

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22-09-2015

(Orders reserved on 04-09-2015)

CORAM:

THE HONOURABLE MR.JUSTICE K.RAVICHANDRABAABU

**Original Petition No.512 of 2014
and
Application No.3726 of 2015**

Chettinad International Coal Terminal Private
Limited
having its registered office at
Vth Floor, Rani Seethai Hall, No.603,
Anna Salai,
Chennai 600 006,
rep. by its Director Mr.V.Chandramoleeswaran ...Petitioner

vs

- 1.Kamarajar Port Limited
having its registered office at
1st Floor, P.T.Lee Chengalvaraya Naicker Maaligai (1st Floor),
No.23, Rajaji Salai,
Chennai 600 001.
- 2.Mr.Justice Doraiswamy Raju,
Former Judge, Supreme Court of India,
No.20 (39), Pooram Prakasam Road, Balaji Nagar,
Royapettah, Chennai 600 014.
- 3.Mr.Justice S.Jagadeesan,
Former Judge, High Court of Madras,
Old No.23/New No.53,
3rd Main Road, Gandhi Nagar,
Adyar, Chennai 600 020.

4.Mr.Justice R.Balasubramanian,
Former Judge, High Court of Madras,
No.5, Tiger Varadachari 1st Road,
Kalakshetra Colony, Besant Nagar,
Chennai 600 090.

...Respondents

Prayer: Petition filed under section 34 of the Arbitration and Conciliation Act, 1996 to set aside the award dated 29.07.2014 passed by the learned Arbitrators (Respondents 2 to 4) to the extent that the award seeks to dismiss the petitioner's claim towards augmentation charges, compensation sought and Exclusivity claimed under the terms of the Agreement between the parties as also the award of interest at 15% p.a. on the award and consequently, allow the petitioner's claim towards augmentation charges, compensation and Exclusivity.

For Petitioner : Mr.P.S.Raman
Senior Counsel
for M/s.Satish Parasaran

For Respondents: Mr.M.Ravindran for R1
Senior Counsel
for M/s.Krishna Ravindran

Application No.3726:

Kamarajar Port Limited
having its registered office at
1st Floor, P.T.Lee Chengalvaraya Naicker Maaligai (1st Floor),
No.23, Rajaji Salai,
Chennai 600 001. ..Applicant

Chettinad International Coal Terminal Private
Limited
having its registered office at
Vth Floor, Rani Seethai Hall, No.603,
Anna Salai,
Chennai 600 006,
rep. by its Director Mr.V.Chandramoleeswaran ..Respondent

Prayer:Application filed under Order XIV Rule 8 of Original Side Rules read with Section 151 of C.P.C. and section 9(ii) a & (c) of the Arbitration and Conciliation Act, 1996 to direct the respondent to deposit an amount of Rs.88,68,00,000/- (Rupees Eighty Eight Crores and Sixty Eight Lakhs Only) in an interest bearing non-lien bank account.

For Applicant :Mr.M.Ravindran
Senior Counsel
for M/s.Krishna Ravindran
For Respondent : Mr.P.S.Raman
Senior Counsel
for M/s.Satish Parasaran

O R D E R

This original petition is filed to set aside the award dated 29.07.2014 to the extent dismissing the petitioner's claim towards augmentation charges, compensation sought and exclusivity claimed under the terms of the agreement between the parties and also against the award of interest at 15% per annum.

2.The first respondent in the above Arbitration O.P. viz., Kamarajar Port Trust filed A.No.3726 of 2015 for a direction to the respondent in this application who is the petitioner in the main arbitration O.P. to deposit an amount of Rs.88,68,00,000/- in an interest bearing non-lien bank account.

3.Facts of the case are as follows:-

During the month of October 2002, the first respondent invited tenders for the purposes of setting up a common user coal terminal with all backup facilities and equipment on a Build-Operate-Transfer (BOT) basis for a period of 30 years. A consortium comprising of the South India Corporation Limited (SIC), Portia Management Services Management Limited (PMSL), Navayuga Engineering Limited (NEL) participated jointly in the tendering process for the coal terminal amongst other bidders. The bid of the above said consortium was duly accepted by the first respondent and thus, the consortium emerged as a successful highest bidder on the basis of its offer of a revenue share of 52.524%. Thus, the consortium was selected to develop the coal handling facility at Ennore Port on a Build-Operate-Transfer basis for a period of 30 years. Consequently, the consortium floated a special purpose vehicle under the name and style of "Chettinad International Coal Terminal Private Limited" which is the petitioner herein for the purpose of executing the project. Thereafter, the petitioner and the first respondent entered into the License Agreement on 14.09.2006. The said Agreement provides for the grant of license to the petitioner for the purpose of design, engineer, finance, construct, operate, maintain, market and transfer a common user coal terminal on BOT

basis with all backup facilities and equipment. The petitioner prepared and submitted the detailed project report and the same was approved by an independent Engineer as contemplated under clause 6 of Part I of the Agreement. The zero date was fixed as 06.02.2008. As per the agreement, the construction of the project was to be completed and the commercial operations were to be started by 05.08.2010. However, due to breach of assurances and promises made by the first respondent, the project could not be completed and commercial operations could not be started within the scheduled date. However, the project was completed later and the same was reported on 10.02.2011. Due certification was provided on 15.03.2011 with effect from 11.03.2011. The first respondent sought to levy liquidated damages amounting to Rs.1,31,03,640/- for the alleged delay of 36 days in completing the project. The petitioner raised objections which ultimately resulted in Arbitral proceedings.

4.The main issue of contention between the parties to the arbitration is with regard to the cost relating to the equipment/machinery brought in for the maintenance and augmentation of the terminal. This cost is sought to be exempted from the Revenue share payable to the first respondent by the

petitioner. The first respondent contended that the claimant having upgraded the terminal to 8 MTPA could not claim that the same amounted to augmentation and that clause 15.1.4 would only operate where the augmentation is achieved after commissioning.

5. In fact, before the initiation of Arbitral proceedings, the parties consented to the constitution of an Expert Committee in accordance with clause 24.1 of Part I of the agreement to settle their disputes. However, there was no settlement arrived at between the parties before the Expert Committee. Consequently, the present arbitration proceedings came to be commenced by invoking clause 24.2 of Part I of the agreement. 14 issues were framed to be dealt in the said arbitration. After completion of the pleadings by both sides and examination of the witnesses on each side and hearing the submission of arguments on each side, the award was passed on 29.07.2014. pursuant to the passing of the said award, the first respondent raised a demand note dated 07.08.2014 in respect of alleged outstanding augmentation charges along with 15% interest as on 31.07.2014. Hence, the present petition is filed under section 34 of the Arbitration and Conciliation Act, 1996.

