UNITECH LIMITED & ORS.
v.
TELANGANA STATE INDUSTRIAL INFRASTRUCTURE CORPORATION (TSIIC) & ORS.

(Civil Appeal No. 317 of 2021)

FEBRUARY 17, 2021

[DR. DHANANJAYA Y CHANDRACHUD* AND M. R. SHAH, JJ.]

Contract: Tender – APIIC invited bids to develop, design and construct an integrated township/aerospace park in area of 350 acres of land – Unitech was successful bidder – In LOA, it was stipulated that the allotment of land was subject to outcome of a pending litigation – Pursuant to acceptance of LOA, Unitech by various instalments paid Rs. 165 crores: Rs. 140 towards cost of land, Rs. 20 crores towards earnest money deposit and Rs. 5 crores toward project development expenses – On 19.12.2011, decision was given by High Court in pending litigation in State of Andhra Pradesh through Principal Secretary v. Pratap Karan that the Government of Andhra Pradesh did not have title to the project land – During the years 2012 and 2013, Unitech called upon APIIC to execute the sale deed, handover the project site and ensure that the encumbrances on the project land are cleared in terms of Development Agreement so as to comply with its obligations – The State of Andhra Pradesh was reorganised w.e.f. 02.06.2014 – Request was made to newly formed TSIIC (successor of APIIC) to clarify the status – On 02.04.2015, Unitech sought release of earnest money deposit of Rs.20 crores in light of full payment of consideration – On 09.10.2015, Supreme Court in Pratap Karan case upheld the judgment of the High Court – Thereafter, on 14.10.2015, Unitech requested APIIC and TSIIC, to refund all the amounts which were received in relation to the land together with interest and damages for the loss suffered by them – Writ petition under Art.226 was instituted before the High Court seeking a refund of Rs 165 crores together with interest at the SBI Prime Lending Rate ("SBI- PLR") from the date of payments – A Single Judge of the High Court allowed Unitech's Writ Petition – Writ Appeal by

* Author

UNITECH LIMITED & ORS. v. TELANGANA STATE INDUSTRIAL INFRASTRUCTURE CORPORATION (TSIIC) & ORS.

TSIIC and the State of Telangana – The Division Bench of the High Court while upholding order of Single Judge on liability of TSIIC directed refund of the principal sum of Rs 165 crores with interest from 14.10.2015 at the SBI-PLR, as opposed to the dates of payment of installments, beginning from September 2007 – Appeal by Unitech – Held: Under the Development Agreement which was executed between APIIC and Unitech, APIIC was to transfer the land absolutely free from all encumbrances by executing a sale agreement – The terms of the agreement were to prevail in the event of any conflict with any other document which formed a part of the bidding process – Thus, the terms of the agreement were placed on the pedestal of the highest priority for interpretation, as compared to other documents, including the LoA – Under the terms of the Development Agreement, APIIC was obligated to sell and transfer the land together with its right, title and interest free from all encumbrances "forthwith upon payment of the last installment of the total purchase price by the developer" – The fulfillment of the terms of the agreement was postulated on the availability of the land – The failure of title in the erstwhile APIIC and the Government of Andhra Pradesh attained finality upon the decision of Supreme Court – The basic postulate on which the entire contract was founded stood nullified as a consequence of the failure of title – The agreement clearly provides that the ability of the Government of Andhra Pradesh/TSIIC to convey full title to the developer forms the basis of the contract – The failure of title entitled Unitech to claim a full refund together with compensatory payment, as contractually defined – Further, the Development Agreement provides that compensatory payment will be "from the date on which the first payment of project price" is made – The Division Bench was in error in curtailing the right of Unitech to claim a refund with effect from the dates on which the respective payments were made – Unitech cannot be penalized for wanting to continue with the agreement, as APIIC navigated disputes over its claim to the land – While Unitech was put to notice of the existence of a litigation, the Development Agreement which stipulated an encumbrance-free handover also specified that its covenants would supersede all other understandings and that its terms would rank as the first, in order of interpretive priority – The judgment of the Division Bench suffers from a clear and patent error in restricting the liability of paying interest w.e.f. 14.10.2015 – The liability must

date back, in terms of the Development Agreement, from the date on which the respective payments were made by Unitech – Interest at the contractual SBI-PLR rate has to be paid to Unitech – However, considering the position of Unitech which knowingly entered into the Development Agreement with full knowledge of the pending litigation and with an intention to continue with the project after a delay of over seven years, up until a decision by this Court, the interest rate is payable to Unitech, without compounding.

Andhra Pradesh Reorganization Act, 2014: Apportionment of the liabilities between the instrumentalities of the State of Andhra Pradesh and Telangana – The land which is comprised in the project site falls exclusively within the Telangana region as specified in the demerger scheme – TSIIC shall refund the amounts due and payable to Unitech in terms of the present judgment – TSIIC would be at liberty to pursue its rights and remedies in accordance with law over its claim for apportionment.

Stamp duty: Unstamped agreement – The Development Agreement, on the basis of which Unitech sought to avail its contractual remedy has not been registered or assessed to stamp duty – Under Article 3.1 of the Development Agreement, the obligation of paying registration fees and stamp duty is on Unitech – Stamp Act is a fiscal measure enacted to secure the revenue for the State, and not to arm the opponent with a weapon of technicality – Unitech's claim to compensatory payment cannot be defeated on the sole ground of the payment of stamp duty – Directions passed to impound the Development Agreement and present it to the Chief Controlling Revenue Authority in the State of Telangana for assessment of stamp duty and to the competent authority for registration – The assessment shall be completed within thirty days – The appropriate stamp duty and registration charges shall be paid by TSIIC and be deducted from the refund due and payable to Unitech under the terms of this order.

Constitution of India: Art.226 – Writ jurisdiction – The jurisdiction under Art.226 is a valuable constitutional safeguard against an arbitrary exercise of state power or a misuse of authority – In determining as to whether jurisdiction should be exercised in a contractual dispute, the Court must, undoubtedly eschew, disputed questions of fact which would depend upon an evidentiary

determination requiring a trial – But equally, it is well-settled that the jurisdiction under Art.226 cannot be ousted only on the basis that the dispute pertains to the contractual arena – This is for the simple reason that the State and its instrumentalities are not exempt from the duty to act fairly merely because in their business dealings they have entered into the realm of contract – Similarly, the presence of an arbitration clause does oust the jurisdiction under Art.226 in all cases though, it still needs to be decided from case to case as to whether recourse to public law remedy can justifiably be invoked – Contract.

Constitution of India: Art.14 – The State and its instrumentalities are duty bound to act fairly under Art.14 of the Constitution – They cannot, even in the domain of contract, claim an exemption from the public law duty to act fairly – The State and its instrumentalities do not shed either their character or their obligation to act fairly in their dealings with private parties in the realm of contract – Investors who respond to the representations held out by the State while investing in public projects are legitimately entitled to assert that the representations must be fulfilled and to enforce compliance with duties which have been contractually assumed.

Disposing of the appeals, the Court Held:

1. **Article 23.1 of the Development Agreement in the present case mandates the parties to resolve their disputes through an arbitration. However, the presence of an arbitration clause within a contract between a state instrumentality and a private party has not acted as an absolute bar to availing remedies under Article 226. If the state instrumentality violates its constitutional mandate under Article 14 to act fairly and reasonably, relief under the plenary powers of the Article 226 of the Constitution would lie. While exercising its jurisdiction under Article 226, the Court is entitled to enquire into whether the action of the State or its instrumentalities is arbitrary or unfair and in consequence, in violation of Article 14. The jurisdiction under Article 226 is a valuable constitutional safeguard against an arbitrary exercise of state power or a misuse of authority. In determining as to whether the jurisdiction should be exercised in a contractual dispute, the Court must, undoubtedly eschew, disputed questions of**

fact which would depend upon an evidentiary determination requiring a trial. But equally, it is well-settled that the jurisdiction under Article 226 cannot be ousted only on the basis that the dispute pertains to the contractual arena. This is for the simple reason that the State and its instrumentalities are not exempt from the duty to act fairly merely because in their business dealings they have entered into the realm of contract. Similarly, the presence of an arbitration clause does oust the jurisdiction under Article 226 in all cases though, it still needs to be decided from case to case as to whether recourse to a public law remedy can justifiably be invoked. The jurisdiction under Article 226 was rightly invoked by the Single Judge and the Division Bench of the Andhra Pradesh in this case, when the foundational representation of the contract has failed. TSIIC, a state instrumentality, has not just reneged on its contractual obligation, but hoarded the refund of the principal and interest on the consideration that was paid by Unitech over a decade ago. It does not dispute the entitlement of Unitech to the refund of its principal. [Para 33]

2. Contractual right to compensatory payment

In the present case, the basic postulate underlying the contract between the parties was the availability of the land which comprised the project site. The LoA dated 28 November 2007, stated that the allotment of land was subject to the outcome of the pending appeal before the High Court of Andhra Pradesh. The dispute over the title of the Government of Andhra Pradesh was the subject of the pending litigation. At the same time, the LoA mandated that Unitech must pay the amount stipulated - including the purchase price of Rs.145 crores for the land as well as the project development expenses. A failure to do so would constitute a significant event of default resulting in a forfeiture of the earnest money deposit. Acting on the LoA, Unitech did in fact comply with its obligation to pay, having paid a total amount of Rs.165 crores towards the purchase price, besides the earnest money deposit and project development expenses. The Development Agreement which was executed between APIIC and Unitech contains specific representations to the effect that APIIC was authorized to transfer and deliver the project site admeasuring 350 acres on an outright sale

basis. Under the Development Agreement, APIIC was to sell and transfer the land absolutely together with its right, title and interest, free from all encumbrances by executing a sale agreement. The terms of the agreement were to prevail in the event of any conflict with any other document which formed a part of the bidding process. The terms of the agreement were placed on the pedestal of the highest priority for interpretation, as compared to other documents, including the LoA. Under the terms of the Development Agreement, APIIC was obligated to sell and transfer the land together with its right, title and interest free from all encumbrances "forthwith upon payment of the last installment of the total purchase price by the developer". That Unitech paid the total purchase price is not in dispute. The obligation assumed by APIIC to handover possession together with title upon the payment of the last installment of the purchase price unequivocally emerges from Article 3.1 and Article 4.1 of the Development Agreement. The fulfillment of the terms of the agreement was postulated on the availability of the land. [Para 34]

