

ESSAR BULK TERMINAL LIMITED & ANR.

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v.

STATE OF GUJARAT & ORS.

(Civil Appeal No. 2406 of 2018)

FEBRUARY 22, 2018

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**[R. F. NARIMAN AND NAVIN SINHA, JJ.]**

*Indian Ports Act, 1908:*

*s.5 – Notification under – By State Government – For expansion of port limits – Challenged by appellant-Company (who was using a captive jetty) stating that the expansion would affect the lands reclaimed or to be reclaimed by them – Petition dismissed by High Court – On appeal, held: The Notification for expansion of Port limits issued u/s. 5 was in public interest and hence was not ultra vires s. 5 – The alteration/expansion of the limits of the Port cannot be said to affect appellant-Company’s rights qua reclaimed lands as the lands were reclaimed illegally i.e. without prior permission under s.35(1) of Gujarat Maritime Board Act – In the facts of the case the appellant-Company cannot be said to have legitimate expectation – The land reclaimed by the appellant-Company not only belonged to the State Government, but the same also could be utilized by Maritime Board for any purpose – Therefore, appellant-Company has no right to private property – Thus, the Notification also does not affect any rights of the appellant-Company to private property – Gujarat Maritime Board Act, 1981 – s.35(1) – Gujarat Infrastructure Development Act, 1999 – ss. 8, 9 and 10 – Doctrine of Legitimate expectation.*

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*Gujarat Maritime Board Act, 1981:*

*s.35(1) – Interpretation of.*

**Dismissing the appeal, the Court**

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**HELD: 1. It is not correct to say that if Section 35(1) of Gujarat Maritime Board Act, 1981 were to be read with Section 35(2), it would be clear that permission for reclamation would only be necessary if a private asset were to be created in the hands of a private person. The asset to be created belonged only**

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- A to the Government of Gujarat and it was for the Gujarat Maritime Board (GMB) to grant permission to the Appellants to use the same. Section 35(1) is couched in negative language and does not refer to private rights being created. Section 35(2) cannot be read so as to throw light on Section 35(1), as under Section
- B 35(2), the GMB is only given a discretionary power to require a person, who has acted in contravention of Section 35(1), to remove the illegal erection. The wide language of Section 35(1) cannot be whittled down by Section 35(2), as the GMB may or may not utilise the discretionary power granted to it under Section 35(2). The plain language of Section 35(1) cannot be curtailed by reading
- C by inference, into sub-section (2), the fact that the GMB may, by notice, require a person to remove an erection, only when it has been made without previous permission, so as to create a private asset in the hands of a private person. The wide language of Section 35(1) makes it clear that any reclamation within the limits
- D of the GMB cannot be carried out except with the previous permission in writing of the GMB. It is clear, therefore, that dredging to a depth of below 8 meters and reclamation of any area to the south of the mangroves was done by the Appellants in the teeth of Section 35(1) of the Gujarat Maritime Board Act. [Para 16] [351-G-H; 352-A-D]
- E 2. Despite appellant-Company's production being at much less than what was projected, the Appellants' continued demands would show that the real motive was to go beyond a captive jetty and to develop a commercial port which cannot be done without a global tender under the Gujarat Infrastructure Development
- F Act. [Para 17] [352-G]
- G 3. As many as three MOUs were executed between the Appellants, the GMB and the State Government, which MOUs were valid only for a period of 12 months and were stated not to have granted any right to the Appellants, who would incur all the expenditure for the same. This being the case, it cannot be said that any legitimate expectation could be based on any of the aforesaid expired MOUs. Therefore, no such expectation could possibly have arisen out of the aforesaid MOUs or the correspondence between the Appellants and the GMB. [Para 18] [352-H; 353-A-B]
- H 4. It is evident from the correspondence between the

Appellants and the GMB, that the Appellants were clearly told that the land to be reclaimed by the Appellants would not only belong to the Government of Gujarat, but also that the GMB could utilize the aforesaid land for any purpose. What seems to emerge on a reading of the letters between the parties is that the Appellants wished to dredge the canal, at their own cost, which was next to their captive jetty, for their own purposes, for which they obtained the necessary permission. However, since dumping of earth, which would emerge as a consequence of dredging, into the open sea would be extremely expensive, it was stated that instead this earth could be dumped to create reclaimed land next to the captive jetty, which would then benefit both, the Appellants and the GMB. The argument that huge amounts had been spent to reclaim land is wholly fallacious - huge amounts were spent to dredge a canal which was permitted, as the Appellants alone were to bear the cost, and as an increased draft would benefit all, as the canal was open to all to use. Therefore, any plea as to a legitimate expectation of reclaimed land being allocated for the Appellants' own use is contrary to the correspondence by the Appellants themselves. [Para 19] [353-C-F]

5. Even if the Appellants' plea were to be accepted, the alteration of the limits of the port cannot possibly be said to affect the Appellants' rights qua reclaimed land, which has been reclaimed illegally i.e. without prior permission under the Gujarat Maritime Board Act. Thus, the CRZ clearance by the Ministry of Environment and Forests dated 6<sup>th</sup> May, 2014 for reclamation of 334 hectares of land does not further the Appellants' case in any way. [Para 22] [358-H; 359-A-B]

6. It is correct that the power of the Government to alter the limits of any port under Section 5(1) of the Ports Act must be done only in public interest. However, it has not been shown to the Court as to how the impugned notification is contrary to public interest. The affidavits filed in the High Court, by the State Government and the GMB, show that a commercial port's limits were altered in public interest because the number of vessels at the port were expected to increase dramatically and it was, therefore, necessary to make adequate facilities not only for anchorage of such vessels, but also for reasons of customs

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- A formalities, port conversion, general security etc. Therefore, the notification is not *ultra vires* Section 5 of the Ports Act. The Appellants have no ‘right’ to private property in view of the fact that the ownership of the captive jetty that has been constructed and the ownership of reclaimed land is with the GMB/State Government. For this reason also, the Notification is *intra vires*
- B as the alteration in the limits of the Port does not affect any ‘right’ of the Appellants to private property. [Para 25] [359-E-H]

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2406 of 2018.

