IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on	19.09.2019
Judgment pronounced on	27.09.2019

CORAM

THE HONOURABLE Mr. JUSTICE **SENTHILKUMAR RAMAMOORTHY**

O.P. Nos.190 and 199 of 2013
and
O.A.No.703 of 2013

Chennai Port Trust
No.1, Rajaji Salai,
Chennai - 600 001 ... Petitioner
(in O.P. No.190 of 2013 and 1st respondent in O.P. No.199 of 2013)

Vs.

1.Chennai International Terminals Pvt. Ltd.,
2nd Floor, North Wing, Jawahar Building,
No.17, Rajaji Salai,
Chennai - 600 001. ... 1st Respondent
(in O.P.No.190 of 2013 and Petitioner in O.P.No.190 of 2013)

2.Hon'ble Mr. Justice J.Kanagaraj(Retd)
No.7, Justice Ramanujam Road,
Chennai - 600 041.

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

4.Hon'ble Mr. Justice K.P.Sivasubramanian(Retd.)
No.47, Pulla Avenue, Shenoy Nagar,
Chennai - 600 030. ... Respondents 2 to 4 in both petitions.

Prayer in O.P.No.190 of 2013:- Original Petition is filed under Section 34 of Arbitration and Conciliation Act, 1996 to set aside the Award dated 19.09.2012 by the Arbitrators/Respondents 2 to 4 in so far as the reliefs No.1,3,4,5 and 6 granted by the Arbitral Tribunal.

Prayer in O.P.No.199 of 2013:- Original Petition is filed under Section 34 of Arbitration and Conciliation Act, 1996 to set aside the Award dated 19.09.2012 passed by the Arbitrator in so far as it held the annual rate of escalation to be applied on the lease charges payable by the Petitioner will be 5%(compoundable), and thus render justice.

For Petitioner : Mr.G.Rajagopalan
Additional Solicitor General for
Mr.R.Karthikeyan
(Petitioner counsel in O.P.No.190 of 2013 and 1st respondent counsel in O.P.No.199 of 2013)

For Respondents : Mr. Satish Parasaran
Senior Counsel for
M/s.Vinod Kumar
(Ist respondent counsel in O.P.No.190 of 2013 and Petitioner counsel in O.P.No.199 of 2013)

O R D E R

The Respondent before the Arbitral Tribunal is the Petitioner in O.P. No.190 of 2013 and the Claimant in the Arbitration Proceeding is the

Petitioner in O.P. No.199 of 2013. In both the above mentioned O.P.s, the Award dated 19.09.2012 of the Arbitral Tribunal (the Award) is challenged in respect of particular conclusions of the Arbitral Tribunal, as specified in the respective Petitions and detailed below.

2.In O.P. No.190 of 2013, the Award is challenged in respect of reliefs 1,3,4,5 and 6 which were awarded in favour of Chennai International Terminals Private Limited(the Licensee). In O.P. No.199 of 2013, the said Award is challenged in so far as it was held therein that the annual rate of escalation to be applied on the lease charges payable by the Petitioner will be 5%(compoundable).

3.For the sake of convenience, the Petitioner in O.P. No. 190 of 2013 is referred to as the Chennai Port Trust and the Petitioner in O.P. No.199 of 2013 is referred to as the Licensee in this order.

4.The Chennai Port Trust invited a tender in April 2005 for the purpose of converting the then existing East Quay and South Quay – III of the Chennai Port into a container terminal. Upon consideration of the bids, the Chennai Port Trust accepted the bid submitted by the Licensee. Accordingly, a Licence Agreement dated 07.03.2007 was executed whereby the Licensee was granted a licence to build, operate and maintain the 2nd container terminal at the East Quay of 527 meters and South Quay-III 264 meters of the Chennai Port for a period of 30 years, and thereafter transfer the same to the Chennai Port Trust. As per the Licence Agreement, charges are payable by the Licensee to the Chennai Port Trust as per the Scale of Rates approved by the Tariff Authority for Major Ports(TAMP), as indicated in Appendix -VI of the Licence Agreement, under the provisions of the Major Port Trust Act,1963(the MPT Act).

