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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON	PRONOUNCED ON
03.01.2022	19.01.2022

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THE HONOURABLE MR.JUSTICE M.DHANDAPANI

W.P. NOS.26119 & 26121 OF 2021

AND

W.M.P. NOS.27566, 27568, 27570 & 27571 OF 2021

PSA SICAL Terminals Ltd.
South India House, 36-40, Armenian Street
Chennai 600 001, rep. by its
Authorised Signatory
Mr. Suresh Amirapu

.. Petitioner in both petitions

- Vs -

1. Union of India
rep. By its Secretary
Ministry of Ports, Shipping & Waterways
Dept. of Shipping, Port Department
Transport Bhawan No.1, Parliament Street
New Delhi 110 001.
2. The Board of Trustees of
V.O. Chidambaranar Port Trust
rep. By its Chairperson
Administrative Building
Tuticorin Port Trust, Tuticorin 628 004.

.. Respondents in both petitions

W.P. No.26119 of 2021 filed under Article 226 of the Constitution of India praying this Court to issue a writ of certiorarified mandamus calling for the records of the 1st respondent, culminating in the impugned Office Memorandum dated 11th Nov., 2021, bearing No.PD-13/18/2020-PPP/e-338899 disbanding the Committee constituted by the 1st respondent and to quash the same as being arbitrary, unilateral and against the principles of natural justice and to consequently direct the 1st respondent to set out the policy/the manner in which the disputes/issues



between the petitioner and the 2nd respondent are to be settled within a time frame to be determined by the Hon'ble Court.

W.P. No.26121 of 2021 filed under Article 226 of the Constitution of India praying this Court to issue a writ of mandamus directing the first respondent to ensure that the members of the Committee expeditiously proceed with the process/proceedings initiated by the first respondent vide office memorandum dated 21.7.2020 for settlement of disputes between the petitioner and the second respondent, including by issuing necessary directions to submit report/recommendations to the first respondent suggesting the way forward and solutions to the issues within a time frame fixed by this Hon'ble Court, after granting the petitioner an opportunity to be heard and making representations and after considering the issues raised by the petitioner.

For Petitioner : Mr. P.H.Arvind Pandian, SC, for
in both WPs M/s. S.Raghunathan

For Respondents: Mr. Sankaranarayanan, AAG for R-1
in both WPs Mr. Yashod Varadhan, SC, for
M/s.Yashwanth for R-2

COMMON ORDER

The present petition has been filed by the petitioner assailing the disbandment of the Committee, which had been constituted by the 1st respondent for the purpose of resolving the disputes/issues with regard to the issue pertaining to royalty as a part of the tariff forming part of the Tariff Order, which has been since been reduced drastically in total deviation of the licence agreement.

2. The facts, just and necessary for the disposal of the present petition could be stated as under :-

The petitioner company, being the successful bidder, in the tender process for operating the Container Terminal in the 2nd respondent Port, in pursuance of the licence agreement, had been handling the Container Terminal since 1997 on Build, Operate and Transfer basis (for short 'BOT') with the tariff for the charges, inclusive of royalty, being finalised through the various Tariff Orders by the Tariff Regulator/Government, viz., Tariff Authority for Major Ports (for short 'TAMP'). The said tariff orders are to be reviewed once in three years and the petitioner was to continue operation and maintenance of the



Terminal for a period of 30 years as per the terms of the licence agreement. The royalty collected by the petitioner was, in turn, paid to the 2nd respondent.

3. It is the specific case of the petitioner that the TAMP had drastically cut the tariffs and disallowed inclusion of royalty as an element of cost, while finalising the tariff for the years 2002 and 2008, which resulted in financial loss to the petitioner and against the said order, writ petition in W.P. Nos.40637 to 40639 of 2002 was filed before this Court, which granted interim orders and permitted the petitioner to collect tariff at the rates prevailing since 1999. The said scenario continued between the years 2005 to 2011 which resulted in series of writ petitions being filed by the petitioner and this Court granted interim directions against which writ appeals have been filed, which are pending.

