Airports Authority Of India vs Hotel Leelaventure Ltd. on 15 July, 2016

Author: J.R. Midha

Bench: J.R. Midha

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*    IN THE HIGH COURT OF DELHI AT NEW DELHI

+                        O.M.P. 1206/2012

%                                  Date of Decision : 15th July, 2016


          AIRPORTS AUTHORITY OF INDIA        ..... Petitioner
                  Through: Mr. Sandeep Sethi, Senior Advocate
                           with Mr.Vaibhav Kalra and Ms.
                           Jasbeer Bidhuri, Advocates.

                           versus

          HOTEL LEELAVENTURE LTD.         ..... Respondent
                  Through: Mr. Abhimanyu Mahajan, Mr. Milan
                           Deep Singh and Ms. Ambha Goel,
                           Advocates.

CORAM :-
HON'BLE MR. JUSTICE J.R. MIDHA

                              JUDGMENT
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1. The greatest challenge before the judiciary today is the frivolous litigation. The judicial system in the country is choked with false claims and such litigants are consuming Courts' time for a wrong cause. False claims are a huge strain on the judicial system. In Subrata Roy Sahara v. Union of India, (2014) 8 SCC 470, J.S. Khehar, J. observed that the Indian judicial system is grossly afflicted with frivolous litigation and ways and means need to be evolved to deter litigants from their compulsive obsession towards senseless and ill-considered claims. Relevant portion of the said judgment is as under:

> "191. The Indian judicial system is grossly afflicted, with frivolous litigation. Ways and means need to be evolved, to deter litigants from their compulsive obsession, towards senseless and ill-considered claims.
>
> (Emphasis supplied)

2. In the present case, the respondent is a lessee in respect of 11,000 sq. mtrs. land near Mumbai International Airport for a period of 30 years from 1st April, 1994 to 30th March, 2024. On 13th

August, 2008, i.e., after about 14 years of the commencement of the lease, the respondent invoked the arbitration and raised a claim to seek discharge from the liability to pay Royalty of Minimum Guaranteed Amount [hereinafter referred to as "Royalty (MGA)"] under the lease on the ground that it has become commercially unviable to construct the Hotel due to recession in the hotel industry and therefore, the clause with respect to payment of Royalty (MGA) has frustrated under Section 56 of the Contract Act.

3. The learned Arbitrator allowed the respondent's claim and declared that the payment of Royalty (MGA) by the respondent has become impossible under Section 56 of the Contract Act w.e.f. 01st June, 2008 and, therefore, the parties may enter into a new contract. As a result, the respondent is continuing the possession but is discharged from the liability of paying Royalty (MGA). According to the petitioner, the respondent's liability as on 31st May, 2016 along with interest thereon has crossed Rs.258 crores.

4. The petitioner has challenged the award dated 29th August, 2012 under Section 34 of the Arbitration and Conciliation Act on various grounds inter alia:

> 4.1. The award is against the well settled law that the lessee's liability to pay the amounts under the lease to the lessor is absolute and unconditional; and the learned Arbitrator had no power of absolving the respondent from making the payment of the Royalty (MGA).

4.2. The impugned award is also against the well settled law that Section 56 of the Contract Act is not applicable to leases. If the payment of Royalty (MGA) had became unviable, the respondent had the option to surrender the lease but the respondent could not claim that the clause requiring the payment of Royalty (MGA) has frustrated.

4.3. The learned Arbitrator has re-written the contract which is not permissible in law. The learned Arbitrator was bound by the terms of the contract, but he has gone beyond the contract by discharging the respondent from the liability to pay the Royalty (MGA) and directing the parties to re-negotiate the contract.

4.4. The statement of claim instituted by respondent is gross abuse and misuse of process of law. The statement of claim was not even maintainable in law and the learned Arbitrator ought to have rejected the same at the outset.

5. Factual matrix 5.1. The petitioner licensed 11,000 sq. meters of land near Mumbai International Airport to the respondent in 1982. On respondent's request, the license was converted into a lease and a lease deed dated 07th February, 1996 was executed by the parties for a period of 30 years w.e.f. 01st April, 1994 to 31st March, 2024. Under the lease deed, the respondent was required to pay the lease money as well as the Royalty (MGA). Relevant clauses of the lease deed are as under: -

> "WHEREAS the land, admeasuring approximately 11,000.00 Sq. Mtrs. shown in the sketch annexed hereto vests in the Authority.

WHEREAS Lessee is desirous of being guaranteed, lease for using the said plot of land for a term of 30(thirty) years for the purpose of constructing and setting up of another wing to the existing Hotel Block consisting of 150 rooms as a new separate Hotel Block and after the expiry of the said terms of lease, the Hotel structures, fitting and fixtures, plants and machinery will become the property of the Authority automatically without paying any compensation to the Lessee by the Authority. And whereas the Authority is willing to grant lease to the Lessee as above on terms and conditions mutually agreed upon, this Indenture.

WITNESSETH:

1.(a) This lease shall commence on 01.04.1994 and shall be in force for a period of 30 (thirty) years from 01.04.1994 to 31.03.2024. The lease period of 30 (thirty) years shall be without prejudice to the rights of the Authority to determine the lease agreement for 18,000 Sqm. Plot of existing hotel with the party. The currency of this agreement shall not bind Authority to an automatic extension of the lease agreements for 18,000.00 Sqm. on which existing hotel is situated.

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2. The Lessee shall pay @ Rs.200.00 per Sq. mtr. per annum as lease money subject to 10% compound escalation per annum for use and occupation of the land per year in advance, in each year. The first of such payments to be made before taking over the land on lease. The rate of lease money payable by the Lessee shall be subject to revision by the Authority from time to time and the lessee agrees to pay such revised lease money without any protest.

3. In addition to the lease money mentioned hereinabove and as revised from time to time, the lessee shall pay to the Authority; Royalty as minimum guaranteed amount as mutually decided between the parties and, in absence of any decision, as decided by Chairman of Airport Authority of India. For this purpose gross turnover will be arrived at after excluding Govt. Taxes/levies on turnover.

3.(a) The amount on royalty shall become payable from the date of commencement of the Hotel or after the expiry of 3 years gestation period allowed for construction of the Hotel Block commencing from 01.06.1995, whichever is earlier.

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6. The lessee shall construct the building/structure/installations strictly in accordance with the plans and specifications with F.S.I. (Floor Space Index) as ONE to be approved by the Authority, in writing, and in conformity with such directions as the Authority may give, in this behalf, or in connection therewith. Sanction or approval of any other local authority to the constructions of the building/structure/ Installations whenever

required shall also be obtained by the Lessee and the said building or structure shall be constructed by the lessee in accordance therewith.

Progress of construction shall be reported to the Authority quarterly, after furnishing schedule of execution.

6(a) Construction on the allotted land will commence within a period of 36 months. In case it is delayed, an additional charge of 50% of the lease rent will be levied for the next year i.e. 4th year. The allotment of land made under this lease will be cancelled if construction is not started within five years.

xxx xxx xxx 6(e) The licencee shall construct the Hotel Block consisting of 150 rooms as per approved plans.

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13. In the event of failure to pay the lease money and other amounts herein provided from on the respective due dates, simple interest at the rate of 18% (Eighteen percent) per annum shall be payable on all delayed payments without prejudice to the Authority's other rights and remedies. Interest rate can be revised upwards if there is upward revision in the bank rate and such upward revision will be effected after giving 30 (thirty) days notice to the Lessee.

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17. The lessee shall observe at all times without any question or dispute all rules, regulations and directions issued from time to time by the Authority and/or by Director General of Civil Aviation and such other authorities having jurisdiction over the locality wherein the premises are situated which are intended to safeguard or facilitate the use of the locality by airport or for any other purpose.

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26. If the lessee shall desire to determine this agreement it shall give the authority 180 days clear notice in writing of such desire and shall upto the time of such determination pay the amounts due and perform and observe the covenants on his part hereinbefore contained, then immediately on the expiration of such notice this lease shall cease but without prejudice to the rights and remedies to which the Authority has become entitled in respect of any anticipated claim or breach of the covenant."

(Emphasis supplied) 5.2. By a supplemental agreement dated 07th February, 1996, the parties agreed to Royalty (MGA) according to Schedule A or 7.5% of the gross turnover of the new hotel block, whichever was higher. A three years' gestation period was allowed to the respondent from 01st June, 1995 to 31st May, 1998 for construction of 150 rooms hotel block on the leased land. Relevant terms of the supplemental agreement are as under:

"1. In addition to the payment of the lease rental as provided in the said Agreement to Lease dated the 7th day of February, 1996, the Lessee shall also pay to the Authority Royalty as minimum guaranteed amount, as specified in schedule A annexed hereto or at the rate of 7.5% of the gross turnover of the new Hotel Block, whichever is high. For the purpose of determination of gross turnover, government taxes/levies on turnover will be excluded.

2. The amount of Royalty shall be payable from the date of the commencement of the Hotel or after the expiry of three years gestation period allotted for the Hotel commencing from 01.06.1995 whichever is earlier.

3. On account payment of the above Royalty amount proportionate to the gross turnover shall be made by the Lessee quarterly. The said payment shall be made within a period of 30 days of the close of each quarter."

(Emphasis supplied) 5.3. The Schedule attached to the supplemental agreement dated 07th February, 1996 is reproduced hereunder:

"Schedule 'A' M/s Hotel Leela Venture Limited shall be liable to pay the minimum guaranteed amount as under:

(Rs/ in lakhs) Year Projected Minimum guaranteed turnover amount payable

1. ---- ----

2. ---- ----

3. ---- ----

4. Rs.1725 Rs.129.37

5. Rs.2242 Rs.168.15

6. Rs.2915 Rs.218.62

7. Rs.3789 Rs.284.17

8. Rs.4926 Rs.369.45

9. Rs.6403 Rs.480.22

10. Rs.8324 Rs.624.30 11 Rs.10821 Rs.811.57

12. Rs.14067 Rs.1055.02

> 13. Rs.18287 Rs.1371.52 The turnover for the remaining period of the agreement shall be worked out on the basis of 17% (Seventeen Percent) compound growth per year."

5.4. On 10th June, 1996, the respondent submitted a plan for the proposed hotel to the petitioner in which the respondent amalgamated the land in question with the lands already allotted by the petitioner on lease and to use the same for the facilities like swimming pool and other recreational facilities. The petitioner rejected this plan on 4th September, 1996 and advised the respondent to submit a revised plan for construction of 150 rooms as per the lease deed. On 23rd October, 1997, the respondent submitted revised Plan-II which was rejected by the petitioner on 12th November, 1997 on the ground that the height of the proposed building was above the maximum limit of 50 feet. On 20th November, 1997, the respondent submitted Plan-III which was accepted by the petitioner on 21st November, 1997. However, the respondent did not raise the construction as per the approved plan and on 21st September, 1999, the respondent came up with a fresh Plan-IV for construction of a hotel with 62.2 feet height which was rejected by the petitioner on 21st January, 2000.

5.5. In the year 2002, disputes arose between the parties with respect to the rejection of building plans and the liability to pay the Royalty (MGA) which were referred to the sole arbitrator. Five issues arose for consideration before the learned Arbitrator out of which following three issues are relevant to be discussed here and are reproduced hereunder:

> "3. Whether HLVL is not liable to pay MGA/royalty on account of refusal of the AAI to sanction the building plan submitted for sanction by HLVL on 21.07.1999?
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> 4. Whether the AAI is entitled to recover Rs.39,51,24,000/- from HLVL on account of MGA/royalty for the period, 01.01.1998 to 31.12.2006, and additional amount on that reckoning from 01.01.2007 till date?
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> 5. Is the AAI entitled to recover interest, if any from the HLVL and if so what would be the fair rate at which such interest may be calculated and on what amount of the claim?"

(Emphasis supplied) 5.6. Vide award dated 17th May, 2008, the learned Arbitrator held the respondent liable to pay Rs.4,53,53,850/- towards lease money for the period ending 31st March, 2008 and Rs.47,80,17,177/- towards Royalty (MGA) for the period ending 30th June, 2007. Relevant portion of the award is reproduce hereunder:

> "(35) To conclude, therefore, the lessee admits that the lessor is entitled to realize and recover rent, and the arrears of rent, as claimed till date. The arrears of rent from 01.04.2005 to 31.03.2008 amounting to Rs.4,53,53,850/- as claimed, are admittedly payable by the Respondent to the claimant. The claimant is also entitled to realize and recover royalty/MGA amounting to Rs.47,80,17,177/- for the period ending 30.06.2007. The claimant admits having received payment of a sum of Rs.10,00,00,000/- (Ten Crores) from the respondent during the period of

> negotiations between the parties before the present reference, thus leaving a balance of Rs.37,80,17,177/-

still payable by the respondent to the claimant. Issue 3 and 4 are therefore decided accordingly.

xxx xxx xxx The claimant is entitled to recover from the respondent a sum of Rs.37,80,17,177/- on account of royalty/MGA with interest pendente lite with effect from 01.03.2007 till date at the rate of 10% per annum with future interest at the same rate for the period of three months from today. He is also entitled to recover Rs.4,53,53,850/- on account of rent for the period 01.04.2005 to 31.03.2008. If the two payments are not made within the period of three months, as prescribed herein, the lessor will be entitled to recover both the decreetal amounts, with interest upon the respective principal amounts at the rate of 15% per annum from today till their payment."

(Emphasis supplied) 5.7. Both the parties accepted the arbitral award dated 17th May, 2008 which became final and binding on both the parties.

5.8. Vide letter dated 13th August, 2008, the respondent again invoked the arbitration agreement contained in Clause 37 of the lease agreement dated 07th February, 1996. The relevant portion of the letter dated 13th August, 2008 is reproduced hereunder:

> "It is submitted that the projected turnover set out in the Supplemental agreement is unconscionable, totally out of proportion to reality and, therefore, unworkable. Since the projected turnover under the Supplemental Agreement and the consequent Minimum Guaranteed Amount is unconscionable and unachievable, we urged that the payment of the Minimum Guaranteed Amount under the Supplemental Agreemnt be deleted so that the Royalty @ 7.5% will be paid on the actual gross turnover of the proposed hotel of 150 rooms. In any event, even if payment of the Minimum Guaranteed Amount were to be retained, the projected turnover and the resultant Minimum Guaranteed Amount should be substituted with reasonable and achievable figures based on the turnover of the existing Leela Hotel with a yearly growth on the lines that were agreed by AAI for the Radisson Hotel at Delhi.
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> xxx xxx xxx It will be clear beyond doubt from the above that it will not be possible to achieve the Gross Turnover and the ARR for the proposed 150 room hotel. From the commencement of the Minimum Guaranteed Amount till date the ARR that will be required to achieve the Projected Turnover is unrealistic and far higher than the ARR achieved by the existing Leela Hotel as well as that achieved by other hotels in Mumbai and Delhi.
>
> If you fail to do so within 10 days of the receipt of this letter, this may be treated as invocation of arbitration under Clause 37 of the Lease Agreement and the following issues may be referred to a Sole Arbitrator to be appointed by the Chairman, AAI:

(i) Whether the Projected Turnover of the Hotel and the resultant Minimum Guaranteed Amount set out in the Supplemental Agreement dated 7 February, 1996, is not unconscionable, arbitrary and an impossibility not capable of being achieved in the circumstances prevailing in the hotel industry.

(ii) If the first question is answered in the affirmative, then should not fresh terms in regard to the Minimum Guaranteed Amount etc. be not finalised, to be binding on the parties in pari materia with that of A.B. Hotels Ltd. for the Radisson, New Delhi.

(iii) Should not the Agreement presently expiring on 31 March, 2024 be not extended for a further period of 14 years in the circumstances of the case."

(Emphasis supplied) 5.9. Vide letter dated 27th August, 2008, the respondent raised one more dispute for being referred to the Arbitrator. The relevant portion of the letter dated 27th August, 2008 is reproduced hereunder: -

"We hereby request that the following issues be also included in the reference to arbitration:

(IV) Whether a fresh period of three years not be granted to the Lessee for construction of the Hotel, during which no Minimum Guaranteed Amount shall be payable."

5.10. On 12th January, 2009, the Chairman of Airport Authority of India appointed a sole Arbitrator to adjudicate the claims mentioned in the letters dated 13th August, 2008 and 27th August, 2008 and the counter claims of the petitioner.

5.11. On 13th February, 2009, the sole Arbitrator entered upon reference. On 02nd March, 2009, the respondent filed the Statement of Claim before the learned Arbitrator in which the respondent sought the following prayers: -

"26. The Claimant Leela, therefore, prays -

(i) That this Hon'ble arbitral tribunal may be pleased to declare:

(a) That the Minimum Guaranteed Amounts as Royalty which are contained in the Supplemental Agreement dated 7th February, 1996 executed between Airport Authority and Leela and unconscionable, arbitrary and an impossibility not capable of being achieved in the circumstances prevailing in the hotel industry;

(b) That it will be in the interest of justice, equity and good conscience to, finalize the Minimum Guaranteed Amounts payable by Leela to Airport Authority in pari material with that of A.B. Hotels Ltd. for the Radisson, New Delhi with effect from the date of the reference;

(c) That the lease agreement between Airports Authority and Leela in respect of the said 11,000 sq. mtrs. of land which is scheduled to expire on 31st March, 2024 stands extended by a period of 14 years;

(d) That Leela will not be liable to pay any Minimum Guaranteed Amount towards Royalty for a period of three years which is meant for the construction of the 150 room hotel on the said 11,000 sq. mtrs. of land and Leela will be entitled to a further additional construction period of one year after payment of an additional charge of 50% of the ground rent, such a provision may be given in the Agreement."

