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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on: 12.09.2017

Delivered on : 01.11.2017

CORAM

**THE HON'BLE MR.JUSTICE M.M.SUNDRESH
AND
THE HON'BLE MR.JUSTICE N.SATHISH KUMAR**

C.M.A. (MD) No.345 of 2016
and
C.M.P. (MD) No.4867 of 2016

The Board of Trustees of
V.O. Chidambaranar Port Trust
rep. By its Chairman,
Tuticorin. .. Appellant

Vs.

- 1.M/s PSA Social Terminals Limited,
South India House, 36-40,
Armenian Street, Chennai - 1.
- 2.Hon'ble Mr.Justice (Retd)
R.Balasubramanian,
No.5, Tiger Varadhachariar Road,
1st Street, Kalashetra Colony,
Besant Nagar, Chennai - 90.
- 3.Hon'ble Dr.Justice AR.Lakshmanan (Retd)
Dev Regency 1st Floor,
No.11, 1st Main Road, Gandhi Nagar,
Adyar, Chennai - 20.
- 4.Hon'ble Mr. Justice S.Jagadeesan (Retd.)
Old No.23, New No.53, 3rd Main Road,
Gandhi Nagar, Adyar, Chennai - 20. .. Respondents

Appeal under Section 37 (b) of the Arbitration and
Conciliation Act, 1996 against the order dated 25.02.2016 made in
AROP No.260 of 2015 on the file of the Principal District Judge,
Tuticorin.



For Appellant .. Mr.Yasodh Vardhan,
Sr. Counsel
for M/s.S.Yaswanth

For Respondents .. Mr.Vijay Narayan,
Sr. Counsel
for M/s.Raguvaran Gopalan
for R1

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JUDGMENT

M.M.SUNDRESH, J.

A global tender was issued by the appellant on 09.04.1997 inviting bids for development of VII Berth as a container terminal and maintain the same for 30 years on Build, Operate and Transfer Basis.

2.The first respondent submitted its bid on 24.10.1997. The financial offer was submitted on 19.12.1997. As the offer made by the first respondent was the highest, it was accordingly accepted and letter of intent was issued on 29.01.1998 followed by a license agreement dated 15.07.1998. Needless to state that the financial bid of the first respondent formed the consideration in its favour. The payment to be made is by way of royalty. This royalty is based upon the offer made by the first respondent. Now, there are two types of consideration. Royalty is something which is fixed, payable from year to year. The second one is a revenue sharing model. As per this model, the revenue augmented through users is to be shared. Tariff is something which has to be collected from the users.

3.The Tariff Authority for Major Ports (TAMP) was constituted through the institution of Section 47-A to 47-H by appropriately amending Section 48 of the Major Port Trusts Act, 1963 (hereinafter referred to as 'the Act'). This authority is an expert body in the fixation of tariff. While doing so, it has to take into consideration various factors including the interest of port trusts, licensees, users and general public. This tariff is fixed from time to time by the TAMP. Section 111 of the Act deals with the policy of the Government. Such a policy has got a binding effect on the TAMP.

4.Article 14 of the license agreement defines a law, change of law apart from availing a relief under such a change. These provisions are reproduced hereunder:

"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 instructions 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 of 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:

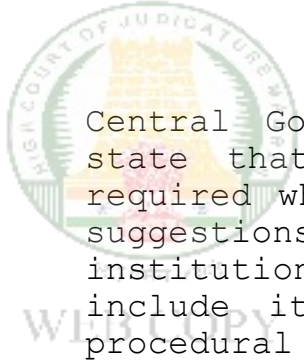
If after the date of this Agreement, there is a change in law which substantially and adversely affects the rights of the licensee under this Agreement, so as to alter the commercial viability of the project, the licensee may, by written notice request amendments to the terms of this Agreement.

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."

5.The definition of law, as mentioned above, gives a wider import. However, it should be of a binding nature. It should bind the parties by its operation. The various categories given are to be weighed on the principle of *ejusdem generis*. Therefore, such an Act and ordinance as the case may be is beyond and *de hors* the agreement between the parties. A change in law would mean an amendment or alteration, modification or repeal of an existing law. This is by a Government authority. Therefore, the change in law would come in only when there exists a law as defined under Article 14.1 of the license agreement. Such a change in law will have to come into existence after the date of agreement so as to enable the licensee to get the relief provided it adversely affects its rights guaranteed under the agreement.

6.The license agreement *inter se* parties in clear terms speaks about the payment of royalty. On the contrary, it does not speak anything about royalty becoming an element of cost for fixation of tariff. Thus, the first respondent was quite aware of the exact amount of royalty payable by it. The financial terms form part of the agreement under Appendix 12.

7.As discussed above, the tariff is to be fixed by the TAMP. While undertaking the said exercise, it takes into consideration various factors. For evaluating a uniform system, a workshop took place on 26th and 27th February 1998. The deliberations were recorded by way of guidelines. However, these guidelines were not notified. They did not have the approval of the



Central Government nor backed by it. These deliberations merely state that the share costing system and pricing principle are required while adopting competitive pricing. It also made several suggestions including the need for strengthening TAMP as an institution to function independently. The other discussion would include its role, overall approach, tariff related issues both procedural and structural, cargo related charges and its autonomy etc., Hence it was aimed at creating a better system within the existing frame work.

