amendment to the 1996 Act.

The effect thereof would be that the mandate of the Arbitrator would stand expired in view of Section 29-A.

- 24.** That apart, there are no pleadings or finding regarding the second arbitral proceeding being a continuation of the first, and it is a new case being sought to be made out before this court.
- 25.** Again, the counter claims of Efcalon were not pressed in the first arbitral proceeding. As such, if the present proceeding be deemed to be a continuation of the first, the award holder Efcalon is estopped from seeking eviction.
- 26.** Furthermore, the claims made in the two arbitral proceedings were different in several respects. Whereas monthly rent was claimed in the first proceeding up to January 31, 2011, in the second proceeding, it was claimed from October 1, 2010 to February 13, 2011, the purported date of termination of lease being the date of the notice under Section 106 of the Transfer of Property Act, that is, January 28, 2011. Secondly, damages claimed in the first proceeding were till October 31, 2011, whereas in the second proceeding, liquidated damages as per Clause 16 of the agreement was claimed from February 14, 2011 till November 17, 2011.
- 27.** Thirdly, *mesne profits* were claimed in the first proceeding from November 18, 2011 till recovery whereas in the second, it was claimed from November 1, 2011, as the agreement expired on October 31, 2011. Fourthly, interest was claimed in the first proceeding at the rate of 18 per cent per annum whereas in the second, at the rate of 24 per cent per annum with quarterly rests.

- 28.** Hence, as the second proceeding is not a continuation of the first, it could not be said that the award debtor Star Track waived its right to object to the agreement being insufficiently stamped by virtue of no such objection being taken in the first proceeding.
- 29.** Learned Senior Counsel further points out that since a fresh notice under Section 21 of the 1996 Act was issued for the second reference, which was recorded in the order dated August 2, 2016, passed under Section 11 of the 1996 Act, and there was no transposition of the parties between the first and the second proceedings, it also cannot be argued that the second proceeding was a mere continuation of the first. Such position, it is argued, is all the more strengthened by the fact that under Section 11 of the 1996 Act, a new Arbitrator was appointed in accordance with the Fourth Schedule of the amended 1996 Act, which is a new appointment for all practical purposes.
- 30.** Learned senior counsel for the appellant next contends that if the *jural* relation between the parties is claimed to be a month-to-month tenancy, it would be *de hors* the agreement and would flow from the statute. As the arbitration clause in the agreement pertains to the interpretation of the clauses of the agreement, the reliefs claimed before the Arbitrator would then go beyond the pale of the agreement, including the arbitration clause. Hence, the claim would not be arbitrable at all if such a stand of monthly tenancy is taken by the award holder/respondent.
- 31.** Citing *Paul Rubber Industries Private Limited v. Amit Chand Mitra and Another*, reported at (2023) SCC OnLine SC 1216, it is argued that if

monthly tenancy is created *de hors* the agreement, such unregistered instrument cannot be looked into even for the determination of the terms of the tenancy. Thus, it is argued that the impugned interim award was perverse and patently contrary to law and as such, ought to be set aside.

- 32.** Learned senior counsel for the award holder/respondent/Efcalon argues that even if the *jural* relationship of monthly tenancy flows from statute and not from the unregistered agreement, it is well-settled that the arbitration clause is severable from the rest of the agreement for the purpose of determining the consensus of the parties to submit their disputes to arbitration.
- 33.** Secondly, it is argued that the appellant Star Track admits the existence of the agreement and claims possession by virtue of the same. It also admits having paid license fee in terms of the agreement till September, 2010. Thus, the appellant cannot traverse beyond the agreement at this juncture.
- 34.** Section 116 of the Evidence Act, which was applicable at the relevant juncture, is also attracted, estopping the award debtor from disputing the title of the respondent.
- 35.** In the Section 11 proceeding, the award debtor admitted a valid arbitration agreement and subsisting arbitrable disputes. The order passed therein was upheld up to the Supreme Court and, as such, has attained finality. Thus, it is argued that the arbitrability of the disputes cannot now be challenged by the appellant.