- C From the Judgment and Order dated 25.04.2017 of the High Court of Gujarat at Ahmedabad in SPLCA No. 8356 of 2016.

Mihir Joshi, Sr. Adv., Kyur Gandhi, Ms. Priyal Parikh, Ms. Divanshi Singh, Rudreshwar Singh, Kaushik Poddar, Advs. for the Appellants.

- D Tushar Mehta, ASG, Harish N. Salve, Neeraj Kishan Kaul, Kapil Sibal, Dr. A.M. Singhvi, Harin P. Raval, Sr. Advs., Ms. Hemantika Wahi, Ms. Vishakha, Samar Kachwaha, Ms. Chanan Parwani, Akash Lamba, Varun Mathur, Nikhil Goel, Ms. Naveen Goel, Ashutosh Ghade, R. N. Karanjawala, Ms. Ruby Singh Ahuja, Vishal Gehrana, Sahil Monga, Siddhant Gupta, Sandeep Singhi, Mrs. Manik Karanjawala (For M/s.
- E Karanjawala & Co.), M/s. Lawyer’s Knit & Co, Advs. for the Respondents.

The Judgment of the Court was delivered by

**R. F. NARIMAN, J.** 1. Leave granted.

- F 2. The present appeal involves a challenge to a notification dated 18<sup>th</sup> January, 2016, issued under Section 5 of the Indian Ports Act, 1908, by which the State Government of Gujarat expanded the port limits of Hazira port. It is the case of the Appellants before us that by doing so, the Appellants have been affected because they have spent huge monies on lands reclaimed by them, which would be directly affected by the
- G expansion of the aforesaid port limits.

3. The brief facts necessary for determining the questions that arise in this appeal are as follows.

- H In 1994, the parent company of the Appellants entered into an agreement with the Gujarat Maritime Board (hereinafter referred to as “GMB”)

for use of a captive jetty in Magdalla port. Pursuant to a Port Policy framed by the Government of Gujarat in 1995, and a Build, Own, Operate and Transfer (BOOT) Policy framed for private sector participation in development of the State's ports in 1997, the GMB issued a Global Notice for Expression of Interest for Development of Green Field Site Port Facilities, inviting bids in the name of Hazira port project. A consortium led by Shell Gas B.V. was selected to develop, operate and maintain certain facilities on leased area in the port on a BOOT basis, together with related LNG facilities. Pursuant to the acceptance of its bid, Shell Gas B.V. created two subsidiaries in Gujarat, namely, Hazira Port Private Limited (HPPL) and Hazira LNG Private Limited. A concession agreement dated 22<sup>nd</sup> April, 2002 was entered into between the GMB, the State Government and HPPL for the purpose of development, operation and maintenance of Hazira port by HPPL. A notification dated 23<sup>rd</sup> June, 2004 was issued by the State Government notifying Hazira port and setting out its limits, in exercise of powers under Section 4(2) of the Indian Ports Act. This was carved out of the port limits of Magdalla port, which was so reduced as to exclude the aforesaid Hazira port.

4. Sometime in the year 2000, the Appellants had set up a shallow draft captive jetty of 456 meters at the mouth of the River Tapi, which connected to the sea at a distance of about 7 kilometers. The initial depth of the aforesaid draft captive jetty was about 3 to 4 meters.

5. As many as three Memorandums of Understanding (MOU) were entered into between the Appellants, the GMB and the State Government in the years 2007, 2011 and 2013, inter alia, for development of a RORO terminal and development of the water-front of 3000 meters. Each of these MOUs was only for a period of 12 months.

6. On 25<sup>th</sup> November, 2010, HPPL identified Adani Hazira Port Private Limited (Adani) as its sub-concessionaire, and entered into a sub-concession agreement with Adani on the same date. On 21<sup>st</sup> July, 2014, HPPL requested the GMB for amendment/extension of its port facilities. After entering into an MOU with Adani, dated 27<sup>th</sup> February, 2015, for exploring business opportunities, which fell through, HPPL, by its letter dated 14<sup>th</sup> March, 2015, revised its request for amendment of port facilities, citing the need for additional back-up area, as a result of which a much larger area than what was originally asked for was now requested. This larger area would include lands reclaimed and/or to be

A reclaimed by Essar by dumping earth out of dredging the canal next to the captive jetty of the Appellants. This proposal was approved by the GMB by its resolution dated 19<sup>th</sup> March, 2015. Meanwhile, on 7<sup>th</sup> April, 2015, Essar wrote a detailed representation to the GMB stating its objections to the extension of port limits on various grounds. On 21<sup>st</sup> April, 2015, the State Government wrote a letter to the GMB, inter alia, asking it to examine the aforesaid representation of the Appellants. A similar representation dated 29<sup>th</sup> May, 2015 was also made by the Appellants to the Chief Principal Secretary of the State. By a detailed letter dated 16<sup>th</sup> July, 2015, the GMB dismissed all the objections of the Appellants. However, on 26<sup>th</sup> August, 2015, the State Government requested the GMB to reconsider the issue of extension of port facilities in its forthcoming board meeting, and send its recommendations to the Government in relation thereto. On 28<sup>th</sup> September, 2015, the GMB passed a resolution in which it recommended the original proposal submitted by HPPL on 21<sup>st</sup> July, 2014. However, on 5<sup>th</sup> December, 2015, the Chief Principal Secretary to the Chief Minister circulated a note stating that the number of vessels at the port was expected to increase dramatically from 30-40 to 70-80, and that the port limits need to be extended to accommodate customs formalities, safety etc. In view thereof, it was necessary to make adequate facilities for anchorage of all the said vessels and that, therefore, the GMB's resolution of 19<sup>th</sup> March, 2015 should be strictly implemented. On 11<sup>th</sup> December, 2015, the State Government then wrote to the GMB stating that the port facilities will be extended in terms of the GMB resolution dated 19<sup>th</sup> March, 2015. Following this, the requisite notification dated 18<sup>th</sup> January, 2016, which has been impugned by the Appellants in a writ petition before the Gujarat High Court, was then issued under Section 5 of the Indian Ports Act.

