

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 24.08.2017

DELIVERED ON : 01.03.2018

CORAM :

The Hon'ble Ms.INDIRA BANERJEE, CHIEF JUSTICE

AND

The Hon'ble Mr.JUSTICE M.SUNDAR

Original Side Appeal No.231 of 2015

and

M.P.Nos.1 and 2 of 2015

Chettinad International Coal Terminal

Private Limited,

having its registered office at

V Floor, Rani Seethai Hall,

No.603, Anna Salai,

Chennai-600 006.

represented by its Director

V.Chandramoleeswaran

... Appellant

Vs.

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

2. Mr.Justice Doraiswamy Raju,
Former Judge, Supreme Court of India,
No.20 (39), Pooram Prakasam Road,
Balaji Nagar, Royapettah,
Chennai-600 014.

3. Mr.Justice S.Jagadeesan,
Former Judge, High Court of Madras,
Old No.23 / New No.53,
3rd Main Road, Gandhi Nagar,
Adyar, Chennai-600 020.

4. Mr.Justice R.Balasubramanian,
Former Judge, High Court of Madras,
No.5, Tiger Varadachari 1st Road,

Kalakshetra colony, Besant Nagar,
Chennai-600 090.

.. Respondents

Original Side Appeal is preferred under Order XXXVI Rule 9 of the Original Side Rules read with Clause 15 of the Letters Patent read with Arbitration and Conciliation Act, 1996, against the order dated 22.9.2015 passed in O.P.No.512 of 2014.

O.P. filed under Section 34 of the Arbitration Act 1996 to set aside the award dated 29.07.2014.

For Appellant : Mr.AL.Somayaji, SC
for Mr.T.Balaji

For Respondents: Mr.M.Ravindran, SC
for Mr.Krishna Ravindran

JUDGMENT

M.SUNDAR, J.

This intra-court appeal is filed under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'A and C Act' for the sake of brevity).

2 To be noted, memorandum of grounds of appeal states that this is an appeal under Order XXXVI Rule 9(1) of the Original Side Rules of the Madras High Court read with Clause 15 of the Letters Patent and the Arbitration and Conciliation Act, 1996, but no specific provision of A and C Act has been given. (To be noted Rule 9(1) is apparently a typographical error and there is no sub-rule (1) in the said Order XXXVI Rule 9).

3 We treat it as an appeal primarily under Section 37 of the A and C Act as the instant intra-court appeal is directed against an order dated 22.09.2015 made by a learned Single Judge of this Court in a petition under Section 34 of the A and C Act, being O.P.No.512 of 2014. The learned single Judge has dismissed O.P.No.512 of 2014, confirming an Award dated 29.7.2014 made by a three member Arbitral Tribunal. A perusal of the memorandum of grounds of Original Side Appeal in the instant intra-court appeal before us reveals that this appeal has been filed under Order XXXVI Rule 9 of the Original Side Rules of this Court read with Clause 15 of the Letters Patent. It is clearly impermissible, in the light of section 37 of the A and C Act and in the light of the elucidation on this aspect of the matter by the Hon'ble Supreme Court of India in Fuerst Day Lawson Limited Vs. Jindal Exports Limited [(2011) 8 SCC 333]. Therefore, without standing on technicalities, as stated supra, we treat this as an appeal under Section 37 of the A and C Act.

4 To be noted, while dismissing O.P.No.512 of 2014, learned Single Judge has also passed an order in Application No.3726 of 2015 taken out by the first respondent before us

seeking a direction to deposit certain specific sum of money in an interest bearing no-lien bank account pursuant to the arbitral award. This application has been closed. However, the instant intra-court appeal being O.S.No.231 of 2015 is directed against O.P.No.512 of 2014 only.

5 This being an appeal under Section 37 of the A and C Act, it would suffice if a thumbnail sketch of facts, which are essential for understanding and appreciating this order, are given. We do so under the caption 'Factual Matrix' infra.

FACTUAL MATRIX :

6(a) The appellant Chettinad International Coal Terminal Private Limited is hereinafter referred to as 'CICTPL' for the sake of brevity. The first respondent before us, namely, Kamarajar Port Limited, is hereinafter referred to as 'Ennore Port' for the sake of brevity, convenience and clarity.

6(b) Some time in October, 2002, Ennore Port invited tenders for setting up a common user terminal with all backup facilities and equipment on a Build-Operate-Transfer (hereinafter referred to as 'BOT' for brevity) basis for a period of 30 years. There were several bidders. The bid made by a consortium of three member companies emerged successful having inter-alia offered a revenue share of 52.524%. This consortium of three member companies, as per the tender conditions floated a special purpose vehicle and that the special purpose vehicle is CICTPL.

6(c) As per the tender conditions, the special purpose vehicle CICTPL and Ennore Port entered into an agreement / contract dated 14.9.2006. This agreement / contract which is styled as Licence Agreement is the fulcrum of the case and is hereinafter referred to as the 'said agreement' for the sake of convenience and clarity.

6(d) There is an arbitration clause in the said agreement.

6(e) Certain disputes arose between the parties qua the said contract. The disputes reached the arbitral tribunal via an expert committee (as contemplated in the said agreement). There were several issues before the arbitral tribunal.

6(f) The arbitral tribunal is a three member arbitral tribunal. The Presiding Arbitrator is a retired Judge of the Supreme Court and two retired Judges of this court with the Presiding Arbitrator constituted and completed the three member arbitral tribunal. After detailed pleadings, depositions and production of documents by way of exhibits, the arbitral tribunal pronounced an Award dated 29.7.2014.

6(g) To be noted, there are certain aspects of the award which went against the Ennore Port, but Ennore Port accepted the Award and has given complete legal quietus to the Award. However, CICTPL alone preferred the aforesaid O.P.No.512 of 2014 under Section 34 of the A and C Act.

6(h) As is evident from the judgment of the learned Single Judge, which is being called in question before us and also on

the basis of the submissions made before us in this intra-court appeal, the parties agreed that the only issue before the learned Single Judge and obviously before this court pertains to clauses 14 and 15.1.4 of the said agreement. In other words, the only issue is interpretation of Clauses 14 and 15.1.4 of the said agreement to answer the question as to whether CICTPL is entitled to deduction of augmentation charges being expenditure incurred by CICTPL for deployment and maintenance of additional machinery and equipment from the 52.524% revenue share payable by CICTPL to Ennore Port?

6(i) Arbitral tribunal, in the light of the pleadings, depositions and exhibits placed before it, examined Clauses 14 and 15.1.4 of the said agreement and returned a finding that CICTPL is not entitled to deduction of augmentation charges from the revenue share. The arbitral tribunal so concluded by holding that the obligation of CICTPL to pay 52.524% of gross revenue as its revenue share is unconditional and that the same cannot be derogated under any circumstances, as according to the arbitral tribunal clause 15.1.4 of the said agreement is a special provision that would come into operation only under certain circumstances amongst many envisaged under clause 14 of the said agreement and the instant case is not one such circumstance where clause 15.1.4 comes into play.

6(j) Taking a plea that such finding of the arbitral tribunal is patently illegal and opposed to public policy in India, CICTPL preferred the aforesaid O.P.No.512 of 2014.

