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TM International Logistics Limited and Another Vs The Tariff Authority for Major Ports and Others

Court: Calcutta High Court

Date of Decision: May 15, 2009

Acts Referred: Major Port Trusts Act, 1963 â€" Section 42(1)

Citation: (2009) 3 CALLT 154 : 113 CWN 673

Hon'ble Judges: Sanjib Banerjee, J

Bench: Single Bench

Advocate: Samaraditya Pal, Mr. Debasish Kundu, Mr. Jaydeb Ghorai and Ms. V. Meharia, for the Appellant;Biswarup Gupta and Mr. Somnath Bose for the Respondent No. 1, for the Respondent

Final Decision: Allowed

Judgement

Sanjib Banerjee, J.
The growing pains of privatisation come to the fore in these proceedings.

2. The writ petitioners question the tariff set for them to operate berth No. 12 at the Haldia port. The principal challenge is as to the authority of the

statutory body to set rates retrospectively and require the first petitioner company to refund to its clients the alleged excess payment received over

several years. The incidental challenge to the rates is in the Authority acting unreasonably and failing to take into account relevant considerations

that has resulted in a lower tariff being petitioners claim to deserve.

3. The first petitioner company is an Indo German joint venture that provides logistic services including port operations in India, chartering, steamer

agency, shipping and clearing and freight forwarding services.

4. In the year 2000 the Board of Trustees for the Port of Kolkata (the port) invited proposals for allotment of multipurpose berth No. 12 at the

Haldia dock complex. The request for proposal document set out the scope of the work and the description thereof. Clause 3.1.9 of such

document provided that the preferred bidder would be entitled to collect all kinds of cargo-related charges as per the port"s scale of rates framed

or revised from time to time in accordance with the provisions of the Major Port Trusts Act, 1963 (the said Act). The existing scale of rates of the

port was appended to the document.

5. By an agreement of January 29, 2002 the petitioner company was engaged by the port as licencee for performing various services included u/s

42(1) of the Act and maintaining the said berth for a period of 30 years on the terms and conditions contained in the voluminous document. By the

time the said agreement was executed, the Tariff Authority for Major Ports (TAMP or the Authority) had been set up following the 1997

amendment to the said Act and such authority is referred to in the agreement.

6. Some of the definitions in the agreement, the grant thereunder and clauses relevant for the present purpose as have been referred to by the

petitioners, need to be noticed:

Scale of Rates"" means the scale of rates of the licensor framed from time to time by the competent authority under the provisions of MPT Act,

1963.

TAMP"" means Tariff Authority for Major Ports established under the MPT Act, 1963.

Tariff means the applicable rate(s) as per Scale of Rates.

2.1 License

The Licensor hereby grants to the Licensee, subject to the provisions of this Agreement, an exclusive license for equipping, constructing, financing,

operating, managing, maintaining, replacing the Project/ Project Facilities and Services at its cost, charges, expenses, risk and arrangement.

2.2. License Period

The License hereby granted is for a period of 30 years commending from Date of Award of License during which the Licensee is authorised to

implement the Project and to provide Project Facilities and Services in accordance with the provisions hereof....

4.1 Collection of Charges

a) The Licensee shall be entitled to collect all kinds of cargo related charges as per licensor''s Scale of Rates framed/ revised from time to time as

per provisions of MPT Act, 1963 for carrying out various services to fulfill the scope of the project as per provisions of this agreement. As of the

date hereof, the applicable Scale of Rates is as set out in Appendix - 17....

5.1 Payments of Royalty

a) The Licensee shall pay to the Licensor royalty per Month at the percentage level as set out in appendix - 19 of the actual revenue earned by the

Licensee during the month as per provisions of 4.1(a) above.

7. The petitioner company paid an upfront fee of Rs.7.10 crore to the port and a further sum of Rs.36,37,200/- towards security deposit. The

petitioners claim to have paid the initial annual rent of Rs. 19,20,160/- and rent thereafter at an enhanced rate of five per cent every year. It is the

petitioners" case that the petitioners collected the cargo-related charges for the services rendered by the petitioner company in the years 2002-03

and 2003-04 on the basis of the port"s existing scale of rates as prescribed in appendix-17 to the agreement.

8. Though the port has not been impleaded, a matter that has come in for some criticism by the Authority which is the only respondent to have put

in an appearance, there is a give-away line in paragraph 17 of the petition that would indicate that the port was contemplated to be impleaded but

was consciously avoided. The drama unfolds in November, 2003. The petitioners say that the grant contained in the agreement with the port and

the terms thereof permitted the petitioners to fix rates for the services rendered by the petitioner company at the relevant berth in accordance with

the port rates and the petitioners were unaware, that the terms of the agreement as to rates were apparently meaningless till they were favored with

a letter of November 29, 2003 issued by the port. To some extent, the letter would go to indicate that even the port was oblivious to the

Authority"s primacy in the matter of fixing rates for cargo related services. The letter invited the petitioner company to get its rates approved by the

Authority and notified in the Official gazette:

Sub.: Approval of rates levied by you for various services rendered at Berth No. 12 of Haldia Dock Complex handed over to you under Licence.

This has reference to the above.

As you are aware of, performance of various cargo related services, as detailed in the relevant License Agreement between your good company &

Kolkata Port Trust, is allowed under the provisions of section 42(3) of the Major Port Trust Act, 1963. The said License Agreement inter alia

permits you to levy charges, for the services rendered by you at the said Berth No. 12, at the rates not exceeding the respective rates stipulated in

the Scale of Rates of Kolkata Port Trust, as may prevail from time to time being approved by the Tariff Authority of Major Ports (TAMP).

In a recent workshop conducted in Kolkata by the TAMP it was clarified-by the Chairman of the TAMP that terminal operators, authorised u/s

42(3) of the Major Port Trust Act, 1963 to provide services indicated u/s 42(1) of the said Act, are also required to get the rates (levied by them)

approved and notified by the TAMP.

The above issue was also discussed with your officials in the meeting at Haldia on 07.11.03.

In view of the above you are requested to ensure immediate necessary actions for getting your rates approved by the TAMP and then notified in

the Official Gazette.

9. The petitioner company responded, not to the port but by writing to the Authority on December 15, 2003, asserting that it was entitled to

cargo-related charges in accordance with the port''s scale of rates as the port had given authority to the petitioner company to render such services

u/s 42(3) of the Act. The later portion of such letter is relevant for the present purpose:

2. u/s 48 of Major Port Trust Act, TAMP is to frame a Scale of Rate for services performed by a port or any authorized person u/s 42(3) of the

Act. It is also obligated u/s 42(4) that no such authorised person can recover for such services any sum in excess of the amount specified by

TAMP and notified in the Official Gazette.

3. The charges for those service(s) being rendered by TMILL, in as much as it is authorized to do so under the Licence Agreement, is being

recovered in accordance with the Scale of Rates of Kolkata Port Trust, as framed by TAMP and notified from time to time in the official gazette.

Thus requirements of MPT Act are fully met, both in respect of section 42 & 43.

However, if TAMP still feels that a separate Notification in Official Gazette is required to notify the charges of TMILL, we believe it can be done

through a simple Notification that TMILL cannot recover charges in excess of that fixed for such services (as listed in Licence Agreement) as per

Scale of rates of Kolkata Port trust, as prevalent from time to time.

10. It is of some significance that the petitioners'' initial reaction was of denial, in the sense that they merely asked the Authority to approve the

port''s scale of rates for the petitioner company and regularise the matter ""through a simple notification.

11. The Authority reacted by its letter of February 17, 2004 insisting that the tariff that was required to be approved for a private terminal operator

had to be assessed with reference to the costs and investments of such operator. The Authority noted that the scale of rates of any port trust would

be different from a private operator''s since the port''s costs of operation and investment would throw up a different set of figures than a private

operator''s. The distinction was thus first drawn by the Authority between the scales of rates of public bodies manning ports and private terminal

operators thereat. The letter is the essential basis that charted the course of action that the Authority set for itself:

Please refer to your letter No. TMILL/562/03-04 dated 15 December 2003 on the subject cited above.

2. Section 42(4) of the Major Port Trusts Act, 1963 read with section 48 ibid requires rates to be notified by This Authority in respect of the

identified services provided by persons authorised u/s 42(3).

3. It has to be recognised that the Scale of Rates of a Port. Trust is usually framed with reference to the cost of operation and investment made by

the Port Trust. The rates so fixed will, therefore, be relevant as long as the Port Trust operates the facilities.

4. Even if status quo in tariff for justifiable reasons is to be maintained, a specific authorisation to that effect is to be given by this Authority after

taking into consideration all relevant factors.

5. It may be noted that separate Scale of Rates for private terminal operators, wherever privatisation of container handling facilities of major ports

had taken place so far, has been notified by this Authority after analyzing the tariff proposals submitted by the concerned operators.

6. The TMILL is advised to submit a detailed tariff proposal.

12. The petitioner company toed the Authority line and, somewhat belatedly, submitted its proposal in November 2004 for framing of tariff for the

cargo-related services rendered by it. At the time that the petitioner company submitted its first proposal, the guidelines for tariff regulation framed

in February, 1998 u/s 111 of the Act were in vogue. Revised Guidelines entitled, ""Guidelines for Regulation of Tariff at Major Ports 2004"" were

published on March 31, 2005 superseding the earlier guidelines and the new guidelines were to remain operative for a period of five years from the

date of publication thereof. The preamble to the 2004 guidelines reports that the terms thereof were firmed up after meetings with various

interested persons.

