AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

WPC No.2989 of 2021

Ultratech Cement Limited, A Company registered under The provisions of Companies Act, 1956 and having its Registered office at 'B' Wing, Ahura Centre, 2 Floor, Mahakali Caves Road, Andheri (East) Mumbai - 400093 (Maharashtra) and its Cement Plant/Unit at Rawan Cement Works, P.O. Grasim Vihar, Village- Rawan District Baloda Bazar-Bhatapara (CG) and Hirmi Cement Works, Post Hirmi- 493195, Village-Hirmi District Baloda Bazar-Bhatapara (CG) through its authorized representative.

-----Petitioner

Versus

1. Union of India through the Secretary, Ministry of Railways, Government of India, Rail Bhavan, New Delhi (India).
2. Chairman, Railway Board - Rail Bhawan, Raisina Road, New Delhi – 110001.
3. South East Central Railway, Zonal Office, Bilaspur through Its General Manager, Bilaspur.
4. Senior Divisional Operational Manager South East Central Railway, Divisional Office, Raipur (CG).
5. M/s Shree Cement Limited, Bangur Nagar, Post Box No. 33, Beawar, Rajasthan305901.

----Respondents

For Petitioner : Mr. P. Chidambaram, Senior Advocate,
Mr. Ashish Shrivastava, Senior Advocate along with
Mr. Ashish Prasad, Advocate
Ms. Mukta Dutta, Advocate,
Mr. Aman Pandey, Advocate,
Mr. Ankur Diwan, Advocate,
Mr. Aman Menon, Advocate,
Mr. Rohishek Verma, Adavocate,
Mr. Rahul Ambast, Advocate, & Mr. Udit Khatri, Advocate

For Respondents No.1 to 4 : Mr. Ramakant Mishra, Deputy Solicitor General,
Mr. Tushar Dhar Diwan, Central Government Counsel,
Mr. Rishabh Dev Singh, Advocate

For Respondent No.5 : Mr. Krishnan Venugopal, Senior Advocate,
Mr. Abhishek Sinha, Senior Advocate along with
Mr. U. N. Tiwary, Advocate, and
Mr. Ghanshyam Patel, Advocate

Date of hearing : 22.03.2024
Date of Order : 09.05.2024

Hon'ble Shri Justice Rakesh Mohan Pandey

CAV Order

1. By way of this petition, the petitioner has sought the following relief(s):-

*"**10.1** This Hon'ble Court may kindly be pleased to call for the entire records concerning the case of the petitioner from the possession of the respondents for its kind perusal.*

***10.2** This Hon'ble Court may kindly be pleased to issue appropriate writ quashing and setting aside the impugned IPA dated 08.04.2021 (Annexure P/1) and any other permission and /or approval to further process application made by respondent No.5 being dated 09.02.2021, granted by the respondent No.4 to the respondent No.5 for the purported Greenfield PFT under the 2020 PFT Policy including any permission or approval granted by the respondent No.3 to the respondent No.5 for use of the petitioner's Hathband Private Siding, as being arbitrary and illegal;*

***10.3** This Hon'ble Court may kindly be pleased to issue any other relief as deemed fit and proper in the facts and circumstances of the case."*

2. The petitioner/company has challenged In-Principle Approval (for short 'the IPA') dated 08.04.2021 granted by respondent No. 4/Senior Divisional Operational Manager, South East Central Railway, Divisional Office, Raipur for the proposed construction of a purported Greenfield Private Freight Terminal (for short, Greenfield PFT).

3. The facts of the present case, in a nutshell, are as under:-

A. The petitioner is the largest manufacturer of grey cement, ready-mix concrete and white cement.

B. The Petitioner established Hathband Private Siding (single line) in the Hathband Railway Station in the year 2000 to connect its two integrated cement manufacturing plants i.e. Hirmi Cement Works and Rawan Cement Works for inward and outward movement of raw material and finished products.

C. The petitioner operated its Hathband Private Siding in terms of the Private Siding Policy. The agreements dated 01.02.2008 and 10.08.2010 were entered into between the petitioner and respondent No. 3. The petitioner has invested the amount of Rs. 1800-2000 crores (approx.) towards the expansion of a few

of the associated cement grinding units.

D. The petitioner carried out Brownfield expansion in the cement manufacturing plants located in the State of Chhattisgarh and the same will result in increased traffic (peak) on the petitioner's Hathband Private Siding from 20 to 28.5 rakes per day.

E. The Private Siding Policy is defined in Freight Marketing Circular No. 11 of 2016, which refers to privately owned siding constructed/laid out by a Party at its own cost for railway freight services at the premises of its plant or manufacturing unit or production unit or mines etc. under a special arrangement.

F. The Private Freight Terminal Policy (for short, PFT) was introduced by respondent No. 1 on 23.06.2020 in order to attract more investment in PFTs from the private sector. The objective of the said policy is to encourage the participation of logistic services providers to create world-class logistics facilities i.e., (i) to enable rapid development of freight handling terminals with the participation of the private sector; (ii) to increase the presence and share of railways in the overall transport chain; & (iii) to shift the traffic from road to rail by providing efficient and cost-effective logistics and warehouse solutions.

G. On 09.02.2021, respondent No. 5 moved an application before the railway authorities seeking permission to construct Greenfield PFT under the PFT Policy of 2020, using the petitioner's Private Siding-Hathband.

H. On 08.04.2021, respondent No. 4 granted In-Principle Approval (IPA) to respondent No. 5 for the purported Greenfield PFT, but no information was given to the petitioner.

I. On 04.06.2021, for the first time, the petitioner was informed by respondent No. 4 that respondent No. 5 had submitted a proposal for the construction of Greenfield PFT with take-off from private railway siding of M/s. Ultratech Cement Ltd., Rawan connected from HN Railway Station and proceedings for the approval are going on with the railway administration.

J. On 09.06.2021, respondent No. 4 informed the petitioner that a tripartite meeting was scheduled at 15.30 hrs on 10.06.2021 with regard to the application submitted by respondent No. 5.

K. On 10.06.2021, the petitioner made a representation before respondent No. 4 raising its preliminary objection to the

purported Greenfield PFT.

L. On 11.06.2021, respondent No. 4 accepted the request of the petitioner to reschedule the meeting on 17.06.2021.

M. On 17.06.2021, a virtual meeting was held and the petitioner came to know that the impugned IPA was granted to respondent No. 5 by respondent No. 4 on 08.04.2021 and, respondent No. 5 had already submitted the detailed project report for approval of respondent No. 4.

N. On 01.07.2021, the petitioner received a copy of the letter dated 18.06.2021 from respondent No. 5 through its email dated 01.07.2021 requesting the petitioner to provide a detailed review of the DPR for the purported Greenfield PFT.

O. On 02.07.2021, the petitioner raised an objection with regard to the construction of a purported Greenfield PFT by respondent No. 5.

P. On 16.07.2021, respondent No. 4 informed the petitioner that a meeting would be held through video conferencing on 16.07.2021 to discuss the proposed PFT.

Submissions on behalf of the Petitioner / UltraTech Cement Limited:-

4. Mr. P. Chidambaram, learned Senior Advocate appearing for the petitioner made the following submissions:-

(i) The Private Siding Agreements dated 01.02.2008 and 10.08.2010 ("Private Siding Agreement") between the Petitioner and the Railways were entered into when the Private Siding Policy of 2005 ("Policy of 2005") was in force. The next Private Siding Policy was introduced on 22.08.2016. He further submitted that the Policy of 2005 was reiterated in the Private Siding Policy of 2016 ("Policy of 2016"). Respondents No. 1 to 4 have not produced the Policy of 2005 nor have they demonstrated that the Policy of 2016 was materially different from the Policy of 2005.

(ii) Respondents No. 1 to 4 have quoted the definitions of various clauses of the Policy of 2016 in their return. Respondent No. 5 has also reproduced a few clauses of the Policy of 2016. This implies that the definitions provided under the Policy of 2005 were not different from the definitions given under the Policy of 2016. In their reply to the Additional Affidavit filed by the Petitioner, Respondents No. 1 to 4 have stated that "M/s. UltraTech Cement Ltd. has not migrated to GCT Policy so it abided by the Siding Agreement under the Policy guidelines enforced at that time which are reiterated in the Master Circular on Private Siding Policy in the year 2016" which amounts to a clear admission that the Policy of 2005 was reiterated in the Policy of 2016 and there are no material differences which would affect the case of the petitioner.

(iii) Learned Senior Counsel also submitted that the Private Siding Agreement (Annexure-P/3) to the Policy of 2016 is substantially the same as the signed Private Siding Agreements entered into between the Petitioner and the Railways on 01.02.2008 and 10.08.2010. The small differences are immaterial and the main clauses are identical or substantially the same.

(iv) He further contended that from the interpretation of the Private Siding Policy and terms used in the Policy, the following conclusions can be arrived at:-

i. The Private Siding is only for the end-user (Petitioner in this case). However, one co-user is permitted with the permission of the siding owner and approval of the COM. This clause was amended on 25.09.2017 and again on 18.08.2020. As amended up to date, under Clause 1(i), multiple co-users can be permitted to use the Private Siding on receipt of a written request from the siding owner.

ii. The 'Co-user' is defined as the railway user who has been given permission by the Railway Administration at the written request of the siding owner.

iii. Private Siding is defined as a special arrangement allowing the Railway Track to be connected to the applicant's works. The connecting track is the "private siding".

iv. The siding owner shall bear the capital cost of the siding from the take-off point at the serving station.

v. The responsibilities of the siding owner are contained in paragraph 9.1 of the Private Siding Policy.

(v) Learned Senior Advocate also contended that clauses (d), (H), 4, 13, 15, 16 (a), (d) and (e), 21, 24 (e) and 27 of the Private Siding Agreement are relevant for the disposal of the present case and are required to be discussed:-

d. The **"Applicant"** means the person named as party hereto of the other part and includes in the case of a firm or other association or body of individuals, the individual person or persons for the time being and from time to time Constituting the firm, association or body and, in the case of a company, Corporation or body and corporate the successor in business of interest, such company, corporation or body corporate for the time being.

H. "Siding" includes the Railway track connecting the Applicant's works with the SOUTH EAST CENTRAL Railway system as hereinafter agreed to be constructed by the Railway Administration and all branches and extensions thereof which may hereafter be constructed by the Applicant or by the Railway Administration at the Applicant's request and all sleepers, ballast, embankments, bridges, tunnels, signals interlocking and tele-communication equipment gates, building and other constructions, erections, works and movable. Property constructed /erected/ made/ provided or used in connection with the said track and also all land whereon or, on part whereof the said track and connected things aforesaid are constructed/erected /made/provided or used including land acquired for the purpose thereof as hereinafter provided and land belonging to the Railway Administration and land belonging to or occupied or used by the Applicant.

4. LAND-

a) The Railway land required for laying the siding will be licensed to the applicant, the land outside the Railway boundary shall be

acquired by the Applicant.

b) The Railway land required for the siding will be licensed to the Applicant. The Applicant will have to pay for the land license fee at the rate of 6% per annum of the market value of the land or at such rate as may be revised from time to time. This license fee will be revised every year with a notional increase in land value of 7% p.a. or at such rate as may be revised from time to time over the previous year's market value of land to arrive at the land value of the current year. The land outside the Railway Boundaries shall be acquired by the Applicant at his cost by purchase or otherwise.

c) License fee of land: The Applicant shall pay to the Railway Administration in advance on the first day of April every year such sum of money as may be fixed by the Railway Administration from time to time as a yearly license fee for the use and occupation of land belonging to the Railway Administration upon which the portion of the said siding and works coloured red on the said plan shall be situated, the first payment thereof to be made on the 1st day ___N.A._____.

13. (a) Cost of Railway staff employed at the siding.

In all private sidings other than Engine on load only, barring the cost of one commercial staff per shift, railways will bear the cost of all other railway staff. The cost of all staff at Engine on Load (EOL) siding will be borne by the Railways.

(b) Cost of assets created in the siding.

The applicant shall provide or bear the cost of proper and suitable office accommodation and quarters for all Railway staff posted at the Siding.

(C) Terminal Incentive cum Engine on Load Scheme (TIELS).

(i) Instructions circulated vide Board's letter no.2005/TC(FM)/1/8 dt. 06.03.06 should be followed in this regard.

15. Siding not to be used by other Person (a) No traffic; inward or outward other than that of the Applicant’s Works shall at any time be sent over the siding by the Applicant except with the prior written permission of the Railway Administration and the Applicant undertakes not to permit any other person whomsoever to use the siding and not to take or receive or permit any other person to take or receive from any other person whomsoever any consideration of remuneration of any sort or in respect of the carrying of any commodity over for any purpose whatsoever in connection with siding except with the prior written permission of the Railway Administration and in all cases or disputes or differences with regard to any matters mentioned in this clause the decision of the Chief Operations Manager/Chief Commercial Manager of South Eastern Central Railway shall be final and binding on the Applicant.

(b) The Applicant is forbidden to assign, transfer or sublet in any

manner whatsoever either/whole or any part of the siding without prior written permission of the Railway Administration. The booking and delivery of traffic of the co-user of the siding shall be governed by the same rules and regulations as applicable to the siding owner as far as the levy of freight and other charges are concerned. The siding owners shall give a written undertaking that NA (Name of the party/co-user) has been allowed to use NA (Name of the siding) owned by him with his consent and that the co-user(s) will be responsible for the payment of all railways dues that may accrue as a result of granting of such facility.

16(a). The Applicant shall pay freight and also all other charges (including siding, Placement and withdrawal charges, where leviable) on traffic booked and required by him from and to the siding, from the date of opening of the siding in accordance with the Railway Administration's tariffs, Circulars and Advices in force at or given effect to from the time the traffic is carried or such rates as may be fixed by the Railway Administration from time to time. Such traffic will, be subject to all the rules, conditions and charges as contained in such Tariffs, Circulars and Advices. The date of opening of the siding will be reckoned from the date of notification issued by the Commissioner of Railway Safety or by the Civil Eng Department, as the case may be stating that the said siding is opened to Railway traffic and is fit for movement of the same.

(d) Unless a Goods Clerk representing the Railway Administration is employed at the siding empowered to effect delivery, their wagons will not be placed in the siding until delivery is effected at the serving station. In the event of the Applicant and other co-users of the siding failing to effect delivery within the prescribed free time after the arrival of the wagons at the serving stations, the usual demurrage charges shall begin to accrue on such wagons thereafter, the free time being granted only once.

(e) The Applicant shall at all times permit any person appointed by the Railway Administration to inspect the loading and unloading of wagons of the said siding (Colored red & Green).

21. Applicant not to transfer rights:
The Applicant shall not be entitled to assign or transfer or sublet or permit to be used or enjoyed by any other person in any manner whatsoever any of the rights or benefits conferred upon the Applicant by these presents and any purported assignment, transfer or subletting or permission shall be void and of no effect. Provided also that in the event of any other person being permitted by the Railway Administration to use the siding on the Applicant's request or otherwise the Applicant shall remain responsible to the Railway Administration for all the charges and obligations under this Agreement.

24 (e) In the event of the applicant contravening the provisions of Clause-15 hereof; &

27. Agreement to bind Applicant until terminated by the Railway Administration:

Until terminated by the Railway Administration or unless and until the person or persons in whom the entire rights and interests of the Applicant have vested and with whom the Railway Administration has agreed to enter into a Private Siding Agreement has executed and registered such Agreement in the same form as these presents or in such other form as the Railway Administration may require as provided in Clause 21 hereof, this Agreement shall be binding upon the Applicant and the successors in title or interest of the Applicant in the Applicant's Works.

Provide that the Applicant may, by giving 6 months (six months) notice to the Railway Administration discontinue the use of the siding. In such event, the Applicant shall not be liable for the payment of maintenance and other charges under the Agreement for the period subsequent to the date of expiry of the said notice, but nevertheless, all other obligations under the Agreement shall be binding on him.
Provided further that the Railway Administration has the right without as signing any reason to terminate this Agreement on 6 (six) months notice."

(vi) Learned Senior Counsel stated that on a plain reading of these provisions, the following conclusions may be drawn:-

(i) The applicant is the siding owner (Petitioner in this case);

(ii) The railway land required for laying the siding will be licensed to the applicant and the land outside the railway boundary shall be acquired by the applicant;

(iii) The siding owner shall bear the cost of the railway staff at the siding;

(iv) Siding shall not be used by any other person and, if this condition is violated, the applicant-siding owner is liable to suffer termination of the Private Siding Agreement.

(vii) Learned Senior Advocate further argued that Respondent No. 5 is a stranger to the agreement between the Petitioner and the Railways. Respondent No. 5 cannot use the Petitioner's Private Siding (of a length of 17.085 km) without the consent of the Petitioner. The Petitioner alone has the right to apply for the use of the siding by a co-user. The Petitioner has not consented to or applied to the Railway for the use of the private siding by Respondent No. 5. Hence, by no

stretch of argument can Respondent No. 5 be described or claim to be a Co-user. In this connection, the Petitioner relies upon the averments of Respondents No. 1 to 4 stated in their reply dated 19.08.2021 to the Writ Petition that:-

> "From above definition it becomes clear that the Respondent No. 5 who has proposed to construct a Private Freight Terminal, would not fall within the definition of "co-user" because in the PFT the Respondent No. 5 as Terminal Management Company (TMC) will be providing railway traffic including parcel traffic and containers to other industries and business houses and general public as logistics service provider and it would not be using the siding of Petitioner "for handling of his own goods" as required under definition of "co-user". ..... Neither mere linkage of railway track would render the respondent No.5 'co-user' nor setting up of a PET can be subjected to permission of a private siding owner. A Private siding is meant for the exclusive use of end user or maximum for end user with a co-user, whereas the PFT is a much larger idea..."

