(2013) 06 KAR CK 0121

In the Karnataka High Court

Case No : Writ Petition No''s. 39414-415, 39416-417 of 2012 (GM-RES) , 26708 of 2011 (GM-RES) , 26796-797, 17982-983, 16279, 16596, 9848, 28280-281, 17688, 2747 of 2012 (GM-RES) , 34491, 34874, 34542, 36972, 41019, 34867-868, 36109, 34492, 36973-974, 34541, 34784,

M/s. K.G.C. Enterprises APPELLANT

Vs

The New Mangalore Port Trust, The Traffic Manager, The Assistant Estate Manager and The Tariff Authority etc. etc. RESPONDENT

Date of Decision : 28-06-2013

Acts Referred:

Constitution of India, 1950 — Article 14
Major Port Trusts Act, 1963 — Section 111, 48, 49, 49-B, 50-C

Citation : (2013) 4 AKR 528

Hon'ble Judges : Mohan M. Shantanagoudar, J

Bench : Single Bench

Advocate : K. Dhiraj Kumar, in Writ Petition Nos. 39414-415, 39416-417, 26796-797, 17982-983, 16279/2012 and 16596, 9848 and 28280-281 of 2012 and W.P. Nos. 5920-5921/2013, Sri D.L.N. Rao for Sri S. Rajendra, in W.P. No. 26708/2011, Sri S. Rajendra, in W.P. No. 17688, 2747, 34491 and 34874/2012, 34542, 36972, 41019, 34867-868, 36109, 34492, 36973-974, 34541 and 34784, 44487 and 34865 and 34866/2011 and Sri Udaya Holla for Sri S. Rajendra, in W.P. No. 29007/2011, for the Appellant; Subramanya R. for M/s. Ashok Haranahalli Associates, for R1 to R3 in Writ Petition Nos. 39414-415, 39416-417, 34491 and 34874/2012 of 2012 (GM-RES), 34542, 36972, 41019, 34867-868, 34492, 36973-974, 34541 and 34784, 44487 and 34865 and 34866/2011 and W.P. Nos. 5920-5921/2013, Sri K. Kalyan Basavaraj, ASG., for R4 and Sri Jayakar Shetty is appointed as amicus curiae in Writ Petition Nos. 39414-415, 17982-983 of 2012 (GM-RES), Sri Ashok Harnahalli for M/s. Ashok Haranahalli Associates, for R3 in W.P. No. 26708, 29007/2011, W.P. Nos. 26796-797, 17982-983, 16279/2012 and 16596, 9848, 28280-281, 17688 and 2747/2012, Sri S.R. Khamroz Khan, for R1 in W.P. No. 17688, 2747/2012, Sri Ashok Harnahalli, in W.P. No. 34542/2011, for the Respondent

Final Decision : Disposed Off

Judgement

Mohan M. Shantanagoudar, J.—For the sake of convenience, documents/ annexures as produced in Writ Petition No. 26708/2011 are referred. Each of the petitioners in these writ petitions is allotted certain area of the unpaved land belonging to New Mangalore Port Trust (''NMPT'' for short) on monthly licence basis. The licence was renewed periodically on payment of the agreed licence fee from time to time. The Tariff Authority for Major Ports. (''TAMP'') being the authority for fixation of tariffs for major Ports under the Major Port Trusts Act, 1963 (''the Act'' for short), fixes the tariffs for various services provided by the Port Trust. While fixing/revising the rates relating to the licence fee for the purpose of land use, TAMP is following the guidelines/policy published by Union of India. The copy of the policy of the Central Government viz., ''Land Policy for Major Ports'' is produced alongwith certain of the writ petitions. One of the copies of the ''Land Policy for Major Ports'' is produced in Writ Petition No. 26708/2011 at Annexure-C. Clause 5.1.1(b) of the said policy discloses that the licence can be renewed on the expiry of the previous licence period and each renewal of licence shall be treated as a fresh licence. As aforementioned, the petitioners used to get the licence renewed for every succeeding month by writing letter in advance and paying licence fee in advance for the succeeding month as per the terms of the allotment letter issued in favour of the petitioners. Acceptance and encashment of cheques sent towards the licence fee alongwith the covering letter seeking renewal of licence by the Chairman of the NMPT is deemed to be the renewal of licence. Same is the practice being followed by the authorities since the date of first renewal.