3. The failure of title in the erstwhile APIIC and the Government of Andhra Pradesh attained finality upon the decision of this Court in State of Andhra Pradesh Through Principal Secretary v. Pratap Karan. The basic postulate on which the entire contract was founded stood nullified as a consequence of the failure of title. The agreement clearly provides that the ability of the Government of Andhra Pradesh/TSIIC to convey full title to the developer forms the basis of the contract. The failure of title entitles Unitech to claim a full refund together with compensatory payment, as contractually defined. The claim does not raise a disputed question of fact requiring an evidentiary determination. The finding in regard to the entitlement of Unitech to a refund is unexceptionable and has correctly not been called into question at the stage of the hearing, despite the grounds which were raised in the pleadings in the proceedings initiated under Article 136 of the Constitution by TSIIC and the State of Telangana. APIIC, as an instrumentality of the erstwhile Government of Andhra Pradesh, invited bids for a public project. Having invited private entrepreneurs to submit bids on stipulated

terms and conditions, it must be held down to make good its representations. The State and its instrumentalities are duty bound to act fairly under Article 14 of the Constitution. They cannot, even in the domain of contract, claim an exemption from the public law duty to act fairly.The State and its instrumentalities do not shed either their character or their obligation to act fairly in their dealings with private parties in the realm of contract. Investors who respond to the representations held out by the State while investing in public projects are legitimately entitled to assert that the representations must be fulfilled and to enforce compliance with duties which have been contractually assumed. [Para 37]

State of Andhra Pradesh through Principal Secretary v. Pratap Karan **(2016) 2 SCC 82 – referred to.**

4. The Single Judge of the Andhra Pradesh High Court, in the course of the judgment dated 23 October 2018 computed as on 30 September 2018, an amount of Rs.660.55 crores as due and payable. Interest on the basis of the SBI-PLR was compounded annually in terms of the provisions of the Development Agreement. The Single Judge noted that the respondents to the writ proceedings had not disputed (i) the dates of payment or (ii) interest at the rate of the SBI-PLR and no material to contradict the computation was submitted. In appeal, the Division Bench however directed that the claim for interest should be computed from 14 October 2015. This was the date on which Unitech addressed a communication seeking a refund of the 'compensatory payment' following the decision of this Court on 9 October 2015 on the absence of title to the land in the Government of Andhra Pradesh. The Division Bench has proceeded on the rationale that Unitech was placed on notice that the award of the contract was subject to the outcome of the appeal in the High Court; and Unitech was aware of the outcome of the first appeal yet, as a developer, it wanted to continue with the project. The above circumstances have no bearing on whether Unitech is entitled to a refund of moneys from the date of initial payment. The entitlement of Unitech to a refund of the amounts paid is embodied in the terms of the contract which envisage that a default on the part of APIIC in conveying the land or the existence of

political *force majeure* events would furnish a valid basis for the "compensatory payment". Moreover, the date from which compensatory payment has to be made is specifically provided : the Development Agreement provides that it will be "from the date on which the first payment of project price" is made. The Division Bench was in error in curtailing the right of Unitech to claim a refund with effect from the dates on which the respective payments were made. Obviously, Unitech had entered into the project since it wished to pursue it. Unitech cannot be penalized for wanting to continue with the agreement, as APIIC navigated disputes over its claim to the land. While Unitech was put to notice of the existence of a litigation, the Development Agreement which stipulated an encumbrance-free handover also specified that its covenants would supersede all other understandings and that its terms would rank as the first, in order of interpretive priority. The judgment of the Division Bench suffers from a clear and patent error in restricting the liability of paying interest with effect from 14 October 2015. The liability must date back, in terms of the Development Agreement, from the date on which the respective payments were made by Unitech. Interest at the contractual SBI-PLR rate has to be paid to Unitech. However, considering the facts and circumstances of this case, the conscionability of Article 14.3.1 read with Article 1(h) of the Development Agreement stipulating compensatory payment at the SBI-PLR, compounded annually, becomes suspect. Clause 17 of the LoA expressly mentioned that the title of the land is *lis pendens* and subject to the outcome of the proceedings pending before the Andhra Pradesh High Court. Unitech considered this circumstance and consciously entered into the Development Agreement. It continued to liaise with APIIC after an unfavorable judgement of the Andhra Pradesh High Court and did not issue a termination notice, until the title was conclusively denied by a judgement of this Court. [Para 38]

Central Bank of India v. Ravindra **(2002) 1 SCC 367 : [2001] 4 Suppl. SCR 323 – followed .**

K P Subbarama Sastri v. KS Raghavan **(1987) 2 SCC 424 (38) – relied on.**

5. Considering the position of Unitech which knowingly entered into the Development Agreement with full knowledge of the pending litigation and with an intention to continue with the project after a delay of over seven years, up until a decision by this Court, the interest rate is payable to Unitech, without compounding. [Para 38]

Apportionment of the liabilities between the instrumentalities of the state of Andhra Pradesh and Telangana

6.1 The Single Judge has imposed the liability to refund on TSIIC clarifying however, that it is "entitled to recover it from the State of Andhra Pradesh and the APIIC, if under law they are entitled to do so". The Division Bench has not interfered with the above direction. [Para 39]

6.2 Section 68 of the Re-organization Act is comprised in Part VII which enunciates "Provisions as to Certain Corporations". The corporations which are listed out in the IXth Schedule include APIIC which appears at Serial No.17. Section 68(2) states that the assets, rights and liabilities of the companies and corporations referred to in sub-Section (1) shall be re-apportioned between the successor states in the manner provided in Section 53. [Para 40]

6.3 Section 65 allows for the successor states of Telangana and Andhra Pradesh to agree on the manner in which the benefit or burden of any particular asset or liability can be apportioned. Section 66 empowers the Central Government on a reference made, within three years from the appointed date, by either of the successor states to order an adjustment or allocation of the liability. Finally, to complete the narration of the statutory scheme. [Para 41]

6.4 Section 71(a) speaks of the interests and shares of the existing State of Andhra Pradesh in the companies specified in the IXth Schedule between the successor States. APIIC has brought on record the certificate issued by the Managing Directors of TSIIC and APIIC recording the auditing of assets and liabilities as on 1 June 2014. [Para 41]

6.5 Schedule I provides for the Zonal offices pertaining to Telangana region. Serial no.3 refers to the Shamshabad

and Mauli Ali region which includes the area covered by the project site. The land which is comprised in the project site falls exclusively within the Telangana region as specified in the demerger scheme. TSIIC shall refund the amounts due and payable to Unitech in terms of the present judgment. TSIIC would be at liberty to pursue its rights and remedies in accordance with law over its claim for apportionment. [Paras 42, 43]

7. TSIIC and the State of Telangana have brought to our notice that the Development Agreement, on the basis of which Unitech has sought to avail its contractual remedy has not been registered or assessed to stamp duty. Under Article 3.1 of the Development Agreement, the obligation of paying registration fees and stamp duty is on Unitech. It is well-settled law that the Stamp Act is a fiscal measure enacted to secure the revenue for the State, and not to arm the opponent with a weapon of technicality. Unitech's claim to compensatory payment cannot be defeated on the sole ground of the payment of stamp duty. The Development Agreement shall have to be impounded and be presented to the Chief Controlling Revenue Authority in the State of Telangana for assessment of stamp duty and to the competent authority for registration. The assessment shall be completed within thirty days. The appropriate stamp duty and registration charges liable to be paid in terms of the determination shall be paid by TSIIC and be deducted from the refund due and payable to Unitech under the terms of this order. [Para 44]

8. The Development Agreement stands impounded and shall be forwarded by TSIIC within two weeks to the competent authority for registration and for assessment of stamp duty. The assessment to stamp duty and formalities for registration shall be completed within one month. The amount payable towards stamp duty, penalty (if any) and registration charges shall be paid initially by TSIIC into the account of the competent authority within two weeks of the determination and shall be adjusted against the refund payable by TSIIC to Unitech; The appeal filed by Unitech, arising out of SLP(C) No 9019 of 2019 is allowed in part by setting aside the direction of the Division Bench of the High Court which confined the liability to pay

interest only with effect from 14 October 2015; Unitech shall be entitled to a refund of an amount of Rs.165 crores together with interest at the SBI-PLR commencing from the respective dates of payment, computed in accordance with the provisions of the Development Agreement (except for compounding); The amount which has been deposited in the Registry of this Court in pursuance of the interim order shall be disbursed to Unitech together with accrued interest. The balance due and payable under the terms of this judgment shall be refunded by TSIIC to Unitech within two months from the receipt of a certified copy of this judgment; and In terms of the directions of the Single Judge of the High Court, TSIIC will be at liberty to pursue its remedies for apportionment in relation to APIIC in accordance with law. No opinion is expressed on the merits or tenability of the claim for apportionment asserted by TSIIC. [Para 45]

ABL International Ltd. v. Export Credit Guarantee Corporation of India **(2004) 3 SCC 553;** *State of UP v. Sudhir Kumar* **2020 SCC online SC 847;** *Oriental Kuries Ltd. v. Lissa* **(2019) 19 SCC 732;** *Bhubaneshwar Development Authority v. Susanta Kumar Mishra* **(2009) 4 SCC 684 : [2009] 2 SCR 149 – referred to.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 317 of 2021.

From the Judgment and Order dated 01.04.2019 of the High Court for the State of Telangana at Hyderabad in Writ Appeal No. 1594 of 2018.

With C.A. Nos. 318 and 319 of 2021

N. Venkataraman, ASG., C. S. Vaidyanathan, Sr. Adv., Ms. Anubha Agrawal, Ms. Ranjeeta Rohatgi, Ms. Neeha Nagpal, Anuroop Chakravarti, S. Udaya Kumar Sagar, Ms. Sweena Nair, Ms. Sharu Anna John, Advs. for the Appellants.

