



IN THE HIGH COURT OF JUDICATURE AT MADRAS

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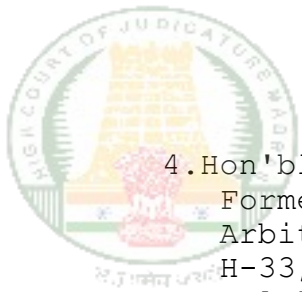
THE HON'BLE MS.INDIRA BANERJEE, CHIEF JUSTICE
and
THE HON'BLE MR. JUSTICE ABDUL QUDDHOSE

O.S.A.Nos.20 and 59 of 2014

Chennai Container Terminal Private Limited,
Having its Registered Office at
Narottan Morajee Road,
Ballard Estate, Mumbai - 400 001
and its Chennai office at
Chennai Port Trust Administrative Building,
Ground Floor, No.1, Rajaji Salai,
Chennai - 600 001. .. Appellant
in OSA.20 of 2014
& 1st respondent
in OSA.59 of 2014

vs

- 1.The Board of Trustees of
Chennai Port Trust,
rep. by its Chairman,
Rajaji Salai,
Chennai - 600 001. .. 1st Respondent
in OSA.20 of 2014
& Appellant
in O.S.A.59 of 2014
- 2.Hon'ble Mr.Justice R.C.Lahoti,
Former Chief Justice of India,
Presiding Arbitrator,
B-56, Sector 14, Noida,
UP - 201 301.
- 3.Hon'ble Mr.Justice R.Jayasimha Babu,
Former Judge, Madras High Court
(Arbitrator)
612, Raj Mahal Vilas Extension,
2nd Stage, 3rd Block,
Bangalore - 560 094.



4.Hon'ble Mr.Justice S.A.Kader,
Former Judge, Madras High Court,
Arbitrator,
H-33, Parvathi Street,
Kalakshetra Colony,
Besent Nagar,
Chennai - 600 090.

.. Respondents 2 to 4
in both OSAs.

Appeals filed under Order XXXVI, Rule 9 of Original Side Rules read with Clause 15 of Letters Patent against the order dated 08.1.2014 passed in O.P.No.493 of 2013 on the file of this Court.

O.P.No.493/2013:

This Original Petition is filed under Section 34 of the Arbitration and conciliation Act, 1996, challenging an award passed by an Arbitral Tribunal, setting aside a notice of termination of a concession agreement and directing the petitioner to refund an amount of Rs.63,86,21,493/-.

For Appellant .. Mr.Novroz seervai
in OSA.20/2014 Senior Counsel
& 1st respondent for M/s.S.Raghunathan
in OSA.59/2014 M/s.Farhad Sorabjee

For 1st Respondent.. Mr.T.R.Rajagopalan
in OSA.20/2014 Senior Counsel
& appellant for M/s.R.Karthikeyan
in OSA.59/2014 R.Bharanidharan
for 1st respondent

COMMON JUDGMENT

Ms.Indira Banerjee, Chief Justice

The appeal, being O.S.A.No.20 of 2014, filed by M/s.Chennai Container Terminal Private Limited, hereinafter referred to as "Chennai Container", is against a judgment and order dated 8.1.2014 passed by the learned Single Judge, in a petition under Section 34 of the Arbitration and Conciliation Act, 1996, hereinafter referred to as "the 1996 Act", for setting aside of the arbitral award dated 26.11.2012 passed by an Arbitral Tribunal comprising the former Chief Justice of India, R.C.Lahoti, and two other Retired Judges of this Court.

2. To develop and manage the Chennai Container Terminal and to make it a hub port, through private sector participation, the Ministry of Surface Transport, Government of India, invited offers from International parties on 20.11.1997. In response to the invitation, three entities submitted their bids. One of them was a company by name P & O Australia Ports Pty. Limited.



3. Australia Ports Pty. Limited formed a consortium along with three other companies, namely, Jakari Express Private Limited, Mumbai; Meherji Cassinath Limited, Mauritius and Chettinad Logistics Private Limited. The offer of consortium headed by Australian company was provisionally accepted. Thereafter, the said Australian Ports Pty. Limited along with its consortium members, floated the company Chennai Container Terminal Private Limited on 12.9.2000 for implementation of the project.

4. A license agreement was executed between Chennai Container and the Board of Trustees for the Chennai Port, hereinafter referred to as "the Chennai Port Trust", some of the relevant provisions of which are set out herein below:

Article I: Definition and Interpretations:

'Hub Port' is a 'direct call Port / load center Port' which aggregates containers from the places of origin through feeder vessels and dispatches them to the destination / transshipment ports through larger vessels.

"Main Line Vessels" means large container vessel plying between Hub Port without any intermittent transshipment in the neighbouring Ports.

Article 1.03 this Agreement constitutes the entire understanding between the parties regarding the project and supersedes all previous written and/or oral representations and/or arrangements regarding the project. If there is any aspect of the Project not covered by any of the provisions of this Agreement, then and only in that event, reference may be made by the parties to the Request for Proposals issued by the Ministry of Surface Transport including addendum, clarifications given in writing and the submissions of the Licensee and the technical and financial proposals submitted by the Licensee.

Any amendment, addition or variation to this Agreement shall be valid and binding only if the same are mutually agreed upon by the Parties, approved by the GOI and executed in writing and signed by the Licensor and the Licensee.

