IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE

BEFORE:

THE HON'BLE JUSTICE ARIJIT BANERJEE
AND
THE HON'BLE JUSTICE OM NARAYAN RAI

APO 112 OF 2022
IA NO: GA/1/2022

VIZAG SEAPORT PRIVATE LIMITED
VS.
STEEL AUTHORITY OF INDIA LIMITED

For the Appellant	: Mr. Ritzu Ghosal, Sr. Adv. Mr. Aurin Chakraborty, Adv. Mr. Aditya Chakraborty, Adv. Mr. Anirban Ghosh, Adv.
For the Respondent	: Mr. Pradip Kumar Ghose, Sr. Adv. Mr. Aryak Dutt, Adv.
Hearing Concluded On	: 09.04.2026
Judgment On	: 25.06.2026

OM NARAYAN RAI, J.:-

1. This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereafter "the 1996 Act") is directed against a judgment and order dated August 10, 2022 whereby the Hon'ble Single Judge has allowed the respondent's application under Section 34 of the 1996 Act and set aside the majority arbitral award dated August 30, 2015.

FACTS OF THE CASE:

2. Shorn of unnecessary details, the relevant facts are as follows:-

a. The appellant and the respondent had entered into a Short Term Agreement (hereafter "STA") on May 06, 2008 for a period of three years (with a provision for extension of one year at the option of the respondent), whereunder the appellant was to handle coal-cargo imported by the respondent through two multi-purpose berths named EQ-8 and EQ-9 at Visakhapatnam Port.

b. In terms of the said agreement, the appellant was to handle an assured volume of 1.5 million metric tonnes per annum of cargo at EQ-8 which involved unloading the cargo from the vessels that alighted at the General Cargo Berth or any other place nominated by the Visakhapatnam Port Trust (hereafter "VPT"), transportation thereof from hook point to stockpile area and mechanised loading of the cargo on the railway wagons or rakes.

c. On or about December 20, 2010 the appellant issued a notice to the respondent demanding payment of demurrage charges for the period May 04, 2009 to November 30, 2010 in respect of cargo volumes that had allegedly exceeded the contractual period. The respondent refused to honour the demand contending that demurrage charges were not provided for in the contract.

d. In view of such disputes and differences between the parties on the aspect of payment of demurrage charges, the arbitration clause in the agreement was invoked and the dispute was referred to a three member arbitral Tribunal.

e. The appellant lodged its claim for a sum of Rs.30,83,07,496/- (Rupees Thirty Crore Eighty-Three Lakh Seven Thousand Four Hundred and

Ninety-Six) along with interest @8% p.a. thereon before the Tribunal. The respondent contested the claim by filing its counter statement.

f. The Tribunal rendered a split verdict on August 30, 2015. While the majority award directed payment of Rs.19,68,46,018/- (Rupees Nineteen Crore Sixty-Eight Lakh Forty-Six Thousand and Eighteen) only together with interest @8% p.a. thereof from the date of reference till the date of the award and @6% from the date of award till realization to the appellant, the minority award rejected the claim of the appellant.

g. Feeling aggrieved by the majority award, the respondent approached this Court under Section 34 of the 1996 Act. The Section 34 application of the respondent has been allowed by the order impugned upon setting aside the majority award and affirming the minority view. Hence, the present appeal.

SUBMISSIONS ON BEHALF OF THE APPELLANT:

3. A summary of the submissions of Mr. Ghosal, learned Senior Counsel appearing for the appellant (both orally as well as in writing) is follows:-

a. The impugned judgment travels beyond the limits of Section 34 of the 1996 Act and by extension Section 37 of the 1996 Act since the Hon'ble Single Judge has re-appreciated evidence, re-interpreted the contract, preferred the minority view over the majority and substituted his own understanding of the contractual and statutory framework for that of the Tribunal which is not permissible.

b. Section 34 Court does not sit in appeal over an arbitral award. In support of such submissions, the following judgments were relied on:-

i. ***Oil & Natural Gas Corporation Limited vs. Saw Pipes Limited***[1],

ii. ***Associate Builders vs. Delhi Development Authority***[2],

iii. ***Ssangyong Engineering & Construction Company Limited vs. National Highways Authority of India (NHAI)***[3]

iv. ***PSA SICAL Terminals Private Limited vs. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin & Others***[4]

c. The Explanation to Section 34(2)(b)(ii) of the 1996 Act confines "public policy of India" to fraud or corruption, violation of Section 75 or Section 81 of the 1996 Act, contravention of the fundamental policy of Indian law, or conflict with basic notions of morality and justice. Section 34(2A) of the 1996 Act (patent illegality) is further restricted by the proviso, which prohibits setting aside an award merely for erroneous application of law or re-appreciation of evidence.

d. As there is no allegation of fraud, corruption, violation of Section 75 or Section 81 of the 1996 Act, or any outcome that shocks morality or justice, the majority award could not have been interfered with. The majority award does not suffer from any "patent illegality" which covers only obvious defects on the face of the award.

e. Under Section 37 of the 1996 Act, this Court is not expected to conduct a second merits review.

f. This Court must restore the discipline as laid down in ***Ssangyong Engineering & Construction Company Limited*** (supra) and ***PSA SICAL***

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[1] **(2003) 5 SCC 705**
[2] **(2015) 3 SCC 49**
[3] **AIR 2019 Supreme Court 5041**
[4] **AIR 2019 Supreme Court 4661**

Terminals Private Limited (supra) and reinstate the reasoned majority award which is a possible view.

g. The appellant is a licensee of the VPT. Under Section 42 of the Major Port Trusts (MPT) Act, 1963 (hereafter "the 1963 Act"), the VPT delegated to the appellant the authority to render specified port services at Berths EQ-8 and EQ-9. Under Section 47A of the 1963 Act, the Tariff Authority for Major Ports (hereafter "TAMP") is the statutory body mandated to fix tariffs, including demurrage and storage charges. The appellant acts as a port operator within the statutory regime of the 1963 Act.

h. Article 4.1 and Appendix 6 of the License Agreement, expressly authorise the respondent to levy and collect tariff, including demurrage and storage charges, strictly in accordance with the Scale of Rates (SoR) notified by VPT/TAMP from time to time. The STA dated May 06, 2008 between the appellant and the respondent specifically refers to and incorporates this Licence Agreement.

i. The STA itself repeatedly ties the contractual arrangement to the statutory framework. Clause 2 (definitions), Clause 5.5, Clause 5.32(i), Clause 14.3, Clause 14.6 and Annexure-1 all refer to the Licence Agreement, the 1963 Act, the VPT Rules and TAMP notifications. Clause 5.5 states that discharge of cargo shall be regulated by the rules and regulations enforced by VPT/MPT Act from time to time.

j. Annexure-1 sets out the Integrated Terminal Service Charges (hereafter "ITSC") of Rs. 167 per metric ton and its components. It clearly records that royalty and lease rentals are in terms of VPT/TAMP notifications and

subject to escalation accordingly. The STA is thus not a free-standing private contract; it is expressly embedded in the MPT/TAMP structure.

k. Two TAMP Orders are central: the order dated April 02, 2007 (Exhibit-C19) in force when the STA was signed and the order dated April 15, 2009 (Exhibit-R7) in force during the claim period. Both orders separate demurrage (Clause 3.5) and storage charges (Clause 3.6.2) and emphasise that storage area must be treated as temporary transit space, not warehousing and that the charges are meant to deter prolonged stay of cargo. The fact of land subsidence of shore/harbour area due to prolonged storage of heavy commodities in transit area is also a cogent geographical reason for which there is a deter vis a vis form of penalty for prolonged storage.

l. The majority award also relies on three decisions of the Hon'ble Supreme Court in the cases of ***Trustees of the Port of Madras vs. Aminchand Pyarelal & Others***[5], ***Board of Trustees of the Port of Bombay vs. Indian Goods Supplying Co.***[6] and ***Board of Trustees of the Port of Bombay vs. Jai Hind Oil Mills Co. & Others***[7], which uphold the power of port authorities to levy demurrage to prevent congestion and ensure quick clearance. The Court has recognised demurrage-like charges as legitimate tools to keep the cargo moving.

m. Within this *matrix*, the appellant, as licensee and operator, provides integrated terminal services under the STA. ITSC is determined and adjusted in light of TAMP, SoR and the Licence Agreement. Any further

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[5] **(1976) 3 SCC 167**
[6] **(1977) 2 SCC 649**
[7] **(1987) 1 SCC 648**

liability for breach such as storage charges for excess stacking contrary to Clause 5.12 must be assessed by reading the STA, Licence Agreement and TAMP SoR together.

n. The dispute arises from the respondent's continuous stacking of cargo beyond the limits in Clause 5.12 of the STA and its failure to evacuate cargo promptly by arranging sufficient rakes and giving proper schedules under Clauses 4.3 to 4.6 and 4.10.

