IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.85/1996

1. Sesa Shipping Limited,
a Company incorporated under
the Companies Act, 1956 and
having its Registered office at
Sesa Ghor, 20 EDC
Complex, Patto, Panaji, Goa.
(deleted from 5th October 1996)

2. Sesa Goa Limited,
a Company incorporated under
the Companies Act, 1956
and having its Registered
Office at Sesa Ghor, 20 EDC
Complex, Patto, Panaji, Goa. .... Petitioners.

Versus

1. The Board of Trustees of
the Port of Mormugao, a body
corporate set up under the
provisions of the Major Port
Trusts Act, 1963 and having
its office at Mormugao
Harbour, Goa.

2. Union of India, through
the Secretary to the
Government of India,
Ministry of Commerce, New Delhi. .... Respondents.

Mr. S.K. Kakodkar, Sr. Advocate with Mr. J.J. D'Souza,
Advocate for the petitioners.

Mr. V.B. Nadkarni, Sr. Advocate with Mr. Y.V. Nadkarni,
Advocate for respondent No.1.

Mr. V.P. Thali, Sr. Central Govt. Standing Counsel for
respondent No.2.

CORAM : V.C. DAGA,
P.V. HARDAS, J.J.

DATE OF RESERVING THE JUDGMENT :
JULY 9, 2002.

DATE OF PRONOUNCING THE JUDGMENT:
JULY 24, 2002.

J U D G M E N T: (Per V.C. DAGA, J.)

A stillborn contract, the terms of which proposed by respondent No.1, the Board of Trustees of the Port of Mormugao ('the Board' for short), is a subject matter of challenge in this petition at the instance of the petitioner, who is one of the exporters engaged, inter alia, in export of iron ore. The question sought to be raised, in our view, is no longer res integra. However, much debate is raised on this question which needs determination before going to the merits of challenges set up in the petition.

FACTS IN BRIEF

2. The facts giving rise to the present petition in, nutshell, are as under :

The First petitioner is a fully owned subsidiary company of the second petitioner, incorporated under the Companies Act, 1956. Respondent No.1 set up a Mechanical Ore Handling Plant, a facility in the Port of Mormugao for loading of iron ore for export at Berth No.9. The said facility is offered to the iron ore exporters. The iron ore exporters are obliged to load the vessels nominated by the foreign buyers at the said facility. However, as the iron ore exports through the Port of

Mormugao increased continuously over the years, the said facility was found to be inadequate for the needs of the exporters. As a result of the low loading rate at the facility,the vessels nominated by the foreign buyers could not be loaded quickly at the said facility because of certain limitations imposed over the size of loading which resulted in causing heavy losses to the exporters by way of demurrage. The iron ore exporters from Goa, therefore, could not compete in the iron ore international market.

3. The aforesaid circumstances compelled some of the iron ore exporters from Goa to acquire ocean going vessels equipped with sophisticated gear for a quicker loading of iron ore in mid-stream for the barges. Such vessels are known as 'transhippers'. Loading of iron ore at the said facility by the transhippers is controlled and regulated by the regulations known as "Mormugao Port (Shipment of Ore and Pellets from the Mechanical Ore Handling Plant at Berth No.9 and related matters) Regulations, 1979" ("Berth No.9 Regulations" for short).

4. The transhippers which are operating in the Port of Mormugao and its environs, are :- "Gosalia Prospect", owned by M/s Salgaonkar Engineers Pvt. Ltd.,;

"Swati Rani", owned by M/s. V.M. Salgaocar and Brothers Ltd.; "Priyamvada" owned by M/s. V.S. Dempo and Co. Ltd., and "Maratha Deep" owned by M/s. Chowgule and Co. Ltd., of course, with the permission of the Ministry of Commerce, Government of India, New Delhi.

5. The petitioners brought into India and commenced using in Port of Mormugao and its environs, the transhipper known as "M.V. Orissa" with the permission of the Central Government under Letter dated 16.9.1991 issued by the Ministry of Commerce, Govt. of India, New Delhi, copy of the said letter with the terms and conditions incorporated therein is on record.