6(k) The original petition was resisted by Ennore Port, pleading that the interpretation of the aforesaid two clauses of the said agreement by the arbitral tribunal cannot be revisited and reexamined as an appeal under Section 34 of the A and C Act. Ennore Port also contended that interpretation of arbitral tribunal qua aforesaid two clauses is correct.

6(l) Learned Single Judge, after detailed hearing, came to the conclusion that the interpretation given by the arbitral tribunal is correct and there is no scope for interfering with the same under Section 34 of the A and C Act. Aggrieved CICTPL is in an intra-court appeal before us.

DISCUSSION :

7(a) From the narration of thumbnail sketch of facts under the caption 'Factual Matrix' supra, it will be clear that the crux and gravamen of the entire appeal turns on interpretation of Clauses 14 and 15.1.4 of the said agreement.

7(b) Therefore, before we proceed further with the discussion, we deem it appropriate to extract both the clauses and we do so infra.

"14. Payments to the Licensor.

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

I. On an annual basis, from the day the Licensee first provides cargo handling services to users of the Terminal (which may be before the Date of Commercial Operation) or from the Date of Commercial Operation, whichever is earlier, the Licensee shall be liable to pay to the Licensor the higher of the following amounts

a) the Revenue Share

b) the Minimum Annual Guaranteed Revenue for that respective year of Commercial Operations as provided in Appendix 11

This amount shall be payable in monthly instalments in the manner provided in Sections 14 II III and IV below.

II. On the 5th of every Month the Licensee shall pay Revenue Share for the previous Month's throughput, as per the provisions of the Negotiable Instruments Act. Such Revenue Share shall be the amount equal to product of the value quoted in the commercial proposal of the Licensee, provided in Appendix 6 and the Gross Revenues accrued for the Month to the Licensee as a result of operations of the Project Facilities based on Section 11.2.4.II.

III. For every year of Commercial Operations, at the end of the first six Months, along with the seventh Month's Revenue Share, the Licensee shall pay to the Licensor the difference in Revenue Share for the six Month period and the pro rated share of Minimum Annual Guaranteed Revenue, in case such Revenue Share is less than pro rated share of Minimum Annual Guaranteed Revenue;

IV. In case the Revenue Share for the first six Month period is greater than the pro rated share of Minimum Annual Guaranteed Revenue such that the Licensee has paid to the Licensor an amount (the "Credit Amount") by which the Revenue Share for the six Month period is greater than the pro rated share of Minimum Annual Guaranteed Revenue, then such Credit Amount, shall be adjusted in the following six Months of that year of Commercial Operations such that on an annual basis, the higher of the annual Revenue Share and the Minimum Annual Guaranteed Revenue for such year is paid by the Licensee to the Licensor. It is hereby clarified that no unadjusted Credit Amount remaining in any year of Commercial Operations shall be carried forward to subsequent years.

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

- a) all the gross revenues accruing to the Licensee for the services rendered and facilities provided by the Licensee including revenues accruing from berth hire charges for the berth built by the Licensee.
- b) all the gross revenues accruing to the Licensee from handling, wharfage, stevedoring, storage and movement of cargo including transshipment.
- c) all the gross revenues accruing to the Licensee from shifting of cargo within the Terminal for inspection, processing, storage or loading/unloading.
- d) all the gross revenues and income from storage charges and demurrage/detention charges.
- e) all the gross revenues and income from miscellaneous services offered and facilities provided within the Terminal.
- f) all other gross revenues and income from charges not specified above, if any, for handling, storage and movement of cargo within the Terminal.
- g) any other gross revenues and income earned by the Licensee not specified above and directly attributable to the Project and Project Facilities, provided that any income earned from investing surplus funds and from investments not directly related to the Project would be excluded from the computation of accrued revenue.

VI. All Revenue Share payments payable by the Licensee shall be payable in the currency of invoice raised on users of the Terminal, irrespective of the same being converted into Indian Rupees by the Licensee or any other Person.

VII. From the Handover Date of the Licensed Premises till the date of signing of the Lease Agreement, land licence fee shall be payable by the Licensee to the Licensor. The payment of the land licence fee shall be made on the 5th of every Month for the Month. Land licence fee for the land in the Licensed Premises shall be calculated at the rate of Rs.40 per annum or part thereof per square meter or part thereof.

VIII. Upon the achievement of Financial Close, Parties shall execute the Lease Agreement, Land lease rentals, security deposit and lease premium

for the Licensed Premises given to the Licensee for undertaking the Project shall be payable by the Licensee at the rate and schedule specified in the Lease Agreement in Appendix 8 and calculated from the date of the Lease Agreement. The land lease rentals shall be payable at monthly intervals in advance for the following month on the 5th of every month.

IX. The Licensee shall also pay rent or other charges for the additional land or other premises or additional utilities or services, made available by the Licensor to the Licensee in accordance with the prevailing Port's Scale of Rates and the statement of terms and conditions thereof, effective from time to time. The term of the lease shall run concurrently with this Agreement and shall terminate on the termination or expiry of this Agreement.

X. The Licensee and/or the users of the Terminal shall pay to the Licensor, wayleave charges as specified below, which shall be escalated at 30% after every five (5) years.

a) For right of way along conveyor corridor:
Rs.1 per metric tonne handled at the Terminal

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15.1.4. Exemption of Revenue Share

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

7(c) It is the specific case of CICTPL that clause 14(I) of the said agreement provides for Ennore Port to be entitled to minimum annual guaranteed revenue or revenue share whichever is higher. Further more, Ennore Port is entitled to minimum annual guaranteed revenue or revenue share whichever is higher, annually. 'Revenue Share' has been defined in the said agreement. 'Revenue Share' as defined in the said agreement is a share of the gross revenue and the method of calculating the gross revenue has also been provided in a separate clause in the said agreement. To be noted, definition of 'Revenue Share' is found in clause 1.1.84 and the method of computing the gross

revenue has been set out in clause 14(V) of the said agreement. In this scenario, it is the specific case of CICTPL that the entitlement of Ennore Port as aforesaid has been made subject to clause 15.1.4 of the said agreement. According to CICTPL, Clause 15.1.4 of the said agreement is an exemption clause.

7(d) It is not in dispute before us that while 'Revenue Share' has been defined and the method of computation of gross revenue has been set out in the said agreement, the term 'augmentation' has not been defined in the said agreement. For this purpose, CICTPL pressed into service a judgment of the Delhi High Court being VHCPL-ADCC Pingalai Infrastructure Pvt. Ltd. Vs. Union of India ([2010] 171 DLT 370). In this judgment, meaning of augmentation has been explained in paragraphs 63 to 75.

7(e) We recollect what is usually said of certain terms when difficulty is encountered in giving an accurate and precise meaning. It is often said of such terms 'easy to describe, but difficult to define'.

7(f) We refer to Pingalai judgment alone here, as it was absolutely essential to capture the submissions of CICTPL. Otherwise, we are referring to case laws elsewhere in this judgment.

7(g) Besides contending that clause 15.1.4 is an exemption clause, it is also contended by CICTPL that clause 15.1.4 is intended to serve as an incentive.