o. The first part of Clause 5.12 requires the appellant to store a maximum of 60,000 MT of the respondent's cargo at any time. In exigency, the appellant can store an additional 30,000 MT, but only for a period not exceeding 15 days upon the respondent giving 30 days' prior notice.

p. The appellant 's claim is limited to storage charges for cargo stacked in breach of this clause, i.e. quantities in excess of 60,000 MT (or 90,000 MT in exigency) and for periods beyond 15 days without notice. The claim period is from May 04, 2009 to March 01, 2012. The computation is strictly as per Clause 3.6.2 of the TAMP SoR, which provides storage charges for cargo remaining in storage beyond the free period. No demurrage under Clause 3.5 was claimed; only storage charges under Clause 3.6.2 for excess stacking in storage space.

q. Over-stacking began intermittently on May 16, 2009. From then on, the appellant addressed multiple letters/emails (Exhibits C25 to C50) to the respondent, warning that stocks had exceeded 60,000 MT, pointing out that the two rakes per day contemplated in the STA were not being allotted and asking the respondent to evacuate cargo. On December 20, 2010, by Exhibit C51, the appellant formally informed the respondent

that it would claim storage charges at TAMP rates under the 1963 Act. The respondent denied the claim by Exhibit C58 dated September 17, 2011.

r. The original claim was about Rs. 30.83 crores (or Rs. 33.21 crores including all heads) computed using daily stock data from C68 and applying the step-up rates in Clause 3.6.2 to the excess over contractual limits and free period. The majority award, after checking the calculations and the evidence, finally awarded Rs.19.68 crores with interest, thereby disallowing roughly Rs. 13.5 crores.

s. The respondent did not challenge the correctness of the underlying data or the mathematical method. Its alleged defences were legal and interpretative- that ITSC was all-inclusive, that the STA was a lease, that TAMP was inapplicable, that Clause 5.12 was wrongly read, that once actual volume exceeded 2 million MT no storage charges lay and that appellant waived its rights. The majority award examined and rejected each of these defences.

t. The Hon'ble Single Judge's conclusion that 40,500 sq. m. was leased to SAIL and that ITSC included lease rental for that area, so no further storage charges could be levied is contrary to the contract, correspondence, Licence Agreement and the majority award.

u. The STA does not state that any plot or area is leased or exclusively earmarked for the respondent. Clause 3.3 simply says that 40,500 sq. m. will be utilised for handling cargo, mechanised handling facilities, drains, roads, railway tracks, buildings, amenities and other systems for integrated terminal services. It describes functional use of the back-up

area, it does not confer exclusive possession of a storage area to the respondent. Clause 1.1(a) makes this even clearer. If 40,500 sq. m. were exclusively leased to the respondent, the appellant could not also commit to use the same facilities for other customers.

v. The Tribunal rightly concluded that the parties had deliberately avoided any exclusive lease arrangement.

w. The ITSC break-up does not change this. Annexure-1 shows that the appellant recovers its own lease rentals to VPT as part of its cost base, these are rentals the appellant pays to VPT for the entire licensed area (1,17,000 - 1,21,700 sq. m.), not rents paid by the respondent for any exclusive plot. Lease rent is only about 0.5% of the cost base underlying ITSC of Rs. 167/-. Recovering this cost from all users does not convert any user into a lessee of a defined area.

x. Clause 5.12 is inconsistent with any lease to the respondent. Clause 5.12 exists precisely because there is no such exclusive lease. The Hon'ble Single Judge's reliance on TAMP Clause 3.5(3)(v) also rests on a misunderstanding. First, there is no lease to the respondent. Second, the appellant has not claimed demurrage under Clause 3.5 at all. It has claimed storage charges under Clause 3.6.2 for excess stacking in storage space. Clause 3.5(3)(v) is meant to prevent double recovery of demurrage from a user who is already paying rent for an operational area which is not the case here.

y. The majority award carefully analyses the STA, Licence Agreement, correspondence and TAMP orders to conclude that there is no lease to SAIL and that ITSC does not cover unlimited storage of excess cargo in

breach of Clause 5.12. This reasoning is cogent. The Hon'ble Single Judge's contrary view is based on a fresh re-reading of the contract and evidence, which is prohibited under Section 34 of the 1996 Act.

z. The conclusion that the latter part of Clause 5.12 entitled the respondent to store upto 1,20,000 MT once annual cargo handled exceeded 2 million MT conflates actual volume with cargo commitment. Clause 5.12 has two parts. The first sets the normal regime- up to 60,000 MT at any time; and in exigency upto 90,000 MT for 15 days, with 30 days' prior notice. The second part applies *"only if the cargo commitment is expected to go beyond 2 million MT per year"*, in which event higher storage may be organised. Cargo commitment must be understood with Clause 1.2(a) and Clauses 4.1 - 4.3.

aa. Under Clause 1.2(a), the respondent gave a firm commitment of 1.5 million MT per year for three years. Clause 4.3 requires the respondent to inform VSPL before each financial year of likely annual volumes and then review. Only if SAIL increases this commitment by informing the appellant that its expected commitment will exceed 2 million MT per year, does the latter part of Clause 5.12 apply.

bb. In fact, the respondent never modified its commitment of 1.5 million MT. It never sent pre-year data saying that cargo commitment was expected to go beyond 2 million MT, never gave 30 days' prior notice to allow the appellant to arrange additional space and never agreed to the higher penalty risk for shortfall that such increased commitment would carry. On the respondent's own showing, actual volume in 2010-11 crossed 2 million MT only near the end of the year and incidentally.

cc. The majority award recognised the difference between "commitment" and "actual volume". In paragraph 120, it generously applied Clause 5.12 and extended a benefit to the respondent by deducting Rs. 6,39,42,719/- from the claim on the footing that cargo in 2010-11 exceeded 2 million MT, although the strict conditions of the second part of Clause 5.12 were not met.

dd. Both the majority and minority awards and the respondent's own pleadings, accept that the appellant stacked the respondent's cargo in excess of the contractual limit and for prolonged periods. The only real question is the financial consequence.

ee. The Hon'ble Single Judge's approach treats the accidental crossing of 2 million MT in one year as an automatic entitlement to much higher storage without SAIL complying with the other preconditions of Clause 5.12. That reading undermines the structure of assured commitment and penalties in Clauses 4.1-4.3 and ignores the prior notice requirement.

ff. The majority finding of breach by the respondent is based on contemporaneous documents. The majority Tribunal found no proof that the respondent had complied with Clauses 4.5, 4.6 and 4.10 or that the appellant had failed to place wagons after proper instructions. As these were matters within the special knowledge of the respondent, therefore, the only reasonable inference from the record is that the respondent failed to evacuate cargo forcing the appellant to use its limited storage space as a warehouse for SAIL.

gg. TAMP SoR and the 1963 Act fully apply to STA as both parties relied on TAMP and the respondent had also filed Exhibit R7 (TAMP order dated

April 15, 2009) and used Clause 3.5(3)(v) to support its case of lease. It also filed a Section 16 application arguing that the Tribunal had no jurisdiction and that TAMP should decide.

hh. The TAMP orders of April 02, 2007 (C19) and 15 April 2009 (R7) contain detailed reasons. The tariff structure distinguishes demurrage (Clause 3.5) for cargo overstaying in transit area and storage charges (Clause 3.6.2) for cargo stacked in storage space. The appellant's claim is only under Clause 3.6.2 and only for excess beyond contractual caps.

ii. The Tribunal's approach is also supported by Hon'ble Supreme Court cases which recognise that demurrage-like charges are essential for decongesting ports and are not penal windfalls. The majority award merely uses TAMP-approved rates to quantify damages for breach of a clause (5.12) whose object is to prevent indefinite storage.

jj. The Hon'ble Single Judge's remark that STA is a private contract to which TAMP does not apply ignores the incorporative clauses in STA, the Licence Agreement, the respondent's own reliance on TAMP and its Section 16 plea and the statutory character of the respondent's operations.

kk. The Review Meeting of October 09, 2009 was meant to address the quantity of cargo, performance against commitment and linked adjustments in ITSC and not breach of Clause 5.12 or damages. It cannot be concluded that the appellant waived its right to demurrage charges or storage charges by not raising such issue there.

ll. VSPL raised the issue of over-stacking separately and repeatedly. Clause 14.5 of STA clearly provides that no amendment or waiver shall be binding unless executed in writing. There is no such written waiver.