F 7. Shri Mihir Joshi, learned senior counsel appearing on behalf of the Appellants, has argued that the first proposal alone, which was sent on 21<sup>st</sup> July, 2014, ought to have been accepted by the GMB. The second proposal for the increased area would directly impinge upon the land that was reclaimed or to be reclaimed by the Appellants, after spending huge monies for the same. The learned senior counsel specifically stated that the approval for the second proposal was done in great haste, within a matter of four days. He went on to add that the State Government had, by its letters dated 1<sup>st</sup> June, 2013, recommended to the Ministry of Environment to grant CRZ clearance to Essar for the proposed expansion of port facilities, which included additional 334 hectares of land. It was

his case that the said Ministry, on 6<sup>th</sup> May, 2014, granted the aforesaid clearance, despite which the expanded port limits would now eat into the aforesaid area, as only an area of 140 hectares out of 195 hectares, which was reclaimed by the Appellants, could be used by the Appellants. He argued that various assurances were given and MOUs were entered into with the Appellants, on the basis of which huge investments were made, and at the very least the doctrine of legitimate expectation would be attracted. He attacked the notification stating that it was ultra vires Section 5 of the Indian Ports Act, which required public interest alone to be seen. Indirectly, the extension of the limits of Hazira port would grant HPPL an extended port area without bidding, which would be contrary to the Gujarat Infrastructure Development Act, 1999. According to him, the overlapping of area with Essar was only in the second proposal, which was wholly arbitrarily recommended by the GMB initially approving the second proposal of 2015, and thereafter correctly approving only the first proposal of 2014. The GMB's resolution of 28<sup>th</sup> September, 2015 was the correct decision, which could not have been arbitrarily interfered with by the Chief Principal Secretary of the Chief Minister, on the basis of which the impugned notification has been issued.

8. On the other hand, Shri Harish Salve, learned senior counsel appearing on behalf of the State of Gujarat, painstakingly took us through the Port Policy of 1995 and the BOOT Policy of 1997. According to the learned senior counsel, since 13 berths were to be constructed, out of which 5 berths have already been constructed, a total of 1011 hectares was already allocated for port related activities to HPPL. This would be clear from a reading of the detailed project report (DPR) of 2010, and this being the case, the expansion of port limits by the impugned notification was well within the originally conceived area of 1011 hectares. He referred to and relied upon affidavits submitted by the State Government as well as the GMB before the High Court, to argue that Essar's demands for reclaimed land had nothing to do with the expansion of the limits of Hazira port. They operated in two completely different spheres. He further went on to state that no permission under Section 35 of the Gujarat Maritime Board Act, 1981 has been given to reclaim any land, which was a condition precedent to Essar's demands for further reclaimed land. He also pointed out that, being a captive port, Essar's production was much less than what was projected and, in fact, only 30% of the cargo that it was supposed to handle was being handled. According to the learned senior counsel, the objections to the expansion

A of Hazira port's limits are completely misconceived, inasmuch as what  
the Appellants really sought was for their captive port to become a  
commercial port by bypassing the provisions of the Gujarat Infrastructure  
Development Act. In any case, the Appellants' captive jetty was grossly  
underutilised and the Appellants demands for grant of reclaimed land  
has nothing to do with HPPL demanding an alteration to the limits of  
B Hazria Port, so as to cater to the increased traffic of a commercial port  
open to all.

9. Shri Tushar Mehta, learned Additional Solicitor General  
appearing on behalf of the GMB, adopted the arguments of Shri Salve.  
C In addition, he defended the GMB's approval dated 19<sup>th</sup> March, 2015,  
stating that despite the fact that the said approval came within four days  
of the HPPL letter dated 14<sup>th</sup> March, 2015, this paled into insignificance  
as nothing followed from this. Also, according to the learned ASG, on an  
examination of the official records, he found nothing in support of the  
D GMB's turn-around on 28<sup>th</sup> September, 2015, which accepted only the  
first and not the second proposal of HPPL. According to him, finally  
what was done by the State Government was in public interest and for  
good reason.

10. Shri Kapil Sibal, learned senior counsel appearing on behalf of  
HPPL and Adani, painstakingly took us through various letters written  
E by the Appellants to the GMB and permissions given. According to the  
learned senior counsel, it was clear that from a reading of the initial  
proposals of 2005 and 2006, and the later proposals of the Appellants  
that their real aim was to conduct commercial operations on their captive  
jetty, which would circumvent the need for a global tender as required  
F by the Gujarat Infrastructure Development Act. In essence, he also  
submitted that as the Appellants could claim no right or expectation of  
any sort and as the present petition was not a public interest litigation,  
the writ petition should have been dismissed at the threshold as the  
Appellants could show no right or expectation of any kind. Dr. Singhvi  
and Shri Harin P. Raval broadly supported the contentions of Shri Sibal.

G 11. Before dealing with the arguments of counsel, it is important  
to set out some of the important provisions of the relevant Acts before  
us. Sections 3(9), 4 and 5 of the Indian Ports Act read as under:

H “3(9). “Government”, as respects major ports, for all purposes,  
and, as respects other ports for the purposes of making rules under  
clause (p) of section 6(1) and of the appointment and control of

port health officers under section 17, means the Central Government, and save as aforesaid, means the State Government. A

**4. Power to extend or withdraw the Act or certain portions thereof**

(1) Government may, by notification in the Official Gazette.- B

(a) extend this Act to any port in which this Act is not in force or to any part of any navigable river or channel which leads to a port and in which this Act is not in force;

(b) specially extend the provisions of section 31 or section 32 to any port to which they have not been so extended; C

(c) withdraw this Act or section 31 or section 32 from any part thereof in which it is for the time being in force.