4. In spite of repeated cuts in the rates of tariff, the royalty under the licence agreement was being escalated higher each year, the financial outflow of the petitioner increased dwindling its financial position, thereby incurring loss and as a result, the royalty payable by the petitioner exceeded the charges received by the petitioner towards the container handling charges charged by the petitioner. In such a backdrop, the petitioner invoking the arbitration clause in the licence agreement, filed petition u/s 9 of the Arbitration and Conciliation Act before the District Court, Tuticorin, in which, by order dated 30.6.2011, ad-interim injunction was granted restraining the 2nd respondent from charging royalty at escalated rate from 15.7.2011. Thereafter, the District Court allowed the petition filed by the petitioner by making the injunction absolute, which led to the initiation of arbitration proceedings in terms of Article 15 of the Licence Agreement and the Arbitration proceedings ended in an arbitral award being passed on 14.2.2014 in favour of the petitioner and challenge was made to the said order before this Court as well as the Hon'ble Supreme Court.

5. It is the further case of the petitioner that in and about the year 2016, the 2nd respondent had appointed a Consultant, who, after analyzing the matters had filed a report suggesting that royalty payment is in the increasing order and that the tariff is less compared to the royalty payment and, therefore, for more business friendly and conducive growth, revenue sharing model would be more suitable. Pursuant to the said report, the petitioner, by its letter dated 17.1.2017, had stated its willingness to explore the possibilities of a mutually acceptable settlement in terms of the revenue share model suggested by the consultant appointed by the 2nd respondent.



6. It is the further case of the petitioner that due to discriminatory treatment meted out to the petitioner due to more flexible options given to the adjacent berth, the business of the petitioner started sliding, leading to more financial burden on the petitioner and being aggrieved by the said discriminatory treatment, the petitioner more the Madurai Bench of this Court by way of a petition, in which interim protection was granted to the petitioner vide order dated 29.7.2019.

7. It is the further averment of the petitioner that pending the arbitral proceedings, pursuant to the interim order of this Court, while the respondent was paying the charges as per the older tariff order, office memorandum dated 21.7.20 was issued by the 1st respondent, constituting a committee for the purpose of settlement of disputes/court cases amicably between the petitioner and the Port Trusts and a recording has also been made about the willingness expressed by the petitioner to amicably settle the disputes/court cases pertaining to various Port Trusts.

8. It is the further averment of the petitioner that the committee was mainly constituted for the purpose of examining the disputes/court cases, identify the key reasons, assess the shortfalls in fulfilling obligations from both sides along with tentative cost impact, assess the charges of penal nature in each case, negotiate with the petitioner, assess the overall financial implication and to suggest recommendations for moving forward.

9. It is further averred by the petitioner that an application under Right to Information Act, requesting for certain information was filed and the materials obtained by the petitioner revealed that the disbandment of the committee constituted vide official memorandum dated 21.7.20 and the constitution of the new committee was not in pursuant to the judgment of the Hon'ble Supreme Court dated 28.7.2021, which clearly shows that the order of the Hon'ble Supreme Court was not the reason for the constitution of the new committee and, therefore, any issue, which was referenced before the old committee stood enured before the new committee, which requires to be considered.

10. It is further averred that though interlocutory application was filed in the matter, which was pending before the Hon'ble Supreme Court, which was objected to by the 2nd respondent, as the matter being sub judice, however, in view of the efforts of the 1st respondent to find an amicable solution to the pending disputes and in view of the orders of the Hon'ble Supreme Court dated 28.7.2021. Thereafter, the 2nd respondent



addressed a letter dated 4.8.2021 communicating to the petitioner about the due of royalty payable by the petitioner along with interest and penalty to the tune of Rs.1027,37,09,260/-. The petitioner, vide letter dated 11.8.2021 to the 1st respondent requested for convening of the Committee constituted vide the official memorandum dated 21.7.20 for proceeding with the hearing.

11. In the absence of any progress of the Committee to proceed further, the petitioner preferred W.P. Nos.18671 and 18676/21 seeking direction for expeditious settlement of the disputes pursuant to the official memorandum dated 21.7.20. Pending the said writ petitions, the 2nd respondent herein had issued a notice of "intent to terminate" dated 6.10.2021 invoking Article 13.4.1 of the licence agreement, the basis for which being the alleged royalty dues payable by the petitioner, which had already been referred to the committee. It is the averment of the petitioner that the said notice had virtually defeated the intent and purpose of the Committee formed by the 1st respondent vide the official memorandum dated 21.7.20. It is the further averment of the petitioner that pending hearing of the matter by this Court for very many reasons, the impugned official memorandum has been issued and served on the petitioner by the 1st respondent disbanding the committee constituted on the ground that the issue having been finally adjudicated upon by the Hon'ble Supreme Court, the dispute relating to royalty cannot be reviewed by the committee.

