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IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

TUESDAY, THE 22ND DAY OF FEBRUARY 2022

THE HON'BLE MR. JUSTICE SENTHILKUMAR RAMAMOORTHY

O.P.No. 979 of 2019

In the matter of Award dated 26 August 2019 passed by an Arbitral Tribunal comprising Hon'ble Mr. Justice K.S.P. Radhakrishnan (Retd.), Former Judge, Supreme Court of India; Hon'ble Mr. Justice K.Chandru (Retd.), Former Judge, Madras High Court; and Mr. Sudipto Sarkar, Bar-at-Law, Senior Advocate in respect of disputes arising out of a Concession Agreement dated 4 September 2012 for conversion of 8th Berth at V.O. Chidambaranar Port as a Container Terminal on a BOT basis.

DAKSHIN BHARAT GATEWAY TERMINAL
PRIVATE LIMITED,
141, 14th Floor, Jolly Maker Chambers II,
Nariman Point, Mumbai – 400 021.
Rep.by its Authorised Signatory,
Ananda Padmanaban S. Subba Rao

... Petitioner

-Vs-

V.O. CHIDAMBARANAR PORT TRUST,
Through its Chairman
Tuticorin – 628 004.

... Respondent



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Original Petition praying that this Hon'ble Court be pleased to (a) set aside the Majority Award dated 26 August 2019 passed by Tribunal insofar as it relates to Issues 2 to 7 and 11 ; b) confirm the principles and conclusions set out in the Minority Award insofar as it relates to Issues 2 to 4.

This Original Petition having been heard on 05.01.2022 in the presence of Mr.Ciccu Mukhopadhaya, Senior Counsel for Mr.P.Raj Jhabak Advocates for the petitioner herein and Mr.Yashad Vardhan, Senior Counsel, for Mr.S.Yashwanth, Advocates for the respondent herein and upon reading the petition and the award dated 26/08/2019 filed herein and having stood over for consideration till this date and coming on this day before this Court for order in the presence of said advocates for the parties hereto and this Court having observed that although the Petitioner contended that Article 9.4 of the Concession Agreement does not prescribe that such details be provided either in the financial statement or the auditor's certificate, it should be noticed that Article 9.4 mandates that the Concessionaire should maintain all documents and supporting evidence of, *inter alia*, Port users, tariffs charged and amounts received. Besides, it bears



repetition that the grant of rebate is governed by the TAMP Notification, and evidence of rebate is material, eventually, this claim was rejected on the basis of such appraisal and such findings are not entirely convincing - especially in light of the fact that the conclusions turned at least partly on the evidence that the Petitioner had made arrangements for HMCs for Port users - and may have justified interference in appellate proceedings, where re-appraisal is permissible, given the limited scope of challenge proceedings, it cannot be inferred that the findings are perverse or amenable to interference under Section 34 of the Arbitration Act, therefore, the findings and the Award on Issues (iii) and (iv) do not call for interference,

it is ordered as follows :-

That the Arbitral Award dated 26.08.2019, be and is hereby set aside as regards the rejection of the claim for amendments to the Concession Agreement consequent to change in law.

2. That in all other respects, no interference is warranted with the Award.

3. That the amendment claim consequent to change in law is a live issue, it is open to the Petitioner to institute de novo arbitral proceedings in respect thereof.



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4. That in case the Petitioner initiates de novo arbitral proceedings, the Petitioner shall be entitled to the benefit of Section 43(4) of the Arbitration Act.

5. That there shall be no order as to costs.

WITNESS THE HON'BLE MR. JUSTICE MUNISHWAR NATH BHANDARI, CHIEF JUSTICE, HIGH COURT AT MADRAS AFORESAID, THIS THE 22ND DAY OF FEBRUARY 2022.

Sd/-

ASSISTANT REGISTRAR (O.S-II)

//Certified to be true copy//

Dated at Madras this the day of 2022.

COURT OFFICER(O.S.)

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O.P.No. 979 of 2019

DATED : 22.02.2022

FOR APPROVAL: 09.03.2022

APPROVED ON : 09.03.2022



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 05.01.2022

Pronounced on : 22 .02.2022

C O R A M :

The Hon'ble Mr. Justice **SENTHILKUMAR RAMAMOORTHY**

O.P.No.979 of 2019

Dakshin Bharat Gateway Terminal
Private Limited,
No.141, 14th Floor, Jolly Maker Chambers II,
Nariman Point, Mumbai – 400 021.
Rep. by its Authorised Signatory
Ananda Padmanaban S.Subba Rao

... Petitioner

Vs

V.O.Chidambaranar Port Trust,
Through its Chariman
Tuticorin – 628 004.

... Respondent

PRAYER : This Petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 praying to set aside the Majority Award dated 26 August 2019 passed by the Tribunal insofar as it relates to Issues 2 to 7 and 11; confirm the principles and conclusions set out in the Minority Award insofar as it relates to Issues 2 to 4.

For Petitioner : Mr.Ciccu Mukhopadhaya, S.C.
For Mr.P.Raj Jhabak

For Respondent : Mr.Yashod Vardhan, S.C.
for Mr.S.Yashwanth



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ORDER

This dispute arises out of a Concession Agreement dated 04.09.2012 (the Concession Agreement) between the Petitioner, as the Concessionaire, and the Respondent, as the Concessioneing Authority. The Petitioner was the claimant before the Arbitral Tribunal. An Arbitral Award dated 26.08.2019 (the Award) is assailed under Section 34 of the Arbitration and Conciliation Act, 1996 (the Arbitration Act). At the inception, it should be noticed that this petition was filed after Section 34 was amended by Act 3 of 2016 and, therefore, the interpretation placed on Section 34 in *Ssyangyong Engineering and Construction Company Limited v. NHAI*, (2019) 15 SCC 131, and the judgments that followed would govern.