N. Venkataraman, ASG., C. S. Vaidyanathan, Soumya Chakraborty, Sr. Advs., S. Udaya Kumar Sagar, Ms. Sweena Nair, Ms. Sharu Anna John, Ms. Anubha Agrawal, Arup Banerjee, Mahesh Agarwal, Anuroop Chakravarti, Ms. Neeha Nagpal, Anshuman Srivastava, E. C. Agrawala, Advs. for the respondents.

UNITECH LIMITED & ORS. v. TELANGANA STATE INDUSTRIAL INFRASTRUCTURE CORPORATION (TSIIC) & ORS.

The Judgment of the Court was delivered by

DR. DHANANJAYA Y CHANDRACHUD, J.

A. Background

B. Proceedings before this Court

C. Salient features of the transaction documents

D. Submissions of the parties

E. Analysis

E.1. Maintainability of the writ petition under Article 226

E.2. Contractual right to compensatory payment

E.3. Apportionment of the liabilities between the instrumentalities of the state of Andhra Pradesh and Telangana

F. Summation

A. Background

1. The appeals arise from a judgment dated 1 April 2019 of a Division Bench of the High Court for the State of Telangana. Three appeals will form the subject matter of these proceedings. The three appeals which arise have been instituted by

(i) UNITECH Limited ("**Unitech**");

(ii) Telangana State Industrial Infrastructure Corporation ("**TSIIC**"); and

(iii) State of Telangana.

2. In September 2007, the Andhra Pradesh Industrial Infrastructure Corporation Ltd. ("**APIIC**") invited bids to "develop, design and construct" an integrated township project / multi services aerospace park in the area of about 350 acres of land in Nadergul Village, Saroornagar Mandal, Ranga Reddy District. In pursuance of its press release, APIIC floated a bid document.

3. On 28 November 2007, the bid submitted by Unitech was accepted upon payment of an earnest money deposit of 20 crores. It was contractually required to pay an amount of Rs 140 crores as project

land cost and Rs 5 crores towards project development expenses. A litigation in regard to the land was pending. While issuing a Letter of Award ("**LoA**"), APIIC made the allotment of the land subject to the outcome of the pending litigation. The LoA stipulated that:

"17. The allotment of said land is subject to the outcome of the Appeal Suit No. 274/2007 in (OS No. 155/05), WP Nos. 19670/07, 20667/07 and 22043/07 pending before the Hon'ble High Court of Andhra Pradesh."

4. Pursuant to accepting the LoA on 3 December 2007, Unitech paid the first installment of Rs 15 crores towards the purchase price of the land. This was followed by the second installment for Rs 20 crores on 4 December 2007. On 27 December 2007, it deposited an amount of Rs 5 crores towards project development expenses. On 1 January 2008, it paid the third installment of Rs 35 crores towards the purchase price of the land.

5. On 5 January 2008, APIIC while acknowledging the receipt of the three installments of Rs 70 crores towards the cost of land directed the Zonal Manager, Shamshabad Zone, Hyderabad to hand over the project site to enable Unitech to commence survey and planning work. The fourth installment of Rs 35 crores towards the purchase price of the land was paid on 11 January 2008, while the fifth installment for another Rs 35 crores was paid on 25 January 2008. Unitech paid, in the above manner, a total amount of Rs 165 crores: Rs 140 crores towards the cost of land, Rs 20 crores towards earnest money deposit and Rs 5 crores towards project development expenses.

6. On 19 August 2008, a Development Agreement was entered into between APIIC, Unitech and Nacre Gardens Hyderabad Limited, formerly known as (Unitech Hyderabad Township Limited), a special purpose vehicle formed to execute the project.

7. On 29 April 2011, APIIC issued a notice to show cause to Unitech to commence work on the project land. On 11 May 2011, Unitech requested APIIC to intimate, within seven days, the steps being taken to handover the land with reference to the provisions of Article 13.3(b) of the Development Agreement which mandated an encumbrance-free handover. The response to APIIC's show-cause notice dated 29 April 2011 was further re-iterated in Unitech's letter

dated 14 May 2011 stating that APIIC would have to first establish its title to the land and to remove the encumbrances, before work could commence.

8. On 21 May 2011, APIIC was informed that a 'political *force majeure* event' within the meaning of the Development Agreement had taken place. On 19 December 2011, the High Court of Andhra Pradesh in a proceeding titled as "**Pratap Karan** v **Govt. of Andhra Pradesh**[1], held that the Government of Andhra Pradesh did not have title to the project land. Following the decision, Unitech by its communication dated 27 March 2012 requested APIIC to clarify the position and to jointly explore possible solutions to the title dispute over the project site.

9. On 12 July 2012, Unitech addressed a letter to APIIC recording that:

"9. In view of the delay in the commencement of the Project on account of reasons attributable to APIIC alone, the Developer is suffering financial losses and great hardship. You would appreciate that financial institutions are being paid interest on the aggregate amounts paid to APIIC for the Project, and the Developer is considering further appropriate action."

On 8 April 2013, Unitech again called upon APIIC to come forward to execute the sale deed, handover the project site and ensure that the encumbrances on the project land are cleared in terms of the Development Agreement so as to comply with its obligations at the earliest.

10. The State of Andhra Pradesh was re-organized into the successor States of Andhra Pradesh and Telangana with effect from 2 June 2014 under the provisions of the Andhra Pradesh Reorganization Act, 2014. On 12 March 2015, Unitech addressed a letter to the newly-formed TSIIC (as successor of APIIC) seeking its intervention in clarifying the actual status of the extent of the land awarded to them, the cases against the erstwhile APIIC, physical handover of possession with a clear title and compensation for loss of time and opportunity. On 2 April 2015, Unitech sought a release of the earnest money deposit of Rs 20 crores, in light of the full payment of the consideration.

1 Appeal Suit No. 274 of 2007 (Andhra Pradesh High Court)

11. On 9 October 2015, a two-judge bench of this Court in its decision in **State of Andhra Pradesh through Principal Secretary** v. **Pratap Karan**[2] upheld the judgment of the High Court. After the decision of this Court, Unitech requested APIIC and TSIIC, on 14 October 2015, to refund all the amounts which have been received in relation to the land together with interest and damages for the loss suffered by them, which included the cost of borrowing capital from banks, expenses for planning and designing, opportunity costs and other costs for development.

12. On 24 December 2015, Unitech sought a refund of an amount of Rs 457 crores towards principal and interest. This was followed by reminders on 31 May 2016 and 7 June 2016. An advocate's notice was also issued on 13 June 2016.

13. Initially, invoking the jurisdiction under Article 32 of the Constitution, Unitech filed proceedings before this Court which were disposed on 1 May 2017[3] by granting liberty to move the High Court under Article 226. A Writ Petition under Article 226 was instituted before the High Court for the State of Telangana[4] seeking a refund of Rs 165 crores together with interest at the SBI Prime Lending Rate ("**SBI- PLR**") from the date of payments. By a judgment and order dated 23 October 2018, a Single Judge of the High Court allowed Unitech's Writ Petition. The concluding paragraphs 61 to 64 of the judgment are extracted below:

"**61.** In the instant case, retention of the amounts paid by the petitioners by the respondents is against the fundamental principles of justice, equity and good conscience and clearly amounts to unjust enrichment of the respondents particularly when such a retention is arbitrary and also violates Article 14 and 300-A of the Constitution of India. **Therefore, the respondents are bound to make restitution of the amounts claimed by petitioners with interest as per SBI Prime Lending Rate as per Clause 14.3.1 r/w Clause 1.1.(l) of the Development Agreement from the date of receipt of the said amount till payment.**

2 (2016) 2 SCC 82
3 Writ Petition (Civil) No. 302 of 2017 (Supreme Court of India)
4 Writ Petition (Civil) No. 29722 of 2017 (Andhra Pradesh High Court)

"62. According to the petitioners, as on 30-09-2018, the following amounts are payable:

S. No.	Date of payment	Particulars	Principal Amount (INR Cr)	Interest @SBI PLR	Total Refund (INR Cr)
1	17-Sep- 07	Earnest Money	20.00	62 64	82.64
2	03-Dec- 07	Instalment	15.00	45.38	60.38
3	04-Dec- 07	Instalment	20.00	60.48	80.48
4	26-Dec- 07	Development Charges	5.00	14.97	19.97
5	01-Jan- 08	Instalment	35.00	104.52	139.52
6	11-Jan- 08	Instalment	35.00	104.08	139.08
7	25-Jan- 08	Instalment	35.00	103.48	138.48
Total			165.00	495.55	660.55

Interest was calculated compounded annually @ SBI PLR Rate. Counsel for petitioner stated that since SBI PLR was only available till 5th Oct 2015 as per SBI website, post that period, SBI PLR has been taken at same rate as 5th Oct 2015 i.e. 14.05% p.a.

63. The respondents have not disputed either the dates of the payments or the interest at SBI Prime Lending Rate mentioned by the petitioners or placed any material to contradict the same.

64. Therefore I hold that the amount of Rs.660.55 crores is due and payable to the petitioners by respondents, which shall be paid by respondents to petitioner no.3 within 4 weeks from today. However, they are entitled to recover it from the State of Andhra Pradesh and the APIIC, if under law they are entitled to do so. This does not preclude the petitioners from claiming other amounts from respondents towards damages under other heads, if they are entitled to do so under law."

(emphasis supplied)

14. A Writ Appeal was filed before the High Court by TSIIC and the State of Telangana[5]. The Division Bench of the High Court upheld the order of the Single Judge on the liability of TSIIC to refund an amount of Rs 165 crores to Unitech. However, the Division Bench directed a refund of the principal sum of Rs 165 crores with interest from 14 October 2015 at the **SBI-PLR**, as opposed to the dates of payment of installments, beginning from September 2007.

