Tamil Nadu Petroleum Dealers Association Vs The Union of India, Indian Oil Corporation Ltd., Hindustan Petroleum Corporation Ltd. and Bharat Petroleum Corporation Ltd.

Court: Madras High Court

Date of Decision: March 1, 2011

Acts Referred: Constitution of India, 1950 â€" Article 226

Citation: (2011) WritLR 637

Hon'ble Judges: S. Manikumar, J

Bench: Single Bench

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

S. Manikumar, J

1. Tamil Nadu Petroleum Dealers Association, represented by its President has sought for a writ of Mandamus, directing the Union of India,

represented by its Secretary, Ministry of Petroleum and Natural Gas, Shastri Bhavan, New Delhi, the 1st respondent herein, to grant arrears of

Shrinkage allowance, for the period from 31.07.1989 to 29.09.2000, on advalorem basis, to the Dealers in high altitude areas.

2. The petitioner''s association is a society registered under the Tamil Nadu Societies Registration Act, 1975. It has dealers all over Tamil Nadu

selling Petrol, diesel and kerosene, through their District Associations and there are Life members in the petitioner''s association. The objective of

the association is to protect the interest and welfare of the dealers and to represent on their behalf of them to the Oil industry and Ministry of

Petroleum, whenever difficulties are faced by the members of the association. It is further submitted that some of the members of the petitioner''s

association are high altitude dealers, selling motor spirit (petrol) and high speed diesel in Hill Stations such as Nilgiris District, Kodaikanal in

Dindigul District, Yearcaud in Salem District, and business in petrol/diesel at Hill Stations involve operational difficulties. The storage tanks and

filling points of the respondents 2 to 4 are located in plains at Coimbatore (Peelamedu and Irugur) and Sankari, where, the temperature is 29

Degree Celsius and above. Dealers in high altitude areas sell petrol and high speed diesel in retail, through their dispersing pumps at 15 Degree

Celsius and below, sometimes in winter period, the temperature would fall as low as zero Degree Celsius With every degree drop in temperature,

there is a reduction in volume and quantity of petrol and diesel, due to shrinkage and the same is also linked to coefficient of expansion or

contraction of the product conserved for petrol, the density of which is between 0.695 to 0.720. The temperature of the filling station located in

plain is 29 Degree Celsius and that of the petrol pump at Ooty is 15 Degree Celsius and therefore, there is shrinkage loss for every Kilolitre of

petrol, due to difference in temperature. Similarly, in respect of high speed diesel, there is shrinkage or contraction in volume per litre, depending

upon the variation in temperature. In order to compensate the loss in quantity and volume, due to shrinkage, to the dealers in high altitude areas, the

Government of India, the 1st respondent herein, has considered and decided to grant shrinkage allowance commencing from 1977 and as per their

decision, the cost price of the quantity loss, through shrinkage per kilolitre was sanctioned as shrinkage allowance and that the same was permitted

to be recovered by the dealers, in the sale price, from the consumers on the advice of respondents 2 to 4.

3. The petitioner association has further submitted that in the year 1977, shrinkage allowance has been sanctioned for motor spirit (petrol)/high

speed diesel by the Government of India, Ministry of Petroleum and Natural Gas, New Delhi, the 1st respondent herein, who directed the oil

companies namely, respondents 2 to 4, to grant shrinkage allowance to high altitude dealers. Subsequently, shrinkage allowance was enhanced in

proportion to the increase in the sale price of high speed diesel/petrol till 1989.

4. It is the grievance of the petitioner that though the sale price of petrol/high speed diesel has been increased on many occasions, from 1989

onwards, the Oil Companies, respondents 2 to 4 have not increased the shrinkage allowance, on the ground that the Ministry of Petroleum and

Natural Gas, New Delhi, the 1st respondent herein, has not passed any specific orders, permitting shrinkage allowance. Though several meetings

were held by the Oil Companies and it was agreed that the dealers of petrol/high speed diesel can add shrinkage allowance along with the

commission, in arriving at the retail selling price per litre for petrol/high speed diesel, no specific orders were passed by the Government of India.

However, shrinkage allowance has been increased with effect from 30.09.2000 without granting such allowance for the interregnum period

between 31.07.1989 and 29.09.2000. The 1st respondent has not passed any orders, inspite of reminders from the petitioner"s association, as

well as periodical reminders from the respondents 2 to 4, the Oil Companies. Being aggrieved by the action of the 1st respondent in not granting

shrinkage allowance for the period between 31.07.1989 and 29.09.2000, the petitioner''s association filed W.P.No.3523 of 1994, for a

Mandamus, directing the Union of India, represented by its Secretary, Ministry of Petroleum and Natural Gas, New Delhi, the 1st respondent

herein, to fix shrinkage allowance on advalorem basis, for petrol and diesel to the dealers in high altitude areas in Tamil Nadu. When the matter

came up for hearing, it was represented by the learned Additional Central Government Standing Counsel appearing for the 1st respondent that

subsequent to filing of W.P.No.3523 of 1994, the Central Government has passed certain orders with regard to the claim made by the petitioner''s

association and on the basis of such representation made by the Learned Central Government Counsel, the writ petition filed by the petitioner''s

association came to be dismissed. When the petitioner''s association enquired into the matter, they came to know that by proceedings dated

29.09.2000, the 1st respondent has addressed a communication to the Oil Co-ordination Committee stating that the revision of rates of shrinkage

allowance shall be passed on to the consumers in retail selling price, except in North-East states and that there was no mention about the shrinkage

allowance claimed by the petitioner association for the period between 1989 and 2000, for almost 11 years till 30.09.2000.

