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13 May 2011

Shri. Sandeep Prakash
Secretary,
AERA Building, Administrative Complex,
Safdarjung Airport, Aurobindo Marg,
New Delhi - 110003.

Subject: Comments & submissions of the Federation of Indian Airlines (FIA) tendered in response to the AERA Consultation Paper No.02/ 2011-12 (Review of levy of Development Fee (DF) – IGI Airport, New Delhi-reg.

Dear Sir,

This is in reference to the AERA letter dated 21st April 2011, D.O.No.AERA/20011/DIAL-DF/2009-10/Vol.IV and AERA Consultation Paper No.02/ 2011-12 (Review of levy of Development Fee (DF) – IGI Airport, New Delhi-reg). At the outset FIA thank AERA for not only bringing out AERA Consultation Paper No.2 on the above subject matter but also for holding a stakeholder consultation meeting on 9th May 2011 on the same issue. FIA believes that these consultation meetings give key stakeholder like FIA and its members an opportunity to put forth their preliminary views/opinions in front of AERA and other stakeholders involved.

FIA is hereby placing on record the following submission which has been arrived solely from discussions, deliberations and past experiences of the member airlines for the kind consideration by the authority.

Enclosed are the following for your kind consideration.

- FIA submission on behalf of member airlines.
- Consumer Online Foundation, etc. Vs. Union of India (UOI) and Ors., etc. (Decided on: 26.04.2011).
- 2007 APTEL 223*, Karnataka Power Transmission Corporation Limited Vs. Karnataka Electricity Regulatory Commission, Bangalore and Ors. (In the appellate Tribunal for Electricity, New Delhi, Decided on: 29.08.2006).

Thanking you,

Yours Sincerely,

Ujjwal Dey
Sr. Executive Officer

Submissions on behalf of the Federation of Indian Airlines

1. On behalf of its member airlines, FIA is hereby placing submissions in response to the Consultation Paper No.2/2011-12 dated 21.04.2011 in addition to the submissions made in the public consultation organized on 09.05.2011.

CONTEXT OF THE CONSULTATION

2. The Hon'ble Supreme Court in its judgement dated 26.04.2011 in the case of Consumer Online Foundation vs. Union of India & Others held that:-

(a) With effect from 01.01.2009, the Airport Economic Regulatory Authority alone can determine the rate for levy of development fees under the AERA Act, 2008. Section 13(1)(b) of the AERA Act is relevant.

(b) Airport Development Fee cannot be levied by the private operator and AAI cannot assign its right to collect fee from the passengers under the AAI Act 1994.

(c) If Airport Development Fee has to be granted, the same requires approval of the Authority/AERA and mere two letters from the Ministry of Civil Aviation is not adequate to justify the levy.

A copy of the Supreme Court judgement is placed as **Attachment 1** hereto.

3. The airport operator/concessionaire was selected to operate, maintain and develop Delhi Airport in April, 2006 with the governing terms and conditions reflected in:-

(a) The Operation, Management and Development Agreement ("**OMDA**") executed between the Airport Authority of India ("**AAI**") and the special purpose vehicle incorporated by the successful consortium, Delhi International Airport Limited ("**DIAL**") on 04.04.2006, including -

(i) ***CAPEX***: Chapter XIII mandates and casts an obligation upon DIAL to arrange for financing and/or meeting all financing requirements through suitable debt and equity contributions in order to comply with the obligations under OMDA including the development of Airport. It is relevant to note that Schedule 5 and 6 define and specify the Aeronautical and non-Aeronautical services in OMDA.

(ii) ***TARIFF***: Chapter XII of the OMDA provides for tariff and regulation and casts obligation upon the operator to levy Aeronautical Charges as per the provisions of SSA. It further provides that the operator is free to fix the charges for non-Aeronautical services subject to the applicable law. The passenger service fee is to be collected and disbursed in accordance with the SSA.

