

(2015) 03 KAR CK 0443
In the Karnataka High Court
Case No : C.M.P. No. 83 of 2014

ITI Limited

APPELLANT

Vs

Hosmat Hospital Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 06-03-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(6)
Contract Act, 1872 — Section 62
Finance Act, 1994 — Section 65(105)(ZZZZ)

Citation : (2015) 03 KAR CK 0443

Hon'ble Judges : Aravind Kumar, J

Bench : Single Bench

Advocate : Kamalacharan S.R., for the Appellant; L.M. Chidanandayya,
Advocates for the Respondent

Final Decision : Allowed

Judgement

Aravind Kumar, J.—Petitioner is seeking for appointment of an Arbitrator by invoking Section 11(6) of the Arbitration and Conciliation Act, 1996 in terms of Clause 7.3 of Lease Deed dated 06.11.2012 Annexure-E to adjudicate the dispute that is said to have arisen between the parties, contending inter alia that it had entered into a lease deed with the respondent for leasing the immovable property as described in the deed on 17.06.2005 as per Annexure-C initially for a period of five years and after expiry of said term lease deed dated 29.09.2010 came to be entered into with the respondent and after termination of said lease period by efflux of time, it came to be extended with retrospective effect by entering into lease deed dated 06.11.2012 Annexure-E and said lease came to be entered into for a period of five years from 07.11.2012 to 06.11.2017 as per Annexure-F and lease having been extended from time to time dispute has arisen between the parties on the issue of payment of service tax relating to period 01.06.2007 to 06.11.2012 and while entering into lease deed on 06.11.2012 as per Annexure-F which is for the subsequent period i.e., period from 07.11.2012 onwards the parties were at ad idem with regard to payment of

service tax and accordingly clause came to be incorporated in the said lease deed as to payment of service tax by lessee i.e., by respondent and insofar as payment of service tax relating to earlier period which was covered under lease deeds dated 17.06.2005, 29.10.2010 and 06.11.2012 which is at Annexures C, D and E respectively, issue was not resolved between parties since respondent-lessee had taken a stand that it is not liable to pay Service Tax for the period 01.06.2007 to 06.11.2012. It is also contended that Chairman and Managing Director of petitioner company invoking clause 7.2 of lease deed dated 17.06.2005 Annexure-C passed an order directing the lessee to remit the amount of Rs. 2.36 crores to the lessor with interest which related to service tax paid by the petitioner-lessor in favour of Union of India, indicating in the order that when lease was initially entered into between the parties there was no levy of service tax on lease of immovable property and as such this issue was not included in the terms agreed to under the lease deed and during the currency of lease entered into between parties under lease dated 17.06.2005 amendment to Finance Act, 1994 came to be passed by virtue of which service tax has been made payable in respect of rental income also and as such there is dispute between parties with regard to said payment and on account of clause in the said lease deed being silent and when the parties had not visualized the levy of such tax, petitioner had contended that same is liable to be paid by the lessee which came to be denied by it and as such arbitration clause found in the said agreement as well as in the subsequent agreements executed between the parties on 29.09.2010 and 06.11.2012 same was required to be enforced to adjudicate the dispute between parties and as such petitioner made a request to respondent to concur with the named Arbitrator and on account of demand made by the petitioner by issuing legal notice having been rejected by respondent or in other words respondent having not concurred with appointment of Arbitrator, petitioner has sought for appointment of an Arbitrator.