2. Earlier to issuing Land Policy for Major Ports of 2004 by the Union of India, the rentals fixed by the TAMP were valid up to 19.2.2002. In the year 2002, NMPT proposed for revision of rentals of the land leased. In the meanwhile, the Land Policy for Major Ports was issued by the Union of India in 2004. TAMP thereafter passed an order on 20.1.2005, which came to be gazetted on 3.2.2005 as per Annexure-E. The revised rates of licence fees/rent are prescribed in the said notification. The revised rates were valid from 20.2.2002 till 19.2.2007. Though the validity of the Gazette Notification dated 3.2.2005 has lapsed on 19.2.2007, the validity of the same was extended from time to time till 30.9.2010. In the meanwhile, the Port Trust had proposed revision of licence amount in the month of March-2007.

When the facts stood thus, the proposal/recommendation of the NMPT for revision of lease rentals/licence amount made in the year 2007, was approved by TAMP and the same was published in Part III, Section- 4 of the Gazette of India, Extraordinary dated 23.7.2010 as per Annexure-G. In furtherance of the said gazette notification, the NMPT issued a Circular dated 31.1.2011 notifying the revision of licence fees with effect from 20.2.2007 as per Annexure-H.

It appears, the Association of NMPT Stevedores and Carriage & Freight Forwarding Agents Association represented to the NMPT to withdraw the notification Annexure-H dated 31.1.2011 insofar as it relates to revision of rent with effect from 20.2.2007. But their request is not acceded to by NMPT. Subsequently, demand notices are issued by the NMPT demanding the arrears of licence fees w.e.f. 20.2.2007 alongwith penal interest (in certain cases). The petitioners are aggrieved by the Gazette Notification Annexure-G dated 23.7.2010 of TAMP and the Circular dated 31.1.2011 vide Annexure-H issued by the NMPT to the extent of it being made effective from 20.2.2007. The petitioners have also sought for quashing the respective demand notices issued by the NMPT.

3. Heard Sri D.L.N. Rao and Sri Udaya Holla, learned senior advocates and Sri Dhiraj Kumar, learned advocate for the petitioners and Sri Ashok Haranahalli, learned senior counsel appearing on behalf of the respondent-NMPT and Sri Jayakar Shetty, learned amicus curiae.

4. Sri D.L.N. Rao and Sri Udaya Holla, learned senior advocates appearing on behalf of the petitioners contend that Clause 5.1.1(b) of the Land Policy for Major Ports makes clear that every renewal of licence is a fresh licence; Every licence is renewed after taking licence fee in advance by the NMPT; Therefore for every licence period, there was a concluded contract without there being any dues from the petitioners to the NMPT; The licence granted in favour of the petitioners does not reserve any right in favour of NMPT to raise claim for every lapsed period if there were revision of rates with retrospective effect; it is not permissible for the NMPT to demand licence fee with retrospective effect; the demand is arbitrary and is opposed to law of contract. Learned counsel further submits that Clause 5.3(I)(c) of the Land Policy for Major Ports mentions that Scale of Rates shall be escalated by 2% per annum till such time that Scale of Rates is revised with the approval of the competent authority i.e., TAMP; as such the rates fixed under the notification dated 3.2.2005 vide Annexure-E produced alongwith Writ Petition No. 26708/2011 would prevail till such time the rates are revised by the TAMP; since the validity of the notification Annexure-E dated 3.2.2005 is extended from time to time till 30.9.2010 and as the petitioners have paid the licence fee as per the rates mentioned in Annexure-E all through till 30.9.2010, it is not open for the NMPT to claim the licence fee with retrospective effect from 20.2.2007; even the extension order i.e., the order extending the validity of the notification Annexure-E dated 3.2.2005 up to 30.9.2010 has not reserved the right of TAMP and NMPT to recover any difference of amount in licence fee; since the NMPT has accepted the licence fee paid by the petitioners as per the notification Annexure-E dated 3.2.2005 even during the extended period and consequently allowed the petitioners to utilize the allotted land on lease, it is not open for TAMP and NMPT to demand the difference of licence fee with retrospective effect.