- 36.** It is argued by learned senior counsel for the respondent that the provisions of Section 37 of the 1996 Act are stricter than Section 34 of the said Act and while exercising such jurisdiction, the court does not exercise normal appellate jurisdiction. Thus, no grounds having been made out under Sections 34 and 37, the present challenge should be dismissed.
- 37.** Learned senior counsel for the award debtor next moves on to the issue admissibility of the lease agreement in evidence. Counsel cites *N.N. Global Mercantile Private Limited v. Indo Unique Flame Limited and others*, reported at (2021) 4 SCC 379 as well as *Interplay between Arbitration Agreements under Arbitration and Conciliation Act, 1996 and Stamp Act, 1899, In Re*, reported at (2024) 6 SCC 1 to argue that in terms of Section 35 of the Indian Stamp Act, a compulsorily registrable document, if unregistered, would at the most be inadmissible in evidence and not a *void* document. Such defect is curable by the provisions of the Indian Stamp Act itself.
- 38.** It is next argued that since the appellant Star Track did not raise the objection as to insufficient stamp and/or non-registration of the concerned lease agreement in the previous arbitral proceeding, but itself invoked the arbitration clause in the agreement, the appellant is now estopped from taking the plea that the agreement was erroneously looked into by the Arbitrator.
- 39.** Learned senior counsel appearing for the respondent next contends that the mere argument of inadmissibility of the agreement in evidence is immaterial, since the appellant itself was admittedly put in

possession of the disputed property in terms of the agreement and paid license fees in terms thereof. The possession itself having been rendered unlawful, it is open to the respondent/award holder to seek eviction on the basis of the admitted facts.

- 40.** Moreover, it is well-settled that even if a lease deed is unregistered, month-to-month tenancy shall be inferred, thus rendering the non-registration of the agreement merely academic.
- 41.** The appellant argues that the finding in the first arbitral award that the agreement was null and void was not specifically set aside in the previous round of litigation under Section 34 and thereafter under Section 37 of the 1996 Act, as it was only observed by the Appellate Court that the present award debtor was not entitled to remain in possession without paying occupation charges. Learned senior counsel for the respondent, however, contends that such argument of the appellant is entirely unfounded. It is submitted that the first award was set aside in its entirety, irrespective of the observations made while doing so.
- 42.** Although the previous counter claim was not pressed, it is submitted that there is no bar in seeking eviction on the same cause of action in a subsequent proceeding.
- 43.** Lastly, learned senior counsel for the respondent argues that the present award debtor/appellant has pleaded that the agreement is a nullity and is thus subject to Sections 64 and 65 of the Contract Act not only in its amended Statement of Claim in the first arbitral proceeding but also in its Statement of Defence and affidavit-in-

opposition to the application under Section 31(6) in the second arbitral proceeding. In view of such consistent claim throughout, it is incumbent on the appellant, in any event, to restore the benefits, including possession, obtained under the agreement sought to be rescinded/denied under Sections 64 and 65 of the Contract Act.

- 44.** Upon considering the arguments of the parties, the issues involved in the present adjudication boil down to a few cardinal questions, which are decided as follows:

Lease or license

- 45.** One of the plinths of the appellant's arguments is that the learned Arbitrator relied on Clause 4 of the agreement-in-question in truncated form and only considered Clauses H and I, without looking at the legal effect of the other clauses of the agreement, to come to the erroneous finding that the agreement evidences a license, and not a lease.
- 46.** Clauses H and I as well as Clause 4 (in its entirety) of the agreement are set out below:

"H. Although in terms of the said order the licensor duly paid the entire arrears of lease rent to the Kolkata Port Trust, it has not yet renewed the lease of the said premises as directed by the order dated 1st December, 2004. Even without the lease being formally renewed in terms of the order dated 1st December, 2004, the licensor has been and continues to be in possession and occupation of the said premises, having been put in possession thereof by the Official Liquidator at the time of delivery of the structures, plant and machinery lying at the said premises to the licensor;

I. In the absence of a formal renewal of the lease, upon being approached by the licensee for the grant of a sub-lease of the said premises, the licensor has instead agreed to grant it a license in respect thereof for a fixed terms of 6 years commencing from 1st August, 2005

on the terms and conditions contained herein, which have in turn been agreed upon by the licensee.

...