Silence on a particular claim in a review meeting whose scope is different cannot, in the face of Clause 14.5, amount to waiver or estoppel.

mm. The majority award rightly rejected the waiver/estoppel plea of the respondent. The Hon'ble Single Judge reversed this by treating one meeting's silence as waiver, ignoring Clause 14.5 and the Tribunal's findings which is beyond the scope of Section 34 of the 1996 Act.

nn. Subsequent work orders dated November 28, 2013 and September 20, 2014, issued after the STA period, providing for higher free storage (e.g.1,75,000 MT free) and could not be relied on to show the parties' understanding that ITSC includes free storage. They cover three to six month periods, at significantly higher ITSC rates and different storage conditions based on changed negotiation and business strategy in later years after the earlier dispute had already arisen.

oo. The present dispute is only about breach of the STA dated May 06, 2008 for the period May 04, 2009 to March 01, 2012. Later contracts cannot retrospectively rewrite Clause 5.12 or convert limited earlier obligations into unlimited free storage. The Hon'ble Single Judge's use of these later documents to undermine the majority award shows re-evaluation of evidence.

pp. The Hon'ble Single Judge wrongly criticised the Rs. 40 lakh lump sum deduction in the majority award despite a clear basis for such deduction.

qq. Once the Tribunal explains how it reached its figure, a Court under Section 34 of the 1996 Act cannot re-calculate the quantum. The majority Tribunal has displayed extreme arithmetic prowess and the reasoning

ascribed to the deduction of Rs. 40 lakh warranted no interference by a Court under Section 34 of the 1996 Act.

rr. Limitation, though faintly raised by the respondent, is not a real issue. The claim is well within three years in either view.

ss. Allegations of bias against the majority arbitrators were never raised during the arbitration. They appear only later in the respondent's Section 34 challenge and do not meet the statutory requirements under Sections 12 and 13 of the 1996 Act.

tt. Even if it is assumed that the majority Tribunal misapplied law by applying TAMP SoR that could not be a ground to set aside the majority award as erroneous application of law is not available as a ground under Section 34 of the 1996 Act.

uu. The impugned judgment undermines the fundamental policy of Indian arbitration law by re-writing the contract (treating STA as a lease, treating ITSC as all-inclusive, diluting Clause 5.12), ignoring the incorporative TAMP/MPT references and effectively preferring the minority award over the majority on merits.

vv. The impugned judgment dated August 10, 2022 in A.P. No. 1750 of 2015 sets aside the award by re-appreciating evidence, re-interpreting the contract and statutory framework and substitutes the Court's choice for the Tribunal's possible and reasoned view. The grounds invoked do not fall under Section 34(2) or 34(2A) of the 1996 Act.

SUBMISSIONS ON BEHALF OF THE RESPONDENT:

4. A summary of the submissions of Mr. Ghose, learned Senior Counsel appearing for the respondent (both orally as well as in writing) is follows:-

a. The majority award is wrong and deserves to be set aside.

b. The arbitration reference arose out of the STA between the parties. The STA was for a period of three years commencing from the date of the agreement with provision for extension for one more year at the respondent's option. The period of agreement was from May 06, 2008 with extension expiring on May 05, 2012.

c. Referring to the various clauses of the STA, it was argued that right from unloading of the cargo from the vessel till dispatch of the cargo in railway rakes, the responsibility was entirely of the appellant. The respondent booked the railway wagons and handed over the indents to the appellant for bringing the rakes and loading of cargo to be dispatched to various steel plants of the respondent.

d. Clause 5.12 of the STA is the most important clause giving rise to the present dispute between the parties. There is no dispute as held by the majority and minority of arbitral Tribunal that this clause has two parts - First part relates to storing of cargo volume of 60,000 MT with provisions for further 30,000 MT for a period not exceeding 15 continuous days. The respondent was to give 30 days' notice to the appellant to organise stacking of the cargo. As per the second part of clause 5.12 if the cargo volume was expected to go beyond 2.0 million MT per year, then the appellant was to organise storage of cargo upto 90, 000 MT with further provisions for storing of 30,000 MT of cargo in case of exigencies for a period not exceeding 15 days.

e. For all the work/services rendered by the appellant, the rates were fixed as shown in ITSC in terms of clause 6 of the STA and the Schedule of Rates read with Annexure -1.

f. Under Clause 8 of the STA it was agreed by the parties that the first six months of the operation shall be treated as the test period to make assessment of the actual quantity of cargo that can be made available to the appellant by the respondent and the terms will be reviewed jointly and if required terms and conditions will be further revised.

g. The breakup of the charges for handling has been set out in Rate Schedule of ITSC (Annexure -1).

h. Nowhere in the STA, it is stated that the agreement will be governed by regulation of the 1963 Act or TAMP. On the contrary when the appellant raised the question of TAMP rates, the respondent submitted that the reference should be made before TAMP and not before the Tribunal. The respondent made a formal application to this effect. The appellant submitted that this is a private agreement between the parties and the 1963 Act or TAMP has nothing to do with it and the application of the respondent was rejected by the Tribunal.

i. The majority view has failed to consider the charts shown in the meeting held on December 19, 2014 indicating annual handling of cargo by the appellant. Going by the chart, it will appear that during the STA period, the cargo volume guaranteed by the respondent far exceeded 1.5 million MT or 0.75 million MT in the initial period. The cargo volume exceeded or was likely to exceed 2.0 million MT per annum and therefore the second

part of clause 5.12 would be applicable and not first part of clause 5.12 as held by the majority.

j. The majority award failed to consider the charts showing the handling of the cargo which were handed up by the appellant to the Tribunal on December 19, 2014. There is no whisper in the majority award regarding the chart which is a very vital piece of evidence. It also shows total non-application of mind. This was a vital piece of evidence ignored by the majority and ignoring it is a ground for setting aside the award.

k. The majority dealt at length regarding the transit area when the same has been deleted. It is non-application of mind by majority.

l. In support of the submission that an arbitral award can be set aside if it is in conflict with public policies as enumerated in Section 34(2)(b) [Explanation1] of the 1996 Act the respondent also relied upon ***Oil & Natural Gas Corporation Limited*** (supra) and ***Associate Builders*** (supra).

m. ***Oil & Natural Gas Corporation Limited vs. Western Geco International Limited***[8] was relied on to demonstrate that *"non-application of mind is a defect that is fatal to any adjudication."*

n. Paragraphs 31 and 52 of ***Associate Builders*** (supra) were pressed to contend that where the Tribunal ignored vital evidence in arriving at its decision, such decision would be perverse. Similar statement is in Para 52.

[8] **(2014) 9 SCC 263**

o. ***PSA SICAL Terminals Private Limited*** (supra) was cited to demonstrate that the aforesaid decisions have been consistently followed by the Hon'ble Supreme Court in its subsequent decisions.

p. The minority award had extensively dealt with the charts showing the handling of the cargo which were handed up by the appellant to the Tribunal on December 19, 2014.

q. Because of non-consideration of a vital piece of evidence namely the charts, the majority proceeded on the basis that the first part of clause 5.12 of STA was applicable whereas it should have been the second part. Thus there is an error apparent on the face of the majority award.

r. The majority finding in paragraph 72 of the award to the effect that *"it is universal practice of business to look for more and more profit and in doing so if there appears any violation of agreement inviting penalty/demurrage, the same cannot be avoided or denied."* shocks the conscience of the Court.

s. In other words, the majority Tribunal gave its blessing to violate the terms of the agreement to make more profit. Paragraph 28 and 42.3 of ***Associate Builders*** (supra) were placed to show that if the finding shocks the conscience of the Court the award deserves interference.

t. The majority award travelled beyond the terms of the contract and practically re-wrote the contract in complete violation of Section 28(3) of the 1996 Act. The majority consistently in their award relied upon TAMP regulations and the 1963 Act.

u. Nowhere in the STA it is said that TAMP rules and regulations or the 1963 Act will govern the STA.

v. On the contrary, before the Tribunal, the appellant categorically submitted that it is a private contract between the parties and the parties are bound by the terms and conditions of STA. Paragraphs 19 and 42.3 of ***Associate Builders*** (supra) were read to prop the contention.

w. With regard to the rules applicable to the substance of the dispute as defined in Section 28(3) of the 1996 Act and also in the case of ***Oil & Natural Gas Corporation Limited*** (supra), the Hon'ble Supreme Court has clearly laid down that any violation of a substantive provision of India law is fatal to the award which was also held in ***Associate Builders*** (supra) and the subsequent decisions by the Hon'ble Supreme Court.

x. After expiry of the STA period by *efflux* of time, the contract was renewed by the respondent's work orders dated November 28, 2013, May 27, 2013, May 13, 2014 and April 29, 2014.

y. In the subsequent work orders, the appellant was to provide storage space for 1, 75,000 MT of cargo of SAIL irrespective of any time limit. Therefore the whole argument of appellant VSPL that it did not have space for storing of cargo beyond 90,000 MT beyond 15 days and the storage space cannot be used as a warehouse for storing of cargo which would be in violation of the 1963 Act is belied from the said work orders which were all accepted by the appellant. The appellant throughout reiterated that it is a private contract with the respondent and was entitled to fix its own terms and conditions with the importer for operations of EQ8 and EQ9 berths. It is a Build Operate Transfer contract with the VPT.

z. If the appellant wanted to charge demurrage/storage charges beyond 15 days or any period, it could have modified the terms of STA in the review

meeting held on October 09, 2009. Clause 8 of STA stipulates that the parties agreed that after first six months of operation which is to be treated as test period, to make assessment of the quantity of cargo made available by the respondent to the appellant and after which the terms would be reviewed jointly and if required, terms and conditions would be further revisited. The contract commenced on May 06, 2008 and review meeting took place on October 09, 2009, long after expiry of six months and it was held in terms of Clause 8 of the STA. The appellant VSPL never asked for any modification of the terms and conditions of STA and therefore the legal conclusion is there was waiver by the appellant VSPL.

aa. On the proposition that waiver means consciously giving up a known legal right, the judgments in the cases of ***Shaw and Co. vs. B. Shamaldas and Co.***[9] and ***Provash Chandra Dalui & Another vs. Biswanath Banerjee & Another***[10] were relied upon.

bb. The judgment in the case of ***Dakshin Haryana Bijli Vitran Nigam Limited vs. M/s. Navigant Technologies Private Limited***[11] was relied on to show the relevance of a dissenting award and to contend that the Court is not precluded from considering the findings and conclusions of the dissenting Arbitrator. It was submitted that the Hon'ble Supreme Court in ***Ssangyong Engineering & Construction Company Limited*** (supra), upheld the view holding the dissenting opinion to be the correct position of law.