15. The Division Bench of the High Court has come to the conclusion that in the exercise of the writ jurisdiction under Article 226, the Single Judge's decision had aligned itself with the line of precedent of this Court; justifiably entertained the writ petition and directed a refund of the consideration. However, the order of the Single Judge directing the payment of interest compounded *inter alia* at the **SBI-PLR** from the dates of payment commencing from September 2007 has been modified in terms of the direction requiring the payment of interest at the **SBI- PLR** from 14 October 2015. In taking this view, the Division Bench held:

    (i) Under the LoA dated 28 November 2007, Unitech was put to notice that the award of the contract was subject to the outcome of a litigation which was pending before the High Court;

    (ii) Even the advertisement for the award of the contract indicated that it would be subject to the outcome of a first appeal which was pending before the High Court;

    (iii) Unitech accepted the award of the contract on 3 December 2007 and made its payments between September 2007 and January 2008;

    (iv) The release of the earnest money deposit was sought on 2 April 2015 and a refund of the entire amount paid with interest, was claimed for the first time on 14 October 2015, after the judgment of the High Court attained finality through the decision of this Court dated 9 October 2015; and

    (v) Unitech was aware of the pending litigation and was awaiting the outcome of the civil appeal and the tenor of the correspondence indicates that they wished to continue with the project.

5 Writ Appeal No. 1594 of 2018 (Andhra Pradesh High Court)

On the above premises, the Division Bench of the High Court took a considered view that Unitech's request for a refund on 14 October 2015, after the decision of this Court confirming that the Government of Andhra Pradesh had no title to the land, should mark the commencement of TSIIC's liability to pay interest.

B. Proceedings before this Court

16. Notice was issued by this Court in the Special Leave Petition filed by Unitech on 15 April 2019.

17. On 13 February 2020, this Court recorded that a new Board of Directors had taken charge of the business of Unitech limited. At this stage, it must be noted that the Board of Directors of Unitech has been superseded and replaced by a Board appointed by the Union government.

18. On 5 March 2020, when the proceedings came up before this Court, besides the Special Leave Petition filed by Unitech limited and its subsidiary, the Court was seized with two other Special Leave Petitions filed by TSIIC and the State of Telangana, respectively. This Court noted the submissions which were urged on behalf of TSIIC that following the re-organization of the erstwhile State of Andhra Pradesh, a division of the assets and liabilities was required to be effected by the Central government under Section 71 of the Andhra Pradesh Reorganization Act 2014, in the absence of which TSIIC could not alone be held liable to deposit the entire amount as ordered to be refunded by the High Court. This Court recorded the submission of TSIIC that it would deposit 42 per cent of the principal sum of Rs 165 crores, amounting to Rs 69.30 crores. It additionally directed that interest commencing from 14 October 2015 must be deposited, at the rate and in the manner directed by the Single Judge of the High Court. The order of this Court dated 5 March 2020 reads thus:

" ……Mr C S Vaidyanathan, learned senior counsel appearing on behalf of TSIIC contests the liability of TSIIC to meet the liability for the outstanding, if any, that may be due from APIIC. In this context, reliance has been placed on Section 68 of the Andhra Pradesh Reorganisation Act 2014 which provides as follows:

> "68. Provisions for various companies and corporations:- (1) The companies and corporations specified in the Ninth Schedule constituted for the existing State of Andhra Pradesh shall, on and from the appointed day, continue to function in those areas in respect of which they were functioning immediately before that day, subject to the provisions of this section.
>
> (2) The assets, rights and liabilities of the companies and corporations referred to in sub-section (1) shall be apportioned between the successor States in the manner provided in section 53."

Section 71 contains the following provision:

> "71. Certain provisions for companies:- Notwithstanding anything in this Part, the Central Government may, for each of the companies specified in the Ninth Schedule to this Act, issue directions–
>
> (a) regarding the division of the interests and shares of the existing State of Andhra Pradesh in the Company between the successor States;
>
> (b) requiring the reconstitution of the Board of Directors of the Company so as to give adequate representation to the successor States."

APIIC has been listed at Entry 17 of the Ninth Schedule to the Act.

The submission of Mr C S Vaidyanathan is that in the absence of a division by the Central Government between the liability of APIIC and TSIIC, as contemplated in Section 71 of the Act, TSIIC cannot be held liable for the entire amount merely on the ground that the lands fall within the jurisdiction of the successor State of Telangana. The submission is that despite the objections which were raised on behalf of the TSIIC, APIIC was not impleaded as a party to the proceedings before the High Court.

Mr Tushar Mehta, learned Solicitor General of India has appeared both in support of the Special Leave Petition which has been filed on behalf of Unitech Limited (which is now under the management of a Board of Directors constituted by the Central Government) and to oppose the Special Leave Petitions, which have been filed by TSIIC.

At this stage, we direct that APIIC be impleaded as a party in all the Special Leave Petitions. The amendment be carried out within a period of one week from today.

Notice shall be issued to APIIC, the newly impleaded party, returnable in four weeks.

Mr. C.S. Vaidyanathan, learned senior counsel stated that without prejudice to the rights and contentions of TSIIC in these proceedings, it will deposit forty-two per cent of the principal sum of Rs 165 crores before this Court, which works out to Rs 69.30 crores. This amount shall be deposited within a period of four weeks from today. In addition, we are of the view that since there is effectively a money decree, TSIIC should also deposit interest computed on the aforesaid amount of Rs 69.30 crores, computed with reference to 14 October 2015 as the commencement date, at the rate and in the manner which has been directed in the order of the learned Single Judge of the High Court, by 30 April 2020. All amounts which are deposited by TSIIC shall be subject to the result of the present proceedings and would be without prejudice to its rights and contentions.

The amount, upon deposit, shall be invested in a fixed deposit of a nationalized bank by the Registry of this Court. The newly constituted Board of Directors of Unitech Limited would be at liberty to make an application for withdrawal of the aforesaid amount."

Notice has been issued in the Special Leave Petitions filed by the State of Telangana on 22 July 2019 and by TSIIC on 29 April 2019.

19. The appeals arising out of the three proceedings under Article 136 of the Constitution have been heard together since they arise out of common facts and the same transaction.

C. Salient features of the transaction documents

20. Before dealing with the rival submissions, it is necessary to preface our analysis with a reference to the salient aspects of the transaction, leading to the award of the contract and the execution of the Development Agreement between APIIC and Unitech.

21. On 28 November 2007, the LoA was issued by APIIC to Unitech for the development of an integrated airport township / multi services aerospace park, Hyderabad on a public-private-partnership basis.

Clause 3 of the LoA contemplated the payment of an amount of Rs 140 crores towards the value of the land, payable in four tranches each of Rs 35 crores. Clause 3 of the LoA was in the following terms:

"3. Total Purchase Price.

The Total Purchase Price for the Total Land shall be Rs.140 crores (Rupees one hundred and forty crores only). The value of the land is fixed at Rs.40 Lakhs per acre (Rupees Forty Lakhs per acre) and payable to APIIC as follows:

i) Rs.35 Crores (Rs. Thirty Five crores only) within 7 days from the issue of LOA to the Developer.

ii) Rs.35 Crores (Rs. thirty Five Crores only) to be paid within 30 days from the date of 1st instalment by the developer.

iii) Rs.35 Crores (Rs. thirty five Crores only) within 15 days from the date of 2nd instalment by the developer.

iv) Rs.35 Crores to be paid within 15 days from the date of 3rd instalment by the developer.

Sale Deed will be executed by APIIC in favour of Special Purpose Vehicle (SPV) only on receipt of rs.140 Crores from the Successful Bidder/SPV, as per the instalments fixed above.

"All the payments mentioned above need to be strictly adhered to by the Developer/ SPV. In the event of default of any of the instalments mentioned above, APIIC shall forthwith forfeit the respective amounts paid by the Bidder (in addition to EMD) unless APIIC has given any extension of time for any such payment. Any such default in payment by the Developer/ SPV may lead to withdrawal or cancellation of award of the project to the Successful Bidder without any obligation or liability on whatsoever account to APIIC.

APIIC decision to withdraw or cancel award of project in such default circumstances shall be final and binding on the Developer/SPV. The total Purchase Price may be adjusted based on the extent of the land verified during the joint inspection of the respective Developer and APIIC.

(illegible) will be handed over to SPV on, "as is where is basis" in parcels to such (illegible)."

Clause 12 contemplated the forfeiture of the Earnest Money Deposit and / or performance security in the event of a "significant event of default" prior to execution of the Development Agreement. Among the default events were:

"(ii) Failure to pay the Total Purchase Price quoted for the land to APIIC within the time as specified in this Letter of Award."

22. Some of the salient provisions regarding transfer of land in the Development Agreement dated 19 August 2008 executed between APIIC and Unitech are set out below:

(i) The recitals to the agreement contained a specific representation that APIIC was authorized to transfer and deliver the project site admeasuring 350 acres:

> "D) In terms of a Panchnama dated 8.5.2007 of the Deputy-Collector, Saroornagar Mandal, RR District has transferred Acres 373-22 Guntas in Survey No. 613 (New 119) at Nadergul Village to APIIC, and APIIC is authorised- to transfer (on an outright sale basis) and deliver the Project Site measuring Acres 350-00 Guntas to the Developer."

(ii) APIIC covenanted to transfer and sell the land together with its rights, title and interest free from all encumbrances by executing a sale deed in favour of Unitech:

> "G) APIIC shall sell and transfer the Land absolutely, together with all rights, title, interest and benefits belonging thereto/ connected therewith (but free of all Encumbrances), by executing a Sale Deed in favour of the Developer."

23. (i) Article 1 contained definitions *inter alia* of the following expressions:

> "h) "Applicable Rate" means the prime lending rate of the State Bank of India, compounded annually.
>
> l) "Compensatory Payment" with reference to all or any portion of the Project Site (the "Compensated Land") as on a particular date (the "Reference Date") for the purposes of this Agreement including for the purposes of Clauses-14.3.1, 14.3.2, 17.6 and 23.3 hereof shall mean an amount equal to the sum aggregate of the following:

(i) The Total Purchase Price in respect of the Compensated Land until the Reference Date, as per the audited accounts of the Developer;

(ii) Interest-calculated at the rate of SBI PLR ("Interest"), on the Total Purchase Price of the Compensated, Land, from the date on which the first payment of purchase price in respect of the Compensated Land is made (whether by way of an advance or an earnest money deposit) until the Reference Date.

All the above payments shall be denominated in Indian rupees."