5. The petitioner''s association has further submitted that shrinkage allowance had been sanctioned from the year 1977 for motor spirit (petrol) and

high speed diesel by the Government of India, the 1st respondent, who directed the Oil Companies namely, respondents 2 to 4, to grant shrinkage

allowance to high altitude dealers. The price of petrol and high speed diesel has increased in manifold from 1989 onwards and consequently, the

1st respondent ought to have issued appropriate orders, directing the respondents 2 to 4, Oil Companies, to grant shrinkage allowance for the

dealers in high altitude areas. When the 1st respondent has granted shrinkage allowance from 1977 to 1989 and thereafter, from 30.09.2000

onwards, there is no reason as to why the 1st respondent has declined to consider to grant shrinkage allowance to high altitude dealers, in the

interregnum period between 1989 and 2000.

6. Taking this Court, through the material on record, Mr.T.R.Mani, Learned Senior Counsel for the petitioner''s association submitted that when

the Government of India on principle, have agreed to grant shrinkage allowance since 1977, and thereafter continued from 30.09.2000 onwards

and when the cost price of petrol/high speed diesel has increased in manifold, the 1st respondent herein, has failed to consider that the members of

the petitioner''s association have a legitimate right and expectation for grant of shrinkage allowance, for the period between 1989 and 2000 and

that therefore ""causus omissus"", is apparent on the face of the record.

7. Learned Senior Counsel for the petitioner further submitted that when shrinkage allowance is admitted to retail pump outlets (RPO) located at

high altitudes with temperature significantly, lower than the temperature prevailing in the supply depot area, and that different rates of shrinkage

allowance have been fixed by the Government of India, taking into account, the difference between the average annual mean temperature prevailing

in the supply depot area and receiving locations and the coefficient of shrinkage, based on the average density of the product namely, petrol/high

speed diesel and when the rate of shrinkage allowance approved by the Government of India is included in the sale price except North-East,

where, it was absorbed by the Oil Pool Accounts, there is absolutely no reason as to why there should be a denial of shrinkage allowance between

1989 and 2000.

8. Inviting the attention of this Court, to paragraph Nos. 18 and 19 of the counter affidavit filed by the Under Secretary to the Government of

India, Ministry of Petroleum & Natural Gas, New Delhi, the 1st respondent herein, the reasons assigned by the respondents that the Administered

Pricing Mechanism (APM) had been dismantled with effect from 01.04.2002 and any retrospective revision in the rates of shrinkage allowance

cannot be implemented, as Administered Pricing Mechanism (APM) had already been dismantled and that the contention that the shrinkage

allowance is not a fundamental right and the losses estimated are only theoretical. Learned Senior counsel further submitted that the abovesaid

contentions are wholly irrelevant, for the reason that shrinkage allowance has been granted since 1977 and thereafter continued from 30.09.2000

onwards and therefore, the abovesaid objections are liable to be rejected.

9. Learned Senior Counsel further submitted that following several representations, a meeting between the Federation of All India Petroleum

Traders (FAEPT) and the Government of India, New Delhi, the 1st respondent herein, represented by the Additional Secretary to the Government

of India, and the respondents 2 to 4, represented by their Directors, was held on 23.08.2006 wherein, it was agreed that the Oil industries would

release shrinkage allowance within 10 days and thereford, it was legitimately expected and believed that the arrears of shrinkage allowance

between 1989 and 2000 would be settled. In this context, Learned Senior Counsel took this Court through the reply dated 28.03.2002 of the

Hon"ble Minister for Petroleum and Natural Gas, Government of India, New Delhi, addressed to the Federation of All India Petroleum Traders,

New Delhi. He also took this Court through the minutes of the meeting held on 23.08.2006 at 05.00 P.M., in the Ministry of Petroleum and

Natural Gas, Government of India, at Shastri Bhawan, New Delhi, under the Chairmanship of the then Additional Secretary, Mr.Anil Razdan,

wherein, it was recorded that when FAIPT has raised the issue of arrears of shrinkage allowance which had not been released to hill area dealers

since 2004; that the Oil industry has agreed to release the shrinkage allowance within 10 days. Highlighting the minutes, Learned Senior Counsel

submitted that the members of the petitioner"s association have a legal right to demand payment of shrinkage allowance for the interregnum period

between 31.07.1989 and 29.09.2000, as a matter of right, as the Central Government on principle, have agreed to grant shrinkage allowance

taking into consideration the loss of petrol or high speed diesel on account of contraction of the product depending upon the variation in the

temperature and the co-efficient factor of the product, and also of the fact that on principle, they have allowed shrinkage allowance to be

recovered by the dealers in the sale price of petrol/high speed diesel from 1977 to this date, excepting for the break period between 31.07.1989

and 30.09.2000.

10. Per contra, based on the averments made in the counter affidavit filed by the Under Secretary, Ministry of Petroleum and Natural Gas, the 1st

respondent herein, Mr. J. Ravindran, Learned Assistant Solicitor General of India, submitted that the writ petition filed by an association seeking

for a Mandamus, is not maintainable in law, as no legal right is conferred on the members of the association nor there is any infringement of right in

not granting shrinkage allowance, which is only a concession made by the Government of India. He further submitted that pricing of petroleum

products was based on the recommendations of the Expert Pricing Committees and when the Government have referred the issue of grant of

shrinkage allowance to Oil Review Committee (OPRC) in September 1989, the said committee submitted a report to the Government in June

1991 and recommended the following simplifications:

i) No shrinkage allowance may be allowed at a location where the difference between the average annual mean temperature of receiving and

supplying location is less than 1 Degree Celsius.

ii) At the time of opening a new retail pump outlet as well as during revisions in the prices of MS and HSD, the shrinkage allowance to be given

may be finalised between the oil industry and the OCC and Government be kept informed of the change. Formal approval of Government before

giving allowance need not be obtained, as is being done now.

iii) It is not necessary to review the shrinkage allowance once it is fixed unless there is a change in the price of product, change in the location of the

supplying depot or the retail pump outlet.