6.The sum and substance of the grounds raised in this petition are as follows:

i)The impugned Award is opposed to public policy, being patently illegal and against the public interest. The first respondent port trust has penalized the petitioner by refusing to grant exemption for the additional investments made, i.e., augmentation charges, from the revenue share as contemplated in Clause 15.1.4 of the License Agreement. The Tribunal's interpretation of Clause 15.1.4 of the License Agreement would discourage private licensees from augmenting their terminals resulting in a loss of revenue to the exchequer and as such, lies in conflict with the public policy of India. The Tribunal has failed to appreciate the submissions made by the petitioner/claimant in relation to the interpretation of Clause 15.1.4 of the License Agreement. The petitioner has clarified that the deductions that have been made by the petitioner in lieu of amounts exempted under clause 15.1.4 are relatable to capital costs of Rs.63 crores incurred by the petitioner towards purchase of such additional machinery and the running/maintenance costs for the same. The Tribunal has premised its reasoning upon a mistaken assumption and consequently, wrongly dismissed the petitioner's claims.

ii)The learned Arbitral Tribunal, having observed that the petitioner has sustainable claim in relation to costs incurred for such additional machinery, however proceeded to dismiss the petitioner's claims in a blanket manner. The Arbitral Tribunal has exceeded the scope of the pleadings before it in the impugned proceedings. The basis for calculation of augmentation charges, i.e. the costs incurred for machinery bought in to augment capacity, has not been disputed by the first respondent and the Tribunal has erred in so far as it has substituted its own views for the first respondent's contentions. The Tribunal has supplied meaning to the License Agreement even where no such interpretation has been sought. The Arbitral Tribunal has also failed to interpret Clause 15.1.4 of the License Agreement in light of its intended object and purpose. The Arbitral Tribunal has also failed to appreciate that the petitioner had the option to establish a system of only 4 MTPA and the same to achieve full capacity before proceeding to expand it to 8 MTPA. The Tribunal has proceeded to treat the petitioner's obligation to pay 52.524% of the gross revenue to the first respondent as an unconditional obligation which cannot be derogated from in any circumstance. The clause 15.1.4 is a special provision that comes into operation in certain circumstances amongst the many envisaged under the general provision, i.e. clause 14 of the License

Agreement. In cases of conflict between a specific provision and a general provision of this nature, the specific provision prevails over the general provision. When the parties agree to the terms of the contract including Clause 15.1.4, an interpretation cannot be drawn that the particular term/clause was never intended to be acted upon by the parties. The Arbitral Tribunal has erred in holding that the levy of 'augmentation charges' was imaginary and destructive as the first respondent itself was not only aware of the levy under this additional head, but has also acquiesced to such levy. The impugned award is unjust and unreasonable in so far as the learned Arbitral Tribunal has awarded interest at 15% p.a. in the instant case in a mechanical manner with due application of mind or exercise of the discretion vested in it.

7.The first respondent filed a counter affidavit wherein it is stated as follows:

i)The very same issue was agitated before the Expert Committee as contemplated under the contract. The majority view of the expert committee and the views expressed in the award are quite similar and are mostly in favour of the first respondent. The Arbitral Tribunal provided ample opportunity to both parties and passed a detailed, well

reasoned and unanimous award and the same was accepted by the first respondent. In fact, the Arbitral Tribunal set aside the liquidated damages levied by the first respondent to the tune of Rs.1,31,03,640/- and also rejected the first respondent's claim of Rs.1,00,00,000/- towards business loss. The first respondent was also directed to pay the petitioner herein a sum of Rs.35,00,388.25 towards cost of construction of road. The award was accepted in full by the first respondent.

ii) The scope for interference in arbitral awards by courts is very limited. Such interference is warranted only when any of the grounds mentioned under section 34 of the said Act are attracted. In the instant case, none of the grounds mentioned under section 34 of the said Act is attracted. All the contentions raised herein by the petitioner were raised before the Arbitral Tribunal and were considered in detail. Therefore, the petitioner cannot seek for reopening all the issues once again which were already considered and decided by the Arbitral Tribunal. The award is not contrary to public policy or to the terms and conditions of the contract dated 14.09.2006.

8.Application No.3726 of 2015 is filed by the Port for a direction to the respondent/petitioner in main O.P. to deposit an amount of Rs.88,68,00,000/- by contending that the award having been passed directing the original petitioner to pay a sum of Rs.88,68,78,817/- to the applicant herein, the non payment causes severe hardship and financial difficulty, as the applicant herein has borrowed heavily from the banks and that the applicant is required to maintain the port facilities in good condition, which involves loss of capital and recurring expenditure. It is also contended that the applicant does not have any security for the said amount which is due and payable by the original petitioner as per the arbitral award.

9.This application is opposed by the original petitioner by filing a counter affidavit wherein they have reiterated the contention already raised in the original petition further by stating that no actual financial hardship is being faced by the applicant.

10.Both sides have advanced their respective arguments on the main original petition itself. Though this original petition was filed by raising very many grounds raising various issues, both sides confined

and advanced their arguments only in respect of the issue pertaining to clause 15.1.4.

11.Mr.P.S.Raman, learned Senior Counsel appearing for the petitioner has made his submissions. A written submission is also filed. The sum and substance of the submissions made on behalf of the petitioner are as follows:

i)The challenge made in this petition pertains to interpretation of clause 15.1.4 of the License Agreement. The exemption for augmentation charges provided for under the said clause is based upon a standard form Government contract created for the licensing of terminals in major ports across India and such exemption is in furtherance of a Government policy to incentivize licencees to swiftly augment terminals to achieve their full capacity. The learned Tribunal failed to appreciate this policy of the Central Government and consequently, the interpretation of the above said clause by the learned Tribunal is erroneous. The learned Tribunal substituted its views for the agreement between the parties while interpreting the said clause. Therefore, such misapplication or substitution of the contractual terms by the Tribunal is an exception meriting interference by this court under section 34 of the Arbitration and Conciliation Act.

No re-appreciation of evidence or adjudication upon any disputed question of fact has been sought by the petitioner. As per clause 15.1.4, the petitioner is entitled to exclude augmentation and maintenance charges from the revenue share payable to the respondent. The respondent is entitled to the minimum Annual Guaranteed Revenue or Revenue Share, whichever is higher. The term "Revenue Share" is defined in the Agreement as a share of the Gross Revenue and the method of calculating such Gross Revenue is provided under clause 14(V) of the Agreement. However, clause 15.1.4 is an exception to clause 14(V). The Tribunal erroneously interpreted clause 15.1.4 as an exemption for the machinery brought in for augmentation from the levies envisaged under clause 13 and 14 of the License Agreement. The said interpretation would render clause 15.1.4 redundant. The learned Tribunal ought to have seen that clause 15.1.4 is an incentive to the terminal operator to increase the terminal throughput and consequently to accrue the revenue to the port at the earliest. Though the term augmentation is not expressly defined in the Agreement, clause 4 of Part II of the License Agreement refers to the "augmenting" of the terminal from 4 MTPA to 8 MTPA. Clause 3.4 of Part II of the License Agreement specifies the minimum components provided by the licensor/claimant in order to achieve

minimum throughput of 4 MTPA. However, the petitioner has invested the entire project cost at the outset at its own risk. Therefore, the fact of augmentation at the very outset is evident. The respondent has not raised any objection to such investment. Having invested in additional equipment to complete a bigger terminal and generate more revenues for the respondent, the petitioner is entitled to its contractual incentive provided under clause 15.1.4. As the License Agreement is a standard form contract drafted by the respondent, the rule of contra proferentum applies and the interpretation beneficial to the petitioner ought to have been made. The petitioner has only claimed an exemption from revenue share for sums equivalent to the capital and maintenance costs of machinery which they are entitled to as stated supra. As such, the learned Tribunal's interpretation of clause 15.1.4 is absurd and perverse.