4. *It in the meantime if the lease of the said premises is formally renewed by the Kolkata Port Trust in favour of the licensor, it will negotiate the grant of a sub-lease of the said premises to the licensee on the same terms and conditions of this agreement and, will grant such sub-lease in its favour, whereupon the license granted hereby shall automatically come to an end."*

- 47.** A composite reading of the above clauses leaves no manner of doubt regarding the intention of the parties to create a licence, as opposed to a lease. As per the said clauses, the Kolkata Port Trust (KoPT), the superior landlord under which the award holder Efcalon was a lessee, had not yet renewed the lease of the premises at the juncture when the present disputed agreement dated December 26, 2004 was entered into.
- 48.** In such circumstances, even without the lease being formally renewed in terms of an order of court dated December 1, 2004, it was admitted that the licensor had been and continued to be in possession and occupation of the premises and, in the absence of a formal renewal of the lease, upon being approached by the licensee for grant of a sub-lease of the premises, the licensor had *instead* agreed to grant it a *license* in respect thereof.
- 49.** Again, it was assured in Clause 4 of the agreement that if in the meantime the lease of the premises was formally renewed by the Kolkata Port Trust in favour of the licensor, it would *negotiate* the grant of a sub-lease of the premises to the licensee on the same terms and

conditions of the agreement and would grant such sub-lease in its favour, whereupon the license granted by the disputed agreement would automatically come to an end. The crystal-clear provisions as discussed above indicate unerringly that in view of the lease of the licensor itself having not been renewed at that point of time by the superior landlord, it was not possible to grant a sub-lease of the premises to the licensee, for which only a license was being granted instead of a sub-lease.

- 50.** Furthermore, the grant of a sub-lease, even after the lease of the licensor was subsequently renewed by the superior landlord, would not be an automatic affair, since Clause 4 provided that the licensor would *negotiate the grant of a sub-lease* even thereafter. The expression “negotiate” denudes the prospective assurance to grant a sub-lease of certainty but leaves it to further negotiation between the parties.
- 51.** Moreover, the abovementioned clauses of the agreement themselves clearly indicate that a sub-lease might only be prospectively granted, whereupon the licence, which was being currently granted, would automatically end. Hence, it was a licence which was being created, which would end only in the event a sub-lease was created subsequently.
- 52.** It is nobody’s case that any such sub-lease was subsequently created. Rather, the appellant relies on the license agreement itself to argue that the same partook the character of a lease.

- 53.** Also, there arose no question of any lease being lawfully granted by the disputed instrument in any event, since the licensor itself did not have a valid lease in its favour at the relevant juncture.
- 54.** The learned Arbitrator, thus, was perfectly justified in relying on the said clauses alone to derive the intention of the parties. Nothing was left to imagination for the learned Arbitrator to take resort to further internal aids in the instrument to interpret it. In view of the clear intention of the parties being derivable from Clauses H, I and 4, the purported legal effect of the other clauses would merely be an idle academic exercise.
- 55.** It is a well-settled rule of construction of documents that if, on a plain reading, the clear intention of the parties can be gathered, the literal rule of interpretation is applicable and there would not be any further scope of resorting to internal or external aids of interpretation.
- 56.** Even if Clause 4 is read as a whole and not in a “truncated” form as alleged by the appellant, the rest of the Clause provides that a sub-lease would be granted on the same terms and conditions of the disputed agreement. Nothing would hinge on the same, since a prospective and possible grant of sub-lease would not convert the present agreement into a lease deed; rather, such expression all the more substantiates the claim of the award holder that the disputed agreement created a mere licence in the interregnum, before a sub-lease was actually entered into, which was never done ultimately.
- 57.** The appellant argues vociferously that the inclusion of assignees and successors-in-interest in the definition of “licensor” and “licensee” in

the agreement makes it a lease deed. However, the fallacy in the said argument is that, in the same breath, it is mentioned that the expressions would so mean “unless excluded by or repugnant to the subject or context”. The said rider, read in conjunction with Clauses H, I and 4, clearly nullifies the inclusion of assignees and successors within the definitions of licensor and licensee and as such, any reliance on the said expressions would be illusory in the context.