(ii) Article 1.7 stipulates an order of priorities under which, in the event of a conflict between the agreement and any other document, the former would prevail:

"1.7 In the event of any conflict between the terms of this Agreement and the Schedules or any other document, this Agreement shall prevail. The document forming part of bidding process leading to this Agreement shall be relied upon and interpreted in the following descending order of priority;

(a) This-Agreement (Including any amendment / supplement to this Agreement) and the Detailed Project Report]

(b) The Schedules & Annexures to this Agreement

(c) The Letter of Award issued to the preferred bidder

(d) Preferred bidders bid

(e) The RFP"

(iii) Under Article 3.1, APIIC undertook the obligation to transfer the land to the developer free from all encumbrances, upon the developer's payment of the last installment of the total purchase price:

"3.1 APIIC shall, forthwith upon payment of the last instalment of the Total Purchase Price by the Developer sell

and transfer the Land together with all rights, title, interest and benefits belonging thereto/ connected therewith (but free of all Encumbrances), by executing a Sale Deed in favour of the Developer, which shall be registered with the concerned Registrar / Sub Registrar of Assurances. The stamp duty and registration fees payable, if any, on the Sale Deed (subject to Article 8.6 below) to be executed in favour of the Developer shall be borne by the Developer;"

(iv) APIIC acknowledged the payment of Rs 140 crores towards the total purchase price and Rs 5 crores towards project development expenses in Article 3.2.

(v) Under Article 4.1, the developer was to have exclusive promotion and advertising rights in respect of the project and under Article 4.2, could enjoy all rights, privileges and benefits as are generally available to an owner of immovable property.

(vi) Simultaneously with the payment of the last installment of the total purchase price, APIIC was required to handover to the developer:

(a) Ownership and title documents to the land;

(b) A certified copy of the government order evidencing its ownership rights over the land together with a possession certificate issued by the revenue department; and

(c) A declaration certifying that APIIC is the rightful owner of the land which was in its possession.

(vii) Article 13.3 provided for the obligations of APIIC in the following terms:

"13.3 Obligations of APIIC:

For the purpose of this Agreement, each of the following shall be the "Significant APIIC Obligations" of APIIC;

a) to execute the Sale Deed within' the specified time frame, any contracts / document as may be required in accordance with the terms of this Agreement for raising of any finances in relation to the Project,

and other documents with the mutual consent of the parties as may be required to be executed for the Project;

b) to handover the Land as specified in this Agreement without any Encumbrances and with the right of way for the purpose of Development by the Developer.

c) to clear any Encumbrances in respect of any portion of the Project Site (other than those created by the Developer) at any point in time in accordance with the provisions of this Agreement;

d) to facilitate provisions of External infrastructure as contemplated in this Agreement."

viii) The consequences of default by APIIC were stipulated in Article 14.3. Thy were envisaged in the following terms:

"14.3.1 In the event APIIC/ GOAP is unable to execute Sale Deed in favour of the Developer in respect of the Land, within the time specified, APIIC shall, if so required by the Developer, pay Compensatory to the Developers, subject to stay /interim / injunctive / other orders issued by High Court of Andhra Pradesh or any other competent court/ s."

ix) Article 14.3.4 stipulated that:

"14.3.4 Without prejudice to its rights and remedies the Developer shall in no event be (a) liable for failure to meet any of its obligations under this Agreement in the event such failure could be attributed to (i) a default or delay on the part of APIIC in fulfillment of any their respective obligations under Article 13.3 of this Agreement and/ or (ii) Encumbrances or Title Issues on any portion of the Land, which may have Material Adverse Effect on the Project and/ or (iii) Occurrence of Force Majeure Events, and (b) required to pay any interest or make any payment (including Revenue Share) or provide any performance / bank guarantee or other security to APIIC during (i) the continuance of any default on delay on the part of APIIC in fulfillment of their obligations under Article 13.3 of this

Agreement the Project Agreements, and/ or (ii) the period when the development of Project is impacted due to Force Majeure events & Title Issues on the Project Site."

(x) Article 17 of the Development Agreement contains stipulations in regard to *force majeure* events. Article 17.2(a) defined 'political force majeure events':

"17.2 (a) Political Force Majeure Events, comprising Acts of War, invasions, armed conflicts, terrorism, riots, strikes, lockouts, curfews, restraints, acts of Government (including expropriation or compulsory acquisition of any Project Assets), or Change in Law (such as change in policies of GoI in relation to townships, foreign direct investment), which event/s significantly impact the Project, **direct litigation related to APIIC's / GoAP's title to the Project Site), stay/interim/ injunctive/other orders issued by the Court**, unlawful or un-authorised or without jurisdiction revocation of or refusal to renew or grant without valid cause any consent or approval required by the Developer or any of the other Person to perform their respective obligations under the Project Agreements (provided that such delay, modification, denial, refusal or revocation did not result from the Developer's or any of its contractor's inability or failure to comply with any condition relating to grant, maintenance or renewal of such consents or permits), or events of similar nature, in each case which materially affect the implementation of the Project."

(**emphasis supplied**)

(xi) Article 17.6 stipulates that in the event of a political *force majeure* event continuously impacting upon the project as a material adverse effect for over nine months, the developer would be entitled to issue a notice of termination.

Upon such termination, APIIC was required to pay the 'compensatory payment' to the developer:

"17.6 Termination: Either party to this Agreement may issue a notice of termination of this Agreement if a Non-Political Force Majeure Event (or its direct impact) has resulted in

> Material Adverse Effect on the Project and has continued for more than Nine (9) months from the date of occurrence thereof. On the other hand Developer shall be solely entitled (but not obligated) to issue notice of Termination of this Agreement if a Political Force Majeure Event (or its direct impact) has resulted in Material Adverse Effect on the Project and has continued for more than Nine (9) months from the date of occurrence thereof. Upon any such termination of this Agreement due to Political Force Majeure event, APIIC will pay the Compensatory Payment (less any insurance proceeds recovered by the Developer), to the Developer simultaneously with the Developer handing back the Unsold Property to APIIC."

D. Submissions of the parties

24. Mr N Venkataraman, learned Additional Solicitor General, appearing on behalf of the management of Unitech (appointed by the Union of India), emphasized the following undisputed facts:

    (i) Title was never conveyed by APIIC to Unitech In terms of the Development Agreement;

    (ii) By the judgment of this Court dated 9 October 2015, the dispute over the title of the Government of Andhra Pradesh over the project land was conclusively set at rest with a negative finding on title;

    (iii) An amount of Rs 165 crores has been deposited by Unitech since September 2007 with the Government of Andhra Pradesh; and

    (iv) The project cannot be implemented in the absence of title to the lands in the State Government.

25. Relying on a line of precedent of this Court, the ASG submitted that:

    (a) The entire project was premised on the conveyance of title to the land, free from all encumbrances by APIIC to Unitech;

    (b) A solemn representation was held out in the Development Agreement that APIIC was in a position to convey title and possession to Unitech following the award of the contract to it as a developer;

(c) Unitech fulfilled the peremptory obligation to deposit an amount of Rs 165 crores upfront;

(d) 'Political force majeure events' included litigation relating to the title of APIIC or the Government of Andhra Pradesh. On the coming into being of a political *force majeure* event which caused a material adverse impact on the project for over nine months, Unitech was entitled to compensatory payment from APIIC;

(e) Upon the failure of title of the Government of Andhra Pradesh resulting from the judgment of this Court dated 9 October 2015, the developer became entitled to a refund of the amounts paid together with interest compounded annually at the **SBI-PLR**;

(f) The existence of an arbitration clause would not divest the High Court of its jurisdiction under Article 226 of the Constitution to order refund with interest, where a private developer who has entered into an agreement on a solemn representation of the existence of title in the Government is unable to proceed with the project due to a failure of title;

(g) The exercise of the writ jurisdiction under Article 226 in a contractual matter is not ruled out particularly in the present case where there is absolutely no dispute in regard to the basic facts;

(h) The Single Judge of the High Court had justifiably awarded interest from the date of the first payment by Unitech in 2007. The Division Bench erred in restricting the grant of interest from 14 October 2015;

(i) The litigation in regard to the title of the Government of Andhra Pradesh had nothing to do with the moneys paid by Unitech. When the moneys were paid in 2007, the refund of the amount must date back with reference to the date of the initial payment. Therefore, the interest must be computed from the date on which each of the installments were paid; and

(j) When the LoA was issued on 28 November 2007, the judgment dated 23 April 2007 held the field, which was in favour of the Government of Andhra Pradesh. Its subsequent reversal would entitle the developer to a refund with interest, as contracted from the date of the initial payment.

26. Mr C S Vaidyanathan, learned Senior Counsel appeared on behalf of the State of Telangana and TSIIC. At the outset, he has submitted that TSIIC and the State of Telangana do not dispute:

    (i) The maintainability of a writ petition under Article 226 before the High Court; and

    (ii) The fact that the land comprised within the project site is not available for utilization for the project.

    The two areas on which the submissions of Mr C S Vaidyanathan, learned Senior Counsel have been confined are: *firstly*, whether interest at the **SBI-PLR** and the date from which interest has been awarded by the Division Bench of the High Court are justified; and *secondly*, whether the High Court was justified in imposing the entire liability to effect the refund on TSIIC.

27. On the award of interest, the submission is that:

    (i) The LoA dated 28 November 2017 furnished notice to Unitech of the pendency of the litigation;

    (ii) Unitech and its SPV were conscious of the pendency of the appeal before the High Court arising out of the judgment dated 30 April 2007, which had ruled in favour of the title of the Government of Andhra Pradesh

    (iii) Unitech continued to pursue the project and did not claim political force majeure, until after the decision of this court on 09 October 2015;

    (iv) In any event, the High Court has brought about a just balancing of equities by granting interest from the date of the decision of this Court namely 14 October 2015; and

    (v) The rate of interest should be suitably scaled down from the **SBI- PLR**.

    The above submissions in regard to the payment of interest; the date from which interest should be payable and the appropriate rate of interest, were postulated on the liability to refund the principal amount to Unitech. As a matter of fact, it has been expressly stated during the course of the submissions that the liability to refund is not being contested.

