IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/FIRST APPEAL NO. 3040 of 2021
With
CIVIL APPLICATION (FOR INTERIM RELIEF) NO. 1 of 2021
In R/FIRST APPEAL NO. 3040 of 2021
With
CIVIL APPLICATION (FOR PRODUCTION OF ADDITIONAL EVIDENCES) NO. 2 of 2021
In R/FIRST APPEAL NO. 3040 of 2021

With

R/FIRST APPEAL NO. 3055 of 2021
With
CIVIL APPLICATION (FOR INTERIM RELIEF) NO. 1 of 2021
In R/FIRST APPEAL NO. 3055 of 2021
With
CIVIL APPLICATION (FOR PRODUCTION OF ADDITIONAL EVIDENCES) NO. 2 of 2021
In R/FIRST APPEAL NO. 3055 of 2021

With

R/FIRST APPEAL NO. 3506 of 2021
With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2021
In R/FIRST APPEAL NO. 3506 of 2021
With
CIVIL APPLICATION (FOR PRODUCTION OF ADDITIONAL EVIDENCES) NO. 2 of 2021
In R/FIRST APPEAL NO. 3506 of 2021

With

R/FIRST APPEAL NO. 3507 of 2021
With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2021
In R/FIRST APPEAL NO. 3507 of 2021
With
CIVIL APPLICATION (FOR PRODUCTION OF ADDITIONAL EVIDENCES) NO. 2 of 2021
In R/FIRST APPEAL NO. 3507 of 2021

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE J.B.PARDIWALA Sd/-
and
HONOURABLE MR. JUSTICE NIRAL R. MEHTA Sd/-

==========

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

==========

ESSAR BULK TERMINAL LIMITED
Versus
ARCELOR MITTAL NIPPON STEEL INDIA LIMITED

==========

Appearance:
FIRST APPEAL NOS.3040 OF 2021:
MR MIHIR JOSHI, SR.ADVOCATE with M/S. KEYUR GANDHI, AMITA KATRAGADDA, RAHEEL PATEL and KAUSTUBH RAI, ADVOCATES for NANAVATI ASSOCIATES for the Appellant.

MR DARAYUS KHAMBHATA, SR.ADVOCATE with MR MIHIR THAKORE, SR.ADVOCATE with MR NAVIN PAHWA, SR.ADVOCATE with M/S. NIRAG PATHAK, ADITYA PANDYA, SAIRAM SUBRAMANIAM, JUHI GUPTA and ARCHISMITA SAHA, ADVOCATES for the Respondent.

FIRST APPEAL NO.3055 OF 2021:
MR SAURABH SOPARKAR, SR.ADVOCATE with M/S. KEYUR GANDHI, AMITA KATRAGADDA, RAHEEL PATEL and KAUSTUBH RAI, ADVOCATES for NANAVATI ASSOCIATES for the Appellant.

MR DARAYUS KHAMBHATA, SR.ADVOCATE with MR MIHIR THAKORE, SR.ADVOCATE with MR NAVIN PAHWA, SR.ADVOCATE with M/S. NIRAG PATHAK, ADITYA PANDYA, SAIRAM SUBRAMANIAM, JUHI GUPTA and ARCHISMITA SAHA, ADVOCATES for the Respondent.

FIRST APPEAL NOS.3506 OF 2021:
MR DARAYUS KHAMBHATA, SR.ADVOCATE with MR MIHIR THAKORE, SR.ADVOCATE with MR NAVIN PAHWA, SR.ADVOCATE with M/S. NIRAG PATHAK, ADITYA PANDYA, SAIRAM SUBRAMANIAM, JUHI GUPTA and ARCHISMITA SAHA, ADVOCATES for the Appellant.

MR MIHIR JOSHI, SR.ADVOCATE with M/S. KEYUR GANDHI and RAHEEL PATEL, ADVOCATES for NANAVATI ASSOCIATES for the Respondent.

FIRST APPEAL NO.3507 OF 2021:
MR DARAYUS KHAMBHATA, SR.ADVOCATE with MR MIHIR THAKORE, SR.ADVOCATE with MR NAVIN PAHWA, SR.ADVOCATE with M/S. NIRAG PATHAK, ADITYA PANDYA, SAIRAM SUBRAMANIAM, JUHI GUPTA and ARCHISMITA SAHA, ADVOCATES for the Appellant.

MR SAURABH SOPARKAR, SR.ADVOCATE with M/S. KEYUR GANDHI and RAHEEL PATEL, ADVOCATES for NANAVATI ASSOCIATES for the Respondent.

==========

CORAM: **HONOURABLE MR. JUSTICE J.B.PARDIWALA**
and
HONOURABLE MR. JUSTICE NIRAL R. MEHTA

Date : 03/02/2022

COMMON CAV JUDGMENT

(PER : HONOURABLE MR. JUSTICE J.B.PARDIWALA)

1. Since the issues raised in all the captioned Appeals are interrelated and the challenge is also to a common order passed by the Commercial Court at Surat, under Section 9 of the Arbitration and Conciliation Act, 1996 (for short, the 'Arbitration Act'), those were taken up for hearing analogously and are being disposed of by this common judgment and order.

2. There are two parties before us in this litigation : (i) Essar Bulk Terminal Limited ('EBTL', for short) and (ii) ArcelorMittal Nippon Steel India Limited ('AMNS', for short). The EBTL at one point of time was a group company of the Essar Steel India Limited ('ESIL', for short). The ESIL was taken over by the AMNS.

The ESIL set up a steel manufacturing plant at Hazira (Surat) along with a captive jetty. The steel plant is now owned by the AMNS and the captive jetty is run and managed by the EBTL.

3. On 21st February 2011, the AMNS and EBTL executed the Principal Agreement relating to the cargo handling charges (CHA). The Principal Agreement was amended *vide* Amendment Agreements dated 3rd March 2011, 1st April 2013, 17th May 2013 (Third Amendment Agreement), 15th October 2013 (Fourth Amendment Agreement"), 4th December 2014, 28th April 2016 and 4th December 2017. The Principal Agreement *inter alia* set out the cargo handling charges, i.e. the tariff at which the EBTL will handle the cargo of the AMNS at the Deep-Water Jetties. The specific rates are set out in the Principal Agreement.

4. On 28th August 2012, the Service Level Agreement was executed by and between the EBTL and the AMNS. The Service Level Agreement (SLA) was revised by the Amendment Agreement dated 1st April 2016.

5. On 17th May 2013, the EBTL and the AMNS executed the Third Amendment Agreement. The Third Amendment Agreement stated that the cargo handling charges shall be paid by the AMNS in the INR equivalent of USD denominated tariff, at the base exchange rate of USD 1 = INR 54.2190 (i.e. the base exchange rate prevailing on 30th April 2013). In essence, the parties agreed that from 1st May 2013, the cargo handling charges shall be paid at the USD 4.0309 per metric tonne of cargo (subject to 3% annual escalation) (*this rate has been specifically set out in the Annexure I of the Third Amendment Agreement)* (Dollar Tariff).

6. On 18th May 2013, the EBTL and the AMNS executed an amendment agreement to their cargo handling agreement in respect of

the handling of AMNS cargo at the Paradip Port, Hazira. The said Amendment Agreement contained similar terms as the Third Amendment Agreement, including that the Dollar Tariff would be paid at the base exchange rate of the USD 1 = INR 54.2190 (i.e. the base exchange rate prevailing on 30th April 2013).

7. On 15th October 2013, the EBTL and the AMNS executed the Fourth Amendment Agreement, by which, the parties agreed that it will charge the Dollar Tariff from the AMNS once the EBTL draws its first tranche of dollar loans. The Fourth Amendment Agreement specifically stated that all other terms of the Third Amendment Agreement shall remain the same. On the same day, the EBTL and the AMNS also executed another amendment agreement to their cargo handling agreement, containing similar terms as the Fourth Amendment Agreement.

8. In the month of June 2017, the dollar loan was drawn down by the EBTL.

9. On 2nd August 2017, the AMNS was admitted into the CIRP in terms of the IBC.

10. On 8th March 2019, the National Company Law Tribunal, Ahmedabad Bench, approved the AMIPL Resolution Plan for the AMNS. The AMIPL Resolution Plan specifically required that all subsisting contracts with the EBTL continue on the same terms.

11. It is the case of the EBTL that the AMNS had agreed, in the month of June 2019, to pay the additional cargo handling charges @ Rs.21 per metric tonne as per the annual escalation, and in such circumstances, the depth of the channel was deepened to 12 meters

below the chart datum. It is the case of the EBTL that it had been deepening the channel over a period of few years. The EBTL was able to achieve the channel depth of 12 meters below the chart datum in June 2019.

12. On 13th June 2019, the EBTL informed the AMNS that the channel depth of 12 meters below the chart datum has been achieved, and called upon the AMNS to pay the additional cargo handling charges contemplated in Annexure I of the CHA 2011.

13. On 20th June 2019, the AMNS addressed an email to the EBTL that it would advise its charterers to load the vessels upto 14 meters draft, since the EBTL has increased the depth of the channel to 12 meters

14. On 7th August 2019, at the insistence of the AMNS, the EBTL provided the requisite evidence of the increased channel depth to the EBTL, including a Bathymetry Chart from the Chief Hydrographic Officer, and a letter from the the GMB certifying that the depth of the channel is 12 meters or more. The Bathymetry Chart also showed that the depth at the terminal (Berth Pockets) is 14-15 meters and the depth in the channel is 12 meters However, the AMNS declined to pay the additional cargo handling charges as per Annexure I of the CHA 2011.

15. On 15th November 2019, the Supreme Court approved the AMIPL Resolution Plan for the AMNS. Thereafter, on 16th December 2019, the AMIPL took over the management of the AMNS.

16. On 28th February 2020, the NSPC, a statutory body responsible for the safety of the ports in India, issued the NSPC Certificate to the

EBTL in respect of the Deep-Water Jetties, *inter alia*, stating that the permissible draft at the Deep-Water Jetties is '*10 meters + tide*'. The NSPC Certificate also stated that in case of any reduction of depth, the corresponding reduction in draft has to be enforced.

17. On 15th April 2020, the Memorandum of Understanding was entered into between the AMNS and the EBTL, wherein the AMNS agreed to pay the Dollar Tariff to the EBTL on the basis of the base exchange rate prevailing on 30th April 2013 (i.e. USD 1 = INR 54.2190). Thereafter, the AMNS made the payment in December 2020.

18. On 5th May 2020, the EBTL informed the AMNS that it would declare the terminal draft at 10 meters due to non-payment of the additional cargo handling charges in terms of the Annexure I of the CHA 2011.

19. On 27th June 2020, the EBTL informed the AMNS that it was unable to afford the maintenance dredging to maintain the channel depth at 12 meters and again provided the advance notice to the AMNS of its intention to declare the terminal draft at 10 meters

20. On 22nd November 2020, the AMNS issued a letter to the EBTL invoking the arbitration under Clause 15 of CHA 2011 (purported "Notice of Arbitration").

21. On 4th December 2020, the EBTL addressed an email to the AMNS, *inter alia,* informing the AMNS that the purported notice of arbitration was an attempt to frustrate the statutory rights of the EBTL (which is an unsecured creditor of the AMNS) in respect of the consolidated scheme of arrangement proposed between the AMNS and the two group companies under Sections 230-232 respectively of the Companies Act, 2013.

22. On 24th December 2020, the AMNS filed an application under Section 11 of the Arbitration Act, being the IAAP No.05 of 2021, seeking appointment of the arbitrator in terms of the CHA 2011. Pertinently, the EBTL did not come to know about the same till 11th January 2021.

23. On 30th December 2020, the EBTL issued a detailed response to the purported Notice of Arbitration. On the next day, the EBTL drew the first tranche of borrowings in US Dollars.

24. On 3rd January 2021, the EBTL issued notice to the AMNS informing the AMNS of its drawal of dollar loans and intimating that Clauses 2.1 and Clause 2.2 of the Third Amendment Agreement have become effective. The EBTL also annexed a certificate from a Chartered Accountants, i.e. Manish Rathi & Co., dated 1st January 2021, certifying that the EBTL has drawn dollar loans on 31st December 2020.

25. On 11th January 2021, the AMNS issued a letter denying payment pursuant to the notice dated 3rd January 2021 issued by the EBTL, *inter alia,* on the ground that that the dollarization provision is 'onerous'.

26. On 12th January 2021, the EBTL realized that due to absence of maintenance dredging, the depth of the channel has reduced to the extent that it is not safe for the vessels carrying a draft of more than 10 meters to navigate the channel. Accordingly, the EBTL declared the terminal draft at 10 meters.

27. On the same day, the AMNS wrote to the GMB stating that since a writ petition filed by the AMNS is pending before this High Court,

the GMB should abstain from issuing no-objection certificates to the EBTL for availing loans. The AMNS addressed similar letters on 29th January 2021 and 9th February 2021 to the GMB.

28. On 15th January 2021, the EBTL responded to and dismissed the contents of the letter of the AMNS dated 11th January 2021.