(viii) He would next submit that respondent No. 5 is stated to have applied to establish a Private Freight Terminal (PFT) under the Private Freight Terminal Policy dated 23.06.2020 (for short, 2020 PFT Policy). A PFT is a freight terminal operated by a private person who is called a Terminal Management Company (for short, TMC).

(ix) Learned Senior Advocate would further submit that for setting up a PFT, respondent No. 5 should apply for in-principle approval ("IPA") with an operation plan for traffic projection, assessment of the requirement of additional capacity for the Indian Railway network etc. Therefore, it is clear that a PFT will be a public facility in which the TMC is only the operator. A PFT cannot be set up for the exclusive use of the person who proposed the PFT.

(x) He would also contend that the impugned IPA granted by respondents No. 1 to 4 is arbitrary, illegal and void on the following grounds:-

(a) From the list of dates, it will be apparent that

Respondent No. 5 applied for IPA to set up a Greenfield PFT on 09.02.2021 and it was granted on 08.04.2021. Between these two dates, neither any notice was given nor was any opportunity to put forward its objections afforded to the Petitioner.

(b) The IPA does not cite any source of power to grant an IPA for setting up a PFT which will take-off from the existing private siding of the Petitioner. Importantly, it does not cite Clause 19 (c) of the Private Siding Agreement. It does not contain any reasons why approval was granted for the proposed PFT to take-off from the existing private siding of the Petitioner.

(c) The submission of Respondent No. 5 that the IPA is valid because it is identical to the format prescribed in Annexure 2 to the Policy of 2016 is factually wrong and untenable. The format in Annexure 2 is a format to grant in-principle approval for the proposed private siding. Whereas the impugned IPA dated 08.04.2021 grants in-principle approval for the construction of a Greenfield PFT and mischievously adds that the Greenfield PFT will take-off from the private siding of the Petitioner. Certainly, the two are not identical or comparable. It is obvious that the format was taken and altered to grant approval to a PFT and it was mischievously added that the PFT will take off from the private siding of the Petitioner.

(xi) Learned Senior Advocate argues that the impugned IPA has civil consequences to the petitioner and the decision has been taken in utter violation of the principles of natural justice. He submitted that the executive or statutory order is passed by a government authority that has civil consequences upon a person; the principles of natural justice would require that the said person be given an opportunity to be heard. He further submitted that after the grant of the impugned IPA and submission of the proposal of detailed project report by respondent No. 5, the petitioner was informed and immediately

thereafter, objections were raised by the petitioner which clearly shows that the principles of natural justice have been grossly violated. He also submitted that respondents No. 1 to 4 have misused their power in granting the impugned IPA in favour of respondent No. 5 and no such decision could have been taken by respondents No. 1 to 4 without obtaining consent of the petitioner.

(xii) It is further argued that the power to grant IPA to set up a Greenfield PFT is separate. The power to allow a person to 'co-use' the private siding of the petitioner is a different power. He also submitted that this can be done only at the written request of the petitioner or with its consent.

(xiii) He vehemently argued that Clause-19(c) of the Private Siding Agreement to allow 'co-use' has wrongly been applied. He submitted that no private PFT can be allowed to put the goods aggregated by it on a private siding, that too without the consent and behind the back of the owner. There is no provision either in the Private Siding Policy or under the terms of the Private Siding Agreement to allow multiple unspecified users to put their goods without the consent of the petitioner. It is also stated that respondent No. 5 was not eligible to apply for a Greenfield PFT. The application dated 09.02.2021 was moved by respondent No. 5 stating that the goods produced at its factory would be transported from the proposed PFT and a feasibility report was submitted.

(xiv) He stated that there was no proposal for PFT at all.

(xv) He also stated that as per Clause-19(c) of the Private Siding Agreement, the following conditions must be satisfied before an IPA can be granted:-

i. The IPA can be granted only to "any person or persons" other than the owner of the private siding and it cannot be granted to a PFT. The person or persons must be identifiable and must be identified.

ii. The payment by such person or persons to the owner of the siding of such portion of the cost originally paid by the owner must be determined first.

iii. The tollage for such use must also be decided.

iv. Further, the use of the siding by such person or persons in such manner and to such extent as not to interfere with the free use of the siding by the owner must also be determined.

v. The decision on the payment of the cost or the tollage and the decision about the manner in which other persons may use the siding must be arrived at after giving an opportunity to the owner of the siding to state its objections to the proposal. A reasoned order must be passed on the objections of the owner of the siding.

vi. It is only after this process is followed meticulously that the IPA may or may not be granted.

(**xvi**) Learned Senior Advocate also argued that the purported justification given by respondents No. 1 to 5 for the use by respondent No. 5 of the petitioner's private siding is a complete afterthought. In the year 2012, when respondent No. 5 approached the petitioner for consent to co-use, the Railways arrived at the following conclusions:-

a. On a single line network from existing SM-IV to Rawan, it will not be possible to handle 27.5 rakes per day;

b. One additional serving station i.e. SM-V will have to be created ahead of SM-IV (short of Rawan) with a doubling of the line between SM-IV to SM-V;

c. The take off of all three plants i.e. (M/s UTCL Rawan Works, M/s Shree Cement and M/s UTCL Kurkurdih) will have to come from SM-V;

d. In the Reply dated 20.06.2022 filed by Respondents 1-4 to the Additional Affidavit of the Petitioner, Respondents 1-4 have stated as follows confirming the conclusions arrived at in 2012:-

> "...in the year 2012, the following infrastructure development works were required to be taken up by the Petitioner Company, i.e. M/s UTCL, Ravan along with capacity expansion of their plant and In-plant yard modification. As mentioned in Chapter -4 of DPR
>
> (i) 2 new lines at SM-4.
> (ii) ROR at HN.
> (iii) Signaling modification at SM-4.
>
> Similarly as per the approved DPR (In - 2013), M/s Shree Cement Ltd. has to construct –
>
> **A**. SM-S Crossing Station (3 lines) between SM-4 & In-plant yard of M/s UTCL, Ravan.
>
> **B**. In-plant yard of M/s Shree Cement Ltd.-5 lines.
>
> **C**. Doubling between SM-4 and SM-5.
>
> It is pertinent to mention that despite the fact that the aforesaid proposed infrastructure development works which are to be executed by the Petitioner firm & respondent No. 5, M/s Shree Cement Ltd., are not executed but production capacity of the petitioner's plants have been increased long back."

(xvii) Learned Senior Advocate lastly submitted that respondent No. 5 made an attempt to distinguish ***Mohinder Singh Gill's*** case and other similar cases on the ground that where there is public interest involved, the respondents can furnish additional reasons which were not mentioned in the impugned PFT. It is further contended that the application for PFT and grant of IPA is solely for the private interest of respondent No. 5. After having advanced the private interest of Respondent No. 5, it does not lie in the mouth of Respondents No. 1 to 4 and 5 to put forward the specious plea of "public interest", therefore, the ratio laid down in ***Mohinder Singh Gill's*** case and other cases will squarely apply to the present case.

(xviii) It has also been argued by Mr. Chidambaram, learned Senior Advocate that the private siding was constructed by the petitioner at its cost and

was for the exclusive use of the petitioner subject only to allowing a co-user with the consent of the petitioner; thus, the petitioner could use the entire capacity of the private siding for itself; it could also increase its traffic having regard to that capacity, and further increase its production facilities in accordance with the capacity of the private siding.

(xix) In support of his exhaustive arguments, he placed reliance on the judgments rendered in the matters of ***Srilekha Vidyarthi & others v. State of U.P. & others, (1991) 1 SCC 212, para-33*** [*in the absence of reasons, the burden is on the State to justify its action as fair and reasonable*]; ***Mohinder Singh Gill v. The Chief Election Commissioner & others, (1978) 1 SCC 405, para-8; Hindustan Petroleum Corporation Limited v. Darius Shapur Chenai and others, (2005) 7 SCC 627, para 24-26; & State of Punjab v. Bandeep Singh & others, (2016) 1 SCC 724, para -4*** [*the validity of the impugned IPA must be judged by the reasons mentioned in the impugned IPA*]; ***M.P. Power Management Company Limited Jabalpur v. Sky Power Southeast Solar India Private Limited and others, (2023) 2 SCC 703, paras 82, 122, 125***; ***State of U.P. v. Sudhir Kumar Singh & others, (2021) 19 SCC 706, paras 21, 26, 29, 30, 36, 37, 39, 42 & 43; United India Insurance Company Ltd. v. Manubhai Dharmasinhbhai Gajera, (2008) 10 SCC 404, para 46, Gridco Ltd. & anr. v. Sadanada Doloi and another, (2011) 15 SCC 16, paras 22, 25, 26, 27-32, 38, 39***, [*If action/inaction of State is prima facie arbitrary, writ petition would be maintainable even if action of the State is in the realm of non-statutory contract*].

<u>Submissions on Behalf of Respondents No.1 to 4:-</u>

5. Mr. Ramakant Mishra, learned Deputy Solicitor General appearing for respondents No.1 to 4 opposed the submissions made by the learned Senior Counsel appearing for the petitioner and submitted that:-

I. The instant petition is not maintainable as the petitioner has not disclosed the fact that there was a Memorandum of Understanding (MoU) signed between the petitioner and respondent No. 5 about the use of private siding. He further submitted that since respondent No. 5 did not own a private siding, but wanted to construct a Private Freight Terminal from scratch, its proposal has been treated as Greenfield PFT and the contention of the petitioner to the effect that the project of respondent No. 5 should be treated Brownfield PFT, is erroneous.

II. Mr. Mishra argued that the Railways intended to exercise its right conferred by Clause-19 of the Private Siding Agreement and grant permission to respondent No. 5 to use the siding of the petitioner for traffic. He further argued that sufficient care would be taken of the interest of the petitioner while granting permission to respondent No. 5. He also contended that the Railways have every right to save its overall interest, of various stakeholders including upcoming industries and other projects and above all, the interest of the public at large; vesting of such power with Railways is fully justified.

III. He submitted that respondent No. 5 would not fall within the definition of ‘co-user’ as defined under the policy of private siding particularly, clauses 2(v) and (ix). The private siding is meant for the exclusive use of the end-user or maximum for the end user with a co-user, whereas the PFT is a larger idea to facilitate and stimulate the development of privately owned freight terminals which are not

on railway land for dealing with railway traffic including parcel traffic and containers.

IV. He stated that according to the Master Circular, the policy seeks to supplement the in-house programme of the Ministry of Railways by opening the area of terminal development with the participation of the logistics service providers to create world-class logistics facilities.

V. He further stated that if the proposition presented by the petitioner is accepted, in such a situation, respondent No. 5 would have to lay its own new line from Hathband Railway Station, which will make Clause-19 of the Private Siding Agreement futile and redundant.

VI. It is also argued that the application of respondent No. 5 for the proposed construction of the Greenfield PFT was considered by the railway authorities and it was found that the criteria for in-principle approval are fulfilled.

VII. With regard to rake movement, Mr. Mishra submitted that 600 rakes per month as pleaded by the petitioner is disputed and denied. He submitted that in the month of March, 2021 a total of 239 rakes were loaded.

VIII. It is also argued that the in-principle approval is within the domain of expertise of the Railways and the petitioner has given inflated and imaginary figures about possible rake movement on its private single line.

IX. He further contended that according to Clause 19 of the Private Siding Agreement, the petitioner's traffic shall have precedence and the petitioner will be entitled to get tollage.

X. In the additional reply, respondents No. 1 to 4 have stated that the railways can exercise its right conferred by Clause 19 of the private

siding agreement and grant permission to respondent No. 5 to use the private siding of the petitioner.

XI. It is further pleaded and contended that as per the line capacity statement of the BSP division of the SECR, for the year 2018-19, in the single line Section maximum number of trains with an average figure of 94 trains in a day ran between Khongsara-Pendra-Road.

XII. Mr. Mishra submitted that the railways have evolved a method for the maximum use of single-line sections. In the additional reply, Mr. Mishra pleaded that a specific date has been given concerning the use of the single-track section. He further argued that an application was moved by respondent No. 5 on 09.02.2021 for setting up of new PFT/Greenfield PFT according to the policy. The said application was examined in terms of the policy. The Railways after going through the feasibility report and projections of anticipated business volume as per Clauses 8.1.3 and 8.1.4 of IPA on 08.04.2021 granted IPA in favour of respondent No. 5.

XIII. He also stated that IPA is a preliminary approval and not a final. He stated that Para 1.3.1.4 of the PFT Policy provides that IPA will be confined to:-

> **a.** understanding the eligibility of the applicant;
> **b.** whether a takeoff can be given at the serving station;
> **c.** whether the station has the requisite infrastructure for the construction of the proposed PFT;
> **d.** whether a weighbridge can be installed, and
> **e.** traffic projection to assess the requirement for additional capacity on the Railway network.

XIV. He contended that the distance between the Ravan Plant of the

petitioner to the Hathband Railway Station is 17.085 KM and there is a Railway Station i.e. SM IV which will be used for take-off/linkage for the proposed PFT of respondent No. 5. The new Station SM-V will be constructed between crossing station SM-IV i.e. Burgahan and plant yard of the petitioner.

XV. He further contended that respondent No. 5 is also required to construct a new railway terminal called SM-V station to take into account the increase in traffic on the railway track from the proposed PFT and the 17.085 km railway track constructed by the petitioner would be used by respondent No. 5 for its PFT.

XVI. He also contended that the petitioner entered into a private siding agreement with Indian Railways on 01.02.2008, and 10.08.2010 for its private sidings at Rawan and Hirmi plants. As per Clause 1(f) of the agreement, the siding is an undertaking that forms part of the SECR system and the right to use private siding is given in Clause 19. It is also submitted that respondents No. 1 to 4 have granted permission to respondent No. 5 to connect the SM-IV station under Clause 19.

XVII. Mr. Mishra argued that the construction of PFT is in the public interest and will meet the objectives of the PFT Policy after detailed analysis.

XVIII. As far as the eligibility of respondent No. 5 is concerned, Mr. Mishra submitted that respondent No. 5 is eligible as per the Terminal Management Company according to Clause 6.1.1 and power is vested with the Railways under Clause-19 of the Private Siding Agreement. He also submitted that ‘Station’ means any place on the railway at which traffic is dealt or an authority to proceed is given

under the system of working. He argued that SM-4 Budgahan station is operated by the Railway Staff-Station Master though it was constructed at the cost of the petitioner.

XIX. Concerning arbitrary use of power, Mr. Mishra stated that respondents No.1 to 4 have exercised the power given under Clause 19 of the Private Siding Agreement. He further argued that no prejudice would be caused to the petitioner because the petitioner will continue to get the benefit of its private sidings and its traffic will get preference over the traffic of others.

XX. He asserted that the petitioner was invited for discussion. The petitioner initially participated in the meeting but abandoned the process and filed this writ petition. It is also avowed that the private freight terminal was terminated based on the policy and guidelines of Private Freight Terminal, 2020, whereas the Gati Shakti Multi-Model Cargo Terminal Policy came into force on 15.12.2021, but the petitioner has not migrated to the new policy and continued with the erstwhile private siding policy, therefore, the petitioner is bound by the provisions of the private siding policy.

XXI. In support of the submissions put forth, Mr. Mishra placed reliance on the judgments of the Hon'ble Supreme Court rendered in the matters of ***State of Orissa and others v. M/s. Mesco Steels Ltd. & another [(2013)4 SCC 340] para-11, 13, 14,*** and ***Kerala State Electricity Board and another v. Kurien E. Kalathil and others [(2000)6 SCC 293] para-10.***

Submissions on Behalf of Respondent No. 5:-

6. Mr. Krishnan Venugopal, learned Senior Advocate appearing for respondent No. 5 submitted that:-

(i) The impugned IPA has been granted in favour of respondent No. 5 by respondents No.1 to 4 under the PFT Policy of 2020. He further submitted that the petitioner was informed vide letter issued by respondent No. 4 for the grant of IPA on 04.06.2021. He also submitted that the object of the PFT Policy of 2020 is to enable the development of a private freight terminal with the participation of the private sector for enhancing integrated, efficient, cost-effective logistics and warehouse solutions for users. The 2020 PFT Policy enables multiple users, whereas, the Private Siding Policy of 2016 enables exclusive use. He further contended that the 2020 PFT Policy allows two categories of persons to build a PFT, i.e. i. the person who is the owner of the existing private siding constructed under the Private Siding Policy of 2016, &, ii. A person who proposes to construct a wholly new PFT, which is not connected through, related to or dependent on an existing private siding (Greenfield PFT).