6. The said transhipper, after its import, started operating in the Port of Mormugao as per terms and conditions imposed by the Central Government. By letter dated 10.2.1995, the petitioners sought respondent No.1's advice on the formalities to be entered into for operation of the said transhipper "M.V. Orissa". By letter dated 13.6.1995, the first respondent informed the second petitioners that it would have to enter into an agreement with first respondent for a period of five years, subject to the revision thereafter and pay the stipulated rates as envisaged in the Government of India's letter dated 16.9.1991.

7. The petitioners, by letter dated 11.12.1995, requested the first respondent to forward copy of the draft agreement. Under letter dated 13.12.1995, first respondent submitted a draft agreement to be executed by the petitioners in their favour for operating transhipper M.V. Orissa. By letter dated 15.2.1996, the first petitioner not being satisfied made a representation to the first respondent against the conditions sought to be imposed upon the operations of the the said transhipper M.V. Orissa contending, inter alia, that the said conditions are ultra vires, contrary to law, illegal, arbitrary and discriminatory and requested the first respondent to send a revised draft agreement to first petitioner in conformity with law. First respondent, Board replied to the said letter on 2.3.1996 rejecting the petitioners' objections to the conditions of the draft agreement and called upon the petitioners to execute the agreement according to their draft submitted by the Board. The first respondent, Board stated that the impugned conditions merely incorporated the conditions of the Government of India's letter dated 16.9.1991 under which the import and operation of the transhipper was allowed. Respondent No.1 refused to withdraw the said conditions from the said draft agreement; which ultimately, resulted in invoking writ jurisdiction of this Court under Article 226 of the

Constitution of India to challenge the said draft agreement and the terms and conditions proposed by the Board.

8. The petitioners contend that the conditions imposed in the draft agreement on the operation of transhipper M.V. Orissa are not similar to the conditions imposed by the first respondent on the other transhippers in the port. The petitioners further contend that no service is being rendered by the first respondent so as to enable them to claim, levy and collect the special charges from the petitioners. The petitioners, in nutshell, objected to the terms and conditions proposed by respondent No.1. The petitioners are seeking twin writs, a writ of certiorari to quash certain terms and conditions sought to be imposed by respondent No.1 for operating their transhipper known as "M.V. Orissa" and a declaratory writ of mandamus to withdraw or cancel and not to interfere with the use of that transhipper and not to impose any special charges on it.

9. The petitioners during the pendency of the petition, amended their petition on 6.3.1996 and introduced a challenge to the conditions imposed by Government of India vide its letter dated 16.9.1991 on

the operation of the transhipper M.V. Orissa and also sought a declaration of invalidity thereof with a further relief of declaration that the petitioners are entitled to operate transhipper, M.V Orissa as transhipper in the Port of Mormugao and its environs without complying with the said conditions.

10. On being noticed, respondents appeared and objected to the interim relief which, ultimately, came to be rejected and the petitioners were permitted to enter into the agreement without prejudice to their rights. Accordingly, the petitioners executed agreement on 6.3.1996 in favour of respondent No.1 and the same has been renewed from 7.3.2001 by an Agreement dated 8.2.2001. Incidently, the said agreements are also subject matter of challenge in the present petition.

THE ARGUMENTS

11. At the outset, Shri V.B. Nadkarni, learned Senior Counsel appearing for respondent No.1, Board pressed into service, a Judgment of the Supreme Court delivered in the case of The Board of Trustees of Port of Mormugao vs. V.M. Salgaoncar and Brothers Pvt. Ltd., Civil Appeal No.1472/1986 decided on 11.9.1996 (hereinafter, referred to as "the Board of Trustees of