12. It is the further averment of the petitioner that the disbanding of the Committee has not been communicated to the petitioner inspite of the petitioner, through its numerous correspondences, requested the Committee to proceed with the settlement of the disputes. It is the further averment of the petitioner that without affording an opportunity of hearing to the petitioner before the Committee, the Committee had been disbanded without consultation with the stakeholders, which is against the principles of natural justice.

13. It is the further averment of the petitioner that there is a clear observation in the judgment of the Hon'ble Supreme Court dated 28.7.2021 that the said order is confined only with the issue as regards the validity of the award and it has not gone inter alia into any other aspect relating to the losses incurred by the petitioner and the commercial viability of the project. It is the further averment of the petitioner that pending W.P. Nos.18671 and 18676 of 2021, which were filed for direction to the 1st respondent to expeditiously proceed with the process of settlement of the disputes in the manner contemplated in the official memorandum dated 21.7.2020, the 1st respondent had not only kept silent without filing any reply in the writ



petition, but had thwarted and defeated the very purpose of the writ petitions by disbanding the committee and placing reliance upon the decision of Hon'ble Supreme Court, had disbanded the committee, which clearly shows the unilateral and high-handed approach of the 1st respondent in dissolving the committee without any cogent and convincing reasoning and also without following the principles of natural justice.

14. Therefore, the petitioner avers, that in the interest of justice, equity and good conscience, the notice of the 2nd respondent relating to intent to terminate the licence agreement dated 15.7.1998 and the impugned office memorandum dated 11.11.2021 disbanding the committee requires to be set aside as otherwise it will cause irreparable loss, hardship and prejudice to the petitioner if the above proceedings are allowed to survive. Therefore, the petitioner prays that its right under Article 14 of the Constitution be protected and the act of the respondents, being arbitrary and in violation of Article 19 (1) (g) of the Constitution, the same requires to be interfered with by setting aside the orders impugned herein.

15. Learned senior counsel appearing for the petitioner submitted that the order of the Hon'ble Supreme Court in C.A.Nos.3699 & 3700/2018 has adverted to the arbitral award and has only set aside the arbitral award leaving all the other points open to be canvassed by the petitioner and has not precluded and closed the petitioner from raising its grievance. That being the case, the disbandment of the Committee and omitting to deal with the grievance of the petitioner and the 2nd respondent relating to the royalty payable is only to cause prejudice to the petitioner, more so, when the subsequent committee had been constituted with wider scope and issues to deal with and disbanding the earlier committee, but omitting to go into the issue of royalty vis-a-vis the revenue sharing basis between the petitioner and the 2nd respondent is wholly unjust and arbitrary.

16. It is the further submission of the learned senior counsel for the petitioner that the exclusion of the grievance of the petitioner with the 2nd respondent relating to royalty being factored as a cost while fixing tariff, which was the sole purpose of constitution of the committee vide Office Memorandum dated 21.7.2020; but the disbandment of the said committee in lieu of the formation of the new committee with wider scope, but without considering the grievance of the petitioner, without putting the petitioner on notice and affording an opportunity of hearing is wholly against the principles of natural justice.

17. It is the further submission of the learned senior counsel for the petitioner that though the initial constitution



of the new committee was with wider terms of reference and wider scope including examination of all PPP project related pending litigation/arbitration/disputes and frame draft policy/policies for settlement/resolution of different categories of issues/arbitration/court cases, however, the grievance of the petitioner is sought to be excluded, more especially relating to royalty being factored as cost while fixing tariff, citing that the issue has come to be settled with the order being passed by the Hon'ble Supreme Court. It is the submission of the learned senior counsel for the petitioner that the order of the Hon'ble Supreme Court makes it clear that the order pertains only to the validity of the arbitral award and all other points are left open for being agitated, but the stand of the respondents that by the order of the Supreme Court, the issue has attained finality, is not substantiated by records.

18. In this regard, the notings in the file relating to disbandment of the Committee, has been placed before this Court and it is the submission of the learned senior counsel that as early as on 4.10.2021, when the new committee was constituted, the reason for constitution was for the purpose of examination of all PPP project related pending litigation/arbitration/disputes and frame draft policy/policies for settlement/resolution of different categories of issues/arbitration/court cases and, therefore, the stand of the respondents that the order of the Hon'ble Supreme Court was the reason for disbandment of the committee constituted vide Office Memorandum dated 21.7.20, is wholly erroneous and is contrary to the notings in the file.