2. The Concession Agreement was executed in relation to the provision of project facilities and services by the Petitioner for the conversion of the eighth berth of the V.O.C. Port (the Port) into a container terminal on build, operate and transfer (BOT) basis. The concession period was 30 years from the date of award of the concession, as defined in the Concession Agreement. The date of award was fixed as the date of fulfillment of conditions precedent unless waived. The conditions



documents for the project by the Petitioner and demonstration of financial close by the Petitioner. Two aspects of the Concession Agreement are of particular significance to the dispute: change in law and payment of royalty. Article 13 of the Concession Agreement deals with change in law. If a change in law event occurs, the Concessionaire's remedy is specified in Article 13.2. Two alternatives are indicated in Article 13.2. Clause (a) provides for renegotiation and amendment of the Concession Agreement so as to place the Concessionaire in substantially the same legal and financial position as it were prior to the change in law. Clause(b) provides for the payment of additional cost arising as a direct consequence of change in law provided such additional cost is more than Rs.21.86 crores in any accounting year. The Concession Agreement provides for payment of license fee and royalty to the Concessioneing Authority in terms of Article 9 thereof. As regards royalty, such royalty is required to be paid at a fixed percentage of the gross revenue of the Concessionaire. For purposes of computing gross revenue, discounts and deferments, if any, offered by the Concessionaire to users shall be ignored.

3. The principal equipments required for the implementation of the project were rail mounted quay cranes (RMQCs) and rubber tyred gantry cranes (RTGCs). In addition, a reach stacker and tractors/trailers were



required. The Petitioner had entered into an understanding with a Chinese company, Shanghai Zhenhua Heavy Industries Company Limited (ZPMC), and placed an order on 25.10.2013 to import three RMQCs. However, the Respondent communicated to the Petitioner on 30.09.2013 that security clearance was required for import of equipment. Eventually, by a communication dated 01.11.2014, the Petitioner was informed that procurement of RMQCs from ZPMC was not recommended by security agencies. As a consequence, RMQCs could not be acquired from ZPMC. Instead, alternative arrangements had to be made by placing an order on Liebherr Container Cranes Limited, Fossa, Killarney, Co.Kerry, Republic of Ireland (LCC), and such order was placed on 25.03.2015. According to the Petitioner, this had both time and cost impact on the execution of the project. Therefore, the Petitioner construed this as a change in law event.

4. In addition, the Petitioner stated that it had to provide a rebate to users on account of the non-availability of key equipment. Consequently, according to the Petitioner, the users of the Port had to deploy harbour mobile cranes (HMCs) and ship gears. Therefore, the Petitioner was constrained to grant rebates to such Port users. The Petitioner contended that it was entitled to deduct these amounts while computing gross revenue



for purposes of payment of royalty to the Respondent at the specified percentage of gross revenue.

5. Disputes arose between the parties with regard to, *inter alia*, the aforesaid issues. Such disputes were referred for arbitration. The Petitioner herein submitted its statement of claim. Seven claims were made by the Petitioner. The first claim was for amendments to the Concession Agreement, whereby the revenue share of the Respondent would be reduced to 40.10% from the existing 55.19% and both the commercial operations date and the concession period would be extended. The second claim related to refund of amounts recovered from the performance bank guarantee. The third claim related to refund of royalty wrongfully collected. The fourth claim related to reversal of royalty. The fifth claim related to set off/adjustment of license fee which was wrongfully collected. The sixth claim related to pension fund levy and the seventh claim related to interest and cost. The Respondent herein filed its statement of defence and counter claim. The Respondent counter claimed a sum of Rs.7.31 crores as damages for reduction in revenue share due to delay. In addition, the Respondent also counter claimed a sum of Rs.3.42 crores towards shortfall in revenue share from May 2017 to September 2017 along with interest thereon. Upon



set out at paragraph 46 of the Award. Given the grounds of challenge, four issues are of relevance. In substance, these issues are: Issue (i) as to whether there was a change in law; Issue (ii) as to whether the Claimant is entitled to the requested amendments to the Concession Agreement; and Issues (iii) and (iv) as to whether the Claimant is entitled to refund of amounts realised from the performance bank guarantee and the sum of Rs.21,277,157 towards the alleged wrongful collection of royalty. Both parties adduced oral and documentary evidence. The Petitioner filed 149 documents along with its statement of claim, which were exhibited as Exhibits (Ex.)C-1 to C-149. The Respondent adduced documentary evidence by way of Ex.R-1 to Ex.R-59 along with its statement of defence. The Petitioner filed about five documents along with its rejoinder, which were marked as Ex.C-150 to C-154. In addition, the Petitioner herein exhibited documents which were marked as CW-1-1 to CW-1-14 and Exhibit CW-2/1 to CW-2/25 through its two witnesses. The Respondent exhibited additional documents through RW-1, which were marked as Ex.R-60 to Ex.R-68. The claimant produced two expert reports. In addition, a joint report was provided by the Chartered Accountants of the Petitioner and Respondent with regard to actual project costs. Eventually, by a majority of two, all the claims and counter claims were dismissed by the Arbitral Tribunal. The said Award is



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6. Oral submissions were made on behalf of the Petitioner by Mr.Ciccu Mukhopadhyay, learned senior counsel, assisted by Mr.Raj Jhabakh, learned counsel; on behalf of the Respondent by Mr.Yashod Vardhan, learned senior counsel, assisted by Mr.S.Yashwanth, learned counsel. Both parties also submitted written submissions.

7. Although the Award deals with each claim and counter claim, the Petitioner focused its challenge on the findings with regard to change in law and the refund claim for wrongful collection of royalty on gross revenue, including the entwined claim for refund of the amount realised by encashing the performance bank guarantee.

8. On the issue of change in law, learned senior counsel for the Petitioner referred to the findings in the Award to the effect that the refusal to grant security clearance for the import of RMQCs from ZPMC qualified as a change in law event. Upon entering the finding that the above event qualified as a change in law event, he contended that the Arbitral Tribunal was required to consider the remedies of the Concessionaire under Article 13.2. By adverting to Clause (a) of Article 13.2, he contended that the

Concession Agreement enables the Petitioner to make a claim for suitable



amendments to the Concession Agreement, including changes to the revenue sharing ratio and extension of the concession period, so as to place the Concessionaire in substantially the same legal and financial position as it were prior to the change in law. Although such remedy was provided for in the Concession Agreement and duly claimed by the Petitioner, he contended that the Arbitral Tribunal refused to apply Clause (a). Indeed, he contended that the Arbitral Tribunal virtually disregarded Clause (a). As regards Clause (b), he pointed out that the said Clause was applicable only under specified circumstances and at the option of the Concessions Authority. Therefore, the Arbitral Tribunal should have considered whether the Concessions Authority opted for the remedy under Clause (b). In spite of the non-availability of any evidence indicating that the Concessions Authority opted for the remedy under Clause (b), the Arbitral Tribunal committed the patent error of recording a finding that the Respondent opted for the remedy under Clause (b).