SECTION 9 APPLICATIONS :

29. On 15th January 2021, the AMNS filed an application under Section 9 of the Arbitration Act against the EBTL seeking *inter alia* the following reliefs :

> *"a. Pass an order directing the Respondent to immediately discharge the vessels waiting at anchorage as on the date of filing of the present petition and continue to service vessels of the Petitioner without any disruption;*
>
> *b. Pass an order of injunction restraining the Respondent from implementing the measures indicated in the email of 12 January 2021 including declaring the terminal draft at 10 meters, or in any manner modifying the arrangement between the parties;*
>
> *c. Pass an order directing the Respondent to maintain the terminal draft and channel depth at the same level as on 10 January 2021;*
>
> *d. Pass an order appointing an independent surveyor to conduct a Hydrographic Survey to assess the depth of the channel and terminal draft;*

e. Pass an order of injunction restraining the Respondent from giving any effect to the measures contemplated in letter dated 3 January 2021 with regard to the Third Amendment Agreement and Fourth Amendment Agreement;

f. Pass an order of injunction restraining the Respondent from determining the cargo handling charges payable by the Petitioner in US Dollar denominated tariff as contemplated in the letter dated 3 January 2021 and reflecting such claims as receivables in its accounts;

g. Pass an order of injunction restraining the Respondent from raising any debt pursuant to the Third Amendment Agreement and Fourth Amendment Agreement;

h. Pass an order of status quo directing the Respondent to continue providing services to the Petitioner in the same manner as was being provided as on 10 January 2021 on the basis of payments being made by the Petitioner in in the same manner as on 10 January 2021."

30. On 22nd January 2021, the court below issued an ad-interim order directing the NSPC to conduct a survey to determine the available depth and draft at the EBTL Jetties. Pertinently, the order dated 22nd January 2021 also recorded that the EBTL is under no obligation to dredge the channel and provide a draft of more than 10 meters to the AMNS. The order was modified vide order dated 12th February 2021, wherein the

Fugro Survey (India) Limited was directed to determine the available depth and draft at the EBTL Jetties. The report submitted on 17th March 2021 ('Fugro Report') was challenged as technically incorrect by the EBTL and such challenge was confirmed by the NSPC. Accordingly, the Fugro Report was disregarded in the Section 9 proceedings.

31. On 15th February 2021, the EBTL addressed a letter to the AMNS and provided detailed submissions in respect of the payment of the Dollar Tariff.

32. On 23rd February 2021, the AMNS issued a letter to the Foreign Exchange Department of the RBI challenging the dollar loans availed by the EBTL. In the same letter, the AMNS stated that if the AMNS were to not pay the Dollar Tariffs as per the CHA 2011, the EBTL's financial condition may become precarious and there is a likelihood of debt recovery/security enforcement/insolvency proceedings being initiated against the EBTL.

33. On 9th March 2021, the EBTL addressed another letter to the AMNS *inter alia* seeking payment of the Dollar Tariff.

34. On 15th March 2021, the EBTL also filed an application under Section 9 before the court below.

35. On 16th March 2021, the EBTL also filed an application under Section 9 of the Arbitration Act against the AMNS seeking *inter alia* the following reliefs :

> *"(a) Pass an order directing ArcelorMittal Nippon Steel India Limited (Defendant) to immediately pay the*

defaulted amount of Rs. 40.89 crore for the month of January 2021 and February 2021 along with interest on delayed payment of Rs. 0.20 crore, aggregating to Rs. 41.09 crore being the applicable Cargo Handling Charges payable under the Cargo Handling Agreement dated February 21, 2011 (as amended by the Third Amendment Agreement dated May 17, 2013 and Fourth Amendment Agreement dated October 15, 2013) to Essar Bulk Terminal Limited (Applicant) and to make and continue to make payment of charges as per the INR equivalent rates of the USD denominated tariff in terms of the Cargo Handling Agreement dated February 21, 2011 (as amended by the Third Amendment Agreement dated May 17, 2013 and Fourth Amendment Agreement dated October 15, 2013) to Essar Bulk Terminal Limited (Applicant);

(d) Pass an order clarifying that Essar Bulk Terminal Limited (Applicant) is not obliged to continue to provide any services under the Cargo Handling Agreement dated February 21, 2011 (as amended from time to time) till such time ArcelorMittal Nippon Steel India Limited (Defendant) does not make payment of the Cargo Handling Charges including the Minimum Monthly Cargo Handling Charges as per the terms of the Cargo Handling Agreement (as amended by the Third Amendment Agreement dated May 17, 2013 and the Fourth Amendment Agreement dated October 15, 2013);

(e) Pass an order restraining ArcelorMittal Nippon Steel India Limited (Defendant) from utilizing the services

under the Cargo Handling Agreement dated February 21, 2011 (as amended from time to time) without making payments of the outstanding amounts as on the date of the order of this Hon'ble Court, and further without providing an undertaking that it will make and continue to make payment of charges as per the INR equivalent rates of the USD denominated tariff in terms of the Cargo Handling Agreement dated February 21, 2011 (as amended from time to time);"

36. On 4th June 2021, the NSPC filed an affidavit in the application, stating that :

a. The declaration of terminal draft is the sole prerogative of the port operator;

b. Vessels can navigate the channel only during the slack period (either high tide or low tide).

c. The requisite channel depth for navigation of vessels is available only during high tide.

37. On 7th June 2021, the court below reserved the application for orders. On 9th July 2021, the arbitral tribunal was constituted by a consent order passed in the application filed under Section 11 of the Arbitration Act.

38. On 16th July 2021, the AMNS filed an application before the court below seeking to refer the subject matter of the disputes to the arbitration. The AMNS submitted that the scheme of the Arbitration Act requires all disputes to be adjudicated by the arbitral tribunal

once constituted. The AMNS accused the EBTL of making attempts to delay the formation of the arbitral tribunal. The application was rejected by the court below.

39. The AMNS therefore preferred a petition under Article 227 of the Constitution against the order dated 16th July 2021, again raising the same issues before this High Court. By judgment and order dated 17th August 2021, this Court rejected the petition.

40. On 14th September 2021, the AMNS preferred a Special Leave Petition before the Supreme Court against the judgment of this Court. The Supreme Court partly allowed the SLP (in favour of the EBTL) and:

a. Directed the Court at Surat to pronounce the order on merits in the Section 9 Applications;
b. Held that there is no evidence of the EBTL attempting to delay the formation of the arbitral tribunal;
c. Held that the intention behind Section 9 of the Arbitration Act is not to turn the clock back and have the same issues re-agitated before a different forum.

41. On 20th September 2021, the impugned order was pronounced by the court below. The impugned order directed the following:

a. The AMNS shall pay the Dollar Tariff at the base exchange rate of December 30, 2020 to the EBTL;
b. The AMNS shall pay the minimum monthly cargo handling charges as per the CHA 2011 to the EBTL;
c. The AMNS shall provide Standby Letter of Credit as per the CHA 2011 to the EBTL;
d. The EBTL shall determine and declare the terminal draft every month; and

e. The EBTL shall maintain a channel depth of 10 meters at all times.

42. The impugned order further stated that the order shall be operative for a period of three months or till the arbitral tribunal decides the same issues under Section 17 of the Arbitration Act, whichever is earlier.

43. On 28th September 2021, in compliance with the Impugned Order, the EBTL declared the terminal draft at 10.02 meters till 27th October 2021.

44. On 1st October 2021, the AMNS addressed a letter to the EBTL demanding that the terminal draft of 11.3 meters be provided and the vessels carrying a draft of 13.6 meters be berthed.

45. On 3rd October 2021, the EBTL responded to the above letter dated 1st October 2021, stating that the only vessels carrying draft of 10.02 meters can be brought into the channel.

46. Insofar as the Section 9 application filed by the AMNS is concerned, more particularly, seeking relief as regards the terminal draft and channel depth, the court passed the following order :

> *"18.1 AMNS has prayed that EBTl shall keep the terminal draft and channel depth at 10 Meter. I have already interpreted the contract to see what is provided under the Agreement. What is provided under the agreement has to be adhered to by EBTL. The agreement specifically provides that minimum draft should be 10 meter at the terminal and*

maximum shall be permissible draft (i.e. 10 meter + tide). To provide such draft as available is the reciprocal obligation of EBTL against it charging MGT and Dollarization to AMNS. EBTL cannot contend that though it will charge MGT and Dollarization to AMNS but it will not honor its obligation under the Agreement and will not provide requisite available permissible draft.

18.2 I have already held for AMNS that one cannot ignore the express terms of the contract under garb of dispute. The same principle will apply for EBTL. What is good for the goose is also good for the gander. Hence EBTL is obliged to provide the draft as available at the terminal and it cannot restrain the terminal draft at ceiling of 10 meter in aberration to the terms of the Contract till the final dispute and liability is adjudicated by Arbitral Tribunal.

18.3 CHA specifically provides declaration of terminal draft. Such declaration of terminal draft has to be based on tidal forecast and other weather conditions. Hence it is required that EBTL shall, based upon the tidal forecast as published by GMB, determine and declare the available terminal draft for every month and accordingly shall service the vessels of the AMNS as per the CHA. EBTL shall also be obliged to maintain the Channel Depth at 10 meter CD."

".....By way of Interim Measure under Section 9(1)(ii)(e) of the Arbitration & Conciliation Act, 1996 EBTL is hereby directed to declare the terminal Draft and maintain the Channel Depth as per Paragraph 18.3 of this Order and shall continue to service the vessels of AMNS."

47. So far as the application filed by the EBTL under Section 9 of the Arbitration Act with respect to the cargo handling charges in the INR equivalent of USD is concerned, the court passed the following order :

> *"In the present case, AMNS is the only customer of EBTL. The only source of income for EBTL is the services provided by it to AMNS. The liability to pay is contractual. Contract is in existence and not terminated. Services are availed by AMNS from EBTL. The objection of AMNS to dishonor its obligation is required to be adjudicated by Arbitral Tribunal, however pending such adjudication if AMNS do not honor its admitted obligation under the CHA then it will be a issue of survival for EBTL, especially in light of its obligation under the CHA.*
>
> *Under the circumstances interim measure as provided under Section 9(1)(ii)(e) are required to be passed, directing AMNS to continue to pay MGT and dollarized cargo handling charges from January 2021 onwards, with clarification that dollar rate shall be as on 30.12.2020."*

48. The operative part of the order passed by the Commercial Court reads thus :

> *"OPERATIVE ORDER*
>
> *A. By way of Interim Measure under Section 9(1)(ii)(e) of the Arbitration & Conciliation Act, 1996 EBTL is hereby directed to declare the terminal Draft and maintain the Channel Depth as per Paragraph 18.3 of this Order and shall continue to service the vessels of AMNS;*

B. By way of Interim Measures under Section 9(1)(ii)(e) of the Arbitration & Conciliation Act, 1996 AMNS is hereby directed to Pay and Continue to pay Invoices raised by EBTL from January 2021 onwards as per Paragraph 17.11 of this Order;

C. It is clarified that services rendered by EBTL and payments made by AMNS under this Agreement shall be subject to final outcome of Arbitration Proceedings;

D. This Interim Measure shall continue for a period of [3] three month from the date of this Order, or until the Ld. Arbitral Tribunal decides Section 17 application of the parties which ever date is earlier;

E. In view of the above terms, both the Applications i.e. Commercial C.M.A. No. 2 of 2021 and Commercial C.M.A. No. 99 of 2021 are hereby PARTLY ALLOWED;

F. The prayers not granted hereinabove stands REJECTED;

G. It is clarified that views expressed in this Order are only tentative in nature, only with a view to adjudicate the prayer made in this applications and are not aimed to finally adjudicate the issues which are required to be adjudicated by the Ld. Arbitral Tribunal.

H. No order as to costs."

49. So far as the EBTL is concerned, it has filed two appeals, i.e. First Appeal Nos.3040 of 2021 and 3055 of 2021

respectively. So far as the AMNS is concerned, it has also filed two appeals, i.e. First Appeal Nos.3506 of 2021 and 3507 of 2021 respectively.

EBTL's APPEALS :

50. We shall first take up the two First Appeals filed by the EBTL. The EBTL has raised two issues before this Court : (i) whether the Commercial Court, in exercise of its power under Section 9 of the Arbitration Act, could have directed the EBTL to maintain a depth in the channel of 10 meters below the chart datum by way of an interim measure in favour of the AMNS ? In other words, whether the EBTL is obliged to : (a) maintain a minimum draft of 10 meters at the terminal and (b) also maintain a minimum depth of 10 meters below the chart datum in the channel, and (ii) whether the Commercial Court was justified in directing the EBTL to continue to provide services without the AMNS required to pay the agreed "Dollar Tariff" ? In other words, whether the AMNS should have been directed to perform its continuing obligation to pay in accordance with the terms of the contract, more particularly, when it continues to avail the services under the contract pending the arbitration. To put it more succinctly, the case put up on behalf of the EBTL is that although the court below accepted that the AMNS is obliged to pay the dollarized tariff, yet it should not have granted the relief to the AMNS by way of an interim measure saying that the dollarized tariff shall be paid using the USD exchange rate prevailing on 30th December 2020, as the base rate. The EBTL says that the USD exchange rate as on 31st April 2013 should have been taken as the base rate.

AMNS's APPEALS :

51. So far as the two First Appeals filed by the AMNS is concerned, it focuses only on the issue of USD denominated tariff. According to the AMNS, the court below should have allowed its application filed under Section 9 of the Arbitration Act, seeking an injunction against the EBTL from implementing the Dollar Tariff. In other words, it is the case of the AMNS that in the application filed by the EBTL under Section 9 of the Arbitration Act, the court below ought not to have passed an order by way of an interim measure directing the AMNS to continue to pay the Dollar Tariff as it amounts to granting of specific performance of an agreement. One appeal by the AMNS is against that part of the order by which the court declined to grant the injunction by way of an interim measure against the EBTL from implementing the Dollar Tariff and the another is against the relief granted to the EBTL as regards the USD exchange rate as on 30th December 2020.