1.03(h) Any word or expression used in this Agreement shall, unless defined or construed in



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this Agreement, bear its ordinary English meaning.

Article III

Article III of the License Agreement deals with Project: Requirements, Rights and Obligations. It has 12 sub clauses: 3.01: Cost of Implementation, Operation and Maintenance; 3.02 Independent Engineer; 3.03 Preparation of Designs and Drawings; 3.04 Review and Approval of the Designs and Drawings; 3.05 Environmental Clearance; 3.06 Investment; 3.07 Construction Phase; 3.08 Operations & Maintenance Phase; 3.09 Main Line Vessels; 3.10 Infrastructure Development Cess by a competent Government Authority; 3.11 Personnel Related Obligations; and 3.12 Utilities and Services.

3.09 Main Line Vessels:

a. The Licensee shall develop Chennai as a Hub Port and ensure that within 3 years from the Date of Commercial Operation, Main Line Vessels also call on the Port. It shall be condition of the License that the following minimum throughput shall be contributed by non-transshipment traffic i.e., containers not transshipped in the neighbouring ports of Colombo, Singapore, Port Klang, Dubai and Salalah. Failure on the part of the Licensee to bring in the following percentage of non-transshipment traffic consecutively for a period of 3 years shall attract termination as per Article 10.01 (a) (viii) (m).

- 20% of Total Traffic in the 3rd year
- 25% of Total Traffic in the 4th year and
- 30% of Total Traffic from the 5th year onwards.

b. In the event of shortfall in the non-transshipment traffic, the Licensee shall pay the Licensor compensation equivalent to the amount of royalty payable by the Licensee on the shortfall in traffic.

c. The intention of the Licensor to develop Chennai as Hub Port is not to provide only for direct sailing between neighbouring ports and Chennai. The purpose of privatization of the terminal is to develop Chennai as a Hub Port and not to get compensation for the failure of the Licensee to fulfill his commitments. If the Licensee cannot develop the Chennai as a Hub Port, the Licensor



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shall be at liberty to terminate the License.

5.01 Guaranteed Traffic

The Licensee guarantees payment of royalty for the following minimum throughput:

i) Stage 1:	From the date of commencement and up to 12 Months after the extended terminal is handed over by the Licensor to the Licensee, the minimum guaranteed traffic shall be as under: a) 1st Year - 3,50,000 TEUs. b) 2nd Year - throughput for the applicable period of the second year of stage 1 shall be worked out on proportionate basis @ 4,00,000 TEUs for the whole of the second year
ii) Stage 2:	From the end of stage 1 and up to start of stage 3, the minimum guaranteed traffic shall be 5,00,000 TEUs per year.
iii) Stage 3:	If the conversion of the Iron Ore Berth into container berth is approved by competent authority, the Licensor has the obligation to hand it over to the Licensee and in the same way Licensee is obligated to accept and convert it into a container berth at Licensee's cost. After one year of handing over of the Iron Ore Berth by the Licensor, additional throughput to be guaranteed by the Licensee shall be as follows: a) 1st Year - 1,50,000 TEUs b) 2nd Year onwards - 3,00,000 TEUs

5.02 Royalty Payment

a) The Percentage of gross revenue earned from operations of the container terminal by levy of tariff that shall be shared with the Licensor by the Licensee shall be 37.128%. The Licensee shall pay the Licensor 37.128% of all revenue earned from operation, storage or in any other form recovered / charged from users.



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Any discounting or rebating in traffic shall not effect the amount of royalty payable by Licensee which shall be calculated on the basis of the amount fixed by the TAMP or the actual tariff recovered / charged for the actual throughput whichever is higher whether or not Licensee is able to recover it or not.

b) In respect of revenue earned from container throughput, in the event that the throughput is equal to or higher than the levels stated in 5.01, the Licensee shall pay to the Licensor royalty per Month in Indian Rupees which shall be the higher of the following:

- i) 37.128% of the actual tariff recovered/charged for the actual throughput; or
- ii) 37.128% of the tariff rates approved by TAMP for the actual throughput.

c) In the event there is a shortfall of traffic as per Article 5.01, the Licensee shall pay to the Licensor a shortfall amount proportionate to the revenue recovered / charged as per 5.02 (a) for the year.

d) The payment of royalty shall commence from the Month in which the Date of Commercial Operation occurs and the amount of royalty calculated as per the following formula shall be paid Monthly in advance for each Month, latest by a date falling 7 Days before the end of the previous Month:

$$37.128\% \times (\text{traffic levels stated in Article 5.01} \times \text{Traffic rate approved by TAMP})$$

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e) After the end of each Month, the Licensee shall send to the Licensor an account of the actual amount collected based on the actual traffic and the tariff rate actually charged. The Licensee shall pay to the Licensor any shortfall between the advance royalty paid pursuant to Article 5.02(d) and the actual royalty payable in accordance with Articles 5.02(a), 5.02(b) and 5.02(c).

f) Royalty amounts remaining unpaid on respective due dates would carry interest @ 2% per Month from the due date till the date of payment or realization thereof.



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5.06. Performance Security

- a. The Licensee shall provide the Licensor with a performance security on the Date of Commercial Operation and at the beginning of each succeeding year of operation.
- b. This performance security shall be for an amount equal to the estimated revenue to the Licensor based on the minimum guaranteed traffic.
- c. The performance security shall be irrevocable and unconditional and shall be of a nationalized bank having its offices/branch in the city of Chennai and encashable at Chennai.