ii) In support of the above contentions, the following decisions are relied on:

- i) 2014(9) SCC 263, ONGC Ltd vs. Western Geco Ltd;
- ii) 2010(2) SCC 182, State of Rajasthan vs Nav Bharat Construction Company;
- iii) 2015(5) SCC 739; Swan Gold Mining vs Hindustan Copper Ltd.,;

iv) AIR 1961 SC 1170, J.K.Cotton Spinning and Weaving Mills

Company vs State of Uttar Pradesh;

v)2003(10) SCC 482, International Coach Builders Limited vs

Karnataka State Financial Corporation;

vi)2005(6) SCC 274, Life Insurance Corporation of India vs Mani Ram;

vii) 2004(3) SCC 694, United India Insurance Co. Ltd. vs
M/s.Pushpalaya Printers;

12.Per contra, Mr.R.Ravindran, learned Senior counsel appearing for the respondent made his submissions. A written submission is also filed. The sum and substance of the submissions made on behalf of the first respondent port are as follows:

i)The very filing of the O.P. under section 34 of the Act is not maintainable as none of the grounds contemplated under the said provision is attracted in this case. The award is not against any public policy and no allegation is made against anybody. The decision relied on by the petitioner reported in *2014(9) SCC 263, ONGC Ltd. v. Western Geco Ltd.*, does not help the case of the petitioner in any manner, on the other hand, the said decision supports the case of the respondent. None of the four concepts/principles that fall under public policy elaborately discussed by the Apex Court is attracted in this case.

The present case involves the interpretation of clause 15.1.4 of License Agreement Part I. The Arbitral Tribunal consisting of three former eminent judges, negated the interpretation as projected by the petitioner and elaborately discussed the scope of clause 15.1.4 in their award. The learned Tribunal after interpreting the said clause in accordance with the plain language contained therein, has held that the petitioner herein is not entitled to exclude any amount from the legitimate share of 52.524% of the gross revenue under the pretext of augmentation and maintenance charges. The petitioner, during the arbitral proceedings initially filed an additional affidavit with five annexures. For the first time, before this court, the petitioner however quantified the equipment and came out with the figure of Rs.63 crores. On the other hand, when the petitioner filed his claim petition before the Expert Committee on 12.12.2011, they have mentioned only 7 items of equipment for the purpose of augmenting. In the claim petition filed before the Tribunal on 15.12.2013, the petitioner has mentioned 11 items towards such purpose. Now in the annexure filed before this court on 21.03.2014, they have mentioned 19 items. Therefore, it is evident that at every stage, the petitioner has given different figures and different items, which shows that the claim of the petitioner is only an after thought. The witness for the claimant before

the Arbitral Tribunal had admitted that the actual cost of the project was well within the estimated cost and Rs.63 crores claimed by the petitioner formed part of the total cost. Therefore, it is evident that the petitioner had not incurred any additional expenditure. The items of the equipment which the petitioner had stated as additional equipment and machineries are already mentioned in the DPR prepared by them and approved by the respondent. There are no separate agreements or DPR for 4 MTPA and 8 MTPA. Therefore, it is evident that the petitioner while signing the agreement and preparing the DPR had understood that the construction was for a throughput of 8 MTPA. The petitioner had never claimed incentive to deduct the so called augmentation charges if it completed the construction in one go. Clause 14(V) of the License Agreement does not refer about the so called augmentation charges whereas all other charges have been specifically mentioned. Therefore, the augmentation charge is outside the terms of the contract. The petitioner has been continuously deducting the so called augmentation charges illegally till last month and has deducted revenue share of over Rs.75 crores without interest and with interest, the amount may cross over Rs.100 crores.

ii) It is well settled that the court will not interfere with the award merely because another view is equally possible. Likewise, this court cannot substitute its own interpretation in the place of interpretation already arrived by the learned Tribunal. The Arbitral Tribunal has made an absolute judicial approach to the issue and given a finding by interpreting the clause 15.1.4. Such interpretation given by the learned Arbitrators/Eminent Retired Judges of this court and Retired Judge of the Hon'ble Supreme Court does not give any room for interference by this court, more particularly, when the award was made after complying with all the requirements including the principles of natural justice.

iii) Before the matter was referred to the Arbitral Tribunal, the very same issue was raised before the Expert Committee and the said Committee after thorough discussion of the entire facts rejected the claim of the petitioner. The claim of the petitioner having been rejected by two forums and when such claim is based on interpretation of particular clause which involves purely an appreciation of fact and not a question of law, this court need not interfere with the said award.

iv) In support of the above contentions, the following decisions are relied:

i) 2010 (2) SCC 182; State of Rajasthan vs Nav Bharat Construction Company;

ii) 2012 (1) SCC 594; P.R.Shah Shares and Stock Brokers P Ltd. vs. BHH Securities P Limited;

iii) CDJ (2013) DHC 603; Vale Australia Pty Ltd. vs Steel Authority of India Ltd;

iv) 2015(5) SCC 739; Swan Gold Mining vs Hindustan Copper Ltd.,

13. Heard both sides. Perused the pleadings and materials placed before this court by the respective parties.

14. The point for consideration in this case is as to whether the petitioner has made out a case for setting aside the award passed by the learned Arbitral Tribunal in respect of the issue pertaining to clause 15.1.4, by exercising the power under section 34 of the Arbitration and Conciliation Act, 1996.

15. It is seen that the Arbitral Tribunal which passed the award was constituted by the respective parties on either side appointing two former judges of this court as members-Arbitrators who in turn appointing a former judge of the Hon'ble Supreme Court of India as the Presiding Arbitrator. In this case, the petitioner challenges the award mainly by contending that the interpretation given by the learned Tribunal in respect of clause 15.1.4 is erroneous, perverse and against the terms of the contract. Though there were other issues raised in the original petition, the learned Senior Counsel appearing for the petitioner submitted that the dispute is confined to the clause 15.1.4 alone.

16. Before going into such issue and giving a finding thereon, it is better and also necessary to understand the scope of section 34 of the Arbitration and Conciliation Act, 1996, which reads as follows:

Section 34 in THE ARBITRATION AND CONCILIATION ACT, 1996:

34. Application for setting aside arbitral award. —

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if — (a) the party making the application furnishes proof that

— *(i) a party was under some incapacity, or*

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation. —Without prejudice to the generality of sub-clause (ii) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal: Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award."

17.The scope of Section 34 has been repeatedly discussed and stated in very many decisions of the Apex Court out of which, the

following recent decisions are enough to be quoted.