GIST OF THE AFORESAID :

52. The AMNS has a huge steel manufacturing plant at Hazira (Surat). It requires huge quantity of iron ore for its steel manufacturing plant. The iron ore in huge quantity is being imported from other countries. Everyday, hundreds of vessels reach at the Magdalla Port. The EBTL has constructed two Deep-Water jetties at the Magdalla Port. The EBTL manages the two Deep-Water jetties. The cargo imported by the AMNS is being unloaded at these jetties. The EBTL says that the only obligation on their part is to maintain a minimum draft of 10 meters at the terminal and a minimum depth of 10 meters below the chart

datum in the channel. The AMNS says that it is the obligation of the EBTL to maintain a channel depth of 10 meters at all times. If the EBTL fails to maintain a channel depth of 10 meters at all times, then hundreds of vessels carrying the cargo may have to wait outside till the high tide as it is only during the high tide that the vessels may be in a position to reach the jetties. If the EBTL maintains a channel depth of 10 meters at all times, then irrespective of the tide, the vessels can safely and freely get into the jetties and the cargo can be unloaded. It is the case of the AMNS that the delay that may be caused for any vessel to reach the jetty on account of the lapse on the part of the EBTL to maintain a channel depth of 10 meters at all times would prove very costly to the AMNS. On the other hand, the EBTL says that the only obligation on their part is to maintain a minimum draft of 10 meters at the terminal.

53. On the issue of dollarization of tariff, it appears that in 2011 the parties had agreed that the cargo handling charges would be in accordance with the INR tariff. By way of the principal agreement, the parties had initially agreed with respect to the rates at which the EBTL would handle the cargo of the AMNS, i.e. 'the cargo handling charges' would be in accordance with the agreed INR denominated tariff. In 2013, the parties agreed to move to a USD denominated tariff. This was pursuant to the request by the AMNS to the EBTL to amend the principal agreement and benchmarked the cargo handling charges in the USD at a specifically agreed exchange rate. The Dollar Tariff was effective from 1st May 2013. The parties had agreed to suspend the Dollar Tariff till the EBTL would draw loans in dollars. In December 2020, the EBTL drew the first tranche of dollar loans. The AMNS took the stance that it would not pay the Dollar Tariff

as the Third Amendment Agreement was quite 'onerous'. The court below took the view that the AMNS is obliged to pay the Dollar Tariff at the base exchange rate prevailing on 30th December 2020 instead of the exchange rate of 30th April 2013 as provided in the contract.

SUBMISSIONS ON BEHALF OF THE EBTL IN THE FIRST APPEALS NOS.3040 AND 3055 OF 2021 RESPECTIVELY:

54. Mr.Mihir Joshi, the learned senior counsel for Nanavati Associates appearing for the appellant-EBTL, vehemently submitted that the Commercial Court could be said to have travelled far beyond the scope of Section 9 of the Arbitration Act while directing the EBTL to maintain a channel depth of 10 meters at all times. Mr.Joshi would submit that the only obligation on the part of his client is to maintain a minimum depth of 10 meters at the terminal and a minimum depth of 10 meters below the chart datum in the channel. The former is an express obligation, which is indisputably being continuously performed by the EBTL and not in controversy. Mr.Joshi would submit that the latter is purportedly an implied covenant, which is sought to be enforced by way of a mandatory direction in the form of an interim measure at the stage of Section 9 of the Arbitration Act. Mr.Joshi would submit that his client has no obligation, express or implied, to maintain any specific depth in the channel.

55. Mr.Joshi would submit that his client, after putting in lot of efforts and incurring lot of expenses, was able to reach a depth of 12 meters below the chart datum in the channel. The AMNS was informed about the same and was also requested to

pay the additional cargo handling charges of Rs.21=00 per MT escalated annually. According to Mr.Joshi, the AMNS doubted such claim put forward by his client as regards reaching the depth of 12 meters below chart datum in the channel. The AMNS declined to pay the additional cargo handling charges of Rs.21=00 per MT escalated annually.

56. Mr.Joshi would submit that his client ensures the AMNS the depth in the channel as would allow the safe navigation of the vessels with a 10 meters draft in furtherance of its clear and undisputed obligation to provide a minimum draft of 10 meters at the terminal. Mr.Joshi would submit that even the court below in its impugned order in para 9.2 has observed that, "*...when we peruse the CHA and SLA, then prima facie, I do not find any such express clause imposing liability upon the EBTL to maintain channel depth at 10 meter and also provide 24 x 7 access.*"

57. Mr.Joshi would submit that the impugned order also records in para 21.3 that, "*...there are no quantifiable data available on record to show that vessels of even 10 meter draft of AMNS has not been serviced or that any of the vessels have grounded or any other incident has happened.*"

58. According to Mr.Joshi, in view of the aforesaid, the mandatory direction issued by the court below to his client to dig the channel to a depth of 10 meters is erroneous in law and more particularly without recording any finding on the issue of balance of convenience.

59. Mr.Joshi would submit that the Deep-Water Jetties are in the Tapi river estuary where the natural depth of the channel is 0 (zero) meter. The channel as it stands today has been dredged continuously by the EBTL to facilitate the safe navigation of the vessels. Dredging the channel requires huge costs on a continuing basis given the continuous siltation patterns. In such circumstances, the parties had agreed that the EBTL shall provide a minimum draft of 10 meters to the vessels of the AMNS. If the AMNS submission that minimum draft of 10 meters is required to be read as an obligation on the EBTL to provide a draft of more than 10 meters, then the obligation on the AMNS to provide 'minimum' monthly cargo handling charges of 2.08 million metric tonne set out in the Annexure I of the CHA 2011 ought to be read as an obligation on the AMNS to provide more than just 25 million metric tonne of cargo per annum. This is clearly not what the parties intended under the contract. It is neither necessary nor reasonable under the CHA 2011 to imply a covenant on the EBTL to provide depth of 10 meters below chart datum in the channel.

60. Mr.Joshi would further submit that in the absence of any benefits or identified prejudice to the AMNS (since all the vessels of 10 meters draft have anyway been continuously handled by the EBTL), such an order to dredge to 10 meters below the chart datum in the channel is wasteful, causes unnecessary environment degradation, and requires irrecoverable cost to be incurred by the EBTL. He would submit that the mandatory direction to maintain the channel depth at 10 meters below the chart datum is prohibited by Sections 14(1)(b) and 39 respectively of the Specific Relief Act, 1963 (since the depth of the channel reduces constantly, any such order imposes a

continuous obligation on the EBTL and would require constant monitoring by the court) Thus, the EBTL ought not to have been directed to maintain a depth of 10 meters below the chart datum in the channel.

61. On the issue of the agreed 'Dollar Tariff', we heard Mr.S.N.Soparkar, the learned senior counsel appearing for the EBTL. Mr.Soparkar would submit that the court below committed a serious error in modifying the express terms of the contract by directing the payment of the Dollar Tariff at different rates. Mr.Soparkar would submit that the court below arbitrarily directed that the rate of USD 3.6792 per tonne (in F.Y. 2020-21) must be paid by the AMNS, which is altogether a different rate from the expressly agreed rate of USD 4.9575 per tonne (in F.Y. 2020-21) recorded in the contract.

62. Mr.Soparkar would submit that the case on hand is one wherein the EBTL and the AMNS have an express and unambiguous agreement on the tariff of USD 4.9575 per tonne payable as the cargo handling charges by the AMNS upon the first tranche of the dollar loans being drawn by the EBTL (Dollar Tariff). The first tranche of the dollar loans was drawn in December 2020 and the EBTL intimated the AMNS that the agreed revised rate is now payable. The learned senior counsel would submit that the AMNS defaulted in making the payment and instead went to the extent of filing an application under Section 9 of the Arbitration Act claiming that the agreed revised tariff is 'onerous' and sought protection from the court below in that regard.

63. Mr.Soparkar would submit that the Commercial Court rightly rejected the claim of the AMNS by holding that the agreement was binding and the AMNS cannot be permitted to resile from its liability to honour the terms thereof. However, saying so, the court re-wrote the fundamental and most material term of the contract by changing the rate.

64. Mr.Soparkar would submit that the court below, under the garb of 'interpreting the contract', directed the tariff conversion date to be December 30, 2020 (which was USD 1 = INR 73), which interpretation is different from the common understanding and interpretation of both the AMNS and the EBTL. It is submitted that neither the pleadings nor the contemporaneous correspondence between the contracting parties contemplates the interpretation of the agreed contractual terms as directed by the court below.

65. Mr.Soparkar would submit, relying on the decision of the Supreme Court in the case of Union of India vs. Kishorilal Gupta, reported in AIR 1959 SC 1362, that when the words in the agreement are clear and unambiguous, there is no scope for drawing hypothetical consideration or the supposed intention of the parties. The parties to the agreement are *ad idem* on the tariff payable pursuant to the Third Amendment Agreement. The parties are also *ad idem* that upon the effectiveness of the Third Amendment Agreement the AMNS is liable to pay the additional tariff of Rs.300 crore *per annum*.

66. Mr.Soparkar invited the attention of this Court to one letter dated 11th January 2021, wherein the following has been stated :

> "*Further, implementation of the Third Amendment would increase the financial obligations of AM/NS India to the tune of approximately Rs. 300 crores per annum without there being any change in the scope of services being provided by EBTL. …*"

67. Mr.Soparkar pointed out that similar position has been reiterated in the Statement of Claims dated 8th October 2020 filed by the AMNS in the arbitration.

68. Mr.Soparkar would submit that the supposed intention of the parties declared by the court below is contrary to the documents and admissions on record. The same has not been asserted by either of the parties in the pleadings or arguments. The same is irrational and contrary to the commercial prudence and reasonableness, and completely unsupported by the factual conspectus in the present case. Such an interpretation would mean that the AMNS had relinquished all control on the tariff to the whims of the EBTL, since the EBTL could have drawn down a small dollar loan on an opportunistic date (say when the exchange rate was at USD 1 = INR 45) and change the tariff payable by its unilateral action

69. Mr.Soparkar would further submit that if the parties had intended to have the Dollar Tariff payable at an exchange rate different from the one set out in the Third Amendment Agreement, the same would be material and would have been reflected in the Fourth Amendment Agreement. In the absence of any agreement between the parties to be bound by a future exchange rate and where the written contract provides a specific

exchange rate, the court below erred in rewriting the terms of the contract to apply a subsequent exchange rate

70. Mr.Soparkar submitted that the court below, without any basis or supported by any pleadings whatsoever, held that the "*intention of the parties was very specific to take the rate that was prevailing on the date of coming into force the agreement*." Accordingly, the court below directed payment of the Dollar Tariff at the base exchange rate of December 30, 2020, resulting in the payment of approximately Rs.3 crore to the EBTL (as opposed to Rs.300 crore which the AMNS would have paid under the contract). It is settled law that the Courts cannot grant reliefs which have neither been pleaded nor prayed.

71. Mr.Soparkar would submit that the court below committed a serious error while holding that even if the Third Amendment Agreement would not have been suspended and was still in operation, even in such a scenario there would be a revision of such RBI reference rate at regular intervals. According to the learned senior counsel, such an assumption is irrational, without basis and contrary to the marked norms.

72. Mr.Soparkar would submit that the court below erred in holding that the entire exercise of enforcing the exchange rate of 2013 in the year 2020 *de hors* the object of the agreement and is something absurdity. Mr.Soparkar would submit that the test for implying a term in a contract is not of absurdity but of the '*penta-principle*' as laid down by the Supreme Court in the case of Nabha Power Ltd. (NPL) vs. Punjab State Power Corporation and another, reported in 2018 11 SCC 508.

73. In Nabha Power Ltd. (*supra*), the Supreme Court held that a term cannot be implied to improve upon a contract. Mr.Soparkar laid much emphasis on the following observations of the Supreme Court in the case of Nabha Power Ltd. (*supra*) :

> *"45. Once again, Lord Hoffmann, now sitting on the Privy Council, in Attorney General of Belize v. Belize Telecom Ltd. [Attorney General of Belize v. Belize Telecom Ltd., (2009) 1 WLR 1988 (PC)] , dealt with the implied terms of the contract in the context of the articles of association of a company. It has been observed as under: (WLR pg.1993-95, paras 16-27)*
>
> > *"16. Before discussing in greater detail the reasoning of the Court of Appeal, the Board will make some general observations about the process of implication. The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed: see Investors Compensation Scheme Ltd. v. West Bromwich Building Society [Investors Compensation Scheme Ltd. v. West Bromwich Building Society, (1998) 1 WLR 896 : (1998) 1 All ER 98 (HL)] , WLR*

pg.912-13. It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.

17. The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls."

(*emphasis supplied*)

74. In such circumstances referred to above, Mr.Soparkar prays that the impugned order passed by the court below directing the AMNS to pay at the rate of USD 3.6792 per tonne instead of the expressly agreed rate of USD 4.9575 per tonne deserves to be quashed and set-aside.

75. Mr.Soparkar would submit that the application filed by his client under Section 9 in that regard may be allowed.

SUBMISSIONS ON BEHALF OF THE AMNS :

76. We heard Mr.Mihir Thakore, the learned senior counsel assisted by Mr.Nirag Pathak, the learned advocate appearing for

the AMNS on the first issue, i.e. on the issue of the channel depth.