2. Respondent has filed detailed statement of objections opposing appointment of Arbitrator by contending that there is no arbitrable dispute and alleged dispute has not been agreed to be resolved between parties as per the agreement in question or in other words, dispute is not alive and arbitration clause found in the three lease deeds dated 17.06.2005, 29.10.2010 and 06.11.2012 which is at Annexures C, D and E has stood extinguished or erased on account of subsequent agreement entered into between the parties on 06.11.2012 as per Annexure -F whereunder issue of payment of service tax in respect of rental income has been agreed upon between parties and under said deed, respondent agreed to pay service tax with effect from 07.11.2012 only and by virtue of same, agreements entered into between parties earlier has stood extinguished by Novatio. Hence, it is contended that arbitration clause which is pressed into service by petitioner does not exist and parties having entered into fresh agreement, by application of "Doctrine of Novatio" agreements relied upon by petitioner has stood wiped out and when there is no subsisting arbitration clause, prayer for appointment of Arbitrator is liable to be rejected. It is also contended

by respondent without prejudice to said contention, arbitration clause found in the lease deed pressed into service vide Annexure-C, D and E by petitioner would itself clearly indicates that such right to invoke arbitration clause is available only to the respondent and same is not available to the petitioner and as such petitioner cannot invoke said arbitration clause and seek for appointment of Arbitrator. On these amongst other grounds urged in statement of objections, respondent has sought for rejection of the petition.

3. I have heard the arguments of Sri. Kamalacharan, learned counsel appearing for petitioner and Sri. L.M. Chidanandayya, learned counsel appearing for respondent. Learned advocates having reiterated the contentions raised in their respective pleadings and in support of their contention have relied upon the following Judgments:

"JUDGMENTS RELIED UPON BY LEARNED COUNSEL FOR PETITIONER:

1. M/s. Indian Drugs and Pharmaceuticals Ltd. Vs. M/s. Indo Swiss Synthetics Gem Manufacturing Co. Ltd. and others, AIR 1996 SC 543 : AIR 1995 SC 543 : (1996) 1 ARBLR 77 : (1995) 6 SCALE 439 : (1996) 1 SCC 54 : (1995) 5 SCR 189 Supp

2. The Branch Manager, Magma Leasing and Finance Limited and Another Vs. Potluri Madhavilata and Another, AIR 2010 SC 488 : (2010) 1 CompLJ 684 : (2009) 12 JT 385 : (2009) 12 SCALE 668 : (2009) 10 SCC 103 : (2009) 14 SCR 815 : (2009) 9 UJ 4335

3. Arbitration Case (Civil) No. 36 of 2014 - M/s. KSS KSSIPL Consortium Through its Constituted Attorney Mr. Devendra Kumar v. M/s. Gail (India) Ltd.

JUDGMENTS RELIED UPON BY LEARNED COUNSEL FOR RESPONDENT:

1 The Union of India Vs. Kishorilal Gupta and Bros., AIR 1959 SC 1362 : (1960) 1 SCR 493

2. Young Achievers Vs. IMS Learning Resources Pvt. Ltd., (2014) 8 AD 467 : (2013) 3 ARBLR 299 : (2014) 118 CLA 180 : (2013) 4 CompLJ 217 : (2013) 13 JT 592 : (2013) 10 SCALE 531 : (2013) 10 SCC 535

3. Larsen and Toubro Ltd. Vs. Mohan Lal Harbans Lal Bhayana, (2014) AIRSCW 1884 : (2014) 1 ARBLR 556 : (2014) 3 JT 485 : (2014) 3 SCALE 54 : (2014) 5 SCJ 691

4. P.K. Ramaiah and Company Vs. Chairman and Managing Director, National Thermal Power Corpn., (1994) 1 SCALE 1 : (1994) 3 SCC 126 Supp

5. 1994 SUPP (3) SCC 83 - State of Maharashtra v. Nav Bharat Builders

6. Union of India (UOI) and Others Vs. Master Construction Co., (2011) 2 ARBLR 105 : (2011) 2 CompLJ 520 : (2011) 5 JT 244 : (2011) 3 RCR(Civil) 526 : (2011) 5 SCALE 165 : (2011) 12 SCC 349 : (2011) 5 SCR 853 : (2011) 2 UJ 1870 : (2011) AIRSCW 4610 : (2011) AIRSCW 2669 : (2011) 3 Supreme 441 :

(2011) 3 Supreme 443

4. Having heard the learned advocates appearing for the parties this Court is of the considered view that following points would arise for consideration:

"1. Whether petitioner is entitled to seek for appointment of an Arbitrator under section 11(6) of the Arbitration and Conciliation Act, 1996 (for short "Act") by virtue of clause 7.3 in the lease deeds dated 17.06.2005, 29.10.2010 and 06.11.2012?