Port of Mormugao", for short) and contended that the dispute sought to be raised in the petition is no longer res integra, in view of the law laid down by the Supreme Court. He also placed reliance on the common Judgment delivered by the Division Bench of this Court in V.M. Salgaoncar and Brothers Pvt. Ltd., and V.S. Dempo & Co. Pvt. Ltd. vs. The Board of Trustees of Marmugao in the Writ Petition Nos.187/1982 and 209/1982 decided on 18th, 20th & 23rd December, 1985 (unreported) to the extent it negatived the contentions of the petitioners in those cases and upheld various contentions of the Board and further contended that the adverse findings recorded in the said Judgment of the Division Bench having been set aside by the Supreme Court in the case of The Board of Trustees of Port of Mormugao (referred supra), the present petition needs no consideration and the petition can be disposed of without going into the merits of the dispute sought to be raised in the petition.

12. Per contra, Mr. S.K. Kakodkar, learned Senior Counsel appearing for the petitioners submits that the said Judgment of the Supreme Court cannot be read as a precedent for want of discussion and findings based on reasons. He submits that a decision which is not expressed or founded on reasons and does not proceed on consideration of issues involved, cannot be deemed to be

a law declared under Article 141 of the Constitution so as to have binding effect as is contemplated by the said Article. He further submits that the questions sought to be raised in the present petition were neither raised or argued, nor discussed by the Supreme Court after pondering over the issues in depth, as such, the said Judgment sought to be relied upon by the respondent No.1 cannot have a binding precedent. He further submits that it is well settled that a precedent is an authority only for what it actually decides and not for what may remotely or even logically follows from it, as such in his submission, ratio of the said decision cannot be put in service to construe the provisions of Section 46 of the Major Port Trusts Act, 1963 ('the Act' for short). He placed reliance on Rajpur Ruda Meha v. State of Gujarat, A.I.R. 1980 S.C. 1707; M/s. Goodyear India Ltd., v. State of Haryana and another, A.I.R. 1990 S.C. 781 and State of U.P. and another v. Synthetics and Chemicals Ltd., and another, (1991) 4 S.C.C. 139 in support of his submission.

13. In rejoinder, learned Counsel appearing for respondent No.1 submitted that where the language used is unmistakable, the logic at play is irresistible, the conclusion reached is inescapable, the application of the law is expounded, then it is not open for the High Court

to brush aside the law laid down by the Supreme Court. In his submission, no Judge in India, except a larger Bench of the Supreme Court, without a departure from judicial discipline, can whittle down, or be unbound by the ratio thereof. He further submits that it is impermissible for the High Court to overrule the decision of Supreme Court on the ground that said Court laid down the legal position without considering any other point. It is not only a matter of judicial discipline for the High Courts in India, but it is the mandate of the Constitution as provided in Article 141. The law declared by the Supreme Court is binding on all courts within the territory of India. He further submits that in this Country, the High Court cannot question correctness of the Supreme Court even though the point sought before the High Court was not specifically considered by the Supreme Court, if consideration thereof can be spelt out with some certainty. He placed reliance on the Judgment of the Supreme Court in cases of Fuzlunbi v. K.Khader Vali and another, (1980) 4 S.C.C. 125; Anil Kumar Neotia v. Union of India, A.I.R. 1988 S.C. 1353; and Suganthi Suresh Kumar v. Jagdeeshan, A.I.R. 2002 S.C. 681 in support of his submission.

14. In the above backdrop, the issue arises as to whether the Judgment of the Supreme Court in the case

of The Board of Trustees of Port of Mormugao v. V.M.Salgaonkar (supra), can be said to be the Judgment answering the test of Article 141 of the Constitution and is thus binding on this Court.