Learned counsel for the petitioners further argued that the petitioners based on the rates that were prevailing as per Annexure-E dated 3.2.2005 and extended orders vide Annexure-F series during the relevant period of time entered into contract with the third parties; various transactions have been executed by the petitioners with their respective clients by making use of Port land under license and had charged the third parties keeping in mind the then prevailing licence fee; if the petitioners were to raise demand with their clients/third parties on the ground of the licence fee is being charged with retrospective effect, the same would not be honoured by the respective clients inasmuch as there is no such contract which compel the third parties to pay the same. It is the case of the petitioners that most of their clients have closed their business with the petitioners after the consignment is shipped or otherwise.

Sri D.L.N. Rao, learned counsel further submits that Clause-3.2.8 of the Notification dated 28.3.2005 issued by the TAMP discloses that in exceptional cases, retrospective effect may be given to the revised/modified rent/licence fees for the reasons to be recorded. According to him, the reasons should be assigned by NMPT for charging modified/revised rent with retrospective effect. Since no reasons are assigned by NMPT for charging with retrospective effect, the demand notices are bad in the eye of law. Sri D.L.N. Rao in support of his contentions relies upon the following decisions:

(i) 2013 SAR (civil) 347 {Lala Ram (D) by L.R. & Others. vs. Union of Indian & Another)}

(ii) Hindustan Lever Limited and Another Vs. Board of Trustees, Visakhapatnam Port Trust and Another,

(iii) Unreported Decision of the Division Bench of the Kerala High Court in UCO Bank--VS. Cochin Port Trust and Another in W.P. (C) NO. 15875/2013 (M).

Sri Udaya Holla, learned senior counsel relies upon the decision of the Apex Court in the case of Assistant Commissioner, Commercial Tax Department, Works Contract and Leasing, Kota Vs. Shukla and Brothers, in support of his contentions.

Sri Dhiraj Kumar, learned advocate appearing for some of the petitioners in addition to the aforementioned submissions argued that fine/penalty is levied on his clients for not lifting and shipping the goods within the specified time, which is illegal and arbitrary; the petitioners could not lift and ship the goods because of the ban orders issued by the Government of Karnataka as well as by the Apex Court for exporting the iron ore.

The writ petitions are opposed by Sri Ashok Haranahalli, learned senior counsel appearing on behalf of respondent-NMPT by filing statement of objections. He submits that the petitioners are heard before enhancement of licence fee; in all the rent/licence agreements, NMPT has indicated specifically about its proposal sent to TAMP relating to revision of lease rentals; the rentals are fixed for a period of five years as a block period and hence the enhancement is made by the NMPT for every five years of block period; the jurisdiction exercised by the TAMP fixing and enhancing the licence fee is adjudicatory and quasi judicial in nature inasmuch as it has to take into consideration various aspects and after notifying the affected parties like the petitioners and after providing them of reasonable opportunity of being heard, the rent has to be revised; the impugned notification dated 23.7.2010 issued by the TAMP vide Annexure-G clearly discloses that joint hearing was held and in the joint hearing, the NMPT as well as the concerned users have made their submissions. Even the Association of New Mangalore Port Stevedores, New Mangalore Port Gearing & Forwarding Agents'' Association and Kudremukh Iron Ore Company Limited made written submissions at the time of joint hearing. Only thereafter, the decision is taken for issuing the Notification Annexure-G dated 23.7.2010. He further submits that the NMPT has merely charged the revised licence fee to the petitioners and virtually it is not a retrospective levy at all; the process of revision of rates was in progress since February 2007 itself and as the concerned authority i.e. TAMP has to take into consideration various relevant aspects and as the decision has to be taken after hearing the affected parties, it has naturally taken some time for arriving at the conclusion; therefore there is no retrospective levy at all. Adequate reasons are assigned for revising the rates; initially the provisional rates only were charged with a clear understanding that final rates would be fixed by the TAMP after hearing the parties; NMPT has merely followed the rates fixed by the TAMP inasmuch as TAMP has got exclusive jurisdiction to enhance or fix the rental.; all other similarly situated persons have already paid the enhanced fee except the petitioners, who have come before this court. He relied upon the Gazette Notification dated 4.6.2007 (gazetted on 21.6.2007) to justify action of the NMPT levying the penal rent on some of the petitioners herein.