In **2014 (9) SCC 263, Oil and Natural Gas Corporation Limited vs Western Geco International Limited**, the Hon'ble Supreme Court has observed at paragraph Nos.34 to 40 as follows:

"34. It is true that none of the grounds enumerated under Section 34(2)(a) were set up before the High Court to assail the arbitral award. What was all the same urged before the High Court and so also before us was that the award made by the arbitrators was in conflict with the "public policy of India" a ground recognised under Section 34(2)(b)(ii) (supra). The expression "Public Policy of India" fell for interpretation before this Court in ONGC Ltd. v. Saw Pipes Ltd. (2003) 5 SCC 705 and was, after a comprehensive review of the case law on the subject, explained in para 31 of the decision in the following words:

"31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term

"public policy" in Renusagar case it is required to be held that the award could be set aside if it is patently illegal. The result would be — award could be set aside if it is contrary to:

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

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

35. What then would constitute the 'Fundamental policy of Indian Law' is the question. The decision in Saw Pipes Ltd. (supra) does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression "Fundamental Policy of Indian Law", we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the Fundamental Policy of Indian law. The first and foremost is the principle that in every determination whether by a Court or other authority that affects the rights of a citizen or leads to any civil

consequences, the Court or authority concerned is bound to adopt what is in legal parlance called a 'judicial approach' in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the Court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of Judicial approach in judicial and quasi judicial determination lies in the fact so long as the Court, Tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bonafide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a Court, Tribunal or Authority vulnerable to challenge.

36. In Ridge v. Baldwin [1963 2 All ER 66], the House of Lords was considering the question whether a Watch Committee in exercising its authority under Section 191 of the Municipal Corporations Act, 1882 was required to act judicially. The majority decision was that it had to act judicially and since the order of dismissal was passed without furnishing to the appellant a specific charge, it was a nullity. Dealing with the appellant's contention that the

Watch Committee had to act judicially, Lord Reid relied upon the following observations made by Atkin L.J. in R. v. Electricity Commissioners, ex London Electricity Joint Committee Co. Ltd (KB p.205)

"...Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

37. The view taken by Lord Reid was relied upon by a Constitution Bench of this Court in [A.C. Companies Ltd vs. P.N. Sharma and Anr.](#) (AIR 1965 SC 1595) where Gajendragadkar, C.J. speaking for the Court observed :

"14...In other words, according to Lord Reid's judgment, the necessity to follow judicial procedure and observe the principles of natural justice, flows from the nature of the decision which the watch committee had been authorised to reach under S.191(4). It would thus be seen that the area where the principles of natural justice have to be followed and judicial approach has to be adopted, has become wider and consequently, the horizon of writ jurisdiction has been extended in a corresponding measure. In dealing with questions as to whether any impugned orders could be revised under A. 226 of our Constitution, the test prescribed by Lord Reid in this judgment may afford considerable assistance."

38. Equally important and indeed fundamental to the

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

39. No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a Court of law. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury's principle of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a Court of law often in writ jurisdiction of the Superior courts but no less in statutory processes where ever the same are available.

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

18. From the above decision, it is made clear that the award of an Arbitral Tribunal could be set aside only if such award is contra to fundamental policy of Indian Law or the interest of India or justice or morality or if it is patently illegal. It is also made clear therein that the patent illegality must go to the root of the matter and if the illegality is of trivial nature the award cannot be said to be against the public policy. The Apex Court further observed that the award must be so unfair and unreasonable shocking the conscience of the court, for it to be set aside. The Apex Court further observed that a decision made by the Tribunal would be perverse or irrational if no reasonable person

would have arrived at such decision. Only under such circumstances, the court cannot sustain the award. Therefore, unless the petitioner herein satisfies this court and bring their case within the above parameters as observed by the Apex Court, this court cannot interfere with the award as a matter of course or routine and substitute its own views in the place of the views already expressed by the learned Arbitrators.

19.It is well settled that this court is not sitting as a court of first appeal nor it is its duty to re-appreciate the evidence or facts already placed, pleaded and considered by the Arbitral Tribunal. At this juncture, I would like to point out the basic difference between the judicial proceedings before the courts of law and the arbitral proceedings before the Arbitral Tribunal constituted under the Special Enactment Act viz., Arbitration and Conciliation Act 1996. First of all, the proceedings before the Arbitral Tribunal in its strict sense cannot be equated with an alternative remedy available before the Authorities under various statutes. On the other hand, it is an independent proceedings contemplated under the alternate dispute resolution mechanism. In fact, it replaces the regular judicial proceedings. Therefore, it is not as though the parties are also at liberty to approach

the court of law to resolve their dispute by submitting themselves to the regular judicial proceedings like a suit. It is well settled that if the parties have entered into an agreement containing arbitration clause, any dispute arising out of such contract or agreement shall have to be referred to and decided by the arbitral proceedings only and not by the court. In so far as the judicial proceedings before the court of law is concerned, the parties to the litigation cannot choose their Judge. On the other hand, in the arbitral proceedings, the parties can choose their own Judge or Judges to decide the issues and therefore, the decision rendered by such Arbitrator/Arbitrators sitting as a Judge or Judges to the litigation, is the final decision on facts as admittedly this Court is not exercising its power under section 34, sitting as a court of first appeal. Further, the scope of interference under section 34 of the Act is also very limited as has been stated by the Apex Court.

20. Recently, in another decision reported in **2015(5) SCC 739, *Swan Gold Mining Limited vs Hindustan Copper Limited***, the Hon'ble Supreme Court has considered the question of interpreting a clause in the contract and the scope for the court to re-appreciate the evidence and to arrive at different conclusion. The Apex Court categorically found that the court shall not ordinarily substitute its

interpretation for that of Arbitrator and the interpretation of the contract is a matter of the Arbitrator who is a Judge chosen by the parties and the court is precluded from re-appreciating the evidence and to arrive at a different conclusion. It is also found by the Apex Court therein that the finding of facts recorded by the Arbitrator cannot be interfered with on the ground that the terms of the contract were not correctly interpreted by him. At paragraph Nos.11, 12,18 and 19, the Apex Court observed as follows:

"11. Section 34 of the Arbitration and Conciliation Act, 1996 corresponds to Section 30 of the Arbitration Act, 1940 making a provision for setting aside the arbitral award. In terms of sub-section (2) of Section 34 of the Act, an arbitral award may be set aside only if one of the conditions specified therein is satisfied. The Arbitrator's decision is generally considered binding between the parties and therefore, the power of the Court to set aside the award would be exercised only in cases where the Court finds that the arbitral award is on the fact of it erroneous or patently illegal or in contravention of the provisions of the Act. It is a well settled proposition that the Court shall not ordinarily substitute its interpretation for that of the Arbitrator. Similarly, when the parties have arrived at a concluded contract and acted on the basis of those terms and conditions of the contract then substituting new terms in the contract by the Arbitrator or by the Court would be erroneous or illegal.

12. It is equally well settled that the Arbitrator appointed by the parties is the final judge of the facts. The finding of facts recorded by him cannot be interfered with on the ground that the terms of the contract were not correctly interpreted by him.