7(h) Assailing the interpretation of clauses 14 and 15.1.4 by Arbitral Tribunal, it was contended by the appellant CICTPL inter-alia that every clause in a contract must be given effect to, that rule of *contra proferentem* applies and that any exemption clause must be interpreted liberally in favour of the beneficiary.

7(i) Opposing the above submissions, it was submitted on behalf of Ennore Port inter-alia that clause 15.1.4 is not intended to serve as an exemption to clause 14, that the list of additional equipments as claimed to have been brought in by CICTPL itself was not wholly accepted by the Ennore Port and the same was disputed. It was also contended by Ennore Port that this is an afterthought on the part of CICTPL. Besides the said submissions, pure legal pleas touching upon scope of a Section 34 petition and the scope of an intra-court appeal under Section 37 were highlighted. It was stressed that a petition under Section 34 of A and C Act is neither an appeal nor a revision. This is not even a review.

7(j) We are of the view that there cannot be much dispute about the legal position that the petition under Section 34 of A and C Act is neither an appeal nor revision. We are of the view that this legal position is indisputable. We go a step further and hold that a petition under Section 34 of A and C Act is a mere 'challenge to an Award' within the four corners of the grounds adumbrated therein. We are also aware of the scope of intra-court appeal under Section 37 of A and C Act. With this in

mind, we examined the controversy before us. For examining the controversy before us, we set out the case laws that were pressed into service by both sides.

7(k) The appellant pressed into service the following case laws. To set out the case laws cited by the appellant and the proposition for which they were relied, we give below the citations and paragraphs highlighted and the same are as follows:

(i) In Sahebzada Mohd. Kamgarh Shah Vs. Jagdish Chandra Deb Dhabal Deb [AIR 1960 SC 953], the Supreme Court in paragraph 11 held as follows :

"11. In his attempt to establish that by this later lease the lessor granted a lease even of these minerals which had been excluded specifically by Clause 16 of the earlier lease, Mr Jha has arrayed in his aid several well established principles of construction. The first of these is that the intention of the parties to a document of grant must be ascertained first and foremost from the words used in the disposition clause, understanding the words used in their strict, natural grammatical sense and that once the intention can be clearly understood from the words in the disposition clause thus interpreted it is no business of the courts to examine what the parties may have said in other portions of the document. Next it is urged that if it does appear that the later clauses of the document purport to restrict or cut down in any way the effect of the earlier clause disposing of property the earlier clause must prevail. Thirdly it is said that if there be any ambiguity in the disposition clause taken by itself, the benefit of that ambiguity must be given to the grantee, the rule being that all documents of grants must be interpreted strictly as against the grantor. Lastly it was urged that where the operative portion of the document can be interpreted without the aid of the preamble, the preamble ought not and must not be looked into. "

(ii) In J.K. Cotton Spinning & Weaving Mills Co. Ltd. Vs. State of U.P. [AIR 1961 SC 1170], the Supreme Court in paragraphs 10 and 15 held as follows:

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

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15.It is unnecessary to consider the question whether the High Court was right in its view as regards the preliminary objection and we express no opinion on the same."

(iii) The Supreme Court in United India Insurance Co. Ltd. Vs. Pushpalaya Printers [(2004) 3 SCC 694], in paragraph 6 held as follows :

"6. The only point that arises for consideration is whether the word "impact" contained in clause 5 of the insurance policy covers the damage caused to the building and machinery due to driving of the bulldozer on the road close to the building. It is evident from the terms of the insurance policy that the property was insured as against destruction or damage to whole or part. The appellant Company agreed to pay towards destruction or damage to the property insured to the extent of its liability on account of various happenings. In the present case both the parties relied on clause 5 of the insurance policy. Clause 5 is also subject to exclusions contained in the insurance policy. That a damage caused to the building or machinery on account of driving of vehicle on the road close to the building is not excluded. Clause 5 speaks of "impact" by any rail/road vehicle or animal. If the appellant Company wanted to exclude any damage or destruction caused on account of driving of vehicle on the road close to the building, it could have expressly excluded it. The insured possibly did not understand and expect that the destruction and damage to the building and machinery is confined only to a direct collision by vehicle moving on the road with the building or machinery. In the ordinary course, the question of a vehicle directly dashing into the building or the machinery inside the building does not arise. Further, "impact" by road vehicle found in the company of other words in the same clause 5 normally indicates that damage caused to the building on account of vibration by driving of vehicle close to the road is also included. In order to interpret this clause, it is also necessary to gather the intention of the parties from the words used in the policy. If the word "impact" is interpreted narrowly, the question of impact by any rail would not arise as the question of a rail forcibly coming to the contact of a building or machinery would not arise. In the absence of specific exclusion and the word "impact" having more meanings in the context, it cannot be confined to forcible contact alone when it includes

the meanings "to drive close", "effective action of one thing upon another" and "the effect of such action", it is reasonable and fair to hold in the context that the word "impact" contained in clause 5 of the insurance policy covers the case of the respondent to say that damage caused to the building and machinery on account of the bulldozer moving closely on the road was on account of its "impact". It is also settled position in law that if there is any ambiguity or a term is capable of two possible interpretations, one beneficial to the insured should be accepted consistent with the purpose for which the policy is taken, namely, to cover the risk on the happening of certain event. Although there is no ambiguity in the expression "impact", even otherwise applying the rule of contra preferentem, the use of the word "impact" in clause 5 in the instant policy must be construed against the appellant. Where the words of a document are ambiguous, they shall be construed against the party who prepared the document. This rule applies to contracts of insurance and clause 5 of the insurance policy even after reading the entire policy in the present case should be construed against the insurer. A Constitution Bench of this Court in General Assurance Society Ltd. v. Chandmull Jain [AIR 1966 SC 1644 : (1966) 3 SCR 500] has expressed that (AIR p. 1649, para 11)

"in a contract of insurance there is requirement of uberrima fides i.e. good faith on the part of the assured and the contract is likely to be construed contra proferentem, that is, against the company in case of ambiguity or doubt".

(iv) In Life Insurance Corp'n. of India Vs. Mani Ram [(2005) 6 SCC 274], the Supreme Court has held in paragraph 17 as under :

"17. In the instant case, condition 2 expressly provided the period during which the payment was to be made. It also in no uncertain terms stated that if premium was not paid before the expiry of grace period, the policy would lapse. In our view, the ratio in Dharam Vir Anand [(1998) 7 SCC 348 : JT (1998) 7 SC 167] would support the Insurance Company rather than the complainant. If all the terms and conditions of the policy (contract between the parties) have to be kept in mind and given effect to, acceptance of argument on behalf of the complainant would make the last part of condition 2 redundant, otiose and inoperative; and

a court of law cannot construe a document in the manner suggested by the counsel for the complainant. As the premium was due on 28-4-1996 and was not paid till 28-5-1996, the policy lapsed. The fora below hence, committed an error of law in allowing the complaint of the respondent herein and the orders are liable to be set aside. "

(v) A division bench of the Delhi High Court, in VHCPL-ADCC Pingalai Infrastructure Pvt. Ltd. Vs. Union of India ([2010] 171 DLT 370) has held in paragraphs 63 to 75 as follows :