5. Section 49-B of the Act empowers the TAMP to fix, increase or alter fees/rent by issuing the notification in the official gazette. Every notification/declaration/order/regulation issued by TAMP in pursuance of the Act shall be published in the official Gazette as per Section 50-C of the Act. Section- 111 of the Act empowers the Central Government to issue directions to TAMP and NMPT. It is further made clear in Section 111 of the Act that TAMP as well as NMPT are bound by the directions on questions of policy as the Central Government may give in writing from time to time. The decision of the Central Government, whether the question is one of policy or not shall be final. Thus the Land Policy for Major Ports vide Annexure-C binds TAMP and NMPT and consequently bind the petitioners, who have entered into contract with NMPT.

6. The copies of the allotment of unpaved area for stacking export goods on lease/licence basis clearly reveal that the licence is issued for a period of one month on payment of certain provisional licence fee. It is specifically made clear in each of the allotment letters issued by the NMPT that it has proposed the revision of rate of rent of Rs. 13.00 per square meter per month to TAMP w.e.f. 20.2.2002. The relevant clause found in each of the allotment letters reads thus:

The revision of rate of Rs. 13.00 per sqm per month is proposed to TAMP w.e.f. 20.2.2002. Hence the rate applicable with 5% escalation is Rs. 13.65 per sqm per month. The present provisional rate is as per the scale of rate i.e. Rs. 8.05 per sqm per month upto 19.2.2004 and Rs. 8.45 sqm per month w.e.f. 20.2.2004. Hence you are liable to pay the difference amount after the rate is approved by the TAMP.

From the above, it is clear that only the provisional rate was fixed at the time of allotment of grant of licence. The rate of rent is not fixed. The NMPT in all the cases have clarified that it has proposed enhancement of rent to TAMP at certain rates and it is charging only the provisional rate for the present. It is further clarified that the licensees are liable to pay the difference amount after the rates are approved by TAMP. Thus it is clear that what was fixed at the initial stage of granting licence was only provisional rate. It was made known by the NMPT that the petitioners are liable to pay the difference amount after the rate is approved by the TAMP. Hence the petitioners having agreed to such condition mentioned supra in the allotment letters, are bound by the same. In all the letters written by the petitioners for renewal of licence from time to time, they have agreed to pay the tentative/provisional rental charges as per the existing scale of rents per month. In view of the same, the petitioners are bound to fulfill the requirement of conditions of licence by paying the differential rate of rent whenever the rentals are revised by TAMP. All the petitioners have agreed for terms and conditions contained in the order granting licence. Only after petitioners agreeing for the terms and conditions, the land was allotted by NMPT.

7. The allotment letters amply make it clear that even at the time of allotment itself, NMPT had already proposed enhancement of licence fee to TAMP. Thus the proposal of the NMPT was pending approval of the TAMP. The petitioners having agreed to pay the difference amount after the rate is approved by TAMP, are bound by such agreement. Since the petitioners have accepted the terms and conditions, they are estopped from escaping their liability to pay in terms of the contract.

8. It is not in dispute that the licence was issued initially for a period of one month to the petitioners. It is also not in dispute that the licence is extended from month to month at the request of the petitioners. Such grant of licence and extension was done as per the Land Policy of 2004 issued by the Central Government.