28. The second limb of submissions is that the liability to refund the principal amount together with interest cannot be imposed on TSIIC alone. TSIIC argues that the liability to refund the principal sum together with interest to Unitech has to be apportioned between TSIIC and APIIC in terms of the provisions contained in the Andhra Pradesh Reorganization Act 2014. The submission is elaborated along the following lines:

    (i) TSIIC has deposited an amount of Rs.127.53 crores before this Court in pursuance of the interim order dated 5 March 2020, out of which Rs.69.30 crores represents the principal and Rs.58.23 crores is towards interest;

    (ii) Section 68 of the Reorganization Act stipulates that the companies specified in the IXth Schedule (including APSIIC) constituted for the erstwhile State of Andhra Pradesh would continue to function in those areas in respect of which they were functioning immediately before the date of re-organization. Under sub-section(2) of Section 68, the assets, rights and liabilities of the companies forming a part of the IXth Schedule are required to be apportioned between the successor states, in the manner indicated in Section 53;

    (iii) Under Section 71, the Central Government is empowered to issue directions in respect of the companies specified in the IXth Schedule *inter alia* for dividing the interest and shares of the existing State of Andhra Pradesh between the successor States;

    (iv) Section 65 allows for an apportionment of assets and liabilities by agreement, while Section 66 confers power on the Central government to order an allocation or adjustment in certain cases;

    (v) Though the Central government constituted a Committee for the distribution of assets, it has not issued any directions, despite the committee submitting its recommendations, in view of the pendency of a petition under Article 32 of the Constitution before this Court; and

    (vi) Section 2(h) of the Re-organization Act provides for a population ratio of 58.32 : 41.68 in relation to the States of Andhra Pradesh and Telangana, based on the 2011 census. On the basis of a population ratio of approximately of 58:42, TSIIC has borne 42

per cent of the liability towards the refund due to Unitech and the balance should be directed to be shared by APIIC representing the successor State of Andhra Pradesh based on the "normal sharing as per the population ratio".

29. During the course of these proceedings, APIIC was directed to be impleaded. APIIC has entered appearance and filed its own counter affidavit. Mr Anuroop Chakravarti, learned Counsel appearing on behalf of the APIIC, has opposed the submissions urged on behalf of the State of Telangana and TSIIC that the liability to refund the principal and interest must be apportioned between TSIIC and APIIC. APIIC has submitted that:

(i) Before the appointed date of 2 June 2014, determined under the Re-organization Act, a final audit was completed on 1 June 2014 and a joint certificate was issued by the Managing Directors of TSIIC/APIIC;

(ii) The certificate issued on behalf of TSIIC and APIIC by its Managing Directors records that all the assets and liabilities having a bearing in the balance sheet as on 1 June 2014 have been audited and included in the demerger scheme and that all assets and liabilities were duly apportioned between Andhra Pradesh and Telangana under the Re-organization Act; and

(iii) Under the scheme of demerger/apportionment, the liability in respect of the dues payable to Unitech has to be borne by TSIIC. This would be evident from the terms and conditions which have been spelt out in Part II of the third Schedule. The Schedule elucidates that the project site which forms the subject matter of the Development Agreement was a part of the area which falls within the jurisdiction of TSIIC. The liability by the terms of the demerger scheme is that of TSIIC.

30. The Special Leave Petition[6] which was filed before this Court by TSIIC raised several objections to the correctness of the order passed by the High Court. Among the grounds which were urged in support of the Special Leave Petition were the following:

6 SLP (C) No. 10135 of 2019

(i) The High Court ought not to have entertained a writ petition under Article 226 of the Constitution "in a pure contractual dispute";

(ii) The Development Agreement contains an arbitration agreement in Article 23.1;

(iii) TSIIC can provide the land to Unitech and hence a direction for refund with interest ought not to have been given;

(iv) There was a violation by Unitech of the terms of the bid document and the LoA and the Development Agreement deviated from the bid and the LoA;

(v) Unitech bid for the project and accepted the LoA with full knowledge of the pending litigation over title to the land forming a part of the agreement, and agreed to await the outcome of the litigation; and

(vi) APIIC entered into the agreement with Unitech and ought to share the liabilities in the population ratio of approximately 58:42, as provided under the Andhra Pradesh Re-organization Act 2014.

31. The State of Telangana, in its submissions before this Court in the Special Leave Petition had similarly assailed the judgment of the High Court on several grounds including the following :

(i) The claim for refund is based on an unregistered Development Agreement which is invalid;

(ii) The land which is comprised in the project site can be made available for the project as the land owners have agreed to transfer the land to the Government of Telangana;

(iii) The terms and conditions of the LoA were not complied with by Unitech;

(iv) In view of the arbitration agreement, a writ petition under Article 226 could not be maintained; and

(v) The liability, if any, has to be shared between the successor states of Andhra Pradesh and Telangana in the ratio of 58:42.

E. Analysis

E.1. Maintainability of the writ petition under Article 226

32. Much of the ground which was sought to be canvassed in the course of the pleadings is now subsumed in the submissions which have been urged before this Court on behalf of the State of Telangana and TSIIC. As we have noted earlier, during the course of the hearing, learned Senior Counsel appearing on behalf of the State of Telangana and TSIIC informed the Court that the entitlement of Unitech to seek a refund is not questioned nor is the availability of the land for carrying out the project being placed in issue. Learned Senior Counsel also did not agitate the ground that a remedy for the recovery of moneys arising out a contractual matter cannot be availed of under Article 226 of the Constitution. However, to clear the ground, it is necessary to postulate that recourse to the jurisdiction under Article 226 of the Constitution is not excluded altogether in a contractual matter. A public law remedy is available for enforcing legal rights subject to well-settled parameters.

33. A two judge Bench of this Court in **ABL International Ltd. v. Export Credit Guarantee Corporation of India**[7] [**ABL International**] analyzed a long line of precedent of this Court[8] to conclude that writs under Article 226 are maintainable for asserting contractual rights against the state, or its instrumentalities, as defined under Article 12 of the Indian Constitution. Speaking through Justice N Santosh Hegde, the Court held:

> "27. …the following legal principles emerge as to the maintainability of a writ petition:
>
> (a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.
>
> (b) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.
>
> (c) A writ petition involving a consequential relief of monetary claim is also maintainable."

7 (2004) 3 SCC 553

8 K.N. Guruswamy v. State of Mysore, AIR 1954 SC 592; Gujarat State Financial Corporation. v. Lotus Hotels (P) Ltd, (1983) 3 SCC 379; Gunwant Kaur v. Municipal Committee, Bhatinda, (1969) 3 SCC 769

This exposition has been followed by this Court, and has been adopted by three-judge Bench decisions of this Court in **State of UP** v. **Sudhir Kumar**[9]and **Popatrao Vynkatrao Patil** v. **State of Maharashtra**[10]. The decision in **ABL International**, cautions that the plenary power under Article 226 must be used with circumspection when other remedies have been provided by the contract. But as a statement of principle, the jurisdiction under Article 226 is not excluded in contractual matters. Article 23.1 of the Development Agreement in the present case mandates the parties to resolve their disputes through an arbitration. However, the presence of an arbitration clause within a contract between a state instrumentality and a private party has not acted as an absolute bar to availing remedies under Article 226.[11]If the state instrumentality violates its constitutional mandate under Article 14 to act fairly and reasonably, relief under the plenary powers of the Article 226 of the Constitution would lie. This principle was recognized in **ABL International**:

"28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power. (See Whirlpool Corpn. v. Registrar of Trade Marks [(1998) 8 SCC 1] .) **And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction**."

(**emphasis supplied**)

9 2020 Scconline SC 847
10 Civil Appeal 1600 of 2000 (Supreme Court of India)
11 Harbanslal Sahnia v. Indian Oil Corporation Ltd., (2003) 2 SCC 107; Ram Barai Singh & Co. v. State of Bihar & Ors., (2015) 13 SCC 592

Therefore, while exercising its jurisdiction under Article 226, the Court is entitled to enquire into whether the action of the State or its instrumentalities is arbitrary or unfair and in consequence, in violation of Article 14. The jurisdiction under Article 226 is a valuable constitutional safeguard against an arbitrary exercise of state power or a misuse of authority. In determining as to whether the jurisdiction should be exercised in a contractual dispute, the Court must, undoubtedly eschew, disputed questions of fact which would depend upon an evidentiary determination requiring a trial. But equally, it is well-settled that the jurisdiction under Article 226 cannot be ousted only on the basis that the dispute pertains to the contractual arena. This is for the simple reason that the State and its instrumentalities are not exempt from the duty to act fairly merely because in their business dealings they have entered into the realm of contract. Similarly, the presence of an arbitration clause does oust the jurisdiction under Article 226 in all cases though, it still needs to be decided from case to case as to whether recourse to a public law remedy can justifiably be invoked. The jurisdiction under Article 226 was rightly invoked by the Single Judge and the Division Bench of the Andhra Pradesh in this case, when the foundational representation of the contract has failed. TSIIC, a state instrumentality, has not just reneged on its contractual obligation, but hoarded the refund of the principal and interest on the consideration that was paid by Unitech over a decade ago. It does not dispute the entitlement of Unitech to the refund of its principal.

E.2 Contractual right to compensatory payment

34. In the present case, the basic postulate underlying the contract between the parties was the availability of the land which comprised the project site. The LoA dated 28 November 2007, stated that the allotment of land was subject to the outcome of the pending appeal before the High Court of Andhra Pradesh. The dispute over the title of the Government of Andhra Pradesh was the subject of the pending litigation. At the same time, the LoA mandated that Unitech must pay the amount stipulated - including the purchase price of Rs.145 crores for the land as well as the project development expenses. A failure to do so would constitute a significant event of default resulting in a forfeiture of the earnest money deposit. Acting on the LoA,

Unitech did in fact comply with its obligation to pay, having paid a total amount of Rs.165 crores towards the purchase price, besides the earnest money deposit and project development expenses. The Development Agreement which was executed between APIIC and Unitech contains specific representations to the effect that APIIC was authorized to transfer and deliver the project site admeasuring 350 acres on an outright sale basis. Under the Development Agreement, APIIC was to sell and transfer the land absolutely together with its right, title and interest, free from all encumbrances by executing a sale agreement. The terms of the agreement were to prevail in the event of any conflict with any other document which formed a part of the bidding process. The terms of the agreement were placed on the pedestal of the highest priority for interpretation, as compared to other documents, including the LoA. Under the terms of the Development Agreement, APIIC was obligated to sell and transfer the land together with its right, title and interest free from all encumbrances "forthwith upon payment of the last installment of the total purchase price by the developer". That Unitech paid the total purchase price is not in dispute. The obligation assumed by APIIC to handover possession together with title upon the payment of the last installment of the purchase price unequivocally emerges from Article 3.1 and Article 4.1 of the Development Agreement. The fulfillment of the terms of the agreement was postulated on the availability of the land. Apart from the terms of the agreement which have already been emphasized, representations in regard to the title to the land are expressly contained in Annexure 1C of the Development Agreement which reads as follows:

"APIIC hereby represents and warrants to the Developer and Unitech that:

1. APIIC is absolutely seized and possessed of and is otherwise well and sufficiently entitled to the Project site. GOAP has free clear and marketable titled to the Project site, and that no Encumbrance of any nature whatsoever exists in respect of the Project site. APIIC was in possession and occupation of the Project site until the date of execution of the Development Agreement and that peaceful physical vacant possession and occupation of the Project site has been handed over to the Developer in terms of the Development Agreement. APIIC

has been duly authorized to enter into the Development Agreement and perform all of its obligations there under…."