5.07 Default of Licensee and Recovery of Amount Due

In the event the Licensee fails to pay to the Licensor any amount due on it for three consecutive Months, then such non-payment shall be construed as default on the part of Licensee and the Licensor, without any notice to the Licensee, shall forfeit the performance security and shall be entitled to terminate the agreement. Any sum remaining unpaid by the Licensee to the Licensor shall be treated as debt due from the Licensee and the same shall be recovered by the Licensor by adjusting the same from any amount payable by it to the Licensee or in accordance with the Applicable Law.

5.08 Delay in Payment

Any payments to be made by the Licensee to the Licensor or vice versa remaining unpaid shall carry interest @ 2% per Month or part thereof from the due date to the date of payment or the date of realization thereof.

10.01.i. The Licensee Event of Default:

The Licensee Event of Default means including but not limited to any of the following events unless such an event has occurred as a consequence of the Licensor Event of Default or a Force Majeure Event:

(m) The Licensee fails to achieve the minimum guaranteed non-transshipment traffic as per provisions under Article 3.09 for a period of 3 consecutive years.

10.01(i)(ii). Any representation made or warranties given by the Licensee under this Agreement is found to be false or misleading.



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8. It appears that disputes and differences arose between Chennai Container and Chennai Port Trust, inter alia, over the following issues:

- (i) Notice dated 6.3.2008 from Chennai Port Trust to Chennai Container informing them of their intention of the Chennai Port Trust to terminate the licence agreement.
- (ii) Encashment by Chennai Port Trust of the performance guarantee of Rs.46.08 crores on the ground that Rs.63.86 crores was allegedly payable by Chennai Container to Chennai Port Trust as compensation for the alleged shortfall in percentage of non-transshipment traffic required to be achieved by the Chennai Container.
- (iii) Letter dated 16.4.2008 of Chennai Port Trust calling for fresh bank guarantee of Rs.46.08 crores towards performance bank guarantee.
- (iv) Letter dated 4.6.2008 of Chennai Port Trust demanding a sum of Rs.27,55,42,178/- towards the alleged shortfall in non-transshipment traffic for the year 2006-2007.

9. In an attempt to resolve the disputes, a meeting was held on 10.3.2008 between the representatives of Chennai Container and the representatives of the Chennai Port Trust and it was resolved to constitute a Committee to look into the quantum of non-transshipment traffic. Pending final decision, Chennai Port Trust demanded Rs.17 crores from Chennai Container after adjustment of the bank guarantee amount already encashed. Chennai Container remitted Rs.17,78,21,493/- to Chennai Port Trust on 24.3.2008.

10. The disputes and differences that had arisen between Chennai Container and Chennai Port Trust were referred to arbitration of an Arbitral Tribunal consisting three retired Judges.

11. On the basis of the pleadings filed before the learned Arbitral Tribunal, the learned Arbitral Tribunal framed the following issues:

"1. Whether the arbitration is premature when the claimant has sought for a committee and committee is seized of the matter ?

2(a). What does the term 'non transshipment container' mentioned in Article 3.09 of the License Agreement mean and constitute ?

(b). Whether the containers originating in and



(c) Whether the respondent has followed the procedure for a 'notice of intent to terminate' as provided for in Article 11.01 of the License Agreement ?

(b) Assuming that the respondent was entitled to encash the performance security bank guarantee, has the respondent followed the requisite procedure under the License Agreement before invoking the bank guarantee ?

(b) Whether the respondent is entitled to retain the amount of Rs.46.08 Crores appropriated by invocation of the performance guarantee No.GTEBOM030058 furnished by the claimant under the provisions of Article 5.01 of the License Agreement?

11. Whether the claimant is entitled to raise the demand for Rs.27,55,42,178/- faxed to the claimant on 5th June 2008 or any other or further demand on the ground of shortfall in non transshipment traffic ?

13. Whether the respondent is entitled to counter claim and cost ?

15. Relief and costs."

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13. Observing that the interpretation of Article 3.09 of the contract was the core of the dispute between Chennai Container and Chennai Port Trust, the Arbitral Tribunal proceeded to examine the said Article.

14. After discussing Article 3.09 elaborately, the Arbitral Tribunal (by majority) observed and held:

"6.7. The dispute between the parties now is not with regard to Licensee's obligations to develop Chennai as a Hub Port, although it is the case of the Claimant that it has in fact discharged its obligations in that regard; that Main Line Vessels have been coming to Chennai since 2002; that 500 Main Line Vessels have come to Chennai Container Terminal between 2001-2008 and that the Respondent itself has declared Chennai as being a Hub Port by declaring on its website that "the Port with three ducts, twenty three berths and drafts ranging from 12 mtrs. to 16.5 mtrs. has become a Hub Port for containers". The Respondent, even while admitting such a statement having been made on its website, has taken the stand that Chennai is only an "emerging Hub Port and not a Hub Port".

6.8. The only action that can be taken under this Article against the Claimant under Article 3.09 (c) for not developing Chennai as a Hub Port is the termination of the License. The Notice of Intent to Terminate issued by Respondent on 5.3.2008 is not for any alleged failure on the part of the Claimant to comply with its obligation regarding development of Chennai as a Hub Port.