13. The appearing parties here have referred to the 2004 guidelines in detail. The guidelines permit operators to a 16 per cent margin on account

of return that is to be treated as an element of the tariff. The essential feature of the methodology adopted is, as clause 2.4.1 of the guidelines

announces, the ""cost plus return on capital employed"" approach. Particular reference has been made, at various stages, to the following clauses of

the said guidelines:

1.3. These shall apply to all the Major Ports to whom the provisions of MPT Act, 1963, as amended from time to time, are applicable or extended

and private terminals operating at these ports (hereinafter referred to as ports) under BOT/BOOT or any other privatisation arrangement adopted

by the Government and other service providers authorised u/s 42 of the said act.

1.4.1. These Guidelines will generally apply, inter alia, in respect of the following:

(i) regulation of tariff levied by the port for services rendered or facilities provided as specified u/s 48 of the MPT Act, 1963.

(ii) fixation of charges, u/s 49 of the said Act, for the use of properties belonging to, or in possession or occupation of, the port or any place within

the limits of the port or the port approaches.

(iii) fixation of fees u/s 49(A) and 49(B), respectively, of the said Act, for pilotage, hauling, mooring, re-mooring, hooking and measuring and other

services rendered to the vessels and port dues on vessels entering the port.

(iv) fixation, u/s 50 of the said Act, of consolidated Scale of Rates for combination of services.

(v) the conditionalities governing application of the tariff/charges/ fees/dues.

1.4.2., The earlier guidelines adopted in Feb. 1998 stand superseded. The principles evolved through various tariff orders will, however, continue

to apply to the extent they are consistent with and not specifically superseded by these guidelines. A compendium or digest of principles evolved

will be published periodically.

2.1. TAMP shall rationalize the tariff structures and streamline tariff setting system.

2.2. In prescribing tariff, TAMP will be guided by the following:

(i) Safeguarding the interest of shippers/consignees and other port users.

(ii) Ensuring just and fair return to ports.

(iii) The factors which will encourage competition, economical use of resources, efficiency in performance and optimum investment.

(iv) he established costing methodologies (including cost plus approach) and pricing principles.

(v) The policy directions issued by the Central Government u/s 111 of the MPT Act.

(vi) Ensuring transparency and participative approach while discharging its functions.

(vii) Tariff leverage will be used to improve operational efficiency of the ports.

(viii) Overall long term objective will be to move to competitive pricing and to push performance of Indian Ports to internationally competitive

levels.

2.4.1. TAMP will continue with the existing port wise Cost Plus return on capital employed approach. Attempts will be made to evolve normative

cost of each component of port operations. In order to encourage cost reduction due to improvement in efficiency/ productivity of the same

operator, at the time of every periodic review of tariff, the actual cost reduction achieved due to efficiency improvement in the previous cycle will

be considered. The benchmark for efficiency will be the average of the past performance of the same operator at the same terminal achieved in the

immediately preceding tariff validity cycle. This would, therefore, naturally exclude any comparison of an operator at a terminal with that of the

same or different operators at other terminals whether or not in the same port. Only 50% of such cost reduction will be considered in the relevant

estimates of expenditure to be relied upon for fixing tariff for the succeeding tariff validity period. It is noted that this approach may result in the

quantum of ROCE exceeding the maximum permissible limit set in these guidelines elsewhere and no moderation thereof will be effected.

IIIustration:

Let us assume expenditure on item "A" is reduced from the earlier level of Rs. 1000/- to Rs.900/- and it was established that this cost reduction

was due to efficiency improvement. For estimation of expenditure under item "A" for the next tariff cycle, the base will be considered as Rs.950/-

[900+50% of (1000-900)] and not Rs.900/-.

2.4.2. TAMP will examine the reasonableness of the costs and investments to ensure that inefficiencies, uneconomic uses/practices or excesses

are not passed on to users.

2.8.1. "Royalty/Revenue share" payable to the landlord port by the private operator will not be allowed as an admissible cost for tariff

computation as decided by the Government in the Ministry of Shipping vide its Order No. PR-14019/6/2002-PG dated 29th July 2003. In those

BOT cases where bidding process was finalised before 29 July 2003, the tariff computation will take into account royalty/revenue sharing as cost

for tariff fixation in such a manner as to avoid likely loss to the operator on account of the royalty/revenue share not being taken into account,

subject to maximum of the amount quoted by the next lowest bidder. This would, however, be allowed for the period upto which such likely loss

will arise. This would not be applicable if there is provision in the concession agreement on treatment of "Royalty/Revenue share".

2.9.1. Return will be allowed on Capital Employed (ROCE), both for Major Port Trusts and Private Terminal Operators, at the same pre-tax

rate, fixed in accordance with the Capital Asset Pricing Model (CAPM)....

2.9.3. Capital Employed will comprise Net Fixed Assets (Gross Block minus Depreciation minus Works in Progress) plus Working Capital.

2.9.4. Working Capital means Current Assets (excluding of Cash/ deposit balances of funds) less Current Liabilities.

2.9.9. TAMP will examine the reasonableness of the various items of Working Capital, like, inventory, sundry debtors, cash balances, etc., to

ensure that it is not unjustifiably expanded and will, from time to time, set limits up to which such balances will be considered admissible for

computing working capital and return thereon....

2.11.1. Bearing in mind the quid pro quo principle, tariff/charges leviable shall be commensurate with the services rendered/ facilities provided.

2.13. The actual physical and financial performance will be reviewed at the end of the prescribed tariff validity period with reference to the

projections relied upon at time of fixing the prevailing tariff. If performance variation of more than + or - 20% is observed as compared to the

projections, tariff will be adjusted prospectively. While doing so 50% of the benefit/ loss already accrued will be set off while revising the tariff.

2.17.1. Whenever a specific tariff for a service/cargo is not available in the notified Scale of Rates, the port can submit a suitable proposal.

2.17.2. Simultaneously with the submission of proposal, the proposed rate can be levied on an ad hoc basis till the rate is finally notified.

2.17.3. The ad hoc rate to be operated in the interim period must be derived based on existing notified tariffs for comparable services/cargo; and,

it must be mutually agreed upon by the Port/ Terminal and the concerned user(s).

2.17.4. The final rate fixed by the TAMP will ordinarily be effective only prospectively. The interim rate adopted in an ad hoc manner will be

recognised as such unless it is found to be excessive requiring some moderation retrospectively.

3.1.1. The proposals for fixation of tariffs, along-with conditionalities governing them, for services rendered or facilities provided as well as the

charges for use of properties and assets, shall be formulated, in accordance-It with these guidelines as amended from time to time, in such formats

with, such supporting details as may be prescribed by TAMP.

3.1.2. TAMP will prescribe a timetable specifying when each port should submit tariff proposal for review/revision. Till such a timetable is

prescribed, proposals for revision of existing tariff shall be forwarded at least 3 months before these are due for revision. Major Port Trusts,

including Private Terminal Operators will be duty bound to send proposal for fixation of tariff within the prescribed time frame. In case of failure on

their part to do so, TAMP may for good and sufficient reasons to believe that interests of users are to be protected and/or to rationalise tariff,

arrangements commonly at ports, suo motu, initiate proceedings in any tariff matter, review and, if necessary, revise the tariffs. In such proceedings,

opportunity of hearing will be given to the concerned ports.

3.1.3. The Major Port Trusts, including Private Terminal Operators at such ports shall initiate tariff proposal and forward the same to TAMP at

least three months before these are due for revision. The Private Operators can submit their tariff proposals directly to TAMP with a copy to the

landlord port trust for information.

3.1.7. Proposal for fixation of rate for use of a new facility or a new service shall be forwarded to the TAMP at least 3 months prior to the

expected date of commissioning of the new facility or service.

3.1.8. Tariff once fixed shall be in force for three years unless a different period is explicitly prescribed in any individual case by TAMP or in the

past concession agreement. For good and sufficient reasons, ports may propose revision ahead-of-schedule. After the specified validity period is

over, the approval accorded will lapse automatically unless specifically extended by TAMP.

3.2.1. The tariff proposal for fixation/ revision of rates received will be registered as a case and examined by TAMP.

3.2.2. With a view to promote the greatest participation of the greatest number of interested parties, copies of tariff proposals will be forwarded

to representative bodies of concerned users and major users of that port for their comments to be received within the stipulated time limit.

3.3. Review of Orders

3.3.1. Application for review of any tariff order will be entertained to the, limited extent of errors apparent on the face of records considered in

the to relevant proceedings, provided such an application is filed within 30 days (sic) of the notification in the Official Gazette.

3.3.2. TAMP may suo motu, review its orders, for good and sufficient reasons. In such proceedings normal consultative process will be followed.

14. To return to the chronology of events, the petitioner company was required by the Authority to submit a revised proposal by May 31, 2005.

The Authority''s order of April 25, 2005 to such effect was made in view of the petitioner company''s letter of April 18, 2005 that it would like to

resubmit its proposal in the light of the revised guidelines. The petitioner company had requested for time till June 30, 2005 but the period was

abridged by a month. The revised proposal came to be made on August 16, 2005. Such revised proposal was circulated by the Authority to user

organisations and to the port, inviting their comments. The comments were forwarded to the petitioner company and a questionnaire was furnished

by the Authority. A hearing was held by the Authority on March 29, 2006 whereat a slide presentation was made by the petitioner company of its

revised proposal.

15. The petitioners say that the figures submitted by the petitioner-company could not be assessed as the accounts of the petitioner company in

respect of its operations at the said berth had not been segregated from its other operations. The accounts were required to be segregated and the

port''s response thereto was sought by the Authority. Thus, the petitioner company''s first appropriate proposal for tariff fixation was deposited on

February 14, 2007. Certain clarifications were thereafter sought by the Authority and the petitioner company''s scale of rates for its cargo-related

services was fixed by the Authority on October 12, 2007. The rates were published in the official gazette on October 25, 2007 and were to come

into effect, u/s 50 of the Act, upon the expiry of 30 days from the date of notification in the official gazette. The scale of rates was to remain in

force till March, 2010.

