IN THE HIGH COURT AT CALCUTTA

(Ordinary Original Civil Jurisdiction)

ORIGINAL SIDE

Present:

The Hon'ble Justice Krishna Rao

AP 1750 of 2015

Steel Authority of India Limited

Versus

Vizag Seaport Private Limited

Mr. Pradip Ghosh, Sr. Adv.
Mr. Aryak Dutta
Ms. Riya Kundu

.....For the petitioner

Mr. Ranjan Bachawat, Sr. Adv.
Mr. Rudraman Bhattacharya
Ms. Mini Agarwal

.....For the respondent

Heard on : 18.07.2022

Judgment on : 10.08.2022

Krishna Rao, J.:

The Steel Authority of India Ltd. (hereinafter referred to as "SAIL") had preferred the instant application under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the award passed by the Arbitral Tribunal consisting of three Arbitrators wherein the Presiding Arbitrator and one Ld. Arbitrator have passed minority award in favour of the respondent

namely Vizag Seaprot Pvt Ltd. (herein after referred to as "VSPL") and one of the Arbitrator has passed separate minority Award and rejected the claim made by the respondent.

On 06.05.2008, a Short Term Agreement (herein after referred as "STA") was entered between the petitioner and the respondent for a period of three years with the further extension of one year *"for providing integrated terminal services at multipurpose berth EQ-8 in the northern arm of inner harbor at Visakhapatnam Port for handling coking coal and metallurgical coke in bulk at Visakhapatnam, Andhra Pradesh".*

The contract was in force till 05.05.2012 and thereafter a fresh agreement was executed from 11.05.2012 onwards with extension till 31.03.2014. The dispute was arose between the parties on 20.12.2010 when the respondent had issued a notice to the petitioner for payment of demurrage charges on cargo volumes exceeding free period which the petitioner has denied for payment on the ground that the payment of demurrage charges is not provided under the contract.

Mr. Pardip Ghosh, Ld. Senior Advocate representing the petitioner submits that the petitioner was importing cooking coal in Panamax size vessels through Vizag Port and the respondent was appointed to handle the imported cargo at Vizag port in terms and conditions contained in the agreement and the respondent was to provide Integrated Terminal Services which includes:

a. Unloading of the cargo from the vessel by shore handling system.

b. *Transportation of the cargo from the hook point to stock pile area and reclaiming cargo from stockpile with shore handling system.*

c. *Mechanized loading of cargo onto railway wagons/racks for onward transportation to the steel plants of the petitioner.*

Mr. Ghosh Submits that at the beginning the petitioner made an application before the Tribunal that the respondent in its statement of claim has referred to Tariff Authority for Major Ports (herein after referred as "TAMP") and the dispute should be adjudicated by the TAMP but the respondents have taken a stand that agreement between the parties is a private agreement and TAMP has no manner of application. Accordingly the Arbitral Tribunal held that it is private agreement between the parties and TAMP Rules and Regulations are not applicable.

Mr. Ghosh submits that demurrage under Major Port Trust Act, 1963, is imposed because importer cannot use port premises as storage space but the majority members failed to consider that the respondent has confirmed in the agreement in clause 3.3 that 40,500 Sq. Mtrs of area would be utilized for handling cargo and this area is exclusively dedicated to stack imported cargo by the respondent. It is further contended that since the area of 40500 sq.mtrs was leased out to the respondent by the Vizag Port Trust, according to TAMP notification no demurrage can be claimed. Under Integrated Terminal Services Charges (herein after referred as ITSC) the respondent was charging Rs. 4733.40 per hundred sq.mtrs per year.

Mr. Ghosh further submits that as per clause 8.0 of the agreement, parties have agreed to review the actual quantity of cargo made available to the respondent after first six months of the operation and after which term

would be review jointly and if required terms and conditions will be further revised but in the instant case review meeting was held on 09.10.2009 but in the said review meeting the respondent did not mentioned with regard to levy of demurrage under clause 5.12.

Mr. Ghosh submits that clause 5.12 has two parts (i) stacking of cargo of volume 60,000MT with additional accumulation of cargo of further 30,000MT for a period not exceeding 15 continuous days. (ii)The second part is when the cargo of petitioner was expected to go beyond 2.0 million MT per year, the respondent would organize storage of cargo upto 90,000 MT with further provision of storing additional cargo of 30,000 MT for a period not exceeding 15 days.It is further contended that both the parties have prepared chart and as per the chart submitted by the parties the first part of clause 5.12 is not applicable and the second part is applicable.

Mr. Ghosh further submits that in the agreement there is no clause for payment of demurrage and the majority Arbitral Tribunal have travelled beyond the contract by directing the petitioner for payment of demurrage to the respondent.

Per Contra, Mr. Ranjan Bachawat, Ld. Sr. Advocate representing the respondent submits that there was never any Cargo Commitment by the respondent. The petitioner's requirement to organize stacking or more cargo is only in the event commitment by respondent to the petitioner is expected to go beyond 2.0 Million MT per year. It is further contended that Annual Cargo Volume is not the same as Cargo Commitment. It is further contended that Cargo Commitment is the assured volume committed by the

petitioner on which ITSC is payable on actual tonnage handled irrespective of whether such assured volume is handled or not. Ld. Counsel for the respondent further submits that in terms of clause 4.2 of the agreement, the petitioner is liable to pay penalty for any shortfall in bringing the assured cargo.

Mr. Ranjan Bachawat further submits that the petitioner is not entitle to store between 90,000 MT to 1,20,000 MT as Clause 5.12 of the Short Term Agreement envisages giving of notice to enable the respondent to organize for additional storage. It is further contended that clause 5.12 provides a cap on the number of grades of coal, cargo volume and the number of days for which such cargo may be stored. It is further submits that admittedly no notice of 30 days was given by the petitioner to the respondent.

Mr. Ranjan Bachawat further submits that as per clause 14.5 no amendment or waiver of the STA is binding unless the same is executed in writing by the parties. It is further contended that the petitioner was never allotted any specific area to the petitioner nor any rent was collected from the petitioner. It is further contended that the land measuring an area 40500 sq.mtrs as mentioned in clause 3.3 of the agreement was to be utilized for handling facilities, drains, roads, railway tracks, building and other amenities and system associated with providing integrated terminal services and thus the same cannot be termed as lease.

Mr. Ranjan Bachawat submits that the claim of the respondent on account of storage charges for over stacking cargo beyond the stipulated

period of time in terms of clause 5.12. It is further submits that the short term agreement not contemplate a lease and there is nothing in the contract which would indicate creation of lease in favour of the petitioner.

Mr. Ranjan Bachawat further submits that the Majority Arbitrators have considered all the clauses of the agreement including clause 5.12 and have not travelled beyond the scope of the contract. It is further contended that the application filed by the petitioner under section 34 of the Arbitration and Conciliation Act,1996 there is no ground to interfere with the award passed by the Majority Arbitrators.