- 58.** The mere right to make addition and alteration or construction given to the licensee under the agreement does not *per se* alter the character of a license to a lease. There is no bar in law for a licensee to be conferred with ancillary powers of making addition and alteration to give proper effect to the purpose of the license and for full utilization and enjoyment of the license.
- 59.** Similarly, merely because the grant of the license is for a term of 6 years, it does not automatically become a lease. There are very few licence agreements which categorically stipulate that the license is to operate on a day-to-day basis. There would be no end to such logic, since the continuance of a licence is a flow, arising from moment to moment, and any arbitrary imposition of discrete intervals in mentioning the period of license might then be construed to create a lease as opposed to a license. By way of explanation, even if a licence is created from day to day, it can conceivably be argued that since exclusive possession is granted for a day, the *jural* relationship loses the character of a license and is crystallized into a daily lease.

- 60.** Hence, the mere fixation of a term of the licence for six years does not automatically make it a lease and the other relevant and key provisions of the instrument creating the legal relationship are to be looked into for construing the intention of the parties.
- 61.** Just because the license is given for a certain period does not debar the licensor to revoke it earlier, if the jural relationship otherwise satisfies the characteristics of a license and the intention of the parties was to create a license, and not a lease, as in the present case.
- 62.** Much stress has also been laid by the appellant on the prior notice period of three months stipulated in Clause 16 of the agreement. However, in the self-same clause, there is also a provision that the parties may terminate the licence without such notice. If such act is done by the licensor, the licensee would have to deliver up vacant possession after the expiry of the notice period otherwise stipulated.
- 63.** We cannot be unmindful of the fact there is a distinction between a breathing period being given for vacating a premises after termination of license and a statutory notice period being incorporated in the agreement. Since the licence fees, in any event, exceed the limits of the governing Rent Control law, that is, the West Bengal Premises Tenancy Act, 1997, even if the jural relationship between the parties was to be construed to be a lease, it would be governed by the Transfer of Properties Act, which stipulates 15 days' notice under Section 106 of the said Act. Thus, Clause 16 of the agreement does not provide for a notice period in consonance with the Transfer of Property Act; if it was, it still might have been argued that the notice contemplated therein

was intended by the parties to be a statutory notice period befitting a lease under the governing statute, lending the colour of a lease to the jural relationship between the parties.

- 64.** Again, Clause 16 has to be read conjointly with the immediately preceding clause, that is, Clause 15 which provides that the licensor and/or its representatives may at any time enter the said premises for any purpose whatsoever. Although there is a rider that the licensor shall not in the course thereof interfere with or disturb the licensee's possession and enjoyment of the property or the activities of the licensee, nonetheless, the unfettered right of the licensor to enter the premises at any given moment of its choice for any purpose whatsoever negates the concept of exclusive possession.
- 65.** As per Clause 15, the only thing that the licensor would be precluded from doing is to dispossess the licensee then and there and/or disrupt the activities of the licensee carried on therein. However, in any event, even a licensee cannot be evicted without due process of law and as such, the restriction to the extreme step of dispossession cannot by itself lend exclusivity to the character of the possession.
- 66.** Hence, Clause 15, read with Clause 16 of the agreement, clearly denotes that exclusive possession was never vested with the licensee but the licensor retained with itself and its representatives the unfettered right to enter the premises at any given point of time and for whatever purpose, hitting at the very root of the exclusivity of possession urged by the appellant.

- 67.** In the light of the above interpretations, the proposition laid down in *Pradeep Oil Corporation (supra)* becomes redundant in the context of the present case.
- 68.** Thus, even a comprehensive reading of the other clauses of the agreement-in-question, apart from Clauses H, I and 4, show that there is nothing clinching to indicate that the specific intention of creating a licence as expressed in the said three clauses, was shaken by any of the other clauses of the instrument. Accordingly, the mere fact that the learned Arbitrator did not specifically mention or discuss the other clauses of the agreement while passing the impugned interim award does not vitiate the said award in any manner, simply because nothing would hinge on such an exercise in so far as the outcome of the impugned adjudication is concerned.
- 69.** Viewed from such perspective, there cannot be any manner of doubt that the *jural* relationship created between the parties by the agreement was one of licence and, in the absence of a case having been made out by either party that the license came to an end upon a sub-tenancy being created subsequently in terms of Clause 4 of the agreement, the relationship remained a licence all through.
- 70.** The reliance of the appellant on the proposition laid down in *Union of India and another v. Sanghu Chakra Hotels P. Ltd.*, reported at (2008) 3 Arb.LR 255, is misplaced, since the learned Arbitrator did not arrive at mutually contradictory and destructive findings. Rather, the nature of findings of the learned Arbitrator was in the alternative. Keeping on balance all the questions which had arisen before him, the learned