(2) A notification under clause (a) or clause (b) of subsection (1) shall define the limits of the area to which it refers. D

(3) Limits defined under sub-section (2) may include any piers, jetties, landing-places, wharves, quays, docks and other works made on behalf of the public for convenience of traffic, for safety of vessels or for the improvement, maintenance or good government of the port and its approaches whether within or without high-water-mark, and, subject to any rights of private property therein, any portion of the shore or bank within fifty yards of higher-water-mark. E

(4) In sub-section (3) the expression “high-water-mark” means the highest point reached by ordinary tides at any season of the year. F

**5. Alteration of limits of ports**

(1) The Government may, subject to any rights of private property, alter the limits of any port in which this Act is in force.

Explanation.- For the removal of doubts, it is hereby declared that the power conferred on the Government by this sub-section includes the power to alter the limits of any port by uniting with that port any other port or any part of any other port. G

(2) When the Government alters the limits of a port under sub-section (1), it shall declare or describe, by notification in the Official H

A Gazette, and by such other means, if any, as it thinks fit, the precise extend of such limits.

Section 35(1) of the Gujarat Maritime Board Act reads as under :

B “35. (1) No person shall make, erect or fix within the limits of a port or port approaches, any wharf, dock, quay, stage, jetty, pier, place of anchorage, erection or mooring or undertake any reclamation of foreshore within the said limits except with the previous permission in writing of the Board and subject to such conditions, if any, as the Board may specify.

C (2) If any person makes, erects or fixes any wharf, dock, quay, stage, jetty, pier, place of anchorage, erection or mooring or undertakes reclamation of foreshore in contravention of sub-section (1), the Board may, by notice require such person to remove it within such time as may be specified in the notice and if the person fails so to remove it, the Board may cause it to be removed at the expense of that person.”

D Further, Sections 8, 9 and 10 of the Gujarat Infrastructure Development Act read as under:

**“Section 8 - Selection of a person**

E (1) A concession agreement for undertaking a project may be entered into with a person who is selected through a competitive public bidding as provided in section 9 or by inviting comparative bids as provided in section 10 or by direct negotiation as provided in section 10A.

F (2) The matters relating to competitive bidding, inviting comparative bids and direct negotiation shall be such as may be prescribed.

**Section 9 - Selection of person by competitive public bidding**

G On the acceptance of the recommendation of the Board made under sub-section (2) of section 5, the State Government, the Government agency or, as the case may be, the specified Government agency shall select a developer for the project through competitive public bidding in the manner as may be prescribed.

**Section 10 - Inviting comparative bids.**

H (1) Where a proposal for undertaking a project and a proposed concession agreement prepared by a person are submitted to the

State Government, the Government agency or a specified Government agency, it may, A

(a) consider the proposal and the proposed concession agreement from all aspects (including technical and financial) and if necessary, modify the same in consultation with the person who has submitted the proposal and the proposed concession agreement; and B

(b) submit the proposal and the proposed concession agreement to the Board, if - (i) the cost of the project exceeds the limit provided by regulations under sub-section (1) of section 5, and

(ii) the undertaking of the project does not require financial assistance from the State Government, the Government agency or the specified Government agency. C

(2) On acceptance of the recommendation of the Board made under sub-section (2) of section 5, the State Government, the Government agency or, as the case may be, the specified Government agency shall adopt the proposal as the basis for selecting a person with whom concession agreement for undertaking the project may be entered into, and for selecting such person, the State Government, the Government agency or, as the case may be, the specified Government agency shall follow the procedure of competitive public bidding prescribed under section 9. D E

(3) Where a person is selected by following the procedure of the competitive public bidding (hereinafter referred to as “the selected person”), the proposal of the selected person shall be compared with the proposal which is earlier submitted by a person to the State Government, the Government agency or, as the case may be, the specified Government agency under sub-section (1) (hereinafter referred to as “the earlier proposer”). F

(4) Where the proposal of the earlier proposer is not preferable to the proposal of the selected person, the earlier proposer shall be given an opportunity to make his proposal competitive with that of the selected person within a period of thirty days from the date on which he has been given the opportunity and where the earlier proposer fails to do so within the said period, the State Government, the Government agency or, as the case may be, the specified Government agency may enter into a contract with the selected person. G H

A (5) (a) Where a concession agreement has not been entered into with the earlier proposer, the cost of preparation of the proposal and the concession agreement incurred by him shall be reimbursed by the State Government, the Government agency or, as the case may be, the specified Government agency and on such reimbursement, the proposal and the concession agreement submitted by the earlier proposer shall be the property of the State Government, the Government agency or, as the case may be, the specified Government agency.

B (b) The cost of preparation of the proposal and the concession agreement shall be determined in such manner as may be prescribed.”

C 12. It is also necessary to set out some parts of the Port Policy of 1995 and the BOOT Policy of 1997.

**“Gujarat Port Policy**

D Gujarat envisages an integrated port development strategy, consisting of creation of port facilities, industrialisation and development of infrastructure facilities like roads and railways in the hinterland. It is estimated that around 3 billion dollars (Rs. 10,000 crores) would be required to create new port facilities along with necessary infrastructure in the coming 5 years. In view of the fact that ships of large sizes are used in the transportation, for the economies of scale in international trade, ports would be developed with direct berthing facilities and speedy mechanical handling facilities, so as to reduce waiting period of the ships and saving in the cargo expenses. To expedite creation of port facilities by 2000 AD, it is proposed to have the participation of private enterprise in the development of port infrastructure.