"63. So far as the meaning of 'augmentation' is concerned, the petitioner has placed reliance on the meaning of augmentation in the Oxford English Reference Dictionary, 2nd Ed. Revised which reads as follows :-

"augmentation : enlargement; growth; increase; the lengthening of the time-values of notes in melodic parts"

64. We may advert to the meaning attributed to 'augmentation' in some other dictionaries as well which shed light on the various nuances of and varied contexts in which the expression appears or is used. In The New Lexicon Webster's Dictionary of the English Language, 'augmentation' is described as follows:-

"augmentation : an increasing or being increased; something which is an increase or addition; (in counterpoint) the repeating of a phrase in notes longer than those first used"

65. In the Legal Thesaurus - Deluxe Edition by William C. Burton the meanings assigned to 'augmentation' and the several meanings assigned to 'capacity' are as hereafter :-

"augmentation : accessory, accrual, accrument, accumulation, adding, advance, advancement, aggrandizement, amplification, appreciation, appurtenance, broadening, buildup, cumulative effect, cumulativeness, development, enhancement, enlargement, enlarging, expansion, extension, gain, growth, improvement, increase, increasing, increment, intensification, magnification, progress, proliferation, redoubling, reinforcement, rise, something added, spread, supplement, widening"

capacity (aptitude), noun:- ability, ableness, aptness, capability, capableness, competence, competency, effectuality, faculty, giftedness, potentiality, power, proficiency, qualification, range, reach, scope, skill, talent capacity (maximum), noun:- ampleness, amplitude, breadth, compass, comprehensiveness, containing power, extent,

full complement, full extent, full volume, fullness, greatest amount, greatest extent, greatest size, holding ability, largeness, limit, limit of endurance, limitation, measure, physical limit, plentitude, reach, room, scope, spacious-ness, stretch, tankage, upper limit, volume capacity (sphere), noun:- ambit, area, arena, boundaries, bounds, division, domain, extent, field, jurisdiction, limits, orbit, pale, province, reach realm, region, scope, specialty, stretch, territory.

66. The Oxford English Dictionary, 2nd Edn., Vol.I gives the following meanings of 'augmentation' and 'capacity' :-

"augmentation : the action or process of augmenting, making greater, or adding to, extension, enlargement' the action or process of raising in estimation or dignity; exaltation, honouring; the process of becoming greater; growth, increase; augmented state or condition; increased size, amount, degree, etc.; increase;.....

Capacity : ability to receive or contain; holding power"

67. These words are also defined in Webster's Third New International Dictionary of the English Language Unabridged which read as follows :-

"augmentation : the act, action, or process of augmenting: the process of becoming augmented: the state of being augmented : something that augments : the device of modifying a musical subject or theme by repetition in tones of : increase of stipend obtained by a parish minister: an additional charge to a coat of arms given as an honor capacity : the power or ability to hold, receive, or accommodate: an empty space: a hollowed-out area : a containing space: a measure of content for gas, liquid or solid : the amount held : the measured ability to contain: the ability to absorb: attaining to or equaling maximum capacity"

68. The meaning of 'augment' and 'capacity' given in the 'Legal Glossary' is :-

"augment : to increase capacity : legal qualification; capability; a position enabling one to do something; a containing space, area or volume"

69. From the above, it is apparent that augmentation is not confined to increase in size alone but takes within its ambit development, enhancement and improvement of an existing facility/situation as well. So far as the context under consideration is concerned, capacity would relate to the limits or the extent to which a facility can accommodate a particular thing. In our

view, the expression 'augmentation' cannot be read in isolation of 'capacity' or devoid of the prime objective of the work to which article 14.1 would apply.

70. Mr. Lalit, learned senior counsel for the petitioner has urged that such increase cannot be confined to a lateral or horizontal increase and has to take into its ambit a longitudinal increase as well. In this regard, reliance has also been placed on the pronouncement of the Karnataka High Court reported at 1999 Crl.L.J. 4220 Abdul Khader vs. Secretary to Government of India & Ors. In this case, the court was concerned with the construction of the words 'conservation' and 'augmentation' for the purposes of section 3 of the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act (52 of 1974). In para 8 of this judgment, reliance was placed on a previous judgment of the Division Bench of the Calcutta High Court reported at 1975 Crl.LJ 1790 entitled Mangilal Baid vs. Secy. Home (SPL) Department of State of W.B. on the same question wherein the expression 'augmentation' was held to mean 'the act or process of increasing the size or amount'. The Karnataka High Court also observed that the expression 'conservation' is wider than 'augmentation'.

71. An increase, so far as foreign exchange is concerned, has no correlation to an increase in the capacity of an infrastructure related construction project as in the instant case. Furthermore, the expressions have to be interpreted keeping in view the spirit, intendment and purpose of the agreement. 'Capacity augmentation' in Article 14.1(a) has to derive colour from the intent to provide the 'desired level of services to the users of the project facility'. The principles laid down in the pronouncements of the Karnataka and Calcutta High Court have to be read in the context in which they were laid.

72. It requires to be borne in mind, that so far as a road or highway or any portion thereof is concerned, its capacity is relatable to the volume and intensity of the traffic plying thereon at any point of time. Capacity augmentation with regard to a road or a highway would obviously relate to increase in such volume or intensity of the traffic plying on it. The total length of the petitioner's project was confined to 2.2 Kms. Capacity augmentation of this project would obviously require such steps to be taken as would enable increase of the volume of the traffic plying on this portion of the highway.

73. Dr. A.M. Singhvi and Mr. C.U. Singh, learned senior counsels appearing for the respondent no.3 have vehemently contended, that increase in the length of the highway or the four laning of the 66.73 kms portion of the NH-6 would not have the effect of increasing the traffic volume or capacity of the 2.2 km portion which forms part of the petitioner's project facility. In order to accommodate increase in traffic intensity or traffic volume on this stretch of 2.2 kms, the width of the section would necessarily require to be increased to accommodate the additional volume.

74. It is further pointed out, that the Pingalai bridge project of the petitioner already stands four laned and there was no further need to widen this bridge. The respondent no. 1 in its affidavit has affirmed that no further widening of the Pingalai river bridge or its approaches is envisaged in the scope of the work allotted to respondent no. 3.

75. We also find that consideration of this issue cannot be from the aspect of traffic volume alone. In order to be covered under Article 14 of the agreement, such augmentation has to be with the intent of providing the desired level of services to the users of the project facility. An increase in traffic volume alone cannot be considered to be a step towards any improvement of the level of service to the users of the bridge or its approaches. Such improvement would more to take into its ambit provision of other facilities and amenities as well.

(To be noted, this case law alone has been mentioned in paragraph 7(d) supra).

(vi) The Supreme Court in State of Rajasthan Vs. Nav Bharat Construction Company (2) [(2010) 2 SCC 182] has held in paragraph 19 as follows :

"19. Similarly, in Food Corporation of India v. Chandu Construction [(2007) 4 SCC 697] in which one of us (Chatterjee, J.) was also a party, it was held that when the arbitrator or the umpire as the case may be, had ignored the specific terms or had acted beyond the four corners of the contract, it was open for the court in the exercise of its power under Section 30 of the Act to set aside the award on the ground that the arbitrator could not ignore the law or misapply the terms of the contract in order to do what he thought was just and reasonable."