Arbitrator proceeded on the premise that, whether viewed from the perspective of a monthly tenancy or a licence, in both cases, the possession of the award debtor had been rendered unlawful.

- 71.** If it was to be construed that the legal relationship between the parties was a month-to-month tenancy due to the absence of a registered lease agreement, the same had been terminated by a valid notice under Section 106 of the Transfer of Properties Act. If, on the other hand, it was a licence, the self-same notice, irrespective of the caption, would operate to revoke the licence. Even otherwise, the initiation of a proceeding for recovery of possession itself is sufficient notice in law for the purpose of evicting a licensee. Hence, such consideration by the learned Arbitrator of the alternative propositions involved, and the act of the learned Arbitrator in arriving at a finding that the award holder was entitled to an interim award of eviction either way, does not constitute “inconsistent” findings against the public policy.
- 72.** Also, the non-consideration of the other clauses of the contract than Clauses H, I and 4 cannot be said to be of any impact which would vitiate the impugned interim award for non-consideration of such clauses within the ambit of Section 28(3) of the 1996 Act. Thus, the proposition laid down in the cases of *State of Chhattisgarh and another v. Sal Udyog Private Limited (supra)*, *South East Asia Marine Engineering and Constructions Limited (SEAMEC Limited) (supra)* and *Delhi Metro Rail Corporation Limited (supra)* are also inapplicable.
- 73.** Moreover, the judgments of *Associate Hotels of India Ltd. (supra)* and *Sohan Lal Naraindas (supra)* cannot be of any avail to the appellant,

since the very exclusivity of possession being transferred to the appellant is not established in the present case.

- 74.** However, the respondent's reliance on *Smt. Bhaiganta Bewah vs. Himmat Badyakar and Anr.*, reported at AIR 1917 Cal 498, is also not germane, since the said judgment lays stress on the effect of Section 116 of the Indian Evidence Act which precludes a lessee or a licensee from denying the title of the lessor/licensor. It was held therein that a lessee, so long as he retains possession which he obtained from a lessor, cannot, even after the expiry of the term, set up in the lessor's suit for ejectment the defence that the lessor had no title at the time the lessee was granted. We are of the opinion that the said proposition is not attracted in the instant case, since the appellant does not deny the title of the respondent/award holder at the time of grant of lease as such but contends that the document creating the lease/license itself is vitiated by operation of law.

Whether insufficiency of stamp duty and non-registration render the agreement void or inadmissible in evidence

- 75.** Two separate objections have been raised by the award debtor – insufficiency of stamp duty and non-registration of the agreement-in-issue.
- 76.** Dealing with the first objection first, the award debtor/appellant itself has claimed possession on the strength of the agreement-in-question, having categorically pleaded that it was put into possession by virtue of

the said agreement and had been paying licence fees in terms of the same.

- 77.** Hence, the appellant would turn out to be a veritable modern-day Kalidasa if it challenged the very agreement on the strength of which it claims possession.
- 78.** Yet, a legal question arises as to whether the stamp duty affixed on the instrument was insufficient. In the event the said instrument was deemed to be a document creating tenancy, it would definitely be seen as insufficiently stamped. However, in view of our above observation on the previous issue, the agreement merely created a licence and, as such, could not be construed to be insufficiently stamped.
- 79.** On the question of registration, it is settled law that if a lease is created by an unregistered instrument, the same shall be construed to be a month-to-month tenancy and would not render the lease unlawful altogether. A conjoint interpretation of Sections 105 and 107 of the Transfer of Property Act supports such contention as well. Hence, whether the jural relationship between the parties is a licence or a monthly tenancy, the agreement could not be said to be mandatorily registrable.
- 80.** Although the argument of the award holder/respondent that the second arbitral proceeding was a continuation of the first cannot be accepted on the grounds as enumerated in the next paragraph, nothing hinges on the same, since even if we were to hold that the second arbitral proceeding is not a continuation of the first and, as a result, the dual objections as to insufficiency of stamp and non-registration, previously

waived, can be raised now by the award debtor, such a dual objection does not cut ice in the matter in view of our conclusions in the immediately preceding two paragraphs.