19. It is therefore the submission of the learned senior counsel for the petitioner that when a Committee has been reconstituted in the place of the old committee with a far wider scope, as is evident from the notings in the file, the stand of the respondents that the disbandment was only on account of the orders of the Hon'ble Supreme Court giving finality to the issue is wholly erroneous. Therefore, learned senior counsel prays for setting aside the impugned order and direct the new committee to take up the issue, as per the terms of reference.

20. Per contra, learned Addl. Solicitor General appearing for the 1st respondent submitted that the BOT agreement was entered into by the petitioner with the 2nd respondent, whereby the petitioner had agreed to pay royalty as per the terms of the agreement. The petitioner, invoking the arbitration clause in the agreement sought modification of the agreement pleading change of law and requesting the Tribunal to change the payment of royalty to revenue share model.



21. It is the submission of the learned Addl. Solicitor General that while the District Court confirmed the award passed by the arbitral Tribunal, this Court, on appeal, set aside the said award, vide order dated 1.11.2017, in and by which it was confirmed that royalty was payable only in accordance with the terms of the agreement. The special leave petition converted into Civil Appeal, before the Hon'ble Supreme Court, was dismissed, vide order dated 28.7.2021, confirming the order passed by this Court.

22. It is the submission of the learned Addl. Solicitor General that the contention of the petitioner to revive the Committee constituted for settling the disputes/court cases and a further direction to the 1st respondent to frame a policy for settlement of disputes cannot be favourably considered as the Courts have time and again held that it would not interfere in the matter of policy decision. The policy of the respondents to charge royalty and not to factor it as a cost in the tariff has been agreed upon by either side vide the agreement entered into and, therefore, the present writ petition is not maintainable.

23. It is the further submission of the learned Addl. Solicitor General that the committee was constituted on 21.07.2020 after the order of this Court, allowing the appeal filed by the 2nd respondent. The Committee was constituted for the specific purpose of settlement of disputes between PSA International /PSA Sical, viz., the holding company and the petitioner with all the Port Trusts, as the petitioner company and its holding company were holding agreements with all the Ports Trusts. Only in that view, the Committee was constituted vide Office Memorandum on 21.7.2020. It is the further submission of the learned counsel for the petitioner that the willingness was expressed to settle the disputes with the various Port Trusts by the holding company and the petitioner company. It is the submission of the learned Addl. Solicitor General that when the said Committee was formed and the petitioner and the holding company had accepted to settle the disputes amicably, the SLP was pending before the Hon'ble Apex Court.

24. It is the further submission of the learned Addl. Solicitor General that pursuant to the formation of the committee, aforesaid, communication emanated from the Ministry of Shipping calling for certain details from the various Port Trusts, including the 2nd respondent. Learned Addl. Solicitor General further submitted that the petitioner, vide letter dated 8.12.20 had addressed to the Ministry of Shipping and others as also the Indian Ports Association in which request was made to take up the issues pertaining to the petitioner with the 2nd respondent relating to royalty/revenue share and issue



pertaining to discriminatory treatment. It is the further submission of the learned Addl. Solicitor General that the Indian Ports Association had, vide its letter dated 10.12.20 stated that regarding payment mode change from royalty to revenue share, the issue is pending with the Hon'ble Supreme Court. It is further pointed out by the learned Addl. Solicitor General that inspite of the Committee deliberating the issue, no amicable settlement was arrived at and a failure settlement was recorded, as evidenced by letter dated 20.1.2021 and the 1st respondent had also responded that it had no intention to interfere either with the Court proceedings or before the arbitral tribunal until considered policy decision is taken. It is therefore the stand of the 1st respondent that from the time of formation of the committee in July, 2020 and the order of the Hon'ble Supreme Court on 28.7.2021, no decision having been arrived at for the 1st respondent to form a policy decision, the decision of the Hon'ble Supreme Court that the award of the Arbitral Tribunal rewriting the agreement is wholly impermissible was rendered.

25. Learned Addl. Solicitor General, therefore, vehemently submitted that the information obtained under the Right to Information Act about the disbandment of the previous committee and formation of the new committee with wider scope should be seen in conjunction with the order of the Hon'ble Supreme Court and should not be seen in isolation. It is therefore submitted that once the said new committee formation is seen together with the order passed by the Hon'ble Supreme Court, the disbandment of the older committee on the formation of the new committee cannot be found fault with.