Heard, the Ld. Counsel for the respective parties, considered the documents available on record and the award passed by the majority arbitrators and minority arbitrator. Before proceeding with the matter the following clause of the Short Term of Agreement are hereby set out :

Clause 1.2-Applicable to SAIL:

a) Assurance on Cargo and Cargo volume: SAIL assures and import cargo volume of 1.5 Million Metric Tonnes of cargo per annum to VSPL Berths for a period of 3 years from the date of signing of the agreement or extended period, if any, however, the penalty shall be applicable & payable by SAIL to VSPL, only if, the Cargo volume falls below the following stipulated levels as follows:

1st year of operation at 10.3 Meters initial draft: :0.75 Million Metric tones
2nd year of operation onwards subject- : 1.0 million Metric tones – to attaining 11 meters draft:

However, the above aspect of assured Cargo volume as well as tonnage reckoned for payment of penalty shall be jointly reviewed, after 6 (six) months of this Agreement, based on actual performance.

The volumes are however expected to be increased progressively with increased in draft of the inner harbor.

Clause 3.3 : Capacity

Based on the minimum discharge rate of 20,000 MT per day, the Berth can handle the Cargo volume up to 4 Million MT in approximately 210-220 days in a year. The Cargo volume of 1.5 Million MT spread over 12 months period can be comfortably handled with adequate buffer provided for maintenance, possible bunching of ships and breakdowns, excluding Force Majeure situation.

Therefore, VSPL warrants that the Cargo assurance by SAIL to VSPL of 1.5 million M.T. on a year on year basis during the Agreement Period of 4 years can be easily handled by VSPL. VSPL confirms that 40,500 square meters of area will be utilized for handling the Cargo and mechanized handling facilities, drains, roads, railway tracks, buildings. Amenities and other systems associated with providing integrated terminal services as per this agreement.

Clause 4.1 –

SAIL assures a minimum Cargo guarantee of 1.5 million metric tonnes per year for inner harbor handling each year of operation through out the Agreement Period. For actual quantity handled up to 1.5 Million Metric Tonnes, the ITSC payable shall be Rs. 167/- per MT. in the first year of operation. In case of any shortfall in handling less than 0.75 million MT (at 10.3 meter initial draft), then for such shortfall quantity of Cargo, SAIL shall make payment by way of penalty to VSPL at the rate of Rs.119/- per MT in the first year of operation. For the second year of operation, any shortfall in quantity below 1 million MT subject to attaining 11 meters draft, SAIL shall make payment to VSPL at the rate of Rs. 119/- per MT. However, the above aspect can be jointly reviewed after 6 (six) months based on actual performance. In case if the handled quantity is more than 3.0 Million MT per annum, then, fore quantity above 3.0 Million MT, SAIL shall make payment of ITSC to VSPL at the rate of Rs. 97/- per MT in the year of achievement. The subsequent year on year escalation in the ITSC from the end of first year of operation is detailed in Annexure-1.

Clause 4.2-

For any shortfall in the Cargo Commitment (except in Force Majuere situation) by SAIL to VSPL, SAIL shall pay Penalty as per Annexure-1 with the following formula :

Penalty:

1. *For 1st year of operation at (10.3 Metre initial draft) quantity short of 0.75 million tonnes.*
2. *For 2nd year of operation onward (subject to attaining minimum 11 Metre draft) quantity short of 1.0 million tonnes.*

   Note: In case the specified draft is not achieved in 2nd or subsequent years, Penalty as per (1) above shall be payable.

Clause 5.12 -

Storage and Stacking – VSPL shall ensure storing of the Cargo grade-wise up to a maximum of 4 grades and up to a maximum Cargo volume of 60,000 M.T. VSPL shall in case of exigencies, endeavor to accommodate Cargo of a further 30,000 M.T. for a period not exceeding 15 (fifteen) continuous days. However, SAIL shall give 30 days notice to VSPL to organize stacking requirement of such higher Cargo volumes. If the Cargo Commitment by SAIL to VSPL is expected to go beyond 2.0 million MT per year, VSPL shall organize for storage of Cargo up to 90,000 MT with a further provision of storing 30,000 M.T of coal in exigencies for a period not exceeding 15 days. VSPL shall stack the Cargo an order manner.

Clause 6.0– Schedules of Rates :

The ITSC payable by SAIL during currency of the Agreement, the year on year escalations to the ITSC, the Penalties for shortfall vis-à-vis the Cargo Commitment by SAIL to VSPL, and incentives for higher volumes are provided in Annexure 1.

All the above charges are fixed for the entire agreement period including the period of extension, if any, of agreement period except for the escalation.

Clause 8.0 – Review :

SAIL and VSPL agree that the first six months of operation of this agreement shall be treated as a test period to make an assessment of the actual quantity of Cargo that can be made available to VSPL terminal and to test the operational parameters, after which the terms will be reviewed jointly and if required terms and conditions will be further revised.

Clause 14.5:

Amendments and Waivers : No amendments or waivers of this Agreement shall be binding unless executed in writing by the parties to be bound thereby. No waiver of any provision of this agreement shall be deemed to or shall constitute a waiver of any other provision nor shall any such waiver constitute a continuing waiver.

Now the question before this Court whether the petitioner is liable to pay any demurrage charges as claimed by the respondents and as awarded by the majority member of the Arbitral Tribunal or whether the respondent is not entitled to get any demurrage charges as held by the Ld. minority member of the Arbitral Tribunal.

None of the parties have adduced any oral evidence before the Arbitral Tribunal and the Arbitral Tribunal has decided the claim made by the respondent on the basis of the documents and the submissions made by the respective parties.

Admittedly, there is no clause in the short term agreement for payment of demurrage. The majority arbitrators while deciding the said issue have held as follows :

"52. *On plain reading of clause 5.12 of the STA as quoted by us above, it would be clear that the same consists of two distinct parts – which is also admitted by all and in two parts the provision for free*

period of 15 days has been separately mentioned. And in case of the first part it is specially mentioned the provision for 30 days notice.