As aforementioned, the Land Policy is issued in exercise of the powers under Section- 111 of the Act by the Central Government which binds TAMP and NMPT. The policy is final until it is changed by the Central Government itself. It is relevant to note that there is no challenge to the policy in these writ petitions. Even otherwise, there is nothing irrational or arbitrariness or unconstitutional in the policy.

9. Clause 5.3 of the Land Policy deals with market value of land leased/licenced and Schedule of Rates. The Schedule of rates and market value of the land will be fixed based on the guidelines found in Clause 5.3. It is relevant to note Clause 5.3(I) of the Land Policy for Major Ports 2004, which reads thus:

5.3(I) Market value of land and Schedule of Rates (SoR)

(a) SoR for land will be recommended to the competent authority/TAMP, by a Committee headed by the Chairman of the Port Trust. The Committee will take into account any/all of the following factors to determine the market value of port land:-

(i) State Government''s ready reckoner of the land value in the area, if available.

(ii) Average rate of actual relevant transactions registered in last three years in the port''s vicinity near adding 2% escalation per annum, as may be necessary.

(iii) Highest accepted tender of Port land for similar transactions.

(iv) Rate arrived at by an approved valuer appointed for the purpose by the Port.

(v) Any other relevant factor as may be identified by the Port.

(b) SoR shall be arrived at., taking 6% market value as rent per annum.

(c) SoR shall be escalated by 2% per annum till such time that SoR is revised with the approval of the competent authority/TAMP.

(d) SoR will be revised every five years.

As is clear from Clause 5.3.(I)(b), the Rates will be decided based on 6% of market value of land as rent per annum. It is specified in Clause 5.3(I)(c) that the Schedule of Rates shall be escalated by 2% per annum till such time that Schedule of Rates are revised with the approval of the competent authority/ TAMP. It is further made clear in Clause 5.3(I)(d) that Schedule of Rates will be revised every five years, which means that the TAMP will revise the rates for a block period of five years. The TAMP may naturally take about 2 to 3 years after receiving the proposal for revising the rates in accordance with law inasmuch as the TAMP has to take into consideration various aspects and the decision has to be taken after hearing the affected parties such as petitioners and NMPT. Only after taking into consideration all the relevant factors and after hearing, the decision will be taken by TAMP for revising the rates on fact situation. Till such time, the Schedule of Rates shall be escalated by 2% per annum provisionally.

For example: If the earlier block period of five years has expired on 1.1.2007, the next block period of five years would be from 1.1.2007 to 1.1.2012. For revising the rates of rent, the NMPT may propose to the TAMP in the meanwhile i.e., in January-February 2007. After getting such proposal, the TAMP would consider various aspects as found in the policy as well as other relevant factors which may be identified by the Port. The decision will be taken only after hearing the affected parties like the petitioners. The aforementioned exercise may consume about 2 to 3 years. In a given case, let me assume that TAMP has taken time up to the end of three years of block period, which means, the TAMP would be taking decision on 31.12.2009; such revisional rates fixed by the TAMP on 31.12.2009 presumably would be notified by the NMPT on 1.1.2010. In such a situation, it is not open for the licensees to contend that the revised rates would come into effect from 1.1.2010 and not from 1.1.2007. The whole exercise of revising the rates of rent would have begun in the year 2007 itself. The TAMP was considering the matter relating to revision of rents w.e.f. 1.1.2007 itself for the block period of five years. However, the decision is taken subsequently after about 3 years that too after exercising all due diligence and after hearing the affected parties relating to the block period from 1.1.2007 to 1.1.2012.

From the aforementioned example, it is amply clear that virtually there is no retrospective enforcement of revised rents. Since the revision would be for a period of five years of the block period, the decision taken within the period of five years would hold good for the entire block period of five years.

10. It is not open for the petitioners to contend that they have charged their respective clients based on the prevailing rentals only and they have not charged their clients based on the revised rents and therefore it is not open for the NMPT to charge revised rentals from the first day of the block period of five years. As aforementioned, the licence is granted and renewed by the NMPT making it clear that NMPT is collecting only the provisional rate of rent and that it has already proposed revision of rates to TAMP and that the petitioners would be liable to pay the difference amount after the revised rate is approved by the TAMP, which means the licensees are bound to pay revised rates even for the period during which the provisional rates are fixed and charged.