5.Upon being granted the licence and being put in possession of the relevant assets, the Chennai Port Trust called upon the Licensee to pay the land lease charges with effect from 2007-2008. Based on such request, the Licensee paid the land lease charges. Subsequently, based on the order dated 03.09.2010 of TAMP, the Chennai Port Trust fixed the base year for the calculation of land lease charges as the year 2002-2003. On that basis, the Chennai Port Trust re-calculated the land lease charges that should be paid by the licensee by applying escalation at the rate of 5% from the year 2002-2003 onwards on the rate fixed for developed land and undeveloped land. In this regard, it is relevant to state that the land lease charges had been fixed at Rs.2000/- per 100 sq. meters for undeveloped land and Rs.3,800/- per 100 sq. meters for developed land and these rates were specified in the Licence Agreement. Therefore, differences arose between the parties as to whether the year 2002 – 2003 should be reckoned as the base year or whether the first year of the licence, namely, 2007 – 2008 should be treated as the base year. In addition, according to the Licensee, the escalation rate should be 2% as provided in the scale of rates read with the land policy guidelines of the Ministry of Shipping, whereas, as per the Chennai Port Trust, the escalation charges per year should be 5% as provided in Article 13.14 of the Licence Agreement. The 3rd issue on which differences arose between the parties is with regard to whether the rate for developed land should continue to be applied in the subsequent years notwithstanding the fact that the macadam surfacing of the developed land had been removed by the Licensee for the purpose of the project after commencing work. In other words, the contention of the Licensee was that once the macadam surface is removed, the land becomes undeveloped land and, therefore, the rate of Rs.2000/- per 100 sq. meters should be applied and not the rate of Rs.3,800/- per 100 sq. meters. The 4th issue on which parties developed differences is with regard to the date from which the land lease charges were liable to be paid. The contention of the Licensee, in this regard, was that the Chennai Port Trust agreed that the date of handing over of the land was 01.05.2007 and not 01.04.2007 and that, therefore, the land lease charges should be charged only from 01.05.2007 and not from 01.04.2007. In view of the inability of the parties to resolve this dispute amicably, the dispute was referred to Arbitration. Accordingly, the Licensee/claimant therein made claims for the following relief against the Chennai Port Trust/respondent therein:

(a) for an Award declaring that the base year for the purpose of calculation of the Licence charges in terms of the Licence Agreement is 2007 – 2008 and not 2002 – 2003 as reckoned by the respondent and consequently direct the respondent to refund the amount of Rs.4,74,84,998/- collected from the claimant in excess;

(b) to declare that the respondent is entitled to an annual escalation of land lease charges at 2%(simple) as per the agreement and consequently direct the respondent to refund to the claimant the excess amount of Rs.6,79,41,154/- collected from the claimant;

(c) Declare that the respondent is entitled to levy and collect the Annual land lease charges for the entire term of licence agreement on the basis of nature of licensed area as it existed on the date of the agreement and consequently direct the respondent to refund the excess amount of Rs.12,12,58,594/- collected from the claimant;

(d) Declare that the annual land lease charges payable by the claimant to the respondent in terms of License Agreement on the area licensed to the claimant is to be reckoned as open space only with effect from the year 2008-2009;

(e) Declare that the licensed premises were handed over to the claimant on 01.05.2007 and the demand made by the respondent for Rs.46,26,721/- towards the lease charges for the period from 01.04.2007 to 30.04.2007 is erroneous and consequently direct refund of the same;

(f) Direct the respondent to pay the claimant interest at 18% per annum (check per annum needed or not) on the excess amounts collected from the claimant.

6. The Chennai Port Trust, by Reply Statement and Counter Claim Statement, made the following counter claims against the Licensee/respondent in the counter claims therein:

(a) Declare that the excess amount of Rs.1,51,42,607 deducted by the Respondent from the amounts payable to the counter claimant towards the land lease rental charges/royalty payments are erroneous and inadmissible, and consequentially direct the respondent to pay the said amount of Rs.1,51,42,607 to the counter claimant.

(b) Declare that the Respondent is bound to pay the penal interest for the delay in payment of land lease charges of Rs.6,84,45,554/-, the payments being made only on 20.11.2009 instead of April 2007 by the Respondent, the said penal interest as per Clause 13.29 of the Agreement works out to Rs.1,94,49,117/- and consequently direct the Respondent to pay the sum of Rs.1,94,49,117/- to the counter claimant.