53. *The first part of clause 5.12 of the STA again consists of three sentences. The first sentence says that the VSPL is obliged to store "upto a maximum cargo volume of 60,000 MT." Then the second sentence starts. There the VSPL is obliged "to accommodate cargo of a further 30,000 MT" in case of exigencies "for a period not exceeding 15 (fifteen) continuous days" Then the third sentence starts with the word "However" and makes SAIL obliged to give 30 days notice to VSPL for such* ***"higher cargo volumes."***

54. *Thus it is clear that the maximum volume of cargo the VSPL is obliged to store is 60,000 MT and the higher volume of 30000 MT of cargo only when 30 days notice is given by SAIL when the maximum volume of 60,000 MT continuously exceeds for more than 15 days. The sense of using the word "However" at the beginning of the third sentence connects it almost in the same breath with the first two sentences of clause 5.12 of STA. In the said clause the words "for a period not exceeding" are very significant for determination of the dispute between the parties. On perusal of those words it appears that even in that case of 30 days notice VSPL was obliged to arrange storing 30,000 MT cargo not exceeding 15 continuous days. That means the right of extra storage of cargo on notice is not unlimited for SAIL. It is again not that the SAIL would give notice every 15 days for excess storing of 30,000 MT and VSPL would be obliged to store the same. It is clearly mentioned in clause 5.12 that right of SAIL was given "in case of exigencies."*

55. *It is a pointer to note that for the second part of clause 5.12 of STA there is no whisper of notice although there also free period is 15 days, because the first part is for day-to-day clearance to cargo keeping the cardinal principle of MPT Act that thee Port area is not to be used as warehouse, but to be used as transit area.*

56. *The second part of the clause deals with the cargo volume on per year cargo commitment basis when VSPL would keep itself ready to accommodate 90,000 MT+30,000 MT in exigencies for a period not exceed 15 days. And this is when Cargo Commitment by SAIL to VSPL is expected to go beyond 2.0 million MT per year."*

The minority arbitrator while deciding the issue held that :

"39. The question for consideration is whether additional cargo was kept for more than 15 continuous days. And whether cargo load expected to go beyond 2.0 million MT per year was considered by the claimant while working out demurrages.

40. From the statement filed by the claimant with the pleadings at page 204 Volume 1 (claimant's documents) which was sent to respondent with claimant's letter dated 20.12.2010, nowhere depicts that cargo in excess of 60,000 MT remained stacked 15 continuous days. When asked to explain, counsel for the claimant stated he would file fresh statement which he did. He filed fresh statement on 19.12.2014 claiming demurrages w.e.f. May 2009 to 5th May 2012. Again this statement did not show that cargo of 30,000 MT remained stacked for 15 continuous days. Therefore, the arbitral fixed a date of hearing on 01.03.2015 seeking clarification before announcing the award.

41. Mr. Somyajulu, counsel for the claimant during that hearing filed yet another statement showing the dates on which cargo of SAIL was in excess of 60,000 MT. This was filed on 01.03.2015. From this list he pointed out that there were four lots when excess cargo remained stacked for 15 continuous days. Those are at Sr. No. 195 starting from 15.11.2009 and continued till Sr. No. 287 dated 15.02.2010. The second lot is from Sr. No. 165 dated 12.09.2010 to Sr. No. 297 dated 22.01.2011. The third lot is from Sr.No.100 dated 09.07.2011 to Sr. No. 143 dated 21.08.2011 and the fourth is from Sr. No. 280 starting from 05.01.2012 to Sr.No.355 dated 20.03.2012. Admittedly this statement is not supported by any evidence. Delhi High Court in the case of Ishwar Singh & Ors. Vs. DDA & Ors. CS(OS) No. 764A/1991 decided on 23.12.2009 held that "No presumption can be made by the Arbitrator of payment made to staff because making of presumption of such expenses, without evidence is fraught with dangers". Mere producing a list without substantiating it with record maintained in due course of business is fraught with danger hence no reliance can be placed on it. Once need to be very careful in relying on such statement in the absence of any evidence.

For the sake of argument and without prejudice to what has been discussed above, if we have to calculate the demurrages then it has to be calculated correctly as per clause 3.6.2 of TAMP. Clause 3.6.2 of TAMP notification of 2011 prescribes that for the 1st fortnight the rate to be charged after the free period would be Rs.6/- per tone per day; for the 2nd fortnight it would be Rs.9/- per tone per day; and for the 3rd fortnight it would be Rs. 3/- per ton per day in addition to the 2nd fortnight charges and after 45 days it would be flat Rs. 24/- per ton per day.

42. Taking this to be the guidelines for charging demurrages we have to keep in mind Article 5.12 of STA, which says limit would be 60,000 MT + 30,000 MT = 90,000MT. Therefore, cargo in excess of 90,000 MT if remained stacked for 15 continuous days would incur demurrages. In the case in question for the period 16.11.2009 to 30.11.2009 there was no excess cargo remained stacked for 15 continuous days. The period 30.11.2009 to 15.12.2009 would thus become 1st fortnight. Rate for 1st fortnight to be charged as per TAMP notification will work out to Rs. 0.4 per ton per day; and for the 2nd fortnight which starts from 15.12.2009

to 30.12.2009 it would be Rs. 0.6 per ton per day. For the 3rd fortnight starting from 30.12.2009 to 13.01.2010 it would be @ Rs. 3.6 per ton per day. For the period after 45 days which starts from 14.01.2010 till 06.02.2010 when the cargo remained stacked continuously in excess of 90,000 MT flat rate of Rs. 24/- per ton per day would apply. According to claimant first lot starts from Sr.No.195 to 287 of the list furnished by it on 01.03.2015 which is from 15.11.2009 to 15.02.2010. Second lot starts from Sr. No. 165 to 297 i.e. from 12.09.2010 to 22.01.2011. Second lot which starts from 27.09.2010 till 12.10.2010 the volume of cargo did not exceed 90,000 MT 15 continuous days. From 12.10.2010 to 27.11.2010 fortnight it exceeded only for 5 continuous days beyond the free period i.e. from 16.10.2010 to 20.10.2010. In between 07.11.2010 to 11.11.2010 the volume of cargo remained less than 90,000 MT. Out of this fortnight starting from 07.11.2010 till 21.11.2010 will be the free period of 15 days. Therefore, nothing was payable during this period. During the period starting from 22.11.2010 till 28.11.2010 it exceeded 90,000 MT beyond the free period. Therefore, claimant could at best claim Rs. 0.4 per ton per day, and thereafter it remained within the limit. For the 3rd Lot starting from Sr.No.100 to 143 i.e. from 09.07.2011 till 21.08.2011 cargo did not exceed 90,000 MT for 15 continuous days except for a short period from 03.08.2011 till 08.08.2011 which amounts to 6 days only. Thereafter from 08.08.2011 which amounts to 6 days only. Thhereafter from 08.08.2011 till 21.08.2011 fortnight it remained below 90,000 MT. Since cargo remained below 90,000 MT, therefore, it has be counted against @ Rs. 0.4 per ton per day. The 4th Lot which starts from Sr.No.280 to 355 i.e. from 05.01.2012 till 20.03.2012 will be treated as the first quarter after free period and the rate would be Rs.0.4 per ton per day upto 20.01.2012 and from 20.01.2012 i.e. 2nd fortnight it would be Rs. 0.6 per ton per day upto 03.02.2012; and with effect from 04.02.2012 it would be Rs. 3.6 upto 18.02.2012. From 19.02.2012 onwards upto 28.02.2012 it will be Rs. 24/- per ton per day because thereafter volume of cargo exceed the limit of 90,000 MT. If we calculate on this basis the claimant would not be entitled to the amount as claimed. Therefore, calculations given by the claimant is contrary to the scale of rates fixed by TAMP. At best if at all the amount can be awarded for the sake of arguments and without prejudice to the legal position discussed above, it would work out for 2009-10 Rs. 1,83,36,697/-; from 2010-11 Rs. 44,975/-; for 2011-12 Rs. 69,94142/- i.e. total Rs. 2,53,75,814/- only.