(b) State Support Agreement ("**SSA**") executed between the Ministry of Civil Aviation

("**MoCA**") and DIAL on 26.04.2006 to record the additional support to be extended by the Government of India ("**GoI**") to DIAL, including:-

(i) ***CAPEX***:

(1) Clause 3.1.1 of the SSA empowered the Authority with the responsibility of certain aspects of regulation including regulation of aeronautical charges in accordance with the broad principles set out in Schedule 1.

(2) Clause 3.1.2 provides that the Aeronautical Charges shall be calculated as per Schedule 6, and that such Aeronautical Charges will not be negotiated post bid after the selection of the successful bidder and will not be altered by JVC (DIAL) under any circumstances.

(3) Clause 3.1.3 provided that the GoI would continue to approve the Aeronautical Charges till the Authority commences regulating such charges. This provision lapsed on 01.01.2009.

(4) Clause 3.3.5 makes it obligatory on the part of private airport operator to procure and maintain at its own cost all security systems and equipment (except arms and ammunitions) as required by GoI/BCAs or its designated nominees from time to time. It is the understanding of the Members of FIA that considerable reserves would have been built into the Passenger Service fee (security component account), which calls for reduction in levy. It is submitted that the funds held by private operators in escrow account to the account of AAI should be permitted to be transferred to meet the shortfall in funding the airport modernization programme undertaken by the operator. In this manner, the funds held in PSF Security account are optimally utilized.

(ii) ***TARIFF***: While fixing the tariff the Authority is required to observe the principles set out in Schedule 1. Some of the principles are as follows:-

(1) Transparency: The Authority shall adopt a transparent approach and keep all the information documented to enable all stakeholders to make submissions. The Authority is required to give reasoned decisions.

(2) DIAL is entitled to impose only those charges which are consistent with the pricing principles set out in this Schedule as also with the IATA pricing principles including:-

- Cost Reflectivity – Any charges incurred by the DIAL shall be allocated across users in a manner that is fully cost reflective and relates to facilities and services that are used

by the Airport users.

- Usage – In general Aircraft operators, Passengers and other users should not be charged for facilities and services that they do not use.

4. On 03.05.2006, the Delhi Airport Management was handed over to DIAL in terms of the OMDA. On 14.01.2009, DIAL wrote to MoCA seeking levy of Airport Development Fee to fund for a claimed shortfall of Rs.1964 Crores in the Security Deposits from real estate development for the Airport under the OMDA.

5. On 09.02.2009, MoCA approved the levy and collection of Airport Development Fee under Section 22 A of the Airports Authority of India Act, 1994 by way of a surcharge levied at an "ad-hoc" rate of Rs.200 per departing domestic passenger and Rs.1300 per departing international passenger, premised on various terms and conditions, including:-

(a) The Airport Development Fee was levied for a period of 36 months w.e.f 01.03.2009 (period ending on 01.03.2012).

(b) By 31.08.2009, DIAL was directed to submit the final project cost estimates and approach the GoI with data based on review of the bidding process in respect of hospitality district.

(c) The approval was subject to final determination of levy by the Government or the Authority.

(d) Airport Development Fee receipts were directed to be deposited in a separate Escrow Account, the modalities whereof were to be decided by DIAL with the approval of AAI. DIAL was required to submit the capital receipts and expenditure to AAI's supervision as presently the independent auditor appointed by AAI only verifies the revenue as defined in Article 1.1 of OMDA and not the receipts thereof.

(e) DIAL was to report the collection and usage of Airport Development Fee on monthly basis to Central Government/Regulator through AAI.

(f) Development Fee was to be utilized for the development of "Aeronautical Assets" only, which are "Transfer Assets" in terms of the OMDA.

(g) The levy was to be reviewed six months after commencement by the Regulator/ Central Government, i.e., by 31.08.2009. At the stage of final determination, the Authority or the Central Government was to ensure adequate consultation with users.