7.As stated earlier, the claims and counter claims were decided by the Arbitral Tribunal by the Award wherein, in a nutshell, the Arbitral Tribunal held as follows: (a) the base year for the application of land lease charges is 2007-2008; (b) the applicable rate of escalation is 5%; (c)once the macadam surface was removed for the purposes of the project, the rate applicable to undeveloped land should be adopted; (d) that land lease charges are payable from 01.05.2007 and not 01.04.2007 and, on all the above issues, with consequential monetary implications. The said Award is the subject matter of challenge in the two O.P.'s to the extent mentioned supra.

8.At the hearing, the learned Additional Solicitor General appeared on behalf of the Chennai Port Trust. His arguments were largely focused on the order dated 03.09.2010 of TAMP and as to how the Arbitral Award is both contrary to public policy and in contravention of substantive law because it overrides the statutory order of TAMP. In order to substantiate the said submission, the learned Additional Solicitor General first referred to the Licence Agreement. In specific, he referred to the definition of the expression “Scale of Rates” which reads as under:

> "Scale of Rates" means the Scale of rates and a statement of conditions as prevalent on the Date of Award of Licence as notified by TAMP under the provisions of MPT Act, as set out in Appendix 6 and as amended from to time and applicable to the Licensor or the licensee as specified in the relevant Article."

By referring to the above definition, he submitted that the Scale of Rates refers to the scale of rates notified by TAMP under the provisions of the MPT Act. In effect, he submitted that the parties to the Licence Agreement recognised the authority of TAMP in the matter of fixation of the Scale of Rates. He, thereafter, referred to Article 13.14 of the Licence Agreement, wherein the expression lease rent is defined as follows:

> "Lease Rent means charges payable by the Licensee to the Licensor for the Licensed Premises

as per applicable licence fee contained in the Licensor's Scale of Rates. The Lease Rent shall be bear an escalation at a rate of 5%(compoundable) per annum as per the Licensor's Scale of Rates. The Licensor shall have the option to refix the base of Lease Rent every five years. The Licensor's Assets shall be classified (as provided in Table 2 of Appendix 3) for the purpose of determining the Annual Land Lease Charges including the premium and security deposit and shall be charged at the rate indicated alongside."

9.In view of the fact that the definition of Scale of Rates refers to the scale of rates set out in Appendix – VI, he, thereafter, referred to the said Appendix – VI(described therein as Chapter VI), wherein the licence fee in respect of open space is specified as Rs.2000/- per calender month or part thereof for every 100 sq. meters or part thereof. It is further specified therein that the licence fee for open space hardened with water bound macadam surface is Rs.3,800/- per 100 sq. meters or part thereof. After drawing reference to the said rates, he also referred to the general note at the foot of Scale 1 of the said Appendix – VI and pointed out that in the event of inconsistency between the rates prescribed in Scale – 1 and Scale -2 of Chapter – 6 and the conditions prescribed by the Government in the Land Policy guidelines in February-March 2004, the conditions prescribed in the said Land Policy guidelines shall prevail. He, thereafter, referred to the Order dated 03.09.2010 of TAMP. In this regard, he submitted that the said Order was issued at the instance of the Licensee, which requested for clarifications by letter dated 02.01.2010 in respect of the license fee prescribed in the Scale of Rates of the Chennai Port Trust. He further pointed out that in response to such request for clarification as to whether the base year should be 2007 – 2008 or 2003 – 2004, TAMP by the said order categorically clarified as under:

> "10.In the result, and for the reasons given above and based on a collective application of mind, this Authority clarifies that:
>
> (i) The base date of license fee for calculation of charges leviable for licencing the CHPT lands is the effective date of implementation of the tariff Order dated 5 October 2002.
>
> (ii) The base rates prescribed in the Scale of Rates of CHPT vide Order dated 5 October 2002 for allotment of space should be escalated by 2% per annum from the due date of such annual escalation which fell after February / March 2004 on announcement of the Land Policy Guidelines by the Government. For the period prior to this, escalation factor of 5% per annum as stipulated in the tariff Order dated 5 October 2002 should be applied.
>
> (iii) The category of land in which an individual lease/licence would fall is a matter of fact to be administered by the port. There is

> nothing for this Authority to clarify the Scale of Rates as no ambiguity is found therein.”