6.9. The Claimant has stated that within seven months of the commencement of the operations in the year 2002, Main Line Vessels started calling at the Port and thereafter 500 Main Line Vessels have called at the Port between 2002 and 2008. The fact that Main Line Vessels have been calling at the Port after the Claimant took over is not disputed by the Respondent. The dispute is only with regard to number of vessels called. Respondent has not furnished any numbers or data of its own; but has only questioned the accuracy of the numbers furnished by the Claimant. Claimant has not led any evidence about the number of Main Line Vessels, which have called at this Terminal. There is no prescription of any minimum number of calls of Main Line Vessels. The Respondent's



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Notice of Intent to Terminate does not refer to Main Line Vessels at all.

6.10. The third concept is Transshipment. The Article casts an obligation on the Licensee to ensure that the percentage of total throughput as set out in Article 3.09 (a) shall be non-transshipment traffic. Transshipment is not defined in the Agreement.

.....

6.15. The Merriam-Webster dictionary mentions that this word appears to have been used from the year 1792. The Wikitionary gives the etymology as trans+shipment a noun, and defines it as: 1. Transfer of goods from one means of transport to another, and 2. The shipment of goods via an intermediate destination.

6.16. The Business Dictionary Online website states that "transshipment are usually made 1) where there is no direct air, land or sea link between the consignor's and consignee's countries, (2) where the intended port of entry is blocked, or (3) to hide the identity of the port or country of origin. Because transshipment exposes the shipment to a higher probability of damage or loss, some purchase orders or letters of credit specifically prohibit transshipment."

6.17. In the Oxford English Dictionary, with reference to the word 'Trans', it is stated "the Latin proposition Trans across, to or on the farther side of beyond, over, also used in combination. In English, trans occurs in compounds representing those already used in Latin and any other form analogously from Latin elements or in which the second element is not English or other non-Latin word".

"Trans as preposition used in conjunction with the English words to convey the sense of movement such as across, or on the farther side, beyond, over etc. Transshipment is the movement or the shifting of the cargo from one ship to another. The container in which the goods are placed are moved from one ship to another. The shipment of such goods continues on the ship to which the cargo is



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transshipped. Such transshipment is not the same as the discharge of cargo. Discharge denotes the end of the journey of that cargo on that ship from which it was discharged. Though the journey of the cargo from the ship from which it was moved comes to an end, the cargo itself continues to be in the process of being carried further, but on a different ship on which the cargo is now placed."

6.18. The crucial sentence in Article 3.09(a) on the proper construction of which the Parties are in serious disagreement read thus:

"It shall be condition of the License that the following minimum throughput shall be contributed by the non-transshipment traffic, i.e., containers not transshipped in the neighbouring Ports of Colombo, Singapore, Port Klang, Dubai and Salalah".

6.19. Non-transshipment traffic for the purpose of this Article, as also for the purpose of License Agreement, is defined here by use of the letters 'i.e.' after 'transshipment traffic', as 'containers not transshipped in the neighbouring Ports of Colombo, Singapore, Port Klang, Dubai and Salalah'.

6.20. Non-transshipment therefore, for the purpose of this Article, is equated to containers not transshipped in the five neighbouring Ports. The manner in which this Article is drafted using double negatives is not the ideal way of setting out what was intended to be stated. However, the meaning of the Article is clear. It is only containers transshipped in the five named neighbouring Ports that are regarded as transshipment traffic for the purposes of this Article and therefore required to be excluded from any computation of non-transshipment traffic.

6.21. Put another way, the entire throughput, excluding the containers transshipped at the five named Ports, would constitute Non-Transshipment Traffic. For purpose of Article 3.09, there are only two categories: (i) Transshipped Containers, and (ii) Non-Transshipped Containers.



6.22. It follows from this that the Containers originating from and finally destined to these named five neighbouring Ports would constitute Non-Transshipment Traffic."

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15. The learned Tribunal (by majority) interpreted non transshipment traffic in Article 3.09 of the contract to include containers originating from and finally destined to the ports of Colombo, Singapore, Port Klang, Dubai and Salalah. Only containers transshipped at the aforesaid five ports were to be excluded from non transshipment traffic.

16. Chennai Port had, in support of its argument that non transshipment traffic would exclude traffic to the five neighbouring ports named above, emphasised on a reply furnished by the Government to P & O Australia Ports Pty. Limited in response to a request to modify the language of Article 3.09(a).

17. The learned Tribunal (by majority) held as under:

"6.32. The information / Reply furnished by the Government in May 2000 to P&O Australia was with respect to their queries that the condition regarding Non Transshipment traffic being very unusual, and the associated penalty very severe, that requirement may be deleted or amended. While raising those queries, P&O Australia had also stated that as the Port operator had no commercial leverage with shipping lines, the port trust may agree to give preferential treatment to shipping lines and that the NTT requirement could be enforced only after the draught is increased to 14.5 m. The Government of India rejected these requests and while doing so, stated that the terminal has to be operated on a common user non discriminatory basis, that any increase in the draught should be done by licensee at its own expense; and the penalty for shortfall in NTT has been included to ensure that commitment to bring in main line vessels is fulfilled.

6.33. The information given on 13.8.2001 by the Minister in the Rajya Sabha, inter alia, was as under:

"The Non Negotiable Conditions have been finalized and one of the conditions stipulates that the licensee will develop Chennai as a Hub Port and ensure that within three years, main line vessels will call on the Port bringing in minimum throughput by way of non-transshipment traffic, ie.,



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container not transshipped from the neighbouring Ports of Colombo, Singapore, Port Klang, Dubai and Salalah to the tune of 20 percent of total traffic in the third year, 25 percent of total traffic in the 4th year and 30% of total traffic from the 5th year onwards."