Annexure-2 to the Development Agreement sets out a list of ownership documents which are tabulated in the following terms:

ANNEXURE-2
LIST OF OWNERSHIP DOCUMENTS

SL. NO.	Description of Document
1	Government Order /Proceeding dated allotting the land in favour of APIIC.
2	Panchnama dated 08.05.2007 delivering possession of the Project site in favour of APIIC.
3.	Sethwar, Faizal Patti and Pahenis issued in respect of the Government Land by the Mandal Revenue Officer.
4,	Pahanis in respect of the Property for the period commencing from 1954.
5.	Sketch map of Nadergul Village (Project Site)

For Unitech Hyderabad Township

Project Manager
Infocity Project Unit For Unitech Limited

35. The consequences of default are expressly stipulated in the agreement. Article 17 stipulates *force majeure* events. Article 17.2 provides for political *force majeure* events comprising *inter alia* "direct litigation related to APIIC's/GoAP's title to the project site, stay/interim/ injunctive/ other orders issued by the Court…"

36. Article 14.3.4 expressly stipulates that the developer shall not be liable for the failure to meet any of its obligations under the agreement, in the event, that it could be attributed to a default or delay on the part of APIIC in fulfilling its obligations. Similarly, the developer would not be held liable as a result of encumbrances or title issues on any portion of the land which may have a material adverse effect on the project or as a consequence of *force majeure* events. Article14.3.1 stipulates that in the event that APIIC/Government of Andhra Pradesh were unable to execute the sale deed in favour

of the developer in respect of the land within the time specified, APIIC shall, if so required for the developer, make compensatory payment subject to court orders. In the event of a political *force majeure* event, Unitech was, in terms of Article 17.6, solely entitled to issue a notice of termination, if it resulted in a material adverse effect on the project, continuing for more than nine months. In that event, APIIC was obligated to make the compensatory payment to the developer. Compensatory payment liable to be paid in terms of the agreement is expressly defined, including for the purposes of Article 14.3.1, to mean an amount which is the aggregate of (i) the total purchase price; and (ii) interest calculated at the **SBI-PLR** on the total purchase price "**from the date on which the first payment of purchase price in respect of compensated land is paid**". The applicable rate was also defined[12] to mean the Prime Lending Rate of the SBI, compounded annually.

37. The failure of title in the erstwhile APIIC and the Government of Andhra Pradesh attained finality upon the decision of this Court in **State of Andhra Pradesh Through Principal Secretary v. Pratap Karan**[13]. The basic postulate on which the entire contract was founded stood nullified as a consequence of the failure of title. The agreement clearly provides that the ability of the Government of Andhra Pradesh/TSIIC to convey full title to the developer forms the basis of the contract. The failure of title entitles Unitech to claim a full refund together with compensatory payment, as contractually defined. The claim does not raise a disputed question of fact requiring an evidentiary determination. Both the learned Single Judge and the Division Bench of the High Court have elaborately considered the precedents of this Court and correctly concluded that Unitech is entitled to a refund. The finding in regard to the entitlement of Unitech to a refund is unexceptionable and has correctly not been called into question at the stage of the hearing, despite the grounds which were raised in the pleadings in the proceedings initiated under Article 136 of the Constitution by TSIIC and the State of Telangana. APIIC, as an instrumentality of the erstwhile Government of Andhra

12 "Article 1(h)- 'Applicable Rate' means the prime lending rate of the State Bank of India, compounded-annually."

13 (2016) 2 SCC 82

Pradesh, invited bids for a public project. Having invited private entrepreneurs to submit bids on stipulated terms and conditions, it must be held down to make good its representations. The State and its instrumentalities are duty bound to act fairly under Article 14 of the Constitution. They cannot, even in the domain of contract, claim an exemption from the public law duty to act fairly.[14]The State and its instrumentalities do not shed either their character or their obligation to act fairly in their dealings with private parties in the realm of contract. Investors who respond to the representations held out by the State while investing in public projects are legitimately entitled to assert that the representations must be fulfilled and to enforce compliance with duties which have been contractually assumed.

38. The Single Judge of the Andhra Pradesh High Court, in the course of the judgment dated 23 October 2018 computed as on 30 September 2018, an amount of Rs.660.55 crores as due and payable. Interest on the basis of the **SBI-PLR** was compounded annually in terms of the provisions of the Development Agreement. The Single Judge noted that the respondents to the writ proceedings had not disputed (i) the dates of payment or (ii) interest at the rate of the **SBI-PLR** and no material to contradict the computation was submitted. In appeal, the Division Bench however directed that the claim for interest should be computed from 14 October 2015. This was the date on which Unitech addressed a communication seeking a refund of the 'compensatory payment' following the decision of this Court on 9 October 2015 on the absence of title to the land in the Government of Andhra Pradesh. The Division Bench has proceeded on the rationale that

    (i) Unitech was placed on notice that the award of the contract was subject to the outcome of the appeal in the High Court; and

    (ii) Unitech was aware of the outcome of the first appeal yet, as a developer, it wanted to continue with the project.

    The above circumstances have no bearing on whether Unitech is entitled to a refund of moneys from the date of initial payment. The entitlement of Unitech to a refund of the amounts paid is embodied

14 Indsil Hydropower v. State of Kerala, Civil Appeal Nos. 5943-5945 of 2019 (Supreme Court of India), para 33; ABL International Ltd. v. Export Credit Guarantee Corporation of India, (2004) 3 SCC 553, para 23; Central Bank of India v. Devi Ispat Ltd., (2010) 11 SCC 186, para 28

in the terms of the contract which envisage that a default on the part of APIIC in conveying the land or the existence of political *force majeure* events would furnish a valid basis for the "compensatory payment". Moreover, the date from which compensatory payment has to be made is specifically provided : the Development Agreement provides that it will be "from the date on which the first payment of project price" is made. The Division Bench was in error in curtailing the right of Unitech to claim a refund with effect from the dates on which the respective payments were made. Obviously, Unitech had entered into the project since it wished to pursue it. Unitech cannot be penalized for wanting to continue with the agreement, as APIIC navigated disputes over its claim to the land. While Unitech was put to notice of the existence of a litigation, the Development Agreement which stipulated an encumbrance-free handover also specified that its covenants would supersede all other understandings and that its terms would rank as the first, in order of interpretive priority. The judgment of the Division Bench suffers from a clear and patent error in restricting the liability of paying interest with effect from 14 October 2015. The liability must date back, in terms of the Development Agreement, from the date on which the respective payments were made by Unitech. Interest at the contractual **SBI-PLR** rate has to be paid to Unitech. However, considering the facts and circumstances of this case, the conscionability of Article 14.3.1 read with Article 1(h) of the Development Agreement stipulating compensatory payment at the **SBI-PLR**, compounded annually, becomes suspect. Clause 17 of the LoA expressly mentioned that the title of the land is *lis pendens* and subject to the outcome of the proceedings pending before the Andhra Pradesh High Court. Unitech considered this circumstance and consciously entered into the Development Agreement. It continued to liaise with APIIC after an unfavorable judgement of the Andhra Pradesh High Court and did not issue a termination notice, until the title was conclusively denied by a judgement of this Court. A Constitution Bench of this Court, in the case of **Central Bank of India** v. **Ravindra**[15], when considering the question of penal interest rates, had observed:

15 (2002) 1 SCC 367

"39….. Pre-suit interest is referable to substantive law and can be subdivided into two sub-heads: (i) where there is a stipulation for the payment of interest at a fixed rate; and (ii) where there is no such stipulation. If there is a stipulation for the rate of interest, the court must allow that rate up to the date of the suit subject to three exceptions: (i) any provision of law applicable to moneylending transactions, or usury laws or any other debt law governing the parties and having an overriding effect on any stipulation for payment of interest voluntarily entered into between the parties; (ii) if the rate is penal, the court must award at such rate as it deems reasonable; (iii**) even if the rate is not penal the court may reduce it if the interest is excessive and the transaction was substantially unfair.**"

(**emphasis supplied**)

In a similar vein, in interpreting Section 74 of the Indian Contract Act, 1872, this Court has held that a contractually-stipulated interest rate, if found to be penal, excessive or *in terrorem* can be reduced to a reasonable rate of compensation.[16]In upholding the reasoning of the Kerala High Court in full, a two judge Bench of this Court in **K P Subbarama Sastri** v. **KS Raghavan**[17] held:

"5…"The question whether a particular stipulation in a contractual agreement is in the nature of a penalty has to be determined by the court against the background of various relevant factors, such as the character of the transaction and its special nature, if any, the relative situation of the parties, the rights and obligations accruing from such a transaction under the general law and the intention of the parties in incorporating in the contract the particular stipulation which is contended to be penal in nature. If on such a comprehensive consideration, the court finds that the real purpose for which the stipulation was incorporated in the contract was that by reason of its burdensome or oppressive character it may operate *in terrorem* over the promiser so as to drive him to fulfil the contract,, then the provision will be held to be one by way of penalty."