The following ports are identified for exclusive investment by private sector:

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1. Simar Power port
  2. Mithiwirdi Steel and Automobile port
  3. Dholera General Cargo port
  4. Hazira Industrial port
  5. Vansi-Borsi Petroleum & liquid chemical port
  - H 6. Maroli Industrial port

These ports will be privatised through a global tender bid. Gujarat Maritime Board will do a preliminary techno-economic feasibility report of all these five locations except Dholera, through a global bid to facilitate prospective bidders. Dholera, being an ancient port and privatisation bids were invited in the past, no techno-economic feasibility will be done for this location. Dholera port will be the first port to be opened up for privatisation by global tendering. For remaining locations based on the preliminary techno-economic study, global tenders will be invited for privatisation. General guidelines are given below.

These port locations are to be given on BOMT (Built, Operate, Maintain and Transfer) basis. The investment in infrastructure projects like ports being capital intensive, with higher gestation period compared to other sectors of investment, Government of Gujarat is very particular that the port projects taken up by private entrepreneurs should be a profitable proposition to them. The viability of port project depends upon the location, the maritime conditions, scale of investment and the kind of cargo to be handled. The port project has to be assured at a reasonable rate of return after accounting for capital recovery and interest repayment. Hence, it is essential that each port project is evaluated based on an investment analysis; consisting of a capital cost, revenue receipts, revenue expenditure and capital recovery. Gujarat Maritime Board will study the financing pattern adopted by the World Bank and the Asian Development Bank and other Financial Institutions to evolve a comprehensive package.

Only the wharfage charges/waterfront charges will be as per the schedule decided by Gujarat Maritime Board. The promoters will be free to charge any other service charges with the prior approval of the Gujarat Maritime Board. After BOMT period, the ownership of the port and its assets will get transferred to Gujarat Maritime Board and they will examine to give it further on lease basis to the same promoter. The terms and conditions will be finalised at that time. The general guidelines for investment analysis and capital recovery for the port projects to determine BOMT period will be announced within 2 months.

#### CAPTIVE JETTIES FOR INDUSTRIES

To ensure that the new port projects are financially viable, permissions for captive jetties would be given only in exceptional

A cases, looking to the quantum of investment and the need for specialised facilities. All industrial units would be encouraged to make use of new port facilities being set up.

To take care of the increasing traffic until the completion of the new port projects, it is decided to make use of the existing captive jetties already constructed or under construction, for which the permission has already been given, to be utilized for specific commercial cargos with the prior approval of the Gujarat Maritime Board.

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C (1) This facility would be available for a reasonable period till new ports become operative. GMB will review the policy taking into account the progress made in the new ports.

(2) Gujarat Maritime Board would be entitled to collect full wharfage charges on the cargos handled, which are not captive to the industrial units.

D Looking to the huge amount of cargo handled in a short period, captive Single Point Mooring (SPM) facilities of industries located in Gujarat will be charged at concessional rate of wharfage for their captive consumption. Nevertheless, for captive cargo for industries located outside Gujarat and non-captive commercial and industrial cargo, will be charged full wharfage by Gujarat Maritime Board.

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**Gujarat BOOT Policy**

“Developer”- The word “Developer” has been used in this document to convey the various roles played by private parties at different stages of the development of the port.

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**(III) OWNERSHIP RIGHTS OF DIFFERENT PARTIES**

G	1. Ownership rights of the Government	The Government is vested with sovereign rights as owner, overseer and conservator of the waterfront and licensor to the Contract.
	2. Ownership Rights and responsibilities of the Developer	The Ownership rights of the Developer would include:

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	<ul style="list-style-type: none"> <li>• The right to mortgage, hypothecate or to execute such covenants as may be required for effectively vesting a charge on the port assets in favour of a lender to the project.</li> <li>• The right to sell, convey or transfer to another entity, the right title and interest and concession vested in the Developer, on the request of a lender to the project, subject to contractual documents. The new Developer will be selected by the lender in consultation with the GMB, and if necessary, the terms and conditions of the concession Agreement may be renegotiated.</li> </ul>
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<p>6. Expansion of facilities and Competition between ports</p>	<p>(a) Expansion of facilities</p> <p>The developers would be encouraged to add capacity over and above the capacity contracted in the concession agreement. Such expansions will be eligible for incentives by the Government, such as land acquisition, extension of royalty holidays etc.</p> <p>At the time of the signing of the Concession Agreement, the Developer will submit, and get approved by GMB, a broad perspective plan for the development of the port in the next fifteen to twenty years. The Government will not place restrictions on any expansion and further development of the port which is within the envisaged perspective plan, subject to statutory clearances. Expansions outside the scope of this plan would be subject to the approval of the GMB.</p> <p>(b) Competition between ports</p> <p>The Government would encourage competition between ports. The following, however, would be ensured:</p>
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	<ul style="list-style-type: none"> <li>• The development of the ten ports would be appropriately phased over a period.</li> <li>• Permission to set up captive jetties would not be granted, save in exceptional circumstances.</li> </ul>
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13. At this point, it is important to refer to the correspondence between the Appellants and the GMB. By their letters dated 11<sup>th</sup> July, 2005 and 13<sup>th</sup> October, 2006, the Appellants stated that as Essar Steel was in the process of doubling its steel production capacity and that it was proposed to handle cargo around 25 MMT, it would require a captive jetty of 550 meters. This would be in addition to the jetty which was already constructed of 592 meters plus 456 meters. In addition to the aforesaid, the Appellants sought permission to deepen the navigational channel upto 8 meters depth, so as to enable direct berthing of deep draught vessels up to 75,000 dead weight tonnage (DWT). For deepening the channel, the dredged material would have to be dumped and the Appellants sought permission, vide their letter dated 2<sup>nd</sup> March, 2007, to dump the dredged material on an area of about 252 hectares on the north side of the mangroves. In addition to the 550 meters jetty, the Appellants also requested the GMB to allot 38 hectares of back-up area. By a letter dated 14<sup>th</sup> June, 2007, the GMB granted in-principle approval for allotment of 400 meters waterfront, with back-up area, so as to create a direct berthing port, in which the channel could be dredged, so as to obtain a draft of 8 meters. Apart from stating that Essar will have to obtain all required permissions and clearances, four conditions are of importance in this letter and are set out hereinbelow:

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“3. The new channel to be created by Essar will be common user channel and will be allowed to be used by all other users. Essar shall not be entitled to recover any charges from other users, if they use the new channel.