8.The license agreement dated 15.07.1998, as stated above was based upon the offer made by the first respondent. Thereafter, the tariff proposal of the first respondent was accepted, based upon Chennai Port's scale of rates. It is to be noted here that Chennai Port stands on a different footing in terms of its quantitative transactions with specific reference to the commercial activities. Therefore, needless to state that the acceptance of the proposal was hugely beneficial to the first respondent. However, by the order dated 28.12.1999, TAMP has clarified to the first respondent that it has not made any reference to the royalty issue. The said order also stated that it is to be decided by the appellant and the Government. The following paragraph would be of importance:

"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".

9.From the above, it is rather clear that the first respondent was made to be aware that no decision was taken by TAMP with respect to allowing royalty as a cost factor in the fixation of tariff.

10.The first respondent duly submitted a proposal seeking tariff revision on 08.02.2002, as required. By order dated 20.09.2002, TAMP revised the tariff. This order passed by TAMP was put into challenge by way of writ petitions before this Court in W.P.Nos.40637 to 40639 of 2002. In paragraph 7, the first respondent has clearly averred that the guidelines formulated pursuant to the deliberations held on 26th and 27th February 1998 by TAMP have no statutory basis and therefore lack legal sanctity. Three prayers have been sought for through three writ petitions filed in W.P.Nos.40637 to 40639 of 2002. They are accordingly extracted hereunder:



Under these circumstances it is prayed that this Hon'ble Court may be pleased to issue a writ of declaration, or any other writ, Order or Direction declaring Sections 48 and 50 of The Major Port Trusts Act, 1963 as unconstitutional and arbitrary insofar as the said sections have conferred arbitrary, untrammelled and unguided power on the first respondent relating to fixing scale of rates for services performed by Board or any other person at major ports in so far as the petitioner is concerned and pass such further or other orders as this Hon'ble Court may deem fit and proper so that justice may be done.

Under these circumstances it is prayed that this Hon'ble Court may be pleased to issue a Writ of Certiorarified Mandamus or any other writ, order or direction to call for the records of the first respondent relating to the order dated 20.09.2002 in Case No.TMP/21/2002-TPT passed under the Major Port Trusts Act, 1963 and quash the same and consequently direct the first respondent to consider the proposal dated 28.02.2002 submitted to the first respondent by the petitioner for revision of the tariff to be charged in the container terminal at the Tuticorin Port Trust and pass orders in accordance with law and pass such further or other orders and thus render justice.

Under these circumstances it is prayed that this Hon'ble Court may be pleased to issue a writ of declaration or any other writ, order or direction declaring that Regulation No.12 and 19 of the tariff authority for major ports (transaction of business) regulation, 1998 as null and void and ultra vires section 47A of the major port trusts act, 1963 in so far as the petitioner as concerned and pass such further or other orders as this Hon'ble Court may deem fit and proper in the circumstances of the case and thus render justice.

11.A perusal of the affidavits filed would show that the first respondent has put into challenge Sections 48 to 50 of the enactment, Regulations 12 and 19 of the Tariff Authority for Major Ports (Transaction of Business) Regulation, 1998 along with the tariff revision order dated 20.09.2002. What is important to be noted is that it is nowhere contended by the first respondent that a decision has already been taken by TAMP having the force of law.

12.The first respondent thus clearly understood the nature of the deliberations held on 26th and 27th February 1998 and its legal impact. Perhaps, that is the reason why it did not even contend in its request for revision of tariff on the binding nature of the so-called guidelines which have not been notified and not from approved by the Government of India.



13. The matter ultimately ended on a compromise resulting in the withdrawal of the writ petitions. It is imperative to place on record the memorandum of compromise entered into between the first respondent herein and respondents 1 and 3 in the writ petitions.

"1. The counsels for the petitioner, first respondent and the third respondent pray jointly to the Court that by consent this Hon'ble Court hear and dispose of the main petition itself.

2. The main petition is being disposed of as withdrawn subject to the terms contained herein below.

3. The first respondent in the main petition, namely, The Tariff Authority for Major Ports confirm having received a formal proposal along with a letter dated 8th August 2005 from the petitioner for a fixation of tariff for future for petitioner-Port. Respondent No.1 inform the Court that the said proposal will be disposed of according to law and a tariff will be formulated and gazette and such tariff will be applicable prospectively 30 days after the date on which it is published in Gazette of India.

4. The petitioner will make a proposal to the Government of India, Ministry of Shipping and Transport in the matter of fixation of quantum of royalty that may be permitted to be allowed as a "pass through" as a revenue expenditure for fixation of the tariff for the period prior to 31st March 2005. it is clarified that for the period thereafter the new guidelines provide the manner and mode in which this has to be done. Respondent No.3, Central Government, on receipt of the proposal may consider the same and pass appropriate orders consistent with the policy decision of the Government of India in the matter of Chennai Container Terminal Limited dated 5th August 2003 and accordingly issue a directive under Section 111 of the Major Port Trusts Act.

5. In view of the stay granted by the learned single Judge in the petition on 8th November 2002, of the operation of the tariff for the period from October 2002, the petitioners have been charging the port users the original tariff fixed in 1999. The tariff fixed in 2002 was less than the tariff fixed in 1999.

6. The petitioners will continue to charge the 1999 tariff till a new tariff is gazette as stated above.

7. Advantage or gains, if any, that the petitioner has enjoyed by virtue of not implementing the 2002 tariff in



view of the stay, will be quantified by the first respondent and such advantage/gain will be adjusted/set off in the proposed new tariff and such set off will be spread over a period of three years.