16 Oriental Kuries Ltd. v. Lissa, (2019) 19 SCC 732; Bhubaneshwar Development Authority v. Susanta Kumar Mishra, (2009) 4 SCC 684

17 (1987) 2 SCC 424

Therefore, considering the position of Unitech-which knowingly entered into the Development Agreement with full knowledge of the pending litigation and with an intention to continue with the project after a delay of over seven years, up until a decision by this Court, we find that the interest rate is payable to Unitech, without compounding.

E.3 Apportionment of the liabilities between the instrumentalities of the state of Andhra Pradesh and Telangana

39. This leaves the court with the last facet which pertains to the dispute *inter se* between TSIIC and APIIC. The Single Judge has imposed the liability to refund on TSIIC clarifying however, that it is "entitled to recover it from the State of Andhra Pradesh and the APIIC, if under law they are entitled to do so". The Division Bench has not interfered with the above direction.

40. Section 68 of the Re-organization Act is comprised in Part VII which enunciates "Provisions as to Certain Corporations". Section 68 of the Re-organization Act provides as follows:

"68. (1) The companies and corporations specified in the Ninth Schedule constituted for the existing State of Andhra Pradesh shall, on and from the appointed day, continue to function in those areas in respect of which they were functioning immediately before that day, subject to the provision of this section.

(2) The assets, rights and liabilities of the companies and corporations referred to in sub-section (1) shall be apportioned between the successor States in the manner provided in section 53."

The corporations which are listed out in the IXth Schedule include APIIC which appears at Serial No.17. Section 68(2) states that the assets, rights and liabilities of the companies and corporations referred to in sub-Section (1) shall be re-apportioned between the successor states in the manner provided in Section 53. Section 53 is in the following terms:

"53. (1) The assets and liabilities relating to any commercial or industrial undertaking of the existing State of Andhra Pradesh, where such undertaking or part thereof is exclusively located in, or its operations are confined to, a local area, shall pass to the State in which that area is included on the appointed day, irrespective of the location of its headquarters:

Provided that where the operation of such undertaking becomes inter-State by virtue of the provisions of Part II, the assets and liabilities of—

(a) the operational units of the undertaking shall be apportioned between the two successor States on location basis; and

(b) the headquarters of such undertaking shall be apportioned between the two successor States on the basis of population ratio.

(2) Upon apportionment of the assets and liabilities, such assets and liabilities shall be transferred in physical form on mutual agreement or by making payment or adjustment through any other mode as may be agreed to by the successor States."

41. Section 65[18] allows for the successor states of Telangana and Andhra Pradesh to agree on the manner in which the benefit or burden of any particular asset or liability can be apportioned. Section 66[19] empowers the Central Government on a reference made, within three years from the appointed date, by either of the successor states to order an adjustment or allocation of the liability. Finally, to complete the narration of the statutory scheme, Section 71 is in the following terms:

"71. Notwithstanding anything in this Part, the Central Government may, for each of the companies specified in the Ninth Schedule to this Act, issue directions-

(a) Regarding the division of the interests and shares of the existing State of Andhra Pradesh in the Company between the successor states;

18 "65. Where the successor States of Andhra Pradesh and Telangana agree that the benefit or burden of any particular asset or liability should be apportioned between them in a manner other than that pr vided for in the foregoing provisions of this Part, notwithstanding anything contained therein, the benefit or burden of that asset or liability shall be apportioned in the manner agreed upon."

19 "66. Where, by virtue of any of the provisions of this Part, either of the successor States of Andhra Pradesh and Telangana becomes entitled to any property or obtains any benefits or becomes subject to any liability, and the Central Government is of opinion, on a reference made within a period of three years from the appointed day by either of the States, that it is just and equitable that such property or those benefits should be transferred to, or shared with, the other successor State, or that a contribution towards that liability should be made by the other successor State, the said property or benefits shall be allocated in such manner between the two States, or the other State shall make to the State subject to the liability such contribution in respect thereof, as the Central Government may, after consultation with the two State Governments, by order, determine."

(b) Requiring the reconstitution of the Board of Directors of the Company so as to give adequate representations is the successor States."

Section 71(a) speaks of the interests and shares of the existing State of Andhra Pradesh in the companies specified in the IXth Schedule between the successor States. APIIC has brought on record the certificate issued by the Managing Directors of TSIIC and APIIC recording the auditing of assets and liabilities as on 1 June 2014. The certificate is in the following terms:

"**CERTIFICATE**

"This is to certify that Andhra Pradesh Industrial Infrastructure Corporation Limited (APIIC LTD.,), Hyderabad have got its Books of Accounts audited upto 1st June, 2014 by M/s Jawahar and Associates, Hyderabad (Statutory Auditors) and accordingly a) All the Assets and Liabilities as appearing in the Balance Sheet as on 01.06.2014 have been brought on record and have been audited and included in the Demerger Scheme and Demerger Balance Sheet and b) the instructions of the Special Chief Secretary (Industries and Commerce), Government of Andhra Pradesh vide Circular No.3685/ INF (SRC)/2014 dated 29.05.2014 have been followed.

All the Assets and Liabilities were duly apportioned between Andhra Pradesh and Telangana States as per the provisions of Andhra Pradesh Reorganisation Act, 2014.

Further to certify that all the suggestions and advices given by Expert Committee with respect to Demerger of Assets and Liabilities have been complied with in formulating the final Demerger Scheme.

E.V. Narasimha Reddy	K.V. Satyanarayana, IAS
Vice Chairman &	Vice Chairman &
Managing Director (FAC)	Managing Director
TSIIC Ltd..	APIIC Ltd.,"

42. The Scheme for apportionment/demerger has also been produced by APIIC in the course of the pleadings. Para 1 of Section 1 Part II of the Scheme is in the following terms:

"1. Upon the coming into effect of the Scheme and with effect from the Appointed Date and subject to this Scheme, all the operational Units of the Demerged Undertaking (including all the estate, assets, rights, title, interest and authorities including accretions and appurtenances of the Demerged Undertaking namely Cyberabad Zone, Jeedimetla Zone, Karimnagar Zone, Patancheru Zone, Shamshabad and Moula Ali Zone, Warangal Zone vest with the Transferee Company and shall, subject to the provisions of the scheme in relation to the mode of vesting and pursuant to Section 53 of the Act and without any further act or deed, or be deemed to have been apportioned and transferred to and vested in the Transferee Company as a going concern so as to become as and from the Appointed Date, the estate, assets, rights, title, interest and authorities of the Transferee Company as detailed in the Schedule-I"

Clause 3 provides thus:

"3(a) In respect of such of the assets and liabilities located/held at the Headquarters of the Transferor Company shall be apportioned between the Transferee Company and Transferor Company on the basis of population ratio.

(b) In respect of the investments in public, private or commercial undertaking companies held by APIIC before the appointed date are apportioned on location basis where the projects are located in a specific region.

(c) In respect of investments in projects having multiple units falling within the territories of State of Andhra Pradesh and Telangana shall be apportioned on the basis of population."

Schedule I provides for the Zonal offices pertaining to Telangana region. Serial no.3 refers to the Shamshabad and Mauli Ali region which includes the area covered by the project site. The land which is comprised in the project site falls exclusively within the Telangana region as specified in the demerger scheme.

43. We clarify that following the course of action which has been adopted by the learned Single Judge, we are not adjudicating finally upon the rights *inter se* between TSIIC and APIIC. TSIIC shall refund the amounts due and payable to Unitech in terms of the present

judgment. TSIIC would be at liberty to pursue its rights and remedies in accordance with law over its claim for apportionment on which, we express no final opinion.

F. Summation

44. TSIIC and the State of Telangana have brought to our notice that the Development Agreement, on the basis of which Unitech has sought to avail its contractual remedy has not been registered or assessed to stamp duty. Under Article 3.1 of the Development Agreement, the obligation of paying registration fees and stamp duty is on Unitech. It is well-settled law that the Stamp Act is a fiscal measure enacted to secure the revenue for the State, and not to arm the opponent with a weapon of technicality.[20]Unitech's claim to compensatory payment cannot be defeated on the sole ground of the payment of stamp duty. The Development Agreement shall have to be impounded and be presented to the Chief Controlling Revenue Authority in the State of Telangana for assessment of stamp duty and to the competent authority for registration. The assessment shall be completed within thirty days. The appropriate stamp duty and registration charges liable to be paid in terms of the determination shall be paid by TSIIC and be deducted from the refund due and payable to Unitech under the terms of this order.

45. For the above reasons, the appeals shall stand disposed of in the following terms:

    (i) The Development Agreement stands impounded and shall be forwarded by TSIIC within two weeks to the competent authority for registration and for assessment of stamp duty. The assessment to stamp duty and formalities for registration shall be completed within one month. The amount payable towards stamp duty, penalty (if any) and registration charges shall be paid initially by TSIIC into the account of the competent authority within two weeks of the determination and shall be adjusted against the refund payable by TSIIC to Unitech;

20 Hindustan Steel Limited v. Dilip Construction Company, (1969) 1 SCC 597 para 7

(ii) The appeal filed by Unitech, arising out of SLP(C) No 9019 of 2019 is allowed in part by setting aside the direction of the Division Bench of the High Court which confined the liability to pay interest only with effect from 14 October 2015;

(iii) Unitech shall be entitled to a refund of an amount of Rs.165 crores together with interest at the SBI-PLR commencing from the respective dates of payment, computed in accordance with the provisions of the Development Agreement (except for compounding);

(iv) The amount which has been deposited in the Registry of this Court in pursuance of the interim order shall be disbursed to Unitech together with accrued interest. The balance due and payable under the terms of this judgment shall be refunded by TSIIC to Unitech within two months from the receipt of a certified copy of this judgment; and

(v) In terms of the directions of the Single Judge of the High Court, TSIIC will be at liberty to pursue its remedies for apportionment in relation to APIIC in accordance with law. No opinion is expressed on the merits or tenability of the claim for apportionment asserted by TSIIC.

46. The appeals arising out of the Special Leave Petitions filed by the State of Telangana and TSIIC shall also stand disposed of in terms of the present judgment. There shall be no order as to costs.

47. Pending application(s), if any, shall stand disposed of.

Headnotes prepared by: Devika Gujral

Result of the case:
Appeals disposed of.