OR

Whether the arbitration clause found in the lease deeds dated 17.06.2005, 29.09.2010 and 06.11.2012 Annexures C, D and E has stood extinguished or wiped out by virtue of an agreement of lease entered into between the parties on 06.11.2012 as per Annexure-F and thereby Section 62 of Indian Contract Act would be attracted and as such petitioner would not be entitled to invoke said clause?

2. What order?"

5. Facts in brief is required to be delved upon for adjudicating the points formulated herein above and they are summarized herein below at the cost of repetition.

BACKGROUND OF THE CASE:

Both parties are not at dispute with regard to the fact that in respect of property bearing No. 45, Magrath Road, Bengaluru-25 owned by petitioner was taken on lease by respondent on its bid being accepted by petitioner and same was pursuant to tender called for by the petitioner. Since respondent was the highest bidder, bid submitted by respondent came to be accepted by the petitioner and lease deed dated 17.06.2005 Annexure-C came to be entered into between parties which was also duly registered in the office of Sub-Registrar. On expiry of five years term as agreed to under the said lease deed, a fresh lease deed came to be entered into between the parties on 29.09.2010 as per Annexure-D which was for a period of six months. During this interregnum period Finance Act, 1994 came to be amended and renting of immovable property was brought within the purview of taxable service as defined under Section 65(105)(ZZZZ) of Finance Act, 1994 and for the financial year 2007-08 service tax payable thereon came to be taxed @ 12.36% vide notification dated 22.05.2007. Hence, petitioner demanded payment of service tax from respondent i.e., lessee on the ground that lessee was the end user or the recipient of Lease. Hence, petitioner called upon respondent - lessee to pay service tax. However, respondent resisted the said claim contending inter alia that as per clause 5.3 of the lease deed it is the duty of petitioner not only to pay property tax but all other taxes as agreed thereunder and as such it did not comply with the demand made by the petitioner. In this background a dispute arose between the parties or in other words dispute arose between petitioner and respondent as to who should bear

the burden of payment of service tax. In this factual scenario further development which took place with regard to leased property in question would also be required to be stated since it would have a bearing on the adjudication of points formulated herein above.

6. After termination of lease deed dated 29.09.2010 Annexure-D by efflux of time respondent is said to have stopped payment of rents though continued to be in occupation of the leased premises in question. As such after mutual discussion a lease deed came to be entered between parties on 06.11.2012 as per Annexure-E whereunder lessee agreed to pay arrears of rent as stipulated under the said agreement. On the same day, one more lease deed also came into existence of even date i.e., 06.11.2012 Annexure-F which was for a period of five years namely for the period 07.11.2012 to 06.11.2017 (Annexure-F). In the meanwhile during November, 2012 Voluntary Amnesty Scheme came to be introduced by Government of India for payment of disputed tax and said scheme is said to have been availed of by the petitioner and as such petitioner is said to have paid the service tax amounting to Rs. 2.36 crores relating to the rental income and on such payment being made, petitioner contended that respondent-lessee being the ultimate recipient of the services, it was liable to pay service tax which has since been paid by petitioner and as such demanded payment of said amount from respondent. However, respondent resisted the said claim by reiterating its earlier stand namely clause 5.3 of the lease deed envisaged payment of all taxes by the lessor i.e., petitioner herein and as such respondent refused to pay service tax of Rs. 2.36 crores said to have been paid by petitioner.