8. In arriving at the quantum of gains, TAMP will bear in mind that the 2002 tariff did not permit pass through of royalty and adjustment from the same will be made as per the directive of the Government of India as stated above. To the extent that the 2002 tariff has been arrived at on the basis of estimates, appropriate adjustments in the quantum of gains will be made if the actual figures, which are now available for the relevant period are different.

9. Before determining the advantages/gains for adjustments/set off, the first respondent will afford an opportunity to the petitioner to be personally heard.

10. All allegations made by parties against each other shall stand withdrawn."

14. This memorandum of compromise also clearly exhibits one undisputed fact. That is, the proposal made by the first respondent seeking fixation of royalty to be allowed as a pass through and the revenue expenditure qua the tariff. This would only mean, at the cost of repetition, that the deliberations held in the month of February, 1998, did not have statutory backing. The first respondent, being a writ petitioner, challenged the enactment, regulations and the order on very many grounds but not on the ground of law in force having changed subsequently to its detriment. Suffice it to state that the license agreement and the initial fixation of tariff were also not on the basis of the aforesaid deliberations.

15. This compromise speaks about one more important factor. Clause 7 as recorded above mandates the first respondent to quantify the advantage/ gains accrued to it in not implementing the 2002 tariff. As a consequence, it was agreed that such advantage/gain will be sought for with the proposed new tariff. This Clause 7 has never been complied with by the first respondent for the reasons known to it, till now.

16. Accordingly, an order was passed by the Government of India in exercise of power under Section 111 of the enactment on 17.04.2006. By the aforesaid order, the request of the first respondent for treating the royalty as cost was once again rejected. This was in turn followed by TAMP. This has resulted in filing two more writ petitions in W.P.Nos.38845 and 38846 of 2006.

<https://hcservices.ecourts.gov.in/hcservices/>

17. This Court, in and by the order dated 22.08.2007, was pleased to set aside the aforesaid orders by directing the



respondents therein viz., the Government of India and TAMP to give a personal hearing and pass fresh orders. It is once again to be reiterated that even in these two writ petitions, the first respondent has not made any specific plea basing its claim on the so-called law of the year 1998.

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18. Once again, orders were passed. Finding that they were not to its liking, the first respondent made one more challenge in W.P.Nos.1350 and 1351 of 2009. This Court once again set aside the orders passed by remitting it for fresh consideration after affording due opportunity. Appeals have been filed against the aforesaid orders both by the first respondent and TAMP in W.A.Nos.196 of 2010 and 1845 of 2009 respectively. TAMP has filed the appeal presumably on the ground that the learned single Judge ought not to have interfered, when the first respondent herein has not complied with its part of the compromise memo in W.P.Nos.40637 to 40639 of 2002 with specific reference to Clause 7, which speaks of furnishing the advantages and gains accrued in its favour in view of the pendency of the proceedings which was also agreed to be adjusted thereafter. Strangely, without pursuing the matter further and based upon the newly dawned wisdom, the first respondent invoked the arbitration clause by taking a plea after more than a decade and after fighting battle after battle against TAMP contending that the so-called guidelines said to have been formulated in the month of February, 1998, constituted a law, which has been subsequently changed and therefore, the royalty model will have to be converted into the revenue sharing one. It is rather surprising that the said claim petition has been filed notwithstanding the fact that the order dated 20.09.2002 passed by TAMP has become final. The writ petitions were only withdrawn. The compromise memo has not been complied with. It is apposite to place on record the following passages of the order dated 20.09.2002 passed by the TAMP:

"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."

19. The aforesaid paragraphs would clearly indicate two things. The first is the knowledge of the first respondent that the order passed in the month of February, 1998 is not a law. Secondly, the issue on "admissibility of royalty as a cost item" came for scrutiny only in the case relating to CCTL, which was disposed of in March, 2002. Incidentally, the first respondent was also given the similar treatment. Therefore, all along, the first respondent has been agitating both before TAMP and the Government and before this Court that royalty as a cost item has to form part of the tariff to be fixed. Now, contrary to the said contention, reliance is made, based upon law and its change, for the first time in the year 2013 before the Arbitral Tribunal. In other words, the first respondent seeks to set aside not only the compromise memo but also the order passed in terms thereon by the Court through an indirect way and that too, when the matters are pending before the authorities apart from challenge being made to the order of the learned single Judge. Therefore, it is not only a case of approbation and reprobation but of parallel remedy, if any. Perhaps, the first respondent must have been well advised to go through the alternative route by eliminating the presence of TAMP and the Government of India while binding them over through the award.

20. A perusal of the statement of claim submitted by the first respondent would show that there was a law in force, which was changed subsequently to its detriment. The claim has also been made on the basis of the legitimate expectation. In the reply statement filed, it has been clearly stated that the first respondent was selected based upon the payment of royalty quoted by it in their bid and as per Clause 4.7.2 of the bid document, tariff will have to be revised once in three years. There were no notified guidelines to include royalty as a cost in the year 1998.

21. The Tribunal was pleased to grant the relief by giving statutory prescription to the so-called guidelines of the year 1998. It took into consideration the statement made by the Government that there was no clarity till the year 2003. It also relied upon the order Ex.C3 dated 08.12.1999 notified on 28.12.1999. From the above, a finding has been given that there was a law in force which, was subsequently changed. Accordingly, Article 14 of the license agreement was pressed into service. Applying the principle of *ubi jus ibi remedium* - there is no wrong without a remedy, the following relief was granted:

(a) The contract in question stands converted from royalty payment module to revenue share module for Berth No. VII with the claimant's liability to the revenue share fixed at 55.19%.