16. The petitioners claim that the tariff approved by the Authority was lower than the rates being charged by the petitioner company in accordance

with the port''s scale of rates to the extent of 20 per cent. This, in effect, is the genesis of the grievance.

17. On November 5, 2007 the petitioner company invoked regulation 3.3.1 of the 2004 guidelines and sought a review of the order of October 2,

2007. Several identified heads of tariff were indicated in the petitioners'' letter of November 5, 2007 which the petitioners required the Authority to

treat as a formal review petition. At the foot of such petition, it was asserted that the surplus for the period upto September, 2007 may not be set

off in full over the two and a half years that the approved rates were to be in force. The petitioner company requested ""that the amount of

reassessed surplus may kindly be set off during the remaining period of the licence.

18. There was a frenzy of activity thereafter. Since the rates approved by the October 12, 2007 order were to be effective on November 24,

2007 even as the review petition remained unattended to, the petitioners brought W.P. No. 24493 (W) of 2007 to this Court wherein an interim

order was made on November 23, 2007 directing the Authority to dispose of the review petitioner by December 31, 2007 by passing a reasoned

order after affording the concerned parties an opportunity of hearing. The implementation of the approved scale of rates was stayed till January 25,

2008, subject to the condition ""that the difference between the rates charged by the petitioner and the rates fixed by the authorities by notification

dated 25th October, 2007 will be kept by the petitioners in short term fixed deposits in a nationalised bank which shall be renewed from time to

time by the petitioners until further orders.

19. On January 15, 2008, the Authority sought extension of the time for disposing of the review petition and was granted time till March 15, 2008

by an order in W. P. No. 24493 (W) of 2007. The embargo on the approved rates becoming operative was continued till April 15, 2008.

20. The review petition was disposed of on March 17, 2008 by revising the rates in respect of a number of items. The order provided that the

scale of rates would come into force upon the subsisting interim order of this Court, being vacated or expiring. The Authority recorded, at

paragraph 7(viii) of the order, that the petitioner company had made the following submission:

The past period surplus may arise from excess charges paid by past users. There may not be any justification in allowing the benefit of tariff

reduction, due to accounting of such past surplus, to the immediate future users. We agree to refund the past surplus to the concerned users.

21. On the Authority''s understanding of the submission made on behalf of the petitioner company, it directed refund of the excess collection at

16.36 per cent of the bill amount made by the petitioner company during the period beginning the commencement of its operation till November

23, 2007 to the concerned parties within three months from the date of the order of March 17, 2008 together with interest at 12 per cent

compounded annually. The private operator was also required to furnish duly audited accounts in such regard to the port within six months.

22. The petitioners question the Authority"s wisdom in directing refund both on the ground of the Authority lacking jurisdiction to assess excess

charging during a previous period and on the ground that no submission was made by the petitioners as recorded at paragraph 7(viii) of the order

of March 17, 2008.

23. W.P. No. 24493 (W) of 2007 and an application therein were disposed of on April 17, 2008 by noticing that the review petition had been

disposed of by the Authority and by granting liberty to the petitioners ""to act on the basis of the said order without prejudice to their rights and

contentions to question its correctness."" The petitioners were permitted to encash the deposit that had been made following the order passed when

such writ petition was received. The deposit was to the extent of Rs.65 lakh.

24. On the day following the disposal of the earlier petition, the petitioner company issued a letter to the Authority dissociating itself from the

submission attributed to it at paragraph 7(viii) of the order of March 17, 2008. Four paragraphs of the letter of April 18, 2008 are of some

importance:

It appears that based on such recording the Authority has passed an order at paragraph- XIV(iii) mentioning that ""TMILL agrees to refund the

excess collection of tariff in the past to the concerned users and further KOPT has also endorsed this approach"". We state that such recording of

an alleged agreement by TMILL is erroneous and contrary to the pleadings consistently made by TMILL in the past as also in the review

application where TMILL had requested that any surplus computed for the preceding years be set off in terms of the guidelines against the tariff

rates over the balance period of the project and not within the next tariff period comprising of 2Ã¯Â¿Â½ years only.

Though some informal discussions after the joint hearing had taken place on this issue with the Chairman of the Authority and your goodself as also

with the Chairman, KOPT, it was never agreed that TMILL would refund the surplus to the actual users within 90 days along with interest.

It is stated that such erroneous recording of an agreement has foisted upon TMILL a liability to be discharged within a period of 90 days by way

of refund which was never the case pleaded by TMILL. In fact on the contrary, TMILL has been aggrieved by the computation of surplus by the

Authority by reason of incorrect adjustment of cost and expenses as also incorrect application of the extant guidelines. It is, therefore, requested

that the recording appearing in paras 7(viii) and XIV(iii) of the order of 17th March 2008 be rectified.

We would like to state that we reserve our right to communicate on the issue of incorrect computation of the past surplus as also wrong treatment

and disallowance of expenses, shortly.

25. Apart from the more involved discussions of the expert body on matters: relating to revenue and allowable expenses, in plain English the order

translates to the petitioner company being required to refund an amount of Rs. 17.75 crore within a period of 90 days therefrom together with

interest thereon at 12 per cent compounded annually. Given that the petitioner company commenced its operation on March 23, 2002 (paragraph

13 of the petition), it was a substantial payout that was involved even from a multinational organisation of the size of the petitioner company with a

corporate behemoth as its Indian promoter.

26. The principal plank of the petitioners'' argument is that the Authority had no power to set tariff for a past and concluded period. The contention

is that the Act and the guidelines confer a mandate on the Authority to only approve rates for a future period, based on past experience and

projections; but do not permit an ex-post facto set of rates to be imposed in respect of transactions that had already been concluded. Without

prejudice to the assertion that the fundamental basis of the Authority''s approach is flawed, the petitioners pick on several heads to suggest that the

Authority''s assessment in respect of such heads was unbecoming of the expertise that it professes to command. The petitioners invite the Court to

get into the (sic) gritty of the complex calculations and reasoning. They say that it is possible for such adjudication in this jurisdiction and would fall

within the scope of judicial review.

27. The petitioners assert that in the absence of any affidavit by the Authority, the only contesting respondent, the averments in the petition have to

be accepted and, in particular, the letter of April 18, 2008 denying the concession attributed to the petitioner company cannot be questioned. The

petitioners claim that their conduct or the contents of the review petition would confer no more jurisdiction on the Authority than given it by statute

and the guidelines framed by the Central Government u/s 111 of the Act.

28. For varying purposes, the contesting parties have referred copiously to the said Act. The following provisions have been cited, in particular:

2. Definitions- ...

(aa) ""Authority"" means the Tariff Authority for Major Ports constituted 1 u/s 47-A;

(v) ""rate"" includes any toll, due, rent, rate, fee, or charge leviable under this Act;

(w) ""regulations"" means regulations made under this Act;

42. Performance of services by Board or other person-(1) A Board shall have power to undertake the following services:

(a) landing, shipping or transhipping passengers and goods between vessels in the port and the wharves, piers, quays or docks belonging to or in

the possession of the Board;

(b) receiving, removing, shifting, transporting, storing or delivering goods brought within the Board''s premises;

(c) carrying passengers by rail or by other means within the limits of the port or port approaches, subject to such restrictions and conditions as the

Central Government may think fit to impose;

(d) receiving and delivering, transporting and booking and dispatching goods originating in the vessels in the port and intended for carriage by the

neighbouring railways, or vice versa, as a railway administration under the Indian Railways Act, 1890 (9 of 1890);

(e) piloting, hauling, mooring, rumoring, hooking, or measuring of vessels or any other service in respect of vessels and

(f) developing and providing, subject to the previous approval of the Central Government, infrastructure facilities for ports.

(2) A Board may, if so requested by the owner, take charge of the goods for the purpose of performing the service or services and shall give a

receipt in such form as the Board may specify.

(3) Notwithstanding anything contained in this section, the Board may, With the previous sanction of the Central Government, authorise any person

to perform any of the services mentioned in sub-section (1) on such terms and conditions as may be agreed upon.

(3A) Without prejudice to the provisions of sub-section (3), a Board may, with the previous approval of the Central Government, enter into any

agreement or other arrangement (whether by way of partnership, joint venture or in any other manner) with, any body corporate or any other

person to perform any of the services and functions assigned to the Board under this Act on such terms and conditions as may be agreed upon.

(4) No person authorised under sub-section (3) shall charge or recover for such service any sum in excess of the amount specified by the

Authority, by notification in the Official Gazette.

(5) Any such person shall, if so required by the owner, perform in respect of goods any of the said services and for that purpose take charge of the

goods and give a receipt in such form as the Board may specify.

(6) The responsibility of any such person for the loss, destruction or deterioration of goods of which he has taken charge shall, subject to the other

provisions of this Act, be that of a bailee under sections 151, 152 and 161 of the Indian Contract Act, 1872 (9 of 1872).

(7) After any goods have been taken charge of and a receipt given for them under this section, no liability for any loss or damage which may occur

to them shall attach to any person to whom a receipt has been given or to the master or owner of the vessel from which the goods have been

landed or transshipped

47A. Constitution and incorporation of Tariff Authority for Major Ports

(1) With effect from such date as the Central Government may, by notification in the Official Gazette, appoint there shall be constituted for the

purposes of this Act an Authority to be called the Tariff Authority for Major Ports.