18. Mr. Sharan, learned senior counsel appearing for the appellant, also challenged the arbitral award on the ground that the same is in conflict with the public policy of India. We do not find any substance in the said submission. This Court, in the case of Oil and Natural Gas Corporation Ltd. (supra), observed that the term 'public policy of India' is required to be interpreted in the context of jurisdiction of the Court where the validity of award is challenged before it becomes final and executable. The Court held that an award can be set aside if it is contrary to fundamental policy of Indian law or the interest of India, or if there is patent illegality. In our view, the said decision will not in any way come into rescue of the appellant. As noticed above, the parties have entered into concluded contract, agreeing terms and conditions of the said contract, which was finally acted upon. In such a case, the parties to the said contract cannot back out and challenge the award on the ground that the same is against the public policy. Even assuming the ground available to the appellant, the award cannot be set aside as because it is not contrary to fundamental policy of Indian law or against the interest of India or on the ground of patent illegality.

19. The words "public policy" or "opposed to public

policy”, find reference in Section 23 of the Contract Act and also Section 34 (2)(b)(ii) of the Arbitration and Conciliation Act, 1996. As stated above, the interpretation of the contract is matter of the Arbitrator, who is a Judge, chosen by the parties to determine and decide the dispute. The Court is precluded from re-appreciating the evidence and to arrive at different conclusion by holding that the arbitral award is against the public policy.”

21.In **2010 (2) SCC 182, State of Rajasthan vs. Nav Bharat Construction Company**, the Apex Court held at paragraphs 17 to 20 as follows:

17.The jurisdiction of the court to set aside an award under section 30 of the Act has now been settled by a catena of decisions of this Court as well as by the different High Courts in India. Taking those principles into consideration, it would thus be clear that under Section 30 of the Act it must be said that the Court is not empowered to reappreciate the evidence and examine the correctness of the conclusions arrived at by the umpire in considering an application for setting aside the award.

*18.*In this connection, we may refer to a decision of this court in *Bhagawati Oxygen Ltd. v. Hindustan Copper Ltd.* In that decision, this court observed in para 25 as follows:(SCC pp.472-73)

"25.This court has considered the provisions of Section 30 of the Act in several cases and has held that

the court while exercising the power under Section 30, cannot reappreciate the evidence or examine correctness of the conclusions arrived at by the arbitrator. The jurisdiction is not appellate in nature and an award passed by an arbitrator cannot be set aside on the ground that it was erroneous. It is not open to the court to interfere with the award merely because in the opinion of the court, another view is equally possible. It is only when the court is satisfied that the arbitrator had misconducted himself or the proceedings or the award had been improperly procured or is 'otherwise' invalid that the court may set aside such award."

19. Similarly, in Food Corporation of India v. Chandu Construction in which one of us (Chatterjee,J.) was also a party, it was held that when the arbitrator or the umpire as the case may be, had ignored the specific terms or had acted beyond the four corners of the contract, it was open for the court in the exercise of its power under Section 30 of the Act to set aside the award on the ground that the arbitrator could not ignore the law or misapply the terms of the contract in order to do what he thought was just and reasonable.

20. That apart, the law is also settled as referred to herein earlier that the jurisdiction of the court under Section 30 of the Act is not appellate in nature and the award passed by the umpire cannot be set aside on the ground that it was erroneous. It is also not open to the court to interfere with the award merely because in the

opinion of the court, another view is equally possible."

22.In **2015(3) SCC 49, Associate Builders vs Delhi Development Authority**, wherein the Apex Court has observed at paragraph Nos.42 to 45 as follows:

42.In the 1996 Act, this principle is substituted by the 'patent illegality' principle which, in turn, contains three sub heads -

42.1.(a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is a really a contravention of [Section 28\(1\)\(a\)](#) of the Act, which reads as under:

"28. Rules applicable to substance of dispute.-

(1) Where the place of arbitration is situated in India,-

(a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;"

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

(c) Equally, the third sub-head of patent illegality is

really a contravention of [Section 28 \(3\)](#) of the [Arbitration Act](#), which reads as under:

"28. Rules applicable to substance of dispute.-

(3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

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

[43.In McDermott International Inc. v. Burn Standard Co. Ltd.](#), (2006) 11 SCC 181, this Court held as under:

"112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that

correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. (See *Pure Helium India (P) Ltd. v. ONGC* [(2003) 8 SCC 593] and *D.D. Sharma v. Union of India* [(2004) 5 SCC 325]).

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award."

44. In *MSK Projects (I) (JV) Ltd. v. State of Rajasthan*, (2011) 10 SCC 573, the Court held:

"17. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such a jurisdictional error needs to be proved by evidence extrinsic to the award. (See *Gobardhan Das v. Lachhmi Ram* [AIR 1954 SC 689],

Thawardas Pherumal v. Union of India [AIR 1955 SC 468], *Union of India v. Kishorilal Gupta & Bros.* [AIR 1959 SC 1362], *Alopi Parshad & Sons Ltd. v. Union of India* [AIR 1960 SC 588], *Jivarajbhai Ujamshi Sheth v. Chintamanrao Balaji* [AIR 1965 SC 214] and *Renusagar Power Co. Ltd. v. General Electric Co.* [(1984) 4 SCC 679 : AIR 1985 SC 1156])."

45. In *Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran*, (2012) 5 SCC 306, the Court held:

"43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.

44. The legal position in this behalf has been summarised in para 18 of the judgment of this Court in *SAIL v. Gupta Brother Steel Tubes Ltd.* [(2009) 10 SCC 63: (2009) 4 SCC (Civ) 16] and which has been referred to above. Similar view has been taken later in *Sumitomo Heavy Industries Ltd. v. ONGC Ltd.* [(2010) 11 SCC 296: (2010) 4 SCC (Civ) 459] to which one of us (Gokhale, J.) was a party. The observations in para 43 thereof are instructive in this behalf.

45. This para 43 reads as follows: (Sumitomo case

[(2010) 11 SCC 296 : (2010) 4 SCC (Civ) 459] , SCC p. 313)

"43. ... The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in Kwaliti Mfg. Corpn. v. Central Warehousing Corpn. [(2009) 5 SCC 142 : (2009) 2 SCC (Civ) 406] the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding."

23.In **2012 (1) SCC 594, P.R.Shah Shares and Stock Brokers P Ltd vs. BHH Securities P Limited**, it has been held at paragraph No.21 as follows:

"21.A court does not sit in appeal over the award of the Arbitral Tribunal by reassessing or reappreciating the

evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at."

24. In **CDJ (2013) DHC 603, Vale Australia Pty Ltd. vs Steel Authority of India Ltd.**, the Delhi High Court at paragraph Nos. 37 and 38 held as follows:

"37. It is settled law that adequacy or inadequacy of evidence or on which side does the weight of the evidence lead to would not be an exercise permissible to be undertaken by a Court considering objections to an Award under Section 34 of the Arbitration and Conciliation Act 1996. As long as there is some evidence to sustain a

finding of fact recorded by Arbitrator the hands of approach must be adopted by a Court seized of objections to an Award.