77. Mr.Thakore would submit that no error, much less an error of law, could be said to have been committed by the court below in granting such relief by way of an interim measure in favour of his client. He submitted that the EBTL is obliged under the CHA to maintain a channel depth of 10 meters at all times. Mr.Thakore took us through various provisions of the Indian Ports Act, 1908 (for short, the 'Ports Act') to establish that the term 'port' would include the jetty, channel and berth. He took us through the following definitions :

> *Section 3(4) - "'port' includes also any part of a river or channel in which this Act is for the time being in force."*
>
> *Section 4(1)(a) - "The Government may, by notification in the Official Gazette, - (a) extend this Act to any port in which this Act is not in force or to any part of any navigable river or channel which leads to a port and in which this Act is not in force."*
>
> *Section 5 - "Alteration of limits of ports - (1) The Government may, subject to any rights of private property, alter the limits of any port in which this Act is in force."*
>
> *Section 6(1)(a) and (b) – (1) The Government may, in addition to any rules which it may make under any other enactment for the time being in force, make such rules, consistent with this Act, as it thinks necessary for any of the following purposes, namely :-*

(a) for regulating the time and hours at and during which, the speed at which, and the manner and conditions in and on which, vessels generally or vessels of any class defined in the rules, may enter, leave or be moved in any port subject to this Act;

(b) for regulating the berths, stations and anchorages to be occupied by vessels in any such port;"

78. Similarly, the term 'port', 'minor port' and 'port approaches' in the Gujarat Maritime Board Act, 1981 are defined as follows :

Section 2(r) - "'port' means any minor port to which this Act applies within such limits as may from time to time be defined by the State Government under the Indian Ports Act."

Section 2(o) - "'minor port' means a port other than a major port declared as such by the Central Government under any law."

Section 2(s) - "'port approaches' in relation to a port means those parts of the navigable rivers and channels leading to the port in which the Indian Ports Act is in force."

79. He submitted that the term 'port' includes channel, jetty and berth is evident from the ESIL's own letter to the GMB (letter dated 3rd August 2007) which states as follows :

"To copy with these special requirements, ESSAR have proposed to undertake development of new captive port facility, which would include the following :

1. Extension of the jetty by 550 meters;
2. Create a deep water berthing facility;
3. Dredge a new approach channel for direct berthing of bigger ships."

80. Thus, according to Mr.Thakore, any reference to the port in the contractual arrangement between the EBTL and the AMNS should include references to the jetty, channel as well as the berth.

81. Annexure-I of the CHA provides as follows :

"EBTL is increasing the depth of the channel from existing 10 meter below chart datum (CD) to 12 meter. After increasing the depth of channel to 12 meter the cargo handling charges for Raw Material will increase by Rs.21/- per MT."

82. According to Mr.Thakore, the Annexure I of the CHA clearly establishes that when the CHA was entered into, there was an assurance to maintain a depth of 10 meters at the channel at all times. Annexure I provides that if the EBTL increases the depth from existing 10 meters to 12 meters below the chart datum, only then the cargo handling charges will increase by Rs.21/- per MT. Thus, it is clear that the CHA was entered into on the premise that a minimum channel depth of 10 meters is available

and will be maintained by the EBTL at all times. In fact, the cargo handling charges were fixed on the premise that the channel depth would be 10 meters below the chart datum at all times.

83. In addition, under the SLA, the EBTL is required to bear the costs of any lighterage of vessels upto 14 meters draft. This also implies that the parties understood that the vessels of upto 14 meters draft can normally navigate through the channel (with a 10 meters depth) without any lighterage.

84. Article 4 of the CHA provides as follows :

"ARTICLE 4 – FACILITIES AND SERVICES

EBTL shall hereby agree to provide ESTL all the facilities required for :-

a) Loading of steel cargo like various types of steel products for export and coastal movement purpose; and

b) Unloading of :

i) raw materials
ii) iron ore
iii) iron ore pellets
iv) coke I coal
v) limestone
vi) dolomite
vii) Any other goods which may be mutually agreed by and between the parties hereto;

The facilities provided by the EBTL shall collectively be referred to as 'Cargo Handling Facilities'.

c) In addition to the article 5.1, EBTL shall provide ESTL the Port related facilities to the vessels of ESTL calling at the Port for loading and unloading of cargo are mentioned below:

i) Berth
ii) Tugs
iii) Pilotage for the vessel
iv) Minimum draft of 10 meters
v) Mechanical loading and unloading facilities
vi) Cargo Handling and Storage etc.
vii) EBTL shall ensure the discharge rate per Weather Working Day as enumerated in Annexure III."

85. The Annexure III of the CHA (including the note provided therein) provides for the discharge rate in MT of various cargo at Hazira Port per weather working day. This annexure contemplates the coming in of cape sized and mini cape sized vessels. The draft of a cape size vessel is around 17 meters and that of a mini cape size vessel is below 17 meters but above 13 meters.

86. Thus, according to Mr.Thakore, as per the CHA, there is an obligation on the EBTL to maintain a minimum terminal draft of 10 meters at all times. However, this does not mean that the EBTL cannot provide a draft higher than 10 meters. The

maximum permissible draft at the Deep Water Berth shall be subject to the approved depth by the NSPC. This is evident from the Recital 2 of the Service Level Agreement which is as follows :

> *"EBTL has guaranteed a minimum draft of 10 M. at its Deep Draft Berth. The maximum permissible draft at Deep Water Berth is subject to approved depth by Navigational Safety at Ports Committee (NSPC) of the Govt. of India from time to time."*

87. The NSPC Certificate dated 28th February 2020 states that the permissible draft is "10 m. + tide".

88. Mr.Thakore submitted that if the provisions of the CHA, SLA and the NSPC Certificate are read together, it is evident that the EBTL has undertaken that the minimum 10 meters terminal draft will be available at all times (including at low tide) and a higher draft will be made available as per tidal variations. This is supported by Annexure III to the CHA, which contemplates the discharge of cape sized and mini cape sized vessels with a minimum cargo load of 80,000 MT discharge rate per weather working day on board. These vessels have a draft of much more than 10 meters. The benefit of tide must necessarily be given, which is also supported by the stipulation in the SLA requiring the EBTL to declare the projected draft for every month – these projections take tidal variations into account.

89. The berthing capacity is at 10 m + tide. Therefore, a vessel having a terminal draft of minimum 10 m + tide can come in. In order for a vessel to reach the berth, it will have to pass through

the channel. So even a vessel with a higher draft than 10 meters should be able to navigate through the channel and reach the berth. If the depth is kept at 7 meters, the navigation through the channel will not be possible. Only a vessel of 10 meters draft can pass through the navigation channel and that too only during the high tide. It will not be possible for a vessel above 10 meters draft to navigate through the channel. Hence, given that the term 'port' includes jetty, channel and berth, the obligation to maintain minimum draft of 10 meters should be throughout the port and not just at the berth.

90. Mr.Thakore submitted that the contract must be read as a whole. To say that the EBTL shall provide minimum draft of 10 meters would mean that a draft of 10 meters shall be available at the terminal at all times. The obligation is to provide 10 m. + tide draft. But a draft of 10 meters should be the minimum that is provided to the AMNS.

91. In the impugned order, the Commercial Court passed the following directions :

> *"(18.1) AMNS has prayed that EBTl shall keep the terminal draft and channel depth at 10 Meter. I have already interpreted the contract to see what is provided under the Agreement. What is provided under the agreement has to be adhered to by EBTL. The agreement specifically provides that minimum draft should be 10 meter at the terminal and maximum shall be permissible draft (I.e. 10 meter + tide). To provide such draft as available is the reciprocal obligation of EBTL against it charging MGT and Dollarization to AMNS.*

EBTL cannot contend that though it will charge MGT and Dollarization to AMNS but it will not honor its obligation under the Agreement and will not provide requisite available permissible draft.

(18.2) I have already held for AMNS that one cannot ignore the express terms of the contract under garb of dispute. The same principle will apply for EBTL. What is good for the goose is also good for the gander. Hence EBTL is obliged to provide the draft as available at the terminal and it cannot restrain the terminal draft at ceiling of 10 meter in aberration to the terms of the Contract till the final dispute and liability is adjudicated by Arbitral Tribunal.

(18.3) CHA specifically provides declaration of terminal draft. Such declaration of terminal draft has to be based on tidal forecast and other weather conditions. Hence it is required that EBTL shall, based upon the tidal forecast as published by GMB, determine and declare the available terminal draft for every month and accordingly shall service the vessels of the AMNS as per the CHA. EBTL shall also be obliged to maintain the Channel Depth at 10 meter CD.

*** ***

A. By way of Interim Measure under Section 9(1)(ii)(e) of the Arbitration & Conciliation Act, 1996 EBTL is hereby directed to declare the terminal Draft and maintain the Channel Depth as per Paragraph 18.3 of this Order and shall continue to service the vessels of AMNS;"

92. Mr.Thakore would submit that the court below cannot be said to have issued any mandatory order or injunction, but rather, could be said to have only directed the parties to comply with the terms of the contract. He would submit that the impugned order needs no interference in an appeal filed under Section 37 of the Arbitration Act, more particularly, when the Section 17 application is very much pending before the arbitral tribunal.

93. Mr.Thakore would submit that the court below has judiciously exercised its discretion and granted the interim reliefs till the time the arbitral tribunal decides the issues under Section 17. This indicates that the court below was conscious of the fact that the arbitral tribunal, having been constituted, is the right forum to get those issues adjudicated. The court below was conscious that the power of the arbitral tribunal is the same as that of a civil court and an order passed by the arbitral tribunal under Section 17 is enforceable as an order passed by a civil court. It is further submitted that the court below cannot be faulted for choosing one of the two options available to it. The discretion exercised by the court below is not prohibited under Section 9 or under any of the provisions of the Arbitration Act.

94. In view of the aforesaid, Mr.Thakore prays that there being no merit in the Appeals filed by the EBTL, the same may be dismissed.

DOLLAR TARIFF :

95. On the second issue, i.e. the Dollar Tariff, we had the benefit of hearing very persuasive and erudite arguments of

Mr.Darayus Khambhata, the learned senior counsel appearing for the AMNS. Mr.Khambhata concentrated more on the scope of Section 37 of the Arbitration Act. He would submit that the scope of interference at the end of the court sitting in appeal under Section 37 against an order passed under Section 9 of the Arbitration Act is very circumscribed compared to the scope of interference by a court sitting in appeal under Order 43 of the Code of Civil Procedure against an interim order passed in a suit.

96. In the aforesaid context, Mr.Khambhata placed strong reliance on a judgment of the Delhi High Court in the case of CRSC Research and Design Institute Group Co. Ltd. vs. Dedicated Freight Corridor Corporation of India Limited and others, reported in 2020 SCC Online Del 1526, wherein it was observed that :

> *"Since the time of the observations quoted above of the Supreme Court, there has been another vital development. The law relating to arbitration has been overhauled and the Commercial Courts Act, 2015 has been enacted, both to expedite adjudication of commercial disputes. The Commercial Division of this Court, in this case, was approached by way of a petition under Section 9 of the Arbitration Act, for interim measures. In exercise of the said jurisdiction, the Commercial Division of this Court is not seized with adjudication of the substantive dispute between the appellant, at whose instance the BGs were furnished, and the respondent no.1, in whose favour the BGs were furnished. The said substantive dispute is to be decided in arbitration. This vital difference is to be kept in mind while*

exercising jurisdiction under Section 9 inasmuch as any interpretation given by this Court to the terms of the contract, even though may be said to be on a prima facie view of the matter, has a potential of influencing the Arbitral Tribunal. Not only so, the grant/non-grant of interim measures under Section 9 is essentially discretionary and the scope of interference in appeal under Section 37 is much more limited than in an appeal arising from an interim order in a suit."

"Even in an appeal against an interim order in a suit, the scope of interference, as per the dicta in Wander Ltd. Vs. Antox India P. Ltd. 1990 (Supp) SCC 727 is confined to cases where the Single Judge has exercise the discretion vested in him arbitrarily or capriciously or perversely or where the Single Judge has ignored settled principle of law regulating grant or refusal of interlocutory injunctions and does not extend to substituting own discretion for the discretion exercised by the Single Judge."

97. Mr.Khambhata thereafter relied upon the decision of the Supreme Court in the case of Wander Ltd. and another vs. Antox India P. Ltd., reported in 1990 Supp SCC 727, wherein the Supreme Court has laid down the permissible scope of interference in an appeal against an interim order passed in a suit, as under :

"In such appeals, the Appellate Court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or

capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by the court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion."

98. According to Mr.Khambhata, if this High Court is inclined to interfere with the impugned order passed by the Commercial Court in exercise of its powers under Section 9 of the Arbitration Act, then it will have to arrive at the conclusion that the findings recorded therein are erroneous or perverse. According to Mr.Khambhata, the impugned order may not be set-aside merely because this Court may not be in agreement with some of the findings recorded by the court below.

99. Mr.Khambhata would submit that even otherwise the court below has restricted the operation of its order for a period of three months or till the Section 17 application is decided. In such circumstances also, this Court may not disturb the order.

100. Mr.Khambhata thereafter gave us more than a fair idea as regards the doctrines of 'party autonomy' and '*kompetenz – competence*'. By explaining the two doctrines, Mr.Khambhata

would submit that the object and purport of the Arbitration Act is to uphold the 'party autonomy' and to avoid judicial intervention, or to minimize it, more particularly, when the parties have opted for arbitration as their dispute resolution process. It statutorily incorporates the doctrine of positive and negative *'kompetenz-competence'*.