15. Let us examine the above issue on the basis of text of the above Judgment of the Supreme Court. If one turns to the said Judgment, it opens with the following words:

> "As had been indicated yesterday that these matters would end up in a settlement, we need to leave an imprint behind about the powers of the Board of Trustees of Port of Mormugao (the Board) in relations to the transhipper owned by the respondents". (emphasis supplied by us)

The above particular opening sentence unequivocally demonstrates that the Supreme Court could have disposed of the Civil Appeal on the basis of the compromise and/or settlement between the parties. However, the Supreme Court felt a need to leave an imprint behind about the powers of the Board of Trustees of the Port of Mormugao in relation to the transhipper owned by the respondents. Therefore, the Judgment specifically deals with the powers of the Board and lays down the law with respect to the powers thereof so as to avoid any cloud on the powers of the Board which was to some extent created earlier by one Judgment of the then Judicial Commissioner of Goa in

the case of Chowgule & Co. Pvt. Ltd., v. The Board of Trustees of the Port of Mormugao, A.I.R.1974 Goa, Daman and Diu 10 and by Division Bench Judgment of this Court in the case of V.M. Salgaonkar and Brothers Pvt. Ltd. & V.S. Dempo & Co.Pvt. Ltd. v. The Board of Trustees of the Port of Marmugao, (referred supra) which was impugned before the Supreme Court in the very appeal. In the above backdrop, in our opinion, it is not open to the petitioners to contend that the Supreme Court was not dealing with any specific question or issue.

16. As we proceed further to read the Judgment of the Supreme Court, in the next sentence, we find that the Supreme Court has considered and interpreted Section 2(p) which defines "pier". The Apex Court said thus :

> "Undeniably the Transhipper is a pier as defined in Section 2(p) read with the Explanation added thereto, in The Major Port Trusts Act, 1963 ('the Act'). It could be allowed to be brought in the Port area and put to use as a pier only on the previous permission in writing of the Board and subject to such conditions, if any, as the Board may specify. It is removable too at the instance of the Board."

Reading of the above sentences unquestionably demonstrate that legal provision was taken into account and the same was considered and interpreted by the Supreme Court, so as to hold that the 'transhipper' is a 'pier' and further held that it could be allowed to be brought in the Port

area and put to use with the previous permission in writing of the Board, and subject to such further conditions, if any, prescribed by the Board and it could be removed. As we further proceed to read the Judgment of the Supreme Court, it specifically refers to Section 46 of the Act, after quoting the said Section and after interpretation thereof, records a positive finding observing that the powers of the Board to permit and impose conditions and the power to cause removal thereof are self-contained in the said section. As we further proceed to read the Judgment of the Supreme Court, it gives a clear-cut indication to a finding reading as "In the correspondence between the parties and the Central Government, starting from the Letter of Intent ending up with the Letter of Consent, the figures of those special charges were nowhere mentioned, as seemingly the said figures were to be decided by due course by the Board". This indicates the unequivocal finding by the Supreme Court that it was well within the province of the Board to consider and determine the figure of special charges taking into account several factors and that is how the absolute authority of the Board in this behalf has been recognized by the Supreme Court. The Supreme Court noticed the findings recorded by the Division Bench of this Court in the Judgment which was impugned before it i.e. the common Judgment delivered in the case of M/s.

V.M.Salgaonkar & Bros. Pvt. Ltd., and criticizing those findings Supreme Court has recorded a specific finding reading as under :

> "The High Court order, in our view, impinged on the powers of the Board vested under Section 46 as well as the terms of consent/contract. It being a matter covered by the statutory provision as also the contract, should have guided the High Court to not cause any interference thereto and its urge to bring forth legitimacy to the special charges, from under the other provisions of the Act, was an exercise which, in our view, was erroneous. To repeat, we say that Section 46 was the solitary provision which was attracted in the case. When the special charges as asked by the Board, were not found to be exorbitant or unconscionable, there was no cause for the High Court to have issued a writ in favour of the respondents."

Reading of the aforesaid para would show that the Supreme Court unequivocally held and laid down that Section 46 was a solitary provision which was attracted in the case and then the fault was also found with the findings recorded by the Division Bench on the merits of the two conditions which were struck down by the Division Bench holding it to be ultra vires in the Judgment which were impugned before Supreme Court in the case of M/s. V.M. Salgaonkar & Bros. Pvt. Ltd. (referred supra).