38.From the very nature of the objections it is apparent that the objector wants this Court to re-appreciate the evidence and re-weigh the probabilities thereof to infer facts; an exercise which we refuse to perform because our doing so would be in breach of the mandate of the law. We highlight that the five limbs have been discussed with reference to the evidence led and law applicable by the learned Arbitrator in paragraphs 117 to 194 of the Award; and suffice would it be to state that each and every aspect of the evidence referred to by AMCI/VALE has not only been noted but has been dealt with by the learned Arbitrator and being a matter pertaining to re-appreciation of evidence, we repeal each and every submission made under the five sub-heads."

25.Keeping the above principles in mind, let me consider as to whether the award passed by the learned Tribunal requires any interference.

26.Both sides submitted that the only issue involved in this case is with regard to the interpretation of clause 15.1.4 of Part I of the Agreement. Clause 15.1.4 reads as follows:

"15.1.4 Exemption of Revenue Share

No Revenue Share shall be claimed and levied by the Licensor on items/equipment brought in for the purpose of setting up of the proposed Terminal through the Licensed Premises by the Licensee until commissioning of the Terminal. Also Revenue Share shall not be claimed and levied for any equipment/machinery brought in by the Licensee for the purpose of maintenance/augmentation of the Terminal after the commissioning thereof till the expiry of the Licence Period through the Terminal."

27. In the claim petition filed before the Arbitral Tribunal, claim No.2 pertains to the present issue viz., exemption of augmentation and maintenance charges from the revenue share payable to the respondent. For proper appreciation claim No.2 as stated in the claim petition is extracted hereunder:

Claim No.2

Whether or not the augmentation and maintenance charges form part of the Revenue Share payable to the respondent?

29. The Claimant states that Part of the Agreement adumbrates the manner in which the revenue earned from the project is to be shared by the parties. The claimant submits that this question as to what constitutes the exact Revenue Share payable to the respondent under the Agreement is crucial for the present arbitration and that a holistic and harmonious reading of the relevant provisions of the Agreement leads to the inescapable conclusion that the respondent is not entitled to claim any part of the revenue earned from equipment/machinery."

28. Thus, it is evident from the very claim made by the petitioner before the Arbitral Tribunal that they seek exemption of augmentation and maintenance charges, which in turn is the revenue earned from equipment/machinery from the revenue share payable to the respondent. In other words, they would like to deduct the revenue earned from equipment/machinery claiming it to be the augmentation charges out of the revenue share payable to the respondent. They are very clear in their claim that the respondent is not entitled to claim any part of the revenue earned from equipment/machinery bought in by the claimant for the maintenance or augmentation of the terminal. Such stand is very clear in the claim petition itself.

29. In fact, perusal of the award would disclose that before recording the oral evidence and for better appreciation of the evidence latter, the learned Arbitrators made a personal inspection of the port area at 9.30 a.m. on 29.09.2013. Therefore, it is evident that the learned Arbitrators, apart from considering the respective pleadings of the parties and their evidence, also made a personal inspection of the site before passing the award, in order to satisfy themselves with regard to the correctness of the claim and the relevance of the evidence let in support of such claim and in order to arrive at a just

and proper conclusion.

30. The learned Arbitral Tribunal framed several issues out of which issue No.5 is the relevant issue for the purpose of considering the claim of the petitioner in respect of augmentation charges. Issue No.5 reads as follows:

"5. What is the scope, extent, purport and object of clauses 1-1(42), 1-1(84)", 14(I) and 15(1.4) of Part I of the Licence Agreement and whether the claimants are entitled to exclusion of augmentation and maintenance charges, in calculating the "Gross revenue" for computing the "Revenue Share" payable by the claimant to the respondent under the terms of the Licence Agreement dated 14.09.2006?"

31. The learned Arbitral Tribunal discussed and decided the above issue at paragraph Nos.15 and 16 of the award. Perusal of the findings rendered by the learned Tribunal in the above said paragraphs would amply show that the Tribunal was fully aware of the real dispute between the parties and the claim made by the petitioner more particularly, under clause 15.1.4. The learned Tribunal also was conscious of the fact that interpretation of clause 15.1.4 was necessary to arrive at a just and proper conclusion. The learned Tribunal also

considered the claim of the petitioner for applying the rule of contra proferentum. It is pertinent to mention at this juncture that the claim made by the petitioner based on clause 15.1.4 and its interpretation is involving purely factual aspects of the matter, where absolutely no question of law is involved. In other words, entire dispute between the parties revolves around factual aspects of the matter alone.

32.The learned Tribunal pointed out at paragraph No.16(a) of the award that the various sub topics enumerated therein under clause 15 and the several stipulations made therein clearly indicate that none of the several contingencies envisaged in those provisions does not in any part of the same attempts even indirectly to deal with clause 14 and annexure 6 or the provisions and obligations therein. It is also found by the learned Tribunal that they are not suggestive a remote possibility of giving an overriding effect of clause 14.

33.At this juncture, it is useful to refer to clause 14(V) of the contract, which deals with liability of the petitioner to pay the revenue share.

"14.Payments to the Licensor

The Licensee shall pay to the Licensor by demand draft payable in Chennai drawn on a scheduled bank in favour of

Licensors, the following amounts:

V. The Gross Revenue accrued shall be calculated as provided for in Section 13 VIII and IX and shall be aggregate of the following revenues whether or not such revenues are actually realized from consignees/agents/customers:

a) all the gross revenues accruing to the Licensee for the services rendered and facilities provided by the Licensee including revenues accruing from berth hire charges for the berth built by the Licensee.

b) all the gross revenues accruing to the Licensee from handling, wharfage, stevedoring, storage and movement of cargo including transshipment.

c) all the gross revenues accruing to the Licensee from shifting of cargo within the Terminal for inspection, processing, storage or loading/unloading.

d) all the gross revenues and income from storage charges and demurrage/detention charges.

e) all the gross revenues and income from miscellaneous services offered and facilities provided within the Terminal.

f) all other gross revenues and income from charges not specified above, if any, for handling, storage and movement of cargo within the Terminal.

g) any other gross revenues and income earned by the Licensee not specified above and directly attributable to the Project and Project Facilities, provided that any income earned from investing surplus funds and from investments not directly related to the Project would be excluded from

the computation of accrued revenue."