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[9] **AIR 1954 Calcutta 369**
[10] **AIR 1989 Supreme Court 1834**
[11] **AIR 2021 Supreme Court 2493**

cc. ***State of Chhattisgarh & Another vs. Sal Udyog Private Limited***[12] was relied on to show that legal view as regards 'patent illegality' taken in ***Associate Builders*** (supra) and ***Ssangyong Engineering & Construction Company Limited*** (supra) remains firm.

dd. A decision of the Hon'ble Supreme Court in the case of ***Food Corporation of India vs. Chandu Construction & Another***[13], was relied on for the proposition that where there is an express term in the contract, the Court cannot find, on a construction of the contract, an implied term inconsistent with the express term.

ee. In this case, the majority held that the rules and regulations of TAMP and Major Port Trust Act are inbuilt and automatically apply. This is a totally wrong proposition. There is no such implied term. An Arbitrator derives his authority from the contract and if he acts in disregard of the contract, he acts without jurisdiction. The departure from contract amounts to manifest disregard of his authority or misconduct on his part and it may also tantamount to *malafide* action.

ff. The majority delved in scrutinizing the claim when the appellant failed to prove its claim. The appellant hopelessly failed to prove that cargo was stored for 15 continuous days as it relied upon first part of clause 5.12. Then the majority took upon itself to analyse the storage of cargo and the period. It is not far the Tribunal to enter the arena of conflict and prove the claim when the claimant has failed to prove the same. The claimant at the hearing from time to time gave charts to back up its claim but the respondent pointed out mistakes in the charts recorded in detail in the

[12] **AIR 2021 Supreme Court 5503**
[13] **(2007) 4 SCC 697**

minority award. The majority found the calculation to be too complicated and deducted a lump-sum amount of Rs.40,00,000/- from the claim amount without giving any reason. This is deprecated in ***Associate Builders*** (supra) case. It is also in violation of Section 31(3) of the 1996 Act which states that Arbitral Tribunal shall give the reason upon which the award is based. No reason has been given for deduction for Rs.40 lakhs which is in violation of the said statutory provisions. Principles laid down in ***Oil & Natural Gas Corporation Limited*** (supra), ***Associate Builders*** (supra), ***Ssangyong Engineering & Construction Company Limited*** (supra) have been consistently followed throughout until now.

gg. The argument of setting aside of the award has to be on narrow ground of Sections 34(2) & 34(2)(a) of the 1996 Act. The respondent has demonstrated the patent illegality, breach of fundamental policy and breach of substantive law of the land committed by VSPL and noted in the majority award. The minority award has dealt in detail with all the provisions argued before the Tribunal.

hh. The minority award should be upheld and majority award should be set aside and the appeal be dismissed.

ANALYSIS & DECISION:

5. We have heard the learned Senior Advocates appearing for the respective parties and considered the material on record.

6. The contours of Section 34 of the 1996 Act now stand clearly defined by a plethora of authorities and some of the very prominent amongst them have been cited by both the parties viz. ***Oil & Natural Gas Corporation Limited*** (supra), ***Associate Builders*** (supra) and ***Ssangyong Engineering &***

Construction Company Limited (supra). We would not burden this judgment by repeating the same once again.

7. We may, however, notice the scope of a Section 37 appeal as succinctly summarised by the Hon'ble Supreme Court in the case of ***Punjab State Civil Supplies Corporation Limited vs. Sanman Rice Mills***[14]:-

> *"**13.** In para 11 of Bharat Coking Coal Ltd. v. L.K. Ahuja, it has been observed as under:*
>
> *"**11.** There are limitations upon the scope of interference in awards passed by an arbitrator. When the arbitrator has applied his mind to the pleadings, the evidence adduced before him and the terms of the contract, there is no scope for the court to reappraise the matter as if this were an appeal and even if two views are possible, the view taken by the arbitrator would prevail. So long as an award made by an arbitrator can be said to be one by a reasonable person no interference is called for. However, in cases where an arbitrator exceeds the terms of the agreement or passes an award in the absence of any evidence, which is apparent on the face of the award, the same could be set aside."*
>
> ********** ********** **********
>
> ***15.** In Dyna Technology (P) Ltd. v. Crompton Greaves Limited, the court observed as under:*
>
> *"**24.** There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.*
>
> ***25.** Moreover, umpteen number of judgments of this Court have categorically held that the courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied*

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unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act."

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20. *In view of the above position in law on the subject, the scope of the intervention of the court in arbitral matters is virtually prohibited, if not absolutely barred and that the interference is confined only to the extent envisaged under Section 34 of the Act. The appellate power of Section 37 of the Act is limited within the domain of Section 34 of the Act. It is exercisable only to find out if the court, exercising power under Section 34 of the Act, has acted within its limits as prescribed thereunder or has exceeded or failed to exercise the power so conferred. The appellate court has no authority of law to consider the matter in dispute before the Arbitral Tribunal on merits so as to find out as to whether the decision of the Arbitral Tribunal is right or wrong upon reappraisal of evidence as if it is sitting in an ordinary Court of Appeal. It is only where the court exercising power under Section 34 has failed to exercise its jurisdiction vested in it by Section 34 or has travelled beyond its jurisdiction that the appellate court can step in and set aside the order passed under Section 34 of the Act. Its power is more akin to that superintendence as is vested in civil courts while exercising revisionary powers. The arbitral award is not liable to be interfered unless a case for interference as set out in the earlier part of the decision, is made out. It cannot be disturbed only for the reason that instead of the view taken by the Arbitral Tribunal, the other view which is also a possible view is a better view according to the appellate court.*

21. *It must also be remembered that proceedings under Section 34 of the Act are summary in nature and are not like a full-fledged regular civil suit. Therefore, the scope of Section 37 of the Act is much more summary in nature and not like an ordinary civil appeal. The award as such cannot be touched unless it is contrary to the substantive provision of law; any provision of the Act or the terms of the agreement."*

8. The limitations of the Section 37 Court are thus quite clear. Keeping the same in mind we now proceed to deal with the case at hand.

9. We have before us, a case where the arbitral Tribunal has rendered a fractured verdict. While the majority view has supported the claimant - appellant, the minority view has gone against it.

10. ***Dakshin Haryana Bijli Vitran Nigam Limited*** (supra) has considered a similar case where the majority award was under challenge and held as follows:-

> *"**22.** An "arbitral award" is the decision made by the majority members of an Arbitral Tribunal, which is final and binding on the parties. Section 35 provides that an arbitral award shall be "final and binding" on the parties and persons claiming under them. A dissenting opinion does not determine the rights or liabilities of the parties which are enforceable under Section 36 of the Act.*
>
> ***23.** The reference to the phrase "arbitral award" in Sections 34 and 36 refers to the decision of the majority of the members of the Arbitral Tribunal. A party cannot file a petition under Section 34 for setting aside, or under Section 36 for enforcement of a dissenting opinion. What is capable of being set aside under Section 34 is the "arbitral award" i.e. the decision reached by the majority of members of the Tribunal. Similarly, under Section 36 what can be enforced is the "arbitral award" passed by the majority of the members."*

11. By the order impugned the Hon'ble Single Judge has set aside the majority award. We therefore have to see as to whether the majority award suffers from any of the defects that have been enumerated under Section 34 of the 1996 Act.