(h) The amount collected through Airport Development Fee was not to, in any case, exceed the ceiling of Rs. 1827 crores (being the shortfall in the net present value as on 01.03.2009). The ceiling amount would be exclusive of taxes. The balance amount of Rs. 1250 crores received as Shareholder's advance would be retained by DIAL. Any escalations of cost would be met from the amount so retained.

(i) Rate and return of the Airport Development Fee levy are premised upon the traffic projections and other estimates. In case the actual figures differ from the estimated figures, the collections during levy period exceed the amount of Rs. 1,827 crores (NPV as on 01.03.2009) or any other amount which the Authority or the Central Government may determine, the excess amount so collected shall not be utilized for any purpose whatsoever, without the prior approval of the Authority or the Central Government.

6. By virtue of Section 54 of the AERA Act, 2008, Section 22A of the AAI Act, 1994 stood amended as on 12.05.2009 such that in respect of 'Major Airports', the Development Fee could be levied only at the rate 'determined' by the Authority under Section 13(1)(b) of the AERA Act. The term 'determined' has a very specific connotation in regulatory jurisprudence which requires:-

(a) Proper filings of audited accounts before the authority in support of the claim for Airport Development Fee by the operator (DIAL); and

(b) Conduct of an 'audit' through regulatory proceedings where reasoned decisions are taken by the Authority -

  (i) To allow or disallow the claim; and

  (ii) Where the claim is allowed, the reasoning in support is justified in terms of Section 13 of the AERA Act

7. The permission given by MoCA for levy of Development Fee was challenged in three public interest petitions before the Delhi High Court which were dismissed on 26.08.2009. The Hon'ble High Court held that there is no illegality attached in imposition of Airport Development Fee by DIAL with the prior approval of the Central Government. In view of the above, DIAL requested for permission to submit the information required for review of Development Fee levied at IGI Airport after six months, i.e., by February 2010, and stated that in the meantime DIAL will continue to charge Development Fee in line with the approval dated 09.02.2009.

8. On 04.11.2009, the Authority passed an order extending the time for submission of requisite information up to 31.01.2010. However, DIAL did not comply with the order dated 04.11.2009 and has all along failed and neglected to furnish the requisite information or comply with the conditions imposed by the permission dated 09.02.009 granted by MoCA to levy an ad hoc Development Fees. As such, on 26.02.2010, the Authority came to a conclusion that it was left with no option but to proceed on the basis of the updated information made available in respect of bidding of hospitality district and the project cost of Rs. 8975 crores based upon which the Central Government had approved the levy of Development Fee (on ad-hoc basis).

9. In this backdrop, the conclusions of the Hon'ble Supreme Court in its recent judgement dated 26.04.2011 in the case titled Consumer Online Foundation vs. Union of India & Others are noteworthy, viz.:-

"(i) We hold that development fees could not be levied and collected by the lessees of the two major airports, namely, DIAL and MIAL, on the authority of the two letters dated 09.02.2009 and 27.02.2009 of the Central Government from the embarking passengers under the provisions of Section 22A of the 1994 Act.

(ii) We declare that with effect from 01.01.2009, no development fee could be levied or collected from the embarking passengers at major airports under Section 22A of the 1994 Act, unless the Airports Economic Regulatory Authority determines the rates of such development fee.

....

(iv) We direct that DIAL and MIAL will account to the Airports Authority the development fees collected pursuant to the two letters dated 09.02.2009 and 27.02.2009 of the Central Government and the Airports Authority will ensure that the development fees levied and collected by DIAL and MIAL have been utilized for the purposes mentioned in Clause (a) of Section 22A of the 1994 Act.

(v) We further direct that henceforth, any development fees that may be levied and collected by DIAL and MIAL under the authority of the orders passed by the Airports Economic Regulatory Authority under Section 22A of the 1994 Act as amended by the 2008 Act shall be credited to the Airports Authority and will be utilized for the purposes mentioned in Clauses (a), (b) or (c) of Section 22A of the 1994 Act in the manner to be prescribed by the rules which may be made as early as possible."