101. Mr.Khambhata thereafter proceeded to make his submissions on merits on the issue of dollarization.

102. Mr.Khambhata submitted that the Third Amendment Agreement and the Fourth Amendment Agreement are not enforceable, and in such circumstances, the AMNS is not obliged to pay the cargo handling charges in accordance with the USD denominated tariff. Mr.Khambhata, with his usual fairness, submitted that this issue however may be decided by the arbitral tribunal. He would submit, without prejudice to his main contention as regards the enforceability of the Third and the Fourth Amendment Agreement, that if at all a dollarized tariff is to be paid, it should be calculated using the USD exchange rate prevailing on 30th December 2020 as the base rate. The claim of the EBTL that the USD exchange rate as on 30th April 2013 should be taken as the base rate is untenable in law. This, according to Mr.Khambhata, is a matter of interpretation of contract to subserve the explicit purpose and intent, i.e. to have a natural hedge.

103. Mr.Khambhata would submit that pursuant to the 4th Amendment Agreement, the amendment effective date came to be shifted to the date on which the EBTL drew its first tranche of

borrowings in the USD. In such circumstances, the date 30th April 2013 could be said to have lost its significance. Since the EBTL drew its first tranche of the borrowings in the USD only on 31st December 2020, the amendment effective date, if any, should be 30th December 2020. Therefore, according to Mr.Khambhata, even if the AMNS is obliged to pay the dollarized tariff, which it denies, but in any case it should be calculated using the USD exchange rate as on 30th December 2020. According to Mr.Khambhata, if it is not calculated using the USD exchange rate as on 30th December 2020, then the Third Amendment Agreement would cease to operate as a natural hedge and would result in a windfall profit for one of the parties based on the changing exchange rate.

104. The learned senior counsel would submit that the Commercial Court adopted a balanced approach by directing the AMNS to pay the dollarized tariff in accordance with the RBI exchange rate prevailing on 30th April 2013. The Commercial Court rightly took such a view considering that the object of the Third Amendment Agreement was to provide a natural hedge.

105. The learned senior counsel submitted that the Commercial Court is also right in observing that if the rate of 30th April 2013 is to be considered for calculating the dollarized tariff, the same would be a bonanza of INR 300 crore per year for the EBTL at the cost of the AMNS, which would run contrary to the very concept of hedging.

106. Mr.Khambhata thereafter made us understand the concept of natural hedge - explicit intention underlying the Third

Amendment Agreement. Mr.Khambhata also took us through the observations made by the Supreme Court in the case of Nabha Power Ltd. (*supra*), more particularly, paragraph 44 therein.

107. Mr.Khambhata, the learned senior counsel pointed out that his client, i.e. the AMNS, has also preferred two First Appeals being First Appeals Nos.3506 of 2021 and 3507 of 2021 respectively. Both these appeals are directed against that part of the order of the Commercial Court, where the Commercial Court directed his client to pay the disputed dollarized minimum monthly charges.

108. Mr.Khambhata would submit that in doing the aforesaid, the Commercial Court has in effect could be said to have granted specific performance of the contract in the Section 9 proceedings. He would submit that the court, exercising powers under Section 9 of the Arbitration Act, is not to enforce the contract since the proceedings under Section 9 are neither the proceedings arising out of a contract nor a suit. Section 9 empowers the court only to issue orders to preserve the subject matter of arbitration till the arbitral tribunal has an occasion to adjudicate the matter; and that if the courts, in exercise of powers under Section 9, start enforcing the terms of the contract, it would frustrate the very concept of arbitration, where the parties choose to have their disputes adjudicated, instead of by the courts, by arbitrators of their choice.

109. Mr.Khambhata would submit that the AMNS disputes its liability to pay the minimum monthly charges and the dollarized cargo handling charges.

110. In such circumstances referred to above, Mr.Khambhata prays that both the First Appeals filed by his client may be allowed and the order passed by the Commercial Court to the extent it has caused serious prejudice to his client may be quashed and set-aside.

ANALYSIS :

111. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for the consideration of this Court is, whether the Commercial Court committed any error in passing the impugned order.

SCOPE OF SECTION 9 OF THE ARBITRATION ACT :

112. Section 9 of the Arbitration Act contemplates 'interim measures, etc.', by the court. The expression 'etc.', used at the end of a definition clause has been held, in several decisions, to be required to be interpreted *noscitur a sociis and ejusdem generis* (the latter principle applying where the words, preceding the word 'etc.', constituted a genus, and the former principle applying more universally, in all cases), the words preceding it. The measures put in place by the court, in exercise of the jurisdiction vested by Section 9 has, therefore, to be in the nature of 'interim measures'. The 'interim reliefs', as held by the Bombay High Court in the Bank of Maharashtra vs. M.V.River Oghese, 1990 AIR (Bom) 107, 'are granted to serve the temporary purpose of protecting the plaintiff's interest so that the suit is not frustrated'.

113. The court, while exercising its power under Section 9 of the Arbitration Act, has to be fully conscious of the power, vested in the arbitrator/arbitral tribunal, by Section 17 of the same Act. A reading of Sections 9 and 17 respectively of the Arbitration Act, reveals that they are identically worded. The 'interim measures', which can be ordered by the arbitral tribunal under Section 17 are the very same as those which can be ordered by the court under Section 9. It is for this reason that sub-section (3) of Section 9 prescribes grant of interim measures, by the court, consequent on constitution of the arbitral tribunal, save and except where the court finds that the circumstances exist, which may not render the remedy, under Section 17, to be efficacious. The court, while exercising jurisdiction under Section 9, even at a pre-arbitration stage, cannot, therefore, usurp the jurisdiction which would, otherwise, be vested in the arbitrator, or the arbitral tribunal, yet to be constituted. The court is also required to ensure that Section 9 is not employed, by litigants, who feel that it is easier to obtain interim relief from a court, rather than from an arbitrator or arbitral tribunal, to forum shop. If left unchecked, Section 9 is easily amenable to such misuse. While, in an appropriate case, the court must not hesitate in ordering 'interim measures', under Section 9, in judging whether a particular case is 'appropriate' or not, the court is required to do some tightrope walking. The principles, to be borne in mind, while examining whether a case has been made out for the grant of interim measures, under Section 9, are the existence of a *prima facie* case, the balance of convenience and the possibility of irreparable loss or prejudice, if the interim relief was to be declined, apart from the consideration of public interest. [see

Ramniklal N. Bhutta vs. State of Maharashtra, (1997) 1 SCC 134 and Raunaq International Ltd. vs. I.V.R. Construction Ltd., (1999) 1 SCC 492]

114. However, it is important to state that the mere satisfaction of these criteria does not, *ipso facto*, make out a case for ordering interim measures under Section 9. Additionally, the court is also required to satisfy itself that the relief, being sought under Section 9, cannot await the constitution of the arbitral tribunal, or the appointment of the arbitrator, and the invocation, before such arbitrator or arbitral tribunal, of Section 17. Emergent necessity, of ordering interim measures is, therefore, an additional *sine qua non*, to be satisfied before the court proceeds to grant relief under Section 9 of the Arbitration Act. While passing orders under Section 9, therefore, the court is required to satisfy itself that (i) the applicant, before it, manifestly intends to initiate arbitral proceedings, Sundaram Finance Ltd vs. NEPC India Ltd, 1999 2 SCC 479, (ii) the criteria for grant of interim injunction, which apply to Order 39 of the CPC, stands satisfied, and (iii) circumstances also exist, which renders the requirement of ordering interim measures an emergent necessity, which cannot await a Section 17 proceeding, before the arbitrator, or arbitral tribunal. In assessing whether such an emergent necessity exists, or not, the court would, essentially, have to satisfy itself that failure to order interim measures, under Section 9, would frustrate, or would render the recourse, to arbitration - which is yet to take place - a futility.

115. In Adhunik Steels Ltd vs. Orissa Manganese and Minerals (P) Ltd, (2007) 7 SCC 125, the Supreme Court examined, in

detail, the scope of Section 9 of the Arbitration Act. Paras 11, 14, 15 and 21 respectively of the report may be reproduced, thus:

> *"9. Learned counsel also relied on International Commercial Arbitration in UNCITRAL Model Law Jurisdictions by Dr. Peter Binder, wherein it is stated:*
>
> > *"It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure ?*
>
> *It is further stated:*
>
> > *"In certain circumstances, especially where the Arbitral Tribunal has not yet been established, the issuance of interim measures by the court is the only way assets can be saved for a future arbitration. Otherwise, the claimant could end up with a worthless arbitral award due to the fact that the losing party has moved his attachable assets to a =safe' jurisdiction where they are out of reach of the claimant's seizure. The importance of such a provision in an arbitration law is therefore evident, and a comparison of the adopting jurisdictions shows that all jurisdictions include some kind of provision on the issue, all granting the parties permission to seek court-ordered interim measures."*

14. Professor Lew in his Commentary on Interim and Conservatory Measures in ICC Arbitration Cases, has indicated:

> *"The demonstration of irreparable or perhaps substantial harm is also necessary for the grant of a measure. This is because it is not appropriate to grant a measure where no irreparable or substantial harm comes to the movant in the event the measure is not granted. The final award offers the means of remedying any harm, reparable or otherwise, once determined."*

15. The question was considered in Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd., 1993 AC 334 : (1993) 2 WLR 262 : (1993) 1 All ER 664 (HL)] The trial Judge in that case took the view that he had the power to grant an interim mandatory injunction directing the continuance of the working of the contract pending the arbitration. The Court of Appeal thought that it was an appropriate case for an injunction but that it had no power to grant injunction because of the arbitration. In further appeal, the House of Lords held that it did have the power to grant injunction but on facts thought it inappropriate to grant one. In formulating its view, the House of Lords highlighted the problem to which an application for interim relief like the one made in that case may give rise. The House of Lords stated at AC p. 367: (All ER p. 690g-h)

> *"It is true that mandatory interlocutory relief may be granted even where it substantially overlaps the final relief claimed in the action; and I also accept that it is possible for the court at the pre-trial stage of a dispute arising under a construction contract to order the defendant to continue with a performance of the works. But the court should approach the making of such an order with the utmost caution, and should be prepared to act only when the balance of advantage plainly favours the grant of relief. In the combination of circumstances which we find in the present case I would have hesitated long before proposing that such an order should be made, even if the action had been destined to remain in the High Court."*

21. It is true that the intention behind Section 9 of the Act is the issuance of an order for preservation of the subject-matter of an arbitration agreement. According to learned counsel for Adhunik Steels, the subject-matter of the arbitration agreement in the case on hand, is the mining and lifting of ore by it from the mines leased to OMM Private Limited for a period of 10 years and its attempted abrupt termination by OMM Private Limited and the dispute before the arbitrator would be the effect of the agreement and the right of OMM Private Limited to terminate it prematurely in the circumstances of the case. So viewed, it was open to the court to pass an order by way of an interim measure of protection that the existing arrangement under the contract should be continued pending the resolution of the dispute by the arbitrator. May be, there is some force in this submission

made on behalf of Adhunik Steels. But, at the same time, whether an interim measure permitting Adhunik Steels to carry on the mining operations, an extraordinary measure in itself in the face of the attempted termination of the contract by OMM Private Limited or the termination of the contract by OMM Private Limited, could be granted or not, would again lead the court to a consideration of the classical rules for the grant of such an interim measure. Whether an interim mandatory injunction could be granted directing the continuance of the working of the contract, had to be considered in the light of the well-settled principles in that behalf. Similarly, whether the attempted termination could be restrained leaving the consequences thereof vague would also be a question that might have to be considered in the context of well-settled principles for the grant of an injunction. Therefore, on the whole, we feel that it would not be correct to say that the power under Section 9 of the Act is totally independent of the well-known principles governing the grant of an interim injunction that generally govern the courts in this connection. So viewed, we have necessarily to see whether the High Court was justified in refusing the interim injunction on the facts and in the circumstances of the case."

116. In Arvind Constructions Ltd vs. Kalinga Mining Corporation, (2007) 6 SCC 798, the Supreme Court reiterated the principle that the exercise of jurisdiction, under Section 9 of the Arbitration Act, is subject to the restrictions and limitations contained in the Specific Relief Act, while Firm Ashok Traders vs. Gurmukh Das Saluja, (2004) 3 SCC 155, also holds - as did

Adhunik Steels Ltd, (1997) 1 SCC 134, two years later - that "the Court under Section 9 is only formulating interim measures so as to protect the right under adjudication before the Arbitral Tribunal from being frustrated".