12. The arbitral Tribunal had framed the following issues for adjudicating the dispute before it:-

> *"1. Whether the instant Arbitration Proceedings are maintainable?*
>
> *2. Whether the claim of the claimant is barred by limitation?*
>
> *3. Whether the Arbitration Proceedings are barred under the Rules and Regulations framed By TAMP?*
>
> *4. Whether Respondent has committed breach of contract as alleged by the claimant?*
>
> *5. Whether Claimant has committed breach of contract as alleged by the Respondent?*
>
> *6. Whether it is a case of lease and the Claimant having collected the lease amount is not entitled to any demurrage on cargo stored on the demised premises as alleged?*

7. Whether the Integrated Terminal Service Charges (ITSC) being levied, include storage charges also?

8. Whether the Claimant is entitled to the amount claimed?

9. Whether the Claimant is entitled to interest, if so, at what rate and from which date?"

13. Issue nos. 3 to 10 are material for the present purpose as the contest circles around them only.

14. The majority members decided issue nos. 3, 4 and 5 by holding that the respondent has acted in breach of the agreement but the appellant has not. Paragraphs 45 to 82 of the award deal with the said issues. The ultimate conclusion arrived at by the majority members is premised on the applicability of the 1963 Act and TAMP. Paragraphs 58 to 66 of the majority view deserve to be noticed in such context:-

*"**57.** In the instant case, VSPL claimed demurrage/storage charge on the basis of the first part of clause 5.12 of STA. In view of all above our mind leans to accept the interpretation of the clause that when the volume of cargo exceeds 60,000 MT continuously for 15 days without any 30 days' notice from SAIL the VSPL is entitled to claim demurrage/storage charge in terms of TAMP orders. We shall now discuss as to whether MPT Act and so also TAMP orders are applicable to the instant case or not hereinbelow.*

***58.** A serious debate was made by both the parties as regards the application of MPT Act so also the orders of the TAMP authority in the instant case. Let us examine the matter cautiously. There is no denying of the fact that transaction between the parties were made on the land of the port. The users of land of sea port are statutorily regulated by the Major Port Trusts Act, 1963. In the forenotes of the STA itself three letters bearing reference Nos. 01:27:001:576 & 580:2007-08 dt. 14th November 2007, 01:27:001:689:2007-08 dt 21" December 2007 and 01:27:001/795/2008 dt.30th January 2008 find mention to be forming an integral part of the STA. Thus in Exhibit C/16 & C/17 at page No.82 & 84 in point Nos. 6 & 7 VSPL accepted the proposal of SAIL for priority as per berthing policy and procedures followed by VPT. Again, Exhibit C/20 at page 132 and in paragraph 4 of the said latter at page 133 it is clearly mentioned that with regard to SAIL's apprehension on ousting priority for SAIL Vessels it was confirmed by the VSPL as Port under meaning of MPT Act 1963 section 42 that*

VSPL is fully authorised to give such ousting priority to a valued customer like SAIL. VPT came within the purview of MPT Act 1963 by Amendment Act 1974. There again clause-1 (k) of the STA has it that the VSPL shall make different types of facilities in order to take care of urgent need of SAIL including congestion at the Port as per berthing policy and procedures followed by VPT. There is no denying of the fact that VPT comes within the purview of MPT Act. Even in the definition Clause 2 of STA, the MPT Act is defined as Major Port Trusts Act 1963 as amended, supplemented, reenacted or replaced from time to time. Naturally, the question comes in our mind if there is no scope of application of MPT Act in the said agreement what was the purpose of defining the MPT Act in Clause-2 of STA? In our view, the answer lies in the affirmative.

59. *All these questions as to whether the MPT Act will be applicable in the instant case are answered in the STA itself in its clause 5.5. Clause 5.5 of STA deals with the provision of discharge of cargo and second paragraph of the said clause reads as under:*

"Discharge of cargo shall be round the clock, in terms with this Agreement and as per the rules and regulations that are enforced by the VPT/MPT Act from time to time (emphasis added)."

60. *The main transaction between the parties centres round the discharge of cargo and clause 5.5 has clearly mentioned that the same will be regulated by the rules and regulations that are enforced by the VPT/MPT Act from time to time.*

61. *Thus the argument of the Respondent that the STA which is a self-contained agreement does not give any scope to import the application of MPT Act does not cut any ice.*

62. *Then again clause 5.28 of the STA recognizes the authority of VPT in the unlikely event of non-performance/under performance of the Berth. The authority of VPT is again recognized in clause 5.34 in respect of berth discharge at NOM area / other place nominated by the VPT and in that case with the assistance of VSPL, the SAIL is to take clearance from the VPT. Again in annexure-1 to STA where the chart of ITSC of Rs.167 and its various components are described it is clearly mentioned in respect of royalty and lease rental that the same would be in terms of VPT/TAMP notification. All these are what are stated and provided and also contained in the STA itself as regards the application of MPT Act and so also the application of TAMP authority.*

63. *Furthermore the respondent SAIL itself tried to build up its case on the notification of The TAMP authority. It was argued before us that in terms of item No. (xxii) at page C/109 the term "transit area" was deleted at the request of the Claimant. Our attention was also drawn at clause (xxi) at page 108 by the Ld. Advocate for the*

Respondent and with these two clauses he tried to impress upon us that the terms "transit areas" there are also taken out by the TAMP authority at the request of the claimant. These two clauses will be discussed by us subsequently at the appropriate place separately in other context. But in any case those two clauses are in the order of the notification of TAMP authority being Notification No.G40 dt.31" March 2005. Thus the respondent was also required to build up their case with the help of order of the TAMP authority. Moreover, in their written statement of defence and written notes of argument the Respondent has heavily banked upon the TAMP orders to build up their case.

64. *TAMP authority is a creation of the MPT Act under the provision of section 47A of the said Act for the purpose of imposition and regulation of the scale of rates at the Port for services performed by Board and other persons. In order to know the function of the Board the provisions of section 42 clause (3) A and (4) of MPT Act are to be understood. Those clauses read as under:*

"Without prejudice to the provisions of sub-section (3), a Board may, with the previous approval of the Central Government, enter into any agreement or other arrangement (whether by way of partnership, joint venture or in any other manner) with, any body corporate or any other person to perform any of the services and functions assigned to the Board under this Act on such terms and conditions as may be agreed upon.

(4) No person authorized under sub-section (3) shall charge or recover for such service any sum in excess of the amount (specified by the Authority, by notification in the Official Gazette)."

65. *On plain reading of those clauses as stated above it appears that the Board may authorize any person for any of the services mentioned in clause (I) of section 42 and such terms and conditions as mentioned agreed upon which were assigned to the Board itself by the Act. Among those functions those are assigned to the Board are landing, shipping of transhipping passengers and goods between vessels in the port receiving, removing, shifting, transporting, storing or, delivering goods brought within the Board premises. Including the carriage by the neighbouring railways area or vice versa and the like activities find mention in clause (I) of section 42.*

66. *In the instant case it is admitted that the claimant took lease of the certain port area namely EQ8 and EQ9 from the VPT for a period of 30 years and on the basis of that lease agreement the Claimant entered into a long term agreement with the SAIL and thereafter as the said LTA could not be given effect to for some technical reasons like non-performance of dredging of the sea port to the optimal level as stipulated in the LTA, the STA between parties was executed. Thus in view of the above position of the MPT Act, VSPL steps into the shoes of VPT in order to perform the various activities*

assigned to the Board of VPT and on the strength of that lease agreement only, the VSPL got the authority to enter into Short Term Agreement with SAIL. From the facts and circumstances and of the documents placed before us by both the parties we have no reason to disbelieve that this position was unknown to the SAIL at the time of execution of the STA. In fact on the request of SAIL, VSPL supplied a copy of such lease agreement to them. Here in the instant case in our considered view the SAIL is a user of the port under the STA and VSPL stands in the position of the owner as a lessee of the VPT."

(Emphasis supplied)

15. Thus according to the majority members, the 1963 Act as well as TAMP were applicable. A perusal of the afore-quoted paragraphs of the majority award would clearly reveal that the ultimate conclusion of the majority members that the 1963 Act as well as TAMP were applicable to the parties apropos the STA hinges on the following points:-

a. In terms of the first part of clause 5.12 of the STA the appellant would be entitled to claim demurrage/storage charge in terms of TAMP orders if cargo exceeded 60,000 MT continuously for 15 days without a 30 days' notice from the respondent.

b. The transactions between the parties were carried out on the land of the VPT. The users of land of a sea port are statutorily regulated by the Major Port Trusts Act, 1963.

c. The users of land of a sea port are statutorily regulated by the Major Port Trusts Act, 1963.

d. The appellant accepted the proposal of the respondent as regards ousting priority as per the berthing policy and procedures of VPT and the appellant allayed the respondent's apprehension on ousting priority for its vessels by affirming that in terms of Section 42 of the 1963 Act, the

appellant was fully authorised to give such ousting priority to a valued customer like the respondent.

e. VPT came within the purview of the 1963 Act by virtue of the Amendment Act 1974.

f. Clause 5.5 of STA which deals with the provision of discharge of cargo clearly mentions that the same will be regulated by the rules and regulations that are enforced by the VPT/1963 Act from time to time.

g. Clause 5.28 of the STA recognizes the authority of VPT in the unlikely event of non-performance/under performance of the Berth.

h. The authority of VPT is again recognized in clause 5.34 in respect of berth discharge at NOM area/other place nominated by the VPT and in that case with the assistance of the appellant, the respondent is to take clearance from the VPT.

i. In Annexure-1 to the STA where the chart of ITSC to the tune of Rs.167 and its various components are described it is clearly mentioned that royalty and lease rental would be in terms of VPT/TAMP notification.

j. The respondent itself tried to build up its case on the notification of the TAMP authority.

k. In terms of Section 42 of the 1963 Act the appellant steps into the shoes of the VPT in order to perform the various activities assigned to the Board of VPT and on the strength of that lease agreement only, the appellant got the authority to enter into STA with the respondent.