(Emphasis supplied) 5.12. At the stage of final hearing of the proceedings before the learned Arbitrator, the respondent conceded that the prayers made in paras 26(i)(b), (c) and (d) of the Statement of Claim were outside the scope of the existing arbitration agreement between the parties and, therefore, the respondent gave up the said prayers. The respondent however pressed the prayer made in para 26(i)(a) of the Statement of Claim.

6. Award of the Arbitrator 6.1. Vide award dated 29th August, 2012, the learned Arbitrator declared that the Minimum Guaranteed Amounts mentioned in Schedule A of the supplemental agreement dated 07th February, 1996 had became impossible of performance w.e.f. 01st June, 2008 and, therefore, the parties are at liberty to enter into a new appropriate arbitration agreement and make a fresh arbitration seeking fixation of amounts payable by the respondent. The conclusion of the Arbitrator is reproduced hereunder: -

"ORDER (A) It is declared that the minimum guaranteed amounts which are stated as payable by the Claimant in Schedule A to the Supplemental Agreement dated 7th February, 1996 executed between the parties became impossible of performance with effect from 1st June 2008. As already observed above in the absence of a specific arbitration agreement between the parties to that effect, this Tribunal refrains from expressing any opinion on what those figures should be. The parties are, however, at liberty to enter into a new appropriate arbitration agreement and make a fresh arbitration seeking fixation of the amount payable as that I cannot do in the present Arbitration as that would be beyond the scope of the existing arbitration agreement between the parties.

(B) The arbitrator's fees were ordered to be shared equally between the parties at the commencement of the arbitration proceedings. Some of the arbitration hearings were organized by the Respondent and some others by the Claimant and each has borne the expenses of holding the hearings organized by it. In the facts and circumstances of the case, both parties are directed to bear the fees of their respective advocates/counsel as well as incidental expenses."

(Emphasis supplied) 6.2. The reasons given by the learned Arbitrator in the award for arriving at the above conclusion are as under:

"15. It is not in dispute that the Claimant has been paying the lease rent as stipulated in Clause 2 of the Lease Deed without demur. It was also confirmed to me by the Respondent after verification of its records that the Claimant has also paid the minimum guaranteed amounts as per Schedule A to the Supplemental Agreement dated 7th February, 1996, for the period up to May, 2008. However, it is the case of the Claimant that the enormity of the worldwide recession coupled with the terrorist attack on five star hotels in Mumbai, which has no precedent in history, have made it commercially impossible for the Claimant to achieve the projected turnover post May, 2008, and consequently, the Claimant is exonerated from paying the minimum guarantees as quantified in Schedule A of the Supplemental Agreement dated 7th February, 1996 from June, 2008 onwards. The parties could not have foreseen the catastrophic events referred to above when they agreed to the estimates of turnover which formed the basis of the minimum guaranteed amounts referred to in Schedule A of the Supplemental Agreement.

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23.As correctly pointed out by the learned counsel for the Claimant, the twin events that befell the hotel industry in Mumbai during the second half of 2008 could not have been foreseen by the parties acting as reasonable men entering into a commercial bargain. Shri Thacker's expert evidence, which as I have said remains uncontroverted, shows that there has been a phenomenal change in the turnover and profitability of five star hotels in Mumbai from June, 2008, which are attributable to the worldwide recession and the terrorist attack on Mumbai hotels. It is therefore just and reasonable to hold that the estimates of turnover made by the parties at the time of executing the Supplemental Agreement dated 07th February, 1996 and the resultant minimum guaranteed amounts payable by the Claimant are no longer binding as it is not commercially possible for the lessee to pay those minimum guaranteed amounts on account of the drastic and unforeseen change in circumstances which has knocked the bottom out of the understanding between the parties regarding future turnover as recorded in Schedule A of the Supplemental Agreement.

24. I have taken note of the fact that the Claimant is not disputing or denying its obligation to pay 7.5% of the gross turnover of the hotel as stipulated in Clause 1 of the Supplemental Agreement dated 7th February, 1996. What has become impossible of performance is payment of the minimum guaranteed amounts as specified in Schedule A to the Supplemental Agreement dated 7th February, 1996 which were calculated on the basis of estimates made by the parties regarding the future turnover of the hotel.

25. The Claimant has not challenged the validity and enforceability of the registered Lease Deed dated 7th February, 1996. As a matter of law, the lease itself is incapable of being frustrated under Section 56 of the Indian Contract Act as explained by the

Hon'ble Supreme Court in Raja Dhruv Dev Chand v. Raja Harmohinder, AIR 1968 SC 1024 and Sushila Devi v. Hari Singh, (1971) 2 SCC 288.

26. The Claimant continues to remain in possession of the leased land and is paying the lease rent stipulated in Clause 2 of the Lease Deed. The learned counsel for the Claimant repeatedly stated before me that the Claimant accepts and abides by all the terms of the registered Lease Deed. But the unregistered Supplemental Agreement dated 7th February, 1996 was a subsequent agreement between the parties to give effect to Clause 3 of the Lease Deed and stands on a different footing from the Lease Deed. Frustration of the latter has no bearing on the former.

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30. It is well settled proposition of law that a party to an agreement cannot refuse to perform his obligations under an agreement merely because their performance has become more onerous. As pointed out by the learned counsel for the Claimant, the doctrine of frustration is an exception to the sanctity, inviolability and enforceability of contracts. The law expects parties to abide by the bargain which they have struck unless they are exonerated from performing their obligations by supervening events of an extreme and unexpected character over which they had no control. The concept of frustration of contract has varied from country to country and from age to age. When supervening events over which the parties had no control have led to a situation where the lessee of a piece of land given on lease for construction of a hotel is required to pay more than the actual turnover of the hotel itself as additional consideration for the lease, which is over and above the lease rent stipulated in the lease deed, it is just and reasonable to conclude that such an agreement has become frustrated.

31. The development of the concept of frustration of contract under the common law is no doubt interesting and educative, but it is unnecessary to dwell at length on any foreign authorities as in my considered opinion the judgment of the Hon'ble Supreme Court of India reported in AIR 1954 SC 44 is sufficient for the purpose in hand. Courts in India have applied the principle of commercial impossibility in appropriate cases. Illustrations can be found in (i) Sushila Devi v. Hari Singh, (1971) 2 SCC 288 (ii) Jagatjit Distilling & Allied Industries v.

Bharat Nidhi Ltd., DLT 15 (1979) 152 (S.N.) (iii) D. Devi Bhagat v. J.B. Advani & Co., 76 Calcutta Weekly Notes; and

(iv) Smt. Sharda Mahajan v. Maple Leaf Trading International P. Ltd., [2007] 139 Comp. Cas 718 (Delhi).

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33. There can be no doubt that the principles of res judicata are applicable to arbitration proceedings. However, the Claimant is relying on events that occurred subsequent to the passing of the Award dated 17th May, 2008 by Mr. Justice (Retd.) K.S. Sidhu and, hence, the earlier arbitration between the parties cannot operate as a bar to the present arbitration.

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38. To conclude, on the basis of the evidence led before me I have no difficulty in holding that the agreement between the parties that the Claimant would pay Minimum Guaranteed Amounts as stipulated in Schedule A to the Supplemental Agreement dated 7th February, 1996 became impossible of performance in a commercial sense on account of the frustrating events that occurred during the second half of 2008. This of course does not mean that the Claimant has ceased to be bound by the requirement of Clause 3 of the Lease Deed to pay an additional amount as minimum guaranteed amount which may be mutually agreed upon, and failing such mutual agreement, as determined by the Chairman of the Respondent. I agree with the submission of the learned counsel for the Claimant that there is nothing in Clause 3 of the Lease Deed to suggest that such mutual agreement or determination by the Chairman of the Respondent is a one-time act or event. Since I am holding that the Supplemental Agreement dated 7th February, 1996 has become impossible of performance from June 2008 on account of two supervening events over which the parties had no control, it will now be necessary for them to arrive at mutually acceptable figures, failing which the Chairman of the Respondent will have to determine what those Minimum Guaranteed Amounts should be. In the absence of a specific arbitration agreement between the parties to that effect, this Tribunal refrains from expressing any opinion on what those figures should be. However, I am recording the fact that the learned counsel for the Claimant stated before me that the Claimant is not challenging the obligation of the Claimant to pay 7.5% of the gross turnover of the hotel as stipulated in Clause 1 of the Supplemental Agreement dated 7th February, 1996, whatever be that amount."

(Emphasis supplied)

7. Submissions on behalf of the petitioner 7.1. The doctrine of frustration as enacted in Section 56 of the Contract Act has no application to leases. Reliance is placed on Raja Dhruv Dev Chand v. Raja Harmohinder Singh, AIR 1968 SC 1024.

7.2. Even assuming Section 56 applies to leases, it cannot be invoked in case of commercial hardship. Frustration cannot be used as a device to avoid a bad bargain. The contract between parties was for a period of 30 years and it was but natural and foreseeable by both the parties that there would be various economic turmoils over a period as long as 30 years. Principle of frustration is not applicable when the event is foreseeable but not foreseen.

7.3. The lease deed and the supplemental agreement (both entered on the same date) clearly provide that the respondent is liable to pay the Royalty (MGA). There is no liberty reserved to the Courts to absolve a party from liability to perform his part of the contract, merely because on account of certain turn of events, the performance of the contract may become onerous.

7.4. The respondent's prayer that the Royalty (MGA) set out in the supplemental agreement dated 7th February, 1996 is unconscionable, arbitrary and an impossibility, is barred by well settled law that a party cannot wriggle out of commercial contract on the plea that the terms of contract are onerous. The respondent is a large company well established in hotel business for many decades, and has access to the best advice both commercial and legal. It entered into the lease deed and the supplemental agreement with open eyes, acted upon the same, and is therefore estopped from challenging the terms of the lease deed and the supplemental agreement. It cannot approbate and reprobate. Reliance is placed as Alopi Parshad v. Union of India (1960) 2 SCR 793, Panna Lal v. State of Rajasthan (1975) 2 SCC 633, State Bank of Haryana v. Jage Ram (1980) 3 SCC 599, Har Shanker v. Deputy Escise and Taxation Commissioner (1975) 1 SCC 737, Puravankara Projects Ltd. v. Hotel Venus International (2007) 10 SCC 33, Bharti Cellular Limited v. Union of India (2010) 10 SCC 174, Mumbai International Airport Pvt. Ltd. v. Golden Chariot Airport JT 2010 (10) SC 381 and Track Innovations India Pvt. Ltd. v. Union of India (2010) 170 DLT 424.

7.5. On failure of the respondent to pay the Royalty (MGA), the petitioner commenced arbitration in which no plea of frustration or impossibility was raised by the respondent in the said earlier arbitration proceedings and the learned Arbitrator published an award dated 17th May, 2008 in favour of the petitioner directing payment of Royalty (MGA) in terms of the supplemental agreement. The pleas in the subsequent arbitration are therefore a clear afterthought and an abuse of the process.

7.6. Even though the arbitral award dated 17th May, 2008 was never challenged, the respondent in the garb of the Mumbai terrorist attacks and economic recession raised the same issues again on 13th August, 2008 and 27th August, 2008 by invoking clause 37 of the lease deed dated 07th February, 1996 even though the same had already been decided in the earlier arbitration proceedings.

7.7. The petitioner, on receiving the statement of claim, filed an application under Section 16 of the Arbitration and Conciliation Act, 1996 on the ground that the learned Arbitrator had no jurisdiction to decide or adjudicate the present dispute as the same had already been adjudicated upon by the learned Arbitrator vide order dated 17th May, 2008. The respondent thereafter filed a reply of the aforesaid application and the petitioner filed a rejoinder to the reply to the respondent herein along with letter dated 17th June, 2004 received under RTI from the Municipal Corporation of Mumbai stating therein that the respondent had already utilized the FSI of the land allotted to it by the petitioner for construction of Hotel Leela Galleria.

7.8. The petitioner also filed a detailed reply to the statement of claim raising preliminary objections about the maintainability of the arbitration as well as the fact that even after a gap of more than 13 years, the respondent had still not constructed any Hotel for which land measuring 11,000 sqm. had been leased by the petitioner to the respondent and FSI/FAR for the 11,000 sq.mtrs of land had been already utilized by the respondent for additional construction on Hotel Leela Galleria. The respondent's claim was just an eye wash to escape the liability to pay Royalty (MGA) as per supplemental agreement dated 07th February, 1996.

7.9. The learned Arbitrator dismissed the petitioner's application under Section 16 of the Arbitration and Conciliation Act, 1996 on 22nd April, 2010 without even considering the fact that the point of dispute that is payment of Royalty (MGA) vis-à-vis grounds urged by the respondent regarding payment of Royalty (MGA) had already been adjudicated upon in the previous award dated 18th May, 2008.

7.10. The learned Arbitrator failed to appreciate that the claims made by the respondent were barred by principle of res judicata and constructive res judicata as the issue regarding liability of the respondent to pay the Royalty (MGA) had been specifically raised, argued and decided in favour of the petitioner in the arbitral award dated 17th May, 2008.

7.11. The respondent itself had categorically admitted in the earlier arbitration that the petitioner was entitled to realise and recover the royalty/Minimum Guaranteed Amount amounting to Rs.47,80,17,177/- for the period ending 30th June, 2007 and, therefore, the respondent cannot be permitted to re-agitate the same issue all over again. Assuming but not conceding that the claims are not barred by the principle of res judicata, it is submitted that the same would still be barred by the principles of constructive res judicata as any matter which might and ought to have been made a ground or defence or attack in the former proceeding but was not so made, then such a matter in the eyes of law, to avoid multiplicity of litigation and to bring about finality in it, is deemed to have been constructively in issue and, therefore, is taken and decided. Reliance is placed on the judgments passed in K.V. George v. Secy. to Govt., Water and Power Deptt. (1989) 4 SCC 595, K.K. Modi v. K.N. Modi (1998) 3 SCC 573 and State of Karnataka v. All India Manufacturers Organisation (2006) 4 SCC 683.

7.12. During the cross-examination of the respondent's witnesses, the learned Arbitrator directed the inspection of the site of construction of the Hotel on 10th June, 2011. Pursuant to the site inspection by the learned Arbitrator as well as both the parties, the learned Arbitrator passed an order dated 10th June, 2011 containing discussions which had never occurred on that date. The petitioner filed an application dated 4th July, 2011 to seek clarification of the order dated 10th June, 2011 as it contained matters contrary to the record. Vide order dated 4th July, 2011, the learned Arbitrator directed that the same shall be considered at the time of final arguments. However, the impugned award neither mentioned nor dealt with the said application.

7.13. The petitioner filed an application under Section 17 of the Arbitration & Conciliation Act, 1996 praying therein that during the pendency of the arbitration proceedings, the respondent should pay the Royalty (MGA) in terms of the supplemental agreement dated 07th February, 1996.

7.14. The application under Section 17 of the Arbitration and Conciliation Act was dismissed by the learned Arbitrator vide order dated 15th November, 2011 on the pretext that the matter was already fixed for final arguments and as such, there is no need to go into the merits of the application.

7.15. The learned Arbitrator completely ignored and overlooked and did not even consider the submissions made by the counsel for the petitioner as well as various judicial pronouncements relied upon by him.

7.16. The reliefs granted by the learned Arbitrator amounts to re- writing of the lease deed and supplemental agreement both dated 07th February, 1996 which is not permissible in view of the well-settled law. The respondent on the one hand wants to enjoy the benefit of the lease and on the other hand, wants to get rid of the conditions in respect of construction of a separate hotel and payment of Royalty (MGA), which are considered onerous by it. This is completely and totally contrary to the settled law.

7.17. The learned Arbitrator has re-written the terms of the contract which is beyond the scope and jurisdiction of the arbitration. The learned Arbitrator has held that the Royalty (MGA) as agreed upon between the parties is impossible for performance, and at the same time, upheld the remaining part for the clause, thereby trying to separate a single clause into two different parts.

7.18. The learned Arbitrator has ignored the well-settled principle laid down by the Supreme Court in Food Corporation of India v. Chandu Construction & Anr. (2007) 4 SCC 697 that an arbitrator is a creature of the agreement and must act in the four walls of the agreement. However, in the present case, the learned Arbitrator has exceeded his jurisdiction by passing the impugned order thereby re-writing the express terms and conditions of the contract which were mutually agreed upon by the petitioner and the respondent herein.

7.19. The learned Arbitrator did not take note of the fact that the novation, rescission or alteration of a contract under Section 62 of the Indian Contract Act can only be done with the agreement of both the parties of a contract. Both the parties have to agree to substitute the original contract with a new contract or rescind or alter. It cannot be done unilaterally or by the Court of law. The respondent in essence sought alteration of the terms of the contract through this tribunal which cannot be permitted. Reliance is placed on the judgments passed in Alopi Parshad & Sons Ltd. v. Union of India (1960) 2 SCR 793, Citi Bank N.A. v. Standard Chartered Bank AIR 2003 SC 4630 and Ramana Dayaram Shetty v. International Airport Authority of India (1979) 3 SCC 489.

7.20. The learned Arbitrator bypassed the fact that the grounds urged by the respondent due to temporary change in the market conditions and the terrorists attack on Mumbai are against the settled law that commercial difficulty, inconvenience or hardship cannot be a justification for not complying with the terms of the contract, more so temporary phase of recession or adverse market conditions cannot be justification for changing the terms and conditions of a commercial contract executed for a longer period, which is 30 yrs in the instant case, and when the respondent with the full knowledge of the terms and conditions, willingly and voluntarily entered into an agreement and as such, the commercial difficulty in terms of the hardship in performance of those conditions cannot be a ground to avoid a contractual obligation. Reliance is placed on State of Haryana v. Jage Ram (1980) 3 SCC 599.