117. The need for restraint, while exercising jurisdiction under Section 9 of the Arbitration Act, was also emphasised by the Delhi High Court, through Dalveer Bhandari, J. (as he then was) in Olex Facas Pvt Ltd vs. Skoda Export Co. Ltd, 2000 AIR (Del) 161 thus:

> *"In my view, though the Court is vested with the power to grant interim relief, but the Court's discretion must be exercised sparingly and only in appropriate cases. The Courts should be extremely cautious in granting interim relief in cases of this nature. The Court's discretion ought to be exercised in those exceptional cases where there is adequate material on record, leading to a definite conclusion that the respondent is likely to render the entire arbitration proceedings infructuous, by frittering away the properties of funds either before or during the pendency of arbitration proceedings or even during the interregnum period from the date of award and its execution. In those cases, the Courts would be justified in granting interim relief."*

118. The categories of 'interim measures', which could be directed under Section 9, stand specifically delineated in the provision itself. The court can, under Section 9, (i) appoint a guardian for the purposes of arbitral proceedings, (ii) direct preservation, interim custody or sale of the goods which are

subject matter of the arbitration agreement, (iii) secure the amount in dispute in the arbitration, (iv) direct detention, preservation or inspection of any property or thing which is the subject matter of dispute in arbitration, or as to a breach any question may arise therein, (v) grant interim injunction or appoint a receiver and (vi) grant such other interim measure of protection as may appear to the court to be just and convenient. The ambit of sub-clause (ii)(e) of sub-section (1) of Section 9, which empowers the court to grant 'such other interim measure of protection as may appear to the court to be just and convenient' - specifically the ambit of the expression 'just and convenient' - constitutes subject matter of the following enunciation of the law, by Banumathi, J. (as Her Ladyship then was), speaking for the High Court of Madras, in V.Sekar vs. Akash Housing, 2011 AIR (Mad) 110 : (2011) 3 Arb LR 327 (DB):

> *"The purpose of Section 9 is to provide an interim measure of protection to the parties to prevent the ends of justice from being defeated. Section 9(2)(e) vests the Court with the power to grant such interim measures of protection as may be just and convenient. The jurisdiction under the "just and convenient" clause is quite while in amplitude, but must be exercised with restraint. Interim measures are to be granted by the Court so as to protect the rights in adjudication before the arbitral tribunal from being frustrated. It does not allow the Coach the discretion to exercise on restrained powers and frustrate the very object of arbitration."*

> *"Under Section 9 of the 1996 Act, for the Court to grant interim injunction, the Court must be satisfied (i) existence of*

prima facie case, (ii) balance of convenience and (iii) potential for irreparable loss or injury. The power under Section 9 has been considered as essential for strengthening and establishing the effectiveness of the arbitration proceedings. Even if a prima facie case existed in favour of a party, the Court will grant "no injunction", where the Court feels that the grant of injunction would frustrate the object of the arbitration."

The Arbitration Act – Doctrines of Party Autonomy and Kompetenz:

119. The object and purport of the Arbitration Act is to uphold the party autonomy and to avoid judicial intervention or to minimize it in disputes, where the parties have opted for arbitration as their dispute resolution process. It statutorily incorporates the doctrines of positive and negative Kompetenz.

I. Positive Kompetenz :

120. Positive Kompetenz, i.e. the power of the arbitral tribunal to decide its own jurisdiction is statutorily recognized under Section 16(1) of the Arbitration Act, which reads as under :

"16. Competence of arbitral tribunal to rule on its jurisdiction.- (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose.-

(a) an arbitration clause which forms part of a contract shall

be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."

121. If the arbitral tribunal rejects the application under Section 16, the applicant has no option but to proceed with the arbitration and thereafter challenge the award on the ground of lack of jurisdiction under Section 34 of the Arbitration Act. It is only when a Section 16 application is allowed, does the aggrieved party have an option to challenge the order of the arbitral tribunal under Section 37(2) of the Arbitration Act. Thus, the intent of the Parliament is to have all the disputes first adjudicated by the arbitral tribunal for as long as possible.

II. Negative Kompetenz :

122. Negative Kompetenz is the other side of the coin. The negative effect doctrine refers to the circumstances under which the court, before which a case is pending, will refrain from a full review of whether an alleged arbitration agreement, exists as between the parties, is valid, and covers the dispute – in deference to allowing the arbitrators to decide those issues in the first instance. Interference, by and large, is to be in the manner of entertaining challenges to the award rather than at stages prior to the award, unless absolutely necessary and unavoidable. Thus, the arbitral tribunal is permitted to decide first.

123. The concept of Negative Kompetenz has also been explained by the Supreme Court in ArcelorMittal Nippon Steel India Limited vs. Essar Bulk Terminal Limited : 2021 SCC OnLine SC 718 as under :

> *"103. Negative Kompetenz-Kompetenz is a sequel to the rule of priority in favour of the Arbitrators, that is, the requirement for parties to an arbitration agreement to honour their undertaking to submit any dispute covered by such an agreement to arbitration. This entails the consequence that the Courts are prohibited from hearing such disputes."*

124. Section 5 of the Arbitration Act emphasizes the doctrine of negative Kompetenz :

> *"5. Extent of judicial intervention.- Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."*

125. Section 9 of the Arbitration Act (after its amendment in 2015) provides as follows :

> *"9. Interim measures, etc., by Court.-*
>
> *[(1)] A party may, before, or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a Court-*

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely :-

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party or authorising any samples, to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

[(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim

measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.

(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.]"

126. Section 9(3) has been introduced as a measure of Negative Kompetenz and also to reduce the burden on the courts. Section 9(3) must be construed purposively and any attempt to thwart the mandate of Section 9(3) of the Act must be discouraged.

127. The fact that Section 9(3) of the Act has been introduced as a measure of Negative Kompetenz is further substantiated by :

i. Section 17(1) now corresponds to Section 9(1) of the Arbitration Act in terms of the scope and nature of interim orders that can be passed by a Tribunal.

ii. the corresponding introduction of Section 17(2) of the Act, which by way of the deeming fiction introduced therein permits direct enforcement of the orders of the arbitral tribunal passed under Section 17 of the Act, treating it as an order of the court for all purposes. Recourse to Section 9 is no longer necessary to enforce the interim orders of an arbitral tribunal.

128. Section 17, as is stands now, reads as under :

"17. Interim measures ordered by arbitral tribunal.- (1) A party may, during the arbitral proceedings or at any time after making of the arbitral award but before it is enforced in accordance with section 36, apply to the arbitral tribunal-

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:-

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient, andthe arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.

(2) Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908, in the same manner as if it were an order of the Court.]"

129. Thus, the clear object and purpose of the Arbitration Act and more specifically the amendments to Sections 9 and 17 introduced vide the 2015 Amendment to the Arbitration Act is :

(i) To enable expeditious resolution of the disputes; and
(ii) To ease the burden of the courts.

130. The Supreme Court in the case of Amazon.com NV Investment Holdings LLC vs. Future Retail Limited and others, reported in 2021 SCC OnLine SC 557, in paras 57, 59, 60, 61 and 62 respectively observed as follows :

"57. It is relevant to note that the 246th Law Commission Report also recommended the insertion of Sections 9(2) and 9(3) as follows:

"Amendment of Section 9

6. In Section 9,

(i) before the words "A party may, before" add sub-section "(1)"

(ii) after the words "any proceedings before it" add sub-section "(2) Where, before the arbitral proceedings, a Court grants any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within 60 days from the date of such grant or within such shorter or further time as indicated by the Court, failing which the interim measure of protection shall cease to operate.

[NOTE: This amendment is to ensure the timely initiation of arbitration proceedings by a party who is granted an interim measure of protection.]

(iii) Add sub-section "(3) Once the Arbitral Tribunal has been constituted, the Court shall, ordinarily, not entertain an Application under this provision unless circumstances exist owing to which the remedy under section 17 is not efficacious."

[NOTE: This amendment seeks to reduce the role of the Court in relation to grant of interim measures once the Arbitral Tribunal has been constituted. After all, once the Tribunal is seized of the matter it is most appropriate for the Tribunal to hear all interim applications. This also appears to be the spirit of the UNCITRAL Model Law as amended in 2006.

Accordingly, section 17 has been amended to provide the Arbitral Tribunal the same powers as a Court would have under section 9]"

59. In essence, what is provided by the SIAC Rules and the other institutional rules, is reflected in Sections 9(2) and 9(3) so far as interim orders passed by courts are concerned. The introduction of Sections 9(2) and 9(3) would show that the objective was to avoid courts being flooded with Section 9 petitions when an arbitral tribunal is constituted for two good reasons – (i) that the clogged court system ought to be decongested, and (ii) that an arbitral tribunal, once constituted, would be able to grant interim relief in a timely and efficacious manner.

60. Similarly, the 246th Law Commission Report recommended the amendment of Section 17 as follows:

"Amendment of Section 17

11. In Section 17

*****

(vi) In sub-section (1), after sub-clause "(d)", insert sub-clause "(e) such other interim measure of protection as may appear to the Arbitral Tribunal to be just and convenient, and the arbitral tribunal shall have the same power for making orders as the Court has for the purpose of, and in relation to, any proceedings before it."

[NOTE: This is to provide the arbitral tribunal the same powers as a civil court in relation to grant of interim measures. When this provision is read in conjunction with section 9(2), parties will by default be forced to approach the Arbitral Tribunal for interim relief once the Tribunal has been constituted. The Arbitral Tribunal would continue to have powers to grant interim relief post-award. This regime would decrease the burden on Courts. Further, this would also be in tune with the spirit of the UNCITRAL Model Law as amended in 2006.]

(vii) delete words in sub-section (2) and add the words "(2) Subject to any orders passed in appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an Order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 in the same manner as if it were an Order of the Court."

[NOTE: This is to ensure the effective enforcement of interim measures that may be ordered by an arbitral tribunal.]"

61. Section 17 was then amended by the very same 2015 Amendment Act (which brought in sub-sections (2) and (3) to Section 9) to substitute Section 17 so that Section 17(1) would be a mirror image of Section 9(1), making it clear that an arbitral tribunal is fully clothed with the same power as

a court to provide for interim relief. Also, Section 17(2) was added so as to provide for enforceability of such orders, again, as if they were orders passed by a court, thereby bringing Section 17 on par with Section 9.

62. An Emergency Arbitrator's "award", i.e., order, would undoubtedly be an order which furthers these very objectives, i.e., to decongest the court system and to give the parties urgent interim relief in cases which deserve such relief."

131. The Supreme Court, in ArcelorMittal's case (supra), in paras 67, 68, 93, 95, 96, 101 and 102 respectively held that :

"67. To discourage the filing of applications for interim measures in Courts under Section 9(1) of the Arbitration Act, Section 17 has also been amended to clothe the Arbitral Tribunal with the same powers to grant interim measures, as the Court under Section 9(1). The 2015 Amendment also introduces a deeming fiction, whereby an order passed by the Arbitral Tribunal under Section 17 is deemed to be an order of Court for all purposes and is enforceable as an order of Court.

68. With the law as it stands today, the Arbitral Tribunal has the same power to grant interim relief as the Court and the remedy under Section 17 is as efficacious as the remedy under Section 9(1). There is, therefore, no reason why the

Court should continue to take up applications for interim relief, once the Arbitral Tribunal is constituted and is in seisin of the dispute between the parties, unless there is some impediment in approaching the Arbitral Tribunal, or the interim relief sought cannot expeditiously be obtained from the Arbitral Tribunal.

93. It is now well settled that the expression "entertain" means to consider by application of mind to the issues raised. The Court entertains a case when it takes a matter up for consideration. The process of consideration could continue till the pronouncement of judgment as argued by Khambata. Once an Arbitral Tribunal is constituted the Court cannot take up an application under Section 9 for consideration, unless the remedy under Section 17 is inefficacious. However, once an application is entertained in the sense it is taken up for consideration, and the Court has applied its mind to the Court can certainly proceed to adjudicate the application.

95. On a combined reading of Section 9 with Section 17 of the Arbitration Act, once an Arbitral Tribunal is constituted, the Court would not entertain and/or in other words take up for consideration and apply its mind to an application for interim measure, unless the remedy under Section 17 is inefficacious, even though the application may have been filed before the constitution of the Arbitral Tribunal. The bar of Section 9(3) would not operate, once an application has been entertained and taken up for consideration, as in the

instant case, where hearing has been concluded and judgment has been reserved...

96. Even after an Arbitral Tribunal is constituted, there may be myriads of reasons why the Arbitral Tribunal may not be an efficacious alternative to Section 9(1). This could even be by reason of temporary unavailability of any one of the Arbitrators of an Arbitral Tribunal by reason of illness, travel etc.

101. As pointed out by Mr. Khambata, the 246 th Report of the Law Commission, submitted in August 2014 states that Section 9(3) seeks to reduce the role of the Court in relation to grant of interim measure, once the Arbitral Tribunal has been constituted. This is also in keeping with the UNCITRAL Model Law which discourages Court proceedings in relation to disputes arising out of an agreement which contains a clause for arbitration.

102. As held by this Court in Amazon.com NV Investment Holdings LLC (supra), the object of introducing Section 9(3) was to avoid Courts being flooded with applications under Section 9 of the Arbitration Act."

132. As observed by the Supreme Court in ArcelorMittal's case (*supra*), Section 9(3) imposes a bar on a court from ousting the jurisdiction of an arbitral tribunal under Section 17 of the Act, unless it is established to the satisfaction of the court, that the remedy under Section 17 of the Act is inefficacious.

Natural hedge – intention underlying the Third Amendment Agreement:

133. It is the case of the AMNS that the explicit intent and business sense underlying the Third Amendment Agreement was to create a 'natural hedge' for the parties. Clause (c) provides as under :

> *"(c) The prices of raw materials and finished goods produced by ESTL is determined by international markets and these prices are benchmarked in US Dollars. Further, majority of the input costs of ESTL will continue to be benchmarked in US Dollars. In order to have a natural hedge, ESTL proposes that majority of its expenses be converted into US Dollar denominated expenses."*

A natural hedge, by definition :

> *"Is a risk mitigation technique that involves investing in asset pairings that are negatively correlated. Natural hedges also occur through the normal course of business; for example, a company that conducts operations in another country will have minimal currency risk, because cash inflows and outflows are in the same currency. This means that a firm might set up supply chains within the country in which it produces and sells goods, so that currency risk is largely avoided. Otherwise, if it only sold into that country but had operations elsewhere, then it would be exposed to currency risk when repatriating the cash back to corporate headquarters."*

134. Further, "*(a) natural hedge can also be implemented when institutions exploit their normal operating procedures. For example, if they incur expenses in the same currency that their revenues are generated they will actually reduce their exchange rate risk exposure, naturally*".