(ii) Mr. Venugopal, learned Senior Advocate argued that the contention of the petitioner that respondent No. 5 does not fall within the definition of Greenfield PFT is incorrect and misleading. He advanced almost similar arguments as addressed by the counsel for respondents No.1 to 4 in this regard.

(iii) He also submitted that after the grant of the IPA on 08.04.2021 to respondent No. 5, the petitioner attended two tripartite meetings called by the Railway Administration on 17.06.2021 and 30.06.2021 to discuss the modalities for connecting Respondent No. 5’s proposed PFT to the Petitioner's private siding and the amount of cost or tollage payable to Petitioner, but the petitioner challenged the IPA by filing W.P. No. 2989 of 2021 on 16.07.2021.

(iv) He further stated that the petitioner's interim application for the stay of the impugned IPA was refused by the Ld. Single Judge of this Court vide a detailed order dated 28.09.2021 holding that (a) the project is in a nascent stage; (b) a reading of clause 19 of the Private Siding Agreement between the Indian Railways and the Petitioner dated 01.02.2008 would prima facie show that the Railways can permit to use the siding of the Petitioner to a third party upon payment of cost; (c) Railways have stated that if Respondent SCL is allowed to use the Petitioner's private siding, the Railways will able to handle the traffic and the petitioner's traffic will be given preference; (d) it is sans practical logic that if for example, 10-15 factories are established in the area, 10-15 separate lines would be required to be set up.

(v) He also stated that Writ Appeal No. 342/2021 preferred against the order dated 28.09.2021 was also dismissed vide order dated 12.05.2022.

(vi) It is further argued that the application of the petitioner for PFT is still pending before the Railways. It is also argued the petitioner has not questioned the detailed project report submitted by respondent No. 5. It is vehemently argued that a writ petition would not lie for the implementation of terms of the contract which in this case is the private siding agreements entered into by the petitioner with the Railway Administration. The real value of the private siding lies only in the connectivity to the railway network as the railway provides the petitioner with 1.08 lakh km of rail network across the length and breadth of the country. The huge value is being provided to the companies in the context of the income tax as the assessee secures the right to use the railway siding for the transportation of raw materials and finished

products. The petitioner has availed the benefit under the Income Tax Act by claiming the deduction under Section 80 IA. The petitioner and its predecessors have been using private siding for the last 24 years and they are getting the benefit of income tax rebate.

(vii) It is contended that the petitioner has received a freight discount at the rate of 10% over the entire railway network. He submitted that as the petitioner has taken income tax benefits on the basis that railways have the power and right to allow connectivity to the public on its private siding, the Railways can exercise its power to grant access to the general public.

(viii) Mr. Venugopal, learned Senior Advocate also submitted that there is no deprivation of the right to property by the Railway Administration in permitting respondent No. 5 to connect to the petitioner's siding as the Railways have a right to allow such connectivity under Clause 19 of the petitioner's private Siding Agreement. No party to a contract can claim deprivation of property where the other party is exercising its contractual right; there is no deprivation of property also for the reason that the petitioner will continue to use the siding and its traffic will be given precedence by the Railway Administration.

(ix) It is further argued that the Railways alone have the power to terminate the private siding agreement and overall control and supervision of the private siding vests only with the Railways. He would refer to the following Clauses of the Private Siding Agreement:-

> **"Clause 1(f)** defines "Undertaking" to include all land, railway lines and other movable or immovable property forming part of the South East Central Railway (SECR) system whether belonging to SECR or not.
>
> **Clause 1(h)** defines "Siding" to include the railway track connecting the Petitioner's works with SECR and includes land

belonging to both the Railway Administration and the Petitioner.

Clauses 6(c) and (d) provide that the capital cost of the new siding, except that at the serving station and the "Y' connection, is borne by the Petitioner.

Clause 14 provides that wagons will be hauled by the Railway Administration, and no traffic in commodities other than those considered necessary for the industry shall be sent to the siding except with the written permission of the Railways.

Clause 15(a) records the undertaking of the Petitioner not to permit any other person to use the siding "except with the prior written permission of the Railway Administration".

Clause 15(b) requires the Petitioner to give an undertaking that the co-user has been allowed to use the siding with his consent. There is nothing in clause 15 that requires the Railways to seek the Petitioner's consent.

Clause 19 gives the Railway Administration various rights and powers to use the siding.

Clause 19(b) empowers the Railways to allow connection to the siding and also such alterations as may be necessary to effect such connection. Similarly, **Clause 19(c)** allows the Railways to permit the use of the siding for the traffic of any other person upon payment by such person either of a portion of the cost or tollage. Neither **Clause 19(b) nor (C)** requires Railways to seek the Petitioner's consent before allowing a third party to use the private siding. However, the Petitioner's traffic shall have precedence over all other traffic. Further, a bare reading of Clause 19(c) also shows that the determination of proportionate cost or tollage cannot be made at the preliminary stage of IPA. [These arise after the construction of the PFT is complete and the PFT is ready to be operationalised]

Clause 20 permits the Railways to convert the entire siding into a railway siding by giving the Petitioner six months' notice and paying it compensation.

Clause 21 prohibits the Petitioner from transferring its rights under the Agreements.

Clause 23 allows the Railways to close the siding or any part thereof in the public interest by serving six months’ notice of its intention to terminate the Agreement. In such a situation, the Railways may either construct an alternative siding for the Petitioner or pay compensation to the Petitioner, which is the

cost of the siding originally paid less depreciation @ 5% per annum up to 20 years. No compensation is payable by the Railways after the lapse of 20 years. In the case of the Hirmi siding (the major portion), admittedly the period of 20 years has lapsed, and the Petitioner would not be entitled to any compensation if the Railways chose to terminate the Agreement under this clause. Even the Rawan siding has existed for at least 14 years. (Please see Ultratech ITAT Order, para. 12, where tax deduction for Hirmi siding at issue was claimed from FY 1999-2000).

Clause 24 permits Railways to terminate the Agreements where the Petitioner fails to observe or perform any of its obligations therein.

Clause 27 provides that the Petitioner is bound by the Agreements until terminated by the Railway Administration and until the rights of the Petitioner stand vested in the person with whom the Railways thereafter have entered into a siding agreement. Clause 27(i) only gives the Petitioner the right to discontinue the use of the siding after which he would not be liable to pay the maintenance and other charges.

Clause 26 provides that the consequence of termination is that the Railways would disconnect the siding from the Railway system.

(x) He thus submitted that the Railways have every right under Clause 19 of the Private Siding Agreement to allow the connection of the proposed PFT of the Respondent SCL with the Petitioner's private siding at the SM-IV station and there is nothing in the Agreements requiring the Railways either to hear the Petitioner or to seek its consent in this regard. It is a well-settled principle of the construction of contracts that it must be read as a whole to determine the mutual rights and obligations of the parties. **[*See-Bangalore Electricity Supply Co v. E.S. Solar Power, (2021) 6 SCC 718 (paras. 16-17)*].**

(xi) He would further submit that on a plain reading of Clauses 1 & 19 of the Private Siding Agreements, it is clear that the two provisions operate in different spheres and apply in two entirely different situations: (a)

Clause 15 clearly deals with a situation where the owner of the private siding wishes to allow third parties as "co-users" to load goods at its private siding. Even in such a case, Clause 15 expressly provides that the owner has to obtain the permission of the Railways before allowing co-users to use its siding, (b) In contrast, Clause 19 gives Railways the absolute right to use the private siding for its own traffic or to allow a connection to the private siding either for itself or for a third party without any restriction whatsoever. A bare reading of Clause 19 shows that there is no requirement for the Railways to obtain the Petitioner's consent or to grant it a hearing.

(xii) He further submitted that the 2016 Policy cannot be looked into to ascertain the terms of the Private Siding Policy of 2005. He also submitted that the Private Siding Policy of 2005 must be understood based on a reading of that policy, and not based on averments in the affidavit filed by the Railways. **[*Yogendra Kumar Jaiswal v. State of Bihar, (2016) 3 SCC 183, Paras 89-91]***.

(xiii) It is also stated that the requirement of the petitioner’s consent to Clause 19 before the IPA is tantamount to re-writing or altering the terms of the contract, which is impermissible under the law and there is no requirement to refer to Clause 19 in the IPA. He also argued that the principle of natural justice has not been violated and sufficient opportunity has been granted as the petitioner was called twice for a tripartite meeting however the petitioner failed to participate. He contended that respondent No. 5 is a Greenfield PFT, as it is covered strictly in accordance with the definition given in the Policy of 2020 and respondent No. 5 is setting up a new PFT at its plant. Respondent No. 5 does not have an existing PFT at the plant. He referred to Clause

3.1.1.5 of the PFT Policy and submitted that respondent No. 5 is eligible to set up a PFT and is not setting up a private siding and in this regard also, similar arguments were advanced as put forth by the learned counsel for the railways.

(xiv) With regard to the malafides, the learned Senior Advocate would submit that the petitioner has not impleaded any specific person and no material particulars with regard to malafides against such person or authority has been pleaded in the entire petition, therefore, this allegation deserves to be repelled.

(xv) With regard to the line capacity, similar arguments have been advanced as already addressed by Mr. Mishra.

(xvi) In support of his elaborative arguments, Mr. Venugopal placed reliance on the judgment of the Hon'ble Division Bench of this Court passed in ***WA No. 342/2021 [Ultratech Cement Ltd. v. Union of India and others];*** and the judgments rendered by the Hon'ble Supreme Court in the matters of ***Mesco Steels Ltd. (supra); Dr. G. Sarana v. University of Lucknow [(1976) 3 SCC 585]; M/s. Ultratech Cement Ltd. v. ACIT-2 Mumbai (2017) SCCOnLine ITAT 52; Commissioner of Income-Tax v. Indian Explosives Ltd., 1992 SCC OnLine Cal 328; Indian Bank v. Blue Jaggers Estates Ltd., (2010) 8 SCC 129; UOI v. Assn. Of Unified Telecom Service providers, (2011) 10 SCC 543; Smita Conductors v. MPSEB, (1983) SCC OnLine MP 104; Khan Saheb M. Hassanji v. State of MP, (1963) Supp 2 SCR 235; Bangalore Electricity Supply Co. v. E.S. Solar Power, (2021) 6 SCC 718; Bai Hira Devi v. Official Assignee of Bombay, (1958) SCC OnLine SC 16; Yogendra Kumar Jaiswal v. State of Bihar, (2016) 3 SCC 183; Excise Commissioner v. Issac Peter, (1994) 4 SCC 104; Purvankara Projects Ltd. v. Hotel***

Venus International, (2007) 10 SCC 33; Venketaraman Krishnamurthy v. Lodha Crown Buildmart Pvt. Ltd., 2024 SCC OnLine SC 182; All India Railway Recruitment Board v. K. Shyam Kumar, (2010) 6 SCC 614; Internet & Mobile Assn. v. RBI, (2020) 10 SCC 24; Municipal Corpn. v. BVG Ind. Ltd., (2018) 2 SCC 301; Federation of Railway Officers Assn. v. UOI, (2023) 4 SCC 289; Monnet Ispat v. State of Jharkhand, (2012) 11 SCC 1; Syndicate Bank v. R. Veeranna, (2003) 2 SCC 15; Dharampal Satyapal Limited v. Dy. CCE Gauhati, (2015) 8 SCC 519; Nisha Priya Bhatia v. Union of India, (2020) 13 SCC 56; Union of India v. J.D. Suryavanshi, (2011) 13 SCC 167.

7. I have carefully heard learned counsel appearing for the respective parties, considered their rival submissions put forth hereinabove and perused the documents placed on the file.

8. **<u>Judgments relied on by Mr. Chidambaram, learned Senior Counsel for the petitioner are as follows:-</u>**

A. The Hon'ble Supreme Court in the matter of ***Shrilekha Vidyarthi (supra)***, in para-33 observed and held as under:-

> ***"33.*** *No doubt, it is true, as indicated by us earlier, that there is a presumption of validity of the State action and the burden is on the person who alleges violation of Article 14 to prove the assertion. However, where no plausible reason or principle is indicated nor is it discernible and the impugned State action, therefore, appears to be ex facie arbitrary, the initial burden to prove the arbitrariness is discharged shifting onus on the State to justify its action as fair and reasonable. If the State is unable to produce material to justify its action as fair and reasonable, the burden on the person alleging arbitrariness must be held to be discharged. The scope of judicial review is limited as indicated in Dwarkadas Marfatia's case (supra) to oversee the State action for the purpose of satisfying that it is not vitiated by the vice of arbitrariness and no more. The wisdom of the policy or the lack of it or the desirability of a better alternative is not within the permissible*

scope of judicial review in such cases, it is not for the courts to recast the policy or to substitute it with another which is considered to be more appropriate, once the attack on the ground of arbitrariness is successfully repelled by showing that the act which was done, was fair and reasonable in the facts and circumstances of the case. As indicated by Di- plock, L.J., in Council of Civil Service Unions v. Minister for the Civil Service, [1984] 3 All ER 935, the power of judicial review is limited to the grounds of illegality, irrationality and procedural impropriety. In the case of arbitrariness, the defect of irrationality is obvious."

B. ***Mohinder Singh Gill (supra),*** para 8:-

"8.*The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J. in Gordhandas Bhanji (A.I.T. 1952 S.C. 16):-*

> *"Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to effect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.","*

C. ***M.P. Power Management Company Ltd. Jabalpur (supra),***

paras 82, 122, 125:-

"82.*We may cull out our conclusions in regard to the points, which we have framed:*

82.1*. It is, undoubtedly, true that the writ jurisdiction is a public law remedy. A matter, which lies entirely within a private realm of affairs of public body, may not lend itself for being dealt with under the writ jurisdiction of the Court.*

82.2 *The principle laid down in Bareilly Development Authority (supra) that in the case of a non- statutory contract the rights are governed only by the terms of the contract and the*

decisions, which are purported to be followed, including Radhakrishna Agarwal (supra), may not continue to hold good, in the light of what has been laid down in ABL (supra) and as followed in the recent judgment in Sudhir Kumar Singh (supra).

82.3.*The mere fact that relief is sought under a contract which is not statutory, will not entitle the respondent-State in a case by itself to ward-off scrutiny of its action or inaction under the contract, if the complaining party is able to establish that the action/ inaction is, per se, arbitrary.*

82.4 *An action will lie, undoubtedly, when the State purports to award any largesse and, undoubtedly, this relates to the stage prior to the contract being entered into [See R.D. Shetty (supra)]. This scrutiny, no doubt, would be undertaken within the nature of the judicial review, which has been declared in the decision in Tata Cellular vs. Union of India26.*

82.5. *After the contract is entered into, there can be a variety of circumstances, which may provide a cause of action to a party to the contract with the State, to seek relief by filing a Writ Petition.*

82.6*. Without intending to be exhaustive, it may include the relief of seeking payment of amounts due to the aggrieved party from the State. The State can, indeed, be called upon to honour its obligations of making payment, unless it be that there is a serious and genuine dispute raised relating to the liability of the State to make the payment. Such dispute, ordinarily, would include the contention that the aggrieved party (1994) 6 SCC 651 has not fulfilled its obligations and the Court finds that such a contention by the State is not a mere ruse or a pretence.*

82.7. *The existence of an alternate remedy, is, undoubtedly, a matter to be borne in mind in declining relief in a Writ Petition in a contractual matter. Again, the question as to whether the Writ Petitioner must be told off the gates, would depend upon the nature of the claim and relief sought by the petitioner, the questions, which would have to be decided, and, most importantly, whether there are disputed questions of fact, resolution of which is necessary, as an indispensable prelude to the grant of the relief sought. Undoubtedly, while there is no prohibition, in the Writ Court even deciding disputed questions of fact, particularly when the dispute surrounds demystifying of documents only, the Court may relegate the party to the remedy by way of a civil suit.*

82.8 *The existence of a provision for arbitration, which is a forum intended to quicken the pace of dispute resolution, is viewed as a near bar to the entertainment of a Writ Petition (See in this regard, the view of this Court even in ABL (supra)*

explaining how it distinguished the decision of this Court in State of U.P. and others v. Bridge & Roof Co.27, by its observations in paragraph-14 in ABL (supra)].