(b)As the contract provides for the PORT sending a proposal to TAMP (if amendment is done between the parties themselves without resorting to any proceeding either to a Court or a Tribunal) we declare that the PORT should send a proposal to TAMP based on this award with a request to act in terms of Ex.C57; while sending the proposal, the PORT shall send the reference tariff of Berth No.VIII to TAMP.

(c)Since there is an Award, the claimant is also entitled to approach any appropriate authority seeking a relief based on this Award.

(d)As far as prayer(d) is concerned, a declaration is given that the Bank Guarantee to be provided by the claimant to the respondent would be only in terms of this award namely on a revenue sharing model.

(e)Having regard to the long duration of the contract and in order to maintain cordiality between the parties, we direct each party to bear their own costs.

35.Accordingly, an Award is passed this 14th day of February 2014 at Chennai in favour of the claimant in terms of paragraphs 26 and 34 supra.

22.Learned senior counsel appearing for the appellant would submit that both the awards are liable to be set aside as the express terms of the agreement were rewritten. There is no law in vogue and therefore, there is no question of change in law. The first respondent has taken a contrary stand to suit its convenience. There is no finding on the greater issue on the existence of the law by which royalty paid would form part of the admissible cost in tariff fixation. There cannot be unilateral novation of contract. The first respondent cannot be given any benefit as it would not comply with its part of the compromise entered into though the appellant was not a party. The award has been passed contrary to law which would nullify the role of TAMP and the Central Government. In support of his contention, the learned senior counsel relied on the following judgments:

(i)Citi Bank N.A. Vs. Standard Chartered Bank and Others ((2004) 1 SCC 12)

(ii)Purvankara Projects Ltd., Vs. Hotel Venus International and Others (2007(10) SCC 33)

(iii)H.R.Basavaraj (Dead) by his Lrs. And Another Vs. Canada Bank and Others ((2010) 12 SCC 458)



(iv) Oil and Natural Gas Corporation Limited Vs. Western Geco International Limited ((2014) 9 SCC 263)

(v) Associate Builders Vs. Delhi Development Authority ((2015) 3 SCC 49)

(vi) I.T.C. Limited Vs. George Joseph Fernandes and Another ((1989) 2 SCC 1)

(vii) LIC of India and Another Vs. S. Sindhu ((2006) 5 SCC 258)

23. Learned senior counsel for the first respondent would submit that considering the scope of Section 34 of the Arbitration and Conciliation Act, 1996, no interference is required. The award is not against the justice and public policy. It is also not irrational. The present scenario would adversely affect the case of the first respondent. There has to be a remedy available in law. In support of his contention, the following decisions are relied upon:

(i) Associate Builders Vs. Delhi Development Authority ((2015) 3 SCC 49)

(ii) Swan Gold Mining Limited Vs. Hindustan Copper Limited ((2015) 5 SCC 739)

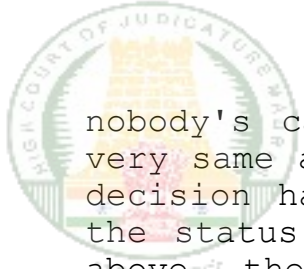
(iii) Rashtriya Ispat Nigam Ltd., Vs. Dewan Chand Ram Saran ((2012) 5 SCC 306)

(iv) Sumitomo Heavy Industries Ltd., Vs. ONGC ((2010) 11 SCC 296)

(v) Steel Authority of India Limited Vs. Gupta Brother Steel Tubes Ltd., ((2009) 10 SCC 63)

(vi) Kwaliti Manufacturing Corpn. Vs. Central Warehousing Corpn. ((2009) 5 SCC 142)

24. We are afraid that the abovesaid award of the Tribunal cannot be sustained in the eye of law. There is absolutely no reason as to why the first respondent has given up its case and approached the Tribunal. We are unable to find any law in existence. There is no material to hold that there was a law in existence prior to the deliberation held on 26th and 27th February 1998 and even if we term it as guidelines having statutory prescription. After all, the parties understood the position very clearly from the year 1999 onwards till the filing of the claim petition in the year 2013. Now what cannot be done directly is sought to be done indirectly. Till <https://hcservices.ecourt.gov.in/hcservices/> before the various forums including the statutory authorities and the Court, it was specifically contended by the first respondent that royalty should form part of a cost item in the tariff. It is



nobody's case that TAMP is not the statutory authority. When the very same authority itself is saying that even in the year 1998, no decision has been taken, we are at a loss to understand as to how the status of law can be given to a deliberation. As we discussed above, the deliberations took note of various factors which are required to be done on a larger level. Even on merits, it did not indicate the royalty being injected into fixation of tariff. We believe that the first respondent has approached the Tribunal with unclean hands to evade and circumvent the solemn undertaking given before the High Court through the compromise memo signed. A shift in the stand, though termed as strategic, can never be approved by a Court of law, especially when the proceedings are pending before the competent and jurisdictional authority. There is absolutely no explanation to the stand taken in the affidavit filed at the first instance before the High Court followed by deceptive silence in not taking a plea that the deliberations got themselves converted into a law.