135. Mr.Khambhata is right in a way that being a risk mitigating mechanism, a natural hedge can never be an arrangement where one party earns a bonanza at the cost of another party. A natural hedge under which the EBTL received payments as per the USD denominated tariff would nullify its exposure to repay the loan at an additional amount owing to the fluctuation in the USD to INR rate.

136. The above has been confirmed by the Reserve Bank of India, which defines a natural hedge as :

> *"Natural hedge, in lieu of financial hedge, will be considered only to the extent of offsetting projected cash flows/revenues in matching currency, net of all other projected outflows. For this purpose, an ECB may be considered naturally hedged if the offsetting exposure has the maturity/cash flow within the same accounting year. Any other arrangements/structures, where revenues are indexed to foreign currency will not be considered as natural hedge."*

137. The Reserve Bank of India's definition and its emphasis on the 'same accounting year' confirms that, a natural hedge cannot be interpreted to mean that, it would enable a party to gain a bonanza owing to the foreign exchange fluctuations.

SUBMISSIONS ON BEHALF OF THE AMNS IN THE FIRST APPEALS NOS.3506 AND 3506 OF 2021 RESPECTIVELY :

138. The submissions by and large stand covered as recorded from para 54 onwards, i.e. the submissions on behalf of the EBTL in their appeals. We need not specifically reiterate the very same submissions.

FINAL ANALYSIS :

139. We propose to deal with the issue of Dollar Tariff first as much is not required to be said at our end in this regard. On plain reading of the impugned judgment and order, it appears to us that the Commercial Court, while granting the relief in favour of the parties, has indeed decided the entire dispute by himself and nothing is left for the decision to be taken by the arbitral tribunal that has already been constituted. It is true that at times it may not be impermissible for the court to come to the *prima facie* finding for granting relief which may result in the final decision in arbitration or suit or substantive proceeding. However, the substantive dispute between the parties is to be decided in arbitration.

140. On 21st February 2011, the EBTL and the ESIL entered into a cargo handling agreement. The CHA provides, *inter alia,* for the obligations in respect of the handling, loading and unloading of cargo related to the operations of the steel plant operated by the ESIL and the port related services/facilities to be provided by the EBTL. The record reveals that the CHA was thereafter amended for seven times. Subsequently, on 7th May

2013, the CHA was amended by way of the Third Amendment Agreement. By way of this amendment, the cargo handling charges payable to the EBTL under clause 5.2 of the CHA was agreed to be determined as per USD denominated tariff of USD 1 = INR 54.2190 (i.e. the RBI Reference Closing Rate as on 30th April 2013). The objective of the Third Amendment Agreement has been provided in the Recital (c) read with Recital (d) which provide as under :

> *"(c) The prices of raw materials and finished goods produced by ESTL is determined by international markets and these prices are benchmarked in US Dollars. Further, majority of the input costs of ESTL will continue to be benchmarked in US Dollars. In order to have a natural hedge, ESTL proposes that majority of its expenses be converted into US Dollar denominated expenses.*
>
> *(d) Accordingly, it would be commercially prudent for the parties to have the charges relating to port handling and other charges to be dominated in US Dollars and an equivalent amount of INR be payable...."*

141. Further, Article 5.2A was inserted which obliged the ESIL to provide the EBTL a Letter of Credit for a value equivalent to one month's billing.

142. On 15th October 2013, the CHA was further amended by way of the Fourth Amendment Agreement. This amendment clarified the applicability of the Third Amendment Agreement. It was agreed that the Third Amendment Agreement shall be effective only after the EBTL draws its first tranche of borrowings

in the USD. Until such time, the cargo handling charges payable to the EBTL shall be determined in Indian rupees.

143. On 16th December 2019, the AMNS took over the operations of the ESIL whereby the ESIL and the EBTL ceased to be a part of the same group of companies, i.e. the ESSAR Group.

144. The stance of the AMNS before the Commercial Court was that the Third Amendment Agreement and the Fourth Amendment Agreement are not enforceable, and in such circumstances, the AMNS is not required to pay the cargo handling charges as per the USD denominated rates.

145. It appears that the Commercial Court, in para 11.5 of the impugned order, made a passing observation that there is some weight in the challenge made by the AMNS to the Third and the Fourth Amendment Agreements. The Commercial Court appears to have taken a balanced view in this regard. It declined to grant the relief as prayed for by the AMNS in their Section 9 application as regards the very enforceability of the Third and the Fourth Amendment Agreements, and at the same time, directed the AMNS to pay the cargo handling charges as per the USD denominated rates prevailing on 30th December 2020 as the base rate.

146. The EBTL is aggrieved by such relief granted in favour of the AMNS as the EBTL asserts that the AMNS should have been asked to make the payment as per the USD exchange rate as on 30th April 2013 and also the payment towards the defaulted amount of Rs.40.89 crore along with interest being the

applicable cargo handling charges payable under the CHA as amended by the Third and the Fourth Amendment Agreements.

147. If the Commercial Court would have straightway said that the Third and the Fourth Amendment Agreements are not enforceable being onerous, the same would have rendered its order vulnerable as it would amount to granting a substantive relief and not as an interim measure.

148. In exercise of the powers under Section 9 of the Arbitration Act, the court concerned is not empowered to adjudicate the substantive dispute between the parties. The said substantive dispute is to be decided in arbitration. This vital difference is to be kept in mind while exercising the jurisdiction under Section 9 inasmuch as, as rightly pointed out by the Delhi High court in the case of CRSC Research and Design Institute Group Co. Ltd. (*supra*) that any interpretation given by the court to the terms of the contract, even though may be said to be on a *prima facie* view of the matter, may have a potential of influencing the arbitral tribunal.

149. In the aforesaid context, the only short point for our consideration is, whether we should interfere with the relief granted by the Commercial Court in favour of the AMNS so far as the USD exchange rate prevailing on a particular date is concerned. Obviously, if the AMNS has been asked to make the payment as per the USD exchange rate as on 30th December 2020, it would suffer a financial loss. However, is this loss which the EBTL may have to suffer would be in the form of an irreparable injury which cannot be compensated in terms of

money at any point of time ? Is it something which the arbitral tribunal would not be in a position to look into and grant an appropriate relief ?

150. It is rather elementary that in the matters of grant of interim relief, the satisfaction of the court only about the existence of *prima facie* case in favour of the suitor is not enough. The other elements, i.e. balance of convenience and likelihood of irreparable injury, are not of empty formality and carry their own relevance; and while exercising its discretion in the matter of interim relief and adopting a particular course, the court needs to weigh the risk of injustice, if ultimately the decision of the main matter runs counter to the course being adopted at the time of granting or refusing the interim relief. We may usefully refer to the relevant principle stated in the decision of Chancery Division in Films Rover International Ltd. and others vs. Cannon Film Sales Ltd., (1986) 3 All ER 772 as under:

> *"....The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the "wrong" decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial.* ***A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong"*** *in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle."*

151. While referring to various expositions in the said decision, the Supreme Court, in the case of Dorab Cawasji Warden vs. Coomi Sorab Warden and others, (1990) 2 SCC 117, observed as under :

> *"16. The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining.* ***But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines****. Generally stated these guidelines are:*
>
> > *(1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.*
> > *(2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.(3) The balance of convenience is in favour of the one seeking such relief.*

17. Being essentially an equitable relief the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the court to be exercised in the light of the facts and circumstances in each case. Though the above guidelines are neither exhaustive nor complete or absolute rules, and there may be exceptional circumstances needing action, applying them as prerequisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion."

152. At this stage, we must refer to a Division Bench decision of the Calcutta High Court in the case of Bikash Chandra Deb vs. Vijaya Minerals Pvt Ltd., reported in (2005) 1 CalHN 582. In the litigation before the Calcutta High Court, there was an agreement between the parties and on the basis thereof the appellant therein had agreed and declared that he would not sell or otherwise part with or dispose of any manganese and iron ore from the mine and the buyer being the respondent therein and the plaintiff in the suit, would be the sole and the only buyer of all the manganese and iron ore from the mine during the continuance of the agreement. The learned counsel appearing for the defendant drew the attention of the court to the factum of the rates as mentioned in the agreement and submitted that the rates were so inexplicably low that those cannot termed to be an unconscionable bargain which the Law Court ought not to have enforced and the parties cannot possibly be *ad idem* on that score and the agreement thus cannot be declared to be valid. It was further argued that there was a negative covenant, which otherwise was unenforceable and the question of directing the specific performance of the contract would not arise. It was

argued that the grant of the interim order of injunction by the learned Single Judge would unmistakably lead to the conclusion that the agreement had been given effect to without the suit being decreed.

153. The Division Bench proceeded in its order that the submission canvassed on behalf of the defendant had some force, but on a closure scrutiny, the same failed to withstand in the test of being substantive. The court took notice of the fact that there was written agreement between the parties and as a matter one of the clauses of the agreement it envisaged grant of a mining lease in favour of the respondent therein. The Division Bench was looking into the legality and validity of the order passed by a learned Single Judge of the High Court granting the injunction. While dismissing the application for stay of the order passed by the learned Single Judge, the Division Bench observed as under :

> *"12. It is true that the learned Trial Judge has passed an ad interim order of injunction and there is some amount of sufferance so far as the appellant is concerned, but does that negate an agreement in writing? We are afraid that at this interlocutory stage of the proceedings, we are not in a position to go into the same.*
>
> *13. In any event, as regards the onerous term, Explanation to Section 20 of the Specific Relief Act, makes the position clear. Explanation I, categorically records that mere inadequacy of consideration or the mere fact that the contract is onerous to the defendant or improvident in its nature shall not he deemed to constitute an unfair*

advantage within the meaning of Clause (a) or hardship within the meaning of Clause (b) of Section 20.

14. Be it recorded that we are not expressing any opinion at this stage of the proceedings and the matter is left to be decided by the Learned Trial Judge, at the time of final disposal of the suit and at this interlocutory stage of the proceedings question of interventions of this Appellate Court or to entertain an appeal or grant an interim order on the basis of submission of the appellant that the agreement is onerous does not and cannot arise.

15. In this context the observation of the House of Lords in the case of White and Carter (Councils) Ltd. v. McGregor, 1962 AC 413, seems to be very apposite. The House of Lords observed : "it may be unfortunate that the appellants have saddled themselves with an unwanted contract causing an apparent waste of time and money. No doubt this aspect impressed the Court of Session, but there is no equity which can assist the appellant. It is trite that equity will not rewrite an improvident contract where there is no disability on either side."

16. Admittedly there is no disability in the facts of this matter under consideration, neither there is any pleading or submission to that effect.

17. Turning attention on to Mr. Mitter's further contention viz. issue of balance of convenience, it is to be noted that the

Court shall lean in favour of introduction of the concept of balance of convenience, but does not mean and imply that the balance would be on one side and not in favour of the other. There must be proper balance between the parties and the balance cannot be an one-sided affair.

18. On the factual score as above, can it be said that the agreement between the parties unmistakably depicts an unfair advantage in favour of the respondent? The answer, on the basis of the observations of the House of Lords, cannot but be in the negative. A sum of 15 lacs has been paid on account of the consideration money and as such, question of reduction in price cannot be stated that to be that onerous so as to prompt the Appellate Court to intervene at the interlocutory stage of the proceedings.

19. Insofar as their issue of negative covenant is concerned, the same cannot, in our view, be decided at this stage of the proceedings.

20. As regards the forum convenience clause, be it noted here that the agreement specifically provides the same and as such it is too early to record our views in that regard."

154. In keeping with the above referred principles, one of the simple questions to be adverted to at the threshold in the present litigation is, whether the EBTL is likely to suffer irreparable injury in case they are paid as per the USD exchange rate prevailing on 30th December 2020.

155. The answer, in our view, has to be in the negative. The arbitral tribunal, in the course of the arbitral proceedings, will be looking into the issue as regards the enforceability of the Third and the Fourth Amendment Agreements. The arbitral tribunal would also be looking into the core issue, whether the AMNS should continue to pay the USD exchange rate prevailing on 30th December 2020 on the principle of natural hedge. All larger issues in this regard will have to be gone into by the arbitral tribunal and the parties would ultimately be governed by the final award that may be passed having regard to the nature of the evidence that may be led by the parties before the arbitral tribunal.

156. In such circumstances, we are of the view that the appeals of both, the EBTL as well as the AMNS, on the issue of the Dollar Tariff should fail.

157. We now proceed to consider the issue with respect to the terminal draft and the channel depth. We propose to look into this issue by posing a question to be answered by us, whether there is anything to indicate that till the point of time the AMNS filed the Section 9 application the EBTL was maintaining a channel depth of 10 meters below the chart datum ? Is it the case that all of a sudden the EBTL stopped maintaining the channel depth, which put the AMNS in difficulty so far as the berthing of the cape sized and mini cape sized vessels are concerned ? Although a faint attempt was made by Mr.Thakore to indicate that the EBTL was maintaining a channel depth of 10 meters below the chart datum based on some data available on record, yet it is difficult for this Court to say anything in this regard.