.....

6.36. With regard to the reply given to the queries raised by P&O Australia, it is clear that the same cannot be an aid to interpretation. Article 1.03 of the Agreement provides that "the Agreement constitutes the entire understanding between the Parties regarding the Project and supersedes all previous written and/or oral representations and/or arrangement regarding the Project. If there is any aspect of the project not covered by any of the provision of this agreement then and only in that event reference may be made by the Parties to the Request for Proposals including addendums, clarifications given in writing and the submissions of the Licencee". The Reply/clarification has thus been superseded, and even if looked into, they do not spell out that containers not transshipped at these five named Ports are to be excluded from NTT."

(emphasis supplied)

18. Further, the learned Tribunal (by majority) rightly held "A contract is necessarily an expression of what is agreed by both Parties. Intent is in the mind: its expression, in the language used. What can be read and understood is only the language of the contract. Intent can only be gathered from the language employed. In case of ambiguity, surrounding circumstances and conduct, and where permissible antecedent documents can be looked in. If there is a mismatch between intent and the language of contract, unless there is ambiguity in the language used, no resort can be had to any external aids to ascertain intent, and in any event the intent of one of the Parties alone cannot alter the content and meaning of unambiguous language employed in the contract."

19. It would perhaps also be pertinent to extract paragraph 6.46 of the Award which reads:

"6.46. The words in Article 3.09 (a) are very clear and leave no room for doubt as to what they mean. The words used clearly indicate that a part of the minimum throughput shall be contributed by non-



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transshipment traffic, and that non-transshipment traffic means containers not transshipped in the neighbouring Ports of Colombo, Singapore, Port Klang, Dubai and Salalah. The reason for naming these five Ports is nowhere set out in the Agreement. The reason, however, is to be gathered from the use of the word 'neighbouring' which qualifies all these five Ports. A look at the world map clearly shows that to the West of India across the Arabian Sea are situated the Ports of Salalah in Oman and Dubai in United Arab Emirates, and to the East of India across the Bay of Bengal are situated Port Klang in Malaysia, Singapore in the State of Singapore and close to the tip of India is Colombo in Sri Lanka. These 5 Ports are neighbouring in the sense of the Ports reached immediately after crossing the seas to West and East of India."

20. The issues framed by the learned Tribunal were answered by the majority as follows:

Re. Issue No.1:

"The Arbitration is not pre-mature. The Committee which had been constituted by the Chairman of the Respondent Trust comprising of two Senior Officers of the Indian Revenue Service submitted its report in March 2009 during the pendency of the Arbitration upholding the stand of the Claimant. In any event, failing amicable settlement, binding Arbitration is the only agreed way of resolving disputes between the Parties under Article 15.02 of the Licence Agreement."

Re. Issue No.2(a):

"Non transshipment Container for the purpose of Article 3.09 of the Licence Agreement is a Container forming part of the total traffic of the Chennai Container Terminal, which has NOT been transshipped at any of the five neighbouring ports of Colombo, Singapore, Port Klang, Dubai or Salalah."

Re. Issue 2(b):

"Containers originating in and destined for the five neighbouring Ports mentioned in Article 3.09 would constitute Non-Transshipment Containers as under that Article all containers handled at the Terminal which do not undergo transshipment at the five neighbouring ports constitute Non-transshipment Traffic."



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Evidence on record has established that Claimant has fulfilled its non-transshipment obligations under Article 3.09(a).

The evidence on record shows that Respondent has, on its website described this Container Terminal as a Hub Port for containers. There is also evidence that Main Line Vessels have called at the Terminal within the period specified in Article 3.09.

It is therefore held that Claimant has fulfilled the requirements and obligations under Article 3.09 of the Licence Agreement."

Re. Issue 7:

"Respondent has failed to provide and prove its calculations for arriving at the percentage of Non-Transshipment Containers."

Re. Issue 8(a):

"Claimant has achieved the requisite minimum percentage of Non-Transshipment Traffic under the provisions of the License Agreement."

Re. Issue 8(b):

"Respondent was not entitled to issue the Notice of Intent to Terminate dated 6.3.2008 on the ground of Non-Achievement of the requisite minimum percentage of Non-Transshipment Traffic under Article 3.09 of the License Agreement."

Re. Issue 8(c):

"Respondent has not followed the procedure provided under Article 11.01 of the License Agreement for issuing the Notice of Intent to Terminate as no event of default had occurred warranting the issue of such Notice."

Re. Issue 9(a):

"Respondent was not entitled to encash the Performance Security Bank Guarantee as there was no failure on the part of the Claimant to fulfill its obligation regarding the extent of NTT under Article 3.09."

Re. Issue 9(b):

"Respondent has not followed the requisite procedure under the License Agreement before invoking the Bank Guarantee as the guarantee was invoked before the expiry of three months from the



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date of demand on the Claimant, and as the Pre condition for invoking the guarantee under Article 5.07 is Licensee's failure to pay the amounts due to Licensor for three consecutive months."

Re: Issue 10(a):

"Claimant is entitled to the return of the entire amount of Rs.63,86,21,493/- together with interest thereon calculated at the rate of 12% p.a. from the date of realization of the said sum by the Respondent till the date of the Award."

Re: Issue 10(b):

"Respondent is not entitled to retain the amount of Rs.46.08 Crores appropriated by the invocation of the Bank Guarantee."