11. The Learned Assistant Solicitor General further submitted that though the recommendations of the Oil Pricing Review Committee in a way

supported the interest of the retail outlet owners, it was not accepted by the Government. However, in 1996, the Government have advised the oil

Industry to suggest a new scheme of shrinkage allowance, taking into account the changes in supply source market linkages, revisions in

temperature data, if any, and the need for new markets to be added. In 1996, it was also thought fit to have a relook at the grant of shrinkage

allowance. In the light of the above decision and in order to propose a new scheme, the Oil Industry embarked upon the process of collecting

reliable temperature data. He further submitted that the industry attempted to obtain reliable temperature data, which could form an uniform basis

for calculating shrinkage allowance. The oil industry tried to collect temperature data from India Meteorological Department (IMD), Government

of India, Survey of India, Geological Survey of India and few other Government departments, which can provide reliable data. However,

respondents 2 to 4 came to the conclusion that the most reliable source for providing temperature data would be India Meteorological

Department, Government of India (IMD), as it possesses the standard methods and equipment for making temperature measurements which are

relied upon by defence and aeronautical establishments.

12. Learned counsel for the 1st respondent further submitted that though in 1996, the Government advised the oil industry to suggest a new

scheme of shrinkage allowance, taking into consideration the changes in the supply source market linkages, revision in temperature data, two years

of efforts culminated in an industry team visit to India Meteorological Department (IMD) headquarters in Pune during October 1998, and the

industry-learnt that though IMD had over 500 observatories throughout the country, many of them were not located, where the industry had retail

markets and supply points. Therefore, India Meteorological Department, Government of India (IMD), could not provide reliable temperature data

for most of the locations that oil industry required. Out of 303 markets and 45 supply points involved, IMD could provide corresponding

temperature data for 57 locations and even then the corresponding supply point temperatures were available for 20 markets only. Therefore, the

whole exercise of finding out the variable temperature at the market supply points could not be achieved and therefore, the oil industry attempted

to explore other alternative for calculating shrinkage allowance, without sacrificing reliability and uniformity. Ultimately, it was thought fit that IMD

could provide a universal lapse rate, which could be applied for arriving at the average temperature differentials between markets and supply

points, based on the altitude differential between them.

13. He further submitted that the figure provided by the IMD was 0.6 degree Celsius drop in temperature for every 100 meter increase in height.

The 1st respondent decided to adopt the lapse rate formula for the purpose as to whether shrinkage allowance could be granted or not. He further

submitted that in the scheme proposed by the Oil Industry, it turned out that 16 markets out of 177 markets which are currently enjoying shrinkage

allowance would be disqualified, if the lapse rate formula is adopted. Accordingly, a meeting was arranged with IMD, Pune, to discuss the issue of

calculating temperature data through other formulae. But the IMD officials informed that no further temperature data was available but agreed to

arrive at a estimated temperature based on the latitude and longitude details for markets and supply points. Though the industry proceeded to

collect latitude/longitude data from the Survey of India Officers, responsible for various geographical areas through out the country, collection of

data for 303 markets and 45 supply points was time consuming and therefore, based on the data available, the revision in rates of shrinkage

allowance was worked out by the Oil Coordination Committee and accordingly, the Government approved the revision in rates of shrinkage with

effect from 30.09.2000.

14. Learned counsel for the 1st respondent further submitted that the Government had dismantled the Administered Pricing Mechanism (APM)

with effect from 01.04.2002. The Oil Pool Account was also abolished with effect from 31.03.2002 and any retrospective revision in the rates of

shrinkage allowance cannot be implemented, as APM has already been dismantled. He also submitted that shrinkage allowance is an element to be

recovered in the retail price from the consumers and any retrospective revision in shrinkage is not feasible.

15. Learned counsel for the 1st respondent further submitted that shrinkage allowance is only a trade arrangement and not even a part of contract.

The losses estimated by the members of the petitioner''s association are only theoretical and therefore, in the absence of any legal right, no

Mandamus can be issued. As regards the contention that in a meeting held on 23.08.2006 and when FAIPT has raised an issue of arrears of

shrinkage allowance not released to the hill area dealers since 2004, the oil industry had agreed to release the shrinkage allowance within 10 days,

learned counsel for the 1st respondent further submitted that on verification of the official records, it was found that the said minutes were not

recorded and issued by Government of India or by any oil companies and therefore, the minutes signed by the Joint Secretary of FAIPT cannot be

said to be an authenticated official document which requires to be acted upon. In sum and substance, he submitted that grant of shrinkage

allowance is purely a matter of concession by the Government and as the said allowance is an element to be recovered in the retail price from the

consumers, retrospective revision in shrinkage allowance from 1987 to September 2000 cannot be granted.

16. Learned counsel for the 1st respondent further submitted that all the representations enclosed in the additional typed set of papers have been

made only after 2000 and since no representations have been made for grant of shrinkage allowance, between the period 1989 and 2000, it is not

open to the petitioner to raise a demand for grant of shrinkage allowance retrospectively, at this length of time, and particularly, when the shrinkage

allowance for the abovesaid period cannot be recovered from the customers. For the abovesaid reasons, he prayed for dismissal of the writ

petition.