43. It would not be out of place to mentioned that in the proceeding held on 19.12.2014 claimant filed a Chart showing cargo handlings during May 2008 to 5th May 2009, May 2009 to 5th May 2010, May 2010 to 5th May, 2011 and May 2011 to 5th May 2012. If we see the chart as filed by the claimant it is clear that for the period May 2008 to 5th May 2009 respondent had supplied a quantity of 0.97 MT. As per agreement respondent was to supply in the first year of the contract a quantity of 0.756 MT. Therefore, claimant has rightly shown that they were not to

claim any demurrages. For the period May 2009 to 5th May 2010 as per claimant's own showing the respondent supplied quantity of 1.94 MT and for the period May 2010 to 5th may 2011 claimant has shown that respondent supplied a quantity of 2.06 MT. For the period May 2011 to 5th May 2012 quantity was 1.86 MT. Applying the second part of clause 5.12 which says if the cargo is expected to go beyond 2.0 million MT then the limit would be 90,000 plus 30,000 i.e. 1,20,000 MT. Therefore, for the period May 2009 to 5th May 2010 when the quantity delivered was 1.94 MT it was expected to go beyond 2.0 million MT. For the period May 2010 to 5th May 2011 actual quantity was more than 2.0 million MT. Therefore, for these period also limit for the purpose of counting over stacking ought to be the limit prescribed in the second part of clause 5.12 i.e. 120,000 MT. If we see the statement filed by the claimant on 19.12.2014, in none of the lot respondent exceeded this limit. In fact claimant has completely ignored second part of clause 5.12. Similarly for the period May 2011 to 5th May 2012, the quantity delivered by the respondent was 1.86 MT which can also be called expected to go beyond 2.0 million MT. The maximum limit as prescribed is 90,000 MT + 30,000 MT for the period of 15 days. Claimant has not taken note of these aspects and the provision of the contract, therefore, wrongly levied demurrages."

On consideration of both awards it reveals that the majority arbitrators while considering clause 5.12 come to the conclusion that the first part of the said clause is applicable and the in terms of Major Ports Act, 1963 and Tariff Authority of Major Ports the respondent is entitle to claim demurrage.The minority arbitrator while considering Clause 5.12 considered the charts showing cargo handling during the said period and held that the second part of the clause 5.12 is applicable and the respondent is not entitle to claim demurrage.

There is no provision in clause 5.12 of the short term contract that demurrage is payable in accordance with TAMP scale of rates. In clause 3.3 of the short term contract the respondents confirms that 40500 sq.mtrs of area will be utilized for handling the cargo and mechanized handling facilities, drains, roads, railway- tracks, buildings. Amenities and other

systems associated with providing integrated terminal services as per this agreement. It is crystal clear that the said area is also provided to the petitioner for stacking cargo and dispatch of cargo by rail wagons to the steel plant of the petitioner. In clause 4.1 of the agreement the Integrated Terminal Service Charges has been specified. In the said clause it is also mentioned that the subsequent year on year escalation in the ITSC from the end of the first year of operation is detailed in Annexure-1 and in the said Annexure also there is no mention of payment of demurrage as per the TAMP scale of rates.

Clause 8.0 provides for "Review" and review meeting was held on 9th October, 2009. In the review meeting also the respondent did not discuss about levy of demurrage and revision of terms and condition of terms of contract for inclusion of claim of demurrage.

In the order passed by the TAMP dt. 11th October 2011 it is held that :

(4).	***Income estimation***	
	(i) The VSPL has mentioned about a bilateral agreement with SAIL under which discounts in tariff were allowed by VSPL and requested not to ignore the revenue discount offered by it to the SAIL in the tariff revision exercise. In this connection, it may be noted that the Authority in some other general revision cases has decided that revenue realizable at the rates approved is to be considered and reduction in revenue due to concessions granted by the port/private	*(a). SAIL is the only majorcustomer importing coking coal through Gearless Panamax vessels in Vizag Port for about 5 MnMTs. As TAMP is awared RINL's coking coal hit her to handled at Vizag Port has fully migrated to Gangavaram Port. Hence for operational viability of VSPL and protection of cargo volume in VPT it is absolutely essential for VSPL to retain SAIL-Cargo. Keeping this in view, a 4 years short term agreement with SAIL was entered w.e.f., 06.05.2008. As such giving*

	operator at its discretion will not be considered in the tariff revision exercise. The revenue impact of such discounts allowed by the VSPL may be quantified for each of the past years and the cost statement may be modified to show revenues realizable at the approved SOR.	*reduction in approved tariff to SAIL is purely out of the contractual necessity and compulsion to retain SAIL cargo at VPT/VSPL. Thus, there is absolutely no discretion from our end in granting reduction in tariff to SAIL. It is again submitted that the concession in tariff to SAIL is also in accordance with TAMP guideline 2.16.1, 4.4 and as advised by TAMP vide ref. xxvii (b) of earlier tariff order.*

In the said order the TAMP has categorically recorded that *"As such giving reduction in approved tariff to SAIL is purely out of the contractual necessity and compulsion to retain SAIL cargo at VPT/VSPL. Thus there is absolutely no discretion from our end in granting reduction in tariff to SAIL."*

In the case reported in AIR 1999 SC 232(Associated Engineering Co. – vs- Government of Andhra Pradesh & Ors.) held that :

> ***"15.*** *In the absence of any provision to pay for extra expenditure and in the light of the specific provision placing the sole responsibility for the maintenance of the haul roads on the Contractor, the arbitrator had no jurisdiction to award 50% at extra rate of Rs. 4 per Sq. Meter. The contract contains no provision for payment of any amount outside what is strictly specified under the clause. In the circumstances, Mr. Madhava Reddy says, the High Court was perfectly justified in coming to the conclusion, which it did, as regards the arbitrator acting outside his jurisdiction.*
>
> ***30.*** *In the instant case, the umpire decided matters strikingly outside his jurisdiction. He out stepped, the confines of the contract. He wandered far outside the designated area. He disgressed far away from the allotted task. His error arose not by misreading or misconstruing or misunderstanding the contract, but by acting in excess of what was agreed. It was an error going to the root of his jurisdiction because he asked himself the wrong question, disregarded the contract and awarded in excess of his authority. In many respects, the award flew in the face of provisions of the contract to the contrary. See the principles state in Anisminic Ltd. v. Foreign Compensation Commission*

[1969] 2 AC 147; Pearlman v. Keepers and Governors of Harrow School, [1979] 1 Q.B. 56; Lee v. Showmen's Guild of Great Britain [1952] 2 Q.B. 329; M.L. Sethi v. R.P. Kapur MANU/SC/0245/1972 : [1973] 1SCR697 ; The Managing Director. J. and K. Handicrafts v. Good Luck Carpets MANU/SC/1060/1990 : AIR1990SC864 and State of Andhra Pradesh &Anr. v. R.V. Rayanim, MANU/SC/0114/1990: [1990] 1SCR54. See also Mustill& Boyd's Commercial Arbitration, Second Edition; Halsbury's Laws of England, Fourth Edition, Vol. 2.