- 81.** However, since a question is raised as to whether the second arbitral proceeding is a continuation of the first, we observe that the ‘continuation of proceeding’ argument of the respondent is not acceptable for several reasons. First, as rightly argued by the appellant, there was no transposition of parties at any point of time which would be an absolute necessity in the event the proceeding was a continuation of the previous arbitral proceeding. In the previous proceeding, the present award holder was the respondent and it filed a counter claim for eviction, arrear occupation charges, etc., whereas the present award debtor was the claimant seeking an award of nullity of the agreement. Unless there was a cross-transposition across the board, the first proceeding would have continued in its original form and its transition into the second, where the positions and capacities of the claimant and the respondent were reversed, would not materialize. Also, since the claim of recovery of possession was not pressed by the respondent, the self-same claim could not be reiterated by way of an interim award. That apart, in the order dated August 2, 2016 passed under Section 11 of the 1996 Act, referring the dispute to arbitration for the second time, it was indicated that there was a fresh notice under Section 21 seeking reference to arbitration by the now claimant/respondent Efcalon, which initiated a fresh arbitral proceeding.

- 82.** Moreover, there were certain differences between the causes of action of the two proceedings, which would negate the concept that the second arbitral proceeding was a continuation of the first.
- 83.** However, such discussion is merely academic, since even if the second proceeding was a fresh one and an objection was legitimately taken regarding insufficiency of stamp, the said objection could not be upheld, as we have already held that the agreement would create a licence, not requiring further stamp duty or registration; alternatively, in the absence of registration, the lease, if any, would be construed as a month-to-month lease, in which case also the learned Arbitrator could look into the agreement without it being impounded.
- 84.** Regarding the question of non-registration, the same also cannot be accepted in view of our earlier observation that the agreement created a licence, and not a lease, and, as such, is not compulsorily registrable at all. Even if it created a licence from month-to-month, it would not be compulsorily registrable, since the jural relationship would emanate from statute and not from the agreement itself. In such a case, the agreement would be merely a piece of collateral document corroborating the case of possession coupled with the payment of licence fees/rent. Hence, the objection of the appellant regarding insufficiency of stamp and/or non-registration was rightly turned down by the both the fora below.
- 85.** The appellant relies on *K.B. Saha and Sons Private Limited (supra)* to argue that non-registration is not a curable defect, which proposition is entirely inapplicable, since the present agreement, as discussed above,

was not required to be mandatorily registered at all. The judgment in *Kotamreddi Seetamma (supra)*, enumerating that registration under the 1908 Act is a matter of public policy, is thus also irrelevant in the present context.

- 86.** Thus, the agreement was very much admissible in evidence, contrary to the arguments of the appellant. Hence, there cannot be said to have been any patent illegality going into the root of the matter in the impugned interim award, which renders irrelevant the proposition laid down in *Avinash Kumar Chauhan (supra)* and *Hasam Abbas Sayyad (supra)*.
- 87.** The appellant relies on *Paul Rubber Industries Private Limited (supra)* for the proposition that a monthly tenancy created *de hors* the unregistered instrument does not permit the court to look into the instrument even for the purpose of determination of the terms of monthly tenancy.
- 88.** However, the question which has fallen for consideration in the present case is somewhat different. It is not a question as to whether the terms of the agreement are to be looked into for determination of the terms of the monthly tenancy; rather, the issue which has cropped up is the very nature of the *jural* relationship of the parties, for which the terms of the agreement have to be inevitably looked into. Such assessment of the terms of the agreement is not for the purpose of determining the incidence or terms of the tenancy but to assess whether it is a lease at all or a licence. In view of our observation that the agreement created a

licence, the proposition laid down in *Paul Rubber Industries Private Limited (supra)* is also not germane in the context.