17. The respondents 2 to 4, Oil Companies, in their respective counter affidavits, have submitted that the retail sale of motor spirit and high speed

diesel is carried on through the authorised dealers of the Corporations. According to Oil Companies, the prices of the petroleum products Viz.,

Petrol, Diesel, Kerosene, LPG till 31.03.2002 were governed by the Administered Pricing Mechanism (APM) of the Government of India. As the

writ petition has been filed during the period when APM was in existence, the parties are bound by the said mechanism of price structure and the

retail selling price of petrol and diesel at the retail outlet was fixed and conveyed to the dealers by the Corporations. According to them, the

temperature in retail outlets located in hilly regions may not be constant and it is subject to variations. While agreeing with the contention of the

petitioner that coefficient factor of motor spirit and high speed diesel depends upon the temperature variation, between the filling points and the

marketing points, resulting in shrinkage of the product during receipt, storage and sale, shrinkage allowance was allowed by the Oil Companies, as

per the directions of the Government of India, so as to compensate the loss on account of such shrinkage/contraction. It is the further submission of

the respondents 2 to 4, that the allowance provided by them was recovered from the consumers, as per the amount arrived at by the Administered

Pricing Mechanism (APM). However, in their counter affidavit the Oil Companies have admitted that shrinkage allowance, as applicable from time

to time was added in the sale price of the petro products in retail outlet in hilly regions. In their counter affidavit, they have also admitted that in so

far as Oil Companies are concerned, the directions of the 1st respondent as and when issued have been sincerely followed and implemented.

However, the respondents 2 to 4 have not admitted the figures given in the annexure, as to the alleged loss sustained by the members of the

petitioner''s association, dealers of petrol and high speed diesel. As the relief sought for, is against the 1st respondent, they have prayed for

dismissal of the writ petition against them.

18. By way of reply, Mr.T.R.Mani, Learned Senior Counsel submitted that when W.P.No.3523 of 1994 was filed by the petitioner''s association,

for a Mandamus directing the Union of India, represented by its Secretary, Ministry of Petroleum and Natural Gas, New Delhi, and four others,

for a direction to revise the shrinkage allowance on ad-valorem basis, to the dealers in high altitude areas in Tamilnadu, there was no objection as

regards the maintainability of the writ petition and after considering the submission of the Learned Counsel for the Central Government that the

Government had passed certain orders, the writ petition was dismissed, as in-fructuous. He further submitted that payment of shrinkage allowance

from 1977 on the basis of the decision of the Central Government, is a right accrued to the members of the petitioner''s association and recognised

by periodical payments. Further, when the writ petition has been filed in the representative capacity, in the light of the rules framed by this Court, it

is not open to the respondents to object to the maintainability of the writ petition, on the ground that it is filed by an Association. He further

submitted that shrinkage allowance is an existing right accepted and recognised by the Government on principle, for a long period since 1977 and

deprivation of the same during the interregnum period from 1989 to 2000, is without any basis and therefore, the writ petition by the Association,

for a Mandamus to enforce such a legal right against the respondents is maintainable in law and therefore, prayed to reject the objections.

He also submitted that the contention of the respondents that all along the petitioner''s association had remained quite and therefore, it is not open

to the petitioner to make a demand for grant of shrinkage allowance, belatedly is not the case of the respondents in their counter affidavit and in

such circumstances, no oral submissions can be advanced, in the absence of any pleadings. He also submitted that several representations have

been made prior to filing of the writ petition and therefore, it cannot be contended that the petitioner had remained quite, when they were denied

payment of shrinkage allowance for the period between 1989 and 2000. For the above-said reasons, he prayed that when the Government have

granted shrinkage allowance on principle, taking into consideration the variations in temperature, Mandamus should be issued.

19.Heard the learned counsel for the parties and perused the materials available on record.

20. In Webster''s Encyclopedic Unabridged Dictionary, the word ''Shrinkage'' means; 1) the act Or fact of shrinking 2) the amount of degree of

shrinking 3) reduction or depreciation in Quantity, value, etc., 4) contraction of a fabric in finishing or washing 5) the difference between the original

weight of livestock and that after it has been prepared for marketing 6) loss of merchandise through breakage, pilferage, shoplifting, etc.

21. In Oxford Dictionary Thesaurus, the word ''Shrinkage'' means; the process or amount of shrinking, allowace made for reduction in the takings

of a business due to wastage or theft.

22. In ''The Chambers Dictionary, the word ''Shrinkage'' means, an act of shrinking, extent of such diminution, in meat marketing, the loss of

carcase weight during shipping, preparation for sale etc., the loss of goods resulting from pilfering breakages, etc.

23. It is not in dispute that shrinkage allowance has been paid in the past, from the year 1977 and the 1st respondent has directed the Oil

Companies, respondents 2 to 4, to grant such allowance to high altitude dealers. The question to be considered is whether shrinkage allowance

granted to the members of the petitioner''s association, dealers of motor spirit and high speed diesel in high altitude areas, is a concession or a right,

based on any contract or promise made by the 1st respondent or a legal right recognised by the government, taking into certain extenuating

circumstances stated supra, and therefore, the members of the petitioner''s association could legitimately expect a revision of shrinkage allowance,

taking into consideration the increase in the cost price of motor spirit and high speed diesel, at the place where the abovesaid petro products are

stored and marketed. It is the admitted case of the 1st respondent that shrinkage allowance was given in the past in cases, where the temperature

in retail pump outlets (RPOs) located at a higher altitude is significantly lower than the temperature prevailing in the supplying depot area and

therefore, the rates of shrinkage allowance were fixed by the Government of India taking into account the difference between the average annual

mean temperature prevailing in the supplying depot area and the receiving locations and coefficient of shrinkage, based on the average density of

the product namely, petrol and diesel. It is the specific case of the Government of India that rate of shrinkage allowance approved by the