34. Thus, the learned Tribunal after considering both clause 14(V) and clause 15.1.4 of the Licence Agreement, has categorically found that the various provisions under sub topics of clause 15 do not give room for any assumption that they or anyone of the provisions therein, be it even 15.1.4 are to have any superimposing or overriding effect of clause 14. The learned Tribunal after considering clause 15.1.4 and clearly understanding the intention and object behind the insertion of such clause, has categorically found that the said clause was really meant to obviate any such liability if such equipment machinery was brought for maintenance or augmentation. The learned Tribunal after observing so, further pointed out that the manner in which the interpretation of the said clause sought to be made by the claimant is not only perverse but would lead to monstrous results, destructive of the basic and fundamental rights of the license itself. The learned Tribunal clearly pointed out that reading of the provision otherwise meant for exempting a levy on the machinery/equipment brought in for development/augmentation, the way the claimant desires as if it was for the exemption of revenue earned thereby would not only amount to distortion and misreading of clause 15.1.4 but also would amount to permitting perfidious reading destructive of the object of

such provision. At this juncture, I would like to point out that entire paragraphs 15 and 16 of the award dealing with the present issue shall have to be read to understand as to how the Arbitrators have thoroughly discussed and construed clause 15.1.4 and ultimately rightly rejected the claim of the petitioner. I am not reiterating the above paragraphs in this order in order to avoid multiplication.

35. The crux of the arguments advanced before this court by the learned senior counsel for the petitioner is that the petitioner having improved the capacity of the Port from 4 MTPA to 8 MTPA, they are entitled to seek exemption of augmentation charges and consequently, to deduct the same while arriving at the revenue share payable to the respondent. In other words, the claim of the petitioner seems to be that increasing the potential of the port from 4 MTPA to 8 MTPA result in augmenting the income to the port and therefore, they must be given exemption in respect of the augmentation charges. I am not able to accept the said contention. First of all, the agreement nowhere defines as what would be the augmentation charges. Secondly, it is not correct to say that the petitioner has increased potential of the port from 4 MTPA to 8 MTPA, as though the same is not contemplated or designed under the original agreement.

36. At this juncture, it is useful to refer to certain clauses of the License Agreement Part II-Project Details, which read as follows:

"3.3.5. Proposed Capacity of the Terminal

The above traffic prospects may justify planning the capacity of the proposed terminal to be 8 MTPA."

"3.5 Phased Development of the Terminal

As stated in Section 3.3.5, the planning of the terminal should be based on a capacity of 8 MTPA. This capacity can be developed in a phased manner. The first stage development should be for a capacity of 4 MTPA. The minimum configuration of the facilities required for the first stage are given in Section 4. The Licensee shall propose in his DPR the system capable of meeting the minimum requirements as well as his plans for meeting the ultimate requirements of the projected traffic."

"4. Minimum Requirements in the First Stage

The Licensee shall adhere to good industry practices and design a system to achieve a minimum throughput of 4 MTPA. The design should provide for augmenting the system to a throughput of 8 MTPA."

37. Perusal of the clauses 3.3.5 and 3.5 of the License Agreement Part II would clearly indicate that the agreement between the parties

is for developing maintaining and operating the terminal with the capacity of the proposed 8 MTPA. Under clause 3.5, it is made clear that the terminal should be based on a capacity of 8 MTPA and such capacity can be developed in a phased manner and such first stage development should have the capacity of 4 MTPA. Therefore, it is evident from the above said clauses that the contract between the parties is only in respect of a capacity of 8 MTPA terminal which of course can be achieved in a phased manner. Merely because the petitioner has achieved such full capacity at one go in the first phase itself, that does not mean that the petitioner has made some extra work outside the scope of the contract and allowed the augmentation of income to occur in this case. Therefore, the interpretation as sought for by the petitioner in respect of clause 15.1.4 is a misconceived one. In other words, there is no possibility of having another view at all other than the one given by the Arbitral Tribunal in view of the fact that clause 15.1.4 is very clear and unambiguous in its language which in fact does not require any interpretation at all. The very reading of the said clause would make it abundantly clear that the revenue share shall not be claimed and levied for any equipment/machinery brought in by the licensee for the purpose of maintenance/augmentation of the terminal "after commissioning

thereof".

38. Therefore, it is very clear that what cannot be levied or claimed is only in respect of any equipment/machinery brought in by the licensee for the purpose of maintenance/augmentation of the terminal that too after commissioning of the same and not in respect of any equipment/machinery brought in by the licensee during the time of execution of the contract in respect of the work covered under the contract. In this case, admittedly the equipments were already brought in at the time of carrying out the works. It is also not in dispute that the petitioner has developed the terminal to 8 MTPA at one go. It is also not in dispute that the petitioner has not spent any extra money and the so called 63 crores of rupees claimed is also spent within the project cost only. When that being the factual position, I do not think that the petitioner is justified in making the claim towards the augmentation charges as made in their claim petition. The learned Tribunal discussed all these aspects in detail and passed a well considered and reasoned award. I do not find any perversity or illegality or absurdity in the finding rendered by the learned Arbitrators in the award. I do not think that any second view is possible while interpreting the said clause 15.1.4. At any event, this

court cannot sit as a court of appeal and thrust its own view in the place of the views expressed by the learned Arbitrators and give its own interpretation in the place of the one already given by the learned Arbitrators, even assuming such view is possible in this case.

39. At the risk of repetition, at this juncture, it is pertinent to reiterate the decision made by the Apex Court in ***Swan Gold Mining*** case reported in ***2015(5) SCC 739*** wherein at paragraph No.12, the Apex Court has observed that the court shall not ordinarily substitute its interpretation for that of the Arbitrators and that when the parties have arrived at a concluded contract and acted upon those terms and conditions of the contract, substituting new terms in the contract either by the Arbitrator or Court would be erroneous or illegal.

40. In fact, interpretation of a particular clause in a contract or agreement may be of two types. One involving the factual aspects of the matter whereas the other involving the question of law. In some cases it may involve both. In so far as the interpretation involving factual aspects of the matter alone is concerned, the interpretation given by the learned Arbitral Tribunal, upon consideration of the factual aspects of the matter, cannot be interfered with by the court

under section 34, even assuming that another view or another interpretation is possible, because this court is not the court of appeal to reappreciate the facts or evidence. On the other hand, if an interpretation involving a question of law and its application and if the Arbitral Tribunal has misconstrued such law or failed to apply a law which ought to have been applied, while interpreting a particular clause or term of a contract or agreement, then this court can venture to set right things by applying the law correctly and express its view as to which should be the correct interpretation of the particular term or clause in the contract or agreement. In this case, I have already pointed out that interpretation of clause 15.1.4 involves pure consideration of factual aspects of the matter only which the learned Arbitral Tribunal has rightly exercised and expressed its view. Therefore, in the absence of any question of law to be considered and decided while interpreting the above said clause in this case, this court finds that the challenge made against such finding of the Arbitral Tribunal, is wholly misconceived. It may be for the purpose of postponing the execution of the award.

41.I also find that the award of the learned Arbitral Tribunal is not contrary to any fundamental policy of Indian law or the interest of

this country and the contention of the petitioner that such interpretation will discourage the petitioner like persons and that it would result in loss of revenue to exchequer are also without any basis. I do not find any justification in the above said contention. On the other hand, I only wonder as to how such interpretation given by the learned Tribunal would cause loss to the Government exchequer. In fact, it would only increase the Government exchequer by getting the appropriate revenue as contemplated under clause 14. Equally, the award is not contrary to justice or morality. It is not patently illegal as well. The Apex Court has observed that it is not enough to say that the award is patently illegal, unless it is proved that such illegality goes to the root of the matter. The petitioner herein except reproducing the above said phraseology in a routine manner in the petition, they have not established any of those grounds warranting interference of the award by this court.