9. Without prejudice, the Petitioner contended that the computation of additional costs under Clause (b) is patently erroneous. On this aspect, the Petitioner contended that additional cost should be computed under Clause (b) by comparing the estimated project cost prior to change in law with the



submitted evidence of the estimated project cost prior to the change in law event in the form of documents relating to financial close. In particular, the estimated project cost of Rs.265.60 crore was approved by the project financiers and financial close was achieved on such basis. This should have been compared with the revised project cost after the change in law event. Instead, the Petitioner contended that the Arbitral Tribunal committed a patent error by adopting the estimated project cost of the Tariff Authority on Major Ports (TAMP). As a result, the comparison was made between TAMP's estimate of Rs.312.13 crore and the revised project cost due to change in law. If the estimated project cost of Rs.265.60 crore had been adopted, the Petitioner would have succeeded. In fact, it was also contended that the Petitioner would have succeeded even if the estimated project cost of Rs.293 crores as per the information memorandum had been applied. Even with regard to the revised project cost, the Petitioner contended that the revised project cost, as arrived at by the Chartered Accountants jointly, should not have been relied upon. The Petitioner further contended that the expert report of Mr.Chaitanya Arora was completely disregarded by the Arbitral Tribunal and that this constitutes an additional ground to interfere with the Award.



10. Thus, on this issue, learned senior counsel for the Petitioner assailed the Award on two grounds: (i) the Arbitral Tribunal disregarded Clause (a) of Article 13.2, a contractual remedy for change in law, without assigning cogent reasons; and (ii) the Arbitral Tribunal disregarded vital evidence as regards the estimated project cost and erroneously adopted the estimated project cost of TAMP for purposes of computing additional cost.

11. Turning to the issue of royalty, the Petitioner pointed out that TAMP had fixed the tariff at Rs.1476/- per 20 foot equivalent unit (TEU) by its order dated 23.02.2016. The gross revenue was required to be calculated at this rate subject to permissible rebates. Rebates could be granted whenever the requisite facilities could not be provided to Port users. Since the principal equipments were unavailable, Port users deployed HMCs or ship gears. Consequently, such Port users demanded a rebate. As a matter of fact, such rebate was provided by the Petitioner. Instead of charging Rs.1476/- per TEU, the Petitioner charged Rs.756/- per TEU. Consequently, a lower gross revenue was realized. Although the Petitioner submitted a financial statement of the gross revenue for every six month period along with a certificate from its statutory auditor, the Respondent disregarded the same and computed and collected royalty based on the maximum gross revenue which could have been collected without reckoning the rebate. In



effect, the Respondent made deductions towards royalty on the assumption that Rs.1476 per TEU was charged, i.e. the maximum tariff, whereas lower revenue was realised because of the rebate provided by the Petitioner.

12. On this issue, the Petitioner relied upon Article 9.4 of the Concession Agreement which imposes an obligation on the Concessionaire to submit to the Concessioneing Authority a financial statement of the gross revenue for every six month period ending 30th September and 31st March every year duly certified by its statutory auditor. In spite of providing such evidence of gross revenue, in compliance with the stipulation in the Concession Agreement, the Petitioner contended that its financial statements were erroneously rejected by the Respondent. Therefore, the Petitioner made a claim for refund of the excess amounts collected by the Respondent as royalty. However, such claim was rejected by the Arbitral Tribunal on the ground that the Petitioner did not provide an audited statement from its statutory auditor. The Petitioner contended that Article 9.4 does not impose an obligation to provide audited financial statements on a six monthly basis. For these reasons, it was contended that the Award rejecting claims towards refund of amounts realised by encashing the performance bank guarantee and by wrongfully collecting excess royalty should be set aside.



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13. The submissions on these issues were supported by relying on precedents such as *Associate Builders v. DDA*, (2015) 3 SCC 49 (paragraphs 28-32), *Patel Engineering v. NEEPCO* 2020 SCC Online SC 466 (paragraphs 24-27), *South East Asia Marine Engineering and Constructions Ltd. v. Oil India Limited* (2020) 5 SCC 164 (paragraphs 28,31 and 32) and *G+H Schallschutz Gmbh v. Bharat Heavy Electricals Limited* 2020 SCC Online Del 019 (paragraph 29) with regard to the scope of interference with an arbitral award. On such basis, it was contended that the conclusions of the Arbitral Tribunal on these issues are liable to be set aside.

14. These contentions were refuted by the Respondents. Mr.Yashod Vardhan, learned senior counsel, contended that Article 13.2 provides for the remedies in case of change in law. The two Clauses of Article 13.2 provide for alternative remedies. The Arbitral Tribunal applied Clause (b) thereof after recording a finding that the Respondent opted for the same. Clause (b) imposed the obligation on the Concessionaire to take necessary mitigation measures as regards the impact of the change in law event on the project. It also envisaged the computation of additional cost as a result of the change in law event. Such additional costs can be computed only if the



cost prior to change in law is established. The Respondent contended that the Petitioner indicated that the change in law event occurred on 01.11.2014 in its notice dated 29.12.2014. Consequently, the Petitioner should have adduced evidence with regard to the project cost as on 01.11.2014 or on a date reasonably proximate thereto. By drawing reference to paragraph 101 of the Award, learned senior counsel for the Respondent pointed out that the Arbitral Tribunal entered a finding that the Respondent failed to adduce credible evidence of the project cost prior to the change in law event. The Respondent also pointed out that the estimated project cost of Rs.265.60 crore was specifically denied by the Respondent in paragraph 23 of its statement of defence. Once the Respondent expressly denied the estimated project cost as claimed by the Petitioner, the Petitioner was under an obligation to establish the project cost as of the date of the change in law event. Since the Petitioner failed to adduce credible evidence in such regard, the Arbitral Tribunal adopted the estimate of TAMP. This course of action was reasonable in the facts and circumstances and does not warrant interference.