7.21. The learned Arbitrator failed to appreciate that the respondent was approbating and reprobating at the same time, which is not permissible in the eyes of law. The respondent who on its own accepted the terms and conditions of the contract cannot now be allowed to avoid the same, on the assumption that it is now disadvantageous to it. Reliance is placed on New Bihar Biri Leaves Co. v. State of Bihar, (1981) 1 SCC 537.

7.22. The learned Arbitrator failed to appreciate that change in the economic scenario which led a project being less favourable or less profitable or the contract becoming more onerous, does not frustrate the terms of the contract.

7.23. The learned Arbitrator failed to appreciate the law laid down by the Supreme Court in Continental Construction Company Limited v. State of Madhya Pradesh, 1998 (3) SCC 82 wherein the Supreme Court expressly while dealing with similar facts and circumstances held that the arbitrator is a Tribunal selected by the parties to decide the dispute according to law and so is bound to follow the settled law and that a contractor having contracted cannot go back to the agreement simply because it does not suit him to abide by it. The Court further held that the contract is not frustrated merely because the circumstance in which the contract was based was altered. The Supreme Court further held that the Indian Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates on some vague plea of equity. It was further observed that the parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate, such as abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution of the contract. However, no general liberty is reserved for the Courts to absolve a party from liability to perform his part of the contract merely because on account of uncontemplated turn of events, the performance of the contract may become onerous.

7.24. The learned Arbitrator failed to appreciate the law laid down by the Supreme Court in Alopi Parshad & Sons Ltd. v. Union of India AIR 1960 SC 588 in which it was held that a contract is not frustrated merely because of its performance has become more onerous and burdensome namely because of abnormal rise and fall in prices, a sudden depreciation of currency, or an unexpected obstacle to the execution of the contract, as these are nothing but ordinary risks of business. The Supreme Court further observed that the Court has no power of absolving the performance of the contract, merely because it has become onerous on account of unforeseen circumstances.

7.25. The learned Arbitrator committed a serious error of jurisdiction in returning a finding in para 34 that it cannot be said that the claimant has no FSI left to construct the hotel, failing to appreciate that this matter was beyond the terms of reference of the learned Arbitrator. Assuming, though without admitting, that the matter of FSI was within the jurisdiction of the learned Arbitrator, the respondent/claimant played fraud upon the petitioner by dishonestly appropriating and utilizing the FSI for the land in question for construction of a building on adjoining land belonging to the respondent. In this manner, the respondent not only misappropriated valuable property of the petitioner, but also this conduct bears out the intent of the respondent that it never intended to construct a hotel on the present land.

7.26. The petitioner filed an application under Section 27 of the Arbitration and Conciliation Act, 1996 seeking liberty to summon a witness from Mumbai Municipal Corporation to resolve the controversy relating to the FSI of 11000 square meters of land. The learned Arbitrator disposed of the application on the ground that the respondent had given up prayers (b) to (d) of the statement of claim. Despite that learned Arbitrator dealt with the plea of FSI in para 34 of the impugned award.

7.27. The respondent does not have the required Floor Space Index to fulfil the contractual obligations. The learned Arbitrator has failed to appreciate the fact that the evidence, documents and the admissions made by the witnesses of the respondent themselves that there is no Floor Space Index (FSI) left with the respondent to construct the Hotel as stipulated in the lease agreement dated 07th February, 1996 and the present proceeding is nothing but a way devised by the respondent to come out of its liability to construct the hotel. The petitioner had placed sufficient materials on record i.e. by way of letter from the Municipal Corporation of Mumbai dated 17th June, 2004 which clearly stated that the respondent does not have the required FSI (Floor Space Index) to construct any hotel on the 11000 sq. mtr. land as the FSI of the same has already been utilized by the respondent in some other projects. The petitioner also placed on record occupancy certificate dated 15th November, 2002 issued by the Municipal Corporation of Mumbai which clearly highlighted the fact beyond doubt that there was no FSI available with the respondent.

7.28. The learned Arbitrator failed to appreciate the fact that even the witness i.e. CW-2 admitted that FSI under the present agreement was "one" and the above mentioned fact was also admitted by the claimant's witness during his cross examination.

7.29. The learned Arbitrator has erred in relying upon the letter dated 26th June, 1981 issued by the Government of Maharashtra Urban Development Department to the respondent. It is submitted that a perusal of the letter dated 25th June, 1991 would show that it was a conditional offer made to the respondent before the agreement was entered into between the parties wherein the State of Maharashtra had offered that subject to fulfilment of the conditions mentioned therein, the respondent may have an FSI of "two" subject to payment of certain charges. However, the learned Arbitrator failed to appreciate the fact that in terms of clause 6 of the lease deed dated 07th February, 1996 entered between the parties, the FSI of the land was "one" and the respondent could not go beyond the same without the prior permission or approval from the petitioner. It is also an admitted position that no such approval was even taken by the respondent from the petitioner herein.

7.30. The learned Arbitrator while erroneously holding that the respondent had an available FSI of "two" by over-looking not only the agreement entered between the parties dated 07th February, 1996, letter dated 17th June, 2004 from the Municipal Corporation of Mumbai, the occupancy certificate dated 15th November, 2002 issued by the Municipal Corporation of Mumbai which clearly specified and demarcated the FSI available on the land in question in terms of the present rules was "one", but also the acceptance and admission by CW-2 that there exists no FSI on the said land.

7.31. The impugned award is also contrary to the law laid down under Section 34 of the Specific Relief Act, 1963. The learned Arbitrator has failed to appreciate the fact that pursuant to the order dated 30th January, 2012, the sole surviving prayer claimed by the respondent was the 'declaration' to the effect that the Minimum Guaranteed Amount has become impossible of performance. In terms of Section 34 of the Specific Relief Act, merely a declaration without seeking any consequential relief cannot be granted.

8. Submissions on behalf of the respondent 8.1. The respondent in the arbitration proceedings restricted its relief to a declaration that the Minimum Guaranteed Amounts stipulated in the Supplemental Agreement dated 7th February, 1996 executed between the parties is an impossibility not capable of being achieved in the circumstances prevailing in the hotel industry. As such, the only point at issue before the learned Arbitrator was whether the Minimum Guaranteed Amount of royalty mentioned in Schedule A to the Supplemental Agreement dated 7th February, 1996 had become impossible of performance post June, 2008 on account of the worldwide recession and the terrorist attack on five star hotels in Mumbai. The combined effect of both these events had a crippling effect on the hotel industry in Mumbai and that the projected gross turnover for the respective years mentioned in the Schedule A became unachievable. The magnitude of the worldwide recession was comparable only to the great depression of the 1920s and the terrorist attack by Pakistani militants on five star hotels in Mumbai was unimaginable. There was no precedent in history to what had happened during the second half of 2008 in Mumbai and no one could have foreseen such an eventuality. The Minimum Guaranteed Amount of royalty based on the estimate of the parties in 1996 regarding the future gross turnover of the hotel had become irrelevant and incapable of achievement. The combined effect of these two events has been to render the Supplemental Agreement dated 07th February, 1996 regarding payment of Minimum Guaranteed Amount to the petitioner, not only more onerous, but commercially impossible of performance within the meaning of Section 56 of the Indian Contract Act, 1972.

8.2. The respondent admits and acknowledges the existence, validity and enforceability of the Lease Deed dated 07th February, 1996 executed by the petitioner in favour of the respondent in respect of 11,000 sq. meters of land located near the Sahar International Airport, Mumbai. The rights and obligations of the lessor and the lessee as set out in the said Lease Deed were not under challenge at all. It was common ground between the parties before the learned Arbitrator that the lease deed dated 07th February, 1996 was never frustrated and both parties affirmed its validity and enforceability. The respondent states that as a matter of law, a lease is incapable of being frustrated as has been repeatedly held by the Supreme Court.

Reliance is placed on the judgment passed in Raja Dhruv Dev Chand v. Raja Harmohinder (supra) and Sushila Devi v. Hari Singh (1971) 2 SCC 288.

8.3. The projected gross turnover mentioned in Schedule A became unachievable following the worldwide recession which was unprecedented since the great depression of the 1920s as well as the terrorist attack by Pakistani militants on five star hotels in Mumbai which had no precedent at all in history. The respondent led expert evidence on the impact of these events on the hotel industry in Mumbai and the difference it would make to the projected turnover of the 150 room hotel proposed to be constructed on the 11,000 sq. meters of land leased to the respondent by the petitioner. The affidavit of the expert witness, Shri Vijay Premji Thacker, a Chartered Accountant providing consultancy services to the hotel and tourism industry, with vast experience to his credit was filed by the respondent. The witness analysed in detail the situation prevailing in the hotel industry in Mumbai towards the end of 2008.

8.4. The conclusion drawn by this expert as mentioned in paragraph 5.3 of his affidavit is that during the first ten years of its operations the total revenue or turnover of the proposed hotel would be Rs.646.1 crores and the Minimum Guaranteed Amount payable to the petitioner as additional consideration for the lease would be Rs.673.4 crores for the same ten year period. In other words, the Minimum Guaranteed Amount payable as a part of the consideration for the lease will exceed the total revenue of the hotel by 27.3 crores. This is clearly a bizarre situation which needs to be corrected by declaring the contents of Schedule A to the Supplemental Agreement dated 7th February, 1996 as impossible of performance within the meaning of Section 56 of the Indian Contract Act, 1872. The learned Arbitrator after appreciating the evidence led by both the parties held that the Minimum Guaranteed Amount of royalty as mentioned in the Schedule A to the Supplemental Agreement had become impossible of performance. This is a finding of fact which is not liable to be interfered with by this Court. The learned Arbitrator has left it to the parties to arrive at Minimum Guaranteed Amount of royalty afresh in terms of Clause 3 of the lease deed without in any manner disturbing the obligation of the respondent to pay 7.5% of the gross turnover of the hotel towards royalty as agreed and recorded in the Supplemental Agreement dated 7th February, 1996. The learned Arbitrator has committed no error whatsoever and has acted within the jurisdiction conferred upon him by the arbitration agreement between the parties.

8.5. The frustrating events that gave rise to the cause of action of the respondent occurred after the passing of the award dated 17th May, 2008. It was from June 2008 that the global economic recession began to have its impact on the hotel industry in India, and the evidence of the expert witness, Shri Vijay Thacker is clear on this point. The terrorist attack on Mumbai hotels was on 26th November, 2008, which is a historical event. The said expert witness has demonstrated with facts and figures the crippling effect which these unforeseen events had on the occupancy levels and profitability of five star hotels in Mumbai. Obviously, the respondent could not have raised the issue of frustration which is founded on these subsequent events in the earlier arbitration proceedings.

8.6. The respondent accepts the legal proposition that a contract does not become frustrated because it has become more onerous to one party. The doctrine of frustration is an exception to the sanctity, inviolability and enforceability of contracts. The law expects parties to abide by the bargain which they have struck unless they are exonerated from performing their obligation by supervining events of an extreme and unexpected character over which they had no control. The concept of frustration of contract has varied from country to country and from age to age. When supervening events over which the parties had no control have led to a situation where the lessee of a piece of land given on lease for construction of a hotel is required to pay more than the actual turnover of the hotel itself as additional consideration for the lease, which is over and above the lease rent stipulated in the lease deed, it is not a case of the contract becoming more onerous, but one of frustration.

8.7. It could not have been in the contemplation of the parties to the supplemental agreement dated 7th February, 1996 that the Minimum Guaranteed Amount stipulated in Schedule A thereto would one day exceed by far the total turnover of the hotel itself. Such an unexpected turn of events undoubtedly leads to frustration of the Minimum Guaranteed Amount as mentioned in Schedule A to the Supplemental Agreement.

8.8. Reliance is placed on Satyabrata Ghose v. Mugneeram Bangur & Co. AIR 1954 SC 44, in Sushila Devi v. Hari Singh (1971) 2 SCC 288, Jagatjit Distilling & Allied Industries v. Bharat Nidhi Ltd. DLT 15 (1979) 152 (SN), D. Devi Bhagat v. J.B. Advani & Co. 76 Calcutta Weekly Notes and Sharda Mahajan v. Maple Trading International P. Ltd. [2007] 139 Comp. Cas 718 (Delhi).

8.9. With respect to the petitioner's contention that the claim was barred by Section 34 of the Specific Relief Act, it was submitted that the claim was not barred as the declaration sought fell outside the purview of Section 34 of the Specific Relief Act, 1963.

8.10. With respect to the petitioner's contention that the respondent has no FSI left to build the Hotel block on the lease land, it was submitted that the respondent has utilised the FSI of 1 (one) in carrying out construction on the adjoining Hotel Leela Galleria, as back as in the year 2002 but the respondent can obtain FSI of 2 (two) on payment of premium to the Government. Reliance is placed on the letter dated 25th June, 1991 issued by Government of Mahrashtra, Urban Development Department, in support of this submission.

9. Scope of Section 34 of the Arbitration and Conciliation Act 9.1. The law with respect to the scope of Section 34 of the Arbitration and Conciliation Act, 1996 is well settled. In Oil and Natural Gas Corporation v. Saw Pipes Ltd., 2003 (5) SCC 705, the Supreme Court has considered the scope of interference in an arbitral award on the ground of public policy in great detail and observed that the phrase 'public policy of India" is required to be given a wider meaning so as to prevent frustration of legislation and justice. The Supreme Court held that an arbitral award could be set aside, if it is contrary to (i) the fundamental policy of Indian Law; or (ii) the interest of India; or (iii) justice or morality; or (iv) if it is patently illegal. However, the Court cautioned that the illegality must go to the root of the matter. If the illegality is of trivial nature, the arbitral award cannot be taken to be against public policy. The Court further observed that the award could be set aside if it is so unfair and unreasonable that it shocked the conscience of the Court.

9.2. In Delhi Development Authority v. R.S. Sharma, (2008) 13 SCC 80, the Supreme Court summarized the principles as under:

> "21. From the above decisions, the following principles emerge:
>
> (a) An award, which is
>
> (i) contrary to substantive provisions of law; or
>
> (ii) the provisions of the Arbitration and Conciliation Act, 1996; or
>
> (iii) against the terms of the respective contract; or
>
> (iv) patently illegal; or
>
> (b) the interest of India; or

(c) justice or morality.

(d) The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court.

(e) It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India."

9.3. In Steel Authority of India Ltd. v. Gupta Brother Steel Tubes Ltd., JT 2009 (12) SC 135, the Supreme Court summarised the position in paragraph 26 as follows:

"26. It is not necessary to multiply the references. Suffice it to say that the legal position that emerges from the decisions of this Court can be summarised thus:

(i) In a case where an arbitrator travels beyond the contract, the award would be without jurisdiction and would amount to legal misconduct and because of which the award would become amenable for being set aside by a Court.

(ii) An error relatable to interpretation of the contract by an arbitrator is an error within his jurisdiction and such error is not amenable to correction by Courts as such error is not an error on the face of the award.

(iii) If a specific question of law is submitted to the arbitrator and he answers it, the fact that the answer involves an erroneous decision in point of law does not make the award bad on its face.

(iv) An award contrary to substantive provision of law or against the terms of contract would be patently illegal.

(v) Where the parties have deliberately specified the amount of compensation in express terms, the party who has suffered by such breach can only claim the sum specified in the contract and not in excess thereof. In other words, no award of compensation in case of breach of 10 contract, if named or specified in the contract, could be awarded in excess thereof.

(vi) If the conclusion of the arbitrator is based on a possible view of the matter, the court should not interfere with the award.

(vii) It is not permissible to a court to examine the correctness of the findings of the arbitrator, as if it were sitting in appeal over his findings."

9.4. In Oil and Natural Gas Coporation Ltd. v. Western Geco International Limited, (2014) 9 SCC 263, the Supreme Court further elaborated the principles relating to Section 34 and held as under:

"35. What then would constitute the "fundamental policy of Indian law" is the question. The decision in ONGC [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression "fundamental policy of Indian law", we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law. The first and foremost is the principle that in every determination whether by a court or other authority that affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a "judicial approach" in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge.

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38. Equally important and indeed fundamental to the policy of Indian law is the principle that a court and so also a quasi- judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated audi alteram partem rule one of the facets of the principles of natural justice is that the court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law.

39. No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury principle [Associated Provincial Picture Houses Ltd. v. Wednesbury

Corpn., (1948) 1 KB 223 : (1947) 2 All ER 680 (CA)] of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available.

40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest."

(Emphasis supplied) 9.5. In Associate Builders v. Delhi Development Authority, (2015) 3 SCC 49, the Supreme Court further elaborated the scope of Section 34 and held as under:

"Fundamental Policy of India Law xxx xxx xxx

29. It is clear that the juristic principle of a "judicial approach" demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.

30. The audi alteram partem principle which undoubtedly is a fundamental juristic principle in Indian law is also contained in Sections 18 and 34(2)(a)(iii) of the Arbitration and Conciliation Act..... "

31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

(i) a finding is based on no evidence, or

(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or

(iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.

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Justice

> 36. The third ground of public policy is, if an award is against justice or morality. These are two different concepts in law. An award can be said to be against justice only when it shocks the conscience of the court. An illustration of this can be given. A claimant is content with restricting his claim, let us say to Rs 30 lakhs in a statement of claim before the arbitrator and at no point does he seek to claim anything more. The arbitral award ultimately awards him Rs 45 lakhs without any acceptable reason or justification.

Obviously, this would shock the conscience of the court and the arbitral award would be liable to be set aside on the ground that it is contrary to "justice".

Morality

37. The other ground is of "morality". Just as the expression "public policy" also occurs in Section 23 of the Contract Act, 1872 so does the expression "morality". Two illustrations to the said section are interesting for they explain to us the scope of the expression "morality":

> "(j) A, who is B's Mukhtar, promises to exercise his influence, as such, with B in favour of C, and C promises to pay 1000 rupees to A. The agreement is void, because it is immoral.
>
> (k) A agrees to let her daughter to hire to B for concubinage.