89. Hence, in conclusion, we observe that the objection as to insufficiency of stamp duty/non-registration is not tenable in the circumstances of the present case.
90. In any event, insufficiency of stamp or non-registration could not render the agreement void but would, at the worst, make it inadmissible in evidence, which is not the case here.

Arbitrability of the dispute

91. The appellant has sought to hit at the very root of the arbitrability of the dispute. It is argued that in view of the instrument-in-question being unregistered and insufficiently stamped, the same could not be admissible in evidence and as such, the arbitration clause could not be invoked.
92. However, it is well-settled that an arbitration clause is severable from the rest of the contract containing the same within the contemplation of Section 7 of the 1996 Act, and can be looked into in order to ascertain the intention of the parties to refer their disputes to arbitration, even if the agreement containing the same is otherwise inadmissible. Looked at the issue from such perspective, even if the instrument-in-question was otherwise vitiated, the arbitration clause could be culled out and the intention of the parties to refer their disputes to arbitration could be derived therefrom.

- 93.** However, another premise of the appellant's argument is that if a monthly tenancy was created by statutory interpretation and not by virtue of the agreement concerned, whether the arbitration clause could be invoked at all.
- 94.** The premise of such argument, however, is fallacious. Clause 28 of the disputed instrument contains the arbitration clause. It provides for reference to arbitration in case of "any dispute or difference arising out or in connection with or regarding the interpretation" of the agreement which cannot be settled by mutual discussion.
- 95.** Even for the purpose of ascertaining the jural relationship of the parties, a reference to the clauses of the agreement, in particular Clauses H, I and 4, is inevitable. Thus, the dispute between the parties, which pertains to the claim for recovery of possession primarily, is squarely covered by the arbitration clause, since it undoubtedly pertains to a dispute or difference arising out of as well as in connection with and regarding the interpretation of the instrument. Without interpreting the clauses of the agreement, there cannot be any adjudication on the claim raised relating to the jural relationship of the parties and the nature of the appellant's possession and the consequential right of the award holder to obtain an interim award or a final award of eviction.
- 96.** Thus, the argument that the disputes between the parties are not covered by the arbitration clause and as such, are not arbitrable, is specious and has to be turned down.

The effect of Sections 64 and 65, Contract Act

- 97.** Section 64 of the Indian Contract Act contemplates that when a person at whose option a contract is voidable rescinds it, such party has to restore any benefit, so far as may be, derived under the said contract to the person from whom it was received.
- 98.** In the present case, however, the appellant does not contend that it has rescinded the contract or that the contract was voidable as such, but that by the operation of law, the same is inadmissible in evidence and cannot be relied on to create a jural relationship between the parties. Even if we take the highest case of the respondent on such issue, the appellant merely pleaded that the instrument is *void ab initio*. In the absence of the necessary ingredients of Section 64, that is, the contract being voidable and not *void ab initio* and the act of the party rescinding the same, the provisions of Section 64 cannot be said to be applicable.
- 99.** Section 65 of the Contract Act, on the other hand, provides that when an agreement is discovered to be void or when it becomes void, any person who has received any advantage under the same is bound to restore or to make compensation to the person from whom he received it.
- 100.** In the first arbitral proceeding between the present parties, the appellant, who was the claimant, had categorically sought a declaration that the instrument-in-question was null and void, thus, subjecting him to adjudication by the Arbitral Tribunal. Indeed, if the decree of the first Arbitral Tribunal was upheld, it would be open to argue that the appellant was mandated under Section 65 to restore possession

obtained under the agreement. However, the said question was sub judice before the first Arbitral Tribunal and the award by which such Tribunal sustained the same was set aside on merits under Section 34 of the 1996 Act, which was upheld under Section 37 of the said Act subsequently. Hence, although such a stand was taken by the appellant at the initial juncture, the same having been turned down by the court, it could no longer be said that the contract had become void or was discovered to be void, as the issue was decided squarely against the appellant by the conclusive findings of the Appellate Court, sustaining the Section 34 order and setting aside the previous arbitral award declaring the instrument to be void.

