Psa Sical Terminals Pvt. Ltd. vs The Board Of Trustees Of V.O. ... on 28 July, 2021

Equivalent citations: AIR 2021 SUPREME COURT 4661, AIRONLINE 2021 SC 384

Author: B.R. Gavai

Bench: B.R. Gavai, R.F. Nariman

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 3699-3700 OF 2018

PSA SICAL TERMINALS PVT. LTD. ...APPELLANT(S)

VERSUS

THE BOARD OF TRUSTEES OF V.O.
CHIDAMBRANAR PORT TRUST
TUTICORIN AND OTHERS ...RESPONDENT(S)

JUDGMENT

B.R. GAVAI, J.

1. The appellant has approached this Court being aggrieved by the judgment and order dated 1 st November 2017, passed by the Division Bench of the Madras High Court in C.M.A. (MD) No. 345 of 2016 and C.M.P. (MD) No. 4867 of 2016, thereby allowing the appeal of the respondent No.1 herein under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 Date: 2021.07.28 16:20:39 IST Reason:

> (hereinafter referred to as 'the Arbitration Act') vide which the High Court set aside the award dated 14 th February 2014, passed by the Arbitral Tribunal and the order passed by the District Judge dated 25th February 2016, rejecting the application filed by the respondent No.1 herein under Section 34 of the Arbitration Act.

2. The facts necessary for adjudication of the present appeals are as under:☐The respondent No.1☐ The Board of Trustees of V.O. Chidambranar Port Trust, Tuticorin (hereinafter referred to as 'TPT')

issued a global tender on 9 th April 1997, inviting bids for development of the Seventh Berth at V.O. Chidambranar Port, Tuticorin as a Container Terminal and for operating and maintaining the same for 30 years on a Build, Operate and Transfer (hereinafter referred to as 'BOT') basis. In response to the tender, the appellant PSA Sical Terminals Pvt. Ltd. (hereinafter referred to as 'SICAL') submitted its bid on 24 th October 1997. The financial offer was submitted by SICAL on 19th December 1997. Since SICAL's offer was the highest, the same was accepted and a Letter of Intent (hereinafter referred to as 'LoI') was issued to it on 29th January 1998 and the same was followed by a License Agreement dated 15 th July 1998.

3. In the meantime, the Tariff Authority for Major Ports (hereinafter referred to as 'TAMP') which is an authority constituted under the Major Port Trusts Act, 1963 adopted guidelines on 26th/27th February 1998. SICAL submitted its tariff proposal with regard to the Container Terminal on 28th September 1999. A revised proposal came to be submitted by SICAL on 8th October 1999, thereby including royalty as an element of cost. The said proposal was approved by TAMP's order dated 8th December 1999. TAMP notified its order of 8th December 1999 vide gazette notification dated 28 th December 1999, thereby approving the tariff as proposed by SICAL vide proposal dated 8th October 1999. SICAL submitted a further proposal on 8th February 2002 for review in tariff, again including therein an increase in royalty to be paid as an element of cost and proposed for an increase in the tariff. TPT vide communication dated 10th April 2002, objected to the proposal of SICAL for increase in tariff. TAMP vide its order dated 20th September 2002, rejected the proposal of SICAL for increase in tariff.

4. SICAL filed Writ Petition Nos. 40637 40639 of 2002 before the Madras High Court for quashing of the TAMP order dated 20th September 2002. In the said proceedings, the Madras High Court passed an order dated 8 th November 2002 granting interim relief in favour of SICAL, thereby staying the TAMP order dated 20th September 2002. Vide the said order, SICAL was permitted to charge tariff at the rate prevailing prior to the TAMP order impugned in those petitions.

5. Ministry of Shipping, Government of India (hereinafter referred to as 'GoI') vide notification dated 29 th July 2003, clarified that revenue sharing/royalty payment shall not be factored into as cost for fixation/revision of tariff by TAMP and further directed that the same shall be clearly indicated in subsequent bid documents. On 31st March 2005, TAMP notified the revised guidelines thereby disallowing royalty as an element of cost. However, it also provided that in BOT cases where bidding processes were finalized before 29 th July 2003, the tariff computation will take into account royalty/revenue share as cost for tariff fixation in such a manner as to avoid likely loss to the operator on account of the royalty/revenue share not being taken into account. This was subject to a maximum of the amount quoted by the next lowest bidder. This was also to be allowed only for the period up to which such likely loss would arise. It further provided that this would not be applicable if there is a provision in the concession agreement on treatment of royalty/revenue share.

6. On 17th August 2005, a Memorandum of Compromise (hereinafter referred to as the 'MoC') came to be filed before the Madras High Court between SICAL, GoI and TAMP who were parties to the Writ Petition Nos. 40637 40639 of 2002. As per the said MoC, SICAL was to submit a proposal to the Ministry of Shipping and Transport, GoI in the matter of permitting royalty to be allowed to be

factored into cost while fixation of tariff for the period prior to 31 st March 2005. It was also clarified that for the period thereafter, new guidelines provide the manner and mode in which this has to be done. The MoC provided that on receipt of the proposal, the Central Government would consider the same and pass appropriate orders consistent with the policy decision of the Government of India (hereinafter referred to as the 'GoI') in the matter of Chennai Container Terminal Limited (hereinafter referred to as the 'CCTL') dated 5th August 2003 and accordingly issue a directive under Section 111 of the Major Port Trusts Act, 1963. Vide the said MoC, it was further provided that SICAL would continue to charge the 1999 Tariff which was permitted as per the interim orders passed by the High Court till new tariff was gazetted. It further provided that advantages/ gains, if any, that SICAL has enjoyed by virtue of not implementing the 2002 Tariff, will be quantified by TAMP and such advantages/gains will be adjusted/set□off in the proposed new tariff and such set□ off will be spread over a period of three years.

7. In pursuance of the aforesaid MoC, GoI issued a directive/order to TAMP in case of SICAL on 17 th April 2006. Vide the said directive/order, the request of SICAL for claiming a part of royalty as pass through came to be rejected. SICAL thereafter submitted its proposal for fixation of tariff on 18 th April 2006. TAMP passed a tariff order on 23 rd August 2006, which came to be notified on 15 th September 2006, vide which SICAL's proposal for increase in tariff was rejected.

8. SICAL made a written representation to TPT on 6 th October 2006, thereby seeking relief under the terms of Article 14.3 of the License Agreement. Vide the said representation, SICAL requested for amending the License Agreement so as to incorporate the revenue sharing method and incidental changes.

9. SICAL also filed Writ Petition Nos. 38845 and 38846 of 2006 before the Madras High Court on 9 th October 2006, thereby challenging the GoI directive dated 17 th April 2006 and the TAMP order dated 23rd August 2006. On 27th October 2006, TPT refused to consider SICAL's application for amendment of the License Agreement on the ground that the issues raised were pending consideration before the Madras High Court. The said communication dated 27th October 2006 came to be challenged by SICAL before the Madras High Court vide Writ Petition No.43461 of 2006. The Madras High Court passed an order dated 21st August 2007, in Writ Petition No. 43461 of 2006 filed by SICAL, observing therein that the representation dated 6th October 2006, had nothing to do with the pendency of said writ petition and quashed the communication dated 27 th October 2006. It directed TPT to consider and decide the representation of SICAL on its own merits.

10. Vide subsequent order dated 22 nd August 2007, Writ Petition Nos. 38845 and 38846 of 2006 were allowed by setting aside the TAMP order dated 23 rd August 2006 and the GoI directive dated 17th April 2006. The said order was passed on the ground that SICAL was not given sufficient opportunity of being heard by TAMP and GoI and therefore, directed TAMP and GoI to pass fresh order after giving opportunity of hearing to the SICAL.

11. In pursuance of the order passed by the High Court, the GoI issued a directive on 20 th February 2008, therein considering the contentions raised on behalf of SICAL. The said directive provided that TAMP, while fixing the tariff in case of SICAL, should take into consideration the benefit given

in the case of CCTL.

12. TAMP vide notification dated 26th February 2008, notified the guidelines for upfront tariff fixation for Public Private Partnership projects at Major Ports.

13. In pursuance of the order passed by the High Court dated 21st August 2007, the Chairman, TPT passed an order on 25 th April 2008, observing therein that any change in the bidding parameter is a matter of policy regarding which a decision can be taken only by the GoI and in effect, rejected the proposal of SICAL for amending the License Agreement, so as to incorporate the revenue sharing method.