26. It is therefore the submission of the learned Addl. Solicitor General that the royalty issue having already attained finality before the Hon'ble Supreme Court, the reference before the committee newly constituted only pertains to the pending legal disputes/issues and does not pertain to the one which have reached finality. The notice of intent to terminate the contract being on account of non-payment of royalty since 2011, which is in terms of the contract, the same cannot be said to be illegal. It is therefore the submission of the learned Addl. Solicitor General that any direction to constitute a committee to go into the question of royalty/revenue sharing would be nothing but reviewing the orders of the Hon'ble Supreme Court, which is impermissible and not maintainable. Accordingly, he prays for dismissal of the petition.

27. Learned senior counsel appearing for the 2nd respondent, while in essence adopted the arguments of the learned Addl. Solicitor General insofar as the royalty/revenue sharing being factored as cost while fixing tariff in view of the decision of



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the Hon'ble Supreme Court, further submitted that the Hon'ble Supreme Court has categorically held that the arbitral award is bad in law in view of the fact that the contract, which has been entered into between the petitioner and the 2nd respondent has been rewritten by the arbitral tribunal unilaterally by creating a new contract. It is the further submission of the learned senior counsel that once the Hon'ble Supreme Court has held that the royalty charged is in consonance with the agreement and unilaterally it cannot be modified, the natural course open to the petitioner is to pay the royalty amount to the 2nd respondent. Failure of the petitioner to pay the royalty amount, since the year 2011, citing pendency of the case, which has ultimately attained finality, necessitated the 2nd respondent in issuing the notice of intent to terminate the contract under Article 13.4.1 with the petitioner.

28. It is the further submission of the learned senior counsel for the 2nd respondent that due to the operation of the interim order, the petitioner was paying royalty only at the rates prevailing in 2011, though the licence agreement provided for increase in royalty every year. In view of the dismissal of the appeal by the Hon'ble Supreme Court upholding the royalty, the petitioner is bound to pay the enhanced royalty from 15.7.2011 as per the terms of the contract agreed between the parties.

29. It is the further submission of the learned senior counsel that inspite of the communication to the petitioner about the dismissal of the appeal and the dues outstanding to be paid by the petitioner, no action was taken by the petitioner, which resulted in the second respondent issuing notice of intent to terminate invoking Article 13.4.1.

30. It is the further submission of the learned senior counsel that the present petition is an abuse of process of law as the matter, which has already been adjudicated by the Hon'ble Supreme Court, is sought to be reagitated by filing the present petition and seeking reference of the issues which have already attained finality.

31. It is the further submission of the learned senior counsel that the issue having been given a quietus by the Hon'ble Supreme Court, the Committee having estopped from reviewing the judgment of the Hon'ble Supreme Court, resulted in the disbandment of the Committee and, therefore, the petitioner cannot seek the relief sought for as any order that would be passed by this Court would be against the order of the Hon'ble Supreme Court, which is impermissible.



32. It is the further submission of the learned senior counsel for the petitioner that the constitution of the present committee pursuant to the order of the Hon'ble Supreme Court was only for the purpose of adjudicating the issues involving the petitioner with various other port trusts. The issue of royalty did not require any deliberation by the said Committee for the simple reason that the issue of royalty had already been settled by the Hon'ble Supreme Court. Therefore, there is no illegality in the disbandment of the earlier committee vide issuance of the impugned office memorandum.

33. It is therefore the submission of the learned senior counsel that the issue of royalty having been settled by the Hon'ble Supreme Court, no necessity arose for reviewing the said issue, which resulted in the formation of the new committee for going into the other disputes involving the petitioner and other port trusts and the disbandment of the committee for the purpose of going into the issue of royalty pertaining to the petitioner with the 2nd respondent and, therefore, the relief sought for by the petitioner is wholly misconceived and an attempt to reagitate and delay the due payment to the 2nd respondent and, therefore, no interference is called for with the impugned order and these petitions deserve to be dismissed.

34. This Court paid its careful consideration to the submissions advanced by the learned senior counsel appearing on either side and perused the materials available on record.

35. Though the issue in the present case relates to the disbandment of the committee, which was constituted vide official memorandum dated 21.07.2020, however, the said issue being intrinsically connected with the order passed by the Hon'ble Supreme Court, it is necessary for this Court to carefully peruse the order of the Hon'ble Supreme Court to render a finding.