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7. The ownership of reclaimed land shall vest with the Government of Gujarat/Gujarat Maritime Board.

8. Essar shall not claim for reimbursement of any expenditure incurred for this reclamation.

10. Essar has to reclaim 319.86 hectares area of inter tidal/mud flats except 67 hectares allotted to M/s HPPL and the portion of area in front of 67 hectares towards sea.”

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14. Vide their letter dated 29<sup>th</sup> August, 2007, the Appellants demanded that 1100 meters, in addition to the 550 meters waterfront that was applied for earlier, be given. The Appellants also sought permission for allotment of 252 hectares of land to be reclaimed as back-up area. By their letter dated 1<sup>st</sup> October, 2012, the GMB granted in-principle approval for allotment of 1100 meters waterfront to the Appellants.

15. By their letter dated 15<sup>th</sup> October, 2008, the Appellants asked the GMB to allow them to dredge the channel from 8 meters depth to 10 meters depth to accommodate capesize vessels of 105,000 DWT. Since material dredged from the channel would have to be dumped, an additional area of 316 hectares, towards the south of the mangroves, to dump the material and reclaim the said area was applied for. No such permission was granted by the GMB to go from a depth of 8 meters to 10 meters or to reclaim any area to the south of the mangroves. Shri Mihir Joshi, however, pointed out a completion certificate dated 11<sup>th</sup> February, 2010, in which it was mentioned that the width and depth of the channel is being increased to 300 meters and 10 meters below CD respectively in Phase-2. However, this would clearly not amount to permission for the same, as all that was stated in the completion certificate was a reference to a deep water berth of 8 meters depth below CD, the 10 meters depth being something which may be increased in future.

16. Despite this, what is clear from the record is that the Appellants appear to have actually dredged the channel to a depth of 14 meters and appear to have reclaimed an area of 164 hectares plus 170 hectares to the south of the mangroves, without any permission at all. When this was pointed out to Shri Mihir Joshi, the answer given was that when permission is granted under Section 35(1) of the Gujarat Maritime Board Act, a letter granting such permission specifically says that it is permission that is granted under Section 35(1) and for this purpose, a letter dated 2<sup>nd</sup> August, 2008 was referred to. According to him, therefore, the letter dated 14<sup>th</sup> June, 2007, which referred only to an NOC for reclamation, could not be given the status of permission under Section 35(1). According to the learned counsel, therefore, if Section 35(1) were to be read with Section 35(2), it would be clear that permission for reclamation would only be necessary if a private asset were to be created in the hands of a private person. However, it is clear that the asset to be created belonged only to the Government of Gujarat and it was for the GMB to

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A grant permission to the Appellants to use the same. We are afraid that it is difficult for us to accept this line of argument. Section 35(1) is couched in negative language and does not refer to private rights being created. Section 35(2) cannot be read so as to throw light on Section 35(1), as under Section 35(2), the GMB is only given a discretionary power to require a person, who has acted in contravention of Section 35(1), to remove the illegal erection. The wide language of Section 35(1) cannot be whittled down by Section 35(2) in the manner argued by Shri Joshi, as the GMB may or may not utilise the discretionary power granted to it under Section 35(2). The plain language of Section 35(1) cannot be curtailed by reading by inference, into sub-section (2), the fact that the GMB may, by notice, require a person to remove an erection, only when it has been made without previous permission, so as to create a private asset in the hands of a private person. The wide language of Section 35(1) makes it clear that any reclamation within the limits of the GMB cannot be carried out except with the previous permission in writing of the GMB. It is clear, therefore, that dredging to a depth of below 8 meters and reclamation of any area to the south of the mangroves was done by the Appellants in the teeth of Section 35(1) of the Gujarat Maritime Board Act.

17. Mr. Sibal laid great stress on the letter dated 15<sup>th</sup> November, 2012 to show that, in point of fact, what the Appellants were really angling for was to conduct commercial operations beyond the captive requirements of the Essar Steel plant at Hazira. This letter, while asking for an addition of 3700 meters in addition to the existing 1100 meters waterfront, also went on to speak of developing a 700 meters berth, along with the GMB, for handling commercial cargo. Apart from this, Essar planned to build a world class container terminal and a dry dock, which would serve the shipping industry generally. It also proposed to reclaim a further 334 hectares land on the southern side with the additional dredged material. A perusal of this letter would leave no doubt about the fact that despite Essar Steel's production being at much less than what was projected, the Appellants' continued demands would show that the real motive was to go beyond a captive jetty and to develop a commercial port which, as we have seen, cannot be done without a global tender under the Gujarat Infrastructure Development Act.

18. As stated hereinabove, as many as three MOUs were executed between the Appellants, the GMB and the State Government, which

MOUs were valid only for a period of 12 months and were stated not to have granted any right to the Appellants, who would incur all the expenditure for the same. This being the case, it is a little difficult to appreciate Shri Joshi's contention that any legitimate expectation could be based on any of the aforesaid expired MOUs. The High Court is correct in its conclusion that no such expectation could possibly have arisen out of the aforesaid MOUs or the correspondence between the Appellants and the GMB referred to.