The agreement is void, because it is immoral, though the letting may not be punishable under the Indian Penal Code (45 of 1860)."

Patent Illegality

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42. In the 1996 Act, this principle is substituted by the "patent illegality" principle which, in turn, contains three subheads:

> 42.1. (a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature.

This again is really a contravention of Section 28(1)(a) of the Act, which reads as under:

> "28.Rules applicable to substance of dispute.--(1) Where the place of arbitration is situated in India--
>
> (a) in an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;"

42.2. (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality -- for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside.

42.3. (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

> "28.Rules applicable to substance of dispute.--(1)- (2)*** (3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do."

(Emphasis supplied)

10.Discussion and Findings Respondent's liability to pay the Royalty (MGA) is absolute under the Transfer of Property Act, 1882 10.1. A lease of an immovable property is a transfer of an interest in an immovable property entitling the lessee to the enjoyment of such immovable property which includes the right to possession thereof. An essential feature of the lease is that the transfer is for a consideration which is called premium or rent. The lease is defined in Section 105 of the Transfer of Property Act whereas the rights and liabilities of the lessor and the lessee are defined in Section 108. Section 105 of the Transfer of Property Act defines the lease as under:-

> "Section 105 - Lease defined A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to be transferor by the transferee, who accepts the transfer on such terms.
>
> Lessor, lessee, premium and rent defined The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.
>
> (Emphasis supplied) 10.2. Section 108 clause (l) provides that the lessee is bound to regularly pay the rent/premium to the lessor. The liability of the lessee to pay the rent/premium is absolute and not subject to any commercial hardship faced by the lessee. Section 108(l) of the Transfer of Property Act is as follows:

"Section 108 - Rights and liabilities of lessor and lessee In the absence of a contract or local usage to the contrary, the lessor and the lessee of immovable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased:-

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(B) Rights and Liabilities of the Lessee

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(l) the lessee is bound to pay or tender, at the proper time

and place, the premium or rent to the lessor or his agent in this behalf"

(Emphasis supplied) 10.3. In Gopalakrishna Mudaliar v. Rajan Kattalai, (1974) 1 MLJ 184, the tenant contested the claim for rent on the ground that there had been a cyclone. The Madras High Court rejected the contention holding that the rent stipulated in the lease is an unconditional rent and not subject to acts of God. Relevant portion of the said judgment is as under:

"4. As far as the second contention is concerned, the lease itself makes it absolutely clear that the rent stipulated therein is an unconditional rent and it is not subject to acts of State and God and that under no condition whatever, any remission in the rent shall be given. In view of these express provisions contained in the lease deed, it is not open to the appellants to put forward the contention that they must be relieved of their obligation to pay the stipulated rent either on account of the cyclone or on account of the alleged presence of the cultivating tenants on the lands..."

(Emphasis supplied) Section 56 of the Contract Act has no application to leases 10.4. Section 56 of the Contract Act, second part provides that contract to do an act which, after the contract is made, becomes impossible, becomes void when the act becomes impossible. The relevant portion of Section 56 is reproduced hereunder:-

"Section 56 of the Indian Contract Act Agreement to do impossible act.

An agreement to do an act impossible in itself is void. Contract to do act afterwards becoming impossible or unlawful.

A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful--A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."

10.5. The essential ingredients for application of second part of Section 56 are as under:

(a) A valid and subsisting contract.
(b) There must be some part of the contract yet to be performed.
(c) The contract, after it is entered, becomes impossible to be performed.

10.6. The doctrine of frustration applies to contracts. However, a lease is something more than a mere contract or agreement in so far as it results in the creation of an estate in favour of the lessee. It creates an interest in a property in favour of the lessee. It brings into existence the respective covenants of the lessor and the lessee; including the consideration, and it constitutes an agreement enforceable at law i.e. contracts which have to be performed, until lease comes to an end. There is nothing to be done after the lessee is put in possession and therefore, condition (b) would not be fulfilled. Section 56 of the Contract Act does not apply to cases in which there is a completed transfer. There is a clear distinction between a completed conveyance and an executory contract, and the events which discharge a contract do not invalidate a concluded transfer. The relevant judgments are as under:-

10.6.1. In Raja Dhruv Dev Chand v. Raja Harmohinder Singh AIR 1968 SC 1024, the three-Judge Bench of Supreme Court held that Section 56 of the Contract Act is not applicable when the rights and obligations of the parties arise under a transfer of property under a lease. In this case, the appellant took agricultural land on lease for one year in 1947. The rent was paid and the lessee was given possession. However, before the land could be exploited for any crop, partition took place which left the land in Pakistan and the parties migrated to India. The appellant instituted a suit for refund of the rent, which was decreed. The High Court reversed the decree whereupon the appellant approached the Supreme Court. The Supreme Court held that completed transfers are outside the scope of Section 56. The Supreme Court laid down a clear distinction between a completed conveyance and an executory contract, and events which discharge a contract, do not invalidate a concluded transfer. By its express terms, Section 56 of the Contract Act does not apply to cases in which there is a completed transfer as in the case of concluded lease. Relevant portion of the said judgment is reproduced hereunder:

"10. We are unable to agree with counsel for the appellant in the present case that the relation between the appellant and the respondents rested in a contract. It is true that the Court of Wards had accepted the tender of the appellant and had granted him a lease on agreed terms of lands of Dada Siba Estate. But the rights of the parties did not after the lease was granted rest in contract...

11. By its express terms Section 56 of the Contract Act does not apply to cases in which there is a completed transfer. The second paragraph of Section 56 which is the only paragraph material to cases of this nature has a limited application to covenants under a lease. A covenant under a lease to do an act which after the contract is made becomes impossible or by reason of some event which the promisor could not prevent unlawful, becomes void when the act becomes impossible or unlawful. But on that

account the transfer of property resulting from the lease granted by the lessor to the lessee is not declared void.

12. By the agreement of lease the appellant undertook to pay rent for the year 1947-48 and the Court of Wards agreed to give on lease the land in its management. It is not claimed that the agreement of lease was void or voidable. Nor is it the case of the appellant that the lease was determined in any manner known to law. The appellant obtained possession of the land.

He was unable to continue in effective possession on account of circumstances beyond his control. Granting that the parties at the date of the lease did not contemplate that there may be riots in the area rendering it unsafe for the appellant to carry on cultivation, or that the crops grown by him may be looted, there was no covenant in the lease that in the event of the appellant being unable to remain in possession and to cultivate the land and to collect the crops, he will not be liable to pay the rent. Inability of the appellant to cultivate the land or to collect the crops because of widespread riots cannot in the events that transpired clothe him with the right to claim refund of the rent paid.

13. Authorities in the Courts in India have generally taken the view that Section 56 of the Contract Act is not applicable when the rights and obligations of the parties arise under a transfer of property under a lease. In Abdul Hashem v. Balahari Mondal the Calcutta High Court held that in a case where during the continuance of a tenancy, a notice was served on the tenant requiring him to place a part of the land under tenancy at the disposal of the Land Acquisition Collector, and the Collector took possession of the premises let out to him, it was held that even though the occurrence was unforeseen and was not contemplated by the parties when the lease was created, the occurrence was not so fundamental as to be regarded in law to strike at the root and destroy the basis of the relationship of landlord and tenant.

14. In Tarabai Jivanlal Parekh v. Lala Padamehand it was held that monthly tenants of residential premises from whose occupation the premises were requisitioned continued to remain the monthly tenants of the landlord as before and that by reason of the requisition there was no eviction by title paramount or a frustration of adventure. The Court in that case observed that the doctrine of frustration did not apply where there is a lease whether the term is one for a fixed period or one which can be terminated by notice to quit, as the estate vested in the lessee by a lease is not extinguished by the order of requisition which is of a temporary nature.

15. In Alanduraiappar Koil Chithakkadu by its Trustee M. Ramananda Nainar v. T.S.A. Hamid, a lessee of a shandy tope agreeing to pay an annual rent for a period of five years was held not to be entitled to remission merely for the reason that the shandy was hit by two cyclones during the period of lease and that for some period on account of the cyclone, "the shandy did not form properly or regularly and the lessee

> did not get any income". The Court held in that case that in the absence of any provision for remission on account of losses, no such remission can be granted by the Courts."

(Emphasis supplied) 10.6.2. In T. Lakshmipathi v. P. Nithyananda Reddy (2003) 5 SCC 150, the Supreme Court referred to Raja Dhruv Dev Chand (supra) and held that doctrine of frustration belongs to the realm of law of contracts and it does not apply to a transaction where not only a privity of contract but a privity of estate has also been created inasmuch as a lease is the transfer of an interest in immovable property within the meaning of Section 5 read with Section 105 of the Transfer of Property Act. Relevant portion of the said judgment is reproduced hereunder: -

> "20. The tenancy cannot be said to have been determined by attracting applicability of the doctrine of frustration consequent upon demolishing of the tenancy premises. Doctrine of frustration belongs to the realm of law of contract; it does not apply to a transaction where not only a privity of contract but a privity of estate has also been created inasmuch as lease is the transfer of an interest in immovable property within the meaning of Section 5 of the Transfer of Property Act (wherein the phrase "the transfer of property" has been defined), read with Section 105, which defines a lease of immovable property as a transfer of a right to enjoy such property."

(Emphasis supplied) 10.6.3. In Mahadeo Prosad Shaw v. Calcutta Dyeing and Cleaning Co. AIR 1961 Cal 70, the Calcutta High Court held that the doctrine of frustration has no application to leases. Relevant portion of the said judgment is as under: -

> "12. I, therefore, proceed to consider whether the doctrine of frustration has application to leases.
>
> 13. Section 56 of the Contract Act, 2nd part, is the part which we have to consider. That section is as follows:
>
> "Contract to do an act which after the contract is made becomes impossible ..... becomes void when the act becomes impossible".

14. Hence, there must be--

(a) A valid and subsisting contract between the parties,

(b) There must be some part of the contract yet 'to do'.

(c) The contract after it is made, becomes 'impossible'.

15. If these three conditions are satisfied, then the contract becomes void when the act becomes impossible. This is the law of frustration; but the question still is whether that would operate to a lease. The question arises in the following manner:

16. When a lease is executed, there is transfer of property. The lessee is put in possession and it may be said after the lessee is put in possession that there is nothing yet to be done. Therefore,Section 56 would not apply because condition (b) would not be fulfilled, there being nothing yet to be done by either party.

(Emphasis supplied) Section 4 of the Transfer of Property Act, 1882 10.7. The Indian Contract Act was passed before the Transfer of Property Act. By Section 4 of the Transfer of Property Act, the chapters and sections of the Transfer of Property Act which relate to contracts are to be taken as part of the Indian Contract Act, 1872. Section 4, however, does not enact and cannot be read as enacting that the provisions of the Contract Act are to be read into the Transfer of Property Act. Section 4 of the Transfer of Property Act is reproduced hereunder:

> "Section 4 of the Transfer of Property Act - Enactments relating to contracts to be taken as part of Contract Act and supplemental to the Registration Act The Chapters and sections of this Act which relate to contracts shall be taken as part of the Indian Contract Act, 1872.
>
> And Section 54, paragraphs 2 and 3, and Sections 59, 107 and 123 shall be read as supplemental to the Indian Registration Act"

10.8. It is significant to note that the whole of the Contract Act has not been extended to transfer of immovable properties under Transfer of Property Act. Only such provisions of Transfer of Property Act, which relate to contracts alone, are read as part of the Contract Act, but not vice versa. There is a clear distinction between a contract, which still remains to be performed and a conveyance by which the title to the property actually passes. Thus, a mere agreement to lease would not amount to an actual transfer of right in immovable property. However, after the execution of the lease deed, the transaction passes out of the domain of mere contract into one of conveyance governed by Transfer of Property Act. Such a competed transaction would be governed by the provisions of the Transfer of Property Act.

10.9. The doctrine of frustration embodied in Section 56 of the Indian Contract Act which renders a contract void by reason of the impossibility, would not apply in the case of a lease. The rights of the parties after a lease was granted rest not in contract. Though under Section 4 of the Transfer of Property Act, the chapters and sections of the said Act relating to contracts are to be taken as part of the Indian Contract Act that does not mean that the provisions of the Contract Act are to be read into the Transfer of Property Act. The relevant judgments in this regard are as under:-

> 10.9.1. In Raja Dhruv Dev Chand v. Raja Harmohinder Singh (supra), the Supreme Court held as under:
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> "10. ...By S. 4 of the Transfer of Property Act the chapters and sections of the Transfer of Property Act which relate to contracts are to be taken as part of the Indian Contract Act, 1872. That section however does not enact and cannot be read as enacting that the provisions of the Contract Act are to be read into the Transfer of

> Property Act. There is a clear distinction between a completed conveyance and an executory contract, and events which discharge a contract do not invalidate a concluded transfer.
>
> (Emphasis supplied) 10.9.2. In Amir Chand v. Chuni Lal, AIR 1990 P&H 345, the Punjab and Haryana High Court held as under:-
>
> "4. The doctrine of frustration embodied in S. 56 of the Contract Act which renders a contract void by reason of the impossibility of performing the act required on account of some event, which the promissor could not prevent, would not apply in the case of a lease. The rights of the parties after a lease was granted rest not in contract. Though under S. 4 of the Transfer of Property Act, the chapters and sections of the said Act relating to contracts are to be taken as part of the Contract Act yet that does not mean that the provisions of Contract Act are to be read into the Transfer of Property Act. The doctrine of frustration cannot apply to a lease of the present nature.....".

(Emphasis supplied) Sections 108(e) of the Transfer of Property Act, 1882 is a special law and it excludes the general law i.e. Section 56 of the Contract Act 10.10.Section 56 of the Contract Act is a general law whereas Section 108(e) of the Transfer of Property Act is a special law. In Kedar Lall v. Hari Lall, AIR 1952 SC 47, the Supreme Court held that the special law dealing with the mortgage i.e. Transfer of Property Act shall exclude the general law i.e. the Contract Act. Relevant portion of the Supreme Court judgment is reproduced hereunder:

> "Section 43 is a provision of the Contract Act dealing with contracts generally. Section 82 applies to mortgages. As the right to contribution here arises out of a mortgage, I am clear that Section 82 must exclude Section 43 because when there is a general law and a special law dealing with a particular matter, the special excludes the general. In my opinion, the whole law of mortgage in India, including the law of contribution arising out of a transaction of mortgage, is now statutory and is embodied in the Transfer of Property Act read with the Civil Procedure Code. I am clear we cannot travel beyond these statutory provisions."

(Emphasis supplied) 10.11.The doctrine of frustration of leases is incorporated in Section 108(e) of the Transfer of Property Act. Section 108(e) is reproduced hereunder:

> "Section 108 - Rights and liabilities of lessor and lessee In the absence of a contract or local usage to the contrary, the lessor and the lessee of immovable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased:-
>
> xxx xxx xxx
>
> (B) Rights and Liabilities of the Lessee
>
> xxx xxx xxx

(e) if by fire, tempest or flood, or violence of any army or of a mob or other irresistible force, any material part of the property he wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void:

Provided that, if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision."

(Emphasis supplied) 10.12.The destruction of the leasehold property under the circumstances mentioned in Section 108(e) by itself does not amount to a determination of the lease under Section 111. In other words, even though the lease-hold property is destroyed, the tenancy is not automatically determined. Despite the destruction of the premises, the lease subsists and the lessee is liable to pay the contractual rent. Section 108(e) confers an option on the lessee to treat the lease as void and thereby avoid the liability of paying the rent in future.

10.13.A comparison of Section 108(e) of the Transfer of Property Act with Section 56 of the Indian Contract Act would show that the doctrine of frustration as enacted in Section 56 is substantially incorporated in Section 108(e) of the Transfer of Property Act. Section 56 refers to the stage when the contract becomes impossible or unlawful and there would be frustration within the meaning of that Act and the contract is discharged thereby. Section 108(e) of the Transfer of Property Act does not use the words 'when the contract becomes impossible', but really gives certain instances of it. Section 108(e) of the Transfer of Property Act, begins with certain instances where the lease becomes impossible of further performance and those instances are destruction by 'fire, tempest, flood, violence of an army or of a mob'; and after citing specific instances, it continues to use a rather general clause 'other irresistible force'. 10.14.Section 108(e) is based on the principle of frustration of contract, and was enacted to safeguard the rights of the tenant in case of the total destruction of the property leased to him. It gives him the right to escape his liability as a tenant by declaring the lease void. However, if the tenant does not exercise the option under clause (e) that is, does not invoke the doctrine of frustration, the lease shall continue for the benefit of both the parties. It is the general rule that the rent continues to be payable notwithstanding that, in the case of a dwelling-house or flat, it is at the time of letting, or subsequently becomes, unfit for habitation; or in the case of land near the seashore, that it is of no value; or in the case of agricultural land, that it is unsuitable for the intended use; or that the premises are subsequently destroyed by fire, or carried away by a flood, or inundated by fresh water; or destroyed by enemy action; the premises have become useless to the tenant. It would thus appear that in case of the destruction of the leased accommodation though no fault of the landlord, the tenant can avoid payment of rent only if he declares the lease void under Section 108(e) of the Transfer of Property Act, but if he fails to do so, the lease will subsist for the benefit of both parties and the landlord is entitled to claim rent.

10.15.The entire law of frustration of leases is codified under Section 108(e) of the Transfer of Property Act. Under the Contract Act, the contract stands discharged as this is a part of positive law; whereas under the Transfer of Property Act, it depends on the option of the lessee. Therefore, as a result of frustration, if a lease is to be treated as a contract, it would contradict the result as stated in Section108(e) because in one case, the contract stands automatically discharged and in the other,

only discharged at the option of the lessee.