***31.** The umpire, in our view, acted unreasonably, irrationally and capriciously in ignoring the limits and the clear provisions of the contract. In awarding claims which are totally opposed to the provisions of the contract to which he made specific reference in allowing them, he has misdirected and misconducted himself by manifestly disregarding the limits of his jurisdiction and the bounds of the contract from which he derived his authority thereby acting ultra fines compromise."*

In the instant case also the majority arbitrators have passed and award in favour of the respondent by directing the petitioner for payment of demurrage charges by relying upon the Major Port Trust Act,1963 and in terms of TAMP order which is absolutely outside of the contract as in the contract there is no provision for levy of demurrage.

In the case reported in (2015) 3 SCC 49 (Associate Builders – vs- Delhi Development Authority) the Hon'ble Supreme Court held that :

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

jurisprudence that it can be described as a fundamental policy of Indian law.

31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

(i) a finding is based on no evidence, or

(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at: or

(iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse."

In the case reported in AIR 2019 SC 5041 (Ssangyong Engineering and Construction Co. Ltd. – versus- National Highways Authority of India (NHAI) the Hon'ble Supreme Court held that :

*"**25.**Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paragraphs 18 and 27 of Associate Builders (AIR 2015 SC 363) (supra), or secondly, that such award is against basic notions of justice or morality as understood in paragraphs 36 to 39 of Associate Builders (supra). Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco (AIR 2015 SC 363) (supra), as understood in Associate Builders (supra), and paragraphs 28 and 29 in particular, is now done away with.*

***26.**Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.*

***29.** The change made in Section 28(3) by the Amendment Act really follows what is stated in paragraphs 42.3 to 45 in Associate Builders (AIR 2015 SC 620) (supra), namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator*

construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2A).

***30.** What is important to note is that a decision which is perverse, as understood in paragraphs 31 and 32 of Associate Builders (AIR 2015 SC 620) (supra), while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.*

***49.**The judgments of the Single Judge and of the Division Bench of the Delhi High Court are set aside. Consequently, the majority award is also set aside. Under the Scheme of Section 34 of the 1996 Act, the disputes that were decided by the majority award would have to be referred afresh to another arbitration. This would cause considerable delay and be contrary to one of the important objectives of the 1996 Act, namely, speedy resolution of disputes by the arbitral process under the Act. Therefore, in order to do complete justice between the parties, invoking our power under Article 142 of the Constitution of India, and given the fact that there is a minority award which awards the appellant its claim based upon the formula mentioned in the agreement between the parties, we uphold the minority award, and state that it is this award, together with interest, that will now be executed between the parties. The minority award, in paragraphs 11 and 12, states as follows:".*

In the case reported in AIR 2021 SC 2493 (Dakshin Haryana BiljliVitran Nigam Ltd. – versus- M/s Navigant Technologies Pvt. Ltd) the Hon'ble Supreme Court held that :

*"**36.2.**Second, extending Section 17 of the Limitation Act to Section 34 would do violence to the scheme of the Arbitration Act.As discussed above, Section 36 enables a party to apply for enforcement of award when the period for challenging an award under Section 34 has*

expired. However, if Section 17 were to be extended to Section 34, the determination of "time for making an application to set aside the arbitral award" in Section 36 will become uncertain and create confusion in the enforcement of award. This runs counter to the scheme and object of the Arbitration Act."

(xx) Relevance of a dissenting opinion

(a) The dissenting opinion of a minority arbitrator can be relied upon by the party seeking to set aside the award to buttress its submissions in the proceedings under Section 34.

(b) At the stage of judicial scrutiny by the Court under Section 34, the Court is not precluded from considering the findings and conclusions of the dissenting opinion of the minority member of the tribunal.

(c) In the commentary of 'Russel on Arbitration', the relevance of a dissenting opinion was explained as follows :

"6-058. Dissenting opinions. Any member of the tribunal who does not assent to an award need not sign it but may set out his own views of the case, either within the award document or in a separate "dissenting opinion". The arbitrator should consider carefully whether there is good reason for expressing his dissent, because a dissenting opinion may encourage a challenge to the award.This is for the parties' information only and does not form part of the award, but it may be admissible as evidence in relation to the procedural matters in the event of a challenge or may add weight to the arguments of a party wishing to appeal against the award."15

(emphasis supplied)

(d) Gary B. Born in his commentary on International Commercial Arbitration opines that :

"Even absent express authorization in national law or applicable institutional rules (or otherwise), the right to provide a dissenting or separate opinion is an appropriate concomitant of the arbitrator's adjudicative function and the tribunal's related obligation to make a reasoned award. Although there are legal systems where dissenting or separate opinions are either not permitted, or not customary, these domestic rules have little application in the context of party-nominated co-arbitrators, and diverse tribunals. Indeed, the right of an arbitrator to deliver a dissenting opinion is properly considered as an element of his / her adjudicativemandate, particularly in circumstances where a reasoned award is required. Only clear an explicit prohibition should preclude the making and publication to the parties of a dissenting opinion, which serves an important role in the deliberative process, and can provide a valuable check on arbitrary or indefensible decision making."16

It is further commented that :

"There is nothing objectionable at all about an arbitrator "systematically drawing up a dissenting opinion, and insisting that it be communicated to the parties". If an arbitrator believes that the tribunal is making a seriously wrong decision, which cannot fairly be reconciled with the law and the evidentiary record, then he / she may express that view. There is nothing wrong – and on the contrary, much that is right – with such a course as part of the adjudicatory process in which the tribunal's conclusion is expressed in a reasoned manner. And, if the arbitrator considers that the award's conclusions require a "systematic" discussion, that is also entirely appropriate; indeed, it is implied in the adjudicative process, and the requirement of a reasoned award."