7. Petitioner by invoking clause 7.2 of the agreement dated 17.06.2005 which is found in the lease deed dated 06.11.2012 Annexure-E approached the Chairman and Managing Director of its company for decision being rendered as had agreed to between the parties under the said clause. Chairman and Managing Director of petitioner company after issuing show cause notice to respondent on 11.06.2013 (Annexure-G) and seeking its reply in respect of claim made by the petitioner which undisputedly came to be received by respondent and replied on 01.07.2013 (Annexure-H) whereunder dispute raised by the petitioner came to be denied by respondent contending, Chairman and Managing Director has no jurisdiction to adjudicate said dispute in view of subsequent lease deed having been entered into between the parties on 06.11.2012 (Annexure-F) and the arbitration clause found in the earlier lease deeds had stood extinguished and said arbitration clause being conspicuously absent in the lease deed dated 06.11.2012 (Annexure-F) he does not have jurisdiction to adjudicate the dispute, amongst other grounds. The Chairman and Managing Director of Petitioner-company after considering the pleas put forward by respondent, by order dated 19.12.2013 (Annexure-K) directed the respondent-lessee as follows:

"a) The Lessee is directed to refund/reimburse the amount of Rs. 2.36 Crores (Two Crores Thirty Six Lakhs) to the Lessor along with SBAR of interest per annum from 27.11.2012 till the date of payment.

b) The Lessee is directed to pay interest at SBAR calculated month on month on arrears of rent for the period 18.01.2011 till 06.11.2012 quantified at Rs. 81,85,111.00.9

c) The Lessee is also directed to pay/give security for a sum of Rs. 24,00,000/- (Twenty Four Lakhs) being the value of rectification/repair work to be carried out by the Lessor to the damages caused to the building on account of poor maintenance and unreasonably bad usage leading to such damages;

d) The Lessee is directed to pay the above said sums within 30 days from the date of receipt of this notice."

8. By virtue of said order passed by Chairman and Managing Director, petitioner made a demand on respondent to pay the amount ordered with interest. However, respondent by its reply dated 03.01.2014 Annexure-L denied its liability and without prejudice to its contention raised in its earlier replies-communications contended that it proposes to invoke clause 7.3 of agreement namely to seek resolution of dispute by referring the matter to arbitration. On receipt of said reply petitioner herein got issued a notice on 27.02.2014 (Annexure-M) and appointed Hon"ble Justice Sri. Ajit, J. Gunjal, as the sole Arbitrator to arbitrate and adjudicate the dispute that is said to have arisen between parties under lease deed dated 17.06.2005, 29.09.2010(18.06.2010) and 06.11.2012 Annexure-C, D and E respectively and requested the respondent to concur with the appointment of said arbitrator. In reply to said notice and by its reply dated 06.03.2014 Annexure-N respondent reiterated its earlier stand and refused to concur with the appointment of Arbitrator. Hence, petitioner has approached this court seeking for appointment of Arbitrator by invoking Section 11(6) of the Act.

RE: POINT NO. 1:

9. Initial question which would arise for consideration is as to whether petitioner and respondent had entered into an agreement dated 06.11.2012 (Annexure-E) to resolve their disputes by Arbitration. Hence, it would be apt and necessary to extract relevant arbitration clause of said agreement pressed into service by petitioner in this petition and same reads as under:

"7.3 - If the LESSEE is dissatisfied with the decision of the Chairman and Managing Director of ITI and if with in a reasonable period such mutual discussions do no result in a settlement, all such disputes, claims, etc., shall be resolved through arbitration to be conducted under the provisions of the Arbitration and Conciliation Act, 1996. The Arbitral Tribunal shall comprise of One Arbitrator to be appointed by the LESSOR and LESSEE."