(2) The Authority shall be a body corporate, by the name aforesaid having perpetual succession and a common seal and shall by the said name sue

and be sued.

(3) The head office of the Authority shall be at such place as the Central Government may decide from time to time.

(4) The Authority shall consist of the following Members to be appointed by the Central Government, namely:

(a) a Chairperson from amongst persons who is or who has been a Secretary to the Government of India or has held any equivalent post in the

Central Government and who has experience in the management and knowledge of the functioning of the ports;

(b) a Member from amongst economists having experience of not less than fifteen years in the field of transport or foreign trade;

(c) a Member from amongst persons having experience of not less than fifteen years in the field of finance with special reference to investment or

cost analysis in the Government or in any financial institution or industrial or services sector.

48. Scales of rates for services performed by Board or other person- (1) The Authority shall from time to time, by notification in the Official

Gazette frame a scale of rates at which, and a statement of conditions under which any of the services specified hereunder shall be performed by a

Board or any other person authorised u/s 42 at or in relation to the port or port approaches

(a) transhipping of passengers or goods between vessels in the port or port approaches;

(b) landing and shipping of passengers or goods from or to such vessels to or from any wharf, quay, jetty, pier, dock, berth, mooring, stage or

erection, land or building in the possession or occupation of the Board or at any place within the limits of the port or port approaches;

(c) carnages or porterage of goods on any such place;

(d) wharfage, storage or demurrage of goods on any such place;

(e) any other service in respect of vessels, passengers or goods,

(2) Different scales and conditions may be framed for different classes of goods and vessels.

49. Scale of rates and statement of conditions for use of property belonging to Board--(1) The Authority shall from time to time, by notification in

the Official Gazette, also frame a scale of rates on payment of which, and a statement of conditions under which, any property belonging to, or in

the possession or occupation of, the Board, or any place within the limits of the port or the port approaches may be used for the purposes

specified hereunder:

(a) approaching or lying at or alongside any buoy, mooring, wharf, quay, pier, dock, land, building or place as aforesaid by vessels;

(b) entering upon or plying for hire at or on any wharf, quay, pier, dock, land, building, road, bridge or place as aforesaid by animals or vehicles

carrying passengers or goods;

(c) leasing of land or sheds by owners of goods imported or intended for export or by streamer agents;

(d) any other use of any land, building, works, vessels or appliances belonging to or provided by the Board.

(2) Different scales and conditions may be framed for different classes of goods and vessels.

(3) Notwithstanding anything contained in sub-section (1), the Board may, by auction or by inviting tenders, lease any land or shed belonging to it

or in its possession or occupation at a rate higher than that provided under sub-section (1).

54. Power of Central Government to require modification or cancellation of rates.--(1) Whenever the Central Government considers it necessary

in the public interest so to do, it may, by order in writing together with a statement of reasons therefor, direct the Authority to cancel any of the

scales in force or modify the same, such period as that Government may specify in the order.

(2) If the Authority fails or neglects to comply with the direction under sub-section (1) within the specified period, the Central Government may

cancel any of such scales or make such modifications therein as it may think fit:

Provided that before so cancelling or modifying any scale the Central Government shall consider any objection or suggestion which may be made

by the Authority during the specified period.

(3) When in pursuance of this section any of the scales has been cancelled or modified, such cancellation or modification, shall be published by the

Central Government in the Official Gazette and shall thereupon have effect accordingly.

111. Power of Central Government to issue directions to Board-- (1) Without prejudice to the foregoing provisions of this Chapter, the Authority

and every Board shall, in the discharge of its functions under this Act be bound by such directions on questions of policy as the Central

Government may give in writing from time to time.

Provided that the Authority or the Board, as the case may be, shall be given opportunity to express its views before any direction is given under

this sub-section.

(2) The decision of the Central Government whether a question is one of policy or not shall be final.

29. In order that the petitioners'' detailed submission may be better appreciated, the three counts of defence put up by the Authority may be

mentioned at the outset. The Authority says that section 54 of the Act provides an efficacious alternative remedy and, considering that tariff fixation

is intricate business, the petitioners ought first to have adopted such course of action before applying in this jurisdiction where the Court may be ill-

equipped to address the complexities. The Authority urges that since the statute required tariff to be approved by it, no agreement between the

petitioner company and the port could have wished away the obligation of the petitioner company to obtain previous approval, to the extent

practicable, before proceeding to set its scale of rates. In the petitioner company having illegally charged its customers, it exposed itself to the

possibility of a refund or adjustment which was within the domain of the Authority. The third contention of the Authority is that the specific heads of

tariff that the petitioners attack in the rates approved by the Authority, cannot be looked into save the challenge in respect of royalty, since there

are no prayers in the petition in support of the challenges to the other items.

30. The petitioners refer to a judgment reported at Hukam Chand etc. Vs. Union of India (UOI) and Others, . In that case the retrospective

operation of an explanation introduced by an amendment in 1960 to the Displaced Persons (Compensation and Rehabilitation) Rules, 1955 framed

under the Displaced Persons (Compensation and Rehabilitation) Act, 1954 came to be considered. Rule 49 of the said Rules provided for

payment of compensation for agricultural land. The explanation brought in later sought to restrict the meaning of the expression ""agricultural land"" in

the Rule. In such context, the Supreme Court observed.

8. Perusal of section 40 shows that although the power of making rules to carry out the purposes of the Act has been conferred upon the Central

Government, there is no provision in the section which may either expressly or by necessary implication show that the Central Government has

been vested with power to make rules with retrospective effect. As it is section 40 of the Act which empowers the Central Government to make

rules, the rules would have to conform to that section. The extent and amplitude of the rule-making power would depend upon and be governed by

the language of the section. If a particular rule were not to fall within the ambit and purview of the section, the Central Government in such an event

would have no power to make that rule. Likewise, if there was nothing in the language of section 40 to empower the Central Government either

expressly or by necessary implication, to make a rule retroactively, the Central Government would be acting in excess of its power if it gave

retrospective effect to any rule. The underlying principle is that unlike Sovereign Legislature which has power to enact laws with retrospective

operation, authority vested with the power of making subordinate legislation has to act within the limits of its power and cannot transgress the

same. The initial difference between subordinate legislation and the statute laws lies in the fact that a subordinate law-making body is bound by the

terms of its delegated or derived authority and that Court of law, as a general rule, will not give effect to the rules, thus made, unless satisfied that

all the conditions precedent to the validity of the rules have been fulfilled (see Craies on Statute Law, p. 297, Sixth Edn.).

31. A decision reported at Reliance Energy Limited and Another Vs. Maharashtra State Road Development Corporation Ltd. and Others, is

placed to demonstrate the extent of inquiry made in proceedings in this jurisdiction. The appellant before the Supreme Court questioned the

rationale of the consultant engaged by the employer in finding the appellant unworthy to progress to the commercial stage of bidding for the

construction of the Mumbai Trans Harbour Link between Mumbai and Navi Mumbai. The consultant found that the consortium to which the

appellant belonged did not meet the net cash profit floor-limit of Rs.200 crore that the eligibility criteria specified. The consultant referred to

accounting principles in treating the particulars furnished and upon the appellant crying foul and citing Articles 14, 21 and 19(1)(g) of the

Constitution, the Supreme Court embarked on an exercise of assessing the figures after sifting through the knotty tools of accounting. The

petitioners here say that the Supreme Court did not buy the lack-of-expertise-of-the-Court line that is the usual refrain of uncomfortable

respondents in this jurisdiction.

32. In similar vein, a judgment reported at West Bengal Electricity Regulatory Commission Vs. C.E.S.C. Ltd. etc. etc., has been cited where the

factors that were considered for arriving at the electricity tariff were visited after appreciating the scope of the appellate power available to the High

Court under the relevant statute. The petitioners here argue that if despite whittling down the scope of a regular appeal under the relevant statute to

virtually that of judicial review the Supreme Court ventured into the tricky details to test the bases of the rates, there is no embarrassment posed in

the petitioners'' present challenge being assessed. The circumstances in that case, however, required the Supreme Court to get into the details since

there was a High Court order before it that upset the tariff set by the regulatory commission. There is also a caveat, despite the wide scope of the

appellate provision, at paragraph 69 of the report:

69. ... we have no hesitation in holding that the appellate power of the High Court statutorily is not hedged in by any restriction, but in our opinion,

the High Court merely because it has unrestricted appellate power, should not interfere with the considered order of the Commission unless it is

satisfied that the order of the Commission is perverse, not based on evidence or on misreading of evidence, keeping in mind the fact that the

Commission is an expert body.

33. The next case brought by the petitioners is the one reported at (1955) 3 All ER 48 [Edwards (Inspector of Taxes) v. Bairstow & Anr.]. The

respondents before the House of Lords were assessed to income tax on the profit in a transaction of purchase and sale of a spinning plant. In the

departmental appeal it was held that the transaction was not an adventure in the nature of trade and the assessment was discharged. On appeal by

the Crown, the High Court and the Court of Appeal found it inappropriate to interfere with the order as it involved purely a question of fact. The

opinion of the House was that although the appeal before the Court could only be on a question of law, if it appeared to the appellate Court that no

person if properly instructed in the law and acting judicially could have reached the particular determination, the Court may proceed on the

assumption that a misconception of law had resulted in the determination. The finding that the transaction was not an adventure in the nature of

trade was set aside as it was appraised that the departmental appellate authority had acted either without evidence or on a view of the facts that

could not reasonably be entertained. The petitioners here insist that the same test should be applied in judicial review of the impugned tariff fixation.