Government was allowed to be included in the sale price, except in North-East, where it was absorbed by Oil Pool Account. The respondents 2

to 4 are the Oil Companies under the control of Ministry of Petroleum and Natural Gas and that they are given the responsibilities for sale and

distribution of motor spirit, formally known as high speed diesel and other petroleum products through their retail outlets. When retail outlets are

permitted to function, the companies have entered into dealership agreements with concerned persons for running the outlets and the activities of

the retail outlets are governed by the terms and conditions of the contracts executed between the dealers and the Oil Companies. In so far as

transport, storage and production of petroleum products are concerned, they are governed by the provisions of Petroleum Act and the rules

framed thereunder. Needless to say that maintenance of the quality, during storage, distribution and sale of petroleum products, have to be in terms

of the provisions of the Act and the rules framed thereunder, and also as per the terms and conditions of the contract. Admittedly, the petitioner''s

association has not produced any contract executed between them, to prove that shrinkage allowance was also part of the contract entered into

between the members of the association and the Oil Companies. At the same time, it is not in dispute that there is shrinkage or contraction of the

motor spirit and it varies due to the temperature in high altitude areas, and on account of coefficient factor of expansion or contraction. The

Government of India have also granted shrinkage allowance commencing from 1977 taking into consideration the abovesaid aspect and

accordingly directed the Oil Companies to grant shrinkage allowance to the dealers in high altitude areas. Needless to say that the cost price fixed

for high speed diesel petroleum and other petroleum products have increased manifold.

24. Perusal of the order dated 05.06.1989 of the Government of India, Ministry of Petroleum and Natural Gas, shows that the Government, after

considering the issue of revision of motor spirit has decided to revise the shrinkage allowance suitably. They have also ordered that the revised rate

shall be in force with immediate effect and whenever shrinkage allowance in respect of high speed diesel is lower than the existing rates, in such

cases, the selling price must be brought down. It was also ordered that other instructions in respect of shrinkage allowance as indicated in the

Ministry''s letters dated 26.09.1979 and 28.06.1980 and Government letter dated 08.09.1997 would continue to apply. Subsequently, the

Government of India in their letter dated 29.09.2000 have directed the Executive Director, Oil Coordination Committee, New Delhi, to implement

the decision to allow shrinkage allowance from the date of issue of the abovesaid letter.

25. Perusal of the letter dated 29.09.2000 of the Oil Coordination Committee addressed to the Managing Directors of the Oil companies shows

that the Ministry of Petroleum and Natural Gas has also approved the revised rates of shrinkage allowance for motor spirit and high speed diesel,

as given in the Annexure to the abovesaid letter and the revised shrinkage allowance has been directed to be passed on to the consumers in retail

selling prices, for North East states. The said letter also shows that the Ministry has taken note of the retail selling price of LPG (PACKED

DOMESTIC) for markets, other than hilly areas and from 30.09.2000, there is also revision of shrinkage allowance also.

26. Reading of the counter affidavit of the 1st respondent clearly shows that on principle, the Government of India have taken into consideration

the aspect of shrinkage of motor spirit, based on the difference between annual mean temperature prevailing in supplying depot and the receiving

locations and that of the coefficient of shrinkage, based on the average density of the product namely, petrol and diesel and granted shrinkage

allowance from 1977 onwards. In 1989, the Government of India have referred the matter of granting shrinkage allowance to Oil Price Review

Committee (OPRC) and the recommendations of the Committee, as extracted at paragraph No.7 of the counter affidavit are as follows:

i) No shrinkage allowance may be allowed at a location where the difference between the average annual mean temperature of receiving and

supplying location is less than 1 Degree Celsius.

ii) At the time of opening a new retail pump outlet as well as during revisions in the prices of MS and HSD, the shrinkage allowance to be given

may be finalised between the oil industry and the OCC and Government be kept informed of the change. Formal approval of Government before

giving allowance need not be obtained, as is being done now.

iii) It is not necessary to review the shrinkage allowance once it is fixed unless there is a change in the price of product, change in the location of the

supplying depot or the retail pump outlet.

27. As to the steps were taken by the Government of India, on the recommendations stated supra, the counter affidavit of the 1st respondent is

silent. After five years, the Government have advised the Oil Industry to suggest a new scheme of shrinkage allowance taking into account the

changes in the supply source market linkages, revision in temperature data, if any, and the need for new markets to be added. The Government

after consulting the India Meteorological Department, Government of India, and of the fact that they could not provide the reliable temperature

data for 57 locations, thought it fit to adopt the lapse rate formulae, which states that the temperature would decrease with increase in height.

According to the Government, the figure provided by IMD was 0.6 Degree Celsius drop in temperature for every 100 meter increase in height and

for other reasons, the lapse rate formula could be adopted, while taking up the issue of calculating the shrinkage allowance, as follows:

Temperature data may include variations due to local weather patterns and climate. Compensating these variations may result in claims for such

compensation coming from all the retail outlets irrespective of the fact whether they are situated at high altitude.

Shrinkage allowance should be limited to the drop in temperature due to altitude differential alone.

Temperature due to altitude difference does not vary except under extreme conditions. The altitude data is easy to collect (as compared to average

temperature data from meteorological department), substantiate, easily verifiable, transparent and easy to interpret.

28. Pleadings disclose that in the scheme proposed by the Oil Industry, that out of 177 markets, 16 markets currently enjoying shrinkage

allowance may not be qualified to the grant of the allowance. Subsequently, the industry has admitted to collect latitude/longitude data from the

Survey of India offices, and periodical meetings seemed to have been held with IMD. Finally, the Government had approved the revised rates of

shrinkage allowance and revised the rate in September 2000.