17. The Supreme Court concluded its Judgment saying, "All the same, we are not required to go into elaboration, as the parties at this stage have placed

before us a Deed of Settlement." The deed of settlement was taken on record. In our opinion, in order to give binding force to its Judgment, the Supreme Court further added one line and said that on the basis of what they had said earlier, as well as on the basis of the consent terms, the appeal was allowed and the impugned Judgment of the High Court was set aside and ordered that the terms of the settlement to govern the relationship between the parties. Therefore, it is clear from the Judgment of the Supreme Court that the Division Bench Judgment of this Court in the case of M/s. V.M. Salgaonkar & Bros. Pvt. Ltd. (referred supra) to the extent it was against the Board, came to be set aside, settlement reached by the parties was taken on record, the power of the Board was recognized and the Judgment of the Division Bench to the extent it was appealed against, came to be substituted with the Judgment of the Supreme Court. It can thus be inferred clearly that the terms of settlement were found to be in consonance with the view taken by the Supreme Court. It recognised the power of the Board as such the settlement was allowed to be taken on record. Accordingly, the appeal filed by the Board came to be allowed and the Special Leave Petition challenging the Judgment of the Division Bench to the extent it was against the petitioners in that case (the respondents before the Supreme Court) came to be

dismissed.

18. Having considered the above Judgment of the Supreme Court from all angles and having seen the sweep and dissensions thereof in the light of the provision pressed into service, arguments advanced and the findings recorded, in our opinion, by no stretch of imagination, it can be said to be a Judgment of the Supreme Court is based on no discussion or without dealing with the question raised. At the same time, it also cannot be said that the question of the power of the Board was neither raised nor argued or discussed by the Supreme Court. As a matter of fact, the said Judgment of the Supreme Court gives a full picture of the rival submissions advanced, the full dressed interpretation of Section 46 of the Act and categorical findings recognizing the power of the Board. Taking overall view of the above Judgment of the Supreme Court and having taken a fresh look to the composite findings recorded therein, it would be absolutely clear that the language used in the Judgment is unmistakable, the logic at play is irresistible, the conclusion reached is inescapable, the application of the law as expounded by the Supreme Court is absolutely clear. Therefore, in our opinion, so far as the Judgment of the Supreme Court is concerned, it clearly lays down the law with respect to interpretation

of Section 46 of the Act and the power of the Board to impose terms and conditions on the operation of the transhipper. We do not think that the said question can be allowed to be re-agitated afresh before this Court. In this view of the matter, we refuse to go into the power of the Board sought to be re-agitated by the petitioners and respectfully following the Judgment of the Supreme Court hold that the Board is fully competent to impose terms and conditions while entering into the agreement with the respondent No.1 in the light of the terms and conditions put by the Central Government while granting permission to the petitioners to acquire the transhipper in question.

19. With the aforesaid findings, we propose to turn to the next challenge set up by the petitioners challenging the terms and conditions suggested by the Board in the form of the draft agreement forwarded to the petitioner. The challenge set up by the petitioners to the various conditions are more or less same as were set up in the case of M/s. V.M. Salgaonkar & Bros. Pvt. Ltd., (referred supra) and can be catalogued as under :

(1) Levy of any special charges proposed in the draft agreement is not authorised by law;

(2) The transhipper, in question, cannot be brought by the side of the MDHP at berth No.9 which means that the Port of Trust is unable to render any services

to such ships;

(3) The new special charges sought to be levied are discriminatory;

(4) The conditions which the Port Trust can impose on the transhippers under the provisions are merely for the purpose of regulation of traffic in the port area or for the purpose of prevention of any breach of rules and regulations under which the traffic in the port area has to be controlled and managed by the Port Trust;

(5) The conditions imposed by the draft agreement on the operation of transhipper 'M.V. Orissa' are not similar conditions.