The petitioners have agreed for such terms and conditions and only after such agreement, the licence is issued in favour of the petitioners. In view of the same, it is not open for the petitioners to contend that they did not know that the rents would be revised in future. On the contrary, the petitioners very well knew that the rents would be revised within the block period.

It is relevant to note that the order passed by the NMPT in respect of earlier block period of five years prior to 2007 was accepted by the petitioners as well as other similarly placed agencies/persons. At that point of time also, the order came to be passed by the TAMP in the middle of the block period and the Port Authority had revised the licence fee for the entire block period of five years starting from 1st day of block period of five years. It dearly goes to show that same procedure is being followed by the respondent-authorities and the same is accepted by the petitioners and others. It is further relevant to note that all other similarly placed persons except the petitioners, have paid the revised licence fee w.e.f. 20.2.2007 itself i.e., 1st day of block period of five years (from 20.2.2007 to 20.2.2012).

11. The impugned notification Annexure-G dated 23.7.2010 issued by TAMP by which the rents are revised makes it amply clear that the petitioners and other affected parties were heard. It is also found in the very notification that NMPT has sent its proposals for revision of rents on 5.3.2007 itself on certain grounds. Such grounds are also mentioned in the very order, which means, the whole exercise of revising the rents is being made by the TAMP since 5.3.2007 itself. Paragraph-5 of the impugned notification Annexure-G further indicates that the

NMPT was requested to furnish additional information/clarification on various points. The reply is received by the TAMP subsequently. Thereafter all the relevant factors are considered in detailed manner as is clear from the impugned notification. Paragraphs 8, 9.1, 9.2, 9.3 and 10 of the impugned notification Annexure-G clarify that the joint hearing of the NMPT and the concerned users was held on 17.12.2009 and 22.3.2010; subsequently hearing was also held on 31.5.2010. At the joint meeting held on 17.12.2009, the Association of New Mangalore Port Stevedores, New Mangalore Port Cleaning & Forwarding Agents'' Association and Kudremukh iron Ore Company Limited made written submissions. The copies of such written submissions were handed over to NMPT and thereafter NMPT has responded to the comments. Only after considering the entire material on record, the rents are revised for a block period of five years w.e.f. 20.2.2007. From the aforementioned, it is clear that the TAMP has passed the order and issued the notification in a highly transparent manner. The impugned notification Annexure-G assigns valid reasons for coming to the conclusion and it is just and proper. Moreover, the decision making process is not under challenge, whereas decision is questioned.

Clause-3.2.8 of the notification dated 28.3.2005 issued by TAMP pursuant to the policy of Union of India under Section- 111 of the Act testifies that in exceptional cases retrospective effect may be given for reasons to be recorded. Thus it is clear from the aforementioned clause that reasons are to be recorded for retrospective modification of the licence fee. The Apex Court in the case of Assistant Commissioner, Commercial Tax Department, Works Contract and Leasing, Kota Vs. Shukla and Brothers, has observed that administrative process will best be vindicated by clarity in its exercise; Reason is the very life of law; when the reason of a law once ceases, the law itself generally ceases; such is the significance of reasoning in any rule of law; giving reasons furthers the cause of justice as well as avoids uncertainty.

12. From the aforementioned, it can be safely said that the reasoned order is necessary if the licence fee is revised with retrospective effect. If the revised licence fee is charged in usual manner, no reasons need be assigned. In the matter on hand, though at the first look it appears that the NMPT has charged revised licence fee with retrospective effect (it is also stated so in the impugned order Annexure-G. at Clause-13), on in-depth and meticulous perusal of the material on record, I am clear in my opinion that such prima-facie opinion may not be a correct opinion. Under Section- 49 of the Act, the TAMP shall from time to time, by notification in the Official Gazette, frame a scale of rates on payment of which, any property belonging to Port Trust may be permitted to be used for the purpose specified. Even the revision of licence fee is also within the purview of TAMP. Undisputedly, the revision is done once in a period of five years, which means that the revision cannot be done within the period of five years. Once the scale of rates are fixed, the same are not revisable during the period of five years as is clear from the contract/agreement between the parties. Clause 5.3.I(d) of the ''Land Policy for Major Ports'' 2004, clarifies that Schedule of