16. None of the reasons cited by the majority members lead to the conclusion that either the 1963 Act or TAMP (whether singly or together) would apply to the STA for the purpose of levying demurrage charges. We are aware of our

limitation as a Section 37 Court under the 1996 Act and we are cognizant that an error of reasoning would not make an award so defective as to incur the wrath of Section 34 of the 1996 Act but the question is whether it is permissible for an arbitrator to conjure up a contract or a contractual term where there is none by mere quirk of reasoning?

17. There can be no dispute that certain functions of the VPT may be required to be carried out by the appellant in terms of the lease/license that the appellant has been granted by the VPT. The extent to which and the manner in which the core functions of the VPT are required to be carried out by the appellant, TAMP and the 1963 Act would certainly be applicable but would such applicability also get *ipso facto* extended to the STA for imposition of demurrage charges without there being any express mention of the same? The answer must be in the negative. While the VPT would exercise sovereign and statutory control over all lands within port limits even if the same has been leased out, the same would not impinge on the private contractual relationship between the appellant and the respondent unless the STA expressly states so.

18. Indeed, if there are provisions in the STA that either specifically or by necessary implication indicate that the parties agreed that the 1963 Act and TAMP would apply to them for collection/implementation/imposition of demurrage, then the statute and the tariff would be applicable for such purpose. However, no clause in the STA has been cited to demonstrate that. It cannot be introduced in the STA interpretatively, all the more so when the term relates to financial implications.

19. The phrase *"discharge of cargo... round the clock"* used in clause 5.5 of the STA only binds the parties to an operational timeline. It forces the appellant to supply continuous labour, arrange shifting, and clear customs round the clock so that the berth can physically be emptied quickly. The expression *"as per rules and regulations enforced by the port under the Act"* used in the said clause is a safety and administrative restriction. It means the physical handling must comply with changing port safety codes, environmental laws, and shifting schedules under the 1963 Act. That such clause is entirely operational becomes evident from the fact that it carries absolutely no fiscal or monetary implication. It does not state that the respondent agrees to pay any specific financial rate, nor does it incorporate a financial tariff matrix. A mandate to perform a physical task according to rules cannot be retrofitted into a financial indemnity clause.

20. In the case of ***Food Corporation of India & Others vs. Abhijit Paul***[15] the Hon'ble Supreme Court has reiterated the method for and the purpose of interpretation of a contract in the following words:-

> *"**26.** Interpretation of contracts concerns the discernment of the true and correct intention of the parties to it. Words and expressions used in the contract are principal tools to ascertain such intention. While interpreting the words, courts look at the expressions falling for interpretation in the context of other provisions of the contract and also in the context of the contract as a whole. These are intrinsic tools for interpreting a contract. As a principle of interpretation, courts do not resort to materials external to the contract for construing the intention of the parties. There are, however, certain exceptions to the rule excluding reference or reliance on external sources to interpret a contract. One such exception is in the case of a latent ambiguity, which cannot be resolved without reference to extrinsic evidence. Latent ambiguity exists when words in a contract appear to be free from ambiguity; however, when they are sought to be applied to a particular context or question, they are amenable to multiple*

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outcomes. This position is well explained in the following passage of Halsbury's [Halsbury's Laws of England (5th Edn., 2012) Vol 32, para 409.] :

"Latent ambiguity: When the instrument appears on its face to be free from ambiguity but, upon the endeavour being made to apply it to persons or things indicated, it appears that the words are equally applicable to two or more persons, or two or more things, either without any inaccuracy or with a common inaccuracy…"

Extrinsic evidence, in cases of latent ambiguity, is admissible both to ascertain where necessary, the meaning of the words used, and to identify the objects to which they are to be applied [Halsbury's Laws of England (5th Edn., 2012) Vol 32, para 394.] …"

21. If the STA is examined in the light of the well settled rules governing interpretation of contracts, it would be at once clear that the parties had not intended to include demurrage charges in the STA.

22. It is beyond cavil of doubt that demurrage charges are costs incurred for breaching the timeline allocated for stocking goods at the port. Thus demurrage charges are in the nature of compensatory damages. Now, two expressions defined in the STA deserve notice at this stage:-

*"**Committed Discharge Rate means** The committed discharge of coking coal vessels, up to Haldia Draft at VSPL Berth shall be at the rate of 22,000 Metric Tonnes Per WWD SHINC for all hatches lightening and 17000 Metric Tonnes per WWD SHINC for full discharge on best endeavor basis*

However, penalty shall be payable if the discharge rate falls below 20000 Metric Tonnes per WWD SHINC for lightening and …….

***"Penalty"** means amount payable by SAIL/VSPL to the other Party, towards damage/non-performance in terms with the provisions of the Agreement."*

(Emphasis supplied)

23. Thus the parties have provided for imposition of penalty or damages upon breach of a condition. Clause 5.12 of the STA which provides for storage and stacking (and which forms the backbone of the majority award) may now be noticed:-

"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 in an orderly manner."

24. It is interesting to note that while in the said clause the parties have clarified that in case of exigencies the appellant would endeavor to accommodate cargo for a further period of 15 days, they have remained silent on the aspect of imposition of demurrage charges in case the storage or stacking outlasts the 15 days' period. The tenor of the STA reveals that parties have specifically mentioned the circumstances and conditions where damages would be payable. If there is an omission, it is a conscious omission. Such silence cannot not sound in demurrage charges. If the parties did not intend to make overstay demurrageable can the arbitral Tribunal do so in the manner done by the majority members? We fail to find a positive answer to that question.

25. In such context, the reasoning given by the minority member becomes significant. We use it as a part of our reasoning in the light of the following observations of the Hon'ble Supreme Court in the case of ***Dakshin Haryana Bijli Vitran Nigam Limited*** (supra):-

"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."

26. The minority view on this point may be found from paragraphs 27 to 28 of the minority award:-

*"**27.** Claimant's contention that since Section 48 of Port Act permits levying of demurrages. TAMP notifications issued from time to time would automatically apply to this contract. Provisions of the Port Act and TAMP permit charging demurrages as a deterrent from longer stay of cargo in the terminal. To strengthen his contentions Mr. Somayajulu, counsel for the claimant relied on the following decision of Apex court; Trustee of the Port of Madras vs. Amin Chand Pyarelal, (1976) 3 SCC 167.; Board of Trustee of the Port of Bombay vs. Jai Hind Oil Mills Co. And others (1987) 1 SCC 648; and Board of Trustees of the Port of Bombay vs Indian Goods Supplying Co., (1977) 2 SCC 649. Relying on these judgments counsel for claimant contended that "congestion in the ports affects the free movement of ships and of essential goods. Ships like wagons, have to be kept moving and that can happen only if there is pressure on the importer to remove the goods from the Board's premises with the utmost expedition" Therefore, authority has the right to charge demurrage in order to ensure quick clearance of cargo from the port.*

There is no quarrel with the proposition of Law but we cannot lose sight of the fact that in the above cases Apex court was dealing with issues arisen out of Major Port Trust Act and not out of a private contract. In the present case parties are to be governed by private contract. Hence on facts of these cases reliance by claimant are of no help.

This being a private contract between two parties, terms and conditions of TAMP as such would not apply automatically to this private contract. If claimant was interested to charge demurrage it ought to have incorporated the same in this Agreement. In fact claimant while entering into this agreement consciously did not incorporate charging of demurrages. When rates for stacking of cargo was suggested in this case claimant did not estimate any income from demurrages and that is why it did not form part of ITSC Annexure-I of STA. Claimant had intentionally not incorporated demurrages because it had charged higher rates for stacking of respondent's cargo which fact is clear from answer of claimant to a query raised by TAMP appearing in its Order dated 15.03.2005 at S.No.IV page 98 Vol.I of claimant's documents. There claimant admitted that the demurrage income was considered NIL. This was done. because claimant wanted to earn more revenue through the respondent. Once the provision to charge

demurrages were consciously not provided in the contract by implication "demurrages" cannot be made applicable by relying on Section 48(1)(d) of Port Act. TAMP only fixes scales of rates, had demurrages been incorporated in this agreement then for the rates claimant could rely on the scale fixed by TAMP. Claimant in no uncertain words admitted this fact while answering query of TAMP as mentioned above. Arbitrators are creature of contract, they can neither travel beyond the terms of the contract nor incorporate in it which is not there.