Re: Issue 10(c):

"Respondent is not entitled to retain the amount of Rs.17,78,21,493/- deposited by the Claimant without prejudice."

Re: Issue 11:

"Respondent is not entitled to raise the demand for Rs.27,55,42,178/- faxed to the claimant on 6.6.2008 or any other further demand for the year 2003 to 2008."

Re: Issue 12:

"Respondent is not eligible for claiming compensation for failure to achieve NTT for the years 2003-2008."

Re: Issue 13:

"Respondent is not entitled to any part of its counter claim and is not entitled to costs."

Re: Issue 14:

"Interest sought by the Respondent by its letter on 17.12.2008 is not payable."

21. The decision of the Arbitral Tribunal, as per the majority was as follows:

"1. It is declared that the Claimant has achieved the requisite percentage of Non Transshipment Traffic in terms of Article 3.9 of the Agreement for the period under consideration.

2. It is further declared that the documents



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provided by the Claimant for establishing the percentage of Non Transshipment Traffic are sufficient and acceptable.

3. The Note of Intent to Terminate dated 6.3.2008 issued by the Respondent on the ground of non-achievement of the requisite minimum percentage of non-transshipment traffic, is set aside.

4. The Respondent's demand for Rs.27,55,42,178/- made on 4.6.2008 and 5.6.2008 as Royalty on the alleged shortfall in Non Transshipment Traffic for the year 2006-2007, is set aside.

5. The Claimant is entitled to the return of the sum of Rs.63,86,21,493/- (collected by the Respondent by encashing the Bank Guarantee for Rs.46.08 Crores and compelling Claimant to deposit Rs.17,78,21,493/-) with interest at the rate of 12% from the date of realization of those sums by the Respondent, till the date of the Award.

6. Claimant shall be entitled to recover these sums from the Respondent by setting off these sums against the amount of royalty payable by it under Article 5.02 of the License Agreement.

7. The Counter Claim for Rs.67,80,90,967/- (as alleged shortfall in the Royalty on the ground of non achievement of the requisite minimum percentage of non-transshipment traffic and Interest thereon for the years 2003 to 2006, year 2006-07 and year 2007-08) is rejected.

8. The parties shall bear their respective costs."

22. Chennai Port Trust filed the petition, being O.P.No.493 of 2013, in this Court under Section 34 of the 1996 Act for setting aside the said award.

23. By the judgment and order impugned, the learned Single Bench allowed the petition under Section 34 of the 1996 Act, to the extent that the claims made by Chennai Container had been allowed. Paragraph 13.7 of the operative part of the Award rejecting the counter claim of Chennai Port Trust was, however, upheld.

24. As would be evident from the judgment and order under appeal, the learned Single Bench found that the core dispute in the Arbitral Tribunal was the interpretation of Article 3.09 of the contract. In the Award impugned, the Arbitral Tribunal has elaborately discussed and interpreted Article 3.09.



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25. After considering the arguments advanced on behalf of the parties, the learned Single Bench formulated the following questions:

- (i) whether the views of the minority can be taken into account;
- (ii) whether the pre-contract correspondence can never be looked into at all; and
- (iii) whether Article 3.09 of the contract required any interpretation, so as to give rise to an arbitrable dispute.

26. The learned Single Bench referred to the judgment of the Delhi High Court in *Fertilizer Corporation of India v. I.D.I. Management*, reported in AIR 1984 Del. 333 and in *Chowgule Brothers v. Rashtriya Chemicals and Fertilizers*, reported in 2006 (3) Arb. L.R. 457 (Bom.) and observed that the Court had in those cases held, that it was not permissible to look at the minority Award. However, referring to the judgment of the Supreme Court in *Numaligarh Refinery Limited v. Daelim Industrial Co. Ltd.*, reported in (2007) 8 SCC 466, the Single Bench found that the Supreme Court had approved the minority view taken by the Arbitrators as well founded.

27. Even in *Numaligarh Refinery Limited*, supra, the Supreme Court held that Courts shall not ordinarily substitute their interpretation for that of the Arbitrator. If the parties with either eyes wide open have consented to refer the matter to the arbitration, then normally the finding of the Arbitrator should be accepted without demur. There is no quarrel with this legal proposition, but in a case where it is found that the Arbitrator has acted without jurisdiction, which is wholly contrary to law, then in that case there is no prohibition for the Courts to set things right.

28. There can hardly be any doubt that it is the decision of the majority that constitutes the Award. However, if that Award is liable to be set aside on grounds contained in Section 34 of the 1996 Act and the Court is of the view that the minority correctly interpreted the law, the Court might reject the majority view and place reliance on the minority view.

29. It may be possible to look into the minority view only when it is found that the majority view is unsustainable in law. However, if both the majority and the minority views are plausible views, it is not open to the Court to reject the majority view and uphold the minority view, even though the minority view may also be a correct view.



30. After considering the reasons given by the majority and the reasons given by the minority, the learned Single Bench found that it was clear that the dispute between Chennai Port Trust and Chennai Container revolved around the simple question of whether the volume of traffic that was turned out between Chennai as the Port of Origin and five neighbouring Ports being Ports of Destination and vice versa, was liable to be included in the total traffic, for the purpose of ascertaining whether the licensee achieved the minimum throughput of non-transshipment traffic or not. The answer to the aforesaid question necessarily depended on an interpretation of the contract.