***82.9**. The need to deal with disputed questions of fact, cannot be made a smokescreen to guillotine a genuine claim raised in a Writ Petition, when actually the resolution of a disputed question of fact is unnecessary to grant relief to a writ applicant.*

***82.10.** The reach of Article 14 enables a Writ Court to deal with arbitrary State action even after a contract is entered into by the State. A wide variety of circumstances can generate causes of action for invoking Article 14. The Court's approach in dealing with the same, would be (1996) 6 SCC 22 guided by, undoubtedly, the overwhelming need to obviate arbitrary State action, in cases where the Writ remedy provides an effective and fair means of preventing miscarriage of justice arising from palpably unreasonable action by the State.*

***82.11.** Termination of contract can again arise in a wide variety of situations. If for instance, a contract is terminated, by a person, who is demonstrated, without any need for any argument, to be the person, who is completely unauthorised to cancel the contract, there may not be any necessity to drive the party to the unnecessary ordeal of a prolix and avoidable round of litigation. The intervention by the High Court, in such a case, where there is no dispute to be resolved, would also be conducive in public interest, apart from ensuring the Fundamental Right of the petitioner under Article 14 of the Constitution of India. When it comes to a challenge to the termination of a contract by the State, which is a non-statutory body, which is acting in purported exercise of the powers/rights under such a contract, it would be over simplifying a complex issue to lay down any inflexible Rule in favour of the Court turning away the petitioner to alternate Fora. Ordinarily, the cases of termination of contract by the State, acting within its contractual domain, may not lend itself for appropriate redress by the Writ Court. This is, undoubtedly, so if the Court is duty-bound to arrive at findings, which involve untying knots, which are presented by disputed questions of facts. Undoubtedly, in view of ABL Limited (supra), if resolving the dispute, in a case of repudiation of a contract, involves only appreciating the true scope of documentary material in the light of pleadings, the Court may still grant relief to an applicant. We must enter a caveat. The Courts are today reeling under the weight of a docket explosion, which is truly alarming. If a case involves a large body of documents and the Court is called upon to enter upon findings of facts and involves merely the construction of the document, it may not be an unsound discretion to relegate the party to the alternate remedy. This is not to deprive the Court of its constitutional power as laid down in ABL (supra). It*

all depends upon the facts of each case as to whether, having regard to the scope of the dispute to be resolved, whether the Court will still entertain the petition.

82.12. *In a case the State is a party to the contract and a breach of a contract is alleged against the State, a civil action in the appropriate Forum is, undoubtedly, maintainable. But this is not the end of the matter. Having regard to the position of the State and its duty to act fairly and to eschew arbitrariness in all its actions, resort to the constitutional remedy on the cause of action, that the action is arbitrary, is permissible (See in this regard Kumari Shrilekha Vidyarthi and others v. State of U.P. and others). However, it must be made clear that every case involving breach of contract by the State, cannot be dressed up and disguised as a case of arbitrary State action. While the concept of an arbitrary action or inaction cannot be cribbed or confined to any immutable mantra, and must be laid bare, with reference to the facts of each case, it cannot be a mere allegation of breach of contract that would suffice. What must be involved in the case must be action/inaction, which must be palpably unreasonable or absolutely irrational and bereft of any principle. An action, which is completely malafide, can hardly be described as a fair action and may, depending on the facts, amount to arbitrary action. The question must be posed and answered by the Court and all we intend to lay down is that there is a discretion available to the Court to grant relief in appropriate cases. (1991) 1 SCC 212)*

82.13. *A lodestar, which may illumine the path of the Court, would be the dimension of public interest subserved by the Court interfering in the matter, rather than relegating the matter to the alternate Forum.*

82.14. *Another relevant criteria is, if the Court has entertained the matter, then, while it is not tabooed that the Court should not relegate the party at a later stage, ordinarily, it would be a germane consideration, which may persuade the Court to complete what it had started, provided it is otherwise a sound exercise of jurisdiction to decide the matter on merits in the Writ Petition itself.*

82.15. *Violation of natural justice has been recognised as a ground signifying the presence of a public law element and can found a cause of action premised on breach of Article 14. [See Sudhir Kumar Singh and Others (supra)].*

122. *We have already found that the contract in question, i.e., the PPA, is not a statutory contract. We have also noticed that even if it is a non-statutory contract, there is no absolute bar in dealing with a cause of action based on acts or omission by the State or its instrumentalities even during the course of the working of a contract.*

125. *As far as the public law aspect is concerned, we are inclined to take the view that in view of what has been laid down in Shri Vidhyarthi Lekha (supra), the impact of the action in a contractual matter in the facts by public authority is felt in public domain."*

D. ***Manubhai Dharmasinhbhai Gajera (supra),*** para 46:-

"46.*One important facet of the matter which must also be taken note of is duty on the part of a State to act fairly. Such a fair dealing is expected at the hands of a State within the meaning of Article 12 of the Constitution of India. Strong reliance has been placed by Mr. Parekh on the decision of this Court in Mahabir Auto Stores & Ors. v. Indian Oil Corporation & Ors. [(1990) 3 SCC 752] and Kumari Shrilekha Vidyarthi & Ors. v. State of U.P. & Ors. [(1991) 1 SCC 212]. There cannot be any doubt whatsoever that Article 14 of the Constitution of India which encompasses within its fold, obligations on the part of the State to act fairly which operates also in the contractual field but the said principle would be applicable more in a case where bargaining power is unequal or where the contract is not a negotiated one and/or is based on the standard form contracts between unequals. Some of these decisions, however, had been taken into consideration in Asstt. Excise Commissioner. v. Issac Peter [(1994 (4) SCC 104] whereupon strong reliance has been placed by the learned Solicitor General. Therein, inter alia, it was held :*

> ***"26.*** *Learned Counsel for Respondents then submitted that doctrine of fairness and reasonableness must be read into contracts to which State is a party. It is submitted that the State cannot act unreasonably or unfairly even while acting under a contract involving State power. Now, let us see, what is the purpose for which this argument is addressed and what is the implication? The purpose, as we can see, is that though the contract says that supply of additional quota is discretionary, it must be read as obligatory - at least to the extent of previous year's supplies - by applying the said doctrine. It is submitted that if this is not done, the licencees would suffer monetarily. The other purpose is to say that if the State is not able to so supply, it would be unreasonable on its part to demand the full amount due to it under the contract. In short, the duty to act fairly is sought to be imported into the contract to modify and alter its terms and to create an obligation upon the State which is not there in the contract. We must confess, we are not aware of any such doctrine of fairness or reasonableness. Nor could the learned Counsel bring to our notice any decision laying down such a proposition. Doctrine of*

fairness of the duty to act fairly and reasonably is a doctrine developed in the administrative law field to ensure the Rule of Law and to prevent failure of justice where the action is administrative in nature. Just as principles of natural justice ensure fair decision where the function is quasi- judicial, the doctrine of fairness is evolved to ensure fair action where the function is administrative. But it can certainly not be invoked to amend, alter or vary the express terms of the contract between the parties. This is so, even if the contract is governed by statutory provisions, i.e., where it is a statutory contract - or rather more so. It is one thing to say that a contract - every contract - must be construed reasonably having regard to its language. But this is not what the licencees say. They seek to create an obligation on the other party to the contract, just because it happens to be the State. They are not prepared to apply the very same rule in a converse case, i.e., where the State has abundant supplies and wants the licencees to lift all that stocks. The licencees will undertake no obligation to lift all those stocks even if the State suffers-loss. This one- sided obligation, in modification of express terms of the contract, in the name of duty to act fairly, is what we are unable to appreciate."

A bare perusal of the said decision would show that the same was rendered in the context of contracts entered into between the State and its citizens pursuant to public auction of tenders or by negotiation. Respondents therein sought to get new term incorporated in the Contract on the specious plea of fairness. The said place was rightly rejected. The fact, however, remains that the ratio in Issac is not applicable to the fact of the present case not because the duty to act fairly on the part of a State has no application in the field of a contract but the same would not apply for the purpose of alterations or modifications of a term of contract."

E. Gridco Ltd (supra), *para 22, 25 to 27, 32, 38 & 39:-*

22*. This question has to be answered in two distinct parts. The first part relates to the aspect whether the order passed by the appellant-Corporation is amenable to judicial review and if so what is the scope of such review. The second part of the question is whether on the standards of judicial review applicable to it, the order of termination is seen to be suffering from any legal infirmity. Before we refer to certain decisions of this Court that have dealt with similar issues in the past we may at the outset say that there was no challenge either before the High Court or before us as to the competence of the authority that passed the termination order.*

***25**. It is true that judicial review of matters that fall in the realm of contracts is also available before the superior courts, but the scope of any such review is not all pervasive. It does not extend to the Court substituting its own view for that taken by the decision-making authority. Judicial review and resultant interference is permissible where the action of the authority is mala fide, arbitrary, irrational, disproportionate or unreasonable but impermissible if the petitioner's challenge is based only on the ground that the view taken by the authority may be less reasonable than what is a possible alternative. The legal position is settled that judicial review is not so much concerned with the correctness of the ultimate decision as it is with the decision-making process unless of course the decision itself is so perverse or irrational or in such outrageous defiance of logic that the person taking the decision can be said to have taken leave of his senses.*

***26.** In Shrilekha Vidyarthi & Ors. v. State of U.P. & Ors. (1991) 1 SCC 212, the State Government had by a circular terminated the engagement of all the government counsels engaged throughout the State and sought to defend the same on the ground that such appointments being contractual in nature were terminable at the will of the government. The question of reviewability of administrative action in the realm of contract was in that backdrop examined by this Court. The Court also examined whether the personality of the State Government undergoes a change after the initial appointment of government counsels so as to render its action immune from judicial scrutiny. The answer was in the negative.*

***27**. The Court held that even after the initial appointment had been made and even when the matter is in the realm of contract, the State could not cast off its personality and exercise a power unfettered by the requirements of Article 14 or claim to be governed only by private law principles applicable to private individuals. The Court observed:*

> *"... we are also clearly of the view that this power is available even without that element on the premise that after the initial appointment, the matter is purely contractual. Applicability of Article 14 to all executive actions of the State being settled and for the same reason its applicability at the threshold to the making of a contract in exercise of the executive power being beyond dispute, can it be said that the State can thereafter cast off its personality and exercise unbridled power unfettered by the requirements of Article 14 in the sphere of contractual matters and claim to be governed therein only by private law principles applicable to private individuals whose rights flow only from the terms of the contract without anything more? We have no hesitation in saying that the personality of the State, requiring regulation of*

its conduct in all spheres by requirements of Article 14, does not undergo such a radical change after the making of a contract merely because some contractual rights accrue to the other party in addition. It is not as if the requirements of Article 14 and contractual obligations are alien concepts, which cannot co-exist."

32. *In conclusion, the Court made it clear that the opinion expressed by it was only in the context of contracts entered into between the State and its citizens pursuant to public auction, floating of tenders or by negotiation. The court considered it unnecessary to express any opinion about the legal position applicable to contracts entered into otherwise than by public auction, floating of tenders or negotiation.*

38. *A conspectus of the pronouncements of this court and the development of law over the past few decades thus show that there has been a notable shift from the stated legal position settled in earlier decisions, that termination of a contractual employment in accordance with the terms of the contract was permissible and the employee could claim no protection against such termination even when one of the contracting parties happened to be the State. Remedy for a breach of a contractual condition was also by way of civil action for damages/compensation. With the development of law relating to judicial review of administrative actions, a writ Court can now examine the validity of a termination order passed by public authority. It is no longer open to the authority passing the order to argue that its action being in the realm of contract is not open to judicial review.*

39. *A writ Court is entitled to judicially review the action and determine whether there was any illegality, perversity, unreasonableness, unfairness or irrationality that would vitiate the action, no matter the action is in the realm of contract. Having said that we must add that judicial review cannot extend to the Court acting as an appellate authority sitting in judgment over the decision. The Court cannot sit in the arm chair of the Administrator to decide whether a more reasonable decision or course of action could have been taken in the circumstances. So long as the action taken by the authority is not shown to be vitiated by the infirmities referred to above and so long as the action is not demonstrably in outrageous defiance of logic, the writ Court would do well to respect the decision under challenge.*

9. **Judgments relied on by Mr. Mishra, learned counsel for respondents No.1 to 4/Railways are as under:-**

a. ***M/s. Mesco Steels Ltd (supra)*****,** para 13, 17 & 18:-

> ***13.*** *Appearing for the appellant, Mr. U.U. Lalit, learned senior counsel, made a three-fold submission before us. Firstly, he contended that the writ petition filed by the respondent-company was manifestly premature as the Government had not taken any final decision that could have been challenged by the respondent-company nor was the writ petition, according to the learned counsel, maintainable against a mere inter-departmental letter dated 19th September, 2006, which did not by itself finally decide any right or obligation of the parties so as to furnish a cause of action to the respondent to challenge the same in the extra ordinary writ jurisdiction of the High Court. Secondly, it was contended that even if the letter could be described as a final decision taken by the State Government in regard to the reduction of the lease area, the respondent-company ought to have taken recourse to proceedings under Section 30 of the Act before the Central Government instead of rushing to the High Court in a writ petition. Thirdly, it was contended that the very issue of a show cause notice to the respondent-company suggesting reduction of the lease area after assessment of the actual requirement by reference to the plant already set up, meant that the Government had not taken any final decision in the matter and that the respondent-company could say whatever it intended to say in opposition to the action proposed in the show cause notice where upon the Government could notify a final order on the same, which order could then be challenged by the respondent-company either before the Central Government or before the High Court in a writ petition if otherwise permissible. Inasmuch as the High Court ignored the show cause notice and proceeded on the assumption that the same was an exercise in futility, it fell in a serious error, argued Mr. Lalit. The proper course, according to the learned counsel, was to allow the State Government to take a final view on the show cause notice after considering the response which the respondent-company may have to make.*
>
> ***17.*** *We have given our anxious consideration to the submissions made at the bar. The following questions, in our opinion, arise for determination:*
>
> *(1) Whether the writ petition filed by the respondent-company was premature, the same having been filed against an inter-departmental communication that did not finally determine any right or obligation of the parties?*
> *(2) Whether the show cause notice could be ignored by the High Court simply because it had been issued in violation of the interim order passed by it requiring the parties to maintain status quo?*

(3) Whether the show cause notice was without jurisdiction and could, therefore, be quashed?

18. *The writ petition, as already noticed above, was directed against a communication that had emanated from the office of Director of Mines and brought forward certain factual aspects relevant to the question whether a lease deed could be immediately executed in favour of the respondent- company. A careful reading of the said communication would show that it was issued in pursuance of a letter dated 12th January, 2006 from the Joint Secretary, Government of Orissa to the Director of Mines and another letter dated 29th August, 2006. By the former letter the Joint Secretary to the Government had instructed the Director of Mines to take action pursuant to certain directions issued by the Chief Minister of Orissa. This included making a real assessment of the requirement of respondent-company and permitting execution of a lease deed subject to clearance of the Ministry of Environment and Forest, Government of India. The instructions issued to the Director of Mines also required him to resume the excess area for reallocation of the same to other deserving parties. The Director of Mines had responded to the said communication and assessed the mineral deposits in the area by reference to maps and surveys and made a recommendation back to the State Government. It is obvious from a conjoint reading of letter dated 12th January, 2006 and communication dated 19th September, 2006 sent by the Director of Mines in response thereto that a final decision on the subject had yet to be taken by the Government, no matter the Government may have provisionally decided to follow the line of action indicated in its communication dated 12th January, 2006 issued under the signature of the Joint Secretary, Department of Steel and Mines. It is noteworthy that there was no challenge to the communication dated 12th January, 2006 before the High Court nor was any material placed before us to suggest that any final decision was ever taken by the Government on the question of deduction of the area granted in favour of the respondent so as to render the process of issue of show cause notice for hearing the respondent-company an exercise in futility. On the contrary, the issue of the show cause notice setting out the reasons that impelled the Government to claim resumption of a part of the proposed lease area from the respondent-company clearly suggested that the entire process leading up to the issue of the show cause notice was tentative and no final decision on the subject had been taken at any level. It is only after the Government provisionally decided to resume the area in part or full that a show cause notice could have been issued. To put the matter beyond any pale of controversy, Mr. Lalit made an unequivocal statement at the bar on behalf of the State Government that no final decision*

regarding resumption of any part of the lease area has been taken by the State Government so far and all that had transpired till date must necessarily be taken as provisional. Such being the case the High Court was in error in proceeding on an assumption that a final decision had been taken and in quashing what was no more than an inter-departmental communication constituting at best a step in the process of taking a final decision by the Government. The writ petition in that view was pre-mature and ought to have been disposed of as such. Our answer to question No.1 is accordingly in the affirmative.

b. ***Kurien E. Kalathil (supra),*** para 10:-

10. *We find that there is a merit in the first contention of Mr Raval. Learned counsel has rightly questioned the maintainability of the writ petition. The interpretation and implementation of a clause in a contract cannot be the subject-matter of a writ petition. Whether the contract envisages actual payment or not is a question of construction of contract. If a term of a contract is violated, ordinarily the remedy is not the writ petition under Article 226. We are also unable to agree with the observations of the High Court that the contractor was seeking enforcement of a statutory contract. A contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body. We are also unable to agree with the observation of the High Court that since the obligations imposed by the contract on the contracting parties come within the purview of the Contract Act, that would not make the contract statutory. Clearly, the High Court fell into an error in coming to the conclusion that the contract in question was statutory in nature."*

10. **<u>Judgments relied on by Mr. Venugopal, learned Senior Counsel for respondent No. 5 are that</u>:-**

I. In the matter of ***Ultratech Cement Ltd. (supra)*** the Hon'ble Division Bench of this Court observed and held in paras 14, 17, 18,19, 20, 21, 24, 26 as under:-

14. *Very recently in M/s. N.G. Projects Limited (supra), their Lordships of the Supreme Court taking note of the provisions contained in clause (ha) inserted in Section 41 of the Specific Relief Act, 1963 with effect from 1-10-2018 has held that infrastructural projects should not be stayed in exercise of jurisdiction under Article 226 of the Constitution of India and*

observed as under:

> *"21. Since the construction of road is an infrastructure project and keeping in view the intent of the legislature that infrastructure projects should not be stayed, the High Court would have been well advised to hold its hand to stay the construction of the infrastructure project. Such provision should be kept in view even by the Writ Court while 9 (1960) 3 SCR 713 : AIR 1960 SC 1156 10 1942 AC 130 11 (2010) 2 SCC 142 12 (2011) 6 SCC 73 13 (2013) 9 SCC 221 exercising its jurisdiction under Article 226 of the Constitution of India."*

17. *Laying of railway lines/tracks, plying on the railway tracks, siding, setting up of rail terminal etc. are within the exclusive domain and jurisdiction of the Railways and any such activity can be carried out in such lines / tracks / siding only with the express leave of the Railways and that too subject to terms and conditions as the Railways may deem fit to impose. Undisputedly, for that purpose, the Railways have formulated policy / scheme which has already been brought on record and entered into agreement with the appellant. The Railways have entered into two agreements dated 1-2-2008 and 10-8-2010 with the appellant for private siding for its Hirmi and Rawan plants from Hathband Station. Admittedly and undisputedly, the agreements contained terms and conditions wherein specific clauses inter alia permit third party to use the siding which has been incorporated and accepted by the appellant herein in shape of clause 19 of the agreement Annexure P-3 i.e. Private Siding Agreement. Clause 19 of the Private Siding Agreement deals with Railway Administration's Rights regarding use of the siding. It states that in addition to any other rights, powers and liberties provided for, the Railway Administration shall have the rights, powers and liberties, over and in connection with the siding or any extension or part thereof namely,*

> *(b) To connect or allow to be connected with the siding or any extension or part thereof any other siding or sidings branching or extending therefrom which may have been constructed or which may hereinafter be constructed by or under the authority of the Railway Administration for any other person or persons whomsoever or for the purpose of the Railway Administration and to make or allow such alterations as may be necessary to effect such connection.*

> *(c) To use or to permit the use of the siding or any extension or part thereof for the traffic if any person or persons other than the Applicant and to work traffic over the siding or any extension or part thereof to and from any other siding or sidings or branches or extensions therefrom which may be constructed as aforesaid jointly with the traffic of the Applicant upon payment by such person or persons to the Applicant of either such portion of the cost originally paid by the Applicant to the Railway Administration, in respect of the land and sub-grade work or such tollage for such use as aforesaid as shall be decided by the General Manager for the time being of the Railway Administration or such other Officer as may be nominated by him whose decision shall*

be final, conclusive and binding on the Applicant as to whether a portion of the aforesaid cost shall be payable and if so, the amount thereof or whether a tollage shall be payable and if so, the amount or rate thereof.