As already pointed out by us, the aforesaid identical challenges were also set up in the earlier petitions filed at the instance of M/s.V.M. Salgaoncar and Bros. Pvt. Ltd., and M/s. V.S. Dempo & Co. Pvt. Ltd. (referred supra) before the Division Bench of this Court. All the above challenges were turned down in those petitions, except with respect to the two conditions, viz., (i) the condition imposing special charge of Rs.5.40 paise per tonne and Rs.2.70 paise per tonne for primary loading and up topping and, (ii) the condition empowering the Board to call for financial information in connection with the operation and maintenance of the vessel. These findings adverse to the Board were set aside by the Supreme Court and these conditions were held to be legal and valid. The Division Bench had upheld all the contentions of the Board, barring two, referred to hereinabove, which were subsequently upheld by the Supreme Court. We, therefore, do not think it necessary

to go into these challenges in view of the Judgments of the Division Bench and the Supreme Court, referred to hereinabove. In our opinion, the challenges set up in the petition to the terms of the draft agreement on the above catalogued grounds for the above reasons, must fail.

20. The petitioners pressed into service one more virgin challenge on the touchstone of Article 14 of the Constitution to the terms and conditions of the draft agreement. The petitioners state that the conditions imposed by the draft agreement on the operation of the transhipper 'M.V. Orissa' are not similar to the conditions imposed by the 1st respondent on other transhippers in the Port and, therefore, the Board has practical discrimination. At this stage, we may point out that the terms of the agreement between other transhippers and respondent No.1 are not on record. In absence of the advantage of having look the said terms, we are of the opinion that we cannot go into this question and consequently cannot investigate this challenge. Terms of those conditions have not been extracted in the petition. The petitioners could not even develop their submissions in this behalf for want of adequate material on record. We, at this stage, cannot resist ourselves from referring to the observations of

the Supreme Court in the case of Bharat Singh and others v. State of Haryana and ors., A.I.R. 1988 S.C. 2181, reading as under :

> " When a point which is ostensibly a point of law is required to be substantiated by facts, the party raising the point, if he is writ petitioner, must plead and prove such facts by evidence which must appear from the writ petition and if he is the respondent, from the counter-affidavit. If the facts are not pleaded or the evidence in support of such facts is not annexed to the writ petition or to the counter-affidavit, as the case may be, the court will not entertain the point. There is a distinction between a pleading under the Civil P.C. and a writ petition of a counter-affidavit. While in a pleading that is, a plaint or a written statement, the facts and not evidence are required to be pleaded, in a writ petition or in the counter-affidavit not only the facts but also the evidence in proof of such facts have to be pleaded and annexed to it."

We, for the reasons stated, refuse to go into this challenge set up by the petitioners.

21. The petitioners, in this petition, challenged each and every condition of the draft agreement proposed by respondent No.1, Board. Basic challenge centres around the fact that the Board has either no authority to put such conditions or the proposed conditions are discriminatory, arbitrary and violative of Article 14 of the Constitution. The defence coming from the Board by way of justification to the said

conditions is that the said conditions are nothing, but reproduction of the conditions imposed by the Central Government in their letter dated 16.9.1991 while granting permission to the petitioners, permitting them to acquire transhipper vessel 'M.V. Orissa' to operate at Mormugao Harbour. The Board is claiming source of power to impose this condition based on Section 46, and justifying reasonableness thereof on the basis of terms and conditions imposed by the Central Government vide their letter dated 16.9.1991; wherein the Central Government itself has recognized the power of the Board and provided guidelines as to how and in what mode and manner the said conditions should be imposed on the petitioners.

22. Learned Counsel appearing for respondent No.1 also tried to borrow support from the Judgment of the Division Bench of this Court in the case of M/s. V.M. Salgaonkar & Bros. Pvt. Ltd., (referred supra) wherein the similar conditions put by the Board were justified in those writ petitions on the basis of the conditions imposed by the Central Government while granting permission to acquire the transhipper and the same were found to be legal and valid in absence of any challenge to the conditions imposed by the Central Government at the instance of the petitioners in those petitions.

23. In order to get over the defence set up by the Board in their counter-reply, the petitioners amended their petition and raised several challenges to the terms and conditions imposed by the Central Government vide letter dated 16.9.1991 and sought a declaratory mandamus to declare the said condition as ultra vires, illegal, and arbitrary.