14. SICAL thereafter submitted its proposal for fixation of tariff thereby proposing an increase in tariff on 3 rd October 2008. TAMP passed tariff order dated 17 th December 2008, which came to be notified on 30 th December 2008, rejecting SICAL's proposal for increase in tariff. SICAL thereafter again on 6th January 2009, made a representation to TPT for amendment of the License Agreement in view of Article 14.3. SICAL also filed Writ Petition Nos. 1350 and 1351 of 2009, challenging the tariff order dated 17th December 2008 and the policy direction issued by GoI dated 20 th February 2008. The Madras High Court vide order dated 15th October 2009 allowed those petitions by setting aside the tariff order of 2008 and the GoI directive of 20th February 2008. Vide the said order, the Madras High Court directed TAMP to issue fresh tariff order after obtaining necessary proposal from SICAL and after according sufficient opportunity including personal hearing to SICAL. The GoI directive of 2008 also came to be set aside with a direction to the GoI to consider the matter afresh after giving an opportunity of hearing to SICAL. The said orders have been challenged by TAMP by filing Writ Appeal No. 1845 of 2009 which is pending. It also appears that an appeal has also been filed by SICAL which is also pending before the Division Bench of the Madras High Court.

15. SICAL thereafter addressed a letter to TPT dated 1 st December 2009, raising therein the ground of change in law and therefore again praying for shifting to revenue sharing model. A meeting was held by the Secretary, Ministry of Shipping, GoI on 28th February 2011, wherein the representatives of TPT and SICAL were present. It was decided in the said meeting that two proposals each should be submitted by SICAL as well as TPT. These proposals were to be considered by the Expert Committee.

16. SICAL thereafter on 28th June 2011, moved a petition under Section 9 of the Arbitration Act before the District Judge, Tuticorin with a grievance that the royalty payable for each Twenty-Foot Equivalent Unit (hereinafter referred to as "TEU") was scheduled to exceed the tariff. On 30 th June 2011, District Judge, Tuticorin passed an order granting ad-interim stay in the Section 9 petition, thereby restraining TPT from demanding or recovering any royalty at an escalated rate. In July 2011, SICAL addressed a letter to the Chairman, TPT requesting for referring the dispute for arbitration under Article 15.3 of the License Agreement. The said request came to be rejected by the Chairman, TPT vide communication dated 28th September 2011.

17. In the meanwhile, the proposals submitted by SICAL as well as TPT were being considered by the Expert Committee. On 30th April 2012, District Judge, Tuticorin passed an order thereby allowing

the Section 9 petition filed by SICAL and made absolute the ad-interim injunction granted in its favour. Thereafter, there was exchange of certain communications between SICAL and TPT with regard to the submission of performance bank guarantee at an escalated rate. In the meantime, TPT challenged the order of injunction granted by the District Judge by filing an appeal being C.M.A.(MD) No. 1131 of 2012 and the same is pending consideration before the Madurai Bench of the Madras High Court. SICAL addressed a letter dated 19th November 2012, invoking arbitration clause under Article 15.3 of the License Agreement. In the meantime, on 8th August 2013, TAMP issued 2013 Guidelines for determination of tariff for projects at Major Ports.

18. On 5th April 2013, SICAL filed its Statement of Claim in the arbitration proceedings. TAMP filed its counter statement in June 2013 to which a statement in rejoinder came to be filed by SICAL on 28th June 2013. TPT filed its reply to the rejoinder in August 2013. Vide award dated 14th February 2014, the Arbitral Tribunal passed the award in favour of SICAL holding that there was a change in law and thereby granting reliefs as prayed for by SICAL. It directed conversion of Container Terminal of TPT from royalty model to revenue share model.

19. The award of Arbitral Tribunal dated 14 th February, 2014 came to be challenged by TPT by filing a petition under Section 34 of the Arbitration Act being OP No. 389 of 2014 before the Madras High Court. SICAL challenged the jurisdiction of the Madras High Court to adjudicate the petition filed under Section 34 of the Arbitration Act. There were certain interlocutory proceedings to which reference would not be necessary. By order dated 9th June 2015, the Madras High Court held that the petition filed by TPT under Section 34 of the Arbitration Act was not tenable on the ground of jurisdiction. As such TPT re-presented its Section 34 petition on 30 th June 2015, before the District Judge, Tuticorin being Ar.O.P. No. 260 of 2015. The District Judge, Tuticorin vide order dated 25 th February 2016, dismissed the Section 34 petition filed by TPT. Being aggrieved thereby, TPT filed an appeal before the Madras High Court which came to be allowed by the order dated 1 st November 2017, vide which the award of the Arbitral Tribunal dated 14th February 2014 and the order passed by the District Court dated 25th February 2016, came to be set aside. Being aggrieved thereby, SICAL has approached this Court by way of the present appeals.

20. We have heard Dr. A.M. Singhvi and Shri Gopal Jain, learned Senior Counsel on behalf of the appellant-SICAL, Smt. Madhavi Divan, learned Additional Solicitor General of India and Shri Keshav Thakur, learned counsel on behalf of TPT.

21. Dr. Singhvi submitted that Article 14 of the License Agreement specifically provides that if after the date of the agreement, there is a change in law which substantially and adversely affects the rights of the Licensee under the said agreement, so as to alter the commercial viability of the project, the Licensee may, by written notice, request amendments to the terms of the agreement. He submitted that the definition of law in Article 14 is wide enough and includes any valid act, ordinance, rule, regulation, notification, directive, orders, policy, bye-laws, administrative guidelines, ruling or instruction having the force of law, enacted or issued by Government Authority. The learned Senior Counsel submitted that Article 14.3 also provides that subject to the provisions of Article 15.3, the Licensee shall not be entitled to any compensation whatsoever from the Licensor as a result of change in law. He submitted that if Article 14.3 is read in the correct perspective, it will

be clear that compensation is not provided to the Licensee on account of any change in law inasmuch as a relief could be provided to the Licensee by suitably amending the terms of the agreement when such a change substantially and adversely affects the rights of the Licensee. He submitted that the said Article is a unique one.

22. Dr. Singhvi submitted that the Nhava Sheva Container Terminal Limited (hereinafter referred to as the 'NSCT') was the first project which was built on BOT basis. The second one being the Seventh Berth of TPT. He submitted that these are the only projects wherein royalty method has been adopted. He submitted that all subsequent projects provide for revenue sharing model. He submitted that it will be clear from the stand of TPT, when the proposal was moved by SICAL for increase in tariff in 1999, that it also understood that the royalty was also to be factored in while finalizing the tariff. He submitted that perusal of the tariff order dated 8 th December 1999, would reveal that even TAMP has allowed royalty as a pass through. He submitted that the guidelines of 1998 would also clarify that it was a policy of TAMP that the port pricing was to continue to be cost based with an assured rate of return. He submitted that the said guidelines provide for an assured rate of return. He submitted that TPT, as a matter of fact, vide communication dated 3rd November 1999 addressed to TAMP, had opposed any reduction of tariff as proposed by SICAL.

23. Dr. Singhvi submitted that the first change in law was effected vide order of the GoI dated 29th July 2003, by which no percentage of royalty was permitted as a pass through. The second change in law was effected on 31 st March 2005, by which the royalty was permitted as a pass through, however, restricting the same to the maximum of the amount quoted by the next lowest bidder. He therefore submitted that on account of these changes in law, SICAL was entitled to get a relief of amendment of the License Agreement and on failure of TPT to provide the relief, SICAL was entitled to invoke arbitration. He submitted that though several representations were made to TPT, the same had not been responded to and as such, SICAL was left with no alternative than to invoke the arbitration clause. He submitted that this has been rightly construed by the Arbitral Tribunal. However, the Division Bench of the High Court has erroneously interfered with the finding of fact recorded by the Arbitral Tribunal which was upheld by the District Judge.

24. Dr. Singhvi further submitted that SICAL has been put in a very precarious situation. He submitted that on one hand it is required to pay royalty to TPT on the basis of annual increment, however the tariff which it can charge, has been so fixed so as not to allow royalty as a pass through. He submitted that at one point of time in 2011, the tariff has been so fixed that it surpasses the amount of royalty per TEU, SICAL would be required to pay to TPT. He submitted that if the same is permitted, SICAL would not be in a position to continue its operations. He submitted that SICAL has provided a minimum guarantee to lift a minimum of 4.5 lakh tons of cargo. He submitted that this has been rightly appreciated by the Arbitral Tribunal wherein it has observed that if such a position is permitted to continue, it will substantially and adversely affect SICAL. He submitted that a chart at Page No. 1132 shows that SICAL would incur a gross loss of Rs. 2250 crores. He further submitted that TAMP and the GoI have acted in a discriminatory manner. He submitted that when in case of NSCT, a complete pass through so far as royalty is concerned, is permitted, the same is denied in case of SICAL.