28. *Reference and reliance on Section 42 and 48 of the Port Act by Mr. Somayajulu, Advocate for claimant is misplaced. Admittedly TAMP has been created under the Port Act. The said Act empowers TAMP to fix scale of rates for various items provided those items/paras form part of the contract. Section 48(1)(d) of the Port Act does talk about wharfage, storage or demurrages of goods. But we cannot overlook the opening sentence of Section 48(1) which says the Authority i.e. in this case TAMP shall from time to time frame a scale of rates at which any of the services specified hereunder would be performed meaning thereby if contract provides charging of demurrages of goods then the scale of rates as provided by TAMP would apply. Similarly for wharfage and storage. But if demurrages of goods does not find mention in the private agreement between two parties then the question of claiming demurrage at the scale of rates as framed by TAMP would not arise.*

Admittedly, STA is a private contract between VSPL & SAIL and that TAMP is not the authority to decide dispute like the present between the parties. There is no provision in this contract regarding payment. of demurrages respondent/SAIL keeps its cargo stacked for longer period beyond the free time as prescribed in Article 5.12 of STA. To my mind, all terms and conditions of TAMP mutatis mutandis will not apply to this private contract. Parties are bound by the terms of this agreement i.e. STA. By implication provision of TAMP cannot be attracted nor apply particularly when claimant itself decided not to estimate its income arising out of demurrages while fixing rates under ITSC Annexure-I. This find mention in the response given by claimant to a query raised by TAMP. <u>It appears in TAMP's order dated 15.03.2005 at page 98 item (iv) of Vol. I (claimant's documents). TAMP's query was; "The reason for not estimating income from demurrage charges". To this claimant's response was as follows;</u>

<u>"Since major portion of the storage area will be used on rental basis, income from plot rental has been taken into account. It does not desire/expect the cargo to remain in the transit area beyond the free period and hence the demurrages income is considered NIL.</u>"

(Emphasis supplied)

27. The minority award has also considered other evidence on record to cull out the intention of the parties and has clearly indicated the reason behind non-incorporation of the demurrage charges in the STA. The minority award has found that the appellant had indulged the respondent and refrained from including demurrage charges in the STA as it was getting good business from the respondent who was "*the only major customer importing cooking coal through Gearless Panamax Vessels in Vizag Port for about 5 MnMTs*" Paragraphs 32 and 35 of the minority award may be noticed in such context:-

> *"32. That the claimant had been insisting the respondent not to divert its vessel to Gangavaram and Paradip has been established by various letters of the claimant. Fact of the matter is claimant was scared of losing revenue if the respondent diverted its vessels to some other ports. In this regard reference can be made to claimant's letter dated 22.08.2009 Ex. R-10 (Page 283 of respondent's documents) wherein claimant expressed that it would be geared up to dispatch 3-rakes a day to cater to the requirement of SAIL. Hence SAIL should not divert its cargo to other ports. Followed by letter dated 20.12.2010 Ex. R-12. Letter dated 20.01.2011. Ex. R-11 and email dated 03.05.2011 Ex. R-13. On one hand claimant had been insisting respondent not to divert their vessels from Vizak port at the same time charged demurrages for the same period. This is against principle of natural justice. On the day letter Ex. R-11 dated 20.1.2011 and R-10 dated 22.08.2009 were written to respondent not to divert the cargo, the status of claimant's terminal as shown in Ex.R-11 was 85,100 MT and 97,103 MT of respondent cargo, still claimant insisted the respondent not to divert its cargo. It is not correct for claimant to urge that since respondent had not made available volume of cargo, therefore, asked it not to divert, this argument is belied from the language of those letters. In none of these letters/e-mails it is been mentioned that volume of cargo made available was not as per agreement. The reason for protest by claimant was loss of revenue. Having pressurised the respondent not to divert its cargo, at the same time claiming demurrages shows malafide on the part of claimant.*
>
> *That not only there is absence of provision in STA to charge demurrages, the agreement confirmed 40,500 sq.meter area to be utilized for handling of cargo of the respondent beside amenities and other system with providing integrated terminal*

services as per this agreement. By this agreement means the area to be utilized exclusively for respondent's cargo. Contention of the claimant that while entering into Long term agreement it was made clear vide letter dated 17.12.2003 Ex. C-5 that no specific area had been offered for stacking SAIL'S cargo, this argument, to my mind, is belied by claimant's own showing. Inspite of this letter Ex. C-5 claimant while entering into Long Term agreement incorporated an Article as Article 3.4 under the heading Capacity and confirmed that an area of 81,000 sq.meter would be utilized for SAIL's cargo as per that agreement. If claimant had no intention to specifically earmarked any area to SAIL it would not have incorporated Article 3.3 in STA. Contention of the claimant that this area is part of terminal hence has to be treated as terminal area, this argument is without merits. Terminal area is defined. As per that definition the area of 40,500 sq.meter cannot be called terminal. What claimant argues is contrary to the terms and conditions of the contract. Contractual necessity and compulsion to retain SAIL cargo at VPT/VSPL seems to be the reason of allotting specific area to SAIL. That is how it was incorporated in STA vide Article 3.3. Fact of the matter is claimant at all cost wanted to retain SAIL, therefore, did not use any discretion against it. Claimant admitted that it had no discretion in granting reduction in tariff to SAIL because claimant was desperate to retain SAIL cargo.

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35. The intention not to charge demurrages appears to be claimant's commercial necessity as admitted by claimant itself. In case demurrages were to be charged SAIL might have shifted to some other port, fearing this eventuality demurrage was not incorporated in the agreement in question. The very fact that the term demurrages is absent from the STA goes to show that while entering into this contract claimant consciously waived its right to claim demurrage. This conclusion is supported from claimant's own admission made to TAMP and which appears in TAMP's order dated 11.10.2011 at Page 18 item (4) of respondent's documents. While considering income estimation TAMP questioned the reason of claimant giving discount in tariff to SAIL. In order to justify its action claimant's response was as under:

Item 4(a) "SAIL is the only major customer importing cooking coal through Gearless Panamax Vessels in Vizag Port for about 5 MnMTs. As TAMP is aware RINL's cooking 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 VPSL to retain SAIL -cargo. Keeping this in view a 4 year Short Term Agreement with SAIL was entered w.e.f. 06.05.2008. 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 out end in granting reduction on tariff to SAIL.

It is again submitted that the concession in tariff to SAIL is also in accordance with TAMP guidelines 2.16, 1.4.4 and as advised by TAMP vide ref. Xxv(i) (b) of earlier tariff order.

4(b) It may not be out of place to mention here that after one year of commencement of contract, SAIL unilaterally insisted upon further reduction of rate and forced VSPL to reduce the rates, correspondence referred to herein can be produced to the authorities with the permission of SAIL

4(c) It is submitted that but for this rebate, VSPL could not have achieved the 30% growth in throughout compared to projections in 2009-10 and 2010-11. Despite the cargo growth, the revenue earned is almost the same level of revenue as per projections in 2009-10 and 2010-11 implying that cargo growth achieved is the offshoot of the rebate given.

This shows the reason why claimant was indulgent to respondent. It further proves that claimant was dependent on respondent's cargo and hence gave special concessions status to SAIL."

(Emphasis supplied)

28. The underlined portion of the minority award shows the appellant's stand before the TAMP authority and forms material evidence to demonstrate that parties did not intend to include demurrage charge.

29. Issue nos.6 and 7 have been decided by the majority members by holding that the STA did not contemplate any lease of the storage area and that the ITSC charges did not include storage charges.

30. Even if the majority Tribunal's conclusion that the STA did not contemplate a lease and that ITSC charges did not include storage charges is assumed to be a possible or plausible view not open to interference under Section 34 of the 1996 Act, the same would not lead to application of demurrage charges if the parties ultimately did not intend to do so.

31. We may, however, record that the finding of the minority member in paragraphs 34 and 36 to 38 of the minority award, to the effect that the STA in effect envisaged a lease of the storage area appeals to the conscience of the Court.

32. As would be evident from paragraph 57 of the majority award, the main premise for the ultimate conclusion reached by the majority members is that the first part of clause 5.12 of the STA should be interpreted to mean that the appellant would be entitled to demurrage charges in case the cargo is in excess of 60,000 MT and overstays the free period of 15 days. We have found such construction to be impossible in the facts of the present case since the parties have not agreed to imposition of demurrage charges on the respondent.

33. Even if we proceed on the basis that clause 5.12 of the STA does provide for application demurrage charges, then also the award of demurrage charges appears to be in clear contravention of the said clause.

34. Clause 5.12, has three parts:-

i. The first part imposes an obligation on the appellant to ensure storing of cargo upto a maximum volume of 60,000 MT.

ii. The second part provides that in case of exigency, the appellant would accommodate additional cargo volume to the extent of 30,000 MT for 15 days. It requires the respondent to give 30 days' notice.

iii. The third part provides that if the cargo commitment by the respondent to the appellant goes beyond 2.0 million MT per year then the appellant would organize for storage of cargo upto 90,000 MT with a further provision for storing 30,000 MT coal in case of exigencies for a period of 15 days. This does not require any notice.