10.16.As the Transfer of Property Act is a special provision regarding leases, the general provision as enacted in Section 56 of the Contract Act, would not apply in view of the specific provision relating to leases under Section 108(e) of the Transfer of Property Act. In that view, Section 56 of the Contract Act has no application to leases and instead of that section, Section 108(e) will apply so far as frustration relating to leases is concerned. The clear language of the provision leaves no room for doubt that if any part of the property is wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, it is the lessee who is free to decide whether to continue the lease or not. The lease will not automatically be rendered void. The principle enacted in Section 108(e) of the Act is based on sound equitable principles. The lessee has obtained the property leased on payment of a particular rent/premium. As a result of destruction of a material or substantial part of the premises demised; it is he to whom the usefulness of the property is lessened. If he chooses to continue to pay the rent agreed upon, the lessor cannot have any grievance. The relevant judgments in this regard are as under:-

> 10.16.1. In Raja Dhruv Dev Chand v. Raja Harmohinder Singh (supra), the Supreme Court held that if any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purpose for which it was let out, because of fire, tempest, flood, violence of an army or a mob, or other irresistible force, the lease may at the option of the lessee, be avoided under Section 108 (e) of the Transfer of Property Act. Relevant portion of the said judgment is reproduced hereunder: -
>
> "18. ..... Under a lease of land there is a transfer of right to enjoy that land. If any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purpose for which it was let out, because of fire, tempest, flood, violence of an army or a mob, or other irresistible force, the lease may, at the option of the lessee, be avoided. This rule is incorporated in Section 108(e) of the Transfer of Property Act and applies to leases of land, to which the Transfer of Property Act applies, and the principle thereof to agricultural leases and to leases in areas where , the Transfer of Property Act is not extended. Where the property leased is not destroyed or substantially and permanently unfit, the lessee cannot avoid the lease because he does not or is unable to use the land for purposes for which it is let to him."

(Emphasis supplied) 10.16.2. In Mahadeo Prosad Shaw v. Calcutta Dyeing and Cleaning Co. (supra), the Calcutta High Court held that the Contract Act covers substantially a wider field than Transfer of Property Act. The performance of the duties of a lessor or a lessee may become impossible otherwise than by the destruction of the property; but this clause does not cover those. The Court turned down the argument that the question of frustration of a lease by destruction of the property is to be decided under this Act, but other cases of the lease (contract) becoming impossible are to be adjudged under the Contract Act on the ground that the Supreme Court has, in Kedar Lal v. Harilal (supra) ruled that "it is established principle that where is a general law and special law dealing with a particular matter, the special excludes the general." The Court went on to observe that if the

special law excludes the general law, it excludes the general law in its entirety and not in parts only. Reading this clause, together with the proviso, the Court held that the entire law of frustration of leases is codified under Section 108(e); that under the Contract Act, the contract stands discharged as this is a part of positive law, whereas under the Transfer of Property Act it depends on the option of the lessee; that the result of frustration, if a lease is to be treated as a contract, would contradict the result, as stated in Section 108(e) because in one case the contract stands automatically discharged and in the other, only discharged at the option of the lessee. The Court held that Section 56 of the Contract Act has no application to leases. The Court held as under:

> "17. ..... A comparison of this section of the Transfer of Property Act with Section 56 of the Indian Contract Act would show that the doctrine of frustration as enacted in Section 56 is substantially incorporated in Section 108(e) of the Transfer of Property Act. Section 56 refers to the stage when the contract becomes impossible or unlawful and there would be frustration within the meaning of that Act and the contract discharged thereby. Section 108(e) of the Transfer of Property Act does not use the words 'when the contract becomes impossible', but really gives certain instances of it. The word 'impossible' in Section 56 of the Contract Act has been understood to mean 'impracticable' or 'impossible' of performance in the case between Satyabrata v. Mugnee Ram, aforesaid. Section 108(e) of the Transfer of Property Act on the other hand begins with certain instances where the lease becomes impossible of further performance and those instances are destruction by 'fire, tempest, flood, violence of an army or of a mob'; after citing specific instances it continues to use a rather general clause 'other irresistible force'.
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> 18. Section 108(e) of the Transfer of Property Act refers to "destroyed wholly or rendered substantially and permanently unfit", but Section 56 of the Contract Act refers to "an act becoming unlawful or impossible". Hence, there is no doubt that the Contract Act covers substantially a wider field than the Transfer of Property Act does. The performance of the duties of a lessor or a lessee may become 'impossible' otherwise than by the destruction of the property; but Section 108(e) of the Transfer of Property Act does not cover those cases. An argument, that the question of frustration of a lease by destruction of the property is to be decided under theTransfer of Property Act but other cases of the lease (contract) becoming impossible are to be adjudged under the Contract Act, seems rather difficult to me. The reason is while dealing with the provisions of the Transfer of Property Act and the Contract Act in relation to contribution the Supreme Court held in Kedar Lal v. Harilal reported in 1952 SCR 179 (AIR 1952 SC 47).
>
> "It is an established principle that where there is a general law and a special law dealing with a particular matter, the special excludes the general". If it excludes the general it excludes the general in its entirety and not in parts only.
>
> 19. Reading therefore S. 108(e) together with the proviso I cannot but hold that the entire law of frustration of leases is codified under S. 108(e) of the Transfer of

> Property Act. The result is that under the Contract Act the contract stands discharged as this is a part of positive law; whereas under the Transfer of Property Act it depends on the option of the lessee. Therefore, the result of frustration, if a lease is to be treated as a contract would contradict the result as stated in S. 108(e) because in one case the contract stands automatically discharged and it the other only discharged at the option of the lessee. As the Transfer of Property Act is a special provision regarding leases, the general provision as enacted in S. 56 of the Contract Act, would not apply in view of the specific provision relating to leases under S. 108(e) of the Transfer of Property Act. In that view, I hold S. 56 of the Contract Act has no application to leases and instead of that section, S. 108(e) will apply so far as frustration relating to leases is concerned."

(Emphasis supplied) 10.16.3. In Hind Rubber Industries Pvt. Ltd. v. T.M. Bagasarwalla, AIR 1996 Bombay 389, the Bombay High Court held that the destruction of the leased property does not extinguish the lease. Section 108(e) of the Transfer of Property Act gives the option to the lessee to treat such lease as void. However, if the lessee does not exercise the option, he would continue to be the lessee and liable to pay the rent. Relevant portion of the said judgment is as under:

> "16. In my view, the correct legal position in this country appears to be that the destruction of the tenanted structure does not extinguish the tenancy and the right of occupation of the tenant under the contract of tenancy continues to exist between the parties. Merely because the tenanted structure has been destroyed or demolished, the right transferred under the lease cannot be said to have come to an end, and the relationship of lessor and lessee continues to exist. The destruction of the tenanted premises does not destroy the tenancy rights nor does it bring to an end the relationship of lessor and lessee or for that matter landlord and tenant. The lessee continues to be lessee in the property leased even after its destruction by fire or such like event unless the lessee exercises his option of treating such lease as void. It may be observed that Section 108 of the T.P. Act deals with the rights and liabilities of lessor and lessee and Part-B and clause (e) of Section 108 provides that if the property leased in wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was leased by fire, tempest or flood or violence of any army or of a mob or other irresistible force, such lease may be rendered void at the option of the lessee provided of course that such injury to the lease property has not been occasioned by the wrongful act or default of the lessee. That means that right of the lessee in the leased property subsists even if the leased properly has been destroyed by fire, tempest or flood or violence of an army or of a mob or other irresistible force unless the lessee exercises his option that on happening of such events the lease has been rendered void. By necessary corollary, therefore, if the leased property is destroyed wholly by fire, the lease cannot be said to be extinguished, nor can it be said that lessee's right in the leased property has come to an end unless the lessee exercises such option. The express provision in clause (e) of Section 108 leaves no manner of doubt that on destruction of leased property by fire, the lease cannot be said to be extinguished, automatically..."

(Emphasis supplied) Commercial hardship does not frustrate the contract 10.17.Even assuming Section 56 applies to leases, it is well settled that Section 56 of the Contract Act cannot be invoked in a case of commercial hardship which may make the performance unprofitable or more expensive or dilatory. A contract is not frustrated just because it becomes more difficult or expensive to perform.

10.18.The whole case of the respondent is based on the ground that due to increase in project cost and due to temporary change in the market condition, the contact has become less onerous and therefore, the terms of the contract could not be complied with. It is the settled law that commercial difficulty, inconvenience or hardship cannot provide justification for not complying with the terms of the contract. The respondent entered into a lease with the petitioner with the full knowledge of conditions which they had to carry out in the conduct of their business, on which they had willingly and voluntarily embarked. The lease between parties is for a period of 30 years and it is but natural and foreseeable that there would be various economic turmoils over a period as long as 30 years. Principle of frustration is not applicable when the event is foreseeable but not foreseen.

10.19.In commercial contracts entered into with open eyes, there cannot be variation to the terms of a concluded contract which has already been acted upon and the parties are estopped from challenging the terms and conditions of the contract. If a person of his own accord, accepts or contracts on certain terms and works out the contract, he cannot be allowed to adhere to and abide by some of the terms of the contract which proved advantageous to him and repudiate the other terms of the same contract which might be disadvantageous to him. The maxim is qui approbat non reprobat (one who approbates cannot reprobate), according to which a party to an instrument or transaction cannot take advantage of one part of a document or transaction and reject the rest. The above principles have been laid down in the following judgments:-

> 10.19.1. In Alopi Parshad v. Union of India, (1960) 2 SCR 793, the Supreme Court held that the contract is not discharged merely because it turns out to be a difficult to perform or onerous. In that case the agent, appointed by the Government for supply of ghee, claimed enhancement of rates on the ground that the circumstances changed due to the war. The Supreme Court rejected the claim and held as under:
>
> "21. ...Performance of the contract had not become impossible or unlawful; the contract was in fact, performed by the Agents, and they have received remuneration expressly stipulated to be paid therein. The Indian Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity. The parties to an executor contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate - a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like.
>
> xxx xxx xxx

> 22. There is no general liberty reserved to the courts to absolve a party from liability to perform his part of the contract, merely because on account of an uncontemplated turn of events, the performance of the contract may become onerous. That is the law both in India and in England, and there is, in our opinion, no general rule to which recourse may be had, as contended by Mr. Chatterjee, relying upon which a party may ignore the express covenants on account of an uncontemplated turn of events since the date of the contract..."

(Emphasis Supplied) 10.19.2. In Panna Lal v. State of Rajasthan, (1975) 2 SCC 633, the Supreme Court held that a party cannot resile from the contract on the ground that the terms of payment were onerous. The relevant portion of the judgment is as under:

> "21. The licences in the present case are contracts between the parties. The Licensees voluntarily accepted the contracts. They fully exploited to their advantage the contracts to the exclusion of others. The High Court rightly said that it was not open to the appellants to resile from the contracts on the ground that the terms of payment were onerous. The reasons given by the High Court were that the Licensees accepted the licence by excluding their competitors and it would not be open to the Licensees to challenge the terms either on the ground of inconvenient consequence of terms or of harshness of terms."

(Emphasis supplied) 10.19.3. In State Bank of Haryana v. Jage Ram (1980) 3 SCC 599 the Supreme Court held that the Licensee cannot challenge the terms of the licence on the ground that he is finding it commercially inexpedient to conduct his business. The Supreme Court reaffirmed the principles laid down in Har Shankar v. Deputy Excise and Taxation Commissioner (1975) 1 SCC 737. Relevant portion of the said judgement is reproduced hereunder.

> "14. In Har Shankar [(1975) 1 SCC 737, 745-46] appellants' bid was accepted in an auction held on March 23, 1968 for the right to sell country liquor at two vends in Ludhiana. The appellants paid the security deposit but were unable to meet their obligation under the conditions of auction and fell in arrears. When the State demanded the payment, threatened to cancel the licences granted to the appellants and declared its intention to resale the vends, the appellants filed writ petitions in the High Court of Punjab and Haryana asking that the auction be quashed and the respondents be restrained from enforcing the obligations arising under its terms and conditions. The High Court having dismissed the writ petitions, the Licensees filed an appeal to this Court by certificate.
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> 15. What is important for our purpose in this appeal is that the State of Punjab, which was respondent to the appeal in Har Shankar [(1975) 1 SCC 737, 745-46] raised a preliminary objection to the maintainability of the writ petitions filed by the appellants and that objection was upheld by this Court. The preliminary objection was that such of the appellants who offered their bids in the auctions did so with a full knowledge of the terms and conditions attaching to the auctions and that they

could not be permitted to wriggle out of the contractual obligations arising out of the acceptance of their bids. Holding that the preliminary objection was well-founded, this Court observed : (SCC pp. 745-746, para 16) "Those interested in running the country liquor vends offered their bids voluntarily in the auction held for granting licences for the sale of country liquor. The terms and conditions of auctions were announced before the auctions were held and the bidders participated in the auctions without a demur and with full knowledge of the commitments which the bids involved. Those who contract with open eyes must accept the burdens of the contract along with its benefits. The powers of the Financial Commissioner to grant liquor licences by auction and to collect licence fees through the medium of auctions cannot by writ petitions be questioned by those who, had their venture succeeded, would have relied upon those very powers to found a legal claim. Reciprocal rights and obligations arising out of contract do not depend for their enforceability upon whether a contracting party finds it prudent to abide by the terms of the contract. By such a test no contract could ever have a binding force." (p. 263) At p. 266 (SCC p. 748) of the Report, the court further observed that the writ jurisdiction of High Courts under Article 226 was not intended to facilitate avoidance of obligations voluntarily incurred.

16.....They entered into a contract with the State authorities with the full knowledge of conditions which they had to carry out in the conduct of their business, on which they had willingly and voluntarily embarked. The occurrence of a commercial difficulty, inconvenience or hardship in the performance of those conditions, like the sale of liquor being less in summer than in winter, can provide no justification for not complying with the terms of the contract which they had accepted with open eyes.

17. The judgment in Har Shankar [(1975) 1 SCC 737, 745-46] was followed in Sham Lal v. State of Punjab [(1977) 1 SCC 336] wherein, appellants were the highest bidders in an auction for the sale of country liquor vends at various places in the State of Punjab. The appellants were called upon by the State to pay the amounts which they were liable to pay under the terms of the auction, whereupon they filed writ petitions in the High Court to challenge the demand. Relying upon the passage from Har Shankar [(1975) 1 SCC 737, 745-46] extracted above, the court held that the Licensees could not be permitted to avoid the contractual obligations voluntarily incurred by them and that therefore the High Court was right in refusing to exercise its jurisdiction under Article 226 of the Constitution in their favour.

18. In view of these decisions, the preliminary objection raised by the Solicitor General to the maintainability of the writ petitions filed by the respondents has to be upheld. We hold accordingly that the High Court was in error in entertaining the writ petitions for the purpose of examining whether the respondents could avoid their contractual liability by challenging the Rules under which the bids offered by them were accepted and under which they became entitled to conduct their business. It

cannot ever be that a Licensee can work out the licence if he finds it profitable to do so; and he can challenge the conditions under which he agreed to take the licence, if he finds it commercially inexpedient to conduct his business.

(Emphasis supplied) One who approbates cannot reprobate 10.19.4. In New Bihar Biri Leaves Co. v. State of Bihar (1981) 1 SCC 537, the Supreme Court held that it is a fundamental principle of general application that if a person of his own accord, accepts or contracts on certain terms and works out the contract, he cannot be allowed to adhere to and abide by some of the terms of the contract which proved advantageous to him and repudiate the other terms of the same contract which might be disadvantageous to him. The relevant portion of the judgment is reproduced as under:

"48. It is a fundamental principle of general application that if a person of his own accord, accepts a contract on certain terms and works out the contract, he cannot be allowed to adhere to and abide by some of the terms of the contract which proved advantageous to him and repudiate the other terms of the same contract which might be disadvantageous to him. The maxim is qui approbat non reprobat (one who approbates cannot reprobate). This principle, though originally borrowed from Scots Law, is now firmly embodied in English Common Law. According to it, a party to an instrument or transaction cannot take advantage of one part of a document or transaction and reject the rest. That is to say, no party can accept and reject the same instrument or transaction.

49. The aforesaid inhibitory principle squarely applies to the cases of those petitioners who had by offering highest bids at public auctions or by tenders, accepted and worked out the contracts in the past but are now resisting the demands or other action, arising out of the impugned Condition (13) on the ground that this condition is violative of Articles 19(1)(g) and 14 of the Constitution."

(Emphasis supplied) 10.19.5. In C. Bepathumma v. V.S. Kadambolithaya (supra), the Supreme Court held that he who accepts a benefit under a deed or will or other instrument must adopt the whole contents of that instrument, must conform to all its provisions and renounce all rights that are inconsistent with it.

10.19.6. In Assistant Excise Commissioner v. Issac Peter (supra), the Supreme Court held that in cases of contracts entered into with open eyes, a party cannot seek alteration of the terms expressly agreed to, on the ground of financial hardship. The State has no responsibility to ensure profit to everyone who contracts with it. The relevant portion of the judgment is reproduced hereunder:

"14.....The contract between the parties is governed by statutory provisions, i.e., provisions of the Act, the Rules, the conditions of licence and the counterpart agreement, they constitute the terms and conditions of the contract. They are binding both upon the Government and the Licensee. Neither of them can depart from them.

It is not open to any officer of the Government to either modify, amend or alter the said terms and conditions, not even to the Minister for Excise.

21.....It is not a case where any essential term of contract was kept back or kept undisclosed. The Government had placed all their cards on the table. If the Licensees offered their bids with their eyes open in the above circumstances they cannot blame anyone else for the loss, if any, sustained by them, nor are they entitled to say that license fee should be reduced proportionate to the actual supplies made.