25. Dr. Singhvi further submitted that the High Court has grossly erred in referring to the writ petitions and the MoC filed in one of the writ petitions, while setting aside the award. He submitted that the writ petitions filed by SICAL were basically against TAMP and with regard to the fixation of tariff. However, the arbitration proceedings were about the change in law which changed the policy of permitting pass through of royalty to denial of pass through of royalty. Whereas the proceedings before TAMP are pertaining to fixation of tariff. He further submits that the proceedings before the High Court pertain to the period prior to 2013, whereas the present proceedings pertain to the relief to which SICAL is entitled under Article 14 of the agreement on account of change in law. He submitted that SICAL was compelled to approach the arbitrator since in 2011–12, the royalty payable to TPT crossed the tariff. He submitted that the contention considered by the High Court with regard to the MoC was only an oral argument made by TPT and not part of the pleadings.

26. Dr. Singhvi submitted that the scope of interference in an application under Section 34 and in an appeal filed under Section 37 is very limited. He submitted that unless a finding recorded by the arbitrator amounts to perversity, an interference would not be warranted either under Section 34 or Section 37. He submitted that the District Judge had rightly rejected the Section 34 Application. He further submitted that it was erroneous on part of the High Court in exercise of its jurisdiction under Section 37 to interfere with a well-reasoned award of the Arbitral Tribunal. He relies on the following judgments in support of his submissions: MMTC Limited v. Vedanta Limited1, Associate Builders v. Delhi Development Authority2, State of Jharkhand and Others v. HSS Integrated SDN and Another3, Sumitomo Heavy Industries Limited v. Oil and Natural Gas Corporation Limited4, Kwality Manufacturing Corporation v. Central Warehouse Corporation5, Rashtriya Ispat Nigam Limited v. Dewan Chand Ram Saran6, Steel Authority of India Limited v. Gupta Brother Steel Tubes Limited7, Pure Helium India (P) Limited v. Oil and Natural Gas 1 (2019) 4 SCC 163 2 (2015) 3 SCC 49 3 (2019) 9 SCC 798 4 (2010) 11 SCC 296 5 (2009) 5 SCC 142 6 (2012) 5 SCC 306 7 (2009) 10 SCC 63 Corporation Limited8, P.V. Subba Naidu and Others v. Government of A.P. and Others9, Dhannalal v. Kalawati Bai and Others10, Swamy Atmananda and Others v. Shri Ramakrishna Tapovanam and Others11 and Transcore v. Union of India and Another12.

27. Dr. Singhvi submitted that the UNIDROIT Principles of International Commercial Contracts provide the rules of interpretation of contracts. He submitted that the said principles provide that a contract shall be interpreted according to the common intention of the parties. It is only when the intention cannot be established that the contract shall be interpreted according to the meaning that a reasonable person of the same kind as a party, would give it in the same circumstances. He submitted that from the perusal of Article 14 as well as the conduct of the parties, it is clear that the parties intended that if there was any change in law to the detriment of the Licensee, the Licensee was entitled to relief 8 (2003) 8 SCC 593 9 (1998) 9 SCC 407 10 (2002) 6 SCC 16 11 (2005) 10 SCC 51 12 (2008) 1 SCC 125 from the Licensor by amendment of the contract. He submitted that such intention is clarified from the fact that in such an event, the Licensee was not entitled to claim any compensation. The learned Senior Counsel in this respect relies on the judgments of the Delhi High Court in Sandvik Asia Private Limited v. Vardhman Promoters13 and Hansalaya Properties v. Dalmia Cement (Bharat) Limited14.

28. Dr. Singhvi further submitted that the agreement has to be read as a whole. In his submission, whereas Articles 10.8, 13.4.7 and 13.4.8 make the Licensor's decision binding, Article 14 does not provide it. He submitted that Article 14 is unique in the sense that it provides for restoration of equilibrium. He submitted that the Tribunal had two choices either to grant a pass through or revenue sharing. If it has chosen one of them, then even if it is considered to be a possible view, an interference therein was not warranted.

29. Shri Gopal Jain, learned Senior Counsel submitted that economic viability for long term contracts has to be provided. 13 2007 (94) DRJ 762 14 2008 (106) DRJ 820 He submitted that Article 14 was provided as an in□built safeguard for the said purpose. Relying on the judgment of this Court in Adani Power (Mundra) Limited v. Gujarat Electricity Regulatory Commission and Others 15, he submitted that while construing business contracts, business efficacy is a relevant consideration which has been considered by the Arbitral Tribunal and as such, an interference would not be warranted.

30. Smt. Divan, the learned ASG submitted that the financial offer made by SICAL was made on 19 th December 1997 i.e. much before the 1998 Guidelines came to be published. She submitted that it is unthinkable that the rates quoted by SICAL in 1997 were on the basis of the guidelines which were for the first time published in the year 1998. She submitted that even the said guidelines do not provide for permitting royalty as a pass through. It is further submitted that while submitting the bid, SICAL has submitted the bid on the basis of royalty payable to TPT during the concession period. 15 (2019) 19 SCC 9

31. Smt. Divan further submitted that SICAL has indulged into the conduct of approbate and reprobate. She submitted that whereas in the writ petitions filed by it, SICAL has taken a specific stand that the guidelines do not have the force of law, it has now turned around and taken a stand in the arbitration proceedings that it amounts to change of law. She further submitted that on the date on which the arbitration proceedings were commenced, the tariff orders were already quashed in the writ proceedings in favour of SICAL and only with a view to take double advantage, SICAL has initiated arbitration proceedings. She further submitted that because of the interim order passed by the High Court, the 1999 tariff order is still holding the field, thereby giving a huge undue benefit to SICAL. She submitted that even the conduct of SICAL needs to be taken into consideration. Though as per MoC which was filed way back in 2005, SICAL was required to compensate TPT, it has not done so. She therefore submitted that on one hand, SICAL is taking advantage of orders of the Court and on the other hand not complying with the obligations set out in the MoC, on the basis of which the High Court has disposed of writ petition.

32. Smt. Divan submitted that even the third tariff order passed in case of SICAL had been quashed by the Madras High Court, challenge to which is pending before the Division Bench. She further submitted that on account of an order passed in Section 9 proceedings, TPT is getting a very meagre amount from SICAL.

33. Smt. Divan further submitted that by the award, the Tribunal has provided for entire substitution of the terms of the contract between the parties. She submitted that when the

agreement between the parties was based on royalty method, the Tribunal, by a substitution, has provided for revenue sharing method. She submitted that this is not permissible at all in law. A party cannot be thrusted with a new contract against its wishes. Smt. Divan further submitted that SICAL having elected/availed the remedies of filing of the writ petition, cannot for the same relief under the bogey of so□called change in law, invoke arbitration proceedings. She therefore submitted that the High Court has rightly considered the same and set aside the award. Smt. Divan relied on the following judgments of this Court in support of her submissions. Raghunathrao Ganpatrao v. Union of India16, Nagubai Ammal and Others v. B. Shama and Others 17, Suresh Kumar Wadhwa v. State of Madhya Pradesh and Others 18, All India Power Engineer Federation and Others v. Sasan Power Limited and Others19, Rashtriya Chemicals and Fertilizers Limited v. Chowgule Brothers and Others 20, South East Asia Marine Engineering and Constructions Limited v. Oil India Limited21, J.G. Engineers Private Limited v. Union of India and Another22, Satyanarayana Construction Company v. Union of India and Others23, Ssangyong Engineering and Construction Company Limited v. National Highway Authority of India (NHAI)24 16 (1994) 1 SCC Supp 191 17 [1956] SCR 451 18 (2017) 16 SCC 757 19 (2017) 1 SCC 487 20 (2010) 8 SCC 563 21 (2020) 5 SCC 164 22 (2011) 5 SCC 758 23 (2011) 15 SCC 101 24 (2019) 15 SCC 131

34. Dr. Singhvi, in rejoinder, submitted that a stray statement made by SICAL that the guidelines do not have the force of law, would not be relevant. Inasmuch as in the counter filed by TPT as well as TAMP, they have themselves stated before the High Court that the said guidelines will have the force of law. He therefore submitted that SICAL was entitled in law to invoke Article 14 since there was a change in law which adversely affects the Licensee.

35. Dr. Singhvi further submitted that the contention of Smt. Divan that reliance has been placed by SICAL on change of law for the first time in 2013, is factually incorrect inasmuch as right from 2006, SICAL has been making representations to TPT for giving relief under Article 14. To counter the submission of Smt. Divan that the bid of SICAL was tendered in December 1997, he submitted that though the bid was tendered in December 1997, the agreement was entered into in July 1998, when the guidelines had already come into effect from February 1998. He submitted that the perusal of the proposals submitted by TPT in pursuance of the meeting held by Secretary, Ministry of Shipping and Transport, GoI, would show that TPT as well as its consultant had agreed for revenue share model. He reiterated that the proceedings before the High Court were restricted only to TAMP orders and had nothing to do with change of law. He submitted that none of the case laws cited by Smt. Divan considers a clause analogous to Article 14 and therefore, the said cases would not be applicable to the facts of the present case. He further submitted that the argument with regard to doctrine of election is also without substance.