25. The Tribunal has picked stray statements made here and there by the parties. The stand taken by the appellant is a qualified one even in the year 1999. A mere suggestion made cannot be a factor to hold that an earlier deliberation of a statutory authority attained the status of "law". Similarly, the statement made by the Government with respect to lack of clarity also will not make the deliberation as a law as defined under Article 14 of the lease agreement. After all, law gives a certainty. While one can say it can be interpreted but it cannot be stated as to whether it would amount to law or not unless there are attending circumstances to substantiate it. The best person to say is the authority constituted viz., TAMP. Unfortunately, the said authority is not the party before us. The conduct of the first respondent over the years also clearly shows that it had no doubt that the deliberations reduced into writing in the month of February, 1998 could never be called as a law. If that is the case, such a stand would have been taken long time back in all the proceedings before the Court.

26. We do not find any novation of contract. Such a novation as prescribed under Section 62 of the Indian Contract Act cannot be done unilaterally but with consent of parties. The appellant has refused the request made. Once the parties entered into the contract, they are bound by it and therefore, there is no question of varying its express terms on the ground of subsequent prejudice. The royalty payable has been fixed way back in the year 1998. Therefore, the first respondent was very well aware of it. Similarly, any discussion inter se parties by way of mediation and negotiation can never be put against each other. There is no question of estoppel and in any case, they cannot be related back to interpret the existence of a law. In CITI Bank N.A. vs. Standard Chartered Bank ((2004) 1 SCC 12), the question of novation of contract with specific reference to Section 62 of the Indian Contract Act was considered by the Apex Court. The following paragraph would be of importance:



47. Novation, rescission or alteration of a contract under Section 62 of the Indian Contract Act can only be done with the agreement of both the parties of a contract. Both the parties have to agree to substitute the original contract with a new contract or rescind or alter. It cannot be done unilaterally. The Special Court was right in observing that Section 62 would not be applicable as there was no novation of the contract. Further, it is neither Citi Bank's nor CMF's case nor even SCB's case that there was a tripartite arrangement between the parties by which CMF was to accept the liability. Such a case of novation does not arise for consideration. Shri Andhyarujina, the learned Senior Counsel for Citi Bank has also not seriously pressed for Citi Bank's case being considered by reference to Section 61 abovesaid.

27.A similar view has also been taken in *H.R. Basavaraj v. Canara Bank*, ((2010) 12 SCC 458). Quote :

18. Now let us examine Section 62 of the Act which reads as follows:

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

This section gives statutory form to the common law principle of novation. The basic principle behind the concept of novation is the substitution of a contract by a new one only through the consent of both the parties to the same. Such consent may be expressed as in written agreements or implied through their actions or conduct. It was defined thus by the House of Lords in *Scarf v. Jardine* [(1882) 7 AC 345 : (1881-85) All ER Rep 651 (HL)] : (AC p. 351)

"... that there being a contract in existence, some new contract is substituted for it, either between the same parties (for that might be) or between different parties; the consideration mutually being the discharge of the old contract."

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21. The learned counsel for the appellant further argued that if not a novation, there was at least an alteration in the terms of the original contract when the Bank had let the court-appointed Receivers to deal with the hypothecated property. In fact, the Bank had



also given another loan against the very same property which had been hypothecated also for the first loan. Alteration or variation in the terms of a contract under Section 62 of the Act implies that both parties have voluntarily agreed to the change in the terms of the agreement. In this case however, as can be gathered from the facts and circumstances of the present case, the Bank never had a say in the matter at all. In fact, it was due to a decree of the courts that the property in question had been entrusted in the hands of a Receiver. The Bank never had, in any of the dealings of its own volition, expressly accepted the change of the hands of the property ownership and thereby accepted a change in the liability. It might also be useful to recognise at this point of time, that the Receiver being a public appointed servant cannot bring about a change in the said contract so as to affect the legal consequences for the borrower or the guarantor. The Administrator appointed by the Government had indeed secured a loan towards the facilitation of running of the publications but had not created any new charge on the property.

28.A novation of contract can happen on the principle of sub silentio in terms of Sections 8 and 62 of the Indian Contract Act. For holding so, a waiver or a acquiescence as the case may be is a necessary component. As discussed above, we do not find any consent or waiver or acquiescence on the part of the appellant available in the present case. It is a simple case of a bad bargain, at best, if we have to accept the case of the first respondent in toto, notwithstanding the compromise entered into between the parties in which it was agreed to quantify the advantage or gains enjoyed by the first respondent and adjusted in the proposed new tariff.

29.On a perusal of the communication sent by the first respondent way back in the year 1999 we have no hesitation to hold that what was desired was only the consideration of royalty as a part of cost factor. Thus, it clearly exemplifies the fact that there was no law in existence to that effect prior in point of time. We also find that there was no finding rendered by the Tribunal and as well as the Court on the existence of law in force. Similarly, there is no material produced followed by a finding that such a law, even assuming was in force, as contended, had been given effect to. As rightly submitted by the learned senior counsel, subsequent decisions made thereafter cannot have an application retrospectively, resulting in the contract being rewritten.

30.It is trite that a party claiming compensation must first establish a breach. Such a breach must be the cause of loss of the profit. There cannot be any compensation towards damages for a bad bargain.