The essence of the test is captured in the following passage:

I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination, or as

one in which the evidence is inconsistent with, and contradictory of, the determination, or as one in which the true and only-reasonable conclusion

contradicts the determination. Rightly understood, each phrase propounds the same test.

34. The principle in Edwards is quoted with approval by the Supreme Court in the decision reported at Commissioner of Income Tax, Bombay

Vs. H. Holck Larsen, The discussion is at paragraph 28 of the report and the legal position is summarised thus at paragraph 36:

36. In the premises the totality of all the facts will have to be borne in mind and the correct legal principles applied to these. If all the relevant

factors have been taken into consideration and there has been no misapplication of the principles of law then the conclusion arrived at by the

Tribunal cannot be interfered with because the inference is a question of law. If such an inference was a possible one, subject, however, that all the

relevant factors have been duly weighed and considered by the Tribunal, the inference reached by the Tribunal should not be interfered with.

35. In Cholan Roadways Limited Vs. G. Thirugnanasambandam, the Court found that since the Industrial Tribunal had failed to apply the correct

standard of proof in relation to a domestic enquiry, which is ""preponderance of probability,"" and applied the standard of proof required for a

criminal trial, a case for judicial review was made out. The conclusion was that errors of fact could also be the subject-matter of judicial review.

The sentiment is echoed in the judgment reported at Hindustan Petroleum Corporation Ltd. Vs. Darius Shapur Chenai and Others, .

36. The petitioners rely on a judgment reported at Mahabir Vegetable Oils Pvt. Ltd. and Another Vs. State of Haryana and Others, for the

proposition that unless a statute clearly provided for retroactive operation, rules or regulations framed thereunder cannot provide for retrospective

effect being given. The appellants in that matter had set up a solvent extraction plant encouraged by the substantial exemption from sales tax that

the government policy provided. After 45 per cent of the investment had been made, the relevant rules were amended with retrospective effect.

The amendment wiped out the exemption that would otherwise have been available to the appellants. The Supreme Court held that the doctrine of

legitimate expectation would apply in the legislative field and allowed the appeal.

37. On the same aspect, the petitioners refer to the judgment reported at (2004) 3 SCC 734 (Chandrauathi P.K. v. C.K. Saji) and the following

passage from paragraph 34 of the report:

34. ... The State in exercise of its power under Article 309 of the Constitution of India may give retrospective effect to a rule but the same must be

explicit and clear by making express provision therefor or by necessary implication but such retrospectivity of a rule cannot be inferred only by way

of surmises and conjectures.

38. A judgment of this Court reported at 1995 (2) CLT 309 (Tarun Chakraborty v. State of West Bengal & Ors.) is cited for the principle that

executive instructions, even under Article 162 of the Constitution, cannot have retroactive effect.

39. Apropos the Authority being represented in these proceedings to defend the tariff set by it, the petitioners say that the Authority has taken

more interest in the matter that was expected of it. The petitioners say that an adjudicating authority does not ordinarily appear before a superior

forum to defend its determination or prefer an appeal from an order of reversal of its decision. A judgment reported at (2007) 8 SCC 252

(Mohtesham Mohd. Ismail v. Spl. Director, Enforcement Directorate) is placed in such context.

40. On the rationale of the Authority to direct refund of the alleged extra charge to the customers, the petitioners rely ''on the decision reported at

India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others, and place paragraphs 35 and 36 of the report. The Supreme Court found

there that the levy of cess was illegal but did not direct refund of the amount already collected. It is doubtful as to what extent such principle can be

of any assistance to the petitioners here. If a seller passes on a duty or cess to numerous customers before the duty or cess is found to be illegal, it

may not be possible for the customers to be identified and the amounts illegally obtained refunded. It would also be unjust to direct the government

to refund the amount to the manufacturer or seller when it is noticed that the duty or cess had been passed on to the users. It is the petitioners''

positive assertion in these proceedings that their clients are identifiable and not too numerous in number.

41. The petitioners dwell at length on the deleterious effect of retroactive action. Apart from insisting that the statute did not confer any authority for

setting tariff with retrospective effect, the petitioners maintain that even the 2004 guidelines did not permit the same. The petitioners argue that it is

open to a private person to squander the profits that he has legally made and the State cannot command him to regurgitate what he has already

consumed. In the same vein, the petitioners continue, that if a company has distributed the profits legally made by way of dividend, the company

would not have the authority to seek refund of the dividend from its shareholders upon a subsequent State demand for refund of the profits by a

retrospective action.

42. The major plank of attack on the Authority''s decision is in its going back in time and setting rates for past and concluded transactions. The

supplemental challenge is to the direction contained in the March 17, 2008 order for refund of the alleged excess charges to its clients. The

petitioners have relied on some letters from the erstwhile clients where the clients appear to have absolved the petitioner-company of all liability on

account of refund. At least one letter from a group company appears, however, to be ambivalent. The Authority says that these letters cannot be

relied on since the authors thereof are not parties to these proceedings.

43. The Authority has very appropriately confined its submission to its orders and the material relied upon by the petitioners. The Authority has,

however, questioned the laborious exercise being undertaken by Court arid has referred to section 54 of the Act to suggest that the remedy

thereunder should first have been exhausted by the petitioners. The Authority says that even though section 54 may not expressly refer to an

operator approaching the Central Government to modify or cancel the rates set by the Authority, since it gave the Central Government the power

to direct the Authority to cancel or modify any of the scales in force, the petitioners should have explored such avenue before invoking this

jurisdiction.

44. The Authority refers to a judgment reported at U.P. State Spinning Co. Ltd. Vs. R.S. Pandey and Another, where the Supreme Court,

observed that a petition under Article 226 of the Constitution should not be entertained when a statutory remedy is available unless exceptional

circumstances are made out. In that case the Supreme Court found that the High Court was not justified in entertaining the writ petition but since

the matter had been decided on merits, such merits were addressed by the Supreme Court. The contesting respondent places the following

passage from paragraph 16 of the report:

16. If, as was noted in Ram and Shyam Co. v. State of Haryana the appeal is from ""Caesar to Caesar''s wife"" the existence of alternative remedy

would be a mirage and an exercise in futility. In the instant case the writ petitioners had indicated the reasons as to why they thought that the

alternative remedy would not be efficacious. Though the High Court did not go into that plea relating to bias in detail, yet it felt that alternative

remedy would not be a bar to entertain the writ petition. Since the High Court has elaborately dealt with the question as to why the statutory

remedy available was not efficacious, it would not be proper for this Court to consider the question again. When the High Court had entertained a

writ petition notwithstanding existence of an alternative remedy this Court while dealing with the matter in an appeal should not permit the question

to be raised unless the High Court''s reasoning for entertaining the writ petition is found to be palpably unsound and irrational. Similar view was

expressed by this Court in First ITO v. Short Bros. (P) Ltd, and State of U.P. v. Indian Hume Pipe Co. Ltd. That being the position, we do not

consider the High Court''s judgment to be vulnerable on the ground that alternative remedy was not availed. There are two well recognised

exceptions to the doctrine of exhaustion of statutory remedies. First is when the proceedings are taken before the forum under a provision of law

which is ultra vires, it is open to a party aggrieved thereby to move the High Court for quashing the proceedings on the ground that they are

incompetent without a party being obliged to wait until those proceedings run their full course. Secondly, the doctrine has no application when the

impugned order has been made in violation of the principles of natural justice. We may add that where the proceedings themselves are an abuse of

process of law the High Court in an appropriate case can entertain a writ petition.

45. The Authority has also relied on a Division Bench judgment of this Court reported at Asstt. P.F. Commissioner, Employees" Provident Fund

Organisation Vs. Pawan Kumar Agarwala and Others, where the dictum in U.P. State Spinning Co. has been noticed.

46. A further decision reported at AIR 1971 963 (SC) is placed. At paragraph 8 of the Constitution Bench judgment it has been held that even

when there was no express provision to make a representation there was no bar to a representation being made. Such observation was made in

the context of an order of requisition. The Authority draws inspiration from the judgment to say that section 54 confers express authority on the

Central Government to overturn any scale of rates fixed by the Authority and it was open to the petitioners to invoke such provision or even make

a representation de hors such provision.

47. The petitioners could, indeed, have made a representation to the Central Government for exercising its power of superintendence over the

Authority that the said Act generally confers on it. In theory, there can be a representation made, much as a demand for justice preceding a writ in

the nature of mandamus being sought, in almost every case whether to the authority whose administrative decision is challenged or to the authority

exercising superintendence over the former. The issue is as to whether the remedy of a representation in the present circumstances can be said to

be efficacious and admit the entire gamut of grievance that the petitioners have brought here. An alternative remedy in the form an appeal or review

or revision stands on a different footing than an alternative remedy by way of representation to a body exercising superintendence over the

authority whose conduct is questioned. Without referring to the merits of all the grounds canvassed in these proceedings by the petitioners, there

are involved questions that have been raised based on figures, interpretation of the guidelines and accounting policies. Section 54 of the Act does

not oblige the Central Government to afford a petitioning operator a hearing. The proviso to sub-section (2) requires the Authority to be heard.

Again, there is the precondition to the exercise of jurisdiction u/s 54 that is found in the opening words of sub-section (1). A private terminal

operator"s grievance as to the tariff is guided by an understandable commercial motive that may not necessarily throw up a matter of public interest

for the Central Government to be minded to interfere with the scales set by the Authority. In any event, the availability of an alternative remedy is

not a bar to the maintainability of a writ petition, it is only a ground for the writ Court to exercise restraint and require a petitioner to exhaust its

options before invoking this jurisdiction.