19. It is also important to note from the correspondence between the Appellants and the GMB, that the Appellants were clearly told that the land to be reclaimed by the Appellants would not only belong to the Government of Gujarat, but also that the GMB could utilize the aforesaid land for any purpose. What seems to emerge on a reading of the letters between the parties is that the Appellants wished to dredge the canal, at their own cost, which was next to their captive jetty, for their own purposes, for which they obtained the necessary permission. However, since dumping of earth, which would emerge as a consequence of dredging, into the open sea would be extremely expensive, it was stated that instead this earth could be dumped to create reclaimed land next to the captive jetty, which would then benefit both the Appellants and the GMB. In point of fact, 140 hectares out of 195 hectares that is reclaimed by the Appellants is allocated to the Appellants for their own purposes, the balance to be given as and when a jetty of 1100 meters plus 3700 meters of waterfront is constructed. The argument that huge amounts had been spent to reclaim land is wholly fallacious - huge amounts were spent to dredge a canal which was permitted as the Appellants alone were to bear the cost, and as an increased draft would benefit all, as the canal was open to all to use. Therefore, any plea as to a legitimate expectation of reclaimed land being allocated for the Appellants' own use, thanks to large amounts being spent, is contrary to the correspondence by the Appellants themselves.

20. In point of fact, it is important at this stage to advert to the GMB's detailed reply, dated 16<sup>th</sup> July, 2015, to the State Government, in which it examined the representation made by the Appellants dated 7<sup>th</sup> April, 2015 and rejected the same. This letter expressly states that it deals with the representation of Essar, with the comments of the GMB on the side of the representation of Essar. The following extracts from the aforesaid letter are of great importance and are set out hereinbelow:

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No.	Representation of Essar Ports Ltd. to Hon'ble CM	Comments
1.	EBTL through an investment of more than Rs. 2000 Cr. has been operating deep draft 550m jetty since 2010 and caters to the Essar's Steel plant cargo requirement. The steel plant is expected to ramp up its production in line with its 10 MMTPA capacity and would require augmented marine facility and back up area for handling its increased cargo requirements.	The Proposed port limit excludes the area of 550m jetty and back-up area behind the jetty. Hence, it has no effect. The present capacity of the steel plant is 10 MMTPA whereas the actual steel production at the plant in the year 2014-15 is only 3.15 MMTPA. No firm/definite plans for augmentation in steel production are submitted.
2.	GMB had given NOC for reclamation of 319 ha. in June 2007, pursuant to which Essar started the process for development of back up land for its expansion. The allotment of the reclaimed land to Essar was also decided in the meeting held under the chairmanship of the then Chief Secretary in November 2009. EBTL has developed a channel of more than 7 km length with capacity to handle up to 11m draft vessel and has plans to take it up to 14m draft and have waterfront of more than 5 km.	GMB had granted NOC to dump dredged material for 310 Ha. of land in the mudflat area shown in the map attached as Annexure 3. However, as per the DILR report, the actual reclaimed area is only approx. 195 Ha. Out of this area approx. 98 hectares of reclaimed land is excluded from the proposed expansion of port limit. Further, a specific condition was mentioned in the NOC of GMB that the ownership of the reclaimed land shall vest with GMB/GOG. Further it is also be noted that NOC granted to EBTL for reclamation is also

		beneficial to the company. In case of non-issuance of NOC for dumping the dredged material in the mudflat area (very close to dredged area) the company had to dump the dredged material in the mid sea (very far) which would have been expensive.
3	In order to develop commercial port facilities, EBTL submitted a proposal to GMB in 2008 and signed MOU with GMB for expansion by 3.7 km waterfront along with the associated back up land during vibrant Gujarat 2013 in the presence of Shri. Narendra Modi- Hon'ble Prime Minister of India. Pursuant to this Essar has invested substantial amount in terms of time and money for development of the same. After the necessary recommendation from the Government of Gujarat EBTL has received the environment clearance of 6 <sup>th</sup> May 2014. EBTL has made investment of more than Rs. 15000 Cr. till date for development of waterfront and land reclamation (233 Ha) and is in the process of reclaiming further in order to undertake their planned expansion while their application remains pending.	The proposal for development of commercial ports facilities was received. But, the permission granted to Essar is only for captive purpose and thus, without performing bidding process, there is no policy of GOG to convert captive port facilities into a commercial port terminal. Further HPPL has already rights under concession agreement to develop common commercial port facilities cannot be accepted. GMC or GOG has never granted such permission for commercial port facilities development by Essar.

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6	The proposed expansion of port limits not only constrains the existing steel plant operations but, also infringe on EBTL expansion as explained above, thereby jeopardizing the proposed port facilities for industry. Any step which restricts EBTL's development plans would deprive a port based industry of its growth and realizing its full potential.	The future plans of EBTL are for commercial port operation. There is no policy to convert captive port facilities into commercial port facilities as there is no bidding process involved. Hence, the same may not be acceptable.															
8.	Essar plant at Hazira is the largest integrated steel plant facility in India at a single location and any impact on the operation of the same would be lead to substantial loss to the exchequer. Essar group has invested more than INR 44500 Cr. in the Hazira complex in its steel, power and ports business group infrastructure.	<p>Essar has following captive port facilities operational.</p> <table border="1" data-bbox="836 961 1148 1549"> <thead> <tr> <th>No.</th> <th>Jetty</th> <th>Capacity (MMTPA)</th> </tr> </thead> <tbody> <tr> <td>1.</td> <td>456 m Lighterage Main jetty</td> <td>5</td> </tr> <tr> <td>2.</td> <td>592 m Lighterage (1<sup>st</sup> expansion)</td> <td>5</td> </tr> <tr> <td>3.</td> <td>550 m deep water berth (2<sup>nd</sup> expansi on)</td> <td>15</td> </tr> <tr> <td>Total</td> <td>1598 m</td> <td>25</td> </tr> </tbody> </table> <p>Further, GOG has approved further 1100m waterfront for deep water jetty (3<sup>rd</sup> expansion) for which</p>	No.	Jetty	Capacity (MMTPA)	1.	456 m Lighterage Main jetty	5	2.	592 m Lighterage (1 <sup>st</sup> expansion)	5	3.	550 m deep water berth (2 <sup>nd</sup> expansi on)	15	Total	1598 m	25
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	<p>construction permission is yet to be accorded by GMB. Adding this 1100m waterfront, total jetty/wharf of 2698m will be utilized by EBTL.</p> <p>Against the capacity of 25 MMTPA, EBTL has handled cargo as per Annexure 4. It is seen that during the last year 2014-15 Essar has handled total 10 million tons of cargo against the existing capacity of 25 MMTPA.</p> <p>Further, the company has gradually reduced usages of the main jetty of 456m, the cost of construction has already been set off and full wharfage is payable. EBTL has reduced the cargo handling at the main jetty and it has diverted to 550m deep water jetty where the set off of the cost is available and thus, the concessional wharfage rate is payable.</p>
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In furtherance to the above, the following points may please be seen:

(1)- (3) xxx xxx xxx

(4) ESSAR has submitted details vide letter dated 7<sup>th</sup> April, 2015 of various proposals to GMB for development of waterfront and back-up area from time to time. GMB as a regulatory authority scrutinizes every proposal and submits to Govt. for necessary approval. It is to be noted that GMB granted NOC for dumping dredge material in mudflat area at Magdalla to ESSAR vide letter dated 14<sup>th</sup> June, 2007 (Annexure 5) with a condition that the

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A ownership of reclaimed land shall vest with GMB/GOG (Condition No.7) and ESSAR shall not claim reimbursement for any expenditure, incurred for this reclamation (Condition No 8).”

21. A perusal of the objections of Essar and the comments offered by the GMB would show that, first and foremost, actual steel production at the plant is way below capacity, with no firm or definite plans for augmentation. In fact, in the GMB’s affidavit filed in the High Court, it is stated that only 30% of the total capacity of cargo sought to be projected by the Appellants from 2011 onwards was, in fact, being handled by the Appellants. Also, it was noted that the reclaimed land will be of the ownership of either the Government or the GMB, and, that it is beneficial to the company, as otherwise the dredged material would have to be dumped in the sea which would have been very expensive. However, Shri Joshi referred us to a statement, made in a rejoinder affidavit by the Appellants in the High Court, to the effect that the cost of dumping dredged material to reclaim land was at least twice as much as the cost of dumping the dredged material in the sea. This bald averment made in an affidavit, without any supporting material, cannot be accepted at its face value. The answer to objection 3 is again of great importance, in that the GMB was alive to the fact that Essar is really attempting to convert its captive jetty into a commercial port, without entering into any bidding process, contrary to the Gujarat Infrastructure Development Act. Further, in answer to objection 8, the GMB states that the jetty is 1598 meters long with the further 1100 meters which the Government has approved for a capacity of 25 MMTPA, against which Essar has handled only 10 million metric tonnes of cargo in the year 2014-15.

22. At this point it is also important to note that the GMB’s affidavit filed in the High Court also specifically states that the reclaiming of 334 hectares of land by dredging the channel to 14 meters’ depth was never approved by the GMB. Thus, the argument that the area of 170 hectares and 164 hectares of reclaimed land, which the altered limits of the port has been said to impinge upon, has no legs to stand, in view of the fact that no prior permission has been taken under Section 35 of the Gujarat Maritime Board Act to add reclaimed land to the main land, as has been stated hereinabove. Added to this, the area of 195 hectares that has been reclaimed is allocated to the Appellants for their own use – 140 hectares immediately and the balance only after approval and construction of the further elongated jetty. It is clear that even if the Appellants’ plea

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were to be accepted, the alteration of the limits of the port cannot possibly be said to affect the Appellants' rights qua reclaimed land, which has been reclaimed illegally i.e. without prior permission under the Gujarat Maritime Board Act. Thus, the CRZ clearance by the Ministry of Environment and Forests dated 6<sup>th</sup> May, 2014 for reclamation of 334 hectares of land does not further the Appellants' case in any way.

23. We now come to the Appellants' argument of the haste that is shown by the GMB in recommending the second proposal for altered limits. True, the GMB did act within 4 days of the said proposal, but this fact, without anything more, to demonstrate mala fides or lack of public interest, cannot possibly hold water. It is also to be noted that Shri Salve's plea, that 13 berths would require 1011 hectares of adjacent land and that much less land than 1011 hectares has been allocated for the use of a commercial port, has to be accepted.

24. The further plea, that the forest land to the north consisting of 300 hectares, having now been acquired in October, 2016, would enure to the benefit of HPPL, would also not take the Appellants' case any further, as even these 300 hectares would be subsumed within the requirement of 1011 hectares, as has been pointed out, in the DPR of 2010.

25. There can be no doubt that Shri Joshi's plea that the power of the Government to alter the limits of any port under Section 5(1) of the Indian Ports Act must be done only in public interest is correct. However, it has not been shown to us as to how the impugned notification is contrary to public interest. The affidavits filed in the High Court, by the State Government and the GMB, show that a commercial port's limits were altered in public interest because the number of vessels at Hazira port were expected to increase dramatically and it was, therefore, necessary to make adequate facilities not only for anchorage of such vessels, but also for reasons of customs formalities, port conversion, general security etc. We are not, therefore, satisfied that the notification is ultra vires Section 5 of the Indian Ports Act. We have already seen that the Appellants have no 'right' to private property in view of the fact that the ownership of the captive jetty that has been constructed and the ownership of reclaimed land is with the GMB/State Government. For this reason also, the notification is intra vires as the alteration in the limits of Hazira Port does not affect any 'right' of the Appellants to private property.

A            26. In conclusion, for the reasons given by us in the present judgment, the appeal deserves to be dismissed. The appeal is dismissed with no order as to costs.

Kalpana K. Tripathy

Appeal dismissed.