The Railway Administration shall collect such proportionate cost on behalf of the Applicant but shall not be responsible for collection of tollage for and on behalf of the Applicant, but the Applicant may enter into agreement with the person or person who has / have permitted the use of Siding or part thereof by the Railway Administration on the payment by the latter of tollage. The use of the Siding or any extension or thereof by the Railway Administration or by other persons shall be so conducted in such manner and to such extent as to interfere as little as possible with the free use of the siding by the Applicant whose traffic shall have precedence.

18. *Clause 19(c) of the Private Siding Agreement clearly authorises the Railways to use or to permit the use of the siding or any extension or part thereof for the traffic if any person or persons other than the appellant herein and to work traffic over the siding or any extension or part thereof to and from any other siding or sidings or branches or extensions therefrom which may be constructed as aforesaid jointly with the traffic of the appellant herein upon payment by such person or persons to the appellant. It is not in dispute that the appellant has accepted the aforesaid clause contained in clause 19(b) & (c) of the Private Siding Agreement without any demur or protest and has in fact set up the railway siding subject to the aforesaid terms i.e. clause 19(b) & (c) of the agreement.*

19. *Similarly, on 23-8-2016, the Government of India issued a policy on Private Sidings which contained identical clauses empowering Railways in the shape of clause 19(c) which states as under: -*

"19. Railway Administration's Rights Regarding Use of the Siding:

(c) To use or to permit the use of the siding or any extension or part thereof for the traffic if any person or persons other than the Applicant and to work traffic over the siding or any extension or part thereof to and from any other siding or sidings or branches or extensions therefrom which may be constructed as aforesaid jointly with the traffic of the Applicant upon payment by such person or persons to the Applicant of either such portion of the cost originally paid by the Applicant to the Railway Administration, in respect of the land and sub-grade work or such tollage for such use as aforesaid as shall be decided by the General Manager for the time being of the Railway Administration or such other Officer as may be nominated by him whose decision shall be final, conclusive and binding on the Applicant as to whether a portion of the aforesaid cost shall be payable and if so the amount thereof or whether a tollage shall be payable and if so the amount or rate thereof. The Railway Administration shall collect such proportionate cost on behalf of the Applicant may enter into agreement with the

person or persons who has / have been permitted the use of Sidings or part thereof by the Railway Administration on the payment by the latter of tollage. The use of the Siding or any extension or part thereof by the Railway Administration or by other persons shall be so conducted in such manner and to such extent as to interfere as little as possible with the free use of the siding by the Applicant whose traffic shall have precedence."

20. *Coming to the facts of the case, it is quite apparent that the appellant herein has neither challenged the policy dated 23-8-2016 nor the terms and conditions of the agreement incorporated in shape of clause 19(b) & (c) as noticed herein-above entered between it and the Railways - respondents No.1 to 4 and only on the application of respondent No.5 when respondents No.1 to 4 have granted In Principle Approval (IPA) dated 8-4-2021 to respondent No.5 by which respondent No.5 has been allowed to use the part of the appellant's siding up to certain point for the proposed construction of Green Field Private Freight Terminal (PFT) by respondent No.5 with take off from existing private siding of the appellant connected from HN Station, challenge has been made in the writ petition.*

21. *Reverting to the facts of the case in the light of the aforesaid discussion and analysis, it is quite vivid that clause 19(c) of the agreement entered into between the appellant and respondents No.1 to 4 for private siding of its Hirmi and Rawan plants from Hathband Station clearly permits use of siding or any extension or part thereof for the traffic if any person or persons other than the writ petitioner / appellant herein by a third party upon payment by such person or persons to the writ petitioner which the writ petitioner / appellant herein has accepted and acted upon, and the appellant has not challenged it till this date rather acting upon the agreement without demur or protest and furthermore, In Principle Approval (IPA) has been granted as it is only the first stage of other permissions required at different levels. In that view of the matter, the learned Single Judge has recorded a finding that use of siding by third party i.e. respondent No.5 is permissible under clause 19(c) of the agreement entered into between the writ petitioner / appellant herein and respondent Nos.1 to 4 and the writ petitioner's traffic would be given preference as specific undertaking has been given by the Railways, and further recorded a finding that agreement between the parties prima facie allows sharing of the proportion of cost in case of use of line by another. Furthermore, the finding of the learned Single Judge is that it would be difficult to establish various lines for different plants and thus, the learned Single Judge has allowed respondents No.1 to 4 to finalise the project of putting up a freight terminal at the risk and cost of respondent No.5 and subject to final adjudication of the writ petition. In our considered opinion, the learned Single Judge has reached to a right conclusion and has exercised the discretion strictly in accordance with law, it is neither arbitrary nor capricious or perverse in the light of the principle of law laid down by their Lordships of the Supreme Court in Wander Ltd. (supra) and considering the scope of writ / intra-court appeal held in the matter of Smt. Asha Devi*

(supra), Baddula Lakshmaiah (supra) and B. Venkatamuni (supra) and furthermore, following the recent decision of the Supreme Court in M/s. N.G. Projects Limited (supra) in which their Lordships have clearly held that the High Court should be slow in staying the infrastructural project, as noticed herein-above.

24. *In view of the aforesaid analysis, we are of the considered opinion that the learned Single Judge is absolutely justified in passing the impugned order declining to grant stay in favour of the writ petitioner / appellant herein allowing respondents No.1 to 4 to proceed to finalise the project of putting up a freight terminal that is at the risk and cost of respondent No.5 and subject to final adjudication of the writ petition. We do not find any merit in the writ appeal, it deserves to be and is accordingly dismissed leaving the parties to bear their own cost(s).*

26. *It is also made clear that this Court has not expressed any opinion on the merits of the matter and the observation made / finding arrived herein-above is only for the purpose of adjudicating the validity and correctness of the impugned order dated 28-9-2021 and it is open to the writ court to adjudicate the issue involved in the writ petition on its merit and in accordance with law. All the rival contentions made on the merits of the matter herein-above are left and kept open to be urged before the writ court.*

II. ***ACIT-2 Mumbai (supra),*** para-9 & 12:-

9. *During the course of assessment AO disallowed assessee's claim of deduction u/s.80IA in respect of profit of rail systems. The assessee made this claim on the ground that it had earned profit by operating its rail systems at Hirmi [Chattisgarh; ladipatri [AP], Arakkonam [Tamilnadu] and Durgapur [West Bengal]. In the context, during the assessment proceedings it was explained that the assessee had inherited those rail systems ..... out of demerger from L &T Ltd at all those locations; that the rail systems were set-up by L8:T Ltd [and that way by the assessee company as it had inherited the cement plants from L&T Ltd by way of demerger] to enable the transportation of raw material [coal etc] and finished goods [i.e. cements] at their cement plants through railway wagons at all the said four locations. It was explained that prior to putting up those rail systems, the assessee used to transfer the material from the cement plants [at all the four locations] to the nearest railway station and vice-versa on road through trucks. Before the AO the claim of deduction was justified by assessee by taking the plea that the various conditions as prescribed u/s 80IA(4) was met with in as much as it had entered into an agreement with the government through department of Railways for developing, maintaining and operating the rail system (infrastructure facility); and that in pursuance thereof it had developed the integrated rail*

system in between the plant and the nearest railway track [of Indian Railways] and running it [in between] for movement of the inward and outward material so as to enable it to transport the materials from its plants straightaway to the various destinations and vice-versa at all those four locations; and that by way of such operation of rail systems, it has been able to save the expenses for loading [at those plants] into the trucks, road freight and expenses for unloading and loading the same at the site of nearest Indian railways and that resulted into the. profit of such rail systems.

12. *The rail systems at all these four locations viz. Hirmi, Tadipatri, Arakkonam & Durgapur are said to have commenced the operations in AY 2000-01, AY 1999-00, AY 2001-02 ft AY 2002-03 respectively [refer assessee's reply dated 06.01.2014] It was further observed by CIT(A) that the L&T Ltd, on whose request the private sidings were set up at all these four locations, never claimed any such deduction u/s. 80IA(4). The deductions are being claimed by the assessee company since AY 2004-05, after the various cements plants were transferred to the assessee company [in the year2003-04] as per demerger scheme. In AY 2004-05, claim was made [for the first time] in respect of such Rail System at Hirmi. Then in AY 2007-08, it started claiming deduction in respect of rails systems at Tadipatri and Arakkonam and then in AY 2008-09 for Durgapur also. From AY 2009-10 and onwards the claim pertains to all the four units.*

58. ..... In the ultimate analysis of the facts in the case of assessee Company, the benefits of such siding does ensure to the public in general - to the consumers of cement. Any benefit to the business even though it is first enjoyed by the particular trade or establishment eventually is for the general public good. It has to be noted that several industries may come up on both the sides of sidings from the interchange point till factory gate, if anyone of them wants to make use of railway sidings, it is permissible for the Railway Administration to entertain such request and by making use of the exiting siding, can extend or branch off and lay railway tracks to the industry which makes the request and lay siding accordingly. Thus, the railway siding from the point of interchange till factory gate of the assessee has immense potential, with enabling powers to the Railway Administration (which itself is a public department), to be developed into a facility that will ensure to the public at large. The railway sidings are always constructed for captive consumption. Thus, the provisions of section 80IA(4) cannot be read in the manner to make it redundant, when the legislature in all its wisdom intended to give benefit of tax holiday for construction of infrastructure facility in the form of railway

which is meant for captive consumption.

59. We have carefully gone through the terms and conditions of the agreement entered by the assessee with the railway authority, a perusal of clause 19 of the Railway Siding agreement entered into by the assessee with the Railway authorities, clarifies that construction and operation of the railway siding was not merely for the purpose of the business of the assessee, but was with a long term perspective to create an infrastructure facility which could, at a future point of time and in case a need arise, potentially confer benefit to the public at large. The agreement with the Railway authorities, provided that the facility so created could be made available to others with the discretion and prior permission of the railway authorities thereby rendering the facility open for general public at large. Hence, such a facility is in fact a public utility."

III. ***Khan Saheb M. Hassanji (supra),*** para 2, 3, 11:-

2. *It is necessary to state the following facts in order to bring out the points in controversy between the parties. One Haji Syed Zahiruddin of Bhopal held a mining lease - Ex. P-2 — dated May 29, 1923 in respect of 189.76 acres of land in the district of Chindwara, for extracting coal. The appellants took an assignment of that lease by Ex. P-1 dated September 4, 1940. There were coal bearing areas adjacent to the area covered by the lease aforesaid. The appellants were anxious to acquire those adjacent collieries from their respective owners. The transfers in favour of the appellants could not take place without the sanction of the State Government. After protracted correspondence and negotiations, the Government agreed to grant the necessary sanction to the transfer of those adjacent lands to the appellants subject to the condition that they took a consolidated lease in respect of the whole additional area at an enhanced rate of royalty. The appellants entered into an agreement with the Government on January 11, 1949 (Ex. P-3) by which the rate of royalty payable to Government was raised from Rs 5 to Rs 10 per ton. Though no formal lease deed was executed, the appellants worked the mines with the permission of the Government during the period October 27, 1947 to June 30, 1949. In respect of the coal thus extracted, the appellants paid to the Government the sum of Rs 40,865, including interest, by way of royalty. The plaintiffs paid the aforesaid sum under protest in February-March 1960.*

3. *The plaintifs commenced the present action in February 1951, for a declaration that they were not bound by the terms of the agreement dated January 11, 1949, aforesaid, and that,*

therefore, they were not liable to pay to the Government any sum in excess of that fixed by the lease of 1923, and by the lease of January 21, 1944, in respect of lands transferred to them. They also claimed an injunction against the defendant, the State of Madhya Pradesh, which was the sole defendant, now respondent. There was also a prayer for refund of the said amount of Rs 40,865 plus interest amounting to Rs 1985 from the date of payment of those several sums aggregating to Rs 40,865. Interest pendente lite and future interest at 6% on the decretal amount was also claimed.

11. *There was a faint attempt made on behalf of the appellants to put their objections on a constitutional basis. It was contended that the terms imposed upon the appellants by the State would amount to deprivation of property without the authority of law. It is manifest that this ground of attack is wholly devoid of any force because the State has not deprived them of any property. What they have paid to the Government was realisable under the terms of the contract, which on the findings recorded above is not vitiated. Under the agreement which we hold to be enforceable, the defendant may have struck a hard bargain but that cannot be brought under the prohibition of Article 31(1) of the Constitution, even assuming that the Constitution applied to the transaction in question."*

IV. ***E.S. Solar Power (supra),*** para 16:-

16. *Before embarking on the exercise of interpretation of the agreement it is necessary to take stock of the well-settled canons of construction of contracts. Lord Hoffmann in 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)] summarised the broad principles of interpretation of contract as follows : (WLR pp. 912-13)*

> *"(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*
>
> *(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact", but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*
>
> *(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective*

intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see Mannai Investment Co. Ltd. v. Eagle Star Life Assurance Co. Ltd.

[Mannai Investment Co. Ltd. v. Eagle Star Life Assurance Co. Ltd., 1997 AC 749

: (1997) 2 WLR 945 (HL)].

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require Judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in Antaios Compania Naviera S.A. v. Salen Rederierna A.B. [Antaios Compania Naviera S.A. v. Salen Rederierna A.B., 1985 AC 191 : (1984) 3 WLR 592 (HL)] , AC at p. 201 : (AC p.201)

'.....if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."

V. ***Bai Hira Devi (supra),*** para 4:-

4. *Chapter VI of the Evidence Act which begins with Section 91 deals with the exclusion of oral by documentary evidence. Section 91 provides that, "when the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained". The*

normal rule is that the contents of a document must be proved by primary evidence which is the document itself in original. Section 91 is based on what is sometimes described as the "best evidence rule". The best evidence about the contents of a document is the document itself and it is the production of the document that is required by Section 91 in proof of its contents. In a sense, the rule enunciated by Section 91 can be said to be an exclusive rule inasmuch as it excludes the admission of oral evidence for proving the contents of the document except in cases where secondary evidence is allowed to be led under the relevant provisions of the Evidence Act."