15. With regard to the revised project cost, the Respondent pointed out that both parties agreed to the determination of the revised project cost by the Chartered Accountants of the Petitioner and Respondent. Therefore,



the two Chartered Accountants submitted a joint report. In such joint report, a sum of Rs.319.93 crore was arrived at as the revised project cost. Consequently, the Arbitral Tribunal computed additional cost by deducting the estimate of TAMP from the revised project cost of Rs.319.93 crore. Since the difference was only about 7 crores, which is less than the threshold sum of Rs.21.86 crores specified in Clause (b) of Article 13.2, the Arbitral Tribunal was fully justified in rejecting the monetary claim as a result of the change in law event.

16. The Respondent also pointed out that the Arbitral Tribunal indicated reasons for not applying the remedy under Clause (a) of Article 13.2. In view of the fact that such findings were entered after interpreting Clause (a) of Article 13.2, it was contended that no interference is warranted with such interpretation.

17. As regards the findings of the Arbitral Tribunal on the expert report of Chaitanya Arora, the Respondent contended that the said report was based on assumptions. By drawing reference to paragraph 103 of the Award, it was contended that cogent reasons were set out for disregarding the report of Chaitanya Arora.



18. Apropos the issue of rejection of the rebate claim of the Petitioner, learned senior counsel for the Respondent pointed out that the Arbitral Tribunal did not disregard the evidence on record. Instead, the three certificates, each dated 16.11.2015, of the statutory auditor were considered by the Arbitral Tribunal. After considering the same, in paragraph 127 of the Award, the Arbitral Tribunal referred to the fact that the statutory auditor did not certify the rebates granted in respect of ship gears. In other words, while the Petitioner contended that rebates were granted to Port users for engaging or hiring HMCs or ship gears, the certificates did not provide the details of or the bifurcation between the rebates offered on account of hiring/deploying HMCs and ship gears. Such bifurcation was also not provided in the financial statements of the Petitioner. The Respondent also pointed out that the counter claim of the Respondent towards liquidated damages was rejected, and that the Award is balanced and took into consideration all material evidence. By drawing reference to the judgments of the Hon'ble Supreme Court in *Patel Engineering Limited v. North Eastern Electric Power Corporation Limited* (2020) 7 SCC 167 and *Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation Limited* 2021 SCC Online SC 695 (paragraphs 25 and 27), learned senior counsel for the Respondent concluded his contentions by stating that no interference is warranted with



the Award.

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19. By way of rejoinder, learned senior counsel for the Petitioner contended that the Concession Agreement does not specify that audited financial statements should be provided with regard to gross revenue. He further submitted that Article 9.4 of the Concession Agreement was not interpreted by the Arbitral Tribunal; instead it was disregarded. In addition, he submitted that there is no dispute as regards the actual gross revenue realized by the Concessionaire. He further submitted that the Respondent did not take recourse to Article 9.4, which enables the Concessions Authority to appoint an additional auditor to conduct a special audit of the gross revenue if it intends to do so on account of not accepting the financial statement provided by the Petitioner. In such circumstances, he contended that the Petitioner's claim should have been allowed.

20. On the change in law issue, the Petitioner reiterated that the time impact due to change in law was not taken into consideration by the Arbitral Tribunal. As regards the relevant date for purposes of change in law, it was contended that there was no pleading by the Respondent that 01.11.2014 is the relevant date. It was further contended that there was no pleading by the

Respondent that it had exercised option (b) under Article 13.2. On the



reliance on the revised project cost as per the joint report of the Chartered Accountants, learned senior counsel for the Petitioner pointed out that even the upfront payment to the Respondent had not been reckoned in the revised project cost.

21. In light of the rival contentions, two aspects of the Award should be closely examined. The change in law event is examined first. The Arbitral Tribunal entered a finding that the imposition of the security clearance requirement for procuring RMQCs, which were sought to be imported from ZPMC, qualified as a change in law event. In this regard, the following conclusions in paragraphs 92 and 93 of the Award are material; hence, they are set out below:

“92.In other words, when the Claimant has placed the order on 25.10.2013 it was not informed of the necessity of obtaining prior approval from MoS for importing equipments from foreign countries especially from China.”

“93.Resultantly, the Tribunal is of the view that imposition of the condition of obtaining prior approval from the MoS for importing foreign equipments would amount to imposition of the material condition during the course of implementation of the project. The same therefore would amount to Change in Law as per



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Article 13.1(b) of the Concession Agreement. Issue No.(i) is therefore decided in favour of the Claimant.”

The Respondent herein has not assailed the Award, including this finding. Therefore, it is not necessary to examine whether the above occurrence qualifies as a change in law event; instead, proceeding on the basis that a change in law event occurred, it is sufficient to consider whether the findings and conclusions of the Arbitral Tribunal on the relief claimed by the Petitioner on account of change in law warrant interference. A preliminary aspect of significance is to consider when the change in law event occurred, and the finding extracted above at paragraph 93 of the Award throws considerable light on the issue. This finding clearly indicates that the requirement for security clearance is the change in law event. Such requirement was communicated by letter dated 30.09.2013 from the Respondent to the Petitioner. Against this backdrop, the findings on Issue (ii) warrant close scrutiny. For such purpose, it is necessary to closely examine Article 13.2. Article 13.2, in relevant part, is as under:

“13.2 The Concessionaire's Remedy

(a) In the event of Change in Law the Concessionaire may propose to the Concessional Authority modifications to the relevant terms of this Agreement which are reasonable and intended to mitigate the effect of the Change in Law. Thereupon, the Parties shall, in good faith, negotiate and agree



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upon suitable changes in the terms of this Agreement including extension of the Concession Period, so as to place the Concessionaire in substantially the same legal and financial position as it were prior to such Change in Law. Provided however, that if the resultant Material Adverse Effect is such that this Agreement is frustrated or is rendered illegal or impossible of performance, the Change in Law shall be deemed to be a Political Event, whereupon the provisions with respect thereto shall apply.