36. With the assistance of the learned counsel for the parties, we have gone through the documents placed on record. Though various judgments of this Court as well as some of the High Courts have been cited by counsel of both the parties, we do not find it necessary to refer to all of them. In our view, a reference to few recent judgments of this Court will be sufficient.

37. A bench of this Court, of which one of us (R.F. Nariman, J.) was a party, has considered various judgments of this Court in the case of Associate Builders (supra).

38. Another bench of this Court, again to which one of us (R.F. Nariman, J.) was a party, has considered various judgments of this Court including the judgment in Associate Builders (supra) and the effect of the Arbitration and Conciliation (Amendment) Act, 2015 in the case of Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India (NHAI)25, to which we will refer shortly.

39. Before that, it will be apposite to refer to judgment of this Court in the case of MMTC Limited (supra), wherein this Court has revisited the position of law with regard to scope of interference with an arbitral award in India.

40. It will be relevant to refer to the following observations of this Court in the case of MMTC Limited (supra):

> 25 (2019) 15 SCC 131 "11. As far as Section 34 is concerned, the position is well☐ settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e., if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award.
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> Additionally, the concept of the "fundamental policy of Indian law" would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury [Associated Provincial Picture Houses v. Wednesbury Corpn., (1948) 1 KB 223 (CA)] reasonableness.

Furthermore, "patent illegality" itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.

12. It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(b)

(ii), but such interference does not entail a review of the merits of the dispute, and is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts. (See Associate Builders v. DDA [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] . Also see ONGC Ltd. v. Saw Pipes Ltd. [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] ; Hindustan Zinc Ltd. v. Friends Coal Carbonisation [Hindustan Zinc Ltd. v. Friends Coal Carbonisation, (2006) 4 SCC 445] ; and McDermott International Inc. v. Burn Standard Co. Ltd. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181])

13. It is relevant to note that after the 2015 Amendment to Section 34, the above position stands somewhat modified.

Pursuant to the insertion of Explanation 1 to Section 34(2), the scope of contravention of Indian public policy has been modified to the extent that it now means fraud or corruption in the making of the award, violation of Section 75 or Section 81 of the Act, contravention of the fundamental policy of Indian law, and conflict with the most basic notions of justice or morality. Additionally, sub□ section (2□A) has been inserted in Section 34, which provides that in case of domestic arbitrations, violation of Indian public policy also includes patent illegality appearing on the face of the award. The proviso to the same states that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.

14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the court under Section 34 and by the court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings."

41. In Ssangyong Engineering and Construction Company Limited (supra), this Court after considering various judgments including the judgment in Associate Builders (supra) observed thus:

> "34. What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] i.e. the fundamental policy of Indian law would be relegated to "Renusagar" understanding of this expression. This would necessarily mean that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 :
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> (2014) 5 SCC (Civ) 12] expansion has been done away with. In short, Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as explained in paras 28 and 29 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] .

35. It is important to notice that the ground for interference insofar as it concerns “interest of India” has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the “most basic notions of morality or justice”. This again would be in line with paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

36. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49: (2015) 2 SCC (Civ) 204], or secondly, that such award is against basic notions of justice or morality as understood in paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] . Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263: (2014) 5 SCC (Civ) 12], as understood in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49: (2015) 2 SCC (Civ) 204], and paras 28 and 29 in particular, is now done away with.

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

40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49: (2015) 2 SCC (Civ) 204], namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).

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

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

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

42. Given the fact that the amended Act will now apply, and that the "patent illegality" ground for setting aside arbitral awards in international commercial arbitrations will not apply, it is necessary to advert to the grounds contained in Sections 34(2)(a)(iii) and (iv) as applicable to the facts of the present case."

42. It will thus appear to be a more than settled legal position, that in an application under Section 34, the court is not expected to act as an appellate court and reappreciate the evidence. The scope of interference would be limited to grounds provided under Section 34 of the Arbitration Act. The interference would be so warranted when the award is in violation of "public policy of India", which has been held to mean "the fundamental policy of Indian law". A judicial intervention on account of interfering on the merits of the award would not be permissible. However, the principles of natural justice as contained in Section 18 and 34(2)(a)(iii) of the Arbitration Act would continue to be the grounds of challenge of an award. The ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the "most basic notions of morality or justice". It is only such arbitral awards that shock the conscience of the court, that can be set aside on the said ground. An award would be set aside on the ground of patent illegality appearing on the face of the award and as such, which goes to the roots of the matter. However, an illegality with regard to a mere erroneous application of law would not be a ground for interference. Equally, reappreciation of evidence would not be permissible on the ground of patent illegality appearing on the face of the award.

43. A decision which is perverse, though would not be a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. However, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality.

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

> "31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:
>
> (i) a finding is based on no evidence, or

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

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

32. A good working test of perversity is contained in two judgments. In Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons [1992 Supp (2) SCC 312], it was held: (SCC p. 317, para 7) "7. ... It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law." In Kuldeep Singh v. Commr. of Police [(1999) 2 SCC 10: 1999 SCC (L&S) 429], it was held: (SCC p. 14, para 10) "10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."

45. Keeping these principles in mind, we will have to examine the present case.

46. The facts in the present case are not in much dispute. It will be relevant to refer to clause 5.6 of the bid document, which was published by TPT on 9th April, 1997, which reads thus:

"5.6 TERMS OF THE FINANCIAL OFFER The license to develop the seventh berth as a full-fledged container terminal with ship to shore and shore to ship handling facility, manage, operate and maintain the terminal shall be given for a period of 30 years inclusive of construction period.

The bidder shall state his financial offer to the TPT as the sum of the following components:

a) Quantum of initial payment at the time of executing the contract in order to secure the agreement;

b) Royalty fee payable (before the day of each calendar month) after the commissioning of the terminal for each TEU handled at the terminal in the preceding calendar month. In case actual throughput falls below the minimum throughput guaranteed by the Licensee in his bid, then the Licensee shall pay royalty as per his minimum guaranteed throughput.

(The operator shall pay to the port royalty fee in the same currency in which charges are realised from users. The exchange rate to be used would be notified rate on the date of realisation).

c) Guaranteed minimum TEU throughput that will be handled in each year of the contract.

The offer shall be in the format shown in Attachment 4.1."

47. Perusal of the bid document would reveal, that the bid was for a license to develop the seventh berth as a full-fledged container terminal with ship-to-shore and shore-to-ship handling facility and also to manage, operate and maintain the same for a period of 30 years inclusive of construction period. The bidder was to state his financial offer to TPT comprising of three aspects:

> (a) quantum of initial payment at the time of executing the contract in order to secure the agreement;
>
> (b) royalty fee payable (before the day of each calendar month) after the commissioning of the terminal for each TEU handled at the terminal in the preceding calendar month. It is also clear, that in case actual throughput falls below the minimum throughput guaranteed by the Licensee in his bid, then the Licensee shall pay royalty as per his minimum guaranteed throughput. It also clarifies, that royalty was to be paid in the same currency in which the Licensee realizes the charges from users; and
>
> (c) guaranteed minimum TEU throughput that will be handled in each year of the contract.

48. It will also be necessary to refer to clause 4.7.1 and 4.7.2 of the bid document, which reads thus:

> "4.7.1 SETTING OF PRICES The prescribed rates and charges to be collected by the LICENSEE from users shall not exceed the maximum rates as approved by the Government/Tariff Regulatory Authority. The proposed rates for handling are given in Annexure II.
>
> The LICENSEE shall bill the users of the container terminal for services including terminal charges, wharfage on cargo containerised, container box and cargo related charges to be collected by the LICENSEE. These revenues shall be collected from cargo interests and the owners or agents of the vessels and shall accrue to and be payable to the LICENSEE. Charges on account of Berth Hire, Port Dues, Pilotage etc shall be raised and recovered directly by TPT from the users.
>
> 4.7.2 REGULATION & REVIEW Normally the tariff will be revised by the Government/Tariff Regulatory Authority once in 3 years.