SUBMISSIONS

10. The request for grant of additional airport development fees as claimed by DIAL has to be evaluated in context of the following legal framework:-

(a) Section 13(1)(b), (2) and (4) of the AERA Act.

(b) Decision of the Authority to adopt the Single Till Approach with Price Cap Incentive Regulation.

(c) Relevant provisions of the OMDA dated 04.04.2006, Pr. 8.3.2, 8.3.5, 8.3.6, 8.3.7, 8.5.7, 12.1 to 12.4.

(d) Relevant provisions of the SSA dated 26.04.2006, Pr. 3.1.1 to 3.1.3, 3.5.1 & Schedule I.

Re. Nature of Airport Development Fee

11. Airport Development Fee, if any, should be levied as a cess/tax as held by the Hon'ble Supreme Court, to fund AAI/government to provide world-class airports in

India. The guidelines laid by the Hon'ble Supreme Court as set out to in paragraph 9 above are noteworthy, viz.:-

(a) The Operator DIAL was directed to account for the development fees collected so far.

(b) The Airports Authority of India was directed to ensure that the airport development fee levied and collected by DIAL has been utilized for the purposes mentioned in Clause (a) of Section 22A of the 1994 Act.

(c) After 26.04.2011, any development fees that may be levied and collected by DIAL under the authority of the orders passed by this Hon'ble Authority shall be credited to the Airports Authority of India and be utilized for the purposes mentioned in Clauses (a), (b) or (c) of Section 22A of the 1994 Act in the manner to be prescribed by the rules which may be made as early as possible. As such, there is no question of the airport operator levying, collecting or utilising such airport development fee after 26.04.2011.

12. In this context, it is respectfully submitted that:-

(a) Airlines and passengers must not be burdened with any airport development fee to be collected to fund the capital investments of a private operator.

(b) Airport Development Fee should be levied uniformly across all metro and non-metro airports in India. It should not be airport specific since people travel to destinations, not airports.

13. It is submitted that for the purposes of levy of any airport charges, the Authority is obliged to follow the provisions of SSA and increase the Airport Charges in line with the terms stipulated therein. It is noteworthy that the airlines have been going through difficult times with high crude oil prices. Levy of Airport Development Fee will erode airlines capabilities to increase fares to sustain its operational capabilities. It is respectfully prayed that the Authority keeps in mind the interests/implications of/on the airlines before finalizing any decisions regarding airport development fee and other charges.

14. It is submitted that in effect Airport Development Fee is a capital subsidy/contribution levied and collected from airlines who in turn partly/fully pass it on to the passengers which is beyond the scope of these Agreements (OMDA and SSA). The private airport operators cannot seek re-negotiation of the tariff beyond those prescribed in OMDA and SSA. Hence it is submitted that the private operators are barred from levying the development fee forthwith and the sum collected till date be returned to the Government/Airport Authority of India, to enable it utilize the same for the development of other airports, which are under its control. Moreover, the Government cannot give viability gap funding to the private airport operators especially after the privatization has taken place. An upfront capital grant will be unfair and the additional funding gap of Rs. 1793 crores should be bridged through debt financing, subsidy by Government, or additional equity. It seems that grant of Airport

Development Fee will reduce the funding to AAI, therefore Airport Development Fee is a means to increase tariff at all other airports. Airport Development Fee is a capital receipt which if not subjected to revenue share to AAI will also be exempted from income tax on such collection.

15. It is noteworthy that at the time when Airport Development Fee was sanctioned for DIAL, **one of the primary reasons cited was the crashing real estate scenario then, resulting in Airport operator's inability to raise funds by unlocking real estate value, for the development of Airport**. As the real estate scenario has improved considerably and with DIAL being in a position to unlock value, as reported in the news papers, there is no justification for continuing with the levy of Airport Development Fee. It is not clearly stated not evaluated anywhere as to:-

(a) What is the level of exploitation of real estate commercially at the IGI Airport including how much such space is lying unutilized?

(b) What is the reason for such commercial real estate not being put to use?