In the present case the majority arbitrators have taken into account of the Major Port Trust Act,1963 and TAMP order which is not available in contract and have not considered the chart showing the cargo handling during the contract period which was the material documents available with the arbitrators.The minority arbitrator has considered the said document and also held that in the present case, the parties are to be governed by private contract and not the Major Port Trust Act,1963.The Ld. minority arbitrator also considered the letter issued by the respondent wherein the respondent insisted the petitioner not to divert its vessels even on the day the ground stock was 85,099 MT. The respondent had protested the diversion of cargo not because the petitioner did not full fill the commitment quantity but to ensure, it does not loss revenue. In the letter dt. 20.01.2011 it is also mentioned that diverting the vessels to Gangavaram would cause huge loss of revenue.

In the case reported in AIR 2012 SC 4661 (PSA SICAL Terminals Pvt. Ltd –v- Board of Trust Tuticorn and others) the Hon'ble Supreme Court held that :

> ***"87.*** *It has been held that an Arbitral Tribunal is not a Court of law. Its orders are not judicial orders. Its functions are not judicial functions. It cannot exercise its powers ex debito justitiae. It has been held that the jurisdiction of the arbitrator being confined to the four corners of the agreement, he can only pass such an order which may be the subject-matter of reference."*

In the instant case the majority arbitrators have passed award by going outside of the four corners of the agreement inspite of the fact that there is no clause in the agreement for levy of demurrage against the petitioner and have consider the Major Port Act which was not the subject matter before the Ld. Arbitrators under the contract.

This being the case, it is clear that the majority award has created a new contract by applying provisions of Major Port Act,1963 and TAMP order as there is no provision under the contract for demand of demurrage charges against the petitioner. The majority award also not considerd that in the agreement rate of schedule of ITSC and penalty clause are provided.

Clause 4.0 : SAIL's Responsibilities:

> *"4.1. SAIL assures a minimum Cargo guarantee of 1.5 Million Metric Tonnes per year for inner harbor handing each year of operation through out the Agreement Period. For actual quantity handled up to 1.5 Million Metric Tones, the ITSC payable shall be Rs.* ***167****/- per MT in the first year of operation. In case of any shortfall in handling less than 0.75 Million MT (at 10.3 meter initial draft), then for such shortfall quantity of Cargo, SAIL shall make payment by way of penalty to VSPL at the rate of Rs.* ***119****/- per MT in the first year of operation. For the second year of operation, any shortfall in quantity below 1 Million MT subject to attaining 11 meters draft, SAIL shall make payment to VSPL at the rate of Rs.* ***119****/- per MT. However, the above aspects can be jointly reviewed after 6 (six) months based on actual performance. In case if the handled quantity is more than 3.0 Million MT per annum, then, for quantity above 3.0 Million MT, SAIL shall make payment of ITSC to VSPL at the rate of Rs.* ***97****/- per MT in the year of achievement.*

The subsequent year on year escalation in the ITSC from the end of the first year of operation is detailed in Annexure-1."

As per Annexure-1, Clause 6 of the agreement, the composition of the calculation of the ITSC of Rs. 167/- is as follows:-

"6.Composition of the calculation of the ITSC of Rs. 167/-

Element	***%***	***Basic of Escalation***	***Index***
Power	*8.0*	*APERC Notification*	*Rs. 5.44 per unit for HT customers*
Royalty	*2.5*	*VPT/TAMP Notification*	*Wharfage of Rs. 26 per MT and 17.11% thereof*
Lease Rentals	*0.5*	*Wholesales Price Index (WPI) of all commodity*	*Rs. 4733.40 per sq. mtrs. Per year*
Others	*36.0*	*No escalation*	*RBI Bulletin on the date commencement operations.*
Non-escalable	*53.0*		
Total	***100***		

The base index of WPI/the rates as per the VPT Notification will be as prevailing on the date of commencement of operation. Power will be at the unit rate prevalent on the date of signing of this Agreement.

Escalation/de-escalation shall be calculated at the beginning of second year based on the above parameters. The due dates for such annual revisions shall be the beginning of each year from the date of commencement of this operations be on except for Royalty (Wharfage), Lease Rentals and Power, which shall be on actual as per VPT/TAMP Notification and APERC Notification (or as specified in Clause 6.1 to 6.4 of the agreement) respectively.

Annual (Financial Year) WPI for all commodity will be considered for escalating 36 % of the ITSC. For Example, if the agreement commences in May 2008 then the rates will be revised from May 2009 and the changes in whole sale price index (all commodity) of 2007-2008 and 2006-2007(WPI all commodity of 2007-2008/WPI all commodity of 2006-2007) will be considered for escalating the 36 % of ITSC applicable in May 2008.

In case of power element of ITSC, increase/decrease in HT power rate as per APERC notification (or as specified in Clause 6.1 to 6.4 of the agreement) should be considered as the basic of escalation."

The respondents vide their notice dt. 20.12.2010 have issued the notice claiming demurrage charges by relying upon Clause 5.12 of the agreement. In the notice dt. 20.12.2010, the respondents have mentioned as follows:-

> "*It was agreed under clause 5.12 of the STA that VSPL would provide storage for storing of cargo volumes up to a maximum of 60,000 MT and only in case of exigencies, VSPL would endeavor to accommodate another 30,000 MT, provided 30 days prior notice of is received from SAIL to organize stacking requirement of such higher volumes. The component of storage charges is factored in the ITSC rate in the STA.*
>
> *For the cargo stored over and above the agreed storage volumes of 60,000 MT, demurrage charges are levied as per the VSPL SOR approved and notified by TAMP under the provisions of MPT Act."*

The respondents have claimed demurrage charges of Rs. 30,83,07,496/- for the period of 06.05.2008 to 31.03.2012 with interest at the rate of 8 % on the basis that the petitioner has committed breach of clause 5.12 of the agreement by storing excess cargo beyond 60,000 MT and free period of 15 days without giving 30 days notice.

Keeping in view the principles of law laid down in the judgments referred to above, I shall now proceed with the matter.It should be further noted that in the instant case, award came to be passed prior to October 2015and as such section 34 of 1996 would apply. A reading of the above judgments make it very claear that the scope of intereference would be only when the award is against the public policy of India or came to be passed contrary to the terms of the contract or where the award is so perverse which goes to the root of the matter or where the Arbitrator construe the

contract/ agreement in such a way which no fair minded or a reasonable person would do.