(b) In the alternative to the aforesaid, subject to the Concessionaire taking necessary measures to mitigate the impact or the likely impact of Change in Law on the Project, if as a direct consequence of a Change in Law, the Concessionaire is obliged to incur Additional Cost in any accounting year, any such Additional Cost above a sum of Rs.21.86 Crores may at the option of the Concessioneing Authority be borne by the Concessioneing Authority. It is clarified that Additional Cost up to Rs.21.86 Crores (Rupees Twenty One Crores and Eighty Six Lakhs Only) in any accounting year shall be borne by the Concessionaire;

(c) Upon occurrence of a Change in Law, the Concessionaire shall notify the Concessioneing Authority, of the following:

(i) the particulars, nature and the impact of

Change in Law on the Project;



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(ii) in sufficient detail, the estimate of the Additional Cost likely to be incurred by the Concessionaire on account of the Change in Law; and

(iii) the measures, which the Concessionaire has taken or proposes to take to mitigate the impact of Change in Law, including in particular, minimising the Additional Cost.

(d) Upon receipt of the notice of the Change in Law issued by the Concessionaire pursuant to the preceding sub-article (c), the Concessioneing Authority and the Concessionaire shall hold discussions and take all such steps as may be necessary including determination/certification by an Expert, appointed by the Parties by mutual consent, of the Additional Cost and to determine the quantum of the Additional Cost to be incurred.

(e) If it is determined that the only material impact of a Change in Law is Additional Cost and the Concessioneing Authority opts to compensate the same in accordance with the preceding sub-article (b) (emphasis added), the Concessionaire shall not be entitled to any other remedy nor shall seek any alterations to the Agreement and the Concessioneing Authority shall, within 30 (thirty) Days from the date of determination of quantum of Additional Cost to be borne by the Concessioneing Authority in accordance with sub-article (b) above, compensate the Concessionaire in either of the following ways:



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(i) by lump-sum reimbursement of such Additional Cost to the Concessionaire;

(ii) reimbursement of such Additional Cost to the Concessionaire, in not exceeding four half yearly installments, subject to payment of interest at SBI PLR+2% (two percent) on the amount the payment of which is deferred.

Notwithstanding the aforesaid, if the terms of Good Industry Practice, the event constituting a Change in Law could be insured, the Concessionaire shall not be entitled to any remedy under this Article 13.2....”

22. Clause (a) of Article 13.2 enables the Petitioner to seek amendments to the Concession Agreement so as to place the Petitioner in the same position as it would have been but for the change in law event. In terms thereof, the Petitioner requested the Arbitral Tribunal to modify the revenue share and re-fix the commercial operations date (COD) as well as the concession period. Upon receipt of notice of change in law from the Petitioner, parties were required to enter into negotiations in terms of Clause (d). Pursuant thereto, as per Clause (e), the Clause (b) remedy could be triggered if two conditions are satisfied: (i) it is determined that the only material impact of the change in law event is additional cost; and (ii) the



(b). In this case, the Arbitral Tribunal refused to apply the remedy under Clause (a) and, at paragraph 101, entered the following finding:

“101. The Tribunal finds that the Respondent after examining the various documents placed before it by the Claimant, had opted to compensate the additional costs if any incurred by the Concessionaire in accordance with Article 13.2(b)....”

While recording the said finding, the Arbitral Tribunal did not: (i) consider the requirements of Clause (e) of Article 13.2 or even without reference thereto record a finding that the only material impact of change in law was additional cost; (ii) refer to a specific document by which the Respondent opted for the additional cost remedy. Even the pleadings of the Respondent are not referred to in such regard. The findings in paragraph 105 should, however, be taken note of before drawing definitive conclusions on this issue. After noticing the definition of additional cost under the Concession Agreement, the Arbitral Tribunal held, in relevant part, as under in paragraph 105:

“105.The Tribunal finds the impact of change in law on the economic value of the project has been computed on the basis of the revised project cost of Rs.355 crores, but in the Joint Report referred to above the actual project cost as on 13.4.2018 was stated to have been Rs.319.94 crores. There is no



refusal thereof, constitutes the change in law event. While on this issue, the material distinction between the date of occurrence of the change in law event and the period of time over which the time and cost impact thereof manifests should be recognised. The time impact of the entire security clearance process extending from application for clearance and the rejection thereof and culminating in the placing of orders on LCC appears to be the basis for the claim for revision of the COD and concession period. However, the Arbitral Tribunal entered the above findings by disregarding Clause (e) of Article 13.2. The consequence of such findings is that the Arbitral Tribunal refused to apply the remedy under Article 13.2(a), and this was the primary remedy prayed for by the Petitioner. Hence, this is a patent error which goes to the root of the matter.

24. While the conclusions in the preceding paragraph are sufficient to interfere with the part of the Award rejecting the request for amendments to the Concession Agreement, extensive arguments were advanced on additional cost, and this would have a bearing if the additional cost aspect is sought to be revisited as an element of the remedy under Article 13.2(a) in *de novo* proceedings. Therefore, the said contentions are examined. Article 13.2(b) refers to the defined term 'Additional Cost'. As the claimant, the



Petitioner made its claim on the basis of the estimated project cost of Rs.265.60 crores as per the financial close documents. This was different from the defined term “Estimated Project Cost” of Rs.312.23 crores, which is the cost of the project as estimated by the Concessioneing Authority, as per the Concession Agreement. Was the Arbitral Tribunal justified in rejecting the estimated project cost as per the financial close documents? The reasons indicated by the Arbitral Tribunal for rejecting the project cost of Rs.265.60 crores are set out in paragraphs 105 and 108 of the Award. In paragraph 105, the Arbitral Tribunal recorded as under:

"105....The Tribunal finds there is no certainty as to what was the original estimated project cost of Rs.265.60 Crores, and the Claimant could not establish the said project cost as on 01.11.2014, prior to the purported Change in Law."

Likewise, in paragraph 108, in relevant part, the Arbitral Tribunal recorded as under:

"108. In order to apply Article 13.2 (b), opted by the Respondent, it is necessary to know what was the basis for original estimated project cost of Rs.265.60 crores. Information Memorandum as well as the sanction letter show as Rs.293 crores. Common loan agreement, the project cost was shown as Rs.265.50 crores. The Respondent had specifically



requested the claimant to furnish the base documents including the copy of the contract entered into by the Claimant with ZPMC, China which was not made available by the Claimant to the Respondent to work out the impact or likely impact of Change of Law nor was it made available to the Tribunal. The Respondent vide its letter dated 25.07.2013 sought clarification from the Claimant since there is considerable variation in the project cost mentioned in various documents but no clarification was given by the Claimant to work out the impact of the Change in Law. In the absence of any reliable evidence to ascertain the original project cost, the Tribunal is inclined to accept the project cost as taken by TAMP for fixation of tariff especially when the Claimant has started collecting tariff from users based on that project cost which is Rs.312.23 crores.”