10. It is not in dispute under said clause, both parties had agreed to resolve their disputes through arbitration and both parties had agreed to appoint one Arbitrator. Said clause is also found in the lease deeds dated 29.09.2010 Annexure-D and lease deed dated 06.11.2012 Annexure-E though not in

verbatim. Perusal of statement of objections and entire communication exchanged between the parties would leave no doubt in the mind of this Court about there being an arbitration clause in these lease deeds. Infact respondent does not dispute said arbitration clause being in existence in these lease deeds. On the other hand it is expressly admitted by respondent itself in all its communication and also in its statement of objections filed about existence of said clause in these three lease deeds namely Annexures C, D and E. However, it has been contended that said arbitration clause found in these lease deeds has stood extinguished or wiped out by virtue of a fresh lease deed entered into between the parties on 06.11.2012 vide Annexure-F which came to be duly registered in the office of jurisdictional Sub-Registrar. The stand of the respondent in its statement of objections for the purpose of convenience is extracted herein below, which would also clearly spell out as to what is the stand taken by the respondent with reference to above referred arbitration clause. Hence, same is extracted herein below:

"7. That the respondent submits that the previous lease deeds are not in existence to invoke the arbitration clause by virtue of new lease deed dated 06.11.2012 which deletes the Arbitration clause. The earlier lease deeds have not been in existence to invoke arbitration clause. When that being so, xxx requires to be rejected at the threshold itself. (a) that the lease deeds which are relied upon by the petitioners wherein there is arbitration clause have already been expired. The present lease deed dated 06.11.2012 does not contain the arbitration clause and therefore when there is no arbitration clause for appointment of an arbitrator".

(Emphasis supplied)

11. While traversing the petition averments in its statement of objections at paragraph 8 respondent has unequivocally admitted about existence of earlier lease deeds. It has been stated by the respondent in its statement of objections to the following effect.

"8. That the statement of the Petitioner with regard to the constitution of the Petitioner Company is not disputed. Further statement that the Lease Deeds are not disputed."

12. Having said so respondent and to stave off its liability to pay service tax which has been demanded by petitioner, has taken umbrage under clause 5.3 of said lease deeds by contending that all taxes including property tax has to be paid by petitioner itself and respondent is not required to indemnify the claim made by the petitioner in that regard. In view of the above pleadings and admissions found therein it does not leave any doubt in mind of this court to arrive at a conclusion that there is arbitration clause under these lease deeds - Annexures-C, D and E whereunder, parties have agreed to resolve their dispute by taking recourse to arbitration.

13. However, incidental question that would arise for consideration would be as

to whether said arbitration clause found in the lease deeds at Annexures C, D and E can be invoked by petitioner or not by virtue of contention raised by the respondent which is to the effect that said clause in the agreement has stood wiped out or extinguished by virtue of fresh lease deed having been entered into between the parties on 06.11.2012 (Annexure-F). In order to answer this question Point No. 2 will have to be delved upon and if the answer is in favour of respondent, question of appointment of arbitrator would not arise at all. However, if the answer is in favour of petitioner, consequential prayer sought for by the petitioner deserves to be granted. Hence, I proceed to adjudicate Point No. 2.

RE: POINT NO.2:

14. The main thrust of arguments advanced by learned counsel appearing for respondent Sri. L.M. Chidanandayya is that after lease deed dated 06.11.2012 Annexure-E came to be executed between the parties, yet another deed came to be entered into between parties on even date itself i.e., 06.11.2012 vide Annexure-F which agreement does not provide for arbitration or in other words the arbitration clause which had been incorporated in the earlier lease deeds Annexures C, D and E was not incorporated in the subsequent lease deed, Annexure-F by consent of parties. Hence, there is no enforceable contract between the parties and as such petitioner cannot seek for appointment of an arbitrator and also on the ground that by virtue of lease deed dated 06.11.2012 Annexure-F having been entered into between same parties earlier lease deeds have stood extinguished or wiped out or erased by application of Section 62 of Contract Act. He would also contend that there is novatio and hence arbitration clause found in the earlier lease deeds is not alive for being invoked. At this juncture it would be apt and appropriate to note the Judgments relied upon by learned counsel appearing for respondent.