Admittedly, there is no clause in the in the agreement or there is any correspondance between the parties with regard to imposition of demurrage upon the petitioner. Under clause 4.0 the responsibilities of the petitioner (SAIL) is provided.Penalty made clause is 4.2 and in the said clause also there is no provision for demurrage.There is nothing in the short term agreement with regard to applicability of Major Port Trust Act,1963 or TAMP order. In the year 2011 itself the TAMP has decided that " *As such giving reduction in approved tariff to SAIL is purely out of the contractual necessity and compulsion to retain SAIL cargo at VPT/VSPL. Thus there is absolutely no discreation from our end in granting reduction in tariff to SAIL."*

Further, the payment of loss or the demurrage to be reimbursed, in my view, may not be a ground to reverse or rewrite the tender condition as it was not accepted by the petitioner . Deleaing with rewriting the terms of the agreement, the Hon'ble Apex Court in Satyanarayana Construction Company – versus- Union of India and others reported in (2011)15 SCC 101, held that :

> "*Thus, as per the contract,the contractor was to be paid for cutting the earth and sectioning to profile etc.@110 per cubic mtrs.There may be some merit in the contention of Mr. Tandale that the contractor was required to spend huge amount on the rock blasting work but, in our view,once the rate had been fixed in the contract for a particular work,the contractor was not entitle to claim additional amount merely because he had to spend more for carrying out such work.The whole exercise undertaken by the Arbitrator in determining the rate for work at serial no.3of Schedule "A"was beyond his competence and authority.It was not open to the Arbitrator to rewrite the terms of the*

contract and award the contractor a higher rate for the work for which rate was already fixed in the contract.The Arbitrator having exceeded his authorityand power,the High Court cannot be said to have committed any error in upsetting the Award passed by the Arbitrator with regard to claim no.4."

*"**53.** In J.G. Engineers Private Limited vs. Union of India (UOI) and others MANU/SC/0527/2011 : 2011 (5) SCC 758, the Hon'ble apex Court dealt with similar issue holding:-*

"A Civil Court examining the validity of an arbitral award under Section 34 of the Act exercises supervisory and not appellate jurisdiction over the awards of an arbitral tribunal. A court can set aside an arbitral award, only if any of the grounds mentioned in Sections 34(2)(a)(i) to (v) or Section 34(2)(b)(i) and (ii), or Section 28(1)(a) or 28(3) read with Section 34(2)(b)(ii) of the Act, are made out. An award adjudicating claims which are 'excepted matters' excluded from the scope of arbitration, would violate Section 34(2)(a)(iv) and 34(2)(b) of the Act. Making an award allowing or granting a claim, contrary to any provision of the contract, would violate Section 34(2)(b)(ii) read with Section 28(3) of the Act ....(emphasis supplied).

The High Court proceeded on the erroneous assumption that when Clauses (2) and (3) of the agreement made the decisions of the Superintending Engineer/Engineer-in-Charge final as to the quantum of liquidated damages and quantum of extra cost in getting the balance work completed, the said provisions also made the decision as to the liability to pay such liquidated damages or extra cost or decision as to who committed breach final and therefore, in arbitrable; and that as a consequence, the Respondents were entitled to claim the extra cost in completing the work (counter claims 1 and 3) and levy liquidated damages (counter claim No. 2) and the arbitration costs (counter claim No. 4). Once it is held that the issues relating to who committed breach and who was responsible for delay were arbitrable, the findings of the arbitrator that the contractor was not responsible for the delay and that the termination of contract is illegal are not open to challenge. Therefore, the rejection of the counter claims of the Respondents is unexceptionable and the High Court's finding that arbitrator ought not to have rejected them becomes unsustainable. The award of the Arbitrator rejecting the counter claims is therefore, upheld.

.... Section 28(3) of the Act provides that in all cases the arbitral tribunal shall decide in accordance with the terms of the contract and shall also take into account the usages of the trade applicable to the transaction. Sub-section (1) of Section 28 provides that the arbitral tribunal shall decide the disputes submitted to arbitration in accordance with the substantive law for the time being in force in India. Interpreting the said provisions, this Court in Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd. MANU/SC/0314/2003 : 2003 (5) SCC 705 held that a court can set aside an award under Section 34(2)(b)(ii) of the Act, as being in conflict with the public policy of India, if it is (a) contrary to the fundamental policy of Indian Law; or (b) contrary to the interests of India; or (c) contrary to justice or morality; or (d) patently illegal. This Court explained that to hold an award to be opposed to public policy, the patent illegality should go to the very root of the matter and not a trivial illegality. It is also observed that an award could be set aside if it is so unfair and unreasonable that it shocks the conscience of the court, as then it would be opposed to public policy.

It is well-settled that where the contract in clear and unambiguous terms, bars or prohibits a particular claim, any award made in violation of the terms of the contract would violate Section 28(3) of the Act, and would be considered to be patently illegal and therefore, liable to be set aside under Section 34(2)(b) of the Act.

***54.** If the award is contrary to the substantive provisions of law or the provisions of the Act or against the terms of the contract, it would be patently illegal, which could be interfered under Section 34. However, such failure of procedure should be patent affecting the rights of the parties. (ONGC's case).*

***55.** Ergo, from the above judgments referred to above, it is clear that decisions of the Court or Arbitral Tribunal shall be in accordance with the terms of contract or agreement and if it is against the terms of agreement, the same would be patently illegal. (ONGC and Associates Builders' cases). If there is any ambiguity in the terms, the Arbitral Tribunal can interpret the same vis-à-vis the other terms of the contract or the communication. As observed earlier, in the instant case, the issue is not with regard to any ambiguity or inconsistency in the terms of the agreement.*

***56.** Issue relating to change in tender condition, after acceptance of the tender, by the successful tenderer came up for consideration before the Hon'ble Apex Court in Central Coalfields Limited and another vs. SLL -*

SML (Joint Venture Consortium) and others dated 17.08.2016 Passed in Civil Appeal No. 8004 of 2016. It was a case where the bid of SLL-SML in response to a notice inviting tender issued by Central Coalfields Limited was rejected.

57. *It would be appropriate to extract the relevant paras in the said judgment, which are as under:*

34. *The core issue in these appeals is not of judicial review of the administrative action of CCL in adhering to the terms of the NIT and the GTC prescribed by it while dealing with bids furnished by participants in the bidding process. The core issue is whether CCL acted perversely enough in rejecting the bank guarantee of JVC on the ground that it was not in the prescribed format, thereby calling for judicial review by a constitutional court and interfering with CCL's decision.*

35. *In Ramana Dayaram Shetty v. International Airport Authority of India MANU/SC/0048/1979 : (1979) 3 SCC 489 this Court held that the words used in a document are not superfluous or redundant but must be given some meaning and weightage:*

It is a well-settled Rule of interpretation applicable alike to documents as to statutes that, save for compelling necessity, the Court should not be prompt to ascribe superfluity to the language of a document "and should be rather at the outset inclined to suppose every word intended to have some effect or be of some use". To reject words as insensible should be the last resort of judicial interpretation, for it is an elementary Rule based on common sense that no author of a formal document intended to be acted upon by the others should be presumed to use words without a meaning. The court must, as far as possible, avoid a construction which would render the words used by the author of the document meaningless and futile or reduce to silence any part of the document and make it altogether inapplicable .....