23. Maybe these are cases where the Licensees took a calculated risk. Maybe they were not wise in offering their bids. But in law there is no basis upon which they can be relieved of the obligations undertaken by them under the contract. It is well known that in such contracts -- which may be called executory contracts -- there is always an element of risk. Many an unexpected development may occur which may either cause loss to the contractor or result in large profit. Take the very case of arrack contractors. In one year, there may be abundance of supplies accompanied by good crops induced by favourable weather conditions; the contractor will make substantial profits during the year. In another year, the conditions may be unfavourable and supplies scarce. He may incur loss. Such contracts do not imply a warranty -- or a guarantee -- of profit to the contractor. It is a business for him -- profit and loss being normal incidents of a business. There is no room for invoking the doctrine of unjust enrichment in such a situation. The said doctrine has never been invoked in such business transactions. The remedy provided by Article 226, or for that matter, suits, cannot be resorted to wriggle out of the contractual obligations entered into by the Licensees.

26. Doctrine of fairness or the duty to act fairly and reasonably is a doctrine developed in the administrative law field to ensure the rule of law and to prevent failure of justice where the action is administrative in nature. Just as principles of natural justice ensure fair decision where the function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action where the function is administrative. But it can certainly not be invoked to amend, alter or vary the express terms of the contract between the parties. It must be remembered that these contracts are entered into pursuant to public auction, floating of tenders or by negotiation. There is no compulsion on anyone to enter into these contracts. It is voluntary on both sides. There can be no question of the State power being involved in such contracts. It bears repetition to say that the State does not guarantee profit to the Licensees in such contracts. There is no warranty against incurring losses. It is a business for the Licensees. Whether they make profit or incur loss is no concern of the State. In law, it is entitled to its money under the contract. It is not as if the Licensees are going to pay more to the State in case they make substantial profits. We reiterate that what we have said hereinabove is in the context of contracts entered into between the State and its citizens pursuant to public auction, floating of tenders or by negotiation. It is not necessary to say more than this for the purpose of these cases."

(Emphasis supplied) 10.19.7. In Bharti Cellular Limited v. Union of India (2010) 10 SCC 174, the Supreme Court held that no one can approbate and reprobate the same document and anyone who has accepted with full knowledge or notice of facts, benefits under a transaction which he might have rejected or contested, cannot question the transaction or take up an inconsistent position qua the same. Party who has unconditionally accepted the package cannot thereafter reject the inconvenient and onerous conditions while accepting the conditions beneficial to him. Relevant portion of the said judgment is reproduced hereunder:-

> "8. ...A party which has unconditionally accepted the package cannot after such acceptance reject the conditions subject to which the benefits were extended to it under the package. It cannot reject what is inconvenient and onerous while accepting what is beneficial to its interests...
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> 9. Relying upon the decision of this Court in City Montessori School v. State of U.P, New Bihar Biri Leaves Co. v. State of Bihar and R.N. Gosain v. YashpalDhir, this Court has in ShyamTelelink Ltd. v. Union of India held that no one can approbate and reprobate and anyone who has accepted with full knowledge or notice of facts, benefits under a transaction which he might have rejected or contested, cannot question the transaction or take up an inconsistent position qua the same. We have said: (ShyamTelelink case, SCC p. 172, para
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> 23) "23. The maxim qui approbat non reprobat (one who approbates cannot reprobate) is firmly embodied in English common law and often applied by courts in this country. It is akin to the doctrine of benefits and burdens which at its most basic level provides that a person taking advantage under an instrument which both grants a benefit and imposes a burden cannot take the former without complying with the latter. A person cannot approbate and reprobate or accept and reject the same instrument."

(Emphasis added) 10.19.8. The principles of law so settled by the Supreme Court in catena of judgments have been again reiterated in Mumbai International Airport Pvt. Ltd. v. Golden Chariot Airport 2010 (10) SCC 422.

10.19.9. In Track Innovations India Pvt. Ltd. v. Union Of India, 2010 (170) DLT 424, the Division Bench of this Court held that there cannot be variation of the terms of a commercial contract, which has been acted upon. Government is not bound to ensure profit in every commercial contract more so when the contract had been awarded either by public auction or by floating tender or negotiations. The Division Bench further noted that a person cannot approbate and reprobate or accept or reject the same instrument. Relevant portion of the said judgment is reproduced hereunder: -

> "12. ...we are of the opinion that in commercial contracts, such as the present, where the private contractors enter into these contracts having huge financial stakes, there is no scope for seeking variation of the terms of the contract which have been acted

upon on the ground of alleged unreasonableness by invoking Article 14 of the Constitution."

"14. The portions of the above judgments, underlined by us clearly show that in commercial contracts entered into with open eyes, there cannot be variation to the terms of the concluded contract which has been acted upon. Commercial men take commercial decision which sometimes results either in profit or sometimes in loss, however, the Government is not bound to ensure profit in every contracts which are either by public auction or by floating tenders or negotiations. It has been clarified that there is no issue of fairness or arbitrariness with respect to terms of the contract in such commercial contracts."

(Emphasis supplied) 10.19.10. In C.J. International Hotels Ltd. v. N.D.M.C., AIR 2001 Del 435, this Court held that the Licensee cannot challenge the conditions of the licence if he finds it commercially unviable to conduct his business. Relevant portion of the said judgment is reproduced hereunder:

"26. As observed above, the plaintiff had offered its bid for taking on licence the land on which the hotel is constructed. The terms and conditions of the auction were known to the plaintiffs before the auction was held and the bidders participated in the auction without a demur and with full knowledge of the commitments which the bids involved. The Government's acceptance of those bids was the acceptance of willing offers made to it and on such acceptance the lease agreement was executed between the parties which is binding between them. The commercial considerations may have revealed an error of judgment in the initial assessment of profitability of the adventure but that is a normal incident of trading transactions. Those who contract with open eyes must accept the burden of the contract alongwith its benefit. Reciprocal rights and obligations arising out of contract do not depend for their enforceability upon whether a contracting party finds it prudent to abide by the terms of the contract. By such a test, no contract could even have a binding force. The plaintiffs entered with full knowledge of conditions, which they had to carry out in the conduct of their business, on which they had willingly and voluntarily embarked. Merely because the plaintiffs are not finding the licence fee payable under the agreement to be viable for purposes of running the hotel, it cannot ever be said that a Licensee can work out the licence if he finds it profitable to do so and he can challenge the conditions under which he agreed to take the licence, if he finds it commercially inexpedient to conduct his business."

(Emphasis supplied) 10.20.In New Delhi Municipal Council vs. M/s Prominent Hotels Limited, 222 (2015) DLT 706, the licensee challenged the terms of the license deed requiring the licensee to pay the license fee @ 23% of the gross turnover as unlawful and void ab initio on the ground that the project was economically unviable. The Trial Court accepted the contention of M/s Prominent Hotels Limited and declared Clause 3 of the license deed requiring the payment of 23% of the gross turnover as arbitrary, unreasonable, unjust, unconscionable, unlawful and, therefore, null and void

ab initio. The Trial Court directed NDMC to renegotiate the terms with respect to payment of license fee with the licensee. NDMC challenged the decree passed by the Civil Court in Regular First Appeal. This Court following Alopi Parshad v. Union of India (supra), Panna Lal v. State of Rajasthan, (supra), State Bank of Haryana v. Jage Ram (supra), New Bihar Biri Leaves Co. v. State of Bihar (supra), C. Bepathumma v. V.S. Kadambolithaya (supra), Assistant Excise Commissioner v. Issac Peter (supra), Bharti Cellular Limited v. Union of India (supra), Mumbai International Airport Pvt. Ltd. v. Golden Chariot Airport I (supra), Track Innovations India Pvt. Ltd. v. Union Of India (supra) and C.J. International Hotels Ltd. v. N.D.M.C. (supra) held the challenge to the licence deed was barred by well settled law that commercial difficulty cannot provide justification for not complying with the terms of the contract. In commercial contracts entered into with open eyes, there cannot be variation to the terms of a concluded contract which has already been acted upon and the parties are estopped from challenging the terms and conditions of the contract. The State has no responsibility to ensure profit to everyone it contracts with. Profit and loss are normal incidents of a business. The relevant portion of the said judgment is as under:-

> "30.1 Prayer (i) of the suit seeking declaration of clause 3 of the licence deed dated 16th July, 1982 as null and void ab initio, is barred by well settled law laid down by the Supreme Court in Alopi Parshad v. Union of India, (supra), Panna Lal v. State of Rajasthan(supra), State of Haryana v. Jage Ram (supra), New Bihar Leaves Co. v. State of Bihar (supra), Assistant Excise Commissioner v. Issac Peter (supra), Puravankara Projects Ltd. v. Hotel Venus International (supra), Bharti Cellular Limited v. Union of India (supra); and this Court in Track Innovations India Pvt. Ltd. v. Union Of India (supra); and C.J. International Hotels Ltd. v. N.D.M.C.(supra).
>
> 30.2 Following the aforesaid judgments, I hold that the suit with respect to prayer (i) was not maintainable and therefore, the Trial Court had no jurisdiction to pass the decree of declaration.
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> 30.3 The Licensee misled the Trial Court to disregard the well settled law and pass a decree of declaration declaring clause No.3 of the licence deed dated 16th July, 1982 as arbitrary, discriminatory, unreasonable, unjust, unconscionable, unlawful, null and void ab initio.
>
> 30.4 The decree of declaration passed by the Trial Court declaring clause 3 of the licence deed as arbitrary, discriminatory, unreasonable, unjust, unconscionable, unlawful, null and void ab initio, is hereby set aside. 30.26 The impugned judgement and decree is vitiated on account of conscious disregard of the well settled law by the Trial Court. The Trial Court, who was obliged to apply law and adjudicate claims according to law, is found to have thrown to winds all such basic and fundamental principles of law. The Trial Court did not even consider and apply its mind to the judgments cited by NDMC at the time of hearing. The judicial discipline demands that the Trial Court should have followed the well settled law. The judicial discipline is one of the fundamental pillars on which judicial edifice rests and if such discipline is routed, the entire edifice will be affected. It cannot be gainsaid that the judgments

> mentioned below are binding on the Licensee who could not have bypassed or disregarded them except at the peril of contempt of this Court. This cannot be said to be a mere lapse. The Trial Court has dared to disregard and deliberately ignore the following judgments.
>
> 30.36 This case warrants imposition of costs on the petitioners in terms of the judgments of the Supreme Court in Ramrameshwari Devi v. Nirmala Devi (supra) and Maria Margarida Sequeria Fernandes v. Erasmo Jack de Sequeria (supra), Subrata Roy Sahara v. Union of India (supra) and of this Court in Harish Relan v. Kaushal Kumari Relan & Ors. in RFA(OS) 162/2014 decided on 03rd August, 2015, Punjab National Bank v. Virender Prakash, 2012 V AD (Delhi) 373 and Padmawati v. Harijan Sewak Sangh (supra).

30.37 For the reasons discussed hereinabove, the appeal is allowed. The Licensee's suit was not maintainable. The Trial Court had no jurisdiction in this matter. The impugned judgment and decree are non-est and therefore set aside. The Licensee's suit is dismissed with costs of Rs.5,00,000/- to be paid by the Licensee to NDMC within two months.

30.41 The Licensee has no respect for truth and has polluted the pure fountain of justice with tainted hands. The Licensee has played tricks by delaying the proceedings before the Trial Court for more than 18 years. The Licensee has interfered with the administration of justice. This case warrants strict action to be taken. It is a fit case for ordering inquiry or initiating proceedings for contempt of Court. However, the action against the Licensee is deferred for two weeks to enable the Licensee to introspect and file an undertaking to abide by the terms of the licence deed dated 16th July, 1982 and not to resort to any frivolous proceedings/action in future. Since this appeal is being disposed of, the Licensee shall file his undertaking before the Writ Court in WP(C) No.1629/2015. In the event of the failure of the Licensee to file such an undertaking within two weeks, NDMC is permitted to initiate proceedings for criminal contempt against the Licensee."

(Emphasis supplied) Patent illegality 10.21.The lessee cannot seek discharge from the payment of Royalty (MGA). Even assuming for the sake of argument that a lease can frustrate under Section 56 of the Indian Contract Act, the lessee would be bound to surrender the lease and pay the Royalty (MGA) upto the date of handing over of the possession. Even under Section 108(e) of the Transfer of Property Act, the lessee upon exercising the option to treat the lease as void, is liable to surrender the possession and make the payment of the rent upto the date of the surrender.

10.22.Section 56 cannot be invoked to partially declare the clause relating to the payment of Royalty (MGA) to be void. Even assuming for the sake of argument that the lease can frustrate under Section 56 of the Contract Act, the whole lease would become void and the lessee would be liable to surrender the possession and clear the liability of Royalty (MGA) upto the date of surrender under Section 65 of the Indian Contract Act.

10.23.The respondent's argument that the lease is valid and only the clause relating to payment of Royalty (MGA) has frustrated, is absolutely misconceived and unsustainable. Since Section 56 does

not apply to leases, the respondent cannot invoke the same with respect to its obligation to pay the Royalty (MGA).

10.24.Even assuming there was a recession in hotel industry in 2008, it cannot be said that the recession was permanent and would continue for the rest of the period of the lease. The market keeps on fluctuating and therefore, taking the recession in 2008 to frustrate the entire lease is absurd on the face of it. Even the respondent's expert witness did not say and could not have said that the recession would continue forever.

10.25.In Alanduraiappar Koil Chithakkadu v. T.S.A. Hamid, AIR 1963 Madras 94, the tenant invoked Section 56 of the Contract Act to claim remission of rent on the ground that the tenant could not pay the rent on account of two cyclones. The Division Bench of Madras High Court held that Section 56 of the Indian Contract Act has no application to the case. The Division Bench further held that it is difficult to conceive how the cyclone which lasted for a short duration in 1952 and another milder cyclone in 1955 render the performance of the contract impossible or substantially prevented the performance of the contract. Relevant portion of the judgment is reproduced hereunder:

> "(5) ...Unfortunately, however much one may sympathise with the defendant for his predicament, the courts have a duty to enforce the contract between the parties, and in the absence of any provision for remission on account of losses, no such remission can fee granted by the courts.
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> (6) Taking up the question of frustration, we are of the opinion, that this is a case where the principle of frustration laid down under Section 56 of the Indian Contract Act has no application...
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> (7) In India, this principle is embodied in Section 56 of the Indian Contract Act stating that a contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event, which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful. In the decision of the Supreme Court in Satyabrata Ghose v. Mugneeram Bangur and Co., AIR 1954 SC 44 , the scope of Section 56 has been considered. After referring to English cases on the subject of frustration, which could have only a persuasive value and may be helpful in showing how the courts in England have, decided cases under similar circumstances, their Lordships observed that the doctrine of frustration is really an aspect of part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done, and hence comes within the purview of Section 56 of the Indian Contract Act. Having stated this proposition, they considered the application of the principle to the case before them. In that case the defendant company launched a scheme for development of land, and undertook to construct the roads and drains necessary, on that land. They also agreed to sell a plot of the land to the plaintiff. A considerable portion of the area comprised in the scheme, was requisitioned for military purposes in 1941. This prevented the various

construction from proceeding, and the defendant-

company who could not undertake the road construction for an indefinite period, wrote to the plaintiff, seeking to have the agreement treated as cancelled. Their Lordships at p. 326, of the report (SCR): (at p. 49 of AIR), took up the question for consideration as to whether or not the disturbing element which is alleged to have happened in the case, had substantially prevented the performance of the contract as a whole. They came to the conclusion that it could not be said that the requisition by the military vitally affected the contract or made its performance impossible.

(8) In the present case, it is difficult to conceive how the cyclone which lasted for a short duration in 1952, and another milder cyclone in 1955 rendered the performance of the contract impossible, or substantially prevented the performance of the contract. The defendant admits the sudden influx of produce to the shandy, caused by the windfall of this after the 1952 cyclone, and then the slackening of the supplies for a period of six months when the shandy was not being formed regularly. Thereafter, the shandy admittedly continued to function. These disturbances in the business of the shandy would have been over, by the middle of 1953. Though the suit lease commenced on 1-4-1952, the lease deed was executed and registered only on 12-9-1953. By that time, the cyclone had come and gone, and its after-effects also had subsided. Nothing prevented the defendant at that stage, from insisting upon a recital in the contract to provide for the effects of the cyclone. The omission to mention this in the document of the lease, would show that the parties did not intend to provide for a clause about remission of lease amount, on account of the cyclone. In such circumstances it will not be open to the parties to adduce oral evidence that the lease did include a clause for remission, as it will amount to varying the terms of a written contract by parole evidence. However, the defendant has not based his claim for remission on the ground that the contract provided for remission. He seems to have based his claim on the doctrine of frustration. The trial court has referred to the decision of the Supreme Court abovementioned under Section 56 of the Contract Act, and came to the conclusion that in the circumstances of the case, the promisor could not fulfil his promise on account of the two cyclones. It is not clear how the promisor was prevented from fulfilling his promise on account of the cyclone. The interruption in the business for a short period, no doubt, might have led to a fall in the business from what was anticipated, but the lease had five years to run, and the business would have resumed its normalcy in the following season; the business might have even boomed, and the increase in business might have offset the loss. Of course, no evidence has been given about this. The fact, however, is that the lease had five years to run, and both temporary fall of the income in one year and temporary boosting of the income in another year, should be considered to be implied in the calculation of the parties when they entered into the agreement. The long duration of the contract was expected to iron out these variations and provide for a fair average profit during the period as a whole. Therefore, it was quite improper for the trial court to fasten only on the loss during the cyclone, and ignore the profits that might have been earned in the other periods for holding that this is a case where the doctrine of frustration would apply. The trial court in extending its sympathy to the defendant has not considered the fact that the defendant was largely responsible for his present predicament, through having bid at a highly excessive figure at the auction, for no other purpose than to get the better of a rival competing lessee. The court cannot relieve a party of the consequences of such a foolish action. It would have been open to the temple authorities to give some relief on ex gratia basis, if they were so advised, but

that is not for the court to grant. We are of the opinion that this is not a case where the doctrine of frustration would apply."