(c) Is the level of security deposit received commensurate with the market realities for the value of the real estate put to use?

(d) What is the potential of utilization of the surplus real estate and its cash flow implications?

(e) What is the treatment of real estate deposit? It needs to be ascertained whether the security deposits of Rs. 1471 crores have been used to reduce the project cost or they are being treated just as a deposit. The sum of Rs 1471 crores collected by DIAL for having leased 45 acres of land for commercial development represents advance deposits collected from the lessees, which in normal circumstances would have been routed through profit and loss account and reduced the airport charges going forward.

16. From a broad comparison of Capital outlay sanctioned for Mumbai vis-à-vis Delhi, (about US $ 2.50 Billion), the Capacity expansion is a mere 30% i.e. from 650 Aircraft movements to 840 Aircraft movements. For a similar spend at Delhi and with marginal additional expenditure, considerable scope exists to triple the capacity in later years. In these circumstances, the cost of Airport operations at Mumbai will be disproportionately high compared to Delhi, which in itself require introspection and justification for high cost incurrence, as ultimately cost to the passengers will increase substantially. Therefore any increase in cost to the already sanctioned high cost at Delhi Airport needs comprehensive review before granting approval for the incremental cost. Cost overruns in any project of this nature cannot be allowed to be funded through increase in cost to consumers and in fact such costs must be borne by the Airport operators through their internal funding mechanism. It is pertinent to note that the Authority must also take into account the difficulties being faced by the airlines before granting levies to the airport operators. A lot of expenditure has been undertaken to rectify the infrastructure which was handed over to DIAL by the AAI. Therefore, AAI

should pay such costs or it should agree to reduce the revenue share so that the burden on the passengers could be reduced.

17. In the above context, it is submitted that the present consultation process raises the following important and critical questions for consideration of the Authority:-

(a) Whether the levy of Airport Development Fee is justifiable on financial/economic basis?

(b) Whether there has been any change in the circumstances from February, 2009 (when the Government permitted levy of Airport Development Fee) to the situation in March, 2010?

(c) What was the financial model of DIAL:

(i) At the time of the execution of State Support Agreement and OMDA;

(ii) In February 2009 when Airport Development Fee was levied;

(iii) In March, 2010.

(d) What is the justification for continuation of levy of Airport Development Fee?

Re. Single Till Approach

18. It is submitted that the Single Till Approach adopted by the Authority warrants a comprehensive evaluation of the economic model and realities of the airport – both capital and revenue elements. The Airport Development Fee petition of DIAL must not be separately taken up but taken up as part of the overall tariff determination under Section 13(1)(a) and (b) of the AERA Act.

Re. Capital Structure of the Operator

19. The submission of the Operator, DIAL, contradicts its representation contained in the letter dated 14.01.2011 to the Authority asserting that in terms of its Shareholders' Agreement, DIAL is required to maintain a debt to equity ratio of at least 2:1 and it cannot raise further equity if this ratio is breached below this level. In this context, it is noteworthy that:-

(a) The initial master plan (as approved) was for an outlay of Rs. 8,975 crores (please refer to para 5.3 at page 4 of Consultation Paper). Here the minimum debt:equity should have been 2:1 = 5,983.34 crores (debt) : 2,991.67 crores (equity).

(b) The claims of the Operator is that due to various factors the project outlay has increased by Rs. 3,882 crores, i.e., around 44% to Rs. 12,857 crores. Since Airport Development Fee does not constitute debt or equity but is being sought, the emergent capital structure would be:-

(i)	Equity	...	Rs. 2,450 crores	19.056%

(ii)	Development Fees (Claimed)	...	Rs. 3,743 crores	29.113%
(iii)	Debt	...	Rs. 6,664 crores	51.832%

This cannot be possibly permitted without breaching the Shareholders Agreement with serious consequences, as claimed by DIAL. As such, the present proceedings need to be held in abeyance till the capital outlay and structure is duly audited by an independent agency like the Comptroller & Auditor General of India.