36. *It was further held that if others (such as the Appellant in that case) were aware that non-fulfillment of the eligibility condition of being a registered II Class hotelier would not be a bar for consideration, they too would have submitted a tender, but were prevented from doing so due to the eligibility condition, which was relaxed in the case of Respondents 4. This resulted in unequal treatment in favour of*

Respondents 4-treatment that was constitutionally impermissible. Expounding on this, it was held:

It is indeed unthinkable that in a democracy governed by the Rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the Rule of law and its bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the power involves affectation of some right or denial of some privilege.

(Emphasis given)

Applying this principle to the present appeals, other bidders and those who had not bid could very well contend that if they had known that the prescribed format of the bank guarantee was not mandatory or that some other term(s) of the NIT or GTC were not mandatory for compliance, they too would have meaningfully participated in the bidding process. In other words, by re-arranging the goalposts, they were denied the "privilege" of participation.

58. *In Reliance Energy Limited and another vs. Maharashtra State Road Development Corporation Limited MANU/SC/3810/2007 : (2007) 8 SCC 1, the Hon'ble apex Court while dealing with Article 14, 19(1)(g) of Constitution of India and the doctrine of level playing field, held as under:*

36. *We find merit in this civil appeal. Standards applied by courts in judicial review must be justified by constitutional principles which govern the proper exercise of public power in a democracy. Article 14 of the Constitution embodies the principle of "non-discrimination". However, it is not a freestanding provision. It has to be read in conjunction with rights conferred by other articles like Article 21 of the Constitution. The said Article 21 refers to "right to life". In includes "opportunity". In our view, as held in the latest judgment of the Constitution Bench of nine-Judges in the case of I.R. Coelho v. State of Tamil Nadu MANU/SC/0595/2007 : AIR 2007 SC 861, Article 21/14 is the heart of the chapter on fundamental rights. It covers various aspects of life. "Level playing field" is an important concept while construing Article 19(1)(g) of the Constitution. It is this doctrine which is invoked by REL/HDEC in the present case. When Article 19(1)(g) confers*

fundamental right to carry on business to a company, it is entitled to invoke the said doctrine of "level playing field". We may clarify that this doctrine is, however, subject to public interest. In the world of globalization, competition is an important factor to be kept in mind. The doctrine of "level playing field" is an important doctrine which is embodied in Article 19(1)(g) of the Constitution. This is because the said doctrine provides space within which equally-placed competitors are allowed to bid so as to sub serve the larger public interest. "Globalization", in essence, is liberalization of trade. Today India has dismantled licence-raj. The economic reforms introduced after 1992 have brought in the concept of "globalization". Decisions or acts which results in unequal and discriminatory treatment, would violate the doctrine of "level playing field" embodied in Article 19(1)(g). Time has come, therefore, to say that Article 14 which refers to the principle of "equality" should not be read as a stand alone item but it should be read in conjunction with Article 21 which embodies several aspects of life. There is one more aspect which needs to be mentioned in the matter of implementation of the aforestated doctrine of "level playing field". According to Lord Goldsmith - commitment to "rule of law" is the heart of parliamentary democracy. One of the important elements of the "rule of law" is legal certainty. Article 14 applies to government policies and if the policy or act of the government, even in contractual matters, fails to satisfy the test of "reasonableness", then such an act or decision would be unconstitutional.

38. *When tenders are invited, the terms and conditions must indicate with legal certainty, norms and benchmarks. This "legal certainty" is an important aspect of the rule of law. If there is vagueness or subjectivity in the said norms it may result in unequal and discriminatory treatment. It may violate doctrine of "level playing field".*

59. *In State of Chhattisgarh and another vs. M/S. SAL Udyog Private Limited, dated 08.11.2021 passed in Civil Appeal No. 4353 of 2010, the Hon'ble apex Court while dealing with a situation, where the Sole Arbitrator failed to consider clause 6(b) of the Agreement governing the parties, which was not disputed, held in para No. 25 as under:-*

25. *To sum up, existence of Clause 6(b) in the Agreement governing the parties, has not been disputed, nor has the application of Circular dated 27th July, 1987 issued by the Government of Madhya Pradesh regarding imposition of 10% supervision charges and adding the same to cost of the Sal seeds, after deducting the actual expenditure been questioned by the respondent-Company. We are, therefore, of the view that failure on the part of the learned Sole Arbitrator to decide in accordance with the terms of the contract governing the parties, would*

certainly attract the "patent illegality ground", as the said oversight amounts to gross contravention of Section 28(3) of the 1996 Act, that enjoins the Arbitral Tribunal to take into account the terms of the contact while making an Award. The said 'patent illegality' is not only apparent on the face of the Award, it goes to the very root of the matter and deserves interference. Accordingly, the present appeal is partly allowed and the impugned Award, insofar as it has permitted deduction of 'supervision charges' recovered from the respondent-Company by the appellant-State as a part of the expenditure incurred by it while calculating the price of the Sal seeds, is quashed and set aside, being in direct conflict with the terms of the contract governing the parties and the relevant Circular. The impugned Judgment dated 21st October, 2009 is modified to the aforesaid extent.

60. *Hence, the above judgments make it clear that if the terms of agreement are changed after the process has started either by the employer or otherwise, especially if a tender floated by a Government agency, the other bidders would be denied the benefit of either securing the contract or participate in the bid, thereby violating Article 14 of the Constitution of India, which would attract the patent illegality ground amounting to contravention of Section 28(3) of the 1996 Act."*

The patent illegality is permissible ground for reviewing a domestic award vide ruling in Delhi Airport Metro Express Pvt. Limited- vs- Delhi Metro Rail Corporation Ltd. What would constitute patent illegality has been elaborately discussed in Associate Builder's case (2015) 3 SCC 49 (supra), wherein it has been held that patent illegality falls under the head of "Public Policy". Failure on the part of Majority Arbitral Tribunal to decide in accordance with the contract governing the parties would be opposed to Public Policy and awarding the claim contrary to the terms of the contract goes to the root of the matter. Ignoring the terms of contract, amounts to gross contravention of section 28 (3) of the Arbitration and Conciliation Act, 1996 that enjoins the Arbitral Tribunal to take into account the terms of the contract, while making the awrad. To sum up, in the instant case the

majority members of the Arbitral Tribunal have passed an awrad on 30.08.2015 by directing the petitioner to pay an amount of Rs. 19,68,46,018/- along with interest at the rate of 8 % from the date of reference till the date of award and 6 % from the date of award till realization. Ignoring the terms of contract in making the award warrants invocation of the Award vested under Section 34 of Arbitration and Conciliation Act, 1996.

In view of the above the Awrad passed by the majority members of the Arbitral Tribunal dt. 30.08.2015 is set aside. Accordingly, **AP No. 1750 of 2015** is **allowed**.

(Krishna Rao, J.)