24. At this juncture, it will not be out place to mention that the Central Government granted permission to the petitioners vide their letter dated 16.9.1991 for acquisition of transhipper Vessel to operate at Mormugao Harbour. The petitioners acted upon the said terms and conditions by acquiring the transhipper and put it in operation without there being any protest or objection to the terms and conditions imposed by the Central Government at any point of time till the date of amendment i.e. 6.3.1996. Thus, right from September, 1991 till June 1996, at no point of time these conditions were challenged by the petitioners. No approach or demand was ever made to the Central Government either to withdraw, cancel and/or modify the said terms and conditions. In absence of any demand for justice, no Mandamus can be asked for, is settled principle of law. As a general rule, Order will not be granted unless the party complained of has known what it was, he was

required to do, so that he had the means of considering whether or not he should comply with and it must be shown by evidence that there was distinct demand of what which the party is seeking the Mandamus desires to enforce, and the demand was met by a refusal. In State of Haryana & another v. Chanan Mal etc., A.I.R. 1976 S.C. 1654, it was held that he who applies for a Writ of Mandamus, should in compliance with the well known rule of practice, ordinarily, call upon the authority concerned to discharge its legal obligations and to show that it has refused or neglected to carry it out with a reasonable time before applying to a Court for such an order. In this case, the second prayer is a prayer for a Writ of Mandamus. No explanation has been offered for this delayed challenge to the said terms and conditions imposed by the Central Government. Under these circumstances and in the absence of any prior demand for either withdrawal, cancellation or modification of the said terms and conditions, put by the Central Government vide their letter dated 16.9.1991, we do not propose to entertain this challenge to the terms and conditions put by the Central Government. We, therefore, turn down any such challenge to the said conditions and reject the prayer made to this effect.

25. In M/s. Tilokchand Motichand and ors. v.

H.B. Munshi, (A.I.R. 1970 S.C. 898) it was observed by the Supreme Court that the party claiming fundamental rights must move the Court before third party rights come into existence. The action of courts cannot harm innocent parties, if their rights emerge by reason of delay on the part of the person moving the Court. In the case of State of M.P. and others etc.etc. v. Nandlal Jaiswal and others (A.I.R. 1987 S.C.251), the Supreme Court refused to entertain the petition as there was considerable delay in filing the writ petition and in the intervening period, respondents had acquired land, constructed distillery buildings, purchased plant and machinery and spent considerable time, money and energy towards setting up the distillery unit, the delay was held to be fatal. Similarly, in State of Orissa v. Sri Pyarimohan Samantaray and others (A.I.R. 1976 S.C. 2617), it was held that the petition was liable to be dismissed on the ground of inordinate, unexplained delay. Considering all these catena of decisions and that the right which is created in favour of the Board to demand special charges from the petitioners and in absence of any challenge to the terms and conditions imposed by the Central Government while granting permission in favour of the petitioners to acquire transhipper well within time and in the absence of any explanation whatsoever explaining the delay in challenging the terms and conditions imposed by the Central Government, we refuse

to entertain any challenge to the said terms and conditions imposed by the Central Government.

26. Having turned town the challenges to the terms and conditions incorporated in the letter of the Central Government dated 16.9.1991, we feel that the respondents were perfectly justified in exercising their power to put the conditions in the draft agreement on the basis of Section 46 of the Act, in the light of the terms and conditions imposed by the Central Government, which were and are binding upon the petitioners. A party who acquiesces to the terms and conditions and takes part or act upon it without any protest cannot afterwards be allowed to attack it; if the same are put against him. If that be so, the challenge to each and every terms and conditions incorporated in the draft agreement must fail. The petition is, thus, liable to be dismissed being devoid of any substance and accordingly, we dismiss the same.

27. In the result, the petition is dismissed. Rule is discharged with no order as to costs.

V.C. DAGA, J.

P.V. HARDAS, J.

ssm.