Since it has been contended that by application of Section 62 of the Contract Act the terms agreed upon between the parties under lease deeds Annexures C, D and E has extinguished by virtue of lease deed dated 06.11.2012 Annexure-F coming into existence, it would be apt to notice section 62 of the Contract Act and its application to the facts of the present case. Hence, it is extracted herein below:

"Section 62 of Contract Act reads as under:

"Effect of novation, rescission, and alteration of contract - If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed".

By reading of the above provision would indicate that if the contract was validly executed the parties may put an end to it by entering into a new contract to govern their rights and liabilities thereunder. In other words where a new contract has come into existence in substitution to the old contract, the original contract ceases to operate and the original contract has no legal existence. The

issue of novatio has been dealt by the Hon"ble Apex Court in catena of Judgments and for the purposes of the present case the following Judgments would suffice.

15. In the case of The Union of India Vs. Kishorilal Gupta and Bros., AIR 1959 SC 1362 : (1960) 1 SCR 493

"Issue of Doctrine of Novatio came to be considered, examined and held that an arbitration clause is a collateral term of a contract as distinguished from its substantive terms; but none the less it is an integral part of the contract. It has been held that if the clause is couched in widest terms, the dispute whether there is frustration or repudiation of the contract would be covered by it. It has been further held that such cessation of contract would be not because arbitration clause survives but because though such repudiation ends the liability of the parties to perform the contract, it does not put their liability to an end to pay damages for any breach of the contract, after considering scope of Section 62 of the Contract Act following six (6) broad parameters came to be enunciated namely:

"10. The following principles relevant to the present case emerge from the aforesaid discussion:

(1) An arbitration clause is a collateral term of a contract as distinguished from its substantive terms; but none the less it is an integral part of it;

(2) however comprehensive the terms of an arbitration clause may be, the existence of the contract is a necessary condition for its operation, it perishes with the contract;

(3) the contract may be non est in the sense that it never came legally into existence or it was void ab initio;

(4) though the contract was validly executed, the parties may put an end to it as if it had never existed and substitute a new contract for it solely governing their rights and liabilities thereunder;

(5) in the former case, if the original contract has no legal existence, the arbitration clause also cannot operate, for along with the original contract, it is also void; in the latter case, as the original contract is extinguished by the substituted one, the arbitration clause of the original contract perishes with it; and

(6) between the two falls many categories of disputes in connection with a contract, such as the question of repudiation, frustration, breach etc. In those cases it is the performance of the contract that has come to an ended, but the contract is still in existence for certain purposes in respect of disputes arising under it on in connection with it. As the contract subsists for certain purposes, the arbitration clause operates in respect of these purposes."

16. The above principles enunciated by the Hon"ble Apex Court would clearly

indicate the contingencies under which there would be extinguishment of earlier contracts by virtue of fresh contract being entered into or the effect of old contract getting substituted by a new contract. It came to be held by the Apex Court in Kishore Lal Gupta's Case *supra* that when contract was validly or duly executed between the parties it can be put to an end as if it had not existed by substituting with a fresh contract and as such the new contract comes into play which governs the rights and obligations of the parties. It also came to be held that, where the dispute had arisen between parties with regard to repudiation, frustration, breach etc., in those cases it is the performance agreed to under the contract that would come to an end, and contract would still subsist for certain purposes in respect of disputes arising under the agreement in connection with it on the ground that contract subsists for certain purposes and arbitration clause operates in respect of these purposes. In that view of the matter said Judgment relied upon by learned counsel for respondent would not come to his rescue. On the other hand it would clearly indicate that where terms of the contract entered into between parties even if subsequently is extinguished by virtue of entering into fresh contract, the performance or otherwise of the terms of earlier contract would clearly fall within the scope of arbitration. In other words it has been held that by virtue of subsequent contract entered into between the parties the earlier terms of the contract relating to repudiation, frustration or breach would not get wiped out or in other words Doctrine of Novatio would not apply. On facts of said case it was noticed by Hon''ble Apex Court that all three agreements entered into between parties had been settled under a Settlement deed whereunder it was agreed between parties that no party will have further or other claim against the other and as such it came to be held that by virtue of same arbitration clause did not exist or it had stood wiped out.