10.In spite of the said order of TAMP, under the provisions of the MPT Act, the learned Additional Solicitor General submitted that the Arbitral Tribunal proceeded to effectively overrule the statutory order of TAMP by recording in the Award that it has jurisdiction to decide as to whether the decision of TAMP is correct or not. After holding that it has the jurisdiction to decide as to the validity of the order of TAMP, he submitted that in total disregard and contravention of the order of TAMP, the Arbitral Tribunal held as follows at the end of paragraph 27 of the Award:

> "Consequently the rates prescribed by TAMP in March 2006 should alone be applicable to the claimant (licensee) and the year 2007 - 2008 can only be the base year. In as much as the agreement does not speak about the base year. It was totally illegal to adopt 2002 as base year and revise the charges payable by the claimant. The reliance on the escalation rates and adoption of the base year as 2002 has no relevance to the issue and the reasoning of the TAMP is unsustainable. For all the above reasons we hold that the base year in respect of license agreement between the parties is only the year 2007-2008. Consequently the collection of revised charges from the claimant is illegal and liable to be refunded to the claimant."

11.Based on the foregoing, the learned Additional Solicitor General concluded his submissions by stating that the Award is, therefore, in contravention of both substantive law and the contract, which expressly recognises the authority of TAMP in the matter of fixation of the Scale of Rates.

12.In response and to the contrary, the learned Senior Counsel for the Licensee, Mr.Satish Parasaran, submitted that the Chennai Port Trust was required to hand over the requisite land on the actual date of award of licence and that if there is delay, the Date of Award of Licence, which is a defined term in the Licence Agreement, would be shifted to correspond to the date of hand over of land. Accordingly, he submitted that on account of the belated handing over of the land, the Date of Award of Licence was shifted to 01.05.2007. In this connection, he referred to the definition of the Date of Award of Licence, which states that the "Date of Award of License means the date of signing of the agreement or handing over the Licensor's Assets excluding the Reclaimed Area and or providing Environment Clearance for extension of the berths whichever is later". He also referred to the definition of annual land lease charges at Article 12.10 of the License Agreement. It is stipulated, inter alia, therein that the "Lease charges [Annual Land Lease Charges] during the License Period shall be payable by the Licensee to the Licensor at the Licensor's Scale of

Rates as indicated in Appendix – 6 for the Licensor's Assets as per Appendix 3....". He further submitted that it is specifically provided that the land lease charges are payable on annual basis as provided in the table therein. He also referred to the scale of licence fees in respect of undeveloped land and developed land as provided in Appendix/Chapter – 6 under the heading "miscellaneous charges". In response to the contention that the Arbitral Tribunal disregarded the statutory order of TAMP, he submitted that TAMP made it clear in its Order that it did not have the jurisdiction to decide on the dispute arising out of the Licence Agreement between the parties. In order to substantiate this submission, he referred to the finding at paragraph 9 of the said order of TAMP which reads, inter alia, as under:

> "....In any case, this Authority is not the appropriate forum for interpreting a License agreement and settle the disputes between the Landlord Port and a BOT operator...."

From the same paragraph, he also pointed out that TAMP held that "the exercise on hand is not an attempt by this Authority to adjudicate the disputes between CITPL and CHPT with reference to the License Agreement signed between them". Further, he pointed out that it is also recorded that "it is to be borne in mind that the scale of rates notified by the Authority has common application and is not oriented towards any individual cases unless special mention to this effect is made therein".

13.According to the learned senior counsel, the Arbitral Tribunal is the contractually specified adjudicatory authority in respect of all disputes arising out of the Licence Agreement and carried out adjudication by keeping the above aspects in mind. In this context, he further pointed out that the Award expressly refers to the fact that TAMP had observed that it is not the appropriate forum for interpreting the Licence Agreement and for the settlement of disputes between the landlord Port and the BOT operator and also that TAMP had observed that it has expressed its opinion in general on the base year and not with reference to an individual Licence Agreement. He also referred to paragraph 16 of the Arbitral Award wherein a table is provided specifying the land lease charges as per the TAMP order. By drawing attention to the said table, he contended that it would be totally contrary to the terms of the Licence Agreement if the Licensee is called upon to pay Land Lease charges at the rate calculated using the base year 2002 – 2003 when the admitted factual position is that the Licensee was put in occupation of the licensed assets only in May 2007. Accordingly, he submitted that the contractually agreed rates of Rs.2000/- per 100 sq. meters for undeveloped land and Rs.3,800/- per