31. The learned Single Bench observed that "cob web of legal principles, created by judicial precedents, convinced the majority to think that once a contract is reduced into writing, both parties have to go simply by the ordinary meaning assigned to the words contained in the contract. However, the minority did not feel bound by such rigid rules of interpretation". The learned Single Bench, thereafter, proceeded to decide whether the view taken by the majority was in accordance with law of the land and public policy.

32. The learned Single Bench held "if what the majority did, namely to interpret Article 3.09 of the contract, by just looking into its plain language and looking into the meaning assigned by a host of ordinary English dictionaries and the Wikipedia to the words and expressions found therein, is in accordance with law, then the Award cannot be interfered with". But the Arbitrators were obliged by law to look into (i) the surrounding circumstances; (ii) the nature and purpose of the contract and (iii) the intention of the parties in entering into the contract, then the refusal of the majority to look into these aspects might not be in accordance with law and would make their opinion vulnerable to be set at naught.

33. The learned Single Bench rightly observed the law as it originally stood for several decades was that a Court or Arbitral Tribunal was not to travel beyond the words in which a contract had taken shape. However, relying on the judgments of the Supreme Court in *Pure Helium v. ONGC*, reported in (2003) 8 SCC 593; *Mcdermott International v. Burn Standard Co. Ltd.*, reported in (2006) 11 SCC 18; *Bank of India v. K.Mohandass*, reported in (2009) 5 SCC 313, and *G.Ramachandra Reddy and Co. Vs. Union of India*, reported in (2009) 6 SCC 414, the learned Single Bench held that in the past two decades or so, the law has taken a deviation and the Court or the Arbitral Tribunal was now obliged to look into (i) the circumstances surrounding the execution of the contract; (ii) the object of the contract; and (iii) the intention of the parties. Unfortunately, the learned Single Bench completely overlooked Article 1.03 of the Agreement



which provides "the Agreement constitutes the entire understanding between the parties regarding the project and supersedes all previous written and/or oral representations and/or arrangement regarding the Project."

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34. Emphasising on the observation of the Supreme Court in Bank of India (supra) that the nature and purpose of the contract is an important guide in ascertaining the intention of the parties, the learned Single Bench held:

"69. The nature and purpose of the whole contract in this case, as seen from the policy formulated by the Government of India way back in 1997, the queries raised and the reply given by the Ministry and the entire correspondence that eventually culminated in the execution of the contract, show that the very purpose and intention of Chennai Port Trust, in inviting the first respondent for participation, was to ensure that Chennai Port became a Hub Port within a period of time. For testing whether a port is a Hub Port or not, the petitioner has adopted certain parameters, such as the achievement of a particular size of non transshipment traffic during the third, fourth and fifth year of the commencement of contract. Even during the period of negotiations, prior to the execution of the contract, the petitioner had understood non transshipment traffic to exclude the traffic between Chennai Port and the Ports of five neighbouring countries indicated in Article 3.09. But unfortunately, the manner in which the contract was drafted, appears to have given rise to the possibility of a different interpretation, conferring an unintended benefit upon one of the parties namely the first respondent. It is a fundamental principle of the law of contracts that no party can be allowed to enrich itself unjustly at the cost of another. Therefore, it is not open either to me or to the Arbitral Tribunal to tell the petitioner, which is a public body "this is the contract you have entered into; therefore you have to suffer it".

35. The learned Single Bench found that the Arbitral Tribunal had two choices before it namely (i) either to read the contract as an English Professor would do to turn away from the consequences of such linguistic liturgy or (ii) to understand the contract with reference to its object and intent and put the parties to their actual bargain, without enabling either of them to gain any undue advantage, out of the folly of the draftsman. The learned Single Bench held "I think the law as it has



developed today is in favour of the second alternative. Therefore, the Award is liable to be set aside."

36. Rejecting the argument of Mr.Navroz H.Seervai that the brochure issued by the Chennai Port Trust being Ex.C.26 showed that Chennai Port Trust claimed that it had become Hub Port, the learned Single Bench found that what was indicated in Ex.C.26 that the Port of Chennai was "Emerging Hub Port of the Indian Sub Continent". The learned Single Bench found, may be rightly, that there was difference between a Port, which had actually become a Hub Port and one that was merely emerging as a Hub Port. However, the learned Single Bench clearly fell in error in re-analysing and re-appreciating the evidence on which reliance had been placed by the Arbitral Tribunal.

37. From the judgment of the learned Single Bench, it is patently clear that the view taken by the Arbitral Tribunal was not only a possible view, it was a plausible view based on literal interpretation of the contract and, in our opinion, the correct view. The learned Single Bench preferred a different interpretation by analysis of the correspondence at the time of execution of the contract, overlooking Article 1.03 of the Agreement, referred to above.

38. An arbitral award might only be set aside by the Court on the grounds enumerated in Section 34(2) of the 1996 Act, which is set out herein below for convenience:

"34. Application for setting aside arbitral award.-

(1)

(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:



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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 1—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if, (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute."

39. It is nobody's case that either party was under any incapacity or that the arbitration agreement was not valid in law or, that any party had not been given proper notice of the appointment of the Arbitral Tribunal or of the arbitral proceedings or that the arbitral award deals with any 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 or the composition of the Arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the parties. It is also nobody's case that the subject matter of the dispute was



40. An award may be said to be against the public policy if the making of the award was induced or affected by fraud or corruption or on the ground that the award is against justice or against morality or is patently illegal or is against the interest of India. It is nobody's case that the award was induced by fraud or corruption.