158. We are of the view that the relief granted by the Commercial Court by way of an interim measure in favour of the AMNS directing the EBTL to provide and maintain a channel depth of 10 meters below the chart datum for all times overlooks the concept of balance of convenience. Whether there is an obligation, express or implied, to maintain any specific depth in the channel, would be a substantive issue that will have to be looked into by the arbitral tribunal. However, by way of an interim measure to direct the EBTL to keep dredging the channel continuously is something which could not have been granted by way of an interim measure. This relief in favour of the AMNS may be to its benefit, but at the same time, the court should also have considered the hardships that the EBTL may have to face in complying with such interim measures. The Commercial Court should have looked into this particular issue having regard to the balance of convenience. It appears that the Commercial Court got persuaded by some *prima facie* case made out by the AMNS, but mere *prima facie* case by itself is not sufficient to grant any relief by way of an interim measure in exercise of power under Section 9 of the Arbitration Act. The court must be satisfied that the comparative mischief, hardships or the inconvenience which is likely to be caused to the applicant by refusing the relief prayed for will be greater than that which is likely to be caused to the opposite party by granting it. The court owed a duty to consider the convenience of the EBTL as against the convenience of the AMNS.

159. The remarkable observations of Lord Diplock in the case of American Cyanamid Co. vs. Ethicon Ltd., 1975 AC 396: (1975) 2 WLR 316 : The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he

could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where 'the balance of convenience lies'.

160. The relief which has been granted by the court below in favour of the AMNS *prima facie* runs contrary to the finding recorded by the court that 10 meters draft vessels are being serviced. The relevant extract of the impugned order in this regard reads thus :

> *"...With respect I am not able to concur with the arguments of Ld. Sr. Counsel Mr. Khambata. First of all there cannot be theoretical enforcement of a Contract. The obligation to provide minimum 10 Meter draft at the berth 24X7 cannot be interpreted to mean that even if for one minute the draft is not 10 meter that would constitute breach of agreement. Secondly, in absence of quantifiable data to show that vessels of AMNS were not serviced by EBTL, especially in light of data showing that over 140 ships of AMNS were services by EBTL over couple of months, the argument of Ld. Sr.Counsel sans merits. Thirdly as rightly argued and pointed out by Ld. Sr. Counsel Mr. SIBAL no notice of breach has been served by AMNS upon EBTL in this regards*

alleging that EBTL has not been servicing the vessels of AMNS...."

161. It may not be out of place to state at this stage that the AMNS wants the EBTL to maintain a channel depth of 10 meters at all times, but when the EBTL called upon the AMNS to pay the additional cargo handling charges @ Rs.21/- per MT, it doubted the intimation of the EBTL made to the AMNS that it has increased the depth of the channel from the existing 10 meters below the chart datum to 12 meters. *Prima facie*, it appears from the CHA, SLA and the NSP Certificate that the EBTL undertook to maintain a minimum 10 meters terminal draft at all times (including at low tide) and a higher draft subject to the tidal variations.

162. Mr.Thakore is not right in his submission that the court below has not issued any mandatory direction but has only directed the parties to comply with the terms of the contract. On what basis the AMNS says that the court below has only directed the parties to comply with the terms of the contract ? It says so on the basis of the Annexure-I of the CHA which provides as follows:

"EBTL is increasing the depth of the channel from existing 10 meter below chart datum (CD) to 12 meter. After increasing the depth of channel to 12 meter the cargo handling charges for Raw Material will increase by Rs.21/- per MT."

163. On the basis of the above, the AMNS asserts that when the CHA was entered into, there was an assurance to maintain a

depth of 10 meters in the channel at all times. The AMNS assumes that the CHA was entered into on the premise that a minimum channel depth of 10 meters would be available and maintained by the EBTL at all times. We are of the view that all these issues will have to be gone into by the arbitral tribunal, but at the same time, we are sure of one thing that the court below should not have directed the EBTL to maintain a channel depth of 10 meters below the chart datum at all times by way of an interim measure so as to facilitate the cape sized and the mini cape sized vessels to berth safely.

164. Mr.Joshi is right in his submission that all that the AMNS prayed in their Section 9 application was that the channel depth be maintained on the same level as on 10th January 2021. Mr.Joshi pointed out that the depth in the navigation channel as on 10th January 2021 was not 10 meters below the chart datum. In such circumstances, the Commercial Court could be said to have exceeded its jurisdiction by directing the EBTL to maintain a channel depth of 10 meters at all times.

165. The source of power of the court to make orders by way of an interim measure is only in Section 9 of the Arbitration Act and there is no independent power *de hors* that provision. The power under Section 9, however, is not unbridled. It is subject to certain limitations and restrictions, such as, first, it can be exercised by the court to some extent and in the same manner as it could for the purpose of in relation to any proceeding before it, and secondly, the exercise of the power to make interim arrangements should not militate against any power which might be vested in an arbitral tribunal. The interim measures which a court may be requested by a party to take are detailed in

sub-clauses (a) to (e) of clause (ii) of Section 9. Similar measures were given in paragraphs 1 to 4 of the Second Schedule of the Repealed Act. The only change now is that an omnibus provision in the shape of sub-clause (e) has now been added providing that an application may be made to the court for such other interim measures of protection as may appear to the court to be just and convenient. The interim measures of protection which would also include interim injunction should not be passed for the mere asking. There are well-settled and well-defined principles and norms as discussed above governing the grant of temporary injunctions. Suffice it to say that the power conferred under Section 9 of the Arbitration Act is to be exercised by the court only in sparing circumstances. The interim directions can be issued under Section 9 only for the purpose of arbitration proceedings and with a view to protect the interest of the parties which otherwise cannot be protected or safeguarded by the arbitral tribunal. The power contemplated under Section 9 is not intended to frustrate the arbitral proceedings.

166. In the aforesaid context, we may refer to a decision of the Karnataka High Court in the case of Deccan Asian Infrastructure (Mauritius) Inc. vs. BPL Communications Limited and others, reported in (2005) 3 KarLJ 143, as contained in para 14 :

> *"14. As could be seen from the above provision of Section 9 which empowers the Court to grant interim measures for preservation and several custody of the properties involved in the arbitration proceedings the power of the Court under Section 9 of the Act is not unbridled but it is subject to the limitations and restrictions and the Court can exercise the*

discretion to the same extent and in the same manner as it can for the purpose or in relation to any other proceedings before it. Under Section 9 the Court has to exercise the discretion in the interest of justice and take interim measures to preserve the properties involved in the arbitration proceedings. The interim measures are to protect the properties and it must appear to the Court to be just and convenient. That the words used 'just and convenient' do not mean that the Court can pass any Order simply because the Court thinks it convenient. Such Order should be passed only to protect the properties involved in the matter. It cannot be disputed that as an interim measure the Court can also grant an Order of temporary injunction. But can an Order be issued preventing the parties to an arbitration from appearing before the Arbitral Tribunal? Further even in a case where an Order of injunction is to be granted the parties seeking the injunction should satisfy the Court that it has got a prima facie case and that if the Order is refused it would result in irreparable injury to the party and further the applicant should show that the balance of convenience lie in favour of granting the Order rather than refusing it. Even though the powers to grant an interim measure under the Section is wide it has to be exercised in the spirit of the underlying principles enunciated in the section."

167. We are of the view that we should refrain from discussing the various issues at length any further as any discussion in details may cause prejudice to either of the parties before the arbitral tribunal.

168. One more issue was debated before us as regards restricting the operation of the order passed by the Commercial Court providing interim measures in exercise of powers under Section 9 of the Arbitration Act.

169. In the case on hand, the Commercial Court thought fit to discuss all the issues threadbare, but at the end of it, restricted the relief granted in favour of the parties from its operation for a period of three months or until the arbitral tribunal would pass an appropriate order under Section 17 of the Act, whichever is earlier.

170. Mr.Joshi, the learned senior counsel appearing for the EBTL, submitted that having regard to the legislative intent, the endeavour on the part of the court should be to ensure that the process under the Arbitration Act is more user friendly, cost effective and lead to its judicious disposal of the cases. This is apparent from the Statement of Object and Reasons of the 2015 Amendment to the Arbitration Act and the decision of the Supreme Court in Union of India vs. U.P. State Bridge Corporation Limited, (2015) 2 SCC 52. Mr.Joshi appears to be right in his submission that the intent behind Section 9 of the Arbitration Act is not to turn back the clock and require a matter already agitated before the court under Section 9 once again at the end of the arbitral tribunal under Section 17 of the Act. This has been expressly held by the Supreme Court in its judgment dated 14th September 2021 arising out of this very litigation between the parties (ArcelorMittal Nippon Steel India Limited vs. Essar Bulk Terminal Limited, 2021 SCC OnLine SC 718).

171. We are also of the view that if the Commercial Court thought fit to look into the issues raised by the parties threadbare and has delivered an exhaustive judgment going to the extent of even determining the rights of the parties in accordance with the terms of the agreement on record, it should not have restricted the operation of its order.

172. In the aforesaid context, we may refer to a Division Bench decision of this High Court in the case of Kiritkumar Futarmal Jain vs. Valencia Corporation, reported in (2019) 3 GLH 667, wherein the court observed as under :

> *"61. It, however, may be noted that section 9 of the Arbitration Act does not limit the operation of any order passed by the court granting any relief thereunder by way of an interim measure till the constitution of the arbitral tribunal. The order passed by a court under section 9 of the Arbitration Act would continue to remain in force till the arbitral proceedings come to an end. In this regard it may be apposite to cite with agreement the decision of the Andhra Pradesh High Court in the case of Velugubanti Hari Babu v. Parvathini Narasinmha Rao (supra), the relevant part whereof has been extracted hereunder :*
>
> > *"34. As regards the submission that the interim order granted by the Civil Court would automatically come to an end once an arbitrator is appointed and thereafter the party has to seek interim relief before the arbitrator, we find the same without any merit. In Sundaram Finance Ltd., (1999) 2 SCC 479, the Supreme Court held at para-13 as under:*

> *"Under the 1996 Act the Court can pass interim orders under Section 9. Arbitral proceedings, as we have seen, commence only when the request to refer the dispute is received by the respondent as per Section 21 of the Act. The material words occurring in Section 9 are "before or during the arbitral proceedings". This clearly contemplates two stages when the Court can pass interim orders, i.e., during the arbitral proceedings or before the arbitral proceeedings...."*
>
> *35. The language of Section 9(2) of the Act does not limit the operation of interim measure till appointment of arbitrator only. On the contrary, a party can seek interim measure at three stages, viz., before, during the pendency of arbitral proceedings and after passing of the award, but before it is enforced under Section 36 of the Act. The fact that a party can approach the Court even during the pendency of the arbitral proceedings and seek interim measure, clearly shows that the legislature clearly intended to empower the court to grant interim measure to last till the arbitral proceedings conclude and an award is passed. As noted above, the Court is empowered to grant such measures even after an award is passed, but before it is enforced.""*

173. In the above referred judgment, this Court proceeded to observe further in para 64 as under :

> *"64. In the considered opinion of this court, once the jurisdiction of the court is invoked under section 9 of the Arbitration Act for interim measures as contemplated therein, either before or during the pendency of arbitral proceedings or at any time after the making of arbitral award but before it is enforced in accordance with section 36 of that Act and such remedy is exhausted, similar interim measures cannot be claimed before the arbitral tribunal under sub-section (2) of section 17 of the Arbitration Act, inasmuch as, it would give rise to a situation where there would simultaneously be two orders in existence in respect of the same cause of action, one passed by the court and the other passed by the arbitral tribunal, which order is also required to be treated as an order of the court for all purposes, which could not have been the intention of the legislature. The second question, therefore, is also required to be answered in favour of the respondents and against the petitioner."*

174. Thus, this Court took the view that once the jurisdiction of the court is invoked under Section 9 of the Arbitration Act for interim measures either before or during the pendency of the arbitral proceedings and such remedy is exhausted, similar interim measures cannot be claimed before the arbitral tribunal under sub-section (2) of Section 17 of the Arbitration Act as the same may give rise to a situation where there would be simultaneously two orders in existence in respect of the same cause of action; one, that may be passed by the court, and another, that may be passed by the arbitral tribunal. We are

informed that as on date the parties have filed their respective Section 17 applications before the arbitral tribunal. We do not intend to say anything further in this regard. It is for the arbitral tribunal to look into such applications and decide the same in accordance with law.

175. We should not be understood to have laid down as an absolute proposition of law that in any circumstances the relief that may be granted by the court under Section 9 of the Arbitration Act cannot be limited from its operation. What we are trying to convey is that it would all depend upon the nature of the relief granted by the court. In a given case, the relief granted may be of such a type that the court may be justified in saying that such relief shall operate for a particular period of time or till the arbitral tribunal decides the Section 17 application. However, once an exhaustive adjudication is undertaken by the court on all aspects of the matter, then it would be unreasonable, or rather, futile to restrict the reliefs from their operations.

176. In the result, the First Appeal No.3040 of 2021 is partly allowed. The order passed by the Commercial Court directing the appellant – EBTL to maintain a channel depth of 10 meters at all times is hereby quashed and set aside. The other three appeals should fail and are hereby dismissed. The connected Civil Applications stand disposed of.

(J. B. PARDIWALA, J.)

(NIRAL R. MEHTA, J.)

/MOINUDDIN

After the judgment was pronounced, Mr.Pahwa, the learned senior counsel appearing for the AMNS, made a fervent request that the EBTL may be asked to continue to abide by the direction issued by the Commercial Court of maintaining a minimum depth of 10 meters in the channel for 24x7, as the AMNS would like to carry the matter further before the higher forum.

For the reasons recorded in the judgment, we decline the above request.

(J. B. PARDIWALA, J.)

(NIRAL R. MEHTA, J.)

/MOINUDDIN