(vii) In Oil and Natural Gas Corporation Limited Vs. Western

Geco International Limited [(2014) 9 SCC 263], the Supreme Court in paragraph 40 held as follows :

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

(viii) The Supreme Court in Swan Gold Mining Limited Vs. Hindustan Copper Limited [(2015) 5 SCC 739] has held in paragraph 11 as follows :

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

(ix) The Supreme Court in International Coach Builders Ltd. Vs. Karnataka State Financial Corpn. [(2003) 10 SCC 482] has held in paragraph 18 as under :

"18.Counsel for SFCs contended that there is a conflict between the provisions of Section 529 read with Section 529-A of the Companies Act on the one

hand and Section 29 of the SFC Act on the other. It is urged that the provisions of the Companies Act being general law must yield to the provisions of the SFC Act which is special law. In the first place, we see no such conflict between the provisions of the Companies Act as amended in 1985 and the provisions of the SFC Act, 1951. In our view, the provisions of the SFC Act were merely intended to give an expeditious remedy to SFCs without having to go through the procedure of enforcing the mortgage under the Transfer of Property Act, 1882. In fact, even under Section 69 of the Transfer of Property Act, under certain circumstances, a mortgagee has the power to sell the mortgaged property in default of payment of mortgage money without intervention of the court. Under the general law, SFCs would have to file a suit for realising their security unless they qualified under Section 69 of the Transfer of Property Act. This meant considerable delay and holding up of the public monies due to SFCs. In public interest, therefore, special provisions were made by Sections 29, 30, 31 and 32 enabling SFCs to take possession of the mortgaged assets and sell them without having to move a court of law. The provisions of Sections 29 to 32 and the rights flowing thereon are exercisable under ordinary circumstances. However, when the debtor is a company in winding-up, the rights of SFCs are affected by the provisions of the Companies Act, 1956. Looked at from this point of view, therefore, there is no conflict between the provisions of the SFC Act and the Companies Act. Assuming that there is conflict, then the judgment of this Court in A.P. State Financial Corpn. v. Official Liquidator [(2000) 7 SCC 291] clearly holds that the amendments made in Sections 529 and 529-A would override and control the rights under Section 29 of the SFC Act. Though the Companies Act may be general law, the provisions introduced therein in 1985 were intended to confer special rights on the workers and pro tanto must be treated as special law made by Parliament. Since the amendments to the Companies Act were made by a later Act of 1985, they would override the provisions of Section 29 of the SFC Act, 1951. We are unable to accept the contention that the view taken in A.P. State Financial Corpn. [(2000) 7 SCC 291] needs reconsideration. Far from it, we are in agreement with the view expressed therein."

7(1) On the side of Ennore Port, the following case laws pressed into service together with relevant paragraphs are as follows :

(i) State of Rajasthan Vs. Nav Bharat Construction Company (2) [(2010) 2 SCC 182] has also been relied on by learned Senior counsel for Ennore Port. The Supreme Court in paragraphs 17 to 20 held as follows :

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

18. In this connection, we may refer to a decision of this Court in Bhagawati Oxygen Ltd. v. Hindustan Copper Ltd. [(2005) 6 SCC 462] In that decision, this Court observed in para 25 as follows: (SCC pp. 472-73)

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

19. Similarly, in Food Corporation of India v. Chandu Construction [(2007) 4 SCC 697] in which one of us (Chatterjee, J.) was also a party, it was held that when the arbitrator or the umpire as the case may be, had ignored the specific terms or had acted beyond the four corners of the contract, it was open for the court in the exercise of its power under Section 30 of the Act to set aside the award on the ground that the arbitrator could not ignore the law or misapply the terms of

the contract in order to do what he thought was just and reasonable.

20. That apart, the law is also settled as referred to hereinafter that the jurisdiction of the court under Section 30 of the Act is not appellate in nature and the award passed by the umpire cannot be set aside on the ground that it was erroneous. It is also not open to the court to interfere with the award merely because in the opinion of the court, another view is equally possible. Keeping in view these principles as laid down by this Court in the aforesaid two decisions, let us now consider the award passed by the umpire in respect of the claims of the respondent excluding Claims 2 and 26."

(to be noted, this case law was relied on by Appellant also and Appellant highlighted paragraph 19. This has been captured in paragraph 7(k)(vi).

(ii) The Supreme Court in P.R.Shah, Shares and Stock Brokers Private Limited Vs. B.H.H. Securities Private Limited and others [(2012) 1 SCC 594], has held in paragraph 21 as under :

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

(iii) Learned Senior counsel also relied on a decision of the Supreme Court in Oil and Natural Gas Corporation Limited Vs. Western Geco International Limited [(2014) 9 SCC 263]. Relevant paragraphs found in paragraphs 34 to 40 read as follows :

"34. It is true that none of the grounds enumerated under Section 34(2)(a) were set up before the High

Court to assail the arbitral award. What was all the same urged before the High Court and so also before us was that the award made by the arbitrators was in conflict with the "public policy of India", a ground recognised under Section 34(2)(b)(ii) (supra). The expression "public policy of India" fell for interpretation before this Court in ONGC Ltd. v. Saw Pipes Ltd. [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] and was, after a comprehensive review of the case law on the subject, explained in para 31 of the decision in the following words: (SCC pp. 727-28)

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

- (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."

35. What then would constitute the "fundamental policy of Indian law" is the question. The decision in ONGC [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] does not elaborate that aspect. Even so, the expression must, in our opinion, include all such

fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression "fundamental policy of Indian law", we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law. The first and foremost is the principle that in every determination whether by a court or other authority that affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a "judicial approach" in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge.

36. In *Ridge v. Baldwin* [1964 AC 40 : (1963) 2 WLR 935 : (1963) 2 All ER 66 (HL)] , the House of Lords was considering the question whether a Watch Committee in exercising its authority under Section 191 of the Municipal Corporations Act, 1882 was required to act judicially. The majority decision was that it had to act judicially and since the order of dismissal was passed without furnishing to the appellant a specific charge, it was a nullity. Dealing with the appellant's contention that the Watch Committee had to act judicially, Lord Reid relied upon the following observations made by Atkin, L.J. in *R. v. Electricity Commissioners, ex p London Electricity Joint Committee Co. (1920) Ltd.* [(1924) 1 KB 171 : 1923 All ER Rep 150 (CA)] : (KB p. 205)

"... Wherever any body of persons having legal authority to determine questions affecting the

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

37. The view taken by Lord Reid was relied upon by a Constitution Bench of this Court in *Associated Cement Companies Ltd. v. P.N. Sharma* [AIR 1965 SC 1595] wherein Gajendragadkar, C.J. speaking for the Court observed: (AIR p. 1601, para 14)

"14. ... In other words, according to Lord Reid's judgment, the necessity to follow judicial procedure and observe the principles of natural justice, flows from the nature of the decision which the Watch Committee had been authorised to reach under Section 191(4). It would thus be seen that the area where the principles of natural justice have to be followed and judicial approach has to be adopted, has become wider and consequently, the horizon of writ jurisdiction has been extended in a corresponding measure. In dealing with questions as to whether any impugned orders could be revised under Article 226 of our Constitution, the test prescribed by Lord Reid in this judgment [1964 AC 40 : (1963) 2 WLR 935 : (1963) 2 All ER 66 (HL)] may afford considerable assistance."