29. Whenever there is shrinkage or diminution of the quantity of the petro products due to variation in the temperature and co-efficient factor of the

factors, then consequently, there is reduction in the value of the petro products and the owners of the retail outlets, are put in a disadvantageous

position than the dealers in plain areas. The allowance granted by the Government of India is only to mitigate or to compensate the loss to a class

of dealers who have their retail outlets in hilly areas, and who would otherwise suffer, if they have to sell petro products, at the same rate, as done

by others in plain areas. The Government of India or the Oil Industry has not disputed the fact of shrinkage of petro products, due to variation in

temperature and co-efficient factor of the product and therefore if there is a reduction in the volume and value of petro products, and if the pricing

of the same is not allowed to be fixed by the Government of India, through the Oil Industry, by allowing or adding the shrinkage allowance, it

would be amounting to treating the retail dealers in hilly areas, differently and that it would be inequitable. All along, the Government of India and

the Oil Industry have attempted to get the required data, from various sources for the purpose of determination of a suitable formula in fixing the

rate of allowance. If none of the correspondence between the Oil industry and the Government of India or any other appropriate authority, who

were approached to furnish the required data, the Government of India, at any point of time, have indicated that there was any lkelihood of

withdrawing shrinkage allowance to the dealers in hilly areas. It could also be seen that due to inadequacy or accuracy of the material data i.e., that

variation in temperature and in different hilly areas, and the supply points and the likelihood of same of the outlets in hilly areas, losing the benefit of

shrinkage allowance, if the reports were to be accepted, the complexity in fixing the rate of allowance, the issue of finalisng the grant of shrinkage

allowance has been protracted by the Oil Industry, Government of India. Concession would only mean a privilege given, so that there would be an

undue advantage, over the others, by virtue of such concession. Certainly, in the case on hand, it cannot be said that shrinkage allowance granted

to the members of the petitioner''s association would place them in an undue advantageous position over the retail dealers in plain areas. On the

other hand, it is the converse, if the shrinkage allowance is not extended to the members of the petitioner''s association. Therefore, by granting

shrinkage allowance, the retail dealers in hilly areas would not gain any extra privilege and that they would not be in a better or advantageous

position than the dealers in plain areas. Therefore, considering the object and the purpose sought to be achieved, and as understood and

recognised by the parties, all along, the allowance given to the members of the association or the retail dealers in hilly areas, has to held as

compensatory allowance"" to compensate the loss sustained by them due to shrinkage and it is not a concession. Allowance and concession are

two different legal and distinct concepts. In the light of the pleadings and material on record, this Court is of the view that the 1st respondent having

granted the shrinkage allowance in the past between 1977 and 1989 has conceptually erred in not granting the said allowance between 1989 and

1999, but to decide to continue the same, from 2000 onwards.

30. As this Court has come to a conclusion that Government of India, departing from the concept of shrinkage allowance, what is in the nature of

compensatory allowance have presumed and adverted to the same, as concession, it is again obligatory on the part of this Court to examine as to

whether the members of the petitioner''s association or the retail dealers of petro products in hilly areas can claim it as a matter of right.

31. Right:- The word ""right, or in its plural form ""rights,"" is a common term, of broad signification. It is a generic, abstract, and comprehensive term,

having a wide scope of meaning in its various legal applications, and it has no satisfactory definition or explanation except in connection with some

concrete conception of thing out of which it grows. It may mean any legal right as the word is normally used, or it may be limited to some specific

one of the large class of recognised ""rights."" It may be a right to do something, to have something, to be something, or even to let alone; it may

refer to a right or privilege to use a highway or other public facility, or to utilise one of the great institutions of nature, or, on the other hand, it may

refer to personal liberty, security, health, or property.

32. In Wharton''s Law Lexicon, the word ''Right'' means; 1) is a legally protected interest 2) is an averment of entitlement arising out of legal rules

3) right is an interest recognised and protected by moral or legal rules 4) right, comprehends every right known to the law.

33. In K.J.Aiyar''s Judicial Dictionary, the word ''Right'' means; 1) a right is a legally protected interest, 2) a right is an interest which is recognised

and protected by law.

34. In Stroud''s Judicial Dictionary, the word ''Right'' means, is where one hath a thing that was taken from another wrongfully, as by disseisin,

discontinuance, or putting out, or such like, and the challenge or claime that he hath who should have the thing, is called right.

35. In Mr ''X'' Vs. Hospital ''Z'', , the Supreme Court while considering the right of privacy and the violations of personal rights, the conflict

between fundamental right of the parties, at paragraph No. 15, explained the word ""right"" as follows:

RIGHT"" is an interest recognised and protected by moral or legal rules. It is an interest the violation of which would be a legal wrong. Respect for

such interest would be a legal duty. That is how $almond has defined the ""Right"". In order, therefore, that an interest becomes the subject of a legal

right, it has to have not merely legal protection but also legal recognition. The elements of a ""LEGAL RIGHT"" are that the ""right"" is vested in a

person and is available against a person who is under a corresponding obligation and duty to respect that right and has to act or forbear from

acting in a manner so as to prevent the violation of the right. If, therefore, there is a legal right vested in a person, the latter can seek its protection

against a person who is bound by a corresponding duty not to violate that right.

36. Writ of mandamus cannot be issued merely because a person is praying for. One must establish the right first and then he must seek for the

prayer to enforce the said right. If there is failure of duty by the authorities or inaction, one can approach the Court for mandamus. The said

position is well settled by in series of decisions.

(a) In the decision reported in Union of India (UOI) and Another Vs. S.B. Vohra and Others, the Supreme Court considered the said issue and

held that ''for issuing a writ of mandamus in favour of a person, the person claiming, must establish his legal right in himself. Then only a writ of

mandamus could be issued against a person, who has a legal duty to perform, but has failed and/or neglected to do so.