20. In addition, several other crucial questions arise for consideration of the Authority, including:-

(a) What is the legal efficacy and values of the initial master plan approved by Ministry of Civil Aviation?

(b) Under what circumstances, when and to what extent can such outlay be permitted to be revised without complying with the requirements of prudence check?

(c) Can the objections and recommendations of the financial and technical audit reports of EIL and KPMG recommending disallowances of capital expenditure to the tune of Rs. 1,006 crores and Rs. 834 crores respectively be brushed aside contrary to principles under Section 13 of the AERA Act?

(d) Can an international benchmarking study (which has not been shared with stakeholders) form the basis of rejecting a project specific audit report?

(e) For a claimed capital/project outlay of Rs. 12,857 crores if the airlines and indirectly/partly the passengers are to contribute Rs. 3,743 crores as capital infusion while the operator along with AAI brings in only Rs. 2,450 crores, why must the operator not be reduced to a minority shareholder with a representative body of the airlines/passengers being issued the relevant equity? Was such an eventuality contemplated in the competitive bidding process for PPP and airport development by the Government of India?

(f) Can such a claim for Airport Development Fee which exceeds equity within 4 years of award of the OMDA concession be considered as a fair, just or reasonable claim in a prudent, regulated, price cap mechanism as envisaged under the AERA Act read with the Tariff Guidelines of the Authority?

21. Without prejudice to the above, it is respectfully submitted that even if the additional capital outlay claim be treated as valid and admissible, the Authority must consider and decide as to:-

(a) Whether any capital investment so made must not go into the Regulatory Asset Base and be secured through return on equity/return on capital employed over the 60 year tenure of the Concession?

(b) Alternate means of financing including divesting equity, loans from IIFCL and

other financial institutions be explored.

(c) Prudence check on each claim of capex must be done along the lines of the established accounting standards and practices which would disallow unreasonable, unfair or extravagant expenditure.

(d) There has been about 41% escalation in project cost, which seriously undermines the sanctity of the planning process of DIAL and Master Development Plan.

Re. Upfront Fees paid to AAI– Rs. 150 crores.

22. The claim of such upfront fees by the Operator as a part of Airport Development Fee is wrongful and contrary to Clause 3.1.1 of the State Support Agreement, viz –

> "3.1.1 GOI's intention is to establish an independent airport economic regulatory authority (the "**Economic Regulatory Authority**"), which will be responsible for certain aspects of regulation (including regulation of Aeronautical Charges) of certain airports in India. GOI agrees to use reasonable efforts to have the Economic Regulatory Authority established and operating within two (2) years from the Effective Date. GOI further confirms that, subject to Applicable Law, it shall make reasonable endeavours to procure that the Economic Regulatory Authority shall regulate and set/ re-set Aeronautical Charges, in accordance with the broad principles set out in Schedule 1 appended hereto. *Provided however*, the Upfront Fee and the Annual Fee paid / payable by the JVC to AAI under the OMDA shall not be included as part of costs for provision of Aeronautical Services and no pass-through would be available in relation to the same."

In this context, it is respectfully prayed that this claim deserves to be disallowed.

23. In addition to the above submissions, it is submitted that the Authority in paragraph 14.1 of the present Consultation Paper has taken note of various process related issues that have led to increase in the project cost being:-

(a) Uncapped design and build approach followed for project implementation – no sharing of risk with EPC Contractor;

(b) No check kept on cost overrun either by DIAL or PMC – risk mitigation steps not entirely compliant with the international best practices;

(c) No detailed cost estimation of CWP by DIAL;

(d) No detailed estimation of SCP either by DIAL or L&T;

(e) EPC Contractor had no incentive or penalties to enable cost control;

(f) Important stakeholders such as the MoCA and the AAI were not regularly updated on cost overrun – DIAL Board was apprised of the cost variation by way of the Project Cost Report in March, 2010. Prior approval of the Board was not taken for increase in GFA by nearly 84000 sq. mts (from that finalized at the Master Plan Stage).