48. There is also a question of jurisdiction that has been raised by the petitioners. It is not a flippant issue to which the petitioners have paid lip

service to counter a possible defence of alternative remedy. Whatever may be the ultimate outcome of the challenge to the Authority''s jurisdiction

to fix tariff for previous years, it is a jurisdictional issue nonetheless. The challenge as to jurisdiction is both on the count of the extent of the power

available to the Authority and the scope of the authority conferred on it by the Central Government. It does not appear that the entire span of the

petitioners'' challenge here could have been conveniently carried to the Central Government u/s 54 of the said Act. The preliminary issue raised is

answered against the Authority.

49. The Authority says that merely because it fixed tariff for the previous years would not imply retrospective operation of the statute or the

guidelines. The Authority submits that the tariff fixed by it was not retroactive. A judgment reported a D.S. Nakara and Others Vs. Union of India

(UOI), is cited and paragraph 46 thereof placed in the context:

46. By our approach, are we making the scheme retroactive? The answer is emphatically in the negative. Take a Government servant who retired

on April 1, 1979. He would be governed by the liberalised pension scheme. By that time he had put in qualifying service of 35 years. His length of

service is a relevant factor for computation of pension. Has the Government made it retroactive. 35 years backward compared to the case of a

government servant who retired on March 30, 1979? Concept of qualifying service takes note of length of service, and pension quantum is

correlated to qualifying service. Is it retroactive for 35 years for one and not retroactive for a person who retired two days earlier. It must be

remembered that pension is relatable to qualifying service. It has correlation to the average emoluments and the length of service. Any liberalisation

would pro tanto be retroactive in the narrow sense of the term. Otherwise it is always prospective. A statute is not properly called a retroactive

statute because a part of the requisites for its action is drawn from a time antecedent to its passing (see Craies on Statute Law, 6th Edn., p. 387).

Assuming the Government had not prescribed the specified date and thereby provided that those retiring pre and post the specified date would all

be governed by the liberalised pension scheme, undoubtedly, it would be both prospective and retroactive. Only, the pension will have to be

recomputed in the light of the formula enacted in the liberalised pension scheme and effective from the date the revised scheme comes into force.

And beware that it is not a new scheme, it is only a revision of existing scheme. It is not a new retrial benefit. It is an upward revision of an existing

benefit. If it was a wholly new concept, a new retrial benefit, one could have appreciated an argument that those who had already retired could not

expect it. It could have been urged that it is an incentive to attract the fresh recruits. Pension is a reward for past service. It is undoubtedly a

condition of service but not an incentive to attract new entrants because if it was to be available to new entrants only, it would be prospective at

such distance of thirty five years since its introduction. But it covers all those in service who entered thirty five years back. Pension is thus not an

incentive but a reward for past service. And a revision of an existing benefit stands on a different footing than a new retiral benefit. And even in

case of new retiral benefit of gratuity under the Payment of Gratuity Act, 1972 past service was taken into consideration. Recall at this stage the

method adopted when pay scales are revised. Revised pay scales are introduced from a certain date. All existing employees are brought on to the

revised scales by adopting a theory of fitments and increments for past service. In other words, benefit of revised scale is not limited to those who

enter service subsequent to the date fixed for introducing revised scales but the benefit is extended to all those in service prior to that date. This is

just and fair. Now if pension as we view it, is some kind of retirement wages for past service, can it be denied to those who retired earlier, revised

retirement benefits being available to future retirees only. Therefore, there is no substance in the contention that the Court by its approach would be

making the scheme retroactive, because it is implicit in theory of wages.

50. On behalf of the Authority the fundamentals as to the exercise of jurisdiction and the scope of judicial review have been stressed on. Counsel

submits that if an expert body has taken a considered view and if it is not demonstrated that the view was actuated by bias or that a fair hearing

had not been afforded to the petitioners or that a reasoned order was not made, the scope for interference is well nigh absent. The Authority refers

to paragraph 13(iii) of the order of October 12, 2007 where the Authority recorded that it was the first exercise to fix tariff for the services

rendered by the petitioner company as the operator had previously applied the tariff approved for the port based on a provision in its licence

agreement. The Authority refers to the request of the petitioner company recorded at the foot of the review petition that the surplus be not set off in

full over the two and a half years, but it be spread over the remaining period of the licence. The Authority says that the retraction from its recorded

stand by the petitioners'' letter of April 18, 2008, should not detract from the Authority''s understanding of the petitioners'' stand as recorded in

clause 7(viii) of the order dated March 17, 2008. The Authority places the port''s view at the same page of the order (page 444 of the petition)

that past period surplus should be refunded to the concerned parties. The Authority says that the port has been consciously kept out of these

proceedings lest the petitioners'' retraction be sullied.

51. The Authority argues that there is no error of jurisdiction that was committed by it in fixing tariff for the years prior to the date of such fixation.

It says that it was incumbent on the petitioner company to have its rates approved by the Authority and the fact that the petitioners chose not to do

so, would not permit them to enjoy the gains illegally made. The Authority insists that the reason for it being constituted was to ensure fair dealing

and services being available to end-users without monopolistic rates being charged by the handful of operators at the various ports.

52. As to the individual heads of challenge launched by the petitioners, the Authority says that only the challenge as to royalty can be looked into as

the other challenges are not included in the prayers. A judgment reported at Chandigarh Administration Vs. Laxman Roller Flour Mills Pvt. Ltd., is

cited and paragraph 4 thereof placed:

4. A perusal of the relief extracted above shows that the writ petitioner-respondent never asked for any relief in the writ petition commanding the

Chandigarh Administration to issue completion certificate in its favour. Learned counsel for the respondent frankly stated that there is no allegation

in the writ petition to the effect that Chandigarh Administration has illegally withheld the completion certificate. It is settled law that unless the

allegations are made in the writ petition and a relief to that effect is also prayed for in the writ petition, the High Court is not justified in issuing any

order in excess of the relief prayed for in the writ petition. We are, therefore, satisfied that in the absence of pleading and prayer in the writ petition,

the High Court fell in error in issuing directions to the appellant to issue completion certificate to the writ petitioner-respondent. In such

circumstances, we set aside the order of the High Court to the extent it directs the Chandigarh Administration to issue completion certificate to the

writ petitioner respondent. ...

53. The Authority justifies its not using an affidavit in these proceedings on the principle that its conduct has to be assessed on the reasoning found

in its orders and it would have been improper for it to have buttressed its orders in any affidavit. The Authority refers to a judgment of some

vintage to vindicate its stand. In the judgment reported at Commissioner of Police, Bombay Vs. Gordhandas Bhanji, paragraph 11 of the report is

apposite:

11. An attempt was made by referring to the Commissioner''s affidavit to show that this was really an order of cancellation made by him and that

the order was his order and not that of Government. We are clear that public orders, publicly made, in exercise of a statutory authority cannot be

construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he

intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those

to whom they are addressed and must be construed objectively with reference to the language used in the order itself.

54. Despite the dignified and appropriate stand taken by the Authority in not using an affidavit and having its conduct assessed on the basis of its

orders, the contention that the challenge on the individual items so meticulously pressed by the petitioners should be disregarded because there is

no express prayer in the petition, appears to be somewhat harsh. The challenges to the several items have been detailed in the petition and at

paragraph 72 there is a sequitur which is found. In the Laxman Roller Flour Mills case the Supreme Court opined that in the absence of any

pleading and prayer, the High Court could not have issued the directions that it did. At least, the petition enumerates the challenge to the various

items and indicates the bases thereof in detail. And, if generously read, the first three reliefs claimed would encompass the challenge to the

individual items within their fold. It needs to be mentioned here that the Authority has not dealt with the challenges to the individual items save the

challenge on account of royalty, in its conviction that such matters would not be addressed by Court in the absence of specific prayers in support

thereof.

55. On the more specific challenges to the various heads on which the Authority found against the petitioner company, the petitioners question the

basis for denying the petitioner company"s claim on account of overheads. The petitioners also claim that the royalty paid by the petitioner

company to the port for the period upto March 31, 2005 should have been regarded as part of the petitioner-company"s expenditure. The

petitioners challenge the denial of a balance claim of Rs.1.14 crore on account of shore-handling charges for fertilisers. The petitioners say that the

basis for declining the petitioners" request for return on capital, return on equity and in the Authority assessing the working capital figures was

erroneous. The petitioners complain that an interest burden of about Rs.38 lakh has been fastened on the petitioner company without any

justification. These individual heads have been challenged on the grounds that they are palpably wrong and the Authority acted unreasonably

despite the mistakes being pointed out in the review petition.

56. The petitioners'' contention as to overhead expenses is that the matter was not considered at the joint hearing prior to the order dated October

12. 2007 being passed. The petitioners rely on a statement appearing at page 312 of the petition where, under the heading ""overheads"", particulars

on account of management and administration overheads, general overheads, preliminary expenses and upfront payment write-off and others have

been detailed. In the review petition the petitioners contended that overhead costs during 2007-08 to 2009-10 on account of proposed

infrastructure development at the berth amounting to more than Rs.20 crore should have been taken into consideration. The review petition also

referred to the cost of running and maintenance of the infrastructure facility. The order of March 17, 2008 recorded that the estimates as furnished

by the petitioner company for miscellaneous operational expenses for the year 2007-08 had already been accepted without any modification. The

expenses on such head for the two following years had been accepted by the Authority after excluding the expenditure relating to the cost of

shifting a shed. The reason furnished by the Authority in disregarding such claim was that the basis of the claim was too general and no specific

error had been pointed out.