(b) In the decision reported in Oriental Bank of Commerce Vs. Sunder Lal Jain and Another, in paragraphs 11 and 12 the Supreme Court held

thus,

11. The principles on which a writ of mandamus can be issued have been stated as under in The Law of Extraordinary Legal Remedies by F.G.

Ferris and F.G. Ferris, Jr.:

Note 187.-Mandamus, at common law, is a highly prerogative writ, usually issuing out of the highest court of general jurisdiction, in the name of the

sovereignty, directed to any natural person, corporation or inferior court within the jurisdiction, requiring them to do some particular thing therein

specified, and which appertains to their office or duty. Generally speaking, it may be said that mandamus is a summary writ, issuing from the proper

court, commanding the official or board to which it is addressed to perform some specific legal duty to which the party applying for the writ is

entitled of legal right to have performed.

Note 192.-Mandamus is, subject to the exercise of a sound judicial discretion, the appropriate remedy to enforce a plain, positive, specific and

ministerial duty presently existing and imposed by law upon officers and others who refuse or neglect to perform such duty, when there is no other

adequate and specific legal remedy and without which there would be a failure of justice. The chief function of the writ is to compel the

performance of public duties prescribed by statute, and to keep subordinate and inferior bodies and tribunals exercising public functions within their

jurisdictions. It is not necessary, however, that the duty be imposed by statute; mandamus lies as well for the enforcement of a common law duty.

Note 196.-Mandamus is not a writ of right. Its issuance unquestionably lies in the sound judicial discretion of the court, subject always to the well-

settled principles which have been established by the courts. An action in mandamus is not governed by the principles of ordinary litigation where

the matters alleged on one side and not denied on the other are taken as true, and judgment pronounced thereon as of course. While mandamus is

classed as a legal remedy, its issuance is largely controlled by equitable principles. Before granting the writ the court may, and should, look to the

larger public interest which may be concerned-an interest which private litigants are apt to overlook when striving for private ends. The court

should act in view of all the existing facts, and with due regard to the consequences which will result. It is in every case a discretion dependent

upon all the surrounding facts and circumstances.

37. In the light of the discussions and decisions cited supra, this Court is convinced that the members of the petitioner"s association have

established that they have a substantive legal right to be enforced against the 1st respondent. To enforce a legal right, it is not necessary that in

every case, it should always be backed up by statutory provisions or the terms and conditions of contract, and it is suffice that a party who pleads

infringement of any right to prove that there is an interest recognised and protected by moral or legal rules. An interest, violation of which should be

a legal wrong. If one has a thing or interest that is taken away from another wrongly, by discontinuance, or putting out, or such like, and by such

act, there is deprivation or violation of an interest or thing, recognised and protected, by moral or legal rules, then it can be concluded that he has a

legal right to be enforced.

38. Though the Government of India in their counter affidavit have contended that shrinkage allowance is not a part of the contract, but it was only

a trade arrangement by the Government, in consultation with various bodies and the Oil Coordination Committee, and that grant of shrinkage

allowance was purely a concession and that the Government can withdraw the same, the same cannot be countenanced, for the reason that all

along, the loss incurred by high altitude dealers, on account of shrinkage in volume of the petroleum products has been compensated by way of

shrinkage allowance, which has also been reviewed periodically. If granting of shrinkage allowance to the high altitude dealers is only a concession

or trade arrangement, as contended by the 1st respondent, then there is no need to have consulted various bodies to arrive at the method for

granting shrinkage allowance. It could be seen that the entire labour and exercise was only to find out the method in arriving at the rate of shrinkage

allowance, which came to be accepted and revised in the year 2000, and it is not the case of the government that the petitioner is not entitled to

shrinkage allowance. The right to claim shrinkage allowance has been recognised by the government of India from 1977 onwards, though it may

not form part of any agreement, but the purpose and object of granting the allowance is to make good the loss sustained by the dealers, in high

altitudes and to mitigate their hardship. The reasons stated in the counter affidavit for not revising shrinkage allowance between June 1989 and

September 2000, are that the Government had taken steps to consult various bodies such as IMD, Oil industry and Oil Price Review Committee,

as to the method in arriving at shrinkage allowance and it is not the case of the respondents that the high altitude dealers are not entitled to

shrinkage allowance, for the abovesaid period, particularly, when the Government have decided to grant the same from 2000 onwards. One of the

reasons for denial of shrinkage allowance is that Administered Pricing Mechanism (APM) has been dismantled with effect from 01.04.2002 and

Oil Pool Account has been abolished with effect from 31.03.2002 and any retrospective revision in the rates of shrinkage allowance cannot be

implemented, as APM had already been dismantled. The other reason cited is that shrinkage allowance being an element to be recovered from the

consumers, any retrospective revision in the rates of shrinkage allowance is not feasible. On this aspect, it could be noticed that the Oil

Corporations in their counter affidavits have categorically submitted that in view of the violation in temperatures at receiving locations of retail

outlets in hill areas in comparison to that of despatching locations, shrinkage allowance was allowed by the Oil Companies, so as to compensate

the loss incurred, on account of such shrinkage/contraction. They have also submitted that the shrinkage allowance is provided as additional

recovery in sale price from consumers in the amount fixed per Kilolitre of the product. It is also submitted that as and when the Ministry had

revised the shrinkage allowance for petrol and diesel from time to time, the Oil Companies have sincerely followed and implemented. According to

them, shrinkage allowance, as applicable from time to time has been added in the sale price of the petro products by the retail outlets, in hilly

regions.