For any increase from prevailing scales, the LICENSEE may apply for revision of tariff to the Licensor. The Licensor may recommend it for approval of the Committee constituted by the Government/Tariff Regulatory Authority." It would thus be clear, that the bid document itself provides, that the prescribed rates and charges to be collected by the Licensee from users shall not

exceed the maximum rates as approved by the Government/Tariff Regulatory Authority. The proposed rates for handling were prescribed in Annexure❑I of the bid document. It is also provided, that the tariff will be revised by the Government/Tariff Regulatory Authority once in three years. It is further provided, that for any increase from prevailing scales, the Licensee may apply for revision of tariff to the Licensor and that the Licensor may recommend it for approval of the Committee constituted by the Government/Tariff Regulatory Authority.

49. It will be relevant to note that the offer was required to be in the format shown in Attachment 4.1 (Bidders Financial Offer), which requires to give details in three columns. The first one being 'Traffic guaranteed from the Seventh Berth (in TEUS)'. The second being 'Rate of royalty/TEU'; and the third being 'Amount (Rupees)'. These details were to be provided for all 30 years. It will also be relevant to refer to Attachment 4.4, which reads thus:

> "All Responsive Bids which meet the Qualification criteria laid down for the technical evaluation will be ranked based on the present value of the expected payments to the TPT by the Bidder (discounted @ 16% per annum) according to the payment schedule presented in the financial proposal in Attachment 4.1. The calculation of the royalty fees will be based on the Licensee's minimum guaranteed volume of traffic.
>
> If, in the opinion of TPT, the prices quoted in a bid including royalties and schedule of royalties are found to be unrealistic, then such bid will be rejected and not considered for ranking."

50. Attachment 4.4 makes it amply clear, that all responsive bids which meet the qualification criteria for technical evaluation will be ranked on the basis of the royalty fees quoted by the bidder.

51. It will also be relevant to refer to Article 7.3.1 and 7.3.5.1 of the Agreement, which read thus:

"7.3.1 Setting Prices The Licensee shall be entitled to recover from the owners/consignees or vessel owners/agents rates and/or charges due and payable by them for use of the Container Terminal services including terminal charges, wharfage on cargo containerised, container box and cargo related charges in respect of cargo and other services provided by the Licensee provided however that the rates and/or charges to be collected by the Licensee shall not exceed the rates fixed by Licensor in respect of similar services and duly notified by the GoI in official gazette or to be fixed by the Tariff Authority for Major Ports constituted under Article 47A of the Major Port Trusts Act, 1963, as applicable, from time to time. For the purpose of fixing or revising existing Tariff, the GoI has set up an independent Tariff Authority for Major Ports constituted under Article 47A of the Major Port Trusts Act, 1963. The Tariff to be fixed by such authority would be the maximum rate of tariff and the Licensee would be free to fix the tariff at a rate lower than that fixed by such authority. Regarding fixation of tariff and setting prices, the Licensee shall follow the rules and regulations stipulated by TAMP for fixing/review of tariff.

These charges shall be collected from cargo interests and the owners or agents of the vessels and shall accrue to and be payable to the Licensee. The rates prevailing at the time of signing this

Agreement are contained in Appendix 15 to this Agreement.

Charges on account of Berth Hire, Port Dues and Pilotage shall be raised and recovered directly by the Licensor from the users.

The Licensee shall be free to give discounts in tariff. However, such discounts shall be given by the Licensee only in respect to the charges due and payable by the consignees/owners or vessel owners/agents to the Licensee and not in respect of the charges payable by such persons directly to the Licensor.

xxx xxx xxx 7.3.5 Payment and Payment Terms 7.3.5.1 Initial Payment In consideration of the grant of this License, the Licensee shall pay to the Licensor an initial amount of Rs.45 million (Rupees Forty Five Millions only) simultaneously on the Date of Award of License.

The Licensee shall pay to the Licensor, royalty calculated on the basis of Minimum guaranteed traffic royalty rates, as set out in Appendix 12 irrespective of discounts in tariffs, if any, that may be granted by the Licensee. Royalty shall be paid every Month on the basis of annual minimum guaranteed traffic as set out in Appendix 12. Monthly royalty shall be initially calculated proportionately to the yearly royalty based on the annual minimum guaranteed traffic as per the Appendix 12 and shall be paid latest by the 7th Day of the subsequent Month. At the end of each 3 Month period the total royalty payable shall be computed and the difference, if any, between the amount of royalty actually payable, calculated on the basis of actual TEUs handled and the corresponding amount as set out in the Appendix 12, and the amount of royalty already remitted, shall be paid by the Licensee to the Licensor within fifteen Days of expiry of the relevant 3 Months period.

In case the actual traffic falls below the annual minimum guaranteed traffic as guaranteed by the Licensee and as set out in the Appendix l2, then the Licensee shall pay the amount of royalty as per its annual minimum guaranteed traffic.

It is to be noted that the minimum guaranteed traffic royalty rate as set out in Appendix 12 will be adjusted upwards or downwards as a one time measure on fixation of tariff for containers by the TAMP for the first time. This adjustment will be carried out by the Port based on a single percentage (plus or minus) to be applied to all the figures quoted as royalty vide Appendix 12. This single percentage shall be decided on the basis of sum of weighted average of variations to the rates in respect of tariff or containers in the following manner...”

52. Perusal of Article 7.3.1 would reveal, that the Licensee was entitled to recover from owners/consignees or vessel owners/agents, rates and/or charges due and payable by them for use of Container Terminal services including terminal charges, wharfage on cargo containerized, container box and cargo related charges in respect of cargo and other services provided by the Licensee. However, it was provided, that the rates and/or charges to be collected by the Licensee shall not exceed the rates fixed by Licensor in respect of similar services and duly notified by the GoI in official gazette or to be fixed by TAMP constituted under Section 47A of the Major Port Trusts

Act, 1963. The Agreement itself clarifies, that the tariff to be fixed by TAMP should be the maximum rate of tariff and the Licensee would be free to fix the tariff at a rate lower than that fixed by such authority. It is also clear, that the Licensee was to follow the rules and regulations stipulated by TAMP regarding fixation of tariff. Appendix-15 to the Agreement also details out the rates prevailing at the time of signing of the Agreement. The Article specifies that the Licensee was free to give discounts on tariffs. However, such discount would be given only in respect of the charges payable to the Licensee and not payable to the Licensor.

53. Article 7.3.5.1 provides for initial payment of Rs.45 million simultaneously on the date of award of license. The Agreement further clarifies, that the Licensee shall pay to the Licensor royalty calculated on the basis of minimum guaranteed traffic royalty as set out in Appendix-12. It is also provided, that minimum guaranteed traffic royalty rate as set out in Appendix-12 will be adjusted upwards or downwards as a one-time measure on fixation of tariff for containers by TAMP for the first time.

54. It will be relevant to refer to Article 14, which is the bone of contention between the parties, which reads thus:

> "ARTICLE 14 CHANGE IN LAW
>
> 14. Change in Law 14.1 Definition of Law For the purposes of this Agreement, "Law"
>
> means any valid act, ordinance, rule, regulation, notification, directive, order policy, bylaw, administrative guideline, ruling or instruction having the force of law enacted or issued by a Government authority.
>
> 14.2 Definition of Change in Law For the purposes of this Agreement "Change in Law" means any amendment, alteration, modification or repeal of any existing law by Government Authority or through any interpretation thereof by the court of law or enactment or any new law coming into effect after the date of this Agreement, provision for which has not been made elsewhere in this Agreement.
>
> 14.3 Relief under Change in Law If, after the date of this Agreement, there is a 'Change in the Law which substantially and adversely affects the rights of the Licensee under this Agreement so as to alter the commercial viability of the project, the Licensee may, by written notice request amendments to the terms of this Agreement.
>
> Subject to provisions of Article 14.3, the Licensee shall not be entitled to any compensation whatsoever from the Licensor as a result of Change in Law.
>
> 14.4 Changes in Tax Laws and Regulations The Licensee is not entitled to any compensation for any increase in direct and/or indirect tax which the Licensee is liable to pay in respect of the Project."

55. Article 14 deals with 'change in law'. Article 14.1, which defines 'law', states, that law means any valid act, ordinance, rule, regulation, notification, directive, order policy, bylaw, administrative guideline, ruling or instruction having the force of law enacted or issued by a Government Authority.

Article 14.2, which deals with 'change in law', states, that 'change in law' would mean any amendment, alteration, modification or repeal of any existing law by Government Authority or through any interpretation thereof by a court of law or enactment of any new law coming into effect after the date of this Agreement, provision for which has not been made elsewhere in the said Agreement.

Article 14.3 provides for relief under change in law. If, after the date of Agreement, there is a change in the law which substantially and adversely affects the rights of the Licensee under the Agreement so as to alter the commercial viability of the project, the Licensee may, by written notice, request amendments to the terms of the Agreement. It further provided, that subject to provisions of Article 14.3, the Licensee shall not be entitled to any compensation whatsoever from the Licensor as a result of change in law.