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

39. No less important is the principle now recognised

as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury principle [Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., (1948) 1 KB 223 : (1947) 2 All ER 680 (CA)] of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available.

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

(to be noted, this case law was relied on by Appellant also and Appellant highlighted paragraph 40. This has been captured in paragraph 7(k) (vii).

(iv) In Associate Builders Vs. Delhi Development Authority [(2015) 3 SCC 49], the Supreme Court has held in paragraph 42 to 45 as follows :

"42. In the 1996 Act, this principle is substituted by the "patent illegality" principle which, in turn, contains three subheads:

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

"28.Rules applicable to substance of dispute.-(1) Where the place of arbitration is situated in India-

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

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

42.3. (c) Equally, the third subhead 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.-(1)-(2)***

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

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

43. In McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181] , this Court held as under: (SCC pp. 225-26, paras 112-13)

"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. Oil and Natural Gas Commission [(2003) 8 SCC 593 : 2003 Supp (4) SCR 561] and D.D. Sharma v. Union of India [(2004) 5 SCC 325] .]

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

44. In MSK Projects (I) (JV) Ltd. v. State of Rajasthan [(2011) 10 SCC 573 : (2012) 3 SCC (Civ) 818] , the Court held: (SCC pp. 581-82, para 17)

"17. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such a jurisdictional error needs to be proved by evidence extrinsic to the award. (See Gobardhan Das v. Lachmi Ram [AIR 1954 SC 689] , Thawardas Pherumal v. Union of India [AIR 1955 SC 468] , Union of India v. Kishorilal Gupta & Bros. [AIR 1959 SC 1362] , Alopri Parshad & Sons Ltd. v. Union of India [AIR 1960 SC 588] , Jivarajbhai Ujamshi Sheth v. Chintamanrao Balaji [AIR 1965 SC 214] and Renusagar Power Co. Ltd. v. General Electric Co. [(1984) 4 SCC 679 : AIR 1985 SC 1156])"

45. In Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran [(2012) 5 SCC 306] , the Court held: (SCC pp. 320-21, paras 43-45)

"43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was

against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.

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

45. This para 43 reads as follows: (Sumitomo case [(2010) 11 SCC 296 : (2010) 4 SCC (Civ) 459], SCC p. 313)

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

(v) Learned Senior Counsel also relied on Swan Gold Mining Limited Vs. Hindustan Copper Limited [(2015) 5 SCC 739], wherein the Supreme Court in paragraphs 11 and 12 held as under :

"11. Section 34 of the Arbitration and Conciliation Act, 1996 corresponds to Section 30 of the Arbitration Act, 1940 making a provision for setting aside the arbitral award. In terms of sub-section (2) of Section 34 of the Act, an arbitral award may

be set aside only if one of the conditions specified therein is satisfied. The arbitrator's decision is generally considered binding between the parties and therefore, the power of the court to set aside the award would be exercised only in cases where the court finds that the arbitral award is on the fact of it erroneous or patently illegal or in contravention of the provisions of the Act. It is a well-settled proposition that the court shall not ordinarily substitute its interpretation for that of the arbitrator. Similarly, when the parties have arrived at a concluded contract and acted on the basis of those terms and conditions of the contract then substituting new terms in the contract by the arbitrator or by the court would be erroneous or illegal.

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

"

(to be noted, this case law was relied on by Appellant also and Appellant highlighted paragraph 11. This has been captured in paragraph 7(k) (viii)).

(vi) A Division Bench of the Delhi High Court in Vale Australia Pty. Ltd. Vs. Steel Authority of India Ltd. And others [CDJ 2013 DHC 603], held in paragraphs 37 and 38 as follows :

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

38. From the very nature of the objections it is apparent that the objector wants this Court to re-appreciate the evidence and re-weigh the probabilities thereof to infer facts; an exercise which we refuse to perform because our doing so would be in breach of the mandate of the law. We highlight that the five limbs have been discussed with reference to the evidence led and law applicable by the learned Arbitrator in paragraphs 117 to 194 of the Award; and suffice would it be to

state that each and every aspect of the evidence referred to by AMCI/VALE has not only been noted but has been dealt with by the learned Arbitrator and being a matter pertaining to re-appreciation of evidence, we repeal each and every submission made under the five sub-heads. "

7(m) The above list of case laws together with relevant paragraphs, clearly bring out the propositions / principles for which each one of them were pressed into service.

7(n) As stated supra in the earlier part of this judgment, it is not in dispute before us (as between the Appellant and the 1st Respondent) that the entire controversy pertains to only one point and that one point is interpretation of clauses 14 and 15.1.4 of the said agreement by the Arbitral Tribunal. In our view, the entire appeal turns on a very narrow compass and it may not be necessary to go into each and every case law that was cited at the bar in the hearing. However, we have extracted all the judgments cited at the bar (though it is not imperative to do so) for the limited purpose of making this judgment complete in terms of indicating the trajectory of the hearing before us.

7(o) Turning to the interpretation returned by the Arbitral Tribunal, it is the specific case of the appellant that clause 15.1.4 has not been applied at all and clause 14 alone has been applied. This according to the appellant is patent illegality.

7(p) A closer reading of clause 15.1.4 would show that it has been covenanted that revenue share shall not be claimed and levied for any equipment / machinery brought in by the licensee for the purpose of maintenance / augmentation of terminal after the commissioning thereof till the expiry of the licence period through terminal. CICTPL contended that the date of commissioning is also crucial. Our reading of the Award of Arbitral Tribunal, challenge to which was negatived by the learned Single Judge demonstrates the view and interpretation of the Arbitral Tribunal that clause 15.1.4 is not intended to serve as an exemption. In other words, the Arbitral Tribunal has proceeded on the basis that clause 14 operates and clause 15.1.4 is a mere reiteration of clause 14, particularly in the light of what has been noticed of clause 15.1.4. No doubt, clause 15.1.4 is captioned 'Exemption of Revenue Share'. However, it appears to be an assertion that equipment / machinery brought in for maintenance / augmentation of the terminal, post commissioning shall not be exempt from revenue share. Considering that this is an appeal under Section 37 of A and C Act, we do not delve further into this interpretation aspect of the matter. As held by the Supreme Court of India in Swan Gold Mining Limited's case supra (incidentally, it has been pressed into service by CICTPL also), wherein the Supreme Court postulates that interference in a petition under Sections 34 and 37 of A and C Act would arise only when parties have arrived at a concluded contract and acted

on the basis of terms and conditions therein and thereafter new terms are substituted by the Arbitral Tribunal or the court. Nothing of that kind has happened in the instant case.

7(q) Parties have acted in accordance with the covenants. No new term has been read into by the Arbitral Tribunal as confirmed by learned Single Judge. Further more, in this context, it is necessary to reiterate the obtaining legal position that an Arbitral Tribunal always has enough play at the joints qua interpretation of covenants of a contract. With regard to public policy, it was fairly submitted that the appellant CICTPL is not pitching itself on the same and that the appellant CICTPL is only on the patent illegality.