It is noteworthy that such increase warrants disallowance since the Authority is mandated to conduct prudence check and it is vital to scrutinize the lack of diligent contracting, supervision and reporting undertaken by DIAL. In this context, it is noteworthy that the Appellate Tribunal for Electricity in its judgement dated 29.08.2006 in the matter of 'KPTCL vs. KERC & Ors.' reported as *2007 APTEL 223* has clearly held that utilities are free to decide their plans of investment for improvement of system or expansion to meet the demand including upgradation and maintenance for a better and quality supply. It is the commercial decision of the utility and its source to raise funds which falls within the domain of the utility. It is at a later stage that the Commission/Regulator shall undertake a prudent check and if deem fit allow the claim. **In appropriate cases, the Regulator may disallow such cases of utility and it is for the utility to bear the brunt of such investment and it cannot pass it on to consumers.** A copy of the ATE judgement is placed as **Attachment 2** hereto.

24. FIA craves liberty to make additional submissions at a later stage, if necessary.

MANU/SC/0516/2011

IN THE SUPREME COURT OF INDIA

Civil Appeal No. 3611 of 2011 (Arising out of S.L.P. (C) No. 25041 of 2009), Civil Appeal No. 3612 of 2011 (Arising out of S.L.P. (C) No. 23541 of 2009), Civil Appeal No. 3613 of 2011 (Arising out of S.L.P. (C) No. 29471 of 2009) and Civil Appeal No. 3614 of 2011 (Arising out of S.L.P. (C) No. 11799 of 2011) (CC No. 1066/2010)

Decided On: 26.04.2011

Consumer Online Foundation, etc.
Vs.
Union of India (UOI) and Ors., etc.

Hon'ble Judges:
R.V. Raveendran and A.K. Patnaik, JJ.

Acts/Rules/Orders:
Airports Authority of India Act, 1994 - Sections 3, 11, 12, 12A, 12A(1), 12A(4), 22, 22A, 38 and 39; Airports Authority of India (Amendment) Act, 2003; Airports Economic Regulatory Authority of India Act, 2008 - Sections 2 and 13(1); General Clauses Act, 1897 - Section 6; Bombay Agricultural Produce Markets Act, 1939 - Section 11; Bombay Municipalities Act, 1901 - Section 60; Companies Act, 1956; Electricity (Supply) Act, 1948 - Sections 46(1) and 70; Road Transport Corporations Act, 1950 - Section 45(1); Wealth Tax Act, 1957 - Section 7(1); Constitution of India - Article 265