36. In a nutshell, it is the case that relating to royalty being factored as a cost while fixing tariff, the petitioner had filed a petition u/s 9 of the Arbitration and Conciliation Act before the District Court, Tuticorin, and upon favourable orders, petition u/s 34 was filed and, thereafter, Arbitral Tribunal had taken up arbitration and held that instead of royalty, revenue sharing option should be adopted between the petitioner and the 2nd respondent. Aggrieved by the said award, the 2nd respondent filed appeal which resulted in this Court setting aside the said award and, thereafter, the issue had landed before the Hon'ble Supreme Court.

37. The Hon'ble Supreme Court, after exhaustive arguments and elaborate elucidation of the factual matrix of the case, had



held that proposals were given by the petitioner for revision of tariff, however, the Tariff Authority for Major Ports had negatived the said claim and royalty was not factored as a cost while fixing tariff. Not once, but more than three times, similar request by the petitioner had resulted in the same being negatived by the Tariff Authority. The reason for such a stand on the side of the Tariff Authority was the fact that in case the authority decided not to allow revenue share as a cost element for computation of tariffs, the private terminal operator and the licensor, both of whom enjoyed a dominant position, could enter into any commercial arrangement between themselves and pass on the consequential cost to the customers. This was the finding rendered by the Tariff Authority in the 2002 Tariff Order.

38. Pursuant to the above, notification dated 29th July, 2003, came to be issued by the first respondent, as a matter of policy, giving clarification that revenue sharing/royalty payment shall not be factored into/taken into account as cost for fixation/revision of tariff by the Tariff Authority. The above provision was made with the specific purpose that the benefit of higher efficiency on account of private participation in ports should also be passed on to shippers or the users which will not be so if royalty is allowed to be factored in the cost of private operators. It further provided that royalty, if allowed as cost, the private bidders can offer high percentage, which would be recovered from the shippers/users as royalty cost factored in fixing higher rates.

39. Further, notification dated 31.3.2005 was issued by the Tariff Authority in which certain guidelines have been issued and which guidelines superceded the guidelines adopted in February, 1998, tariff order. A perusal of the guidelines, which has been extracted in para-74 of the order of the Hon'ble Supreme Court, the guidelines clearly stipulated that royalty/revenue share payable by the private operator will not be allowed as an admissible cost for tariff computation, as decided by the Government vide its communication dated 29.7.2003. In this regard, useful reference can be had to the relevant observation of the Hon'ble Supreme Court and the same is extracted hereunder :-

"75. The said guidelines specifically provide that 'royalty/revenue share' payable to the landlord port by the private operator will not be allowed as an admissible cost for tariff computation as decided by the Government in the Ministry of Shipping vide its Order No.PR14019/6/2002PG dated 29th July, 2003. It



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further provided, that in those BOT cases where bidding process was finalized before 29th July, 2003, tariff computation will take into account royalty/revenue sharing as cost for tariff fixation in such a manner as to avoid likely loss to the operator on account of the royalty/revenue share not being taken into account. However, this was subjected only to a maximum of the amount quoted by the next lowest bidder. This was further subjected to be allowed for the period upto which such likely loss would arise. It further provided that this would not be applicable if there is provision in the concession agreement on treatment of royalty/revenue share.

76. A conjoint reading of all these documents would reveal that when the bid document was published in April 1997; SICAL tendered its bid in October, 1997 and submitted its financial offer in December, 1997; and the LoI was issued to SICAL on 29th January, 1998, there were no guidelines at all. Even the guidelines of February 1998 do not provide for royalty being factored as cost while fixation of tariff. On the contrary, the tariff order of 1999 specifically clarifies that it has left the royalty issue to be decided by TPT and the GoI. It has specifically clarified that the approval by TAMP should not be interpreted to be amounting to any implicit approval of royalty related issue. Further, the tariff order issued on 20th September, 2002 specifically rejects the claim of SICAL for factoring any royalty as cost while tariff/price fixation. As already stated herein above, SICAL has challenged the said order before the Madras High Court by way of writ petition, which petition has been allowed. It is also not in dispute, that on account of interim order passed by the Madras High Court dated 8th November, 2002, SICAL is still continuing to charge at rates notified in the 1999 tariff order.