Thus, on facts it will have to be examined as to whether the parties had decided to substitute the old contract with a new contract or whether entering into fresh contract it would put an end to old contract and its excitability thereof.

P.K. Ramaiah and Company Vs. Chairman and Managing Director, National Thermal Power Corpn., (1994) 1 SCALE 1 : (1994) 3 SCC 126 Supp , STATE OF MAHARASHTRA v. NAV BHARAT BUILDERS - 1994 SUPPLEMENT (3) SCC 83 which has been relied upon by learned counsel for respondent has been perused by this court. It would indicate that in the facts of said case the claimant had executed an unconditional receipt or a deed for having received money in full and final settlement and attempted to contend that still he has a right to seek for appointment of Arbitrator under the Arbitration clause or the agreement which contains an arbitration clause and same came to be negated by Hon''ble Apex Court on the ground that there exists no subsisting dispute, since claimant had acknowledged in writing accepting the correctness of the measurements as well as the final settlement and received the amount and as such it was held that no arbitrable dispute exists for being referred. It was also noticed by Apex Court that claimant had executed said receipt unconditionally with eyes wide open and as such cannot contend or subsequently allege it was executed on account of

coercion and same is an after thought and a devise to get over the settlement of the dispute and held thereby claimant cannot contend the arbitration clause still exists or agreement has not come to end or contract has not come to end and/or still arbitration clause survives.

17. Infact these two Judgments came to be considered by Hon''ble Apex Court in the case of National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd., AIR 2009 SC 170 : (2008) 3 ARBLR 633 : (2011) 2 CompLJ 486 : (2008) 10 JT 448 : (2008) 152 PLR 709 : (2008) 12 SCALE 654 : (2009) 1 SCC 267 and held in the facts and circumstances of said case that where claimant had executed a deed or receipt for having received money either under the forced circumstances of the case or in order to receive the admitted monies due to him had executed such deed or receipt, it would be a unilateral Act and it does not prevent such claimant from invoking arbitration clause and held that in such circumstances claimant still would be entitled to press for arbitrator being appointed. In that view of the matter these two Judgments relied upon by the respondent does not come to his assistance.

18. Issue of novatio is always a mixed question of fact and law. Until and unless it is expressly agreed upon by the parties that there is Novatio or in other words by virtue of subsequent agreement entered into between the parties the earlier agreements/deeds having stood extinguished or cancelled as expressly agreed under the subsequent contract, doctrine of novatio cannot be held would be attracted. In other words if in the subsequent deed or agreement a specific clause has been entered into indicating thereunder expressly agreeing that all earlier agreements entered into between parties have stood cancelled or annulled or not being enforced then without any further proof it can easily be held that parties were at ad idem insofar as giving up their rights or liability under the previous agreement by entering into fresh agreement and thereby there is recession of earlier contract and in such a situation it can be held that doctrine of novatio would be applicable.

19. There cannot be any dispute that one of the modes by which contract can be discharged is by the same process by which it was created i.e., by mutual agreement namely the parties to the original contract may enter into a new contract by substitution of old as the contract is outcome of agreement between the parties and it is equally open for the parties thereto to bring to an end such contract as it never existed, so as to make the application of doctrine of novatio. The express term of later contract should clearly indicate that parties have agreed to wipe out the terms and conditions agreed to under earlier contract in order to put an end to it. Thus, doctrine of novatio when pressed into service will have to be examined in the facts of that particular case. Until and unless later agreement clearly and specifically indicating that parties were at ad idem and have expressly agreed thereunder to put an end to the earlier contract, Section 62 of Contract Act cannot be held would be attracted. There cannot be any straight jacket formula in this regard. It depends on the facts of each case.