31. The abovesaid principle has been well laid by the Apex Court in *Kanchan Udyog Limited Vs. United Shirts Limited* ((2017) 8 SCC 237), which in turn placed reliance upon two decisions of the English Court. The following is the appropriate paragraph:

31. In *C & P Haulage (supra)*, which considers *Cullinane (supra)* also, it has been observed as follows:

"The law of contract compensates a plaintiff for damages resulting from the defendant's breach; it does not compensate a plaintiff for damages resulting from his making a bad bargain. Where it can be seen that the plaintiff would have incurred a loss on the contract as a whole, the expenses he has incurred are losses flowing from entering into the contract, not losses flowing from the defendant's breach. In these circumstances, the true consequence of the defendant's breach is that the plaintiff is released from his obligation to complete the contract-or in other words, he is saved from incurring further losses. If the law of contract were to move from compensating for the consequences of breach to compensating for the consequences of entering into contracts, the law would run contrary to the normal expectations of the world of commerce. The burden of risk would be shifted from the plaintiff to the defendant. The defendant would become the insurer of the plaintiff's enterprise. Moreover, the amount of damages would increase not in relation to the gravity or consequences of the breach but in relation to the inefficiency with which the plaintiff carried out the contract. The greater his expenses owing to inefficiency, the greater the damages."

32. It is a case of the first respondent approaching the forum without complying its part. Therefore, the principle of fairness cannot be made applicable to its case. Such a principle can never be a substitute for express terms of a contract as held by the Apex Court in *Puravankara Projects Ltd. v. Hotel Venus International* ((2007) 10 SCC 33). The following paragraph is the summation:

33. Just as the principles of natural justice ensure fair decision where function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action when the function is administrative. But the said principle cannot be invoked to amend, alter or vary the expressed terms of the contract between the parties.

33. In *Moti Ram v. Ashok Kumar*, ((2011) 1 SCC 466), the Apex Court has held that the offers, proposals and counter offers can never amount to a concluded contract.

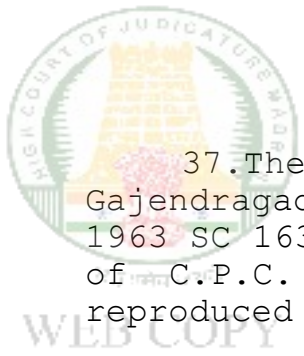
Quote:

2. In this connection, we would like to state that mediation proceedings are totally confidential proceedings. This is unlike proceedings in court which are conducted openly in the public gaze. If the mediation succeeds, then the mediator should send the agreement signed by both the parties to the court without mentioning what transpired during the mediation proceedings. If the mediation is unsuccessful, then the mediator should only write one sentence in his report and send it to the court stating that the "mediation has been unsuccessful". Beyond that, the mediator should not write anything which was discussed, proposed or done during the mediation proceedings. This is because in mediation, very often, offers, counter offers and proposals are made by the parties but until and unless the parties reach to an agreement signed by them, it will not amount to any concluded contract. If the happenings in the mediation proceedings are disclosed, it will destroy the confidentiality of the mediation process.

34. The award passed by the Tribunal was put in challenge, invoking Section 34 of the Arbitration and Conciliation Act, 1996. We are sorry to note that the District Court was not only overawed but also awestruck and thus carried away by the condition of the learned Arbitrators as against the award and thus failed to perform its role as required. After quoting substantially the reasons adopted by the Arbitral Tribunal and the judgments produced by the parties, the award was duly confirmed. After all, the Court is concerned with the legality of the award passed. We do not propose to see anything more than this.

35. Substantial arguments have been made on the scope and ambit of Section 34 and thus Section 37 of the Arbitration and Conciliation Act, 1996. We are quite conscious about the scope of Section 34 leading to Section 37 of the Arbitration and Conciliation Act, 1996. We do feel that restrictive nature of judicial scrutiny envisaged does not apply to the case on hand. We are not dealing with a case on facts. Rather it is based upon a finding where there are no facts available. It is a case of findings without any factual matrix. It is like an old man with a poor vision searching for a black cat in a dark room at midnight when the cat itself is not there. After perusing the entire records, we are not able to find any law as sought to be projected by the first respondent. If there is no law, there cannot be any change of law. If there is no change of law affecting the rights of the first respondent substantially, there cannot be any relief.

36. When a power is circumscribed by the statute, it has to be respected and followed. It cannot be a gamble or a lottery, in the sense that the court can go into the issue by examining the issue that has been barred by law. The legal power has to be exercised by the Courts, keeping its boundaries prescribed.



37. The aforesaid principle has been dealt with by Justice Gajendragadkar wayback in the year 1963 in Ramappa Vs. Bojjappa (AIR 1963 SC 1633). The Supreme Court dealt with the scope of Section 100 of C.P.C. For better appreciation, the relevant paragraph is reproduced hereunder:

In other words, the learned Judge seems to think that the adequacy or sufficiency of evidence to sustain a conclusion of fact is a matter of law which can be effectively raised in a second appeal. In our opinion, this is clearly a misconception of the true legal position. The admissibility of evidence is no doubt a point of law, but once it is shown that the evidence on which courts of fact have acted was admissible and relevant, it is not open to a party feeling aggrieved- by the findings recorded by the courts of fact to contend before the High Court in second appeal that the said evidence is not sufficient to justify the findings of fact in question. It has been always recognised that the sufficiency or adequacy of evidence to support a finding of fact is a matter for decision of the court of facts and cannot be agitated in a second appeal. Sometimes, this position is expressed by saying that like all questions of fact, sufficiency or adequacy of evidence in support of a case is also left to the jury for its verdict. This position has always been (1) (1890) L.R. 17 I.A. 122 (2) [1963] 3 S.C. R. 604. accepted without dissent and it can be stated without any doubt that it enunciates what can be properly characterised as an elementary proposition. Therefore, whenever this Court is satisfied that in dealing with a second appeal, the High Court has, either unwittingly and in a casual manner, or deliberately as in this case, contravened the limits prescribed by s. 100, it becomes the duty of this Court to intervene and give effect to the said provisions. It may be that in some cases, the High Court dealing with the second appeal is inclined to take the view that what it regards to be justice or equity of the case has not been served by the findings of fact recorded by courts of fact; but on such occasions it is necessary to remember that what is administered in courts is justice according to law and considerations of fair play And equity however important they may be, must yield to clear and express provisions of the law. If in reaching its decisions in second appeals, the High Court contravenes the express provisions of section 100, it would inevitably introduce in such decisions an element of disconcerting unpredictability which is usually associated with gambling; and that is a reproach which judicial process must constantly and scrupulously endeavour to avoid.