77. In this scenario, the finding of the Arbitral Tribunal, that there was a law when the Agreement was entered into between the parties, which provided royalty as a pass through and that the said law has been changed for the first time in 2003 and subsequently again changed in



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2005, in our view, is a finding based on 'no evidence'. Had the Arbitral Tribunal perused the tariff orders of 1999 and 2002, it would have found that in the 1999 tariff order TAMP has specifically observed that its approval of the tariff should not be construed as its implicit approval of royalty related issue and the 2002 tariff order specifically states that royalty was not permitted to be factored in the cost while determining tariff. The Arbitral Tribunal has totally failed to take into consideration this aspect of the matter.

78. As such, we are of the view, that since the finding of the Arbitral Tribunal, that there was an existing law to the effect that the royalty payable shall be permitted as a pass through in cost while fixation of tariff, is based on 'no evidence' and the finding, that there was a change in law in 2003 and 2005 is based on without taking into consideration the relevant evidence, would come in the realm of perversity as explained by this Court in paragraph 31 of the Associate Builders (supra). The findings are based on 'no evidence' and 'ignorance of vital evidence' in arriving at its decision."

(Emphasis Supplied)

40. Though it is the contention of the petitioner that the Hon'ble Supreme Court has dealt only with the award and that it has not decided about the royalty/revenue share being factored in as cost in the tariff order and, therefore, the disbandment of the committee is per se erroneous as the issue has been left open by the Hon'ble Supreme Court. However, the said contention does not merit acceptance for the simple reason that the issue before the Hon'ble Supreme Court related to royalty, which was being charged, which was, by way of the award changed to revenue share basis. the Hon'ble Supreme Court has deprecated the finding of the Arbitral Tribunal that when the agreement provided for royalty, at the acceptance of both parties, the same cannot be modified as revenue share basis without the concurrence of the other party, viz., the second respondent herein. In an equal tone, the Hon'ble Supreme Court had also gone on to hold that the tariff order of 1999 specifically left royalty issue to be decided by the first and the second respondents and that the second respondent had not given its concurrence for factoring royalty as a cost while fixing tariff and the same having not been considered by the Tariff Authority, the Hon'ble Supreme Court has clearly held that the finding of



the Arbitral Tribunal that there was a law when agreement was entered between the parties to provide royalty as a pass-through is wholly erroneous as it is based on no evidence. From the above, the Hon'ble Supreme Court has clearly given a categorical finding that there was no change in law from the time of entering into agreement in the year 1998, it is implicitly clear that the Hon'ble Supreme Court has held that it is only royalty that is holding the field and not otherwise.

41. Further, the various communications that have emanated between the petitioner and the respondents clearly reveal that pending the adjudication by the Hon'ble Supreme Court on the royalty issues, talks were through, which did not reach an amicable solution, thereby, the parties had decided to have the matter settled before the Arbitration Tribunal and the Hon'ble Supreme Court through judicial proceedings. The various communications in this regard, which have been adverted to by the respondents clearly speak about the intent and the steps taken by the parties for the settlement of the issues.

42. It is also to be stated that merely because that the notings in the file, which have been obtained by the petitioner under the Right to Information Act does not reveal the disbandment of the committee as being the consequence of the orders passed by the Hon'ble Supreme Court would not suffice to hold that the said disbandment was only for the purpose of a larger reference before another Committee with wider scope. Further, the noting in the file that the existing committee stood disbanded only due to constitution of the new committee and not due to the orders of the Hon'ble Supreme Court would not give any benefit to the petitioner as the scope of reference before the new committee pertained only to matters, which are pending adjudication.

43. Once the Hon'ble Supreme Court has rendered a categorical finding, any interpretation of the said order, by any other authority, other than the Hon'ble Supreme Court, is per se impermissible and would be nothing but administrative overreach and an act in contempt of the orders of the Hon'ble Supreme Court. In such a backdrop, once a verdict has been pronounced by the Hon'ble Supreme Court pertaining to the agreement, by holding that royalty holds the field and it has not been changed since entering into agreement between the parties, the purpose of the constitution of the committee on 21.7.20, to consider the issue between the petitioner and the second respondent, having attained finality at the hands of the Hon'ble Supreme Court, vide the aforesaid order, nothing remained on paper on the above issue to be deliberated by the Committee, which resulted in the disbandment of the Committee. Therefore, this Court finds no error in the order impugned, in

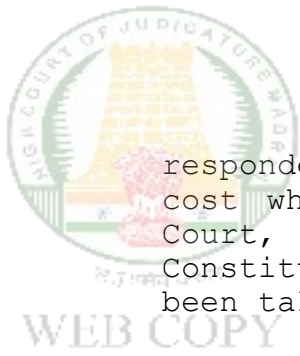


and by which, the committee constituted on 21.7.20 stood disbanded.