Rates will be revised every five years. In view of the Land Policy for Major Ports of the Central Government, each of the petitioners knows very well that the Schedule of Rates will be revised once in every five years. The block period in this matter commenced from 20.2.2007. The licence fee is liable to be renewed subsequently w.e.f. 20.2.2012. Till such revision, the Land Policy for Major Port specifies to collect 2% escalated licence fee per annum with the approval of the competent authority. In the matter on hand, the NMPT has escalated the licence fee by 2% per annum making it clear that such escalation of 2% per annum is provisional and the same will continue till such time the Schedule of Rates are revised with the approval of the competent authority. In this view of the matter, virtually there is no retrospective revision of licence fee in the matter.

Though it is stated in the impugned order Annexure-G dated 23.7.2010 passed by the TAMP at Clause-13 that the revision of lease rents is considered retrospectively from 20.2.2007, in my considered opinion, the revision is not made with retrospective effect for the aforementioned reasons. The observations so made, in my opinion are inadvertent and therefore cannot be relied upon to contend that there is retrospective revision of rents. The impugned order has to be read in its entirety alongwith all the records. The solitary observation, which is inadvertently made by the competent authority will not be the basis to hold that the revision is made with retrospective effect.

13. The High Court of Andhra Pradesh in the case of Hindustan Lever Limited and Another Vs. Board of Trustees, Visakhapatnam Port Trust and Another, in a matter of similar nature has no doubt held that the Port has no authority to levy the revisional licence fee with retrospective effect. The High Court of Andhra Pradesh in the said decision has observed thus:

36. A perusal of the impugned order does not indicate the source of power under which the claim of enhance rent is made retrospectively.) Whenever a demand is raised, it would be supported by some power, under which the authority is authorized to do so. The impugned order is devoid of reasons and the validity of the order has to be tested with reference to the reasons assigned and contained therein. Particularly, the Port Trust being a Statutory Body under the Act, its action must be decided and examined with reference to Article 14 of the Constitution. Article 14 of the Constitution forbids arbitrariness and contemplates equality before law and the public functionary should act fairly and honestly and not arbitrarily and unilaterally.

37. The provisions of Section 48 and 49, are comprehensive one, which deals with the scales of rates for services performed by Board or other person and scale of rates and statement of conditions for use of property belonging to Board. Under the garb of tentative one, the port trust cannot raise a demand retrospectively after a long lapse of period.

But the facts in the said matter are totally different. In the said matter, the agreement between the parties is entirely different than that of the agreement entered in the matters on hand. In this context, it is relevant to note the following observations made by the Andhra Pradesh High Court while considering the relevant clause in the agreement of licence entered into between the parties, which reads thus:

38. I have perused the agreement. Clause 3 of the agreement, which is relevant at the crux of the point, discloses that the fee shall be payable at the rate in force from time to time and shall be paid in quarterly installments for annual license in advance.

40. Neither the agreement nor the provisions of the Acts, authorizes the Collector to make a demand for payment of rent retrospectively. Apart from that, Section 49 of the Act contemplates that the authority shall from time to time by notification in the official gazette, also frame a scale of rates and statement of conditions. But no such instances have been brought to the notice of this Court that in the instant case, such a procedure has been followed.

14. On the other hand, in the present matter, it is specifically agreed by all the parties as under:

The revision of rate of Rs. 13.00 per sqm per month is proposed to TAMP w.e.f. 20.2.2002. Hence the rate applicable with 5% escalation is Rs. 13.65 per sqm per month. The present provisional rate is as per the scale of rate i.e. Rs. 8.05 per sqm per month upto 19.2.2004 and Rs. 8.45 sqm per month w.e.f. 20.2.2004. Hence you are liable to pay the difference amount after the rate is approved by the TAMP.