35. Thus, while assessing the amount of demurrage charge to be paid (assuming it to be payable) it would be required to be considered as to whether in the relevant year the cargo volume had exceeded 2.0 million MT or not because

for every such year the minimum storage volume would be 90,000 MT and not 60,000 MT. These aspects have not been considered by the majority Tribunal at all despite charts showing the handling of the cargo being produced by the appellant to the Tribunal on December 19, 2014 which once again makes the majority award perverse and patently illegal for non-application of mind.

36. The minority award has factored these aspects in the first sub paragraph of paragraph 31 and paragraph 43 of the award which are quoted hereinbelow:-

> *"31. Article 5.12 of STA is in two parts. First part provides stacking of 60,000 MT and an additional 30,000 MT for a period not exceeding 15 continuous days and it would be subject to giving 30 days notice. In the second part there is no requirement of notice. In case cargo is excepted to go beyond 2.0 million MT per year storage/ stacking of cargo would be organized by the claimant i.e. 90,000 MT with further provision of storing 30,000 MT of coal in exigencies for a period not exceeding 15 days.*
>
> *Per clause 8 of the agreement review meeting was held, instead of being held in the first six months as per the terms of the contract it was held after one and a half year i.e. on 05.10.2009. Purpose of review was to make an assessment of the actual quantity of cargo that the respondent was to make available to the claimant and also to test the operational parameters and terms were also to be reviewed jointly thereafter. In that meeting claimant agreed to give concession of rates expecting huge quantity of respondent's cargo to be stacked. As per claimant's own showing over stacking of cargo started way back on 4 May 2009 but not a word uttered in this regard in the review meeting held on 05.10.2009. Clause 1.2(a) prescribe that the aspect of assured cargo volume as well as tonnage reckoned for payment of penalty shall be jointly reviewed, after six months of the agreement, based on actual performance. Thus that review meeting was not only to assess whether cargo commitment was completed but also to assess to find out violation of operational parameter i.e. stacking of excess cargo by the respondent. If it had been penalty would have been imposed. But no such thing find mention in the said review meeting. In the review meeting the claimant even did not object to over stacking of additional cargo in the absence of 30 days notice. Since claimant knew that levy of "demurrages" was not part of the contract, hence did not mention the same. By its conduct claimant*

waived its right, and therefore, estopped from claiming the same now. In this case claimant had been stacking, cargo of the Respondent in excess of 60,000 MT and at no point of time refused to stack additional 30,000 MT because of lack of 30 days notice. Hence by its conduct claimant waived its right of 30 days prior notice before making arrangement of stacking additional quantity of cargo.

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43. It would not be out of place to mention 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 0.75 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.

Whichever angle we may look into this case, I find claimant has failed to prove any breach having been committed by the respondent. Hence for the reasons discussed above claimant is not entitled to demurrages. Claims of claimant are accordingly rejected."

37. The ultimate decision to award demurrage and interest on issue nos. 8, 9 and 10 framed by the arbitral Tribunal is a consequence of the conclusions

arrived at on the earlier issues. Since the basis has been found to be bad, the consequential command must also fail.

38. It is apparent from the discussion made hereinabove that neither TAMP nor the 1963 Act influence the financial terms between the parties to the STA at least insofar as imposition of demurrage charges is concerned. It is also clear that the parties consciously avoided incorporation of any demurrage charge clause in the STA. That being so the ultimate conclusion reached by the majority becomes without foundation and therefore perverse. Reliance by the majority members on the judgments of ***Aminchand Pyarelal & Others*** (supra), ***Indian Goods Supplying Co.*** (supra) and ***Jai Hind Oil Mills Co. & Others*** (supra) would have helped only if it could be concluded that STA was fully governed by the 1963 Act and TAMP. Such is not the case here.

39. The majority members have while holding that the appellant is entitled to demurrage charges observed that *"It is the universal practice of business that the parties involved in such commercial transaction will always look forward for more and more profit and in doing so if there appears to be any violation of agreement inviting penalty/demurrage the same cannot be avoided."* While so observing, the majority members have missed that penalty/demurrage cannot be imposed unless specified in the contract.

40. Furthermore the minority award has also found that the appellant could not produce any evidence in support of its contention that there was any stacking or storing beyond the free period. In such view of the matter, even if the best case of the appellant is taken, no amount could have been awarded

to the appellant. In that context the following findings of the minority Tribunal are relevant:-

> *"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 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 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 Tribunal 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. One need to be very careful in relying on such statement in the absence of any evidence."*

(Emphasis supplied)

41. The aforesaid findings reveal that there was no evidence before the Tribunal at all to justify award of demurrage charges. In that view of the matter, the majority award is one without evidence.

42. We also find substance in the submission of the respondent that non raising of the issue as regards imposition of demurrage charge in the review meeting held on October 09, 2009 amounts to waiver of its right to claim the same, assuming it had such right. In such context clause 8 of the STA may be noticed once:-

> *"**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."*

43. Thus clause 8 of STA provides that the parties would jointly review the terms of the STA. The terms and conditions of the STA do not expressly provide for demurrage charges. Therefore, if the same were to be levied the same ought to have been included while reviewing the terms. Not having done so would mean waiver of the appellant's right to claim such charge. In such context the second sub paragraph of paragraph 31 of the minority award is quite relevant which has already been quoted hereinabove.

44. While on this we cannot miss the flip side. It can be contended that if the appellant understood demurrage charges to be embedded in clause 5.12 as held by the majority and as argued by the appellant, then there can be no need to seek modification and as such there can be no case of waiver. However, in the facts of this case such contention would also not hold good. In such context, the following findings of the minority member may be noted. The same is extracted hereinbelow:-

> *"33. That the fact that area of 40,500 sq. Meter was allotted for SAIL's cargo gets reflected from claimant's own conduct. SAIL vide letter dated 17.09.2011(Ex. 58) which*

was in response to claimant's letter claiming demurrages, denied the claim of the claimant taking the plea based on the provision of Article 3.3 of STA and asserting therein that claimant had confirmed 40,500 sq. Meter area for SAIL's cargo, therefore, SAIL was not liable to pay demurrages. Claimant did not dispute this fact in its reply letter dated 25.10.2011 which was in response to respondent's letter dated 17.09.2011 Ex. C-58. Legal effect of allowing SAIL to utilize the facility area inspite of SAIL refusing to pay demurrages amounts to waiver of its right. Claimant neither terminated the contract nor invoked arbitration when respondent refused to pay demurrages, rather extended the contract for another one year inspite of SAIL refusing to pay demurrages as demanded by claimant vide letter dated 20.12.2011. While extending the contract claimant did so without insisting SAIL to first clear the outstanding dues on account of demurrages. This shows waiver of right if any by the claimant. It would not be correct to contend that waiver does not apply against statutory dues. Insisting of 30 days' notice is not statutory. It is a term of private contract which parties by their conduct can waive."

45. ***Provash Chandra Dalui*** (supra) and ***Shaw and Co.*** (supra) are well known authorities on the well settled legal proposition that waiver is relinquishment of a known right.

46. ***State of Chhattisgarh*** (supra) while referring to the earlier decisions of the Hon'ble Supreme Court in the cases of ***Associate Builders*** (supra) and ***Ssangyong Engineering & Construction Company Limited*** has reiterated the well settled principles for setting aside an arbitral award. In the case at hand we have found that the award is bad for non-application of mind, it is based on no evidence patently illegal and perverse.

47. Both ***Chandu Construction & Another*** (supra) as well as ***PSA SICAL Terminals Private Limited*** (supra) reiterate that the role of the arbitrator is to arbitrate within the terms of the contract, that he has no power apart from what the parties have given him under the contract and that he cannot travel beyond the terms of the contract. The majority members have indeed

travelled beyond the contract and as such the majority award deserves to be set aside.

48. Learned Single Judge has decided the application for setting aside the concerned arbitral award well within the parameters of Section 34 of the 1996 Act. The learned Judge has correctly appreciated the facts of the case and has applied the correct law. In any event, in our opinion, the view taken by the learned Single Judge is an eminently plausible one. It is settled law that if a learned Judge of the High Court takes a possible view, the Division Bench will not interfere in an Intra-Court appeal just because the Division Bench may have a different opinion. The Division Bench will only interfere if the conclusion arrived at by the Single Judge is clearly wrong or perverse, which is not the case here. Therefore, we do not find any reason to interfere with the judgement and order under appeal.

49. For all the reasons aforesaid, the order impugned is sustained. **APO 112 of 2022** together with **IA NO: GA 1 of 2022** stand dismissed. There shall be no order as to costs.

50. Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

I agree.

(Arijit Banerjee, J.) **(Om Narayan Rai, J.)**