VI. ***Issac Peter (supra),*** para 26:-

26. *Learned counsel for respondents then submitted that doctrine of fairness and reasonableness must be read into contracts to which State is a party. It is submitted that the State cannot act unreasonably or unfairly even while acting under a contract involving State power. Now, let us see, what is the purpose for which this argument is addressed and what is the implication? The purpose, as we can see, is that though the contract says that supply of additional quota is discretionary, it must be read as obligatory at least to the extent of previous year's supplies by applying the said doctrine. It is submitted that if this is not done, the licensees would suffer monetarily. The other purpose is to say that if the State is not able to so supply, it would be unreasonable on its part to demand the full amount due to it under the contract. In short, the duty to act fairly is sought to be imported into the contract to modify and alter its terms and to create an obligation upon the State which is not there in the contract. We must confess, we are not aware of any such doctrine of fairness or reasonableness. Nor could the learned counsel bring to our notice any decision laying down such a proposition. Doctrine of fairness or the duty to act fairly and reasonably is a doctrine developed in the administrative law field to ensure the rule of law and to prevent failure of justice where the action is administrative in nature. Just as principles of natural justice ensure fair decision where the function is quasi- judicial, the doctrine of fairness is evolved to ensure fair action where the function is administrative. But it can certainly not be invoked to amend, alter or vary the express terms of the contract between the parties. This is so, even if the contract is governed by statutory provisions, i.e., where it is a statutory contract or rather more so. It is one thing to say that a contract every contract must be construed reasonably having regard to its language. But this is not what the licensees say. They seek to create an obligation on the other party to the contract, just because it happens to be the State. They are not prepared to*

apply the very same rule in converse case, i.e., where the State has abundant supplies and wants the licensees to lift all the stocks. The licensees will undertake no obligation to lift all those stocks even if the State suffers loss. This one-sided obligation, in modification of express terms of the contract, in the name of duty to act fairly, is what we are unable to appreciate. The decisions cited by the learned counsel for the licensees do not support their proposition. In Dwarkadas Marfatia v. Board of Trustees of the Port of Bombay it Was held that where a public authority is exempted from the operation of a statute like Rent Control Act, it must be presumed that such exemption from the statute is coupled with the duty to act fairly and reasonably. The decision does not say that the terms and conditions of contract can be varied, added or altered by importing the said doctrine. It may be noted that though the said principle was affirmed, no relief was given to the appellant in that case. Shrilekha Vidyarthi v. State of U.P.8 was a case of mass termination of District 7 (1989) 3 SCC 293 8 (1991])1 SCC 212: 1991 SCC (L&S) 742 Government Counsel in the State of U.P. It was a case of termination from a post involving public element. It was a case of non-government servant holding a public office, on account of which it was held to be a matter within the public law field. This decision too does not affirm the principle now canvassed by the learned counsel. We are, therefore, of the opinion that in case of contracts freely entered into with the State, like the present ones, there is no room for invoking the doctrine of fairness and reasonableness against one party to the contract (State), for the purpose of altering or adding to the terms and conditions of the contract, merely because it happens to be the State. In such cases, the mutual rights and liabilities of the parties are governed by the terms of the contracts (which may be statutory in some cases) and the laws relating to contracts. It must be remembered that these contracts are entered into pursuant to public auction, floating of tenders or by negotiation. There is no compulsion on anyone to enter into these contracts. It is voluntary on both sides. There can be no question of the State power being involved in such contracts. It bears repetition to say that the State does not guarantee profit to the licensees in such contracts. There is no warranty against incurring losses. It is a business for the licensees. Whether they make profit or incur loss is no concern of the State. In law, it is entitled to its money under the contract. It is not as if the licensees are going to pay more to the State in case they make substantial profits. We reiterate that what we have said hereinabove is in the context of contracts entered into between the State and its citizens pursuant to public auction, floating of tenders or by negotiation. It is not necessary to say more than this for the purpose of these cases. What would be the position in the case of contracts

entered into otherwise than by public auction, floating of tenders or negotiation, we need not express any opinion herein.

VII. ***Monnet Ispat (supra),*** para 264:-

"264*. When it comes to the challenge to the Letter dated 13-9-2005, it is seen that the State Government states therein that nine out of the ten proposals overlap the areas meant for public undertakings and two other companies, and therefore the proposals were called back. The power to take such a decision rests in the State Government in view of its ownership of the mines, though there may not be a reference to the source of power. Absence of reference to any particular section or rule which contains the source of power will not invalidate the decision of the State Government, since there is no requirement to state the source of power as has already been held by this Court in Ram Manohar Lohia [AIR 1966 SC 740 : 1966 Cri LJ 608] ."*

VIII. ***R. Veeranna (supra),*** para 7:-

7. The High Court while holding that the party is bound to pay the interest at the agreed rate took the view that the Bank could not automatically charge the increased rate of interest merely on the basis of rise of interest on account of the RBI circulars. It is not a case of automatically charging the increased rate of interest; charge of higher rate is based on agreement between the parties. The High Court was clearly in error in holding that the principles of natural justice were violated on the ground that the defendants were not put on notice before enhancing the rate of interest when the parties are bound by the terms of the contract. The application of the principles of natural justice cannot be read into the express terms of the contract. The other reason given by the High Court to affirm the decree of the trial court was that the plaintiff Bank violated the circulars/instructions given by the head office and as such the plaintiff could not claim higher rate of interest. We are not in a position to approve this view of the High Court. The instructions given by the head office to the branches were only for their guidance and to safeguard the interest of the Bank in case of dispute. At any rate, these instructions cannot vary the terms of agreement between the parties. In other words, they could not alter the terms of Exts. P-1, P-5 and P-11."

IX. Nisha Priya Bhatia (supra):-

"52. *Notably, the appellant has not impleaded the persons concerned against whom allegations of mala fides are made, as party respondent. Hence, those allegations cannot be taken*

forward. We may usefully advert to the exposition in Purushottam Kumar Jha v. State of Jharkhand [Purushottam Kumar Jha v. State of Jharkhand, (2006) 9 SCC 458 : 2006 SCC (L&S) 1840] which records the abovestated position of law, while addressing the allegations of mala fide exercise of power, in the following words : (SCC p. 466, para 22):

> ***"22.** As to mala fide exercise of power, the High Court held [Purushottam Kumar Jha v. State of Jharkhand, 2003 SCC OnLine Jhar 554 : (2004) 52 (1) BLJR 149] that neither sufficient particulars were placed on record nor the officers were joined as party respondents so as to enable them to make the position clear by filing a counter-affidavit. In the absence of specific materials and in the absence of officers, the Court was right in not upholding the contention that the action was mala fide.".*

X. ***J.D. Suryavanshi (supra),*** paras 5,6,11:-

***5.** A three Judge Bench of this Court in Union of India v. Nagesh - 2002 (7) SCC 603, dealing with similar directions regarding Railways by the said High Court, had set aside a decision of the High Court directing the central government to reschedule the timings of the Awantika Super Fast Express. This Court held:*

> *"After we heard the matter, we are of the view that such a direction could not have been issued by the High Court to the appellants herein in a petition under Article 226 of the Constitution. What would be the scheduled timings for a train for its departure and arrival is an administrative decision keeping in view the larger public interest or public convenience and not the convenience of the public of a particular town. Such a decision is within the exclusive administrative domain of the Railways and is not liable to be interfered with in a petition filed under Article 226 of the Constitution." (Emphasis supplied)*
>
> *In spite of the said decision rendered in regard to the similar earlier orders of the said High Court, the Division Bench of the High Court has chosen to indulge in a similar exercise in this case.*

***6.** Railway administration is a specialized field. It has to cater to the needs of the entire country. It has limited resources and limited number of railway engines and railway coaches, particularly AC coaches, more particularly AC-I class coaches. Railway will have to distribute and utilize the available resources and the available Rolling Stock equitably, uniformly, and appropriately to serve all the sections of the country. It is possible that in a particular section there may be hardship, inconveniences and need for introduction of more trains, better timings, and better facilities. But one sector is not India. We shudder to think what would happen if every High Court starts giving directions to the Railway to provide additional trains,*

additional coaches and change timings wherever they feel that there is a shortage of trains or need for better timings. Even in the State of Madhya Pradesh, we are sure that apart from Gwalior-Indore sector, there are other sectors which may be facing similar hardships and problems. The Railway does not exist to cater to a particular sector. It is for the Railway administration to decide where, how and when trains or coaches should be added or the timings should be changed. The Courts do not have data inputs, specialized knowledge or the technical skills required for running the Railways. The High Court cannot interfere in regard to only one sector without having any material or information about the requirements of other sectors available infrastructure, existing demands and constraints, safety requirements etc. Nor can the High Court direct introduction of trains or additional coaches of a particular category or direct change in timings of a train. Changing the timing of a train is not a simple process, but requires co-ordinated efforts, as it would affect the timings of other trains. There are also different types of trains - express trains, superfast trains, passenger trains, goods trains, with different speeds and priorities. Any attempt to pick and choose one train or one sector for improving the functioning will led to chaos involving technical snags and safety problems.

11. This Court has repeatedly warned that courts should resist the temptation to usurp the power of the executive by entering into arenas which are exclusively within the domain of the executive. How many coaches should be attached, what types of coaches are to be attached, on which lines what trains should run, what should be their timings and frequency, are all matters to be decided by the Railway Administration using technical inputs, depending upon financial, administrative, social and other considerations. This Court has repeatedly held that courts should not interfere in matters of policy or in the day-to-day functioning of any departments of Government or statutory bodies. Even within the executive, the need for separation of roles has been voiced."

Analysis of the above-cited judgments with respect to the subject matter of the present petition:-

11. In the matter of ***Shrilekha Vidyarthi (supra)***, the Hon'ble Supreme Court held that if the State is unable to produce materials to justify its action as fair and reasonable, the burden on the person, alleging arbitrariness, must be held to have been discharged.

12. In ***Mohinder Singh Gill (supra),*** the Hon'ble Supreme Court held that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons.

13. In ***M.P. Power Management Company Ltd. Jabalpur (supra),*** the Hon'ble Supreme Court held that any matter lies entirely within a private realm of affairs of the public body, may not lend itself for being dealt with under the writ jurisdiction of the Court and formulated above stated conditions for the maintainability of the writ petition.

14. The judgments rendered in ***M/s. Mesco Steels Ltd (supra)*** and ***Kurien E. Kalathil (supra)*** relied on by learned counsel for respondents No. 1 to 4 are on the point of the question of maintainability of the writ petition.

15. In ***Khan Saheb M. Hassanji (supra),*** the Hon'ble Supreme Court held that where the Government awards the contract in accordance with the terms and conditions of the agreement, the findings recorded by such authority would not be violative.

16. In ***Bai Hira Devi (supra),*** the Hon'ble Supreme Court observed and held that the normal rule is that the contents of a document must be proved by primary evidence which is the document itself in original. Section 91 is based on what is sometimes described as the "best evidence rule".

17. In ***Issac Peter (supra),*** the Hon'ble Apex Court observed and held that the Courts cannot rewrite or alter the terms of the contract. It cannot be done by applying the doctrine of fairness or reasonableness to the contract entered into by the State entities**.**

18. In ***Monnet Ispat (supra),*** the Hon'ble Supreme Court held that the absence of reference to any section or rule which contains the source

of power would not invalidate the decision of the State.

Findings of the Court:-

19. It is true that pursuant to the 'Private Siding Agreements' dated 01.02.2008 and 10.08.2010 executed between the petitioner and respondent No. 3, the petitioner established Hathband Private Siding in the year 2000 to facilitate seamless transportation between its integrated cement manufacturing plants, namely Hirmi Cement Works and Rawan Cement Works, and invested approximately Rs. 1800-2000 crores; later on, respondent No. 5 with intent to construct a Greenfield Private Freight Terminal (PFT) by using the petitioner's siding made a proposal before the Railways and respondent No. 4 granted IPA to respondent No. 5 on 08.04.2021 without prior intimation to the petitioner. During the virtual meeting on 17.06.2021, for the first time, the petitioner was informed in this regard.

20. In this petition, four documents are required to be looked into (i) Private Siding Policy of 2005; (ii) Agreements entered into between the petitioner and Railways; (iii) Private Siding Policy of 2016; and (iv) Master Circular for Private Freight Terminal of 2020. The petitioner has enclosed the Private Siding Policy of 2016 along with subsequent amendments as Annexure P/2; Agreements dated 01.02.2008 & 10.8.2010 as Annexure P/3 & P/4 and the Private Freight Terminal Policy of 2020 as Annexure P/5. The above-referred documents are interlinked and can't be read in isolation. The relevant provisions of the above documents are given below:-

A. Private Siding Policy of 2016:-

1. Clause 1 deals with the eligibility and applicability.

2. Clause 1(i) says "Private Siding" is only for the end user. However,

one co-user is permitted under the policy (with permission of the siding owner and approval of the Chief Operational Manager).

3. Clause 1(i) has been amended twice, firstly on 25.09.2017 which reads as under:-

> *"Para 1(i) - Private Siding is only for end-users. However, if the siding owner desires to permit co-users) at his siding, co-users) permission can be given (as per definition of 'co-user' given in Para 2(v) of private siding policy - FM Circular No. 11 of 2016) to multi co-users, on receipt of written request from the siding owner, with the approval of COM, subject to operation feasibility and local constraints. However, maximum co-users at a siding should not be more than 3 (three)."*

Secondly, on 18.08.2020 as under:-

> *"Private siding is only for end users. However, if the siding owner desires to permit co-users) at his siding, co-user(s) permission can be given {as per definition of co-user given in Para 2(v) of private siding policy - FMC 11 of 2016} to multi co-users on receipt of written request from the siding owner, with the approval of PCQM, subject to operational feasibility and local constraints."*

4. Clause 2 (v) defines 'Co-User' as under:-

> *"Co-user refers to the permission given to a rail user (other than the owner of a private siding) by the Railway Administration, for using the siding for handling of his own goods traffic at that siding, subject to the provisions of the Siding Agreement."*

5. Clause 2 (ix) defines 'Private Siding' as under:-

> ***"2(ix)** 'Private Siding' refers to privately owned siding constructed/laid out by a Party at its own cost for railway freight services at the premises of its plant or manufacturing unit or production unit or mines etc. under a special arrangement. It means the Railway track connecting the Applicant's works with the Railway system. It shall cover only that portion of track network & related infrastructure on which Railway rolling stock will ply. The network utilised by the Company/Party for their internal use shall not form part of the siding defined herein."*

6. Clause 6 deals with the Capital Cost of Siding. Clause 6.1 says that the siding owner shall bear the capital cost of the new sidings from the take-off point at the serving station. Clause 6.2 says that the capital cost for all traffic facilities, such as 'Y' connection, additional

lines/loop lines at the serving station, crossing station, patch doubling, shunting neck, engine escape line, S&T work, modification to existing OHE or Electrification in future in station limit etc., as to be approved by COM, shall be fully borne by the Railway.

7. Clause 8 deals with the cost of gauge conversion, which says that the siding owner shall bear the full cost of the conversion or the siding shall be closed.

8. Clause 9 deals with the maintenance of assets on new and existing sidings. According to this clause, it would be the responsibility of the siding owner to maintain the track etc. including the electrification.

9. Clause 11 deals with agreement. Clause 11.1 says that an integrated agreement, comprising of 'land license agreement' and private siding agreement; shall be signed in the revised format, enclosed as Annexure-3, before commissioning of the siding.