101. Insofar as the present proceeding is concerned, although such a plea has been taken by the appellant in its pleadings, no such argument was advanced at the time of hearing of the application under Section 31(6), nor did the Arbitral Tribunal uphold such contention. Rather, in the impugned interim award, the learned Arbitrator proceeded on an assumption that if such point was to be argued, the appellant was duty-bound to return the advantages under the contract. However, such “ifs and buts” were in the realm of conjecture and not a real adjudication on an actual argument made by the appellant.

102. Thus, Section 64 and Section 65 of the Contract Act do not come into play in the facts of the present case since there has been no conclusive determination by the learned Arbitrator as to the agreement being actually void.

Whether the parameters of Sections 37 and 34 of the 1996 Act are satisfied

- 103.** The learned Arbitrator weighed the different options emanating from the arguments of the parties and proceeded to grant an interim award of eviction on the premise that whether a monthly tenancy was created, which was terminated validly by a notice under Section 106 of the Transfer of Property Act, or a licence was created by the disputed instrument (in which case, the initiation of the proceeding and/or the prior notice to quit, however captioned, would itself suffice to terminate the licence), either way the appellant was liable to be evicted. Furthermore, on the expiry of the tenure of the agreement, the respondent/award holder automatically became entitled to an award of recovery of possession against the award debtor/appellant.
- 104.** Such consideration of alternative propositions and proceeding on the premise that in either of the scenarios the award holder would be entitled to an interim award as prayed for cannot be said to an exercise which is vitiated by inherent contradiction. Weighing of alternatives cannot tantamount to perversity at all.
- 105.** In fact, in view of the conclusion of the learned Arbitrator that in either case, whether it is a monthly tenancy terminated by a Section 106 notice or a licence, the award holder would be entitled to eviction, being one of the possible views on a preponderance of probability, there cannot be any scope of interference under Section 34 of the 1996 Act.
- 106.** The tests of interference under Section 34, which are extremely restrictive, are not applicable here, since there is no palpable illegality

or patent error of law and/or perversity which shocks the conscience of the court sufficient to set aside the impugned interim award.

107. The boundaries and parameters of an exercise under Section 37 of the 1996 Act against an award passed under Section 34 / 31(6) of the said Act are still more restrictive in the pyramidal hierarchy of challenges as provided in the 1996 Act. Section 5 of the Act categorically provides that there can only be an interference by a court within the contours as provided in the Act itself.

108. A Section 37 appeal borrows its hue from the parameters of Section 34, read with Section 31(6), under which provision the impugned interim award was passed. Since Section 37 does not translate into a regular appeal, but is confined to the yardsticks of Section 34, proceeding on such premise, we do not find any ground under which the impugned judgment under Section 34 can be interfered with. The learned Court taking up the Section 34 application went into all the relevant aspects of the matter and, in its wisdom, affirmed the interim award granted by the Arbitrator on the premise that the tests laid down under Section 34 have not been satisfied.

109. In view of our above discussions, all aspects of which were duly taken into consideration by the Section 34 Court as well as the learned Arbitrator, we are, thus, not inclined to interfere with the impugned interim award.

110. The tests of interference laid down in the judgments cited by the appellant, as extensively discussed above, are not met in the present case.

111.In view of the above observations, the present appeal fails.

112.Accordingly, F.M.A.T. No.57 of 2021 is dismissed on contest, thereby affirming the judgment and order dated January 5, 2021 passed by the learned Judge, Commercial Court at Alipore for South 24 Parganas, Purba Medinipur and Paschim Medinipur in Miscellaneous Case (Arbitration) No.43 of 2019 as well as the interim award passed by the learned Arbitrator on July 15, 2017, as amended on July 22, 2017.

113.There will be no order as to costs.

114.Interim pending applications, if any, stand disposed of accordingly.

(Sabyasachi Bhattacharyya, J.)

I agree.

(Uday Kumar, J.)

Later

After the above judgment is passed, a prayer for stay of the connected eviction execution case is sought by the appellant.

Such prayer is opposed on behalf of the respondent.

However, in order to enable the appellant to take a chance by way of a challenge against our judgment, the connected eviction execution case is stayed for a period of six weeks from date.

(Uday Kumar, J.)

(Sabyasachi Bhattacharyya, J.)