44. Further, it is to be pointed out that consequent upon the disbandment of the committee, a new committee with a higher scope has been formed to deal with the issues between the petitioner, its parent holding with the various ports throughout the country, with exclusion being that except for issues which have already been adjudicated. The stand of the respondents is that the royalty issue having been adjudicated by the Hon'ble Supreme Court, as per the terms of the agreement by setting aside the award of the Arbitral Tribunal, thereby negating the revenue share basis, the said issue no longer survives for being dealt with by the committee. In such a scenario, amplifying the scope in any other way would be interfering with the policy decision and would also be a direct interference with the orders passed by the Hon'ble Supreme Court.

45. The stand of the respondents that the issue of royalty has already been adjudicated by the Hon'ble Supreme Court, has been approved by this Court in the preceding paragraphs and, therefore, the said question of royalty no longer survives for consideration by the new committee. Further, constitution of committee with clear references it has to deal with is within the realm of the first respondent and it is not open to the petitioner to appeal to this Court to direct the first respondent to constitute a committee to redress the grievance of the petitioner. The issues between the petitioner with various other ports has been referenced before the other committee except for the royalty issue and, therefore, disbandment of the committee constituted for deciding the royalty issue does not arise. The petitioner cannot, through this petition, impose upon the first respondent to continue with the previous committee, when the reference before the previous committee having become infructuous due to the issue having been finally adjudicated by the Hon'ble Supreme Court.

46. It is trite that the Courts cannot direct the first respondent to frame a policy for settlement of disputes and that with regard to policy decisions, the courts, normally shall not interfere. In the case on hand, the petitioner, with open eyes, had accepted and entered into the agreement with the second respondent for payment of royalty, with a provision for yearly escalation. The various tariff orders have also taken into consideration various factors and the tariff as also royalty has been fixed. Citing financial difficulties, the petitioner claims a change in agreement terms unilaterally, through arbitral proceedings, is wholly impermissible when the second respondent is not desirous for having such a change in the terms of the agreement. As a matter of policy, the first



respondent not being ready to factor royalty as a part of the cost while fixing tariff, which being a policy decision, this Court, in exercise of its jurisdiction under Article 226 of the Constitution, cannot try to rewrite the decision, which has been taken by the first respondent, as a matter of policy.

47. The petitioner and its parent holding company are admittedly due to the second respondent an amount to the tune of over Rs.1000 Crores and by virtue of the interim orders of this Court dated 8.11.2002, the petitioner is still continuing to charge at rates notified in the 1999 tariff order and not paying the escalation in the royalty as per the terms of the agreement. Pursuant to the orders of the Hon'ble Supreme Court setting aside the award of the Arbitral Tribunal, the petitioner and its holding company are due and payable in a sum of Rs.1000 Crores, which the petitioner and its holding company have not paid, but proceeds with litigations one way or the other to thwart the attempt to recover the dues. Failure to pay the same has resulted in the notice of intent to terminate, which is put to challenge. Once the Hon'ble Supreme Court has rendered its decision, the petitioner and its holding company are bound to pay the sum due to the second respondent. Through continuous litigative process, the petitioner and its holding company are circumventing the second respondent from collecting the enormous amount due to it from the petitioner. Therefore, in the aforesaid backdrop, the intent of the petitioner being clear, the second respondent cannot be found fault with for issuing the aforesaid notice of intent to terminate. This Court does not find any perversity or arbitrariness in the act of the second respondent and, therefore, sees no reason to interfere with the said order.

48. For the reasons aforesaid, W.P. No.26119 of 2021 stands dismissed and consequent upon the dismissal of the above writ petition, the prayer made in W.P. No.26121 of 2021 does not survive any longer as the same has become infructuous and, accordingly, the said writ petition is also dismissed. Consequently, connected miscellaneous petitions are closed. However, in the circumstances of the case, there shall be no order as to costs.

Sd/-

Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

GLN



To

The Secretary
Ministry of Ports, Shipping & Waterways
Dept. of Shipping, Port Department
Transport Bhawan No.1, Parliament Street
New Delhi 110 001.

+2ccs to Mr.G.Ilangovan(SPC), Advocate, S.R.No.3138,3139

+2ccs to M/s. S.Raghunathan, Advocate, S.R.No.2886,2885

W.P.NOS.26119 & 26121 OF 2021

GPL (CO)
PM/31/01/2022