B. <u>Relevant Provisions of Private Siding Agreement:-</u>

a. Clause 14 deals with Traffic on siding:-

> (***a)*** *Wagons will be hauled by the Railway Administration (subject to such rules and restrictions as may be enforced from time to time and from the point marked 'X' in the said Plan No. (same number as in Clause 2) hereinbefore referred to or such other points as may hereafter be fixed upon by mutual consent of the Applicant and Railway Administration in writing at which point they shall be made over to the Applicant and returned to the Railway Administration in such in each case by the Railway Administration. If the applicant undertakes to shunt the wagons from such point to his premises and back with his own staff and locomotive the Railway Administration will not be responsible for any delay, loss and damages caused in consequence of the failure of the Applicant to arrange for such shunting.*
>
> ***(b)*** *Provided that the Railway Administration may at the request of the Applicant undertake shunting by locomotives of wagons inside the premises of the Applicant on the portion of the siding colored green in the said plan and demand such additional charges as may be determined from time to time by the Railway Administration but this facility may be withdrawn at any time at the sole discretion of the Railway.*

(c) *No traffic in commodities other than such as can reasonably be regarded as Necessary for the working or requirements of the mill, factory or industry of the firm, shall, except with the written permission of the General Manager of the SOUTHEAST CENTRAL Railway or an Officer authorized by him, be at any time taken or sent by the Applicant over the siding. No consideration or remuneration of any nature, as may be contained in a written permission of the General Manager or an Officer authorized by him, shall be received or taken by the Applicant in respect of traffic over the siding.*

b. Clause 15 of the agreement says that 'Siding not to be used by other person', which reads as under:-

15. Siding not to be used by other Person:-

(a) *No traffic; inward or outward other than that of the Applicants Works shall at any time be sent over the siding by the Applicant except with the prior written permission of the Railway Administration and the Applicant undertakes not to permit any other person whomsoever to use the siding and not to take or receive or permit any other person to take or receive from any other person whomsoever any consideration of remuneration of any sort or in respect of the carrying of any commodity over for any purpose whatsoever in connection with siding except with the prior written permission of the Railway Administration and in all cases or disputes or differences with regard to any matters mentioned in this clause the decision of the Chief Operations Manager/Chief Commercial Manager of South Eastern Central Railway shall be final and binding on the Applicant.*

(b) *The Applicant is forbidden to assign, transfer or sublet in any manner whatsoever either/whole or any part of the siding without prior written permission of the Railway Administration. The booking and delivery of traffic of co-user of the siding shall be governed by the same rules and regulations as applicable to the siding owner as far as levy of freight and other charges are concerned. The siding owners shall give a written undertaking that NA (Name of the party/co-user) has been allowed to use NA (Name of the siding) owned by him with his consent and that the co-user(s) will be responsible for the payment of all railways dues that may accrue as a result of granting of such facility.*

(c) *for the sister concerns of the Applicant desirous of utilizing the siding facilities, the booking transactions, etc. Shall be in the name of the Applicant only and not in the name of the sister concerns.*

c. Clause 19 of the agreement talks about the Railway administration's Rights regarding the use of the siding:-

> **Railway Administration's Rights regarding use of the siding:-**
>
> In addition to any other rights, powers and liberties herein provided for, the Railway Administration shall have the following rights, powers and liberties, over and in connection with the siding or any extension or part thereof, namely-
>
> ***a.*** *To use the siding or any. extension or part thereof for any purposes of the Railway Administration free of charge or any remuneration to the Applicant in respect of such use.*
>
> ***b.*** *To connect or allow to be connected with the siding or any extension or part thereof any other siding or sidings branching or extending therefrom which may have been constructed or which may hereinafter be constructed by or under the authority of the Railway Administration for any other person or persons whomsoever or for the purpose of the Railway Administration and to make or allow such alterations as may be necessary to effect such connection.*
>
> ***c.*** *To use or to permit the use of the siding or any extension or part thereof for the traffic if any person or persons other than the Applicant and to work traffic over the siding or any extension or part thereof to and from any other siding or sidings or branches or extensions there from which may be constructed as aforesaid jointly with the traffic of the Applicant upon payment by such person of persons to the Applicant of either such portion of the cost originally paid by the Applicant to the Railway Administration, in respect of the land and sub-grade work or such tollage for such use as aforesaid as shall be decided by the General Manager for the time being of the Railway Administration or such other Officer as may be nominated by him whose decision shall be final, conclusive and binding on the Applicant as to whether a portion of the aforesaid cost shall be payable and if so, the amount thereof or whether a tollage shall be payable and if so, the amount or rate thereof.*
>
> *The Railway Administration shall collect such proportionate cost on behalf of the Applicant but shall not be responsible for collection of tollage for and on behalf of the Applicant, but the Applicant may enter into agreement with the person or person who has/have permitted the use of Siding or part thereof by the Railway Administration on the payment by the*

latter of tollage. The use of the Siding or any extension or part thereof by the Railway Administration or by other persons shall be so conducted in such manner and to such extent as to interfere as little as possible with the free use of the siding by the Applicant whose traffic shall have precedence.

d. *To refuse supplies of wagons or other rolling stock for the Applicant to any siding or sidings constructed for any other person or any branches or extensions or parts thereof over which the Applicant may be allowed to work traffic jointly with such other person or otherwise in the event of nonpayment by the Applicant of any sum or tollage which the Railway Administration may decide shall be payable by the Applicant or in the event of non-compliance by the Applicant with any directions or requirement of the Railway Administration with regard to the use of working of the siding or any branch or extension thereof or any other siding branch or extension whether constructed for the Applicant or otherwise including the commission or omission of any act, matter or thing which may interfere with or inconvenience the Railway Administration in the proper working thereof.*

d. Clause-22 of the agreement deals with the Power to terminate the agreement if traffic is insufficient:-

(a) *Notwithstanding anything contained in this Agreement the Railway Administration shall be entitled, in the event of the Railway Administration being of the opinion that the Applicant's traffic over the siding is insufficient to justify the retention of siding by the Applicant, of which the Chief Operations Manager/Chief Commercial Manager of the Railway Administration will be the sole judge, to terminate this agreement by giving to the Applicant not less than 6 (six) month's notice in writing of the Railway Administration intention to terminate this Agreement and on the expiry of such notice, this Agreement shall stand terminated.*

(b) *The termination of this Agreement under the provisions of this Clause shall be without prejudice to any rights of remedies to which the Railway Administration will be entitled to in respect of any acts, matter or things arising before such termination.*

C. <u>Private Freight Terminal Policy of 2020/ Master Circular on PFT:-</u>

1. Clause 2.0. deals with objective, which reads as under:-

"2.1.1. Enable rapid development of network of freight handling terminals with the participation of Private Sector.
2.1.2. Enhance the presence and share of railways in the overall transport chain.
2.1.3. Attract traffic so far predominantly moving by road to rail and attain increased rail freight volumes by offering integrated, efficient and cost effective logistics and warehousing solutions to users."

2. Clause 3.1.3 deals with authorized users:-

3.1.3. Rail users authorized by the TMC (Terminal Management Company) to make use of the facilities at a PFT will be called Authorized Users.

3. Clause 3.1.4. Brownfield PFT:-

A term used to refer to an existing private siding (including the Private Sidings dealing with container traffic) converted into a PFT under this policy.

4. Clause 3.1.13. Co-Use:-

This term refers to the permission given to a rail user by Railway Administration, other than the owner of a private siding, for using the siding for handling of his own goods at the siding, subject to the provisions of the Siding Agreement.

5. Clause 3.1.15. Greenfield PFT:-

A term used to refer to a new freight terminal commissioned as a PFT under this policy.

6. Clause 3.1.19.PFT:-

Private Freight Terminal. A terminal notified under Private Freight Terminal (PFT) policy to deal with rail based cargo including containers.

7. Clause 3.1.20. Private Siding:-

'Private Siding' refers to privately owned siding constructed/laid out by a Party at its own cost for railway freight services at the premises of its plant or manufacturing unit or production unit or mines etc. under a special arrangement. It means the Railway track connecting the Applicant's works with the Railway system. It shall cover only that portion of track network and related infrastructure on which Railway rolling stock will ply. The network utilized by the Company/Party for their internal use shall not form part of the siding defined in the siding.

8. Clause 5.0 deals with Freight Terminals (FTs):-

Loading and unloading of goods transported by rail is done at freight terminals.

9. Clause 6.0 Eligibility for TMC:-

6.1. A TMC should be –

6.1.1. A company registered in India under The Companies Act, 2013; or

6.1.2. A public sector entity (PSUs organizations created under an act of Parliament); or

6.1.3. An entity registered as a Cooperative Society under the Cooperative Societies Act 1912; or

6.1.4. An owning an existing Private Siding or an assisted siding; or

6.1.5. A subsidiary of an entity covered in 6.1.1 or 6.1.2 above; or

6.1.6. A joint venture company; or

6.1.7. A consortium of companies

6.2. The applicants with experience in the business of providing logistic service will be preferred. In case of subsidiary company, experience of the holding company may be reckoned for the purpose of experience. In case of a consortium, experience of the lead member may be reckoned. In the case of a joint venture, for the experience of a member to be considered as qualifying experience he should have at least 26% equity share in the JV.

6.3. If an eligible entity has already applied for a Private siding on private land and same has not been notified as a private siding, it will be entitled to opt for converting its proposal into a proposal for a Greenfield PFT.

10. Clause 7.0 deals with the Conversion of Private Sidings to PFTs:-

7.1. If existing private sidings already operating with a co-use facility, intend to handle cargo of other than co-users (permissible as per the 'Private Siding Policy'), they shall have to necessarily convert themselves into a PFT. However, as provided in EM Circular No. 24 of 2018, ports developed under 'Private Siding Policy' shall not come under the ambit of this provision. Multi-consignors/ consignees/ third party cargo shall be permitted at such ports without any upper limit.

7.1.1. Where in principle approval has been given for conversion of a siding, which was availing co-user permission, into a PFT, such permission will continue till notification of the siding as PFT.

7.1.2. All container terminals (Private Container Terminals developed by container train concessionaires in terms of the MCA and CONCOR's rail-based terminals) are permitted to handle container traffic as well as automobile traffic including auto ancillaries. However, in case container terminals intend to handle other than above traffic, they shall have to convert their terminal into PFT.

7.1.3. If an existing Road-based Inland Container Depot/Container Freight Station requires rail connectivity, it shall have to operate under the PFT policy.

11. Clause 8 deals with Application:-

8.1.1. An application for setting up a Greenfield PFT will include following documents:

8.1.1.1. Papers relating to eligibility criteria as stipulated in para 6.
8.1.1.2. Feasibility Report of the proposed PFT.
8.1.1.3. Projections of anticipated business volumes.
8.1.2. An application for converting an existing private sidings or container terminal into a Brownfield PFT will include following documents.

8.1.2.1. Papers relating to eligibility criteria as stipulated in para 6.
8.1.2.2. Projections of anticipated business volumes.

8.1.3. A list of authorised users of the PFT will be required to be submitted by the applicant TMC after grant of In-Principle Approval (IPA).

8.1.4. This list along with projection of anticipated business volumes as stated above will be used only for the purpose of making an assessment about requirement of additional capacity on IR network, etc.

12. Clause 16 deals with the Construction and maintenance of PFT:-

16.1. The construction and maintenance of PFT will be as per provision of 'Private Siding Policy' of IR issued by Ministry of Railways vide Freight Marketing Circular No. 11 of 2016 under letter No. 99/TC(FM)/26/1/Pt.-II dated 22.08.2016 and as revised/amended time-to-time.]

16.2. Each PFT will be provided connectivity with a station on IR network. Such a station will be the

serving station for the PFT.

16.3. Generally, a PFT will not be permitted to be connected to IR network in mid section. However, in exceptional cases where such a connection becomes inescapable due to physical layout, the same will be permitted by RA in accordance with the extant relevant policy guidelines for 'Private Siding Policy'.

16.4. Rail connectivity upto the takeoff point (nodal point) at the serving station shall be provided by the PFT owner. However, major S&T and OHE works at the serving station will be carried out by railway administration.

13. Clause 26.0 deals with Conflicts:-

26.1. Notwithstanding any provisions in this policy, stipulations of The Railways' Act, 1989 will prevail.

26.2. In case of conversion of container terminal into PFT, if there is any conflict between the provisions of this policy and the MCA, the former will prevail in PFTs of any type.

26.3. In case of a conflict between the provisions of this policy and the private siding policy, the former will prevail in PFTs of any type.

D. <u>Master Circular for Private Freight Terminal, 2020</u>

As per Annexure A appended to the Master Circular on PFT, in-principle approval may be granted according to the stages mentioned in Clause 1.3. For the grant of IPA, the company has to fulfil the stages mentioned in Clause 1.3. The conditions mentioned in Clause 1.3 are as under:-

1.3.1 Stage 1 -At the Divisional Level:

1.3.1.1 For setting up of Private Freight Terminal (PFTs), the applicant shall submit online application on Indian railway websitehttps://ircep.gov.in/PVTSDG so as to enable online tracking of status of application/ approval with SMS alert on registered mobile number of applicant.

1.3.1.2 In addition to on-line application, the applicant shall also submit hard-copy of the application in the prescribed format (along with the requisite documents) duly signed by authorized signatory of the applicant firm to the concerned Division along with the fee as under:

*In case of Private Freight Terminal (PFT), an application fee of * 10 lakh in the form of Demand Draft in favour of FA&CAO of the concerned zonal railway (for example if the proposal is in the jurisdiction of South Central Railway, Demand Draft will be in favour of FA&CAO, South Central Railway).*

1.3.1.3. The process will start with submission of hard copy of application by the applicant to the Division in the prescribed format, with required fee and documents.

1.3.1.4.The In-Principle Approval (IPA) will be confined to i) understanding the eligibility of the Applicant; (ii) whether a takeoff can be given at the serving station; (iii) whether the station has the requisite infrastructure for construction of proposed PFT; (iv) whether 'Electronic In-motion Weighbridge' can be installed inside the PFT or outside; and (v) operational plan for traffic projection, assessment about requirement of additional capacity on IR network etc.

1.3.1.5.The time limit for IPA at the Divisional Level will be 21 days from the date of submission of application by the party.

1.3.1.6.On completion of the exercise at the Divisional level, the proposal with the recommendations of the Divisional Standing Committee shall be sent to the CTPM for further consideration of the Zonal Committee. In case of any delay beyond stipulated 21 days, adequate reasons should be recorded on the file by the DRM.

21. **<u>The provisions of Private Siding Policy, Private Siding Agreement and Private Freight Terminal Policy, 2020</u>:-**

a. The Provisions of the Private Siding Policy of 2005 and 2016 are almost similar and this issue has not been seriously contested by the answering respondents. Clause 1(i) of the Policy of 2016 specifically says that the private siding is only for the end user. In the present case, the petitioner is the end user as the private siding was constructed at the cost of the petitioner. The permission was sought by the petitioner from the Railways and thereafter, land was

acquired. The Railway track of 17.085 km was constructed by the petitioner, undisputedly; the petitioner is the end user. Clause 1(i) of the Policy of 2016 further says that one co-user is permitted with permission of the siding owner and approval of the Chief Operational Manager, thus, this clause makes it amply clear that to permit co-user the use of existing private siding, the permission of the siding owner and COM is necessary.

b. Clause 1.1 has been amended twice firstly, on 25.09.2017 whereby the maximum number of co-users was increased to 3. Secondly, on 18.08.2020 whereby multiple users were permitted.

c. Clause 2(v) of the Policy of 2016 defines 'co-user' according to which a rail user other than the owner of the private siding is permitted by the Railway administration to use the siding for handling his own goods traffic, but at the same time, the provisions of the siding agreement would be binding.

d. Clause 6.1 says that the siding owner has to bear the capital cost of the new sidings from the take-off point at the serving station.

e. Clause 6.2 further says that the capital cost for all traffic facilities, such as 'Y' connection, additional lines/loop lines at the serving station, crossing station, patch doubling, shunting neck, engine escape line, S&T work, modification etc. will be fully borne by the railways.

f. According to Clauses 8 & 9 of the Policy of 2016, the cost of the gauge conversion and maintenance of assets on new and existing sidings will be borne by the siding owner.

g. Clause 11.1, which is an important clause in the Policy of 2016, deals with the private siding agreement which will be signed in the

revised format as per Annexure-P3 before the commissioning of the siding. The petitioner and Railways entered into an agreement on 01-02-2008 and 10-08-2010.

h. Clause 14 of the private siding agreement deals with traffic on siding.

i. Clause -15 says that the siding is not to be used by the other person. It further says that no traffic other than that of the siding owner shall be permitted by the applicant except with prior written permission of the railway administration and the siding owner is not permitted to permit other persons to use the siding. The siding owner shall not receive any consideration or remuneration of any short in respect of the carry of any commodity except with the prior written permission of the railway administration.

j. According to Clause 15-b, the siding owner has to be given a written undertaking that the co-user has been allowed to use the siding owned by him with his consent and the co-user will be responsible for payment of all railway dues that may accrue.

k. Clause -19 of the agreement which has been relied upon by the counsel for the respondents deals with the railway administration's right regarding the uses of the siding. It says that the administration shall have the right, power and liberties, namely, to use the siding free of charge or any remuneration; to connect or to be allowed to connect with the siding or any extension or part thereof any other siding branch; to use or to permit the use of the siding or any extension or part thereof for the traffic upon payment to such person or persons or the applicant of either such portion of the cost originally paid to the railway administration in respect of land for such period, shall be decided by the Chief Manager and such decision

shall be final; conclusive and binding on the siding owner.

l. Clause 22 of the agreement deals with the power to terminate the agreement if traffic is insufficient.

22. **<u>The Policy of 2020 provides as under</u>**:-

An application was moved by respondent No. 5 before the Railways for the establishment of a private freight terminal according to the Policy of 2020. The object of such policy is to enable the rapid development of the network of freight handling terminals with the participation of the private sector to enhance the presence and share of the railways in the overall transport chain and attract traffic predominantly moving by road to rail and attain increased rail freight volumes by offering integrated, efficient and cost-effective logistics and warehousing solutions to users.

i. Clause 3.1.3 of the Policy of 2020 defines authorised users.

ii. Clause 3.1.4 defines Brownfield PFT, and according to its definition, the existing private siding, including private siding converted into a private freight terminal under this policy.

iii. Clause 3.1.13 defines co-user and it includes the rail user to whom permission has been given by the railway administration, other than the owner of the private siding subject to the provisions of the siding agreement. The siding agreement has been given preference in this clause.

iv. Clause 3.1.15 of the Policy of 2020 defines Greenfield PFT and it refers to a new freight terminal commissioned as a private freight terminal under this policy.

v. Clause 3.1.20 deals with private siding, it is privately owned

siding constructed by the party at its own cost for railway freight services at the premises of its plant or manufacturing units.

vi. Clause 6.0 deals with eligibility for the terminal management company and the requirements are:–

(i) the company should be registered under the Companies Act 2013;

(ii) the public sector entity;

(iii) the entity registered as a cooperative society; or

(iv) the owned existing private siding or associated siding;

(v) a joint venture company;

(vi) a consortium of the companies.

vii. Clause 7.0 deals with the conversion of the private sidings into private freight terminals.

viii. Clause 8 deals with the application for setting up of Greenfield PFT and the requisite documents are:–

(i) papers related to the eligibility criteria as stated in clause 6.1.4,
(ii) feasibility report,
(iii) projections of anticipated business volumes.

ix. Clause 13 of the Policy of 2020 deals with the charging of commercial staff; and

x. Clause 26 deals with conflicts.