(Emphasis supplied) The arbitrator cannot re-write the terms of the contract.

10.26.The learned Arbitrator is bound by the terms of the contract and cannot go beyond the terms laid down in the contract. The Arbitrator while giving the award or conducting the proceedings cannot travel beyond the contract. However, the learned Arbitrator has re-written the terms of the contract by absolving the respondent from liability to pay Minimum Guaranteed Amount.

10.27.In Municipal Corporation of Greater Bombay v. Thermal Engineering Corporation, Bombay, 1997(2) Arb.LR 361, the Supreme Court held that the arbitrator has to act within the parameters of the contract. Relevant portion is as under:

> "6. Law is well-settled that an arbitrator is not a conciliator and cannot ignore the law or mis-apply it in order to do what he thinks just and reasonable. He is a tribunal selected by the parties to decide their disputes according to law and so he is bound to follow and apply the law, and if he does not, he cannot be set right by courts provided his error appears on the face of the award. It is equally well settled that where it is apparent not by construction of the contract but by merely looking at the contract that the arbitration travelled outside the permissible territory and thus exceeded his jurisdiction in making the award, it is an error going to the root of his jurisdiction. The arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. He has no power apart from what the parties have given him, under the contract. If he has travelled outside the bounds of the contract, he has acted without jurisdiction. "

(Emphasis supplied) 10.28.In State of Rajasthan v. Nav Bharat Constructions Co., (2006) 1 SCC 86, the Supreme Court held that the arbitrator cannot go beyond the terms of the contract between the parties. Relevant portion of the judgment is as under:

> "27. ...An arbitrator cannot go beyond the terms of the contract between the parties. In the guise of doing justice he cannot award contrary to the terms of the contract. If he does so, he will have misconducted himself. Of course if an interpretation of a term of the contract is involved then the interpretation of the arbitrator must be accepted unless it is one which could not be reasonably possible. However, where the term of the contract is clear and unambiguous the arbitrator cannot ignore it."

(Emphasis supplied) 10.29.In Food Corporation of India v. M/s. Chandu Construction, (2007) 4 SCC 697, the Supreme Court held that the arbitrator is a creature of the agreement between the parties and has to operate within the four corners of the agreement. Relevant portion of the said judgment is reproduced hereunder:

"11. It is trite to say that the arbitrator being a creature of the agreement between the parties, he has to operate within the four corners of the agreement and if he ignores the specific terms of the contract, it would be a question of jurisdictional error on the face of the award, falling within the ambit of legal misconduct which could be corrected by the Court. We may, however, hasten to add that if the arbitrator commits an error in the construction of contract, that is an error within his jurisdiction. But, if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error (see Associated Engg. Co. v. Govt. of A.P., (1991) 4 SCC 665 and Rajasthan State Mines & Minerals Ltd. v. Eastern Engg. Enterprises, (1999) 9 SCC 283).

12. In this context, a reference can usefully be made to the observations of this Court in Alopi Parshad & Sons Ltd. v. Union of India AIR 1960 SC 588 wherein it was observed that the Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity. The Court went on to say that in India, in the codified law of contracts, there is nothing which justifies the view that a change of circumstances, "completely outside the contemplation of parties" at the time when the contract was entered into will justify a court, while holding the parties bound by the contract, in departing from the express terms thereof. Similarly, in Naihati Jute Mills Ltd. v. Khyaliram Jagannath AIR 1968 SC 522 this Court had observed that where there is an express term, the court cannot find on construction of the contract, an implied term inconsistent with such express term

13. In Continental Construction Co. Ltd. v. State of M.P. (1988) 3 SCC 82 it was emphasized that not being a conciliator, an arbitrator cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. He is a tribunal selected by the parties to decide their disputes according to law and so is bound to follow and apply the law, and if he does not, he can be set right by the court provided his error appears on the face of the award.

14. In Bharat Coking Coal Ltd. v. Annapurna Construction (2003) 8 SCC 154 while inter alia, observing that the arbitrator cannot act arbitrarily, irrationally, capriciously or independent of the contract, it was observed, thus: (SCC pp. 161-162, para

22) "22. There lies a clear distinction between an error within the jurisdiction and error in excess of jurisdiction. Thus, the role of the arbitrator is to arbitrate within the terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled beyond the contract, he would be acting without jurisdiction, whereas if he has remained inside the parameters of the contract, his award cannot be questioned on the ground that it contains as error apparent on the face of the record."

15. Therefore, it needs little emphasis that an arbitrator derives his authority from the contract and if he acts in disregard of the contract, he acts without jurisdiction. A deliberate departure from contract amounts to not only manifest disregard of his authority or a misconduct on his part, but it may tantamount to a mala fide action (also see Associated Engg. Co. v. Govt. of A.P. (1991) 4 SCC 93)."

(Emphasis supplied) 10.30.There is merit in the other grounds urged by the petitioner, namely, that the respondent's claims are barred by principles of res judicata/constructive res judicata; and the learned Arbitrator wrongly dismissed the petitioner's application under Sections 16 and 17 of the Arbitration and Conciliation Act, 1996. However, considering that the award is against the well-settled law, is patently illegal and the Arbitrator acted without jurisdiction; this Court is not basing this judgment on the other grounds urged by the petitioner and, therefore, it is not necessary to record the findings with respect to the other grounds urged by the petitioner.

11. Judicial precedents must be applied with reference to the facts of the case 11.1. It is well settled that judicial precedent cannot be followed as a statute and has to be applied with reference to the facts of the case involved in it. The ratio of any decision has to be understood in the background of the facts of that case. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. It has to be remembered that a decision is only an authority for what it actually decides. It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. The ratio of one case cannot be mechanically applied to another case without regard to the factual situation and circumstances of the two cases.

11.2. In Padma Sundara Rao v. State of Tamil Nadu (2002) 3 SCC 533, the Supreme Court held that the ratio of a judgment has to be read in the context of the facts of the case and even a single fact can make a difference. In para 9 of the said judgment, the Supreme Court held as under:

> "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 British Railways Board v. Herrington. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases."

11.3. In Bharat Petroleum Corporation Ltd v. N.R. Vairamani, (2004) 8 SCC 579, the Supreme Court held that a decision cannot be relied on without considering the factual situation. The Supreme Court observed as under:-

> "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. Observations of courts are neither to be read as Euclid's theorems nor as provisions of a statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In London Graving Dock Co. Ltd. v. Horton [1951 AC

737: (1951) 2 All ER 1 (HL)] (AC at p. 761) Lord Mac Dermott observed: (All ER p.

14 C-D) "The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes, J., as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge..."

10. In Home Office v. Dorset Yacht Co. [(1970) 2 All ER 294 :

> 1970 AC 1004 : (1970) 2 WLR 1140 (HL)] (All ER p. 297g-h) Lord Reid said, "Lord Atkin's speech ... is not to be treated as if it were a statutory definition. It will require qualification in new circumstances". Megarry, J. in Shepherd Homes Ltd. v.Sandham (No. 2) [(1971) 1 WLR 1062 : (1971) 2 All ER 1267] observed: "One must not, of course, construe even a reserved judgment of Russell, L.J. as if it were an Act of Parliament." And, in Herrington v.British Railways Board [(1972) 2 WLR 537 : (1972) 1 All ER 749 (HL)] Lord Morris said: (All ER p. 761c) "There is always peril in treating the words of a speech or a judgment as though they were words in a legislative enactment, and it is to be remembered that judicial utterances made in the setting of the facts of a particular case."

11. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

12. The following words of Lord Denning in the matter of applying precedents have become locus classicus:

> "Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.
>
> * * * Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it.""

11.4. The respondent has relied upon Satyabrata Ghose v. Mugneeram Bangur and Co. (supra), Sushila Devi v. Hari Singh (supra), Jagatjit Distilling & Allied Industries v. Bharat Nidhi Ltd. (supra), D. Devi Bhagat v. J.B. Advani & Co. (supra) and Sharda Mahajan v. Maple Trading International P. Ltd. (supra) which are not applicable to the present case and have been wrongly applied by the learned Arbitrator:

11.4.1. Satyabrata Ghose v. Mugneeram Bangur and Co.

(supra) deals with a case of specific performance of an agreement to sell in which the plea of frustration was raised by the seller. In that case, the owner of a large tract of land in Greater Calcutta started a scheme for development of a residential colony, named, Lake Colony Scheme No.1 and agreed to sell a plot in that scheme on 5th August, 1940. The owner received Rs.101/- as earnest money from the purchaser and the conveyance was agreed to be executed within one month of the date of completion of roads on payment of balance sale consideration. In November, 1943, the land was requisitioned due to war. The owner, therefore, decided to treat the agreement to sell as cancelled and gave the option to the purchaser to take back the earnest money within one month. The purchaser filed a suit for specific performance which was resisted on the ground of frustration under Section 56 of the Contract Act. The Supreme Court came to the conclusion that it could not be said that the requisition by the military vitally affected the contract or made its performance impossible. This judgment does not help the respondent as this case relates to specific performance of an agreement to sell and not a lease. 11.4.2. In Sushila Devi v. Hari Singh (supra), the owner invited tender for lease of agricultural land in Tehsil Gujranwalla in January 1947. The respondent deposited the earnest money of Rs.1,000/- and security of Rs.34,000/- for payment of rent. Before the execution of the lease deed, Tehsil Gujranwalla became part of Pakistan as a result of partition and the lessee sought refund of security deposit and the earnest money which was declined by the owner. The lessee invoked Section 56 of the Contract Act. The Supreme Court held that the agreement to lease frustrated under Section 56. The Supreme Court noted Raja Dhruv Dev Chand v. Raja Harmohinder (supra) and held that there is clear distinction between completed conveyance and an executory contract. The Supreme Court applied Section 56 because the lease had not been executed and the agreement to lease had frustrated before the execution of the lease.

This judgment does not help the respondent as we are dealing with a lease deed and not an agreement to lease. It is well settled that Section 56 can apply to agreement to lease but would not apply to the lease deed, which is a completed conveyance. Relevant portion of the said judgment is as under:

> "8. ... Section 56 applies only to contract. Once a valid lease comes into existence the agreement to lease disappears and its place is taken by the lease. It becomes completed conveyance under which the lessee gets an interest in the property. There is a clears distinction between completed conveyance and an executory contract. Events which discharge a contract do not invalidate a concluded transfer see Raja Dhruv Dev Chand v. Harmohinder Singh, (1968) SCR 339= (AIR 1968 SC 1024). In view of that decision the view taken by some of the High Courts that Section 56 of the Contract Act applies to lease cannot be accepted as correct. Further the English decisions bearing on the point can have no further relevance.
>
> 9. But in this case there was no lease. There was only an agreement to lease. As seen earlier, the agreement between the parties was that the property in question should be leased to the plaintiffs for a period of three years. Such a lease could not have been validly made except under a registered instrument. As seen earlier the contract

> between the parties provided that the lease deed should be registered within 15 days from the date of the acceptance of the tender. For one reason or the other, the contemplated lease deed was neither executed nor registered. Therefore, we have before us only an agreement to lease and not a lease. Such an agreement comes within the scope of Section 56 of the Contract Act."

(Emphasis supplied) 11.4.3. Jagatjit Distilling & Allied Industries v. Bharat Nidhi Ltd. (supra) relates to a contract of bailment of goods and not with a lease.

11.4.4. D. Devi Bhagat v. J.B. Advani & Co. (supra) relates to a contract for export of lin seed oil. After the execution of the contract, the export of lin seed oil was prohibited whereupon the defendant pleaded frustration of contract which was allowed. This case also does not relate to a lease.

11.4.5. In Sharda Mahajan v. Maple Trading International P. Ltd. (supra), the petitioner made payment of Rs.60,000/- to the respondent for purchase of gold coins. The respondent failed to refund the said money whereupon the petitioner filed winding up petition before the Delhi High Court. The respondent invoked Section 56 of the Contract Act on the ground that the respondents accounts were frozen by the Enforcement Directorate. This case also does not deal with a lease.

12. The respondent has raised false claims 12.1. In the statement of claim dated 2nd March, 2009 filed by the respondent, it was pleaded by the respondent that due to phenomenal increase in the project cost, it was not possible for the respondent to go ahead with the construction of the proposed hotel if the minimum guaranteed amounts mentioned in the supplemental agreement are treated as binding. The respondent sought further three years time to construct the hotel and exemption from payment of Minimum Guaranteed Amount till then. Relevant portion of the Statement of Claim are reproduced hereunder:-

> "8. However, Leela has been unable to proceed further in that direction because the Minimum Guaranteed Amounts payable by Leela as Royalty as per the said Supplemental Agreement have become obsolete and unworkable. More than

13 years have elapsed out of the total tenure of the Lease Agreement of 30 years including the construction period of three years, since the execution of the said Lease Agreement and the Supplemental Agreement, and there has been a phenomenal increase in the project cost of the proposed hotel as envisaged by the parties. There is no time left for Leela to construct the hotel, set it up and recoup its investment during the remaining part of the term of the lease.

9. Market conditions for the hotel industry have deteriorated and are continuing to deteriorate in the context of the recession, which is a global phenomenon, and the threat of terrorist attacks of the kind that Mumbai witnessed on 26th November, 2008. Leela made several representations to Airports Authority pointing out that it is not possible for Leela to go ahead with the construction of the proposed hotel if the Minimum Guaranteed Amounts as mentioned in the said Supplemental Agreement are treated as binding on Leela....."

> "ISSUE NO.IV Whether a fresh period of three years not be granted to the Lessee for construction of the Hotel, during which no Minimum Guaranteed Amount shall be payable.
>
> 25. It is common ground between Airports Authority and Leela that a minimum of 3 years is required for construction of the hotel and even in the said Lease Agreement and the said Supplemental Agreement it was clearly provided that there will be no payment of any Minimum Guaranteed Amount towards Royalty for three years which is the minimum estimated period for construction of the hotel. It is preposterous to say that a lessee should pay any royalty, whether it is minimum guaranteed or otherwise, based on turnover when there can possibly be no turnover at all. Leela therefore submits that it is entitled to be given a period of three years when no Minimum Guaranteed Amount towards Royalty will be payable and which may be called the construction period of the hotel. Also, as the original lease deed also provided for the construction period to be extended by one year after payment of an additional charge of 50% of the ground rent, such a provision may be given in the Agreement."

(Emphasis supplied) 12.2. The respondent's witness, Mr. V.P. Thakkar, in his affidavit by way of evidence submitted his report on the viability of construction of 150 rooms on the leased land and opined that project was not viable. The witness took the opening date of 1st April, 2011 in para 5 of his affidavit. Paras 2 and 5 of the affidavit of Mr.V.P. Thakkar is reproduced hereunder:-

> "2. I have been requested by Hotel Leelaventure Limited (Company), a public listed company which owns and operates upscale and luxury hotels in India, to examine the viability of an expansion project of 150 rooms to be built adjacent to their existing about 400 room hotel at Sahar Airport in Mumbai. The viability is to be examined having regard to market conditions and expectations for the hotel industry in the context of market conditions arising from the global economic recession and the terror attacks in Mumbai on 26th November, 2008. The project was to be initiated in December, 2008."

...

> "5. Operating and Financial projections 5.1 In the context of the demand-supply scenario prevailing in the Mumbai market as of end 2008, updated to the perceptions and expectations as at date, we have prepared financial projections for a 150 room new hotel to be comprised as the Leela Mumbai project expansion. These projections assume that the guest rooms will be of superior contemporary quality, and will primarily operate as Club Rooms targeted to the upper end of business travelers; this positioning will enable the expansion project to derive a strong competitive capability. 5.2 Our projections are made on the following main assumptions:
>
> 5.2.1 Opening date of 1 April 2011..."

(Emphasis supplied) 12.3. During the course of arbitration proceedings, it came on record and was also admitted by the respondent before this Court that the respondent had utilised the Floor Space Index (FSI) of 1 (One) in respect of the land in question to raise the additional construction on their adjoining Hotel Leela Galleria prior to 2002 and, therefore, the respondent did not have the required FSI to raise any construction on the land in question. The petitioner placed on record the occupancy certificate dated 15th November, 2002 (Ex.CW 2/2) in respect of the construction raised by the respondent.

12.4. As per Clause 6 of the lease deed dated 7th February, 1996, the respondent had FSI of 1 (One) to raise construction on the leased land and the respondent had utilized that the same for raising construction on the adjoining Hotel Leela Galleria prior to the filing of the statement of claim in the year 2002.

12.5. Since the respondent had already raised the additional construction on the adjoining Hotel Galleria by utilising the FSI of the land in question prior to the filing of the statement of claim, the claim made in the statement of claim that the construction was not viable and further three years time be granted to raise the construction, are absolutely false.