57. It is true that there is a sub-heading of ""other expenses"" under the major head entitled ""operating costs"" in the statement furnished by the

petitioner company to the Authority. But it is equally true that there are no particulars in support of the claim on account of overheads either in the

statement or in the review petition. The Authority is an expert body which is required to assess the expenditure likely to be incurred by an operator

during the period for which the tariff is fixed. If, in the expert body''s opinion, miscellaneous operational expenses amount to the same as overheads

and there are no particulars furnished by the operator in support of its claim for overheads in addition to it being allowed miscellaneous operational

expenses, it does not appear that a grossly unfair stand has been taken by the Authority. It is also of some relevance that despite the order of

March 17, 2008 rejecting the claim on account of overheads on the ground that it was too general and did not mention any specifics, the petition

merely repeats the claim on such score in ten lines without either furnishing any particulars or seeking to demonstrate that the reason given by the

Authority to decline such claim was erroneous.

58. On royalty, the petitioners contend at paragraph 62 of the petition that the quantum on such account paid to the port should have been

regarded as an allowable expense in assessing the tariff. They rely on clause 2.8.1 that stipulates that royalty paid by private operators to the

landlord would be taken into account as part of expenditure for fixing tariff, subject to the maximum of the amount quoted by the next lowest

bidder in those BOT cases where the bidding process was finalised before July 29, 2003. The Authority treated royalty as an allowable expense

the financial year 2005-06 onwards but was of the view that since the 2004 guidelines came into effect on March 31, 2005, the benefit to private

operators on account of royalty could only be conferred prospectively. On such reasoning, the royalty paid by the petitioner company for the years

2002-03, 2003-04 and 2004-05 was not considered as part of the cost of the petitioner company in retrospectively assessing tariff for such years.

The petitioners urge that the relevant clause did not specify any cut off date, nor did the 1998 guidelines that held the field before the 2004

guidelines came into effect, bar royalty being considered as a component of cost. The petitioners complain of discrimination as at least two other

private operators, Chennai Container Terminal Limited and Nhava Sheva International Terminal Limited, had been conferred such benefit.

59. The Authority refutes the charge of discrimination and says that the position of the two other private operators could not be compared to that

of the petitioner company. The submission is an exact repetition of the reasoning given by the Authority at page 447 of the petition. The Authority

recorded that in the case of Chennai Container there was a direction on the Authority by the Government of India in exercise of the Government''s

power u/s 111 of the Act. The Authority sought to justify the benefit on account of royalty conferred on Nhava Sheva on the reasons given by it in

its order of March 7, 2006 which appears at page 487 of the petition. Such order recorded that when tariff was fixed for Nhava Sheva in the year

2000 the entire royalty payable to the landlord port was permitted as allowable expense. A subsequent review was undertaken by the Authority in

2005, the object of which was only to review the rates with reference to the estimated traffic projected by Nhava Sheva and the actual traffic. The

Authority reasoned that it was not within its scope in the review proceedings to revisit the matter of royalty.

60. Notwithstanding the assertion by the Authority in the order dated March 17, 2008 that save the two private operators abovenamed other

private operators had not been given the benefit of royalty being regarded as an allowable head of expenditure since the 2004 guidelines would

have prospective operation on such score, it is implicit that the previous guidelines did not expressly prohibit royalty being regarded as part of cost.

The appearing parties have not produced the 1998 guidelines. Merely because the authority did not allow royalty to be treated as an allowable

head of expenditure to other private operators is no ground for refusing the petitioner company since the facts relating to the other cases, except

those of Chennai Container and Nhava Sheva, are not evident from the order of October 12, 2007 or the order of March 17, 2008.

61. In the absence of the 1998 guidelines being produced by the Authority, it would appear that such guidelines did not expressly prohibit royalty

being regarded as an allowable expense. The order in the Nhava Sheva matter would lend support to the same conclusion. If the 1998 guidelines

contained an express bar and the 2004 guidelines removed the embargo, the reasoning given by the Authority would have held good. But since

that is not the case, there appears to be a justifiable grievance that the payment made on account of royalty by the petitioners prior to April 1,

2005 should have been treated as an allowable expense for computing the tariff for the relevant periods. If the Authority understood the 2004

guidelines and the said Act to give it requisite authority to assess the additional charge levied by the petitioner company as compared to the

prevalent norm for the past years for which the petitioner company had not made any application at the appropriate time, it was unreasonable of

the Authority to not confer the petitioner company the benefit of treating royalty as an allowable expense since the 2004 guidelines made provision

for it.

62. The claim on account of shore-handling of fertilisers is for the amount of Rs. 1.14 crore that was added to the income of the petitioner

company apparently to correct errors in the estimates relating to income from steel and iron ore handling. There is no mention in the order of

October 12, 2007 of any adjustment being required to be made on account of steel or iron ore handling and on behalf of the Authority nothing is

shown in such regard. It was the petitioners" contention in the review petition that the amount of Rs.6.86 crore for the years 2007-08, 2008-09

and 2009-10 had been erroneously added on account of loading, transportation and onboard supervision of fertilisers. The petitioners have

handed over a chart to show that fertilisers are taken delivery of from the hook point and the petitioner company does not render any services of

loading, transportation or onboard supervision. The Authority recorded in the order of March 17, 2008 that the petitioner company had not

indicated prior to the order dated October 12, 2007 that it would not undertake such services. The Authority took note of the petitioner

company"s submission and reasoned that only Rs.5.72 crore of the claimed amount of Rs.6.86 crore related* to additional income from fertiliser

handling that had been included in the income estimates. The Authority held that the balance sum was added to the income due to correction of

errors in the estimates relating to income from steel and iron ore handling but neither did the order amplify on such score nor has the Authority

chosen to deal with such challenge at the hearing.

63. Purely on the ground that the reasons given for deducting Rs.1.14 crore on such count does not establish the rationale therefor, the Authority

needs to revisit such issue and either deduct such sum from the petitioner company''s income estimates or give more cogent reasons as to why it

should not be excluded.

64. The petitioners question the erroneous computation of return on capital employed for the past years and the mistaken calculation of working

capital. The petitioners say that for the three financial years upto 2004-05 return on equity has been allowed by bifurcating the capital employed on

notional basis instead of allowing return on equity on actual equity. The petitioners refer to clause 2.9.3 of the 2004 guidelines to assert that capital

employed should be computed on the basis of net fixed assets plus working capital, where net fixed assets is gross block less depreciation and less

work- A in-progress. The petitioners have not pressed the other head under return of capital, that of capacity utilisation.

65. The Authority reasoned in the order of March 17, 2008 that the return allowed prior to the year 2005-06 was based on (he equity component

of the capital employed subject to a debt-equity ratio of 1:1. The Authority noticed '' that the petitioner company had not challenged the approach

adopted by the Authority but had merely required the Authority to consider that the return for that portion of the equity in excess of the norm at the

higher rate of interest at the prevalent prime lending rate of State Bank of India. The '' petitioners claim that the Authority altogether missed their

point.

66. The Authority noticed, in detail, what had weighed with it in its order of October 12, 2007 on the aspect of return on equity for the three

relevant financial years. It noticed the exact contention of the petitioner company as appearing in the review petition and with the expertise available

at its command declined the prayer on the ground that it was a consistent approach that the Authority had adopted in every private terminal

operator''s case beginning Nhava Sheva which was the first private operator. In judicial review, courts look at the decision-making process rather

than the decision. What may appear to be inadequate reasons to the court because of its lack of expertise in the matter, may be sufficient reason

for an expert in the field to understand the basis thereof. Unlike in the case of shore-handling charges for fertilisers where there is a direct reason

given and where it appears that there is nothing in the order in support of such reason, the justification for declining the claim on return on capital is

more as to the methodology. The petitioners have not been able to demonstrate any palpable flaw in the methodology and if the expert body says

that this has been its consistent approach and the petitioners have not been able to demonstrate to the contrary, the finding of the expert body is

not to be treated lightly or tinkered with in judicial review simply because the Court lacks the wherewithal to appreciate the reasons.

67. The further challenge is on account of working capital. Clause 2.9.4 of the 2004 guidelines defines working capital to be current assets less

current liabilities where current assets exclude cash or deposit balances of funds. In the review petition the petitioners suggested that the security

deposit paid to various agencies including the port had not been considered in the working capital calculations on the ground that clause 2.9.9 of

the revised tariff guidelines did not include security deposit as an item of current assets. The petitioners argued that security deposit was universally

considered as an item of current assets. In course of the hearing, the petitioners rely on an ILO programmed book on how to read a balance sheet

and suggest that deposits made when companies entered into contracts should be treated as current assets. The petitioners assert that the

fundamental premise in the Authority rejecting the petitioners'' claim is flawed.

68. Clause 2.9.9 of the 2004 guidelines does not expressly bar security deposit to be excluded from current assets. But the clause amplifies on the

words in parentheses in the relevant definition clause which is clause 2.9.4. Current assets usually include cash balances and deposits. But as to

what would make up current assets for the purpose of the said guidelines has been qualified. It is such qualification which is elaborated upon in

clause 2.9.9. The words in clause 2.9.9 give a general direction to the Authority to assess working capital and contain inclusive words as ""like"".

The general drift of the clause is that the Authority should ensure that working capital is not unjustly expanded. Since every operator is entitled to a

certain return on capital under the said guidelines, every operator would legitimately seek to inflate the current assets component and downsize its

current liabilities with a view to maximise profit and obtain a more favourable return on capital. It is not a crime for a commercial organisation to

attempt this. The definition at clause 2.9.4 would indicate that the return on capital would be directly proportional to current assets and inversely

proportional to current liabilities. It is understandable that every private operator would endeavor to load every possible paisa to its current assets

figures and take away every possible paisa from its current liabilities. But if the expression ""current assets"" as qualified under the said guidelines

does not answer to the description of the same expression in the Companies Act or elsewhere in accounting policies, the Authority had only to be

guided by the meaning of the expression in the guidelines and not take note of how the expression is otherwise understood. If deposits have been

expressly excluded from current assets in the definition clause and if clause 2.9.9 does not expressly refer to security deposit as an allowable head

under current assets, the view taken by the Authority does not appear to be so unreasonable so as to be undone in judicial review. Additionally,

the Authority noted that the petitioner company did not confirm as to whether the security deposit was governed by the agreement with the port.