25. Thus, the Arbitral Tribunal concluded that there was no certainty as to the original estimated project cost of Rs.265.06 crore. In addition, the Arbitral Tribunal assigned considerable materiality and weight to the failure or refusal of the Petitioner to provide a copy of the contract entered into by the Petitioner with ZPMC. As regards the adoption of the estimate by TAMP, the Arbitral Tribunal stated that the said estimate was accepted because the Claimant was collecting tariff from users on the basis of TAMP's order.



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26. The first question that arises on this issue is whether the project cost after the change in law event should be compared with the actual project cost or estimated project cost before the change in law event. Article 13.2 (b) provides for the payment of compensation as regards additional cost. Additional cost is defined in Article 1.1 as under:

"Additional cost means the additional capital expenditure which the concessionaire has or would be required to incur and which has arisen as a result of Change in Law."

From the above definition, it is evident that additional cost refers to the additional capital expenditure incurred or likely to be incurred as a result of change in law. Therefore, evidence as regards the original capital expenditure is necessary. Before the project is completed, it is not possible to provide actual project expenditure. But, the estimated project expenditure, including estimated capital expenditure, can be provided. In a Concession Agreement on BOT basis, the concession is awarded upon financial close. In fact, Article 3 of the Concession Agreement and, in particular, sub clause (vii) of Clause (a) thereof specifies that financial close is a condition precedent. Financial close is achieved when the lenders approve the estimated project cost and agree to provide debt financing on such basis. Therefore, the estimated project cost, which forms the basis for



financial close, is the cost on which the Concessioneing Authority permits the Concessionaire to proceed with the implementation of the project. On the facts of this case, the Petitioner issued a letter dated 22.07.2013 confirming the estimated project cost of Rs.265.60 crore.

27. In these circumstances, can it be said that the refusal of the Arbitral Tribunal to accept the estimated project cost as at financial close warrants interference? The finding at paragraph 108 is largely on the basis that the Petitioner failed or refused to provide a copy of the contract which was entered into by it with ZPMC. The reasoning of the Arbitral Tribunal appears to be that the said contract would have indicated the cost of the RMQCs, which were proposed to be acquired from ZPMC, and thereby the basis of the estimated project cost of Rs.265.60 crores could be discerned. In addition, the additional cost could have been arrived at, provided the cost of procurement of the same equipment from LCC was on record. It should be noticed that the said contract *per se* would not indicate the total project cost or even the total capital expenditure prior to change in law. For instance, even as regards equipment, it would not have indicated the cost of RTGCs, the reach stacker, and tractors/trailers. Nonetheless, in view of the fact that the change in law event was the insistence on and subsequent refusal to grant security clearance for RMQCs to be procured from ZPMC,



WEB COPY this document would be material to determine the capital expenditure on one of the principal equipments, and to compute the additional cost if the cost of procurement from LCC was available. Thus, it appears that the failure or refuse of the Petitioner to produce documents indicating the cost of procurement from ZPMC resulted at least partly in the conclusion that the basis of the cost estimate of Rs.265.60 crores is uncertain. It should also not be lost sight of that an arbitral tribunal is empowered to decide on the admissibility, relevance, materiality and weight of evidence. To that extent, the Arbitral Tribunal did not commit a patent illegality in drawing an adverse inference by attaching materiality or weight to the non-production of such evidence by the Petitioner.

28. The other aspect is the adoption of TAMP's estimate of Rs.312.23 crores. If the Arbitral Tribunal was of the opinion that the actual or even estimated capital expenditure prior to change in law was not provided by the Petitioner, the claim could have been rejected on such basis. Instead, the Arbitral Tribunal adopted the estimated project cost of TAMP. When the project attained financial close on the basis of the estimated project cost of Rs.265.60 crore, which is the project cost on which the project lenders agreed to finance the project, the contention that the Arbitral Tribunal should not have adopted TAMP's estimated project cost of Rs.312.23 crores



from the year 2008 is not devoid of merit. Indeed, it may have justified interference in appellate proceedings. In challenge proceedings under Section 34 of the Arbitration Act, a conclusion arrived at on appraisal of evidence does not call for interference unless such conclusion is perverse. The Arbitral Tribunal recorded that it accepted TAMP's estimate because it was the basis for tariff fixation and after reckoning the uncertainty as regards the estimate per financial close documents. This conclusion cannot be construed as perverse. The Arbitral Tribunal also accepted the revised project cost of Rs.319 crores, as per the joint report of the Chartered Accountants nominated by the two parties. The acceptance thereof by the Arbitral Tribunal in preference to the expert report of Mr.Chaitanya Arora is also reasonable and cannot be construed as arbitrary or patently illegal. Thus, the findings and conclusions on additional cost do not call for interference.

29. When all these aspects are considered cumulatively, as discussed earlier, the conclusions of the Arbitral Tribunal on Issue (ii) warrant interference for two reasons. First, the Arbitral Tribunal disregarded the requirements of Clause (e) of Article 13.2 by not considering or recording a finding on the time impact of the change in law event. Especially in light of



analysis, at a minimum, the Arbitral Tribunal should have examined whether the only material impact of change in law is additional cost, and recorded a finding thereon. As per Clause (e), such finding would be the primary requirement and a condition precedent before examining whether the remedy under Article 13.2(b) may be resorted to instead of that under Article 13.2(a) provided the Respondent/Concessioning Authority opted for such alternative remedy. Secondly, even as regards the conclusion that the Respondent opted for the additional cost option, no basis is discernible from the Award for such conclusion. Since these findings go to the root of the matter, a case for interference is made out as per principles enunciated in judgments cited at the bar.