39. Thus it is evident for over two decades from 1977, except for the break period between 1989 and 2000, the members of the petitioner''s

association have been allowed shrinkage allowance by the Oil Companies, as per the Government of India''s directions, which thus compensating

the loss incurred by the members of the association, on account of such shrinkage/contraction. Though the 1st respondent has contended that the

losses estimated are only theoretical, the fact remains that, but for the loss on account of shrinkage or contraction, the Government would not have

allowed shrinkage allowance for over a decade and continued to allow such allowance from 200p onwards. Therefore, as rightly contended by the

Learned Senior Counsel that if the Government of India, on principle, have taken a decision to compensate the loss suffered by the dealers, in hilly

areas they cannot contend that there would not have been any loss, during the interregnum period. All along, the government have been only trying

to find out a suitable formula in arriving at the method and calculation of rate of shrinkage allowance and it was never the intention or the case of

the government to withdraw the benefit of allowance, which was to compensate the loss.

40. Perusal of the material on record shows that the Federation of All India Petroleum Traders have sent a representation dated 06.03.2002

addressed to the Hon''ble Minister of Petroleum and Natural Gas, New Delhi, requesting the Government to order for payment of arrears of the

shrinkage allowance to the dealers before the end of the financial year, for which, a reply dated 28.03.2002 has been sent to the President,

Federation of All India Petroleum Traders Association, New Delhi, stating that the matter was under examination and further directed them to

make representation thereafter, for grant of arrears of shrinkage allowance.

41. Pleadings further disclose that though earlier, the association made representations and filed W.P.No.463 of 2000, the same has been

dismissed only on the basis of the representation of the Learned Central Government Counsel that some orders have been passed by the

Government of India and the disposal of the writ petition in the manner set out, earlier will not preclude the petitioner''s association from filing

another writ petition. When the association has been permitted to negotiate with the Government of India, Oil Industry and other bodies to ventilate

the grievance of the members of the association, and a reply has been given it is not open to the 1st respondent to contend that the writ petition

filed by the petitioner''s association is not maintainable. Therefore, the objection regarding maintainability is rejected. The arrangement till 1989, has

maintained uniform standards and for the period between 1989 and 2000, there is a departure from the principle that all the persons similarly

placed should be treated equally. No doubt, while fixing a fair price, founded on the mechanics of price fixation, the principles of natural justice is

not applicable, but certainly, the principles of reasonableness and fair play in action, must be observed.

42. In the case on hand, for the cause explained supra, the Government of India, on principle, have granted shrinkage allowance from 1977 to

1989 and thereafter, except for the interregnum period, between 1989 to 1999, have decided to continue the same.

43. Normally, the principle of Causus Omissus is applied only, when there is a case of omission in a statute. The expression, ""Causus Omissus"", as

explained in various decisions, means (1) Omitted case, (2) What a statute or an instrument of writing undertakes to foresee and to provide for

certain contingencies, and through mistake, or some other cause, a case remains to be provided for, it is said to be a causus omissus. In a given

case, the words ""causus omissus"" could also be extended, a legal issue or situation not governed by the statutory or administrative law or by terms

of contract.

44. Testing the action of the Government of India, denying Shrinkage Allowance, for the abovesaid period, this Court is of the view that the said

decision does not satisfy the test of fairness, reasonableness. It is well known that remedy under Article 226 of the Constitution of India is equitable

and the relief has to be granted on the principles of ubi jus ibi re-medium. No law of limitation is applicable in such cases. Therefore, this Court is

of the view that, to the extent, to which, retail dealers have sustained loss on account of denial of Shrinkage Allowance, the same has to be

remedied, in a special case of this nature, as equity demands, suitable remedy.

45. It is to be noted that the demand of the petitioner''s association for shrinkage allowance has been made much earlier to dismantling of APM.

On the question as to whether the petitioner association has approached this Court belatedly and therefore whether the members of the association

could be disentitled from making any claim for arrears of shrinkage allowance, perusal of the resolution and the notification of the Ministry of

Petroleum and Natural Gas dated 28.03.2002 dismantling of APM and the consequential decision shows that the abovesaid Ministry at paragrpah

No.5 has ordered as follows:

(V)The oil pool accounts will be wound up with effect from 1st April 2002. The cumulative outstandings of the oil companies against the pool

account will be liquidated in the following manner:

(a) The Government will issue bonds to the extent of 80% of the amount equivalent to the provisional amount of the settled outstandings of the oil

companies upto 31st March 2002.

(b) The pending claims relating to the APM period, including the updation of costs and margins for the fiscal year 2001-02, will be finalized as

expeditiously as possible. The C&AG will be requested to do a special audit of the oil pool accounts. The whole of the balance amount due to the

oil companies will be liquidated by issuing bonds for the remaining amount after the audit.

(c) The contingent liabilities under the pending litigations, pertaining to the APM period will be settled from the Government budget as and when

such litigations are finally decided.

46. Reading of the Ministry''s resolution shows that if the contingent liability like arrears of shrinkage allowance pertaining to the APM period, has

already been raised, it is for the Government to settle the same as and when the litigations are finally decided.

47. As stated supra, between 1989 and 2000, no decision has been taken by the Government declining to grant shrinkage allowance. Continuation

of grant of shrinkage allowance and the revision from 2000 itself, would prove that the petitioner has a legal right to insist payment of shrinkage

allowance for the interregnum period between 31.07.1989 and 29.09.2000. If for any bona fide reasons, there was a delay in arriving at the rate

of allowance, the same cannot be held against the members of the petitioner''s association.

48. For the foregoing reasons, this Court is of the considered view that the petitioner is entitled to the relief of Mandamus. Accordingly, a direction

is issued to the 1st respondent to grant arrears in shrinkage allowance for the period between 31.07.1989 and 29.09.2000, to the members of the

petitioner"s association, dealers in high altitude areas, after working out the shrinkage allowance, within a period of eight weeks from the date of

receipt of a copy of this order.

49. In the result, the writ petition is allowed as indicated above. No costs.