12.6. As per supplemental agreement dated 7th February, 1996, the respondent was liable to pay the Royalty according to Schedule A or 7.5% of the gross turnover of the new hotel block whichever is higher. Since the respondent had raised the construction in the Hotel Galleria by using the FSI of the land in question, it was incumbent upon the respondent to have placed on record the particulars of the gross turnover of the construction raised by them. However, the respondent chose to conceal the particulars of the gross turnover. The respondent relied upon the hypothetical assumptions which were not relevant as the particulars of gross turn over were available. 12.7. The respondent instituted a frivolous claim to challenge its obligation to pay the Royalty (MGA) which was barred by well settled law. The respondent claimed four reliefs mentioned in para 26(i)(a), (b), (c) and (d) of the statement of claim. However, at the stage of final hearing, the respondent conceded that prayers made in paras 26(i)(b), (c) and (d) of the statement of claim were not maintainable and, therefore, the respondent gave up the said prayers. The respondent pressed prayer 26(i)(a) which was also not maintainable and barred by well settled law. The learned Arbitrator who was bound by the terms of contract, had no jurisdiction to declare the terms of the lease as having frustrated and directing the parties to re-negotiate the terms. However, the respondent misled the learned Arbitrator in pursuance to which the learned Arbitrator exercised the jurisdiction not vested in him and declared that the payment of Royalty by the respondent has become impossible under Section 56 of the Contract Act w.e.f. 1st June, 2008 and, therefore, the parties may enter into a new contract.

12.8. At the stage of final hearing before the learned Arbitrator, the respondent did not dispute or deny its obligation to pay 7.5% of the gross turnover stipulated in Clause 1 of the supplemental agreement dated 7th February, 1996 but disputed the liability to pay the Minimum Guaranteed Amount. Reference may be made to para 13 of the written submissions dated 2nd June, 2012 filed before the learned Arbitrator. However, by directing the parties to re-negotiate the terms, the respondent has been discharged from even paying 7.5% of the gross turnover.

Consequences of making a false claim in Court

13. Section 209 of the Indian Penal Code provides that dishonestly making a false claim in a Court is an offence punishable with punishment of imprisonment upto two years and fine. Section 209 of the Indian Penal Code is reproduced hereunder:

> "Section 209 - Dishonestly making false claim in Court -- Whoever fraudulently or dishonestly, or with intent to injure or annoy any person, makes in a Court of Justice any claim which he knows to be false, shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine."

14. In H.S. Bedi v. National Highway Authority of India, 2016 (155) DRJ 259, this Court examined the scope of Section 209 of the Indian Penal Code and held as under:

"15.1 Section 209 of the Indian Penal Code makes dishonestly making a false claim in a Court as an offence punishable with imprisonment upto two years and fine.

15.2 The essential ingredients of an offence under Section 209 are: (i)The accused made a claim; (ii)The claim was made in a Court of Justice; (iii) The claim was false, either wholly or in part; (iv)That the accused knew that the claim was false; and

(v)The claim was made fraudulently, dishonestly, or with intent to injure or to annoy any person.

15.3 A litigant makes a 'claim' before a Court of Justice for the purpose of Section 209 when he seeks certain relief or remedies from the Court and a 'claim' for relief necessarily impasses the ground for obtaining that relief. The offence is complete the moment a false claim is filed in Court. 15.4 The word "claim" in Section 209 of the IPC cannot be read as being confined to the prayer clause. It means the "claim" to the existence or non-existence of a fact or a set of facts on which a party to a case seeks an outcome from the Court based on the substantive law and its application to facts as established. To clarify, the word "claim" would mean both not only a claim in the affirmative to the existence of fact(s) as, to illustrate, may be made in a plaint, writ petition, or an application; but equally also by denying an averred fact while responding (to the plaint/petition, etc.) in a written statement, counter affidavit, a reply, etc. Doing so is making a "claim" to the non-existence of the averred fact. A false "denial", except when the person responding is not aware, would constitute making a "claim" in Court under Section 209 IPC. 15.5 The word 'claim' for the purposes of Section 209 of the Penal Code would also include the defence adopted by a defendant in the suit. The reason for criminalising false claims and defences is that the plaintiff as well as the defendant can abuse the process of law by deliberate falsehoods, thereby perverting the course of justice and undermining the authority of the law.

15.6 Whether the litigant's 'claim' is false, is not considered merely from whatever he pleads (or omits to plead): that would be to elevate form over substance. To make out the offence, the Court does not merely inspect how a litigant's pleadings have been drafted or the case has been presented. The real issue to be considered is whether, all said and done, the litigant's action has a proper

foundation which entitles him to seek judicial relief.

15.7 Section 209 was enacted to preserve the sanctity of the Court of Justice and to safeguard the due administration of law by deterring the deliberate making of false claims. Section 209 was intended to deter the abuse of Court process by all litigants who make false claims fraudulently, dishonestly, or with intent to injure or annoy.

15.8 False claims delay justice and compromise the sanctity of a Court of justice as an incorruptible administrator of truth and a bastion of rectitude.

15.9 Filing of false claims in Courts aims at striking a blow at the rule of law and no Court can ignore such conduct which has the tendency to shake public confidence in the judicial institutions because the very structure of an ordered life is put at stake. It would be a great public disaster if the fountain of justice is allowed to be poisoned by anyone resorting to filing of false claims.

15.10 The Courts of law are meant for imparting justice between the parties. One who comes to the Court, must come with clean hands. More often than not, process of the Court is being abused. Property-grabbers, tax-evaders, bank-loan- dodgers and other unscrupulous persons from all walks of life find the Court-process a convenient lever to retain the illegal gains indefinitely. A person, who's case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of the litigation.

15.11 The disastrous result of leniency or indulgence in invoking Section 209 is that it sends out wrong signals. It creates almost a licence for litigants and their lawyers to indulge in such serious malpractices because of the confidence that no action will result.

15.12 Unless lawlessness which is all pervasive in the society is not put an end with an iron hand, the very existence of a civilized society is at peril if the people of this nature are not shown their place. Further if the litigants making false claims are allowed to go scot free, every law breaker would violate the law with immunity. Hence, deterrent action is required to uphold the majesty of law. The Court would be failing in its duties, if false claims are not dealt with in a manner proper and effective for maintenance of majesty of Courts as otherwise the Courts would lose its efficacy to the litigant public."

(Emphasis supplied)

15.Imposition of Costs 15.1. In Ramrameshwari Devi v. Nirmala Devi, (2011) 8 SCC 249, the Supreme Court has held that the Courts have to take into consideration pragmatic realities and have to be realistic in imposing the costs. The relevant paragraphs of the said judgment are reproduced hereunder:-

> "C. Imposition of actual, realistic or proper costs and or ordering prosecution would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also

> control unnecessary adjournments by the parties. In appropriate cases the courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings.
>
> 54. While imposing costs we have to take into consideration pragmatic realities and be realistic what the Defendants or the Respondents had to actually incur in contesting the litigation before different courts. We have to also broadly take into consideration the prevalent fee structure of the lawyers and other miscellaneous expenses which have to be incurred towards drafting and filing of the counter affidavit, miscellaneous charges towards typing, photocopying, court fee etc. xxx xxx xxx
>
> 56. On consideration of totality of the facts and circumstances of this case, we do not find any infirmity in the well reasoned impugned order/judgment. These appeals are consequently dismissed with costs, which we quantify as Rs. 2,00,000/- (Rupees Two Lakhs only). We are imposing the costs not out of anguish but by following the fundamental principle that wrongdoers should not get benefit out of frivolous litigation."

(Emphasis supplied) 15.2. In Maria Margarida Sequeria Fernandes v. Erasmo Jack de Sequeria (2012) 5 SCC 370, the Supreme Court held that heavy costs and prosecution should be ordered in cases of false claims and defences as under:-

> "85. This Court in a recent judgment in Ramrameshwari Devi (supra) aptly observed at page 266 that unless wrongdoers are denied profit from frivolous litigation, it would be difficult to prevent it. In order to curb uncalled for and frivolous litigation, the Courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that Court's otherwise scarce time is consumed or more appropriately, wasted in a large number of uncalled for cases. In this very judgment, the Court provided that this problem can be solved or at least be minimized if exemplary cost is imposed for instituting frivolous litigation. The Court observed at pages 267-268 that imposition of actual, realistic or proper costs and/or ordering prosecution in appropriate cases would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary adjournments by the parties. In appropriate cases, the Courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings."

(Emphasis supplied) 15.3. In Messer Holdings Ltd. v. Shyam Madanmohan Ruia, [2010] 104 SCL 293(Bom), the Supreme Court imposed exemplary cost of Rs.25 lakh on each of the three parties for loss of judicial time. Relevant portion of the said judgment is as under:

> "43. ...This Case, in our view, is a classic example of the abuse of the judicial process by unscrupulous litigants with money power, all in the name of legal rights by resorting to half-truths, misleading representations and suppression of facts. Each and every party is guilty of one or the other of the above-mentioned misconducts. It can be demonstrated (by a more elaborate explanation but we believe the facts narrated so far would be sufficient to indicate) but we do not wish to waste any more time in these matters.
>
> 44. This case should also serve as proof of the abuse of the discretionary jurisdiction of this Court under Article 136 by the rich and powerful in the name of a 'fight for justice' at each and every interlocutory step of a suit. Enormous amount of judicial time of this Court and two High Courts was spent on this litigation. Most of it is avoidable and could have been well spent on more deserving cases.
>
> xxx xxx xxx
>
> 45. We therefore, deem it appropriate to impose exemplary costs quantified at Rs.25,00,000.00 (Rupees Twenty Five Lakhs only) to be paid by each of the three parties i.e. GGL, MGG and RUIAS. The said amount is to be paid to National Legal Services Authority as compensation for the loss of judicial time of this country and the same may be utilized by the National Legal Services Authority to fund poor litigants to pursue their claims before this Court in deserving cases."

(Emphasis supplied) 15.4. In Harish Relan v. Kaushal Kumari Relan, 2016 II AD (Delhi) 571, the Division Bench of this Court considered the pronouncements of the Supreme Court with respect to false claims as well as costs and held that there is no limitation on the imposition of costs. Relevant portion of the said judgment is as under.

> "88. It is important to note that Section 35A has no application to appeal or revision proceedings. Given the fact that this court is adjudicating an appeal assailing the judgment passed in exercise of original jurisdiction. Therefore, the jurisdiction of this court to impose costs by virtue of Section 35 of the CPC is unhindered by the limitation contained in Section 35A.
>
> xxx xxx xxx
>
> 95. On the issue of costs, Sections 35, 35A, 35B as well as Order XXA and Order XXIII of the Code of Civil Procedure apply to civil suits alone. There is no statutory provision even providing for imposition of costs, let alone restricting the exercise the power to do so in appellate jurisdiction. We also find that even under the Delhi High Court Rules, 1967 only, the manner in which counsel's fee may be computed in the appeal against the decree on the original side, is provided. There is no provision in the Delhi High Court Rules as to the manner in which the costs in appeals are to be evaluated or imposed. Guidance on the consideration by this court would therefore,

be taken from the principles laid down in the several precedents by the Supreme Court of India. There is therefore, no limitation by statute or the Rules at all on the appellate court to impose actual, reasonable costs on the losing party at all.

Orders under Section 151 CPC for abuse of process of the court

96. It is also necessary to advert to the power of the court under Section 151 of the CPC. This statutory provision specifically states that "Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court". The spirit, object and intendment of the statutory provisions, as well as statutory scheme shows, that the inherent powers of the court are complementary to the powers specifically conferred on the court by the Code, and are in addition thereto. While Section 35A is confined to award of compensatory costs in respect of "false or vexatious claims or defences", Section 151 takes within its ambit a much wider area of litigation which tantamounts to abuse of process of court. Section 151 therefore, enables a court to pass orders as may be necessary for the ends of justice, or to "prevent abuse of process of the court" which is beyond the "false and vexatious" litigation covered under Section 35A and are wide enough to enable the court to pass orders for full restitution."

(Emphasis supplied)

16.Conclusion 16.1. The award is patently illegal as respondent's liability to pay the Royalty (MGA) to the petitioner under the Transfer of Property Act is absolute and unconditional; and the learned Arbitrator had no power to discharge the respondent from paying the Royalty to the petitioner.

16.2. The award is against the well settled law that Section 56 of the Contract Act is not applicable to leases as laid down by the three Judge Bench of the Supreme Court in Raja Dhruv Dev Chand v. Raja Harmohinder (supra) and reiterated in T. Lakshmipathi v. P. Nithyananda Reddy (supra).

16.3. Section 108(e) of the Transfer of Property Act is a special law on the doctrine of frustration of lease and it excludes the general law contained in Section 56 of the Contract Act as held by the Supreme Court in Kedar Lall v. Hari Lall (supra). Reference be made to Section 4 of the Transfer of Property Act, Mahadeo Prosad Shaw v. Calcutta Dyeing and Cleaning Co. (supra) and Amir Chand v. Chuni Lal (supra).

16.4. Section 108(e) of the Transfer of Property Act incorporates the doctrine of frustration of leases in case of destruction or rendering the subject premises unfit for use by fire, tempest, flood, violence or other irresistible force. In such cases, Section 108(e) gives the option to the lessee to treat the lease as void. However, if the lessee does not exercise the option, the lease continues and the lessee remains liable to pay the rent to the landlord. The three Judge Bench of the Supreme Court have discussed Section 108(e) in Raja Dhruv Dev Chand v. Raja Harmohinder (supra). Reference be also made to Mahadeo Prosad Shaw v. Calcutta Dyeing and Cleaning Co. (supra) and Hind Rubber

Industries Pvt. Ltd. v. T.M. Bagasarwalla (supra).

16.5. Even assuming Section 56 applies to leases, the award is contrary to the well settled law that commercial hardship does not frustrate the contract as laid down in Alopi Parshad & Sons v. Union of India (supra), Panna Lal v. State of Rajasthan (supra), State Bank of Haryana v. Jage Ram (supra) Har Shankar v. Deputy Excise and Taxation Commissioner (supra), New Bihar Biri Leaves Co. v. State of Bihar (supra), C. Bepathumma v. V.S. Kadambolithaya, Assistant Excise Commissioner v. Issac Peter (supra), Bharti Cellular Limited v. Union of India (supra), Mumbai International Airport Pvt. Ltd. v. Golden Chariot Airport I (supra), Track Innovations India Pvt. Ltd. v. Union Of India (supra), C.J. International Hotels Ltd. v. NDMC; and N.D.M.C. v. Prominent Hotels Ltd. (supra).

16.6. The award is also contrary to the well settled law that the Arbitrator is bound by the terms of the contract and cannot go beyond the terms of the contract as held by the Supreme Court in Food Corporation of India v. Chandu Construction (supra), State of Rajasthan v. Nav Bharat Construction Co. (supra) and Municipal Corporation of Greater Bombay v. Thermal Engineering Corporation, Bombay (supra). However, the learned Arbitrator has re-written the terms of the contract by discharging the respondent from the liability to pay the Royalty (MGA) and directed the parties to renegotiate the terms of the contract.

16.7. The award is against the justice as well as morality. The obligation of the respondent to pay the Royalty (MGA) is absolute and the respondent is not entitled to plead impossibility as an excuse for non-payment of the Royalty (MGA). If the payment of the Royalty (MGA) had become onerous/unviable, the lessee had the option to determine the lease under clause 26 of the lease deed by 180 days' notice. However, the lessee cannot seek discharge from the liability to pay the Royalty to the petitioner.

16.8. Even assuming that Section 56 of the Indian Contract Act applies to leases, the lessee has to surrender the lease and pay the Royalty (MGA) upto the date of handing over of the possession. The respondent cannot continue in possession and seek discharge from the payment of Royalty (MGA). Even under Section 108(e) of the Transfer of Property Act, the lessee upon exercising the option to treat the lease as void, is bound to surrender the possession and make the payment of the rent/premium upto the date of the surrender.

16.9. Even assuming that Section 56 of the Contract Act applies to leases, the whole lease would become void and the lessee would be liable to surrender the leased property and clear the liability of Royalty (MGA) upto the date of surrender under Section 65 of the Contract Act.

16.10.Even assuming, there was recession in the hotel industry in 2008, it cannot be said that the recession was permanent and would continue for the rest of the period of lease. Frustration cannot be used as a device to avoid a bad bargain. The contract between parties was for a period of 30 years and it was but natural and foreseeable by both the parties that there would be various economic turmoil over a period as long as 30 years. Reference be made to Alanduraiappar Koil Chithakkadu v. T.S.A. Hamid (supra).

16.11.The statement of claim instituted by respondent is gross abuse and misuse of process of law. The statement of claim was not even maintainable in law and the learned Arbitrator ought to have rejected the same at the outset. The respondent's claim does not have any foundation, which would have entitled it to seek any judicial relief.

16.12.The impugned award has resulted in a windfall in favour of the respondent, more as a premium for their own defaults and breaches. The respondent has enjoyed the subject property without paying the Royalty (MGA) and the outstanding dues according to the petitioner, have accumulated to the tune of more than Rs.258 crores.

16.13.The Court is of the prima facie view that the respondent has made a false claim before this Court which amounts to an offence under Section 209 of the Indian Penal Code. However, before initiating the action against the respondent, two weeks' time is granted to enable the respondent to introspect and file an undertaking to pay the arrears of Royalty (MGA) to the petitioner and not to resort to any frivolous proceedings/action in future. In the event of failure of the respondent to file such an undertaking within two weeks, the petitioner is at liberty to file an application under Section 340 Cr.P.C.

16.14.This case warrants imposition of costs on the respondent in terms of the principles laid down in Ramrameshwari Devi v. Nirmala Devi (supra), Maria Margarida Sequeria Fernandes v. Erasmo Jack de Sequeria (supra) and Messer Holdings Ltd. v. Shyam Madanmohan Ruia (supra) and Harish Relan v. Kaushal Kumari Relan, (supra).

16.15.For the reasons discussed hereinabove, the petition is allowed and the impugned award is set aside with costs of Rs.2,00,000/- (Rupees Two Lakh Only) to be paid by the respondent to the petitioner within a period of two months from today.

J.R. MIDHA, J.

JULY 15, 2016 Dk/Rsk/Dev