30. Issues (iii) and (iv), which relate to the refusal to refund the royalty collected, including by calling on and encashing the performance bank guarantee, on gross revenue without reckoning the rebates offered by the Petitioner to Port users, are addressed next. The Petitioner relied on a communication dated 23.08.2016 by which it clarified the ownership details of ship gears and HMCs and also provided the bifurcated statement of rebates to Port users between May 2014 and January 2016 either towards ship gears or towards MHCs. Besides, the Petitioner relied on the financial



statements and the statutory auditor's certificates thereon. Article 9.2 and 9.4

deal with this issue and those Articles are set out below:

"9.2 Payments of Royalty

(a) The Concessionaire shall be required to pay Upfront fee of Rs 5.00 crores as per RFP Clause 2.1.18(iii)

(b) The Concessionaire shall pay to the Concessioneing Authority Royalty per Month equivalent to 55.19 % (Fifty Five decimal nineteen percent) of the Gross Revenue chargeable by the Concessionaire ("the Royalty") subject to the Royalty payable on Minimum Guaranteed Cargo specified in Appendix 14.

(c) Gross Revenue shall be computed on the basis of the maximum Tariffs leviabie for and in respect of the Project Facilities and Services provided during the relevant period of computation. **It is clarified that discounts and deferments, if any offered by the Concessionaire to the users or amounts if any not collected by the Concessionaire for any reason whatsoever in respect of the Project Facilities and Services, shall be ignored for the purpose of Gross Revenue.** Further, in computing the Gross Revenue, income from interest, sale of assets, amounts received by the Concessionaire by way of damages from third parties (excepting damages received from the users on account of demurrage or

such other related charges in respect of the Project Facilities and Services), taxes and cesses in respect to the Project Facilities and Services, if any collected and paid to any Government Authority shall also be ignored.(emphasis added).

(d) Royalty for each Month shall be paid on or before the seventh Day of the immediately succeeding Month.

(e) The payment of Royalty shall commence from the Month in which the Concessionaire commences to provide any Project Facilities and Services, and shall be irrespective of Date of Commercial Operation.

(f) Royalty amounts remaining unpaid on respective due dates would carry interest @ SBI PLR plus 2% (two percent) per annum from the due date till the date of payment or realization thereof.

9.4 Certified Accounts

During the subsistence of this Agreement, the Concessionaire shall maintain all documents and supporting evidences for its financial statements including agreements and documents with respect to all capital and debt raised by the Concessionaire, capital and revenue expenses towards the Project, ship/vessel/user wise information, and, as relevant, the details of cargo handled by category, tariffs charged and the amount of rates received. **The Concessionaire**



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shall submit to the Concessioneing Authority a financial statement of the Gross Revenue for every 6 (six) monthly period ending 30th September and 31st March every year, duly certified by its Statutory Auditors. The certificate must be furnished within 30 (thirty) Days of the end of each such period. (emphasis added).

The Concessioneing Authority shall, at its own cost, have the option to appoint another firm of chartered accountants duly licensed to practice in India (the "Additional Auditor") to conduct a special audit of the Gross Revenue and the financial statements, documents and supporting evidences thereto as may be mandated by the Concessioneing Authority and report to the Concessioneing Authority such information as may be desired by the Concessioneing Authority for any period and the Gross Revenue ("Special Audit").

In the event that the Gross Revenue reported by the Additional Auditor is higher than that reported by the Statutory Auditor, the auditors shall meet to resolve such differences and if they are unable to resolve the same the Concessionaire shall pay Royalty on the Gross Revenue reported by the Additional Auditor. The Concessionaire shall also pay interest @ SBI PLR plus 2% (two percent) on the difference between the Royalty paid by the Concessionaire based on the Gross Revenue reported by the Statutory Auditor and that payable by the Concessionaire based



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on the Gross Revenue reported by the Additional Auditor for the intervening period between the payment of the Royalties as above. Further the Concessionaire shall reimburse all costs, charges and expenses related to the Special Audit. Without prejudice to the aforesaid, if the difference between the Gross Revenue reported by the Additional Auditor and that reported by the Statutory Auditor is higher than [5]% (five percent), the Concessioneing Authority shall at its sole discretion have the right to require a Special Audit for the entire outstanding tenure of the Concession."

31. As per Clause (c) of Article 9.2, the gross revenue is to be computed on the maximum tariff leviable for and in respect of the project facilities and services provided during the relevant period. Discounts and deferments, if offered by the Concessionaire to users or amounts not collected by the Concessionaire for any reason, are liable to be ignored for the purpose of gross revenue. As per Article 9.4, the Concessionaire is required to submit to the Concessioneing Authority a financial statement of gross revenue for every six monthly period. Such financial statement is required to be certified by the statutory auditor. In case the Concessioneing Authority is not satisfied therewith, Article 9.4 enables the Concessioneing



Authority to appoint an additional auditor to conduct a special audit of the gross revenue.

32. In this case, the Respondent does not dispute that the Petitioner submitted statements of revenue every six months. The said statements of revenue and supporting certificates from the statutory auditor are on record, and they pertain to the period ranging from 1.04.2014 to 30.09.2017. Such certificates indicate that the amounts invoiced to customers by the Petitioner and the rebates provided to users had been traced from the financial records of the company to the statement of revenue and found to be in order. The certificates issued in May 2018 also state that the Petitioner provided for gross revenue based on revenue invoiced from customers, whereas the Respondent raised invoices towards royalty based on gross revenue. In spite of the sharp difference in the basis of calculation, admittedly, the Respondent/Concessioning Authority did not exercise the option of appointing an additional auditor.

33. The Arbitral Tribunal examined Article 9.2 and 9.4 as also the Tariff Notification of TAMP dated 16.10.2008. Paragraph 2.5 of the Notification, which reads as under, was relied upon by the Arbitral



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“2.5 Rebates

Rebates as follows shall be applicable to users for carrying out various operations with their own arrangements with the prior written permission of the Terminal Operator when the equipment of the Terminal Operator are not available for some reason.”(emphasis added).

Thereafter, the Arbitral Tribunal recorded, *inter alia*, the following findings in paragraphs 121 and 122:

“121. Further users should have made their own arrangements or else Ship's Gears alone should have been used for loading/unloading Containers from Ship to Shore vice versa.”

“122. The Tribunal finds, in the meeting held on 14.3.2015, the representative of the Claimant has informed that it had placed orders with LCC, Ireland in March, 2015 and delivery period would be 16 months. Further the Claimant had also informed that temporary operations were being carried out using 2 Nos.of HMCs and that Claimant would be bringing 3 more HMCs from Kolkata. The Claimant vide its letter dated 14.05.2015 informed the Respondent that it had consented to the arrangement of one Gottwald Herber Crane by its clients for handling Container Cargo.