7(r) On an extreme demurer, even if there is another plausible interpretation to the covenant, that cannot become a ground for interference either under Section 34 or under Section 37 of the A and C Act. As set out supra, only when what has not been agreed upon by the parties or when the new covenant or new principle which was not the intention of the parties is read into a contract, can there be any scope for interference under Section 34 or section 37 of the A and C Act. As we find no such aspects in this appeal, we find no ground to interfere with the order of the learned Single Judge.

7(s) Referring to paragraph 49 of the judgment of the learned Single Judge, the appellant CICTPL contended that the learned Single Judge has been overwhelmed by the eminence of the members of the Arbitral Tribunal. Otherwise with regard to section 34 of A and C Act, there is nothing to show that there is any illegality much less illegality warranting interference with the order of the learned Single Judge. In our opinion, learned Single Judge has applied Section 34 of A and C Act in its right perspective. With regard to paragraph 49 of the order of the learned Single Judge, a detailed and close reading of the judgment which has been called in question before us demonstrates that the conclusions that have been arrived at by the learned Single Judge have not in any manner been impacted by the eminence of the Arbitral Tribunal as perceived by the learned single Judge. To be noted, paragraph 49 is the penultimate paragraph of the judgment called in question before us and paragraph 49 begins with 'Before parting with this case,'. Therefore, paragraph 49 is merely in the nature of a postscript after a detailed analysis and correct application of Section 34 of A and C Act.

CONCLUSION :

8(a) Owing to all that have been stated supra, we have no reason to interfere with the order of the learned Single Judge and we find no merits in this appeal warranting an interference.

DECISION :

9(a) O.S.A.No.231 of 2015 is dismissed, confirming the order dated 22.9.2015 passed in O.P.No.512 of 2014. Considering

the nature of the matter, there will be no order as to costs. Consequently, connected miscellaneous petitions are closed.

Ms. INDIRA BANERJEE, CHIEF JUSTICE

I have gone through the draft of the judgment prepared by M.Sundar,J. and I have no hesitation at all in agreeing that the appeal should be dismissed.

2. Ennore Port Limited, now known as Kamarajar Port Limited, had invited tenders for setting up a Common User Coal Terminal with all backup facilities and equipment on a Build-Operate-Transfer basis for a period of 30 years. A consortium of three companies, namely, South India Corporation Limited, Portia Management Services Management Limited and Navayuga Engineering Limited, jointly participated in the tender and emerged successful. The consortium was selected for the work of developing the coal handling facility at Kamarajar Port Limited.

3. The facts leading to the award impugned have been narrated by M.Sundar,J. and the same are not reiterated to avoid prolixity. Suffice it to note that the consortium floated the appellant company for the purpose of executing the contract. The disputes and differences which had arisen were referred to the Arbitral Tribunal of Three Judges. The presiding arbitrator was a former Judge of the Supreme Court and the two other arbitrators former Judges of this Court.

4. The Arbitral Tribunal passed a detailed and reasoned award whereby the Arbitral Tribunal set aside the liquidated damages levied by the first respondent to the tune of Rs.1,31,03,640/- and also rejected the claim of the first respondent of Rs.1,00,00,000/- towards business loss. The first respondent was also directed to pay the appellant a sum of Rs.35,00,388.25 towards cost of construction of road. The Arbitral Tribunal, however, rejected the claim of the appellant company to exemption of augmentation charges amounting to Rs.29,19,59,628/-. The first respondent accepted the award in full. The appellant company challenged the award insofar as it related to rejection of its claim on account of augmentation charges.

5. The entire challenge hinges on an interpretation of Clause 15.1.4 of Part I of the Agreement that was executed by and between the first respondent and the appellant company. Under Clause 14(I) of Part I of the Agreement, the first respondent was entitled to the Minimum Annual Guaranteed Revenue or the Revenue Share, whichever was higher every year. Clause 1.1(84) of Part I of the Agreement defined the term "Revenue Share". The method of calculating gross revenue was provided

for in Clause 14(V) of the Agreement. Clause 15.1.4 of Part I of the Agreement provides:

"15.1.4. Exemption of Revenue Share.

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

6. It is the appellant company's own case that the grounds for challenge do not concern disputed questions of fact, but an interpretation of Clause 15.1.4, which, according to the appellant company, is patently erroneous. However, as observed by the Supreme Court in *P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd.*, reported in (2012) 1 SCC 594, the Court does not sit in appeal over the award of an Arbitral Tribunal.

7. It is well settled that all proceedings relating to arbitration are governed by the provisions of the Arbitration and Conciliation Act, 1996, hereinafter referred to as "the 1996 Act".

8. Recourse to a Court against an arbitral award may only be made by an application for setting aside award in accordance with sub-section (2) and sub-section (3) of Section 34 of the 1996 Act. Under sub-section (2) of Section 34 of the 1996 Act, an arbitral award may be set aside by the Court only if the applicant for setting aside furnishes proof that:

- (i) the party was in some incapacity; or
- (ii) the arbitration agreement was not valid under the law to which the parties had subjected it or, failing any indication thereon, under the law for the time being in force; or
- (iii) the party making the application had not been 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 dealt with a dispute not contemplated or falling within the terms of the submission to arbitration, or it contained decisions on matters beyond the scope of the submission to arbitration; or
- (v) the composition of the Arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the parties; or

if the Court found that the subject matter of the dispute was not capable of settlement by arbitration under the law for the time being in force, or the arbitral award was in conflict with the public policy of India.

9. It is nobody's case that any of the provisions of sub-section 2(a) of Section 34 of the 1996 Act were attracted in this case. An award may also be set aside on grounds specified in sub-section 2(b) of Section 34 of the 1996 Act, that is when the Court finds that the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force or on the ground that the arbitral award is in conflict with the public policy of India. It was also nobody's case that the subject matter of the dispute was not capable of settlement by arbitration under the law for the time being in force.

10. The question is whether the arbitral award can be said to have been in conflict with the public policy of India. The answer to the aforesaid question necessarily has to be in the negative. This is evident from Explanations (1) and (2) appended to Section 34(2)(b) of the 1996 Act. Explanation (1) clarifies, for the avoidance of any doubt, that an award would be in conflict with the public policy of India only if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or was in contravention with the fundamental policy of Indian law; or was in conflict with the most basic notions of morality or justice. Explanation (2) makes it clear, for avoidance of any doubt, that the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on merits of the dispute.

11. An award can only be set aside on the ground that it is against public policy, if it is contrary to fundamental policy of Indian Law, or the interest of India, or justice or morality, or is patently illegal. There does not appear to be any patent illegality in the award impugned. The facts which vitiate an award as contrary to the public policy of India have elaborately been discussed in *Associate Builders v. Delhi Development Authority*, reported in (2015) 3 SCC 49.