The Authority also referred to the uniform approach adopted by it and the reason at page 458 of the petition shows that it approached the issue

with an open mind since clause 2.9.9 neither specifically included security deposit as an item of current asset nor expressly excluded it. The

Authority referred to its consistent approach and was of the view that no exceptional circumstance had been cited by the petitioner company

warranting a deviation as to the treatment of security deposit in the petitioner company''s case. The reasons and the Authority''s approach to the

issue - the decision-making process - are not found wanting particularly as, unlike in the royalty case, the petitioners have not been able to cite any

other instance of the Authority having held otherwise.

69. The final count of challenge in respect of the individual heads is as to the interest costs for the year 2005-06 to the extent of Rs.38.61 lakh. In

the review petition the petitioner company claimed that in the cost statement submitted by it no interest cost had been considered for the previous

years. The petitioners refer to the clarification sought by the Authority that appears at page 336 of the petition and the reply to the query furnished

by the petitioner company. The petitioners place page 443 of the petition where the relevant query is noted at the first column and no comments

appear to have been made thereon by the port. The Authority considered the petitioner company''s contention on such count and took a view that

the expenditure amount shown in the cost statement for the year 2005-06 furnished by the petitioner company was less than the amount reflected

in the segregated audited annual accounts. The Authority held that the segregated accounts for the relevant year included interest costs and that

such position had been I confirmed by the petitioner company in its letter of September 3, 2007. The Authority concluded that in view of the

difference between the cost statement and the segregated annual accounts for the relevant berth, the income cost I of Rs.38.61 lakh could not be

allowed to pass through. The methodology disclosed by the Authority was that the return on capital employed method recognised the total value of

assets irrespective of the cost of financing their acquisition. On such basis, the Authority opined that allowing interest on '' such count to pass

through for the year 2005-06 in addition to return on capital employed would amount to a double counting which was impermissible. There is

sound reasoning apparent in the Authority dealing with such aspect of the petitioners'' claim and it appears plausible even to the court which does

not have the expertise that the Authority commands. If, on the petitioner company''s admission in its letter, the segregated accounts for the relevant

year included interest cost; the difference between the cost statement and annual accounts on such score could not be reasonably expected to pass

through. Both the decision and the decision-making process appear to be sound.

70. Though several other heads of claim have been referred to in the review petition and some others find place in the petition, the petitioners have

only pressed the claims in respect of the individual items dealt with herein and have not pressed the others.

71. The petitioners have harped on the Authority having acted without jurisdiction in, what the petitioners describe as, retrospectively fixing tariff.

Merely because the petitioners deem it to be a retrospective fixation of tariff may not be enough to view it as such. The matter calls for an

assessment. In legal parlance something is retrospective, according to the Oxford English Dictionary, if it takes effect from a date in the past.

Black''s Law Dictionary (8th ed.) indicates that ""retrospective"" and ""retroactive"" are interchangeable adjectives. In relation to statutes or rulings,

retroactive"" has been defined as ""extending in scope or effect to matters that have occurred in the past."" The issue can be approached from two

fronts: whether the Authority had the jurisdiction to fix tariff for the periods that have been assailed; and, whether there has been an actual fixation

of tariff from an anterior date.

72. Upon the 1997 amendment coming into effect and the Authority being set up, every operator was obliged to have its rates approved by the

Authority. The Nhava Sheva order shows that the Authority came into being by the year 2000. The petitioner company''s agreement with the port

is dated January 29, 2002, well after the amendment had taken effect and the Authority had been established. The petitioner company commenced

its operations at berth No. 12 of the Haldia Dock Complex on March 23, 2002. From the outset, the petitioner company was required to have its

rates for cargo-related services to be vetted and passed by the Authority. Ignorance of law is no virtue and certainly no excuse. It is possible, as

the port''s letter of November 21. 2003 could suggest, that both the port and the petitioner company laboured under the mistaken apprehension

that the schedule of rates applicable to the port would, in accordance with the licence agreement, apply to the petitioner company. But the

agreement could not have overridden the statute nor do the petitioners show that any extraordinary exemption was granted to the petitioner

company by the Central Government in exercise of its powers under the said Act.

73. The Authority impressed on the petitioner company by its letter of February 17, 2004 that it was incumbent on the petitioner company to have

its rates approved by the Authority. Such clarification was not necessary as the provisions of the amended Act provided for it. Despite the

petitioner company being made aware of its obligation to have its rates approved by the Authority by the letter of November 21, 2003, it first went

into denial mode before accepting the position. There was no contemporaneous challenge to the jurisdiction of the Authority to assess ex post

facto as to whether the rates charged by the petitioner company were in accordance with the prevalent norms. Even such acceptance would not

undo an error of jurisdiction as the judgment cited by the petitioners reported at Harshad Chiman Lal Modi Vs. DLF Universal and Another,

asserts at paragraph 32 of the report:

32. In Bahrein Petroleum Co. this Court also held that neither consent nor waiver nor acquiescence can confer jurisdiction upon a Court, otherwise

incompetent to try the suit. It is well settled and needs no authority that ""where a court takes upon itself to exercise a jurisdiction it does not

possess, its decision amounts to nothing"". A decree passed by a Court having no jurisdiction is non est and its invalidity can be set up whenever it

is sought to be enforced as a foundation for a right, even at the stage of execution or in collateral proceedings. A decree passed by a Court without

jurisdiction is a coram non judice.

74. It begs the question as to whether there was an erroneous assumption of jurisdiction by the Authority. Since it is the obligation of an operator,

under the statute, to have its rates approved by the Authority, unapproved rates charged would be illegal. One need not go into the consequences

that would visit an operator upon such illegality, but the operator would not be heard to complain of the unapproved rates being looked into by the

Authority for the purpose of fixing future rates; not, at any rate, when the petitioners urge discrimination and found their case on Article 14 of the

Constitution. Clause 2.13 of the 2004 admits of a subsequent assessment made by the Authority to ascertain whether the performance of an

operator was at variance with the prescribed limits and for tariff to be adjusted prospectively.

75. The Authority has not really fixed tariff for an anterior period. It has merely assessed the quantum that had been overcharged by the petitioner-

company and has required the petitioner-company to absorb such amount over a future period. The Authority understood the petitioner-company

having sought an order for refund of the additional amount to the client and provided accordingly in its March 17, 2008 order. If the petitioners say

that such submission had not been made, without going into the controversy and the suspicion that the belated letter of April 18, 2008 naturally

arouses, the Authority should stick to the direction covering adjustment of excess charges as contained in its October 12, 2007 order.

76. If the statute obliged the petitioner company to have its rates approved, there was a reasonable period within which the petitioner should have

applied to the Authority for the same. Clauses 2.17.2 and 2.17.3 of the 2004 guidelines refer to an ad hoc rate being operative during an interim

period. The interim period is reckoned to be from the date of submission of the proposal till the date of notification of the approved tariff. The

guidelines cannot be faulted for not having conceived of an operator as the petitioner company flouting the statute and proceeding to charge on the

basis of its licence agreement and without reference to the Authority. The rates charged by the petitioner company from the time of its

commencement of operations in March, 2002 may be deemed to be ad hoc rates subject to approval of the Authority, on a meaningful reading of

the 2004 guidelines. Viewed as such, there would be no error of jurisdiction committed by the Authority.

77. With respect, the bogey of retrospective action--with the taboo associated with the expression--appears to be without basis. The Authority

assessed the rates for an earlier period to adjust the excess amount charged over a future period. If the raison deter of the Authority is to ensure a

level-playing-field and prevent monopolistic rates being charged from end-users, even if some end-users may have suffered at the hands of the

petitioner company, the petitioner company could not be permitted to retain its ill-gotten gains and the Authority was well within its jurisdiction to

require the operator to have its prospective rates adjusted accordingly.

78. To sum up, the Authority was neither in error of jurisdiction nor unreasonable by any yardstick of reasonableness in requiring prospective rates

to be adjusted by the amount of excess charges that had unlawfully been levied on its clients by the petitioner company. The Authority can only be

faulted for not allowing royalty for the period upto March 31, 2005 to pass through and for not clearly explaining why the amount of Rs. 1.14

crore was to be added to the petitioner company''s income out of the sum of Rs.6.86 crore that it claimed on account of adjustments for shore-

handling charges. The Authority is directed to correct the tariff by accounting for the amount paid by the petitioner company by way of royalty for

the period prior upto March 31, 2005; revisit its decision to not allow the further sum of Rs. 1.14 crore on account of shore-handling charges; and,

specify how the recalculated excess charges should be adjusted in the tariff fixed or the future tariff to be fixed for the petitioner-company. The

Authority should communicate its decision, to the petitioner-company within 10 weeks from the date hereof and will not be obliged to hear the

petitioner-company any further.

79. W. P. No. 10094 (W) of 2008 is allowed in part. However, since the major plank of the petitioners'' challenge has failed and the several other

heads of tariff assailed have been upheld, the petitioners will bear a part of the Authority''s expenses in these proceedings and pay costs assessed

at 3000 GMs.

Urgent certified photostat copies of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.