Above mentioned documents indicate that the users were not making their own arrangements so as to



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claim rebates, on the other hand, it was the Claimant who had made all arrangements for Port Operations by arranging the HMCs.”

Eventually, the main findings in this regard are set out in paragraph 127, which is as under:

"127. The Tribunal has gone to above mentioned communications exchanged between the parties in the light of the Articles referred to herein before and the TAMP notification which clearly show that it was the Claimant who had provided services or had made arrangements for the users for loading and unloading goods at the container terminal. Rebates can be granted only when users have made thereon arrangements or when the Ship Gears are used for which no evidence was adduced by the Claimant. The Statutory Auditor has not certified the rebates granted for Ship Gears. The Report should have certified the rebates granted to users for making their own arrangements or using Ship Gears. In fact the Financial Advisor and Chief Accounts Officer of the Port vide his mail dated 16.05.2017 requested the Claimant to indicate by using appropriate abbreviations the rebate granted in respect of use of ship gears and use of HMCs, but nothing transpired and no details were furnished. The Claimant had also failed to provide Statutory Auditors Certificate and

certificates produced were also conditional wherein the Auditor had clearly noted that the Claimant was solely responsible for the preparation of the statement of revenue and the Auditors responsibility was only to report based on the work done. Further it was also stated that Audit was not done for the purpose of certificate and no opinion was also expressed to that effect which in our view is not in conformity with Article 9.4 of the Agreement. The Auditor's Reports on Audit and Ind AS Financial Statement of the Claimant for the year ended on 31.03.2018 was also again a Qualified Opinion on the rebate issue which is at S.No.1 under the head "Basis for Qualified Opinion". The above discussion would clearly indicate the following facts:-

- There is a clear admission by the Claimant in the meeting held on 14.3.2015 that temporary operations in the 8th Berth were being carried out using two HMCs and that the Claimant was making arrangements to provide three more HMCs from Kolkata.*
- No evidence has been produced by the Claimant to show the users of the 8th Berth had made their own arrangements. On the other hand facts would indicate the users had used HMCs arranged by the Claimant.*

<https://hcservices.ecourts.gov.in/hcservices/> *The Statutory Auditor had not separately shown the rebates granted for loading/unloading*



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operations using ship gears as per para 2.5 of the TAMP order dated 16.10.2008. But rebates were claimed by the Claimant in respect of users of ship gears and HMCs.

- The Statutory Auditor in the report on the financial statements of the Claimant for the year ended 31.03.2017 and 31.03.2018 had only given qualified opinion on the rebate issue that means only on the basis of the details furnished by the Claimant."*

34. Article 9.4 mandates that the statutory auditor's certificate should be furnished within 30 days from the end of each six month period. Ordinarily, the financial statements of a company are audited within six months after the end of the relevant financial year. Perhaps for such reason, Article 9.4 does not mandate that an audited financial statement should be submitted by the Concessionaire. However, the Arbitral Tribunal concluded that no audit was done for the purpose of issuance of the certificate, and that the same is not in conformity with Article 9.4. Given the fact that Article 9.4 does not prescribe or mandate the submission of an audited financial statement, the emphasis placed on audit by the Arbitral Tribunal is misplaced. Article 9.2(c) stipulates that discounts, deferments and amounts not collected by the Concessionaire from Port users should be ignored while calculating gross revenue. Therefore, if the Petitioner had



offered a discount, such amount should not be deducted from the gross revenue for royalty computation.

35. Thus, the Concession Agreement does not deal with rebates and it becomes necessary to turn to the TAMP Notification in such regard. The TAMP Notification provides for rebate only if Port users make their own arrangements. Therefore, in order to justify deduction of rebates allegedly offered to Port users from the gross revenue, the conclusion of the Arbitral Tribunal that the Petitioner was required to provide evidence that Port users used ship gears or otherwise made their own arrangements cannot be faulted. After appraising the evidence on record and by attaching considerable weight to the TAMP Notification, the Arbitral Tribunal entered factual findings, *inter alia*, at paragraphs 121, 122 and 127, that the Petitioner failed to provide credible evidence that Port users made their own arrangements. The Arbitral Tribunal also noticed in the Award that the Petitioner did not consent to the two Chartered Accountants of the parties examining the rebates. The scope for interference with the appraisal of evidence by an arbitral tribunal is limited to cases where the findings are based on no evidence, completely irrelevant evidence or where vital evidence was disregarded. In this case, the Arbitral Tribunal did not disregard vital evidence. For instance, the statements of revenue and the



statutory auditor's certificates in relation thereto were examined, engaged with and materiality and weight was assigned thereto by specifying reasons such as non-provision of details of rebates for use of ship gears. Although the Petitioner contended that Article 9.4 of the Concession Agreement does not prescribe that such details be provided either in the financial statement or the auditor's certificate, it should be noticed that Article 9.4 mandates that the Concessionaire should maintain all documents and supporting evidence of, *inter alia*, Port users, tariffs charged and amounts received. Besides, it bears repetition that the grant of rebate is governed by the TAMP Notification, and evidence of rebate is material. Eventually, this claim was rejected on the basis of such appraisal. Such findings are not entirely convincing - especially in light of the fact that the conclusions turned at least partly on the evidence that the Petitioner had made arrangements for HMCs for Port users - and may have justified interference in appellate proceedings, where re-appraisal is permissible. Given the limited scope of challenge proceedings, it cannot be inferred that the findings are perverse or amenable to interference under Section 34 of the Arbitration Act. Therefore, the findings and the Award on Issues (iii) and (iv) do not call for interference.



36. For reasons set out above, the Arbitral Award dated 26.08.2019 is set aside as regards the rejection of the claim for amendments to the Concession Agreement consequent to change in law. In all other respects, no interference is warranted with the Award. In view of the fact that the amendment claim consequent to change in law is a live issue, it is open to the Petitioner to institute *de novo* arbitral proceedings in respect thereof. In case the Petitioner initiates *de novo* arbitral proceedings, the Petitioner would be entitled to the benefit of Section 43(4) of the Arbitration Act. There will be no order as to costs.

Sd./- S.K.R.J.,
22.02.2022

//Certified to be true copy//

Dated at Madras this the day of 2022.

COURT OFFICER(O.S.)

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