38. In Maru Ram etc., Vs. Union of India and Another ((1980) AIR 2147), Justice Krishna Iyer in his usual flamboyance expressed his views on the legal power. "For no legal power can run unruly like John Gilpin on the horse but must keep sensibly to a steady course."

39. While it can be stated that the power has to be exercised in tune with Section 34 of the Arbitration and Conciliation Act, 1996, it can never be stated that the award can never be interfered with, whatsoever may be the reason. Unfortunately, we are not dealing with a case of interpreting the agreement or on facts. In the light of the discussion made above, there is no scope for a possible different view.

40. In our considered view, the Tribunal, without any basis, changed the very terms of the agreement *inter se* parties. Even a subsequent change in law is also not available since all the orders passed by the TAMP and the Government of India have been set aside. We do not agree with the contention of the learned senior counsel for the first respondent that it has got no remedy. It is not a case of no remedy but it is a case of seeking alternative remedy after electing another one, which is yet to be concluded. The Tribunal has committed jurisdictional error in indirectly binding the Government of India and TAMP with the award passed. The non-compliance of the compromise memo and the reason for taking contrary stand coupled with the delay and adopting the subsequent route despite the earlier one pending were also not taken into consideration.

41. We do not wish to dwell much into the legal issues as they are already dealt with in extenso by the Apex Court in the much celebrated decision in Associate Builders Vs. Delhi Development Authority ((2015) 3 SCC 49). Quote:

19. When it came to construing the expression "the public policy of India" contained in Section 34(2)(b) (ii) of the Arbitration Act, 1996, this Court in *ONGC Ltd. v. Saw Pipes Ltd.* [(2003) 5 SCC 705 : AIR 2003 SC 2629] held: (SCC pp. 727-28 & 744-45, paras 31 & 74)

"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 policy. 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 [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] 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:

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- (a) fundamental policy of Indian law; or
- (b) the interest of India; or
- (c) justice or morality, or
- (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.

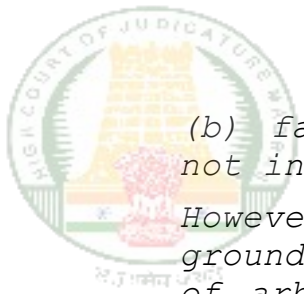
74. In the result, it is held that:

(A) (1) The court can set aside the arbitral award under Section 34(2) of the Act if 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.

(2) The court may set aside the award:

- (i) (a) if the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties,
- (b) failing such agreement, the composition of the Arbitral Tribunal was not in accordance with Part I of the Act,
- (ii) if the arbitral procedure was not in accordance with:



(b) failing such agreement, the arbitral procedure was not in accordance with Part I of the Act.

However, exception for setting aside the award on the ground of composition of Arbitral Tribunal or illegality of arbitral procedure is that the agreement should not be in conflict with the provisions of Part I of the Act from which parties cannot derogate.

(c) If the award passed by the Arbitral Tribunal is in contravention of the provisions of the Act or any other substantive law governing the parties or is against the terms of the contract.

(3) The award could be set aside if it is against the public policy of India, that is to say, if it is contrary to:

- (a) fundamental policy of Indian law; or
- (b) the interest of India; or
- (c) justice or morality; or
- (d) if it is patently illegal.

(4) It could be challenged:

- (a) as provided under Section 13(5); and
- (b) Section 16(6) of the Act.

(B)(1) The impugned award requires to be set aside mainly on the grounds:

(i) there is specific stipulation in the agreement that the time and date of delivery of the goods was of the essence of the contract;

(ii) in case of failure to deliver the goods within the period fixed for such delivery in the schedule, ONGC was entitled to recover from the contractor liquidated damages as agreed;

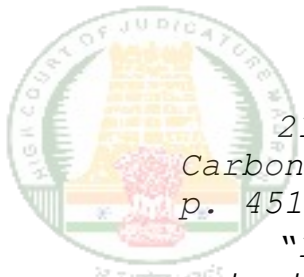
(iii) it was also explicitly understood that the agreed liquidated damages were genuine pre-estimate of damages;

(iv) on the request of the respondent to extend the time-limit for supply of goods, ONGC informed specifically that time was extended but stipulated liquidated damages as agreed would be recovered;

(v) liquidated damages for delay in supply of goods were to be recovered by paying authorities from the bills for payment of cost of material supplied by the contractor;

(vi) there is nothing on record to suggest that stipulation for recovering liquidated damages was by way of penalty or that the said sum was in any way unreasonable;

(vii) in certain contracts, it is impossible to assess the damages or prove the same. Such situation is taken care of by Sections 73 and 74 of the Contract Act and in the present case by specific terms of the contract."