12. The award in respect of the claim to exemption of Augmentation Charges was, as observed above, based on the Arbitral Tribunal's interpretation of Clause 15.1.4. of Part I of the Agreement read with certain other provisions. The relevant part of the award is extracted herein below:

"16. a) It is, therefore, now become necessary to refer to the textual contours, object and purpose of the said clause 15.1.4 by construing the same in its real and proper perspective. Section/Clause

15, has its caption as "General Obligations". The various sub topics enumerated therein and the several stipulations therein clearly indicate that none of the several contingencies envisaged in those provisions does not in any part of the same attempts to even indirectly deal with cl:14 and annexure six or the provisions and obligations therein are suggestive of even a remote possibility of giving an overriding effect to the same by super imposing it on any one or more of the provisions of the licence agreement. That apart there is nothing which makes it also to be a special provision vis-a-vis Section/Clause 14, more particularly 14V to give clause 15.1.4 special status or importance and preference of such nature to the extent of defeating/destroying the soul and life force of the very deal viz., unconditional undertaking/offer by the claimant to pay 52.524% of the gross revenue to be calculated as envisaged in Clause 14.V, as the revenue share for the respondent part parting with its right by making the grant in the form of the licence, in favour of the claimant under the licence agreement dated 14.09.2006. A careful reading of the various provisions under several sub topics of Section/Clause 15 do not give room for any assumption that they or anyone of the provisions therein, be it even 15.1.4 are to have any superimposing or over riding effect of section/clause 14 or throw over board the solemn undertaking or deride/defeat the unconditional offer given by the claimant to pay a revenue share of 52.524% of the gross revenue as defined in the agreement, on the basis of which only the claimant has been chosen for the grant.

b)

A fair, purposive and reasonable reading of the provision would show that it does not speak of the revenue generated by the so-called equipment/machinery at all, but deals with the equipment and machinery brought in or imported by the claimant and handled in any one or more of the methods so as to attract the levy envisaged in cl.14 v, ix and x as well as cl.13 viii and ix of the license agreement. Cl.15.1.4 was really meant to obviate any such liability if such equipment and machinery has been brought for maintenance or augmentation. The manner of reading sought to be suggested on behalf of the claimants is not only perverse but would lead to monstrous results, destructive of the basic and very fundamental basis

of the license agreement itself. In our considered view the provision merely provides for not levying or claiming any revenue share on items of equipment/machinery brought during initial construction period of the project until commissioning of the terminal and even thereafter levy/or claim any revenue share for any equipment/machinery brought for maintenance or augmentation of the terminal, even after commissioning of the terminal till the expiry of the licence period which otherwise is leviable even though brought inside the terminal by the claimant/licensee itself. The attempt of the claimant to rewrite the words 'shall not be claimed and levied for any equipment/machinery' as the revenue (Gross Revenue) earned by the equipment/machinery not only amount to doing violence to the language of the contract but constitute a deliberate attempt to overlook the real purport and object of the provision and thereby attempt to introduce a self infused ambiguity or contradiction in it in juxtaposition to clause/section 14 and particularly Section 14V read with clause 1.1.84 and Appendix 6, which otherwise is clear specific and do not admit of any such doubts whatsoever to resort to any general principle of construction advanced on behalf of the claimant.

c) The futile nature of the attempt of the claimant would stand exposed once clause 15.1.4 is read in the background and context of clause 14V as well as cl. 14 ix and x and cl.13 viii and ix of the license agreement and the impact of the various items of revenue enumerated and the nature and points of their levy and collection on every cargo (equipment and machinery as well) from all users of the terminal including the licensee, which all go to constitute the gross revenue. The provision in Section/clause 15.1.4 only protects the machinery/equipment that may be brought by the licensee into the terminal/project area from local resources or even by import from being not made liable for revenue share only, as long as such equipment/machinery are brought in either for setting up of the terminal or for maintenance and augmentation of the terminal. Reading of the provision otherwise meant for exempting a levy on the machinery/equipment brought in for the development/ augmentation, the way the claimant desires as if it is for exemption of the revenue

earned thereby would not only amount to distortion and misreading of clause 15.1.4, but also would amount to permitting perfidious reading destructive of the very object of such a provision. A careful analysis of the various classes of levies to which any material brought inside for use/storage will be automatically subjected to would inescapably reveal the real reason to enact a provision like 15.1.4 in the contract to exempt such machinery. A careful reading of clause 14V(g) and giving due weight to its contents would also show as to what income only is or could be excluded from the gross revenue would also go to belie the stand taken for the claimant. Clause/Section 13X noticed supra will also go to show that but for a provision like clause/section 15.1.4, the fact that the licensee has brought the equipment/machinery inside the terminal/project area would not by itself enable to avoid liability to one or more of the charges enumerated in clause 14V and the fact that the licensee may not be interested in getting his share of such levy is no reason to deprive the share of levy of any such charges. Therefore, we are of the considered view that clause/section 15.1.4 has a designed purpose to serve but certainly not the one the claimant seeks to project it. Clause 15.1.4 thus is a simple clause with a designed purpose of granting exemption from payment of any one or other of the charges enumerated in clause 14 v, ix and x and cl.13 viii on items, equipment, machinery of the licensee brought by him for setting up Terminal and for augmenting the capacity of the Terminal."

13. It is well settled that when a case involves interpretation of a clause or some clauses of an agreement and the Arbitral Tribunal gives an interpretation which is plausible, the Court would not substitute that interpretation for its own interpretation only because the Court takes a different view or feels that the other interpretation is a better interpretation. This view is fortified by the decisions of the Supreme Court in *State of Rajasthan v. Nav Bharat Construction Co.*, reported in (2010) 2 SCC 182 and *P.R.Shah*, supra.

14. There can be no question of interference with an interpretation of the agreement made by an Arbitral Tribunal, unless the interpretation is so perverse, unreasonable and fanciful that no body of persons instructed in law and acting reasonably could have interpreted the contractual provision in the manner that has been done. The award rejecting the claim in relation to exemption of augmentation charges is based on a

reasonable interpretation of the provisions of the contract. On a careful reading of the application under Section 34 of the 1996 Act with the memorandum of appeal, it is patently clear that it is the appellant company's own case that the Arbitral Tribunal has given a possible interpretation of the language of the statutory provisions without going into the intent and object of the provision. A literal interpretation of words and expressions as used cannot possibly be a perverse interpretation.

15. In our view, the claim of the appellant company in respect of augmentation charges has rightly been rejected by the Arbitral Tribunal on a reasonable interpretation of the provisions of the contract, referred to herein above.

16. As held in *Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.*, (2011) 8 SCC 333, cited by M.Sundar, J. all proceedings relating to arbitration are governed by the 1996 Act, including an appeal which is governed by Section 37 of the 1996 Act, and in deciding an appeal, the Division Bench is only to see if the judgment under appeal is patently erroneous. The Division Bench cannot substitute its view for the view taken by the Single Bench only because it prefers another view and it hardly needs mention that the scope of interference with an impugned award by the Appellate Court is restricted to the same grounds on which an impugned award can be interfered with in proceedings under Section 34 of the 1996 Act.

17. I am in absolute agreement with M.Sundar, J. that the appeal is liable to be dismissed. The appeal is dismissed.

-s/d-

Assistant Registrar (CS-IV)

True Copy

Sub-Assistant Registrar

sasi

To

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

+1 Cc to Mr. Krishna Ravindran, Advocate sr 16176.

+1 CC to Mr.M. Praveen Kumar, advocate sr 16390

O.S.A.No.231 of 2015

SP(02/03/2018)