56. The questions therefore that we will have to answer are:

> (i) As to whether the Arbitral Tribunal was justified in finding a change in law, which entitled the Licensee to invoke Article 14.3 of the Agreement; and
>
> (ii) As to whether the Arbitral Tribunal was justified in converting the contract from royalty payment module to revenue□sharing module of Berth No. VII with the claimant's liability to the revenue share being fixed at 55.19%.

57. For answering the aforesaid questions, we will have to consider the documents placed on record. Apart from that, we will also have to take into consideration the conduct of the parties and their intention as could be gathered from the said material.

58. In this respect, it will be relevant to refer to paragraph 16 in the case of MMTC Limited (supra), which reads thus:

> "16. It is equally important to observe at this juncture that while interpreting the terms of a contract, the conduct of parties and correspondences exchanged would also be relevant factors and it is within the arbitrator's jurisdiction to consider the same. [See McDermott International Inc. v. Burn Standard Co. Ltd. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181]; Pure Helium India (P) Ltd. v. ONGC [Pure Helium India (P) Ltd. v. ONGC, (2003) 8 SCC 593] and D.D. Sharma v. Union of India [D.D. Sharma v. Union of India, (2004) 5 SCC 325].]"

59. The entire finding of the Arbitral Tribunal is based on a premise that when TPT entered into a contract with SICAL there was an existing policy, which provided royalty to be factored into the cost while fixation of tariff and that subsequently, the GoI changed its policy on 29 th July, 2003 thereby

providing that royalty payment/revenue sharing will not be factored into/taken into account as cost for fixation/revision of tariff by TAMP; and that there was subsequent change in policy on 31st March, 2005 vide which part of royalty was permitted to be factored into the cost. However, it being subjected to a maximum amount of the bid of the second lowest bidder. According to the Arbitral Tribunal, there was a change in policy, which amounted to change in law, which, in turn, adversely affected SICAL.

60. Let us examine the correctness of this finding. We are fully aware, that neither under Section 34 nor under Section 37 of the Arbitration Act, the Court is entitled to reappreciate the evidence. The said limitation would be equally applicable to this Court also. Admittedly, the bid document was published on 9th April, 1997. The technical bid of SICAL was submitted on 24th October, 1997. The financial offer of SICAL was submitted on 19th December, 1997. LoI was issued on 29 th January, 1998. All this has happened prior to the guidelines issued by TAMP in February 1998. As such, it is beyond any doubt, that when the bid document was notified and when SICAL submitted its bid and LoI was issued to it, there were no guidelines in vogue. For the first time, the guidelines were adopted by TAMP in the workshop held in Chennai on 26 th/27th February, 1998.

61. Let us examine what do these guidelines provide.

"The TAMP must adhere to established costing systems and pricing principals, its overall objective shall be to move towards competitive pricing.

There are various approaches to tariff fixation. Until more information/knowledge becomes available. Attempts may be made to smoothen the system within the existing framework.

During the Interregnum, port pricing may continue to be cost□based with an assured rate of return. Although the concept of an assured rate of return is not consonant with a completive system. It will be advisable to maintain it for the time being so as not to destabilize the system with abrupt changes. At the same time, to militate the full impact of its continuance, the reasonableness of the existing base and the absolute total costs may have to be examined to ensure that costs of inefficiencies, uneconomic user /practices or excess are not passed on to users. Even if the TAMP is not equipped at present to cope with the load of work relating to such scrutiny, it must at least start pressuring against such costs being built into tariffs. An assured rate of return can be achieved either by increasing the surplus through a rationalized tariff structure and/or reducing the cost of services; or by reducing the capital base by eliminating unproductive and obsolete assets." [emphasis supplied]

62. It could thus be clearly seen that what is provided is that TAMP must adhere to established costing systems and pricing principals and its overall objective should be to move towards competitive pricing. It further provides that until more information/knowledge becomes available, attempts should be made to smoothen the system within the existing framework. It further provides that during the interregnum, port pricing is to be continued to be cost□based with an assured rate of return. It however specifically observes that the concept of an assured rate of return is not consonant with a competitive system. It provides that however, it will be advisable to maintain it for

the time being so as not to destabilize the system with abrupt changes. It further provides that to militate the full impact of its continuance, the reasonableness of the existing base and the absolute total costs may have to be examined to ensure that costs of inefficiencies, uneconomic user/practices or excess are not passed on to users. It further observed, that an assured rate of return can be achieved either by increasing the surplus through a rationalized tariff structure and/or reducing the capital base by eliminating unproductive and obsolete assets.

63. It could thus clearly be seen, that even 1998 guidelines do not mention, that the royalty could be factored in the cost while determining the tariff. Though the said guidelines observed, that the port pricing may continue to be cost-based with an assured rate of return, it further observed, that such a concept of an assured rate of return is not in consonance with a competitive system. Thus, it is amply clear, that when the bids were invited, and SICAL submitted its bid and LoI was issued to it, there was no policy at all. Even the 1998 guidelines do not provide for factoring the royalty in cost while determining the tariff.

64. No doubt that when the first proposal for revision of tariff was submitted by SICAL, in its comments submitted to TAMP, TPT has supported the proposal submitted by SICAL. It is also undisputed, that TAMP vide order dated 08 th December, 1999 (notified on 28th December, 1999) has approved the proposal with regard to fixation of tariff insofar as SICAL is concerned. It will be relevant to refer to sub-para (iv) of paragraph 7 of the TAMP order, which reads thus:

> "(iv) It will be necessary at this point to refer to the royalty issue. Even though some considerations relating to royalty have tariff-implications, we have not so far chosen to interfere in this regard; the royalty issue has been left to be settled by the Port Trust and the Government. That being so, in the light of the TPT's conditional support to the request for dollar-denomination, it will be necessary for us to clarify that our approval of the tariffs cannot be interpreted to amount to any implicit approval of royalty-related issues. Specifically, in the context of the TPT's condition about dollar-denomination of royalty, the method of conversion adopted by the Applicant for the purpose of financial statements based on tariffs denominated in dollar terms cannot be deemed to have been approved by us." [emphasis supplied]

65. It could thus be clear, that TAMP has observed, that though some considerations relating to royalty have tariff-implications, it had not so far chosen to interfere in that regard. The royalty issue has been left to be settled by TPT and the GoI. It has been clarified that its approval to the tariff cannot be interpreted to be amounting to any implicit approval of royalty-related issues. It is thus clear, that even the 1999 TAMP order made it clear, that the said order should not be interpreted to amount to any implicit approval of royalty related issues. It is thus clear, that royalty was permitted to be factored in cost only on account of TPT's conditional support to the proposal submitted by SICAL. It will also be relevant to note that TAMP order of 1999 is much after the TAMP guidelines, which were issued in February 1998. Undisputedly, the said order has been accepted by SICAL including the aforesaid observations in sub-para (iv) of paragraph 7.

66. The second tariff order in case of SICAL came to be passed on 20th September, 2002 (notified on 4 th October, 2002). It will be relevant to refer to sub-para (xi) of paragraph 15.

"(xi) One of the main items of expenditure considered by the PSA SICAL is the royalty payment it has to make to the TPT as per the Concession Agreement. This liability accounts for about 11.4%, 15.4% and 19.2% of the operating income estimated on the basis of the existing tariffs for the years 2002, 2003 and 2004 respectively. As has been mentioned earlier, the existing tariffs were allowed to the PSA SICAL by accepting its proposal to adopt the (then) existing CHPT rates. That being so, there was no detailed cost analysis carried out then.

It is admitted that the issue of admissibility of 'royalty' as a cost item has come under a focused scrutiny only in the case relating to the CCTL which was disposed of in March, 2002. In that case, this Authority decided not to allow 'revenue share' as a cost element for computation of tariffs at the CCTL.

This Authority held that allowing royalty in tariff would mean that the CCTL (Private Terminal Operator) and the CHPT (the Licensor) both of whom enjoyed a dominant position, could enter into any commercial arrangement between themselves and pass on the consequential cost to customers. This Authority also observed that there had been no commitment from anywhere about consequential tariff adjustments and the CA also did not give any assurance to the Licensee about tariff adjustments corresponding to the royalty quoted.