100 sq. meters for developed land should be applied with effect from 2007 – 2008 and the applicable escalation rates should be applied to those rates in the following years. With regard to the claim made for Land Lease charges with effect from 01.04.2007, he pointed out that, in the meeting held on 17.06.2008 between the representatives of the Licensee and Chennai Port Trust, it was expressly recorded that the date of handing over of the licensed premises had been shifted from 01.04.2007 to 01.05.2007. Accordingly, he submitted that there is no scope for claiming Land Lease charges from 01.04.2007. He also referred to the definition of the expression "year" and pointed out that it is defined as a period of 12 consecutive months commencing on the Date of the Award of the Licence and ending on the immediately succeeding March 31. Therefore, he submitted that the Land Lease Charges can only be calculated from the Date of Award of Licence, which is the date of signing of the License Agreement or the date of handing over the licensor's assets, whichever is later. Accordingly, in view of the undisputed position that the date of handing over of the licensor's assets was shifted to 01.05.2007, he submitted that the Award of the Arbitral Tribunal, whereby the Date of Award of the Licence was fixed at 01.05.2007 is perfectly in order.

14.With regard to the Arbitral Tribunal's conclusion that annual escalation should be calculated at 5%, he submitted that the said conclusion is contrary to the General Conditions for Long Term Lease in Chapter/Appendix VI at P.226 of Vol.I which provides that "the lease rent shall bear an escalation at a rate of 2% per annum". Accordingly, he contended that the Award is in contravention of the Licence Agreement, in this regard, and, therefore, O.P.No.199 of 2013 is liable to be allowed whereas O.P.No.190 of 2013 is liable to be dismissed.

15.By way of rejoinder submissions, the learned Additional Solicitor General reiterated that the Chennai Port Trust is a Government entity and that the statutory order issued by the TAMP under the MPT Act is binding on both parties. It was also reiterated that the definition of scale of rates made express reference to the Scale of Rates notified by TAMP.

16.The records were examined and the oral submissions of both the parties were carefully considered.

17.The question that arises for consideration is whether the Award of the Arbitral Tribunal in respect of any of the claims, which are under challenge in the two O.Ps, is liable to be set aside. In this connection, the law with regard to the setting aside of Arbitral Awards, as applicable to this case, i.e. in respect of arbitrations that commenced prior to 23.10.2015, may be referred to briefly. In a nutshell, in a long line of decisions leading up to **ASSOCIATE BUILDERS Vs. DELHI DEVELOPMENT AUTHORITY (2015) 3 SCC 49,** the Hon'ble Supreme Court held that an Arbitral Award may be set aside, on merits, either if it is contrary to public policy or if it is patently illegal. The Award is said to be contrary to public policy, inter alia, if it is in contravention of the fundamental policy of Indian law. As regards patent illegality, it has been held that an Award that is contrary to substantive law or contrary to the Arbitration and Conciliation Act,1996(the Arbitration Act) or in disregard of the contract can be interfered with provided the error is apparent on the face of the record and goes to the root of the matter. With regard to interpretation of contract, the position is that interpretation is within the domain of the Arbitral Tribunal and unless an interpretation is implausible, completely unreasonable or perverse, it would not be interfered with. Similarly, as regards appraisal of evidence, the position is that the Arbitral Tribunal is the final arbiter of the relevance, admissibility, weight and materiality of evidence and that reappraisal of evidence is not to be carried out in a petition under Section 34 of the Arbitration Act. In other words, as regards evidence, interference is warranted only if the Award is based on no evidence or if irrelevant evidence is the basis of the Award or if vital evidence was disregarded.