42. As held by the Supreme Court in *Associate Builders v. Delhi Development Authority*, reported in (2015) 3 SCC 49, an award can be set aside on the ground of public policy, if it is against justice or morality. The concept of justice and morality are different. As held by the Supreme Court in *Associate Builders (supra)*, an award can be said to be against justice when it shocks the conscience of the Court. For example, when a claimant restricts his claim to Rs.30 lakhs in a statement of claim before the arbitrator and does not at any point claim any further amount, but the arbitral tribunal awards Rs.45 lakhs without any acceptable reason or justification, this would shock the conscience of the Court and the arbitral award would be liable to be set aside on the ground that it was contrary to justice.

44. The provisions of Section 23 of the Contract Act indicate the legislative intention to give "morality" a restricted meaning. To quote the Supreme Court, "Its juxtaposition with an equally illusive concept, public policy,



indicates that it is used in a restricted sense; otherwise there would be overlapping of the two concepts." In its wide sense what is immoral may be against public policy, for public policy covers political, social and economic ground of objection.

45. In *Gherulal Parakh v. Mahadeodas Maiya*, reported in AIR 1959 SC 781 extracted in *Associate Builders (supra)*, the Supreme Court quoted the following passage from Pollock and Mulla's Indian Contract Act.

"The epithet "immoral" points, in legal usage, to conduct or purposes which the State, though disapproving them, is unable, or not advised, to visit with direct punishment."

46. Immorality in the context of an arbitral award would mean the enforcement of a contract hit by Section 23 of the Contract Act, 1872. It may cover such agreements as are not illegal but would not be enforced given the prevailing norms of the day. However, the Courts only interfere on this ground if anything shocks the Court's conscience.

47. Section 28(3), casts an obligation on an Arbitral Tribunal to decide in accordance with the terms of the contract and to take into account the usages of the trade applicable to the transaction. Patent illegality in an award renders the award against the public policy. The question is what exactly is patent illegality.

48. In *Associate Builders (supra)*, the Supreme Court held that 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.

49. In *McDermott International Inc. v. Burn Standard Company Limited*, reported in (2006) 11 SCC 181, the Supreme 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



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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. Oil and Natural Gas Commission, (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."

50. With the greatest of respect, the learned Single Bench, in our view, failed to appreciate the law relating to the setting aside of an arbitral award under Section 34 of the 1996 Act. While the learned Single Bench took note of the fact that the conduct of the parties, correspondence exchanged between them were required to be considered for the purpose of a contract, the learned Single Judge ignored the fact that interpretation of a contract was a matter for the Arbitrator to determine even if it gives rise to determination of a question of law and that once it was held that the Arbitrator had the jurisdiction, no further question was to be raised and the Court would not exercise its jurisdiction unless it found that there existed any bar on the face of the Award. Further, at the cost of repetition, it is reiterated that Article 1.03 of the Agreement, referred to above, excludes consideration of correspondence, as observed in the arbitral award of the majority of the learned Arbitrators.

51. In *Rashtriya Ispat Nigam Limited v. Dewan Chand Ram Saran*, reported in (2012) 5 SCC 306, the Supreme Court held as under:

"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."

52. In *Sumitomo Heavy Industries Ltd. vs. ONGC Ltd.*



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reported in (2010) 11 SCC 296, the Supreme Court held:

"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 silting in appeal. As held by this Court in *Kwality Mfg. Corpn. vs. Central Warehousing Corpn.* 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."

53. In *MSK Projects (I) (JV) Limited v. State of Rajasthan*, reported in (2011) 10 SCC 573, the Supreme Court held that "if an 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".

54. The Supreme Court in *P.R. Shah, Shares & Stock Brokers (P) Ltd. vs. B.H.H. Securities (P) Ltd.* reported in : (2012) 1 SCC 594, held that "A Court does not sit in appeal over the award of an 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..... 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."

55. In setting aside the impugned Award, the learned Single Bench, sat in an appeal over the Award, re-analysed the evidence and adopted the minority interpretation out of two plausible interpretations of Article 3.09 of the contract.

56. The judgment and order under appeal cannot be sustained and the same is set aside. The appeal, being O.S.A.No.20 of 2014, filed by the Chennai Container is allowed. No costs.



57. The Chennai Port Trust had also filed an appeal, being O.S.A.No.59 of 2014, against the Award to the extent that the learned Single Bench has upheld the unanimous dismissal by the Arbitral Tribunal of the counter claim filed by it. While the majority found that Chennai Port Trust were not entitled to claim any shortfall on an interpretation of Article 3.09 of the contract, the minority view was that the Chennai Port Trust had failed to substantiate its counter claim with evidence. There are no grounds for interference with the Award rejecting the counter claim of Chennai Port Trust for the reasons already discussed above.

The appeal, being O.S.A.No.59 of 2014, of the Chennai Port Trust is, therefore, dismissed. No costs.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

sasi/bbr

To

The Sub Assistant Registrar,
Original Side, High Court, Madras.

+2cc to M/s.S.Raghunathan, Advocate Sr.No.20734 & 20735

+2cc to M/s.R.Karthikeyan, Advocate Sr.No.20809 & 20810

SR(CO)

sm:21.3.2018

judgment in
O.S.A.Nos.20 and 59 of 2014