23. From the above-discussed provisions of the Private Siding Policy, Private Freight Terminal Policy, and Private Siding Agreements, it is quite vivid that:-

i) The private siding is only for the end user;

ii) Co-user is permitted under the policy after permission of the siding owner and Chief Operational Manager;

iii) The co-user refers to other than the owner of the private siding for use of the siding of the owner of the private siding for handling the goods traffic;

iv) Private siding refers to privately owned siding duly constructed by a party at its own cost for railway freight services;

v) The siding owner has to bear the capital cost of the new siding;

vi) The cost of the gauge conversion and maintenance will be borne by the siding owner;

vii) The siding owner and the railways have to enter into an agreement;

viii) Private siding cannot be used by another person except to whom prior permission of the siding owner and COM has been granted;

ix) The railway administration has the right to permit the use of the siding or any extension or part thereof for traffic other than the applicant upon the payment of such portion to the original cost by the siding owner to the railway administration or on payment of tollage and it would be decided by the Chief Operational Manager of the Railway Administration;

x) Brownfield PFT refers to the existing private siding converted into a private freight terminal;

xi) The Railways can permit a rail user other than the owner of a private siding to use the siding for handling his own goods, subject to the provisions of the siding agreement;

xii) The New freight terminal commissioned as a private freight terminal is a Greenfield terminal. Essential eligibility for the terminal management company is an existing private siding or associated private siding. The application for setting up Greenfield PFT must include the documents related to the eligibility criteria, feasibility report, and projection of anticipated business volumes.

xiii) According to Annexure A of the Policy of 2020, in-principle approval may be granted according to the stages mentioned in Clause 1.3 of the policy.

Right of respondent No. 5 to defend the claim of the petitioner:-

24. Initially, two agreements were entered into between the petitioner with the railway administration on 01.02.2008 and 10.08.2010. Thereafter, the private siding was constructed by the petitioner. Respondent No. 5 moved an application before the railway authorities to set up Greenfield PFT and IPA was granted by the railways on 08.04.2021 behind the back of the petitioner. The petitioner has challenged the decision taken by the railways, and there is a dispute between the petitioner and the railways, though the right accrued in favour of respondent No. 5 as IPA has been granted in its favor, at the same time, the entire exercise was completed without communicating it to the petitioner, therefore, in the opinion of this Court, respondent No. 5 has right to defend the case up to certain extent meaning thereby to support the action of the Railways.

25. With regard to the contention raised by the learned Senior Advocate appearing for respondent No. 5 that the petitioner failed to file the Policy of 2005, the said issue has not been seriously contested by the

respondents. Further, the respondents have not disputed the fact that the provisions of the Policy of 2005 are entirely different from the Policy of 2016.

26. The respondents have filed the reply to the pleadings of the petitioner wherein the petitioner has quoted the provisions of the Policy of 2016 without any objection. Therefore, non-filing of the Policy of 2005 and referring to its clauses is not fatal to the case of the petitioner. Further, the petitioner has not challenged the constitutionality of any clauses of the Policy of 2005 or 2016; therefore, reliance placed by respondent No. 5 on ***Yogendra Kumar Jaiswal (supra) and Bai Hira Devi (supra)*** is of no help.

27. As far as the law laid down in ***Monnet Ispat (supra)*** is concerned, it would be worthy to take note that there is no dispute regarding the power of the Railways as provided under Clause 19(c) of the Private Siding Agreement. The petitioner is claiming the opportunity of hearing before taking the decision by the Railways which is provided under Clause 1(i) of the Policy of 2016.

28. Concerning the income tax rebate, the ratio laid down by the Hon'ble Supreme Court and the High Court of Calcutta in the matters of ***M/s. Ultratech Cement (supra); India Explosives Ltd (supra); Blue Jaggers Estates Ltd. (supra), Assn. of Unified Telecom Service Providers (supra),*** would not apply because the petitioner has not disputed the fact that it is not taking benefit of the income tax rebate. Further, the petitioner has also not disputed the fact that they are not using the railway network; therefore, these judgments do not apply to the given facts of the case.

29. The order passed by the Writ Court while rejecting the application moved by the petitioner for the grant of interim relief and the judgment passed by the Hon'ble Division Bench in WA/342/2021 would not be binding as those findings were recorded while deciding the application for the grant of interim relief, whereas, this petition is being disposed of finally.

30. In ***Zenit Mataplast (P) Ltd. vs. State of Maharashtra and others, (2009) 10 SCC 388, at para 30,*** their lordships of the Hon'ble Supreme Court observed and held that *"Interim order is passed on the basis of prima facie findings, which are tentative. Such order is passed as a temporary arrangement to preserve the status quo till the matter is decided finally, to ensure that the matter does not become either infructuous or a fait accompli before the final hearing. 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"*.

31. Further, the High Court of Jammu & Kashmir and Ladakh in ***Kaka Ram and others vs. Mangat Ram, CM(M) No. 20/2024 CM No. 387/2024*** vide order dated 05.02.2024 reported in ***2024 LiveLaw (JKL) 16*** observed that *"It is noteworthy that a court while considering an application for interim relief, be it the trial court or an appellate court, while making any observation or recording any findings qua the controversy involved in the case, such observations or findings recorded are always tentative and temporary in nature and character being not final expression of any opinion as to the merits of the case".*

32. **Right of respondent No. 5 to install PFT, Eligibility:-**

It is an issue which has to be decided by the Railways according to its policy and any observation made in the present Writ Petition may hamper the right of respondent No. 5.

33. **Whether respondent No. 5 comes within the definition of 'co-user':-**

From a plain reading of the definition of 'co-user' given under the Private Siding Policy of 2016, it is apparent that rail users other than the private siding owner permitted by the railway administration to use siding for its own traffic in that siding would be co-user.

34. In the Policy of 2020, a 'co-user' has been defined as a rail user other than the private siding permitted by the railway administration, subject to the provisions of the siding agreement.

35. In the present case, the private siding was established by the petitioner at its own cost; respondent No. 5 moved an application to set up Greenfield PFT before the Railways and the ultimate object of respondent No. 5 is to use the railway siding of the petitioner for transportation of goods, raw materials and manufactured goods, therefore, in the opinion of this Court, respondent No. 5 is within the purview of the 'co-user'.

36. **Right of the Railways under Clause-19 of the agreement:-**

The right of the Railways is only stated in the private siding policy, the preference has been given to the private siding owner according to clause-1(i) of the Policy of 2016; private siding is only for the end user, and co-user is permitted with the permission of siding owner and chief operational manager. Particularly, under Clause 19(c), the railway has been given the right to use privately owned siding and they can permit any company to use private siding and such owner will be

entitled to get tollage. Clause 19 of the agreement cannot be read in isolation, a harmonious reading of clause 1(i) of the policy, private siding policy, clause 2(v) of the Private Siding Policy of 2016, clauses 15 & 19 of the Private Siding Agreement, and, clause-3.1.13 of the Policy of 2020 would make it abundantly clear that the railways have the authority to permit the co-user to use the railway siding constructed by the private siding owner, but at the same time, the consent of the private siding owner is also relevant thus the right of the railways is not denied.

37. The Railways have every right to permit the co-user or to permit any company to set up the Greenfield PFT and the private siding owner will be entitled to collect tollage, but at the same time, the consent of the private siding owner must be obtained.

38. The contention raised by the petitioner with regard to exclusive ownership cannot be accepted. The multi-railway siding cannot be constructed for each and every company setting up in that locality for the movement of rakes.

39. **Right of the petitioner:-**

The subject private siding has been constructed by the petitioner and it is the end user. The entire construction cost including the acquisition of lands for the private siding was borne by the petitioner; respondent No. 5 moved an application before respondent No. 3 to set up Greenfield PFT. The railway administration granted IPA on 08.04.2021, thereafter, the petitioner was called to attend a tripartite meeting and discuss the modalities for connecting respondent No.5's proposed private siding. In that meeting, the petitioner was informed that the IPA had already been granted in favour of respondent No. 5.

40. It appears that the entire exercise was carried out for the grant of IPA behind the back of the petitioner. Admittedly, the petitioner is the owner of the private siding, and being the end user and owner of the private siding, the petitioner has every right to go across any decision affecting the movement of rakes.

41. Clause 1(i) of the private siding policy strengthens the case of the petitioner, and without permission of the petitioner, the decision ought not to have been taken by the railways with regard to the grant of IPA.

42. The Railways have not assigned any reason and have not discussed the eligibility of respondent No. 5 to set up Greenfield PFT, but at the same time, IPA was granted on 08.04.2021. Though the eligibility of respondent No. 5 is not an issue, the consent of the petitioner was required to be obtained by the railways before taking any decision.

43. The consent of the petitioner is also required to settle the amount of the tollage or charges payable by respondent No. 5. The petitioner is that entity which may disclose the amount of expenditure incurred in setting up the private railway siding.

44. With regard to the public interest as argued by the counsel for the respondents, it would not attract in the present case, as impugned IPA has been granted in favour of respondent No. 5 alone.

45. It is true that the principles of law laid down by the Hon'ble Supreme Court in the matter of ***Mohinder Singh Gill*** ***(supra)***, would not apply where the larger public interest is involved, but looking at the facts and circumstances of this case, it cannot be held that at present, the larger public interest is involved, therefore, the judgements relied upon by the learned counsel for respondent No. 5, particularly in the case

of ***K. Shyam Kumar*** *(**supra**)* and ***Internet & Mobile Association of India*** *(**supra**)*, are of no help.

46. The petitioner in the present case has not challenged any Government contract entered into between the petitioner and the Railways. The petitioner has challenged only the action of respondents No. 3 & 4, whereby impugned IPA has been granted in favour of respondent No. 5 without affording any opportunity of hearing and without obtaining consent of the petitioner.

47. It is already held that there are some provisions in the Policy of 2016, the Agreement and even in the Master Circular on PFT of 2020, which specifically say that any decision with regard to the co-user can be taken after obtaining the consent of the petitioner. Therefore, the facts of the judgements relied on by the counsel for respondent No. 5 in ***R.Veeranna (supra)*** and ***BVG India Ltd. (supra)***, are distinguishable.

48. The principle of natural justice would attract in the cases even where it is not specifically spelt out. For the sake of argument, if no provision is engrafted under Clause 19 of the agreement entered into between petitioner and respondents No. 3 & 4, even though any decision affecting the right of the petitioner cannot be taken behind the back of the petitioner. Further, no reasons have been assigned by respondents No. 3 and 4 while granting IPA to respondent No. 4 and these issues have been discussed in the following judgments.

49. In the matter of ***Dharampal Satyapal Limited*** *(**supra**)*, the Hon'ble Supreme Court has categorically held that the principles of natural justice are very flexible principles and cannot be applied in any straitjacket formula. It all depends upon the kinds

of functions performed and to extent to which the person has directly been affected. In the present case, the rights of the petitioner are being affected without affording any opportunity of hearing, thus the ratio laid down in the above-stated case applies to the facts of the present case, in favour of the petitioner.

50. In the matter of ***MJ James (supra)*****,** the Hon'ble Supreme Court has held that no man shall be a judge in his own cause and the authority is duty-bound to give reasons in support of the decision. It is further held that in the exercise of quasi-judicial or administrative power, there is a requirement to act justly and fairly, and not arbitrarily or capriciously. It is also held that when a complaint is made that the principle of natural justice has been contravened, the court must decide whether the observance of that rule was necessary for a just decision in the facts of the case. This decision too has been cited by respondent No. 5, but in the present case, the decision was not taken by respondents No. 3 & 4 justly and fairly and the petitioner was communicated with regard to the decision after taking it, thus, this decision also supports the case of the petitioner.

51. The decision taken by the Railways while granting IPA to respondent No. 5 is in violation of the rule of *audi alteram partem*. Even if the rules of natural justice are not embodied under Clause 19(c) of the Agreement even though the same would attract where the decision taken by the authority has civil consequences as held in the matter of ***Sahara India (firm), Lucknow v. Commissioner of Income Tax, Central-I and another*** reported in ***(2008) 14 SCC 151*****.** The relevant paras are extracted hereinbelow:-

"**15.**Rules of "natural justice" are not embodied rules.

The phrase "natural justice" is also not capable of a precise definition. The underlying principle of natural justice, evolved under the common law, is to check arbitrary exercise of power by the State or its functionaries. Therefore, the principle implies a duty to act fairly, i.e. fair play in action. As observed by this Court in ***A.K. Kraipak & Ors. Vs. Union of India & Ors. (1969)2 SCC 262***, the aim of rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. They do not supplant the law but supplement it. (Also see: ***Income Tax Officer & Ors. Vs. M/s Madnani Engineering Works Ltd. (1979) 2 SCC 455,***.

17. Initially, it was the general view that the rules of natural justice would apply only to judicial or quasi-judicial proceedings and not to an administrative action. However, in ***State of Orissa Vs. Binapani Dei & Ors. AIR 1967 SC 1269***, the distinction between quasi-judicial and administrative decisions was perceptively mitigated and it was held that even an administrative order or decision in matters involving civil consequences, has to be made consistently with the rules of natural justice. Since then the concept of natural justice has made great strides and is invariably read into administrative actions involving civil consequences, unless the statute, conferring power, excludes its application by express language.

19. Thus, it is trite that unless a statutory provision either specifically or by necessary implication excludes the application of principles of natural justice, because in that event the Court would not ignore the legislative mandate, the requirement of giving reasonable opportunity of being heard before an order is made, is generally read into the provisions of a statute, particularly when the order has adverse civil consequences for the party affected. The principle will hold good irrespective of whether the power conferred on a statutory body or tribunal is administrative or quasi-judicial.

20. We may, however, hasten to add that no general rule of universal application can be laid down as to the applicability of the principle audi alteram partem, in addition to the language of the provision. Undoubtedly, there can be exceptions to the said doctrine. Therefore, we refrain from giving an exhaustive catalogue of the cases where the said principle should be applied. The question whether the principle has to be applied or not is to be considered bearing in mind the express language and the basic scheme of the provision conferring the power; the nature of the power conferred and the purpose for which the power is conferred and the final effect of the exercise of that power. It is only upon a consideration of all these matters that the question of application of the said principle can be properly

determined. (See: ***Union of India Vs. Col. J.N. Sinha & Ors. (1970) 2 SCC 458***."

52. The decision so taken by respondents No. 1 to 4 while granting In-Principle Approval was in violation of the principles of natural justice and such a decision also hampers the rights of the petitioner, therefore this writ petition is maintainable. The judgments relied on by the respondents on this issue are distinguishable.

53. The petitioner has made certain allegations with regard to the malafides against the railway authorities as impugned IPA was granted in favour of respondent No. 5 behind the back of the petitioner. The impugned decision was taken by railway authorities, and there was no need to implead them in person, therefore, the ratio laid down by the Hon'ble Supreme Court in ***Nisha Priya Bhatia (supra)*** does not attract looking to the peculiar facts of the case. The allegations of malafides and arbitrariness can be made against authorities too.

54. In the present petition, the petitioner has not challenged any technical and complex decisions taken by railways. The petitioner being the owner of the private siding was required to be heard before taking any decision with regard to the use of private railway siding. With regard to the right of the railways, it is already held that respondents No. 3 & 4 have the right to permit any person/person(s) to co-use the private siding of the petitioner, but it cannot be done without obtaining the consent of the owner of the private siding.

55. In the matter of ***E.S. Solar Power (supra)***, the Hon'ble Supreme Court held that the contracts/documents must be read as a whole to determine the mutual rights and obligations of the parties. In the

present case also, the Railways cannot make any decision by picking certain clauses or provisions of the policy and agreement. But after reading the entire scheme, it can safely be held that without seeking the consent of the owner of the private railway siding, the decision so arrived would be erroneous. In the present case also, the decision was taken by the railways placing reliance on Clause-19 of the agreement only, and other documents were left over and thus, the judgments relied on by respondent No. 5 support the case of the petitioner.

56. From a bare reading of the above legal proposition, it is very much clear that the aim of the principle of natural justice is to ensure justice and prevent unfair outcomes. It ensures fairness against the actions of the Government and its functionaries or prevents arbitrary use of power. It applies to quasi-judicial, judicial and administrative decisions, especially those with civil consequences, to prevent injustice. However, the application of the principle of natural justice depends on the specific law, the nature of the power, and its purpose.

57. Taking into consideration the above-stated facts and the law laid down by the Hon'ble Supreme Court in the above-cited judgments, in the opinion of this Court, the action of respondents No. 3 & 4 in granting In-Principle Approval to respondent No. 5 cannot be sustained in the eyes of the law, therefore, the impugned In-Principle Approval (IPA) dated 08.04.2021 granted in favour of respondent No. 5 is hereby **quashed**.

58. Accordingly, the instant petition is hereby **allowed**.

59. However, respondents No. 3 & 4 are granted liberty to consider the application moved by respondent No. 5 for setting up Greenfield PFT and for grant of In-Principle Approval afresh, after affording the due

opportunity of hearing to the petitioner.

Sd/-

(Rakesh Mohan Pandey)
Judge

Nadim