42. The case laws relied on by the learned counsel for the petitioner are as follows:

2014 (9) SCC 263, Oil Natural Gas Corporation Limited vs Western Geco International Limited, is relied on to contend that a decision which is perverse or so irrational that no reasonable person

would have arrived, will not sustain in a court of law. Likewise, **2010 (2) SCC 182, State of Rajasthan vs Nav Bharat Construction Company** is relied on to contend that it is open for the Court to set aside the award, if the Arbitrator had ignored the specific terms or acted beyond the four corners of the contract or misapply the terms of the contract.

43.2015(5) SCC 739, Swan Gold Mining Limited vs Hindustan Copper Limited, is cited to contend that the power of the court to set aside the award would be exercised in cases where the court finds that the arbitral award is on the fact of it erroneous or patently illegal or in contravention of the provisions of the law.

44.I have already discussed in detail and found that the interpretation given by the learned Arbitral Tribunal is in accordance with the pure, plain and simple language used in clause 15.1.4. I have also pointed out that there is no ambiguity or confusion in the language used in the said clause, warranting any interpretation other than the one given by the Arbitral Tribunal. The factual findings rendered by the Tribunal in respect of the particular clause does not show any perversity or illegality. Likewise, I do not find that the award

is irrational that no reasonable person would have arrived at the same. So also, I found that the learned Arbitral Tribunal had not ignored any specific terms or acted beyond the terms of the contract or misapplied such terms of the contract. In the absence of any patent illegality or contravention of any provisions of the Act and when there is no error on the face of the award, I do not think that all the above decisions relied on will help the petitioner in any manner. Needless to say the facts of each case are to be considered to apply a particular decision to the facts and circumstances of the present case. In this case, I do not find any similarity of facts.

45. AIR 1961 SC 1170, J.K. Cotton Spinning and Weaving Mills Co. Ltd. vs State of Uttar Pradesh is relied on the side of the petitioner for the proposition that specific provision prevails over the general provision in case of conflict between those two. At paragraph No.10 of the above decision, it has been observed as follows:

"10. Applying this rule of construction that in cases of conflict between a specific provision and a general provision the specific provision prevails over the general provision and the general provision applies only to such cases which are not covered by the special provision, we must hold that Cl.5(a) has no application in a case where the special provisions of Cl.23 are applicable."

For the same proposition, **2003(10) SCC 482, *International Coach Builders Ltd vs Karnataka State Financial Corpn***, is also relied on.

46. There is no quarrel in accepting the said proposition provided there is some conflict between clause 14 and clause 15.1.4 in this case. The learned Arbitral Tribunal has specifically pointed out that various sub topics enumerated under clause 15 and special stipulations therein clearly indicate that none of the several contingencies envisaged in those provisions does not in any part of the same attempt to even indirectly deal with clause 14 and annexure 6 or the provisions and obligations therein are suggestive of even a remedy possibility of giving a overriding effect to the same by superimposing it on any one or more of the provisions of the License Agreement. It is also found by the learned Arbitral Tribunal that there is nothing which makes the clause 15.1.4 as a special provision vis-a-vis clause 14 more particularly, clause 14(V) to the extent of defeating/destroying the soul and life force of the very deal viz., unconditionally undertaking/offer by the claimant to pay 52.524% of the gross revenue to be calculated as envisaged in clause 14(V). Thus, the learned Tribunal pointed out that various provisions under several sub topics of clause 15 do not give any room for assumption that anyone of the provisions therein be it

even 15.1.4 is to have any superimposing or overriding effect of clause 14. For better appreciation of the finding, paragraph 16(a) of the award can be read. When that being the factual finding rendered by the learned Arbitral Tribunal, which in my considered view is the right finding rendered on facts by construing the relevant clauses in the agreement, there is no question of saying that there is a conflict between clause 14 and 15.1.4 so as to apply the above decision of the Apex Court. Therefore, I find the above decisions are also not helping the petitioner based on the facts and circumstances of the present case.

47.2005(6) SCC 274, Life Insurance Corpn. of India vs Mani Ram, is relied on to contend that every clause in a contract must be given effect to. In the above decision, the Apex Court has observed that in contractual clauses, the words and terms therein must be given effect to and part of the contract cannot be referred meaningless while considering and interpreting the other part of the clauses. Here again, I would like to point out that the case of the petitioner is not that the learned Arbitral Tribunal failed to consider a particular clause. On the other hand, it is their case that clause 15.1.4 was misinterpreted. As I have already pointed out that interpretation of the said clause by the

learned Arbitral Tribunal is just and proper and I do not think that the above decision can be pressed into service in this case.

48.2004 (3) SCC 694, *United India Insurance Co. Ltd. vs. Pushpalaya Printers*, is cited on the side of the petitioner to contend that where the words of the document are ambiguous ,they shall be construed against the party who prepared the document by applying the rule of contra proferentum. First of all, it is to be noted that there is no ambiguity in clause 15.1.4. The language used therein is plain, simple and unambiguous which does not require for any interpretation. Equally, reading of the said clause also does not show a possibility of two views. When that being the factual aspects of the matter, there is no question of applying the above decision of the Apex Court to construe clause 15.1.4 against the respondent who prepared the contract. Therefore, I find the above decision is also not applicable to the facts and circumstances of the present case.

49.Before parting with this case, I would like to make a mention about the learned Arbitral Tribunal constituted in this case. Admittedly, each party has chosen a learned Retired Judge of this Court on their side as their Arbitrator. Consequently both the learned

Arbitrators, so chosen by respective parties, have nominated the learned Presiding Arbitrator who is none else than the learned Retired Judge of the Hon'ble Supreme Court of India. It is a matter of fact that all the three learned Arbitrators were active practitioners of this court for long number of years in all branches of law, before their elevation. Their vast knowledge in the field of law and their contribution to the judiciary by rendering very many decisions on important matters are also matter of record. Therefore, there cannot be any doubt much less in the mind of the petitioner that the issues between the parties were dealt with by the highly learned and competent Arbitrators. Perusal of the entire award would exhibit such quality at every point so discussed and decided, after thorough consideration of facts and circumstances; appreciation of relevant materials and evidence. Thus, it is evident that, even though the proceedings are in the nature of arbitration, the learned Arbitrators have dealt with the matter with absolute judicial approach and passed the well considered, reasoned and unanimous award. I am bound to record these facts for the reason that this court while testing the award under section 34 of the said Act also should take judicial notice of the unquestionable eminence of the present Arbitral Tribunal.

Therefore considering from any angle, I find no reason to interfere with the award.

50. Accordingly, I find no merits in this petition and the same is dismissed. Consequently, the connected application is closed.

22.09.2015

Index :Yes/No
Internet:Yes/No
vri

K.RAVICHANDRABAABU,J.

VRI

**PRE DELIVERY ORDER IN
Original Petition No.512 of 2014
and
Application No.3726 of 2015**

22.09.2015