21. In *Hindustan Zinc Ltd. v. Friends Coal Carbonisation* [(2006) 4 SCC 445] , this Court held: (SCC p. 451, para 14)

"14. The High Court did not have the benefit of the principles laid down in *Saw Pipes* [(2003) 5 SCC 705 : AIR 2003 SC 2629] , and had proceeded on the assumption that award cannot be interfered with even if it was contrary to the terms of the contract. It went to the extent of holding that contract terms cannot even be looked into for examining the correctness of the award. This Court in *Saw Pipes* [(2003) 5 SCC 705 : AIR 2003 SC 2629] has made it clear that it is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India."

24. In *DDA v. R.S. Sharma and Co.* [(2008) 13 SCC 80] , the Court summarised the law thus: (SCC pp. 91-92, para 21)

"21. From the above decisions, the following principles emerge:

- (a) An award, which is
 - (i) contrary to substantive provisions of law; or
 - (ii) the provisions of the Arbitration and Conciliation Act, 1996; or
 - (iii) against the terms of the respective contract; or
 - (iv) patently illegal; or
 - (v) prejudicial to the rights of the parties;is open to interference by the court under Section 34(2) of the Act.
- (b) The 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.
- (c) The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.
- (d) It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.

With these principles and statutory provisions, particularly, Section 34(2) of the Act, let us consider whether the arbitrator as well as the Division Bench of the High Court were justified in granting the award in respect of Claims 1 to 3 and Additional Claims 1 to 3 of



the claimant or the appellant DDA has made out a case for setting aside the award in respect of those claims with reference to the terms of the agreement duly executed by both parties."

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42.Arguments are also made placing reliance upon Section 28 (3) of the Arbitration and Conciliation Act, 1996. A perusal of the aforesaid section as it stood prior to 23.10.2015 would make it clear that the Arbitral Tribunal shall decide in accordance with the terms of the contract. The word "shall" assumes greater importance. The further words "and shall take into account the usages of trade applicable to the transaction" has to be read along with the first part. Therefore, the reasoning of the Arbitral Tribunal in this regard cannot be sustained. The following paragraph in Associate Builders Vs. Delhi Development Authority ((2015) 3 SCC 49) would be of relevance:

42.3.(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.The conduct of a party plays a pivotal role in the construction of a contract. This issue has been dealt with by the Apex Court in McDermott International Inc. Vs. Burn Standard Co. Ltd., ((2006) 11 SCC 181), in the paragraph hereunder:

"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]).

The aforesaid decision has been quoted with approval in *Associate Builders Vs. DDA* ((2015) 3 SCC 49).

44. Though the learned senior counsels for the parties made reliance upon various other decisions to substantiate their respective contentions, we do not propose to go into the same in view of our findings above. As discussed above, the law is well settled. Our discussion would clearly show that interference is required as the case would come under the purview of Section 34 of the Arbitration and Conciliation Act, 1996. After all, the contingencies mentioned therein are to be seen from case to case. They may also be overlapping with each other. Thus, we find it is a fit case where our interference is required, though at the appellate stage.

45. Accordingly, the award passed by the Arbitral Tribunal dated 14.02.2014, as confirmed by the Principal District Court, Tuticorin in Arb.O.P.No.260 of 2015 dated 25.02.2016 stands set aside and the Civil Miscellaneous Appeal is allowed. No costs. Consequently, connected C.M.P. is closed.

After pronouncing the order, the learned Senior Counsel appearing for the respondents would submit that the order passed may be kept in abeyance for a period of two weeks.

2. Learned counsel appearing for the appellant seeks time to get instructions.

3. Post the matter on 02.11.2017 at 2.00 p.m. in Chamber.

Sd/-

01.11.2017

This Appeal having been posted on this day (02/11/2017) for further orders in pursuance to the order of this Court dated 01/11/2017, and made herein in the presence of the abovesaid Advocate, the Court made the following Order.



We have posted the matter today i.e., on 02.11.2017, in view of the request made by the learned Senior Counsel appearing for the first respondent seeking the demand, as a consequence of our order passed, to be kept in abeyance for some time.

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2.We have directed the learned Counsel on record for the appellant to get instruction in this regard.

3.Today, the learned Senior Counsel for the appellant fairly submitted that the actual dues will be quantified and informed to the first respondent within a week's time. Thereafter, the payment may be deferred for a period of three weeks.

4. The fair statement made by the learned Senior counsel appearing for the appellant stands recorded.

Sd/-

Assistant Registrar(CSII)

/True Copy/

Sub-Assistant Registrar

To

1.Hon'ble Mr.Justice R.Balasubramanian (Retd.,)
No.5, Tiger Varadhachariar Road,
1st Street, Kalashetra Colony,
Besant Nagar, Chennai - 90.

2.Hon'ble Dr.Justice AR.Lakshmanan (Retd)
Dev Regency 1st Floor,
No.11, 1st Main Road, Gandhi Nagar,
Adyar, Chennai - 20.

3.Hon'ble Mr. Justice S.Jagadeesan (Retd.)
Old No.23, New No.53, 3rd Main Road,
Gandhi Nagar, Adyar, Chennai -600 020.

+One cc to Mr.VR.Shanmuganathan, Advocate, SR.No.84884

+One cc to Mr.K.Prabhakar, Advocate, SR.No.85296

mmi

RL/6C/24P/SKN/RSK/SAR1/11/2/2017

ORDER MADE IN
C.M.A. (MD) No.345 of 2016
01/11/2017