In view of the principle set out in the CCTL case, it is necessary to accord a similar treatment in the case of the PSA SICAL also. It is noteworthy that no extraordinary circumstances appear to emerge in this case warranting any exceptional consideration. That being so, royalty has not been considered as an admissible item of cost for this tariff exercise." [emphasis supplied]

67. Perusal of the aforesaid sub-para would clearly reveal that one of the main items of expenditure considered by SICAL was the royalty payment it has to make to TPT as per the Concession Agreement. It states that the existing tariffs were allowed to SICAL by accepting its proposal to adopt the then existing Chennai Port Trust (hereinafter referred to as "CHPT") rates. It clarifies that there was no detailed cost analysis carried out then. It further states that the issue of admissibility of royalty as a cost item came under a focused scrutiny only in the case relating to CCTL, which was disposed of in March 2002. It states, that in that case, the Authority decided not to allow 'revenue share' as a cost element for computation of tariffs for CCTL. It observes, that allowing royalty in tariff would mean that CCTL (Private Terminal Operator) and CHPT (the Licensor), both of whom enjoyed a dominant position, could enter into any commercial arrangement between themselves and pass on the consequential cost to customers. It further specifies, that the Authority had observed, that there had been no commitment from anywhere about consequential tariff adjustments corresponding to the royalty quoted. It further observed that no extraordinary circumstances appear to emerge in the case of SICAL warranting any exceptional consideration. As such, royalty had not been considered as an admissible item of cost in the tariff.

68. The said order is passed when the 1998 guidelines were still holding the field. In this factual background, it is difficult to appreciate as to how it could be said that the 1998 guidelines issued by TAMP permitted royalty to be factored in cost while fixation of tariff.

69. The 2002 tariff order has been challenged by SICAL by filing Writ Petitions being Writ Petition Nos 40637□40639 of 2002 before the Madras High Court. The Madras High Court has also passed interim order on 8th November, 2002 thereby staying the 2002 notification and permitting SICAL to charge tariff on the basis of the 1999 tariff order.

70. Then comes the notification dated 29 th July, 2003 issued by the GoI, which is in the following terms:

> "In a few cases recently a question arose as to what treatment to be given to revenue sharing/royalty payment made by private terminal operators to the concerned major ports for the purpose of fixation/revision of tariff. TAMP has also requested for guidelines from Ministry in the matter. The matter has been discussed with Chairman, TAMP and considered in this Ministry and it has been decided to clarify as a matter of policy that the revenue sharing/royalty payment shall not be factored into/taken into account as cost for fixation/revision of tariff by TAMP for the following reasons:□
>
> (i) The benefit of higher efficiency on account of private participation in ports should also be passed on to shippers or the users which will not be so if royalty is allowed to be factored in the cost of private operators.
>
> (ii) If royalty is allowed as cost, the private bidder can offer any high percentage which he will recover from the shippers/users in the shape or royalty cost lectured in fixing of higher rates.

It has also been decoded that the position in this regard may be clearly indicated in the bid documents itself while inviting bids for private sector participation at major ports." [emphasis supplied]

71. Perusal of the said notification would clearly show that the GoI has decided to clarify, as a matter of policy, that the revenue□sharing/royalty payment shall not be factored into/taken into account as cost for fixation/revision of tariff by TAMP. The said notification specifically provides that the benefit of higher efficiency on account of private participation in ports should also be passed on to shippers or the users which will not be so if royalty is allowed to be factored in the cost of private operators. It further provides that if royalty is allowed as cost, the private bidder can offer any high percentage which he will recover from the shippers/users in the shape of royalty cost factored in fixing of higher rates.

72. Then comes a notification dated 31st March, 2005 issued by TAMP. It will be relevant to note that these guidelines have been issued subsequent to the consultation meetings held with the stake□

holders at Kolkata, Chennai and Mumbai. It will be relevant to refer to clause 1.4.2, which reads thus:

> "1.4.2. The earlier guidelines adopted in Feb. 1998 stand superseded. The principles evolved through various tariff orders will, however, continue to apply to the extent they are consistent with and not specifically superseded by these guidelines. A compendium or digest of principles evolved will be published periodically."

73. It is thus clear, that the 31 st March, 2005 notification specifically states that the guidelines adopted in February 1998 stand superseded. However, it provides, that the principles evolved through various tariff orders would continue to apply to the extent they are consistent with and not specifically superseded by the 2005 guidelines.

74. It will also be relevant to refer to paragraph 2.8.1 of the 2005 guidelines.

"2.8.1. 'Royalty/Revenue share' payable to the landlord port by the private operator will not be allowed as an admissible cost for tariff computation as decided by the Govt. in the Ministry of Shipping vide its Order No. PR□4019/6/2002□PG dt. 29th July, 2003. In those BOT cases where bidding process was finalized before 29 July, 2003, the tariff computation will take into account royalty / revenue sharing as cost for tariff fixation in such a manner as to avoid likely loss to the operator on account of royalty / revenue share not being taken into account, subject to maximum of the amount quoted by the next lowest bidder. This would, however, be allowed for the period upto which such likely loss will arise. This would not be applicable if there is provision in the concession agreement on treatment of 'Royalty/Revenue Share'." [emphasis supplied]

75. The said guidelines specifically provide that 'royalty/revenue share' payable to the landlord port by the private operator will not be allowed as an admissible cost for tariff computation as decided by the Government in the Ministry of Shipping vide its Order No.PR□4019/6/2002□PG dated 29th July, 2003. It further provided, that in those BOT cases where bidding process was finalized before 29 th July, 2003, tariff computation will take into account royalty/revenue sharing as cost for tariff fixation in such a manner as to avoid likely loss to the operator on account of the royalty/revenue share not being taken into account. However, this was subjected only to a maximum of the amount quoted by the next lowest bidder. This was further subjected to be allowed for the period upto which such likely loss would arise. It further provided that this would not be applicable if there is provision in the concession agreement on treatment of royalty/revenue share.

76. A conjoint reading of all these documents would reveal that when the bid document was published in April 1997; SICAL tendered its bid in October, 1997 and submitted its financial offer in December,1997; and the LoI was issued to SICAL on 29th January, 1998, there were no guidelines at all. Even the guidelines of February 1998 do not provide for royalty being factored as cost while fixation of tariff. On the contrary, the tariff order of 1999 specifically clarifies that it has left the royalty issue to be decided by TPT and the GoI. It has specifically clarified that the approval by TAMP should not be interpreted to be amounting to any implicit approval of royalty□related issue. Further, the tariff order issued on 20 th September, 2002 specifically rejects the claim of SICAL for

factoring any royalty as cost while tariff/price fixation. As already stated herein above, SICAL has challenged the said order before the Madras High Court by way of writ petition, which petition has been allowed. It is also not in dispute, that on account of interim order passed by the Madras High Court dated 8th November, 2002, SICAL is still continuing to charge at rates notified in the 1999 tariff order.

77. In this scenario, the finding of the Arbitral Tribunal, that there was a law when the Agreement was entered into between the parties, which provided royalty as a pass-through and that the said law has been changed for the first time in 2003 and subsequently again changed in 2005, in our view, is a finding based on 'no evidence'. Had the Arbitral Tribunal perused the tariff orders of 1999 and 2002, it would have found that in the 1999 tariff order TAMP has specifically observed that its approval of the tariff should not be construed as its implicit approval of royalty-related issue and the 2002 tariff order specifically states that royalty was not permitted to be factored in the cost while determining tariff. The Arbitral Tribunal has totally failed to take into consideration this aspect of the matter.

78. As such, we are of the view, that since the finding of the Arbitral Tribunal, that there was an existing law to the effect that the royalty payable shall be permitted as a pass-through in cost while fixation of tariff, is based on 'no evidence' and the finding, that there was a change in law in 2003 and 2005 is based on without taking into consideration the relevant evidence, would come in the realm of perversity as explained by this Court in paragraph 31 of the Associate Builders (supra). The findings are based on 'no evidence' and 'ignorance of vital evidence' in arriving at its decision.