20. Keeping in mind these principles when the facts on hand are examined it would clearly indicate that earlier lease deeds Annexures C, D and E was for the following periods:

"(i) 17.06.2005 to 17.06.2010

(ii) 18.06.2010 to 18.12.2010

(iii) 18.12.2010 to 06.11.2012"

Thereafter parties entered into fresh lease deed on 06.11.2012 Annexure-F which has been very heavily relied upon by learned counsel for respondent to buttress his arguments that arbitration clause not being found in this lease deed i.e., lease deed dated 06.11.2012 (Annexure-F) an inference has to be drawn that there is novatio or earlier agreements had stood wiped out. At first blush said argument looks attractive but on deeper examination or scrutiny it does not detain this court for too long to reject the said contention for reasons more than one:

"firstly in the lease deeds produced at Annexures C, D and E it would clearly indicate it was for the periods indicated therein in respect of which petitioner has now raised a dispute and said claim has been denied by the respondent on the ground of fresh agreement having been entered into on 06.11.2012 Annexure-F and as such it wipes out the terms and conditions agreed to between the parties in the earlier agreements. In other words it is contended that arbitration clause found in earlier deeds as per Clause 7.3 would not be available to the petitioner to seek for appointment of arbitrator. It requires to be noticed that agreement dated 06.11.2012 Annexure-F which has been pressed into service by learned counsel for respondent to contend earlier agreements are put to an end is not the agreement which has been pressed into service by petitioner invoking arbitration clause. On the other hand it is the lease deeds dated 17.06.2005, 29.09.2010 and 06.11.2012 Annexures C, D and E which is pressed into service to seek for appointment of arbitrator as per arbitration clause found in said deeds as already noticed hereinabove. Petitioner is claiming that service tax is payable for the period covered under the lease deeds dated 17.06.2005, 29.09.2010 and 06.11.2012 Annexures C, D and E and issue of "payment of service tax" relating to these three lease deeds which is, asserted by the petitioner to be paid by respondent and denied by respondent as not agreed to be paid by it under these deeds is an issue required to be adjudicated by an Arbitrator. Infact respondent has attempted to stave off its liability by pressing into service clause 5.3 found in these deeds. In other words it is also relying on said clause found in these deeds. Thus, dispute that has arisen between the parties relates to payment of service tax for the periods covered under these agreements/deeds. This court cannot embark upon conducting any roving enquiry to find out as to whether said claim is justifiable or not since any finding even if incidentally recorded by this court is likely to prejudice the rights of either of the parties and as such same is left at it."

21. In the light of aforestated discussion this court is of the considered view that

principles of doctrine of novatio would not be applicable to the facts and circumstances of the case by virtue of agreement entered into on 06.11.2012 Annexure-F and as per the terms and conditions agreed to under the lease deeds dated 17.06.2005, 29.09.2010 and 06.11.2012 Annexures C, D and E petitioner would be entitled to enforce the arbitration clause and same would not be wiped out, extinguished or it does not stand rescinded and still it operates between the parties for being enforced. Accordingly Point No. 2 is answered in favour of petitioner and against respondent.

22. While answering Point No. 1 it has been held that question of appointment of Arbitrator may not arise in the event of point No. 2 being answered in favour of respondent. Since, it has been held that for adjudication of dispute between the parties Arbitrator requires to be appointed. I proceed to answer Point No. 3.

RE: POINT NO.3:

In view of Point No. 1 and 2 having been answered in favour of petitioner and against respondent it is to be held that petitioner would be entitled to seek for appointment of an Arbitrator.

Hence, I proceed to pass the following:

ORDER

"1. Civil Miscellaneous Petition is hereby allowed.

2. Hon''ble Justice Sri. V. Jagannathan, Former Judge this court is hereby appointed as Arbitrator and he is requested to enter upon reference and arbitrate the dispute and conduct arbitration proceedings at Arbitration Centre, Bengaluru in terms of the Arbitration Centre, Karnataka (Domestic and International) Rules, 2012.

3. No costs."