18.If the Arbitral Award under challenge in this case is examined against the above mentioned legal context, it is evident that the Arbitral Tribunal closely examined and analysed the terms of the License Agreement. Upon such examination, the Arbitral Tribunal concluded that Scale of Rates is defined as the scale of rates prevalent on the Date of Award of Licence as notified by TAMP under the MPT Act. It is further held in the said Award that based on the notification by TAMP, the Scale of Rates is specified under Appendix/Chapter – 6 of the Licence Agreement as Rs.2000/- per 100 sq. meters as regards undeveloped land/open space and Rs.3,800/- per 100 sq. meters in respect of developed lands/open space hardened with water bound macadam surface. On the said basis, the Arbitral Tribunal concluded that the Land Lease charges were fixed in the Licence Agreement on the basis of rates notified by TAMP and that such rates would, therefore, be applicable from the Date of Award of Licence, which is on 01.05.2007, on account of the admitted shifting of the date of hand over of assets to 01.05.2007. The said finding of the Arbitral Tribunal is based on a reasonable interpretation of the terms of the Licence Agreement and cannot be construed as implausible or perverse on any account. As regards the contention that the Order of TAMP was disregarded, it is clear from Paragraph 9 of the said order that TAMP was conscious of the fact that it is not the appropriate forum to interpret the Licence Agreement and settle the dispute between the landlord Port Trust and BOT operator. TAMP was, in effect, acutely conscious of the fact that its role is not to take decisions in respect of individual cases and that its jurisdiction is with regard to the fixation of the scale of rates for common application. Upon taking into account the said observations of TAMP, the Arbitral Tribunal held that it had jurisdiction to decide as to what is the appropriate base year as regards the Licence Agreement between the Licensee and the Chennai Port Trust. By proceeding on the said basis, the Arbitral Tribunal held that the TAMP order was issued on the basis that an imaginary person had taken the land of the Chennai Port Trust on lease in the year 2002, whereas, the Licence Agreement would be applicable and binding on the Licensee only with effect from the Date of Award of the Licence. Therefore, the Arbitral Tribunal held that, in the absence of a contractually stipulated base year, the only reasonable base year could be 2007 – 2008, which is the year relating to the Date of Award of Licence to the Licensee. This finding of the Arbitral Tribunal is eminently reasonable and is based on a fair reading of the terms of the Licence Agreement.

19.The next issue to be considered is the finding of the Arbitral Tribunal with regard to the applicable escalation rate. In this regard, the Arbitral Tribunal examined Article 13.14, which is reproduced supra and expressly stipulates that the "lease rent shall bear an escalation at the rate of 5%", and held that this express contractual stipulation would prevail over government policy guidelines because the said guidelines do not apply to BOT contractors such as the Licensee. The Arbitral Tribunal further held that the categorical reference to 5% in Article 13.14 of the Licence Agreement is not a mistake and that it should be implemented as opposed to the General Conditions in Appendix VI. This conclusion is also based on a reasonable reading and interpretation of the terms of the Licence Agreement.

20.The third issue that was considered by the Arbitral Tribunal was whether the land lease charges should continue to be charged at the rates specified for developed land notwithstanding the fact that the macadam surface was required to be and was removed by the Licensee for the purposes of the project. On this issue, the Arbitral Tribunal examined the definition of the term "project" in the Licence Agreement read with Appendix 1 and concluded that the Licence Agreement envisages removal of the macadam surface for the purposes of the project and that, therefore, once the macadam surface was removed, the annual land lease charges for the following years should be at the rates specified for undeveloped land. This conclusion is also based on a fair and reasonable construction of the contract and does not warrant interference.

21.Finally, the Arbitral Tribunal examined the minutes of the meeting dated 17.06.2008 and held that the Date of Award of the Licence would be 01.05.2007 because of the admitted delay in the handing over of the Licensor's assets. Once again, this conclusion is based on a proper appreciation of the evidence on record and is not liable to be interfered with under Section 34 of the Arbitration Act.

22.In view of the foregoing discussion and analysis, it is abundantly clear that the Award is not liable to be interfered with on any of the recognised grounds for interference with an Arbitral award.

23.In the result, both O.P. Nos.190 and 199 of 2013 are liable to be and are hereby dismissed. No costs. Consequently, connected application is closed.

27.09.2019

Speaking/Non Speaking order
Index: Yes/No
Internet: Yes/No
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SENTHILKUMAR RAMAMOORTHY, J.
rrg

Pre Delivery order
in
O.P.Nos.190 and 199 of 2013

27.09.2019