79. This brings us to the next issue viz., as to whether the Arbitral Tribunal was justified in passing an award thereby substituting 'royalty payment module' to the 'revenue-sharing module'. A contract duly entered into between the parties cannot be substituted unilaterally without the consent of the parties. The intention of the parties could be gathered from the documents on record. SICAL, for the first time, made representation to TPT on 6th October, 2006 thereby seeking a relief under the terms of Article 14.3 of the Agreement. On 14 th October, 2006, TPT informed SICAL that the issues raised by it were under examination. However, vide order dated 27 th October, 2006, TPT refused to consider SICAL's application for relief since, according to it, the issue raised by SICAL was pending before the Madras High Court. SICAL therefore filed writ petition being Writ Petition No. 4361 of 2006 before the Madras High Court. The Madras High Court allowed the said writ petition vide order dated 21st August, 2007 clarifying that the petition pending before the High Court had nothing to do with the representation under Article 14 of the License Agreement and remanded the matter to TPT for consideration afresh. Vide a reasoned letter dated 25 th April, 2008, TPT rejected the claim of SICAL. TPT has specifically observed that any change in the Agreement cannot be done without prior approval of the GoI. SICAL on 19 th November, 2012 addressed a letter to TPT invoking arbitration under Article 15.3 of the License Agreement. TPT strenuously contested the claim of SICAL with regard to prayer for change from 'royalty payment mode' to 'revenue sharing mode'. The stand of TPT has been crystalized by the Arbitral Tribunal in paragraph 5 of the Award, which reads thus:

> "5. Sum and substance of the defence is as follows:

> "There is no dispute at all. The grievance of the SICAL is that there is an error committed by TAMP in fixing the tariff. That grievance had been repeatedly taken before the High Court of Madras by SICAL and at all stages orders have been passed by setting aside the orders challenged. Therefore, the real grievance of SICAL is only against TAMP and not against PORT.
>
> Since the issue regarding fixing of tariff is pending finality, SICAL cannot maintain any claim legally or factually against PORT. PORT is bound by the order of TAMP. Whatever order TAMP passes, the PORT is bound to obey. The PORT has no right to interfere with the tariff fixing power of TAMP which is their exclusive domain and jurisdiction. The Contract is not entered into on the basis of any guidelines. There was no guideline, as contended by SICAL, on the date of the contract. By the present dispute, SICAL is trying to change the entire nature of the contract, namely, from the royalty module to the revenue sharing module. It is impermissible for a court or this Tribunal to compel any party to enter into a new contract. Contract is always by consent of parties. All the grievance put forward before the Tribunal by SICAL is their grievance in sum and substances before TAMP and High Court of Madras in all challenges made against the order of TAMP. Neither a Court nor the Tribunal can rewrite the Contract. The contract is an enforceable one and simply because SICAL is stated to be losing monetarily, the relief sought for in this dispute cannot be granted. If the case of SICAL is true, it is open to them to put an end to the contract and seek appropriate relief. If such a termination of the contract takes place at the instance of SICAL, then the PORT will take steps to get appropriate relief. Section 56 of the Contract Act is applicable to this case"

A number of case laws have been cited by the learned Senior Counsel for the PORT and we will refer to them at the appropriate stage."

80. It could thus be seen, that SICAL wanted the Agreement to be amended so as to change the 'royalty payment method' to 'revenue□sharing method'. TPT was always opposed to it. The intention of TPT is apparent from its various communications and its stand before the Arbitral Tribunal, that it was not agreeable for amendment of the Agreement from 'royalty payment method' to 'revenue□ sharing method'.

81. However, ignoring the stand of TPT, by the impugned Award, the Arbitral Tribunal has thrust upon a new term in the Agreement between the parties against the wishes of TPT. The 'royalty payment method' has been totally substituted by the Arbitral Tribunal, with the 'revenue□sharing method'. It is thus clear, that the Award has created a new contract for the parties by unilateral intention of SICAL as against the intention of TPT.

82. After referring to various international treaties on arbitration and judgments of other jurisdictions, this Court in Ssangyong Engineering and Construction Company Limited (supra), observed thus:

> "76. However, when it comes to the public policy of India, argument based upon "most basic notions of justice", it is clear that this ground can be attracted only in very exceptional circumstances when the conscience of the Court is shocked by infraction of fundamental notions or principles of justice. It can be seen that the formula that was applied by the agreement continued to be applied till February 2013 — in short, it is not correct to say that the formula under the agreement could not be applied in view of the Ministry's change in the base indices from 1993–94 to 2004–05. Further, in order to apply a linking factor, a Circular, unilaterally issued by one party, cannot possibly bind the other party to the agreement without that other party's consent. Indeed, the Circular itself expressly stipulates that it cannot apply unless the contractors furnish an undertaking/affidavit that the price adjustment under the Circular is acceptable to them. We have seen how the appellant gave such undertaking only conditionally and without prejudice to its argument that the Circular does not and cannot apply. This being the case, it is clear that the majority award has created a new contract for the parties by applying the said unilateral Circular and by substituting a workable formula under the agreement by another formula dehors the agreement. This being the case, a fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract can never be foisted upon an unwilling party, nor can a party to the agreement be liable to perform a bargain not entered into with the other party. Clearly, such a course of conduct would be contrary to fundamental principles of justice as followed in this country, and shocks the conscience of this Court. However, we repeat that this ground is available only in very exceptional circumstances, such as the fact situation in the present case. Under no circumstance can any court interfere with an arbitral award on the ground that justice has not been done in the opinion of the Court. That would be an entry into the merits of the dispute which, as we have seen, is contrary to the ethos of Section 34 of the 1996 Act, as has been noted earlier in this judgment." [emphasis supplied]

83. As such, as held by this Court in Ssangyong Engineering and Construction Company Limited (supra), the fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract has been foisted upon an unwilling party. This Court has further held that a party to the Agreement cannot be made liable to perform something for which it has not entered into a contract. In our view, re-writing a contract for the parties would be breach of fundamental principles of justice entitling a Court to interfere since such case would be one which shocks the conscience of the Court and as such, would fall in the exceptional category.

84. We may gainfully refer to the following observations of this Court in Bharat Coking Coal Ltd. v. Annapurna Construction26.

"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 26 (2003) 8 SCC 154 on the ground that it contains an error apparent on the face of the record."

85. It has been held that 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.

86. It will also be apposite to refer to the following observations of this Court in the case of Md. Army Welfare Housing Organization v. Sumangal Services (P) Ltd.27 "43. An Arbitral Tribunal is not a court of law. Its orders are not judicial orders. Its functions are not judicial functions. It cannot exercise its power ex debito justitiae. The jurisdiction of the arbitrator being confined to the four corners of the agreement, he can only pass such an order which may be the subject□matter of reference."

87. It has been held that an Arbitral Tribunal is not a Court of law. Its orders are not judicial orders. Its functions are not judicial functions. It cannot exercise its powers ex debito 27 (2004) 9 SCC 619 justitiae. It has been held that the jurisdiction of the arbitrator being confined to the four corners of the agreement, he can only pass such an order which may be the subject□matter of reference.

88. In that view of the matter, we are of the considered view, that the impugned Award would come under the realm of 'patent illegality' and therefore, has been rightly set aside by the High Court.

89. The High Court has gone into various other aspects of the matter. Arguments have also been advanced before us with regard to NSCT being given a discriminatory treatment as against SICAL. The arguments have also been advanced on the ground of approbate and reprobate and doctrine of election. It has also been argued on behalf of SICAL that it is incurring huge losses. Per contra, it is submitted on behalf of TPT, that it is incurring huge losses on account of various interim orders passed by the High Court and the District Judge in Section 9 applications.

90. We do not propose to go into those aspects of the matter. TAMP has issued various notifications with regard to fixation of tariff so also various orders have been passed by the GoI with regard to the aspect of grant or refusal of pass through of royalty payable. Various petitions have been filed by SICAL challenging the said orders and notifications. All the petitions were allowed thereby remanding the matters to TAMP and GoI. However, it is not in dispute, that SICAL, by virtue of the interim order passed dated 8th November, 2002 in Miscellaneous Petition No. 60240 of 2002 in Writ Petition No.40638 of 2002 is continuing to levy charges on the basis of 1999 tariff order (dated 8th December, 1999) passed by TAMP.

91. The last notification issued by TAMP with regard to price/tariff fixation dated 17th December, 2008, gazetted vide notification dated 30th December, 2008 was challenged by SICAL by way of Writ Petition No.1350 of 2009. The last direction issued by the GoI dated 20 th February, 2008 was also challenged by SICAL by way of Writ Petition No.1351 of 2009. By an order dated 15th October, 2009, the High Court has allowed these writ petitions by setting aside the order of the GoI dated 20th February, 2008 and the notification dated 17 th December, 2008 issued by TAMP and has

directed the GoI as well as TAMP to consider the issue afresh.

92. It is informed at the Bar, that the said order has been carried in appeal before the Division Bench of the High Court both by SICAL as well as TAMP, which are still pending before the High Court.

93. We are of the considered view, that if we make any observation on merits of the issue with regard to aforesaid submissions made before us, it may prejudicially affect the rights of either of the parties. We therefore refrain from making any observation with regard to the aforesaid arguments, though heavily contested before us.

94. We therefore, confine ourselves with the issue as regards the validity of the Award. We also clarify that any observations made by the High Court with regard to other aspects of the matter except the validity of the Award, would not come in the way of either of the parties raising their grievances in either the proceedings which are pending before the Division Bench of the High Court or any other proceedings to which either of it would be entitled to take recourse in law.

95. In the result, with these observations, we dismiss the appeals. However, in the facts and circumstances of the case, there shall be no order as to costs. Pending applications, if any, shall stand disposed of accordingly.

.....J. [R.F. NARIMAN] .....J. [B.R. GAVAI] NEW DELHI;

JULY 28, 2021