From the above, it is clear that in the case of Hindustan Lever Limited cited supra, the relevant clause of the agreement is totally different. The agreement in the said matter does not anywhere state that the Port Trust has charged only provisional rate of licence fee and that the licensees are liable to pay the difference amount after the revised rates are approved by the TAMP. In the absence of such condition, the High Court of Andhra Pradesh has concluded that there is no source of power for the Port to enhance the rent retrospectively. In view of the same, the Judgment of the High Court of Andhra Pradesh is not applicable to the facts of the present case.

The judgment of the Kerala High Court in the case of UCO Bank Vs. Cochin Port Trust and Another in W.P. (C) NO. 15875/2013(M) mentioned supra is not applicable to the facts of this case inasmuch as the facts as well as the point for consideration in the said matter are entirely different from the facts and point for consideration in the matter/s on hand.

15. There cannot be any dispute that collection of enhanced licence fee with retrospective effect is illegal as held by the Apex Court in the case of Lala Ram (D) by L.R. & Ors. vs. Union of India & Another reported in 2013 SAR (Civil) 347. But if the authority at the inception itself has made it clear to the licensees that what is being charged is only a provisional licence fee and that the licensees are

liable to pay the revised licence fee after approval by the TAMP, the action of the NMPT cannot be said to be illegal. At the time of issuing the licence itself as well as at the time of renewal of licence, it has been made clear by the NMPT that it has proposed revision of licence fee to the TAMP and till such time only provisional licence fee will be charged and that the licensees will have to pay the revised licence fee after approval of the TAMP. The licensees having agreed for the said conditions, entered into the contract. Therefore it is not open for the licensees to go against the terms of the contract and contend that it is not open for the authorities to charge licensees revisional licence fee from 20.2.2007. In view of the above, the challenge to the Circular pertaining to revision of licence fee w.e.f. 20.2.2007 vide Annexure-H fails. However some of the petitioners are charged with penalty or penal licence fee. Sri Dhiraj Kumar, learned counsel appearing on behalf of such petitioners is justified in contending that having regard to the statutory ban on exporting as well as ban by the Apex Court, the shipment of iron ore could not be made by such petitioners. The ban order is modified by the Supreme Court only on 11.2.2011. Since such petitioners could not conduct any shipping activities relating to iron ore due to statutory ban orders as well as orders of the Court, in my considered opinion interest of justice is met with, if leniency is shown by reducing the quantum of licence fee. As per the notification dated 4.3.2010 issued by NMPT, 10 times the normal licence fee has to be imposed on certain of the petitioners inasmuch as they could not lift and transport iron ore from the Port up to seven months. This in my considered opinion would be a heavy burden on the petitioners that too without any fault of them. This Court in the case of M/s. Sathya Granites vs. New Mangalore Port Trust in Writ Petition No. 6725/2011 (GM-RES) disposed of on 29th May 2012 has ordered to charge four times the normal licence fee. The same order is followed by this Court in another Writ Petition also.

In view of the above, I also prefer to direct the respondent-New Mangalore Port Trust to charge four times of the normal licence fee.

Accordingly, the following order is made:

(i) The prayer relating to quashing of Circular dated 31st January 2011 issued by the New Mangalore Port Trust (vide Annexure-H in Writ Petition No. 26708/2011) notifying the revision of licence fee is rejected. Consequently, the prayer to quash the demand notices issued by the New Mangalore Port Trust is also rejected.

(ii) Wherever the penalty/penal licence fee is imposed, the New Mangalore Port Trust is directed to charge four times of the normal fee, treating the non-shipment of goods up to seven months.

We place on record the assistance rendered by Sri Jayakar Shetty, the learned amicus curiae while deciding the matter. Office is directed to pay Rs. 10,000/- (Rupees ten thousand only) as honorarium to the learned amicus curiae.

Writ Petitions are disposed of accordingly.