Cases Referred:
U.P. State Electricity Board, Lucknow v. City Board, Mussorie and Ors. MANU/SC/0179/1985 : (1985) 2 SCC 16; Mysore Road Transport Corporation v. Gopinath Gundachar Char MANU/SC/0327/1967 : AIR 1968 SC 464; Sudhir Chandra Nawn v. Wealth Tax Officer, Calcutta and Ors. MANU/SC/0032/1968 : 1969 (1) SCR 108; Orissa State (Prevention and Control of Pollution) Board v. Orient Paperdd Mills and Anr. MANU/SC/0210/2003 : (2003) 10 SCC 421; Kerala State Electricity Board v. S.N. Govinda Prabhu and Bros. and Ors. MANU/SC/0288/1986 : (1986) 4 SCC 198; Surinder Singh v. Central Government and Ors. MANU/SC/0406/1986 : (1986) 4 SCC 667; Jayantilal Amrathlal v. Union of India MANU/SC /0043/1971 : (1972) 4 SCC 174; S.L. Srinivasa Jute Twine Mills (P) Ltd. v. Union of India and Anr. MANU/SC/1017/2006 : (2006) 2 SCC 740; Gurcharan Singh Baldev Singh v. Yashwant Singh and Ors. MANU/SC/0040/1992 : (1992) 1 SCC 428; The Trustees of the Port of Madras v. Aminchand Pyarelal and Ors. MANU/SC/0235/1975 : (1976) 3 SCC 167; Mumbai Agricultural Produce Market Committee and Anr. v. Hindustan Lever Limited and Ors. MANU/SC/7539/2008 : (2008) 5 SCC 575; Union of India v. S. Narayana Iyer MANU/TN/0383/1969 : (1970) 1 MLJ 19; Union of India and Ors. v. Motion Picture Association and Ors. MANU/SC/0404/1999 : (1999) 6 SCC 150; T. Cajee v. U. Jormanik Siem and Anr. MANU/SC/0029/1960 : AIR 1961 SC 276; The Madras and Southern Maharatta Railway Company Limited v. The Municipal Council Bezwada MANU/TN/0069/1941 : (1941) 2 MLJ 189; Jantia Hill Truck Owners Association, etc. v. Shailang Area Coal Dealer and Truck Owner Association and Ors. MANU/SC /1197/2009 : (2009) 8 SCC 492; Meghalaya State Electricity Board and Anr. v. Jagadindra Arjun MANU/SC/0414/2001 : (2001) 6 SCC 446; Vijayalashmi Rice Mills and Ors. v. Commercial Tax Officers, Palakot and Ors. MANU/SC/3847/2006 : (2006) 6 SCC 763; Commissioner of Income Tax, Udaipur, Rajasthan v. Mcdowell and Company Ltd. MANU/SC/0964/2009 : (2009) 10 SCC 755; Ahmedabad

Urban Development Authority v. Sharadkumar Jayantikumar Pasawalla and Ors. MANU/SC/0400/1992 : (1992) 3 SCC 285; State of West Bengal v. Kesoram Industries Ltd. and Ors. MANU/SC/0038/2004 : (2004) 10 SCC 201; Bangalore Water Supply and Sewerage Board v. A. Rajappa and Ors. MANU/SC /0257/1978 : (1978) 2 SCC 213; Mohammad Hussain Gulam Mohammad and Anr. v. The State of Bombay and Anr. MANU/SC/0083/1961 : 1962 (2) SCR 659; Dhrangadhra Chemical Works Ltd. v. State of Gujarat and Ors. MANU/SC/0481/1972 : (1973) 2 SCC 345; Orissa Cement Ltd. v. State of Orissa MANU/SC/0381/1991 : AIR 1991 SC 1676

JUDGMENT

A.K. Patnaik, J.

1. Application for permission to file SLP in SLP (C) No. 11799/2011 (CC No. 1066/2010) is allowed and delay condoned.

2. Leave granted.

3. These are appeals against the judgment and order dated 26.08.2009 of the Division Bench of the Delhi High Court in public interest litigations upholding the validity of levy of development fees on the embarking passengers by the lessees of the Airports Authority of India at the Indira Gandhi International Airport, New Delhi and the Chhatrapati Shivaji International Airport, Mumbai.

Relevant Facts:

4. The Airports Authority of India Act, 1994 (for short `the 1994 Act') came into force on 01.04.1995 and under Section 3 of the 1994 Act, the Central Government constituted the Airports Authority of India (for short `the Airports Authority'). Section 12 of the 1994 Act enumerates the various functions of the Airports Authority. By the Airports Authority of India (Amendment) Act, 2003 (for short `the Amendment Act of 2003'), Sections 12A and 22A were inserted in the 1994 Act with effect from 01.07.2004. The newly inserted Section 12A provides that the Airports Authority may make a lease of the premises of an airport to carry out some of its functions under Section 12 as the Airports Authority may deem fit. The newly inserted Section 22A of the 1994 Act provides that with the approval of the Central Government, the Airports Authority may levy on, and collect from, the embarking passengers at an airport, the development fees at the rate as may be prescribed. On 04.04.2006, the Airports Authority leased out the Indira Gandhi International Airport, New Delhi (for short `the Delhi Airport') to the Delhi International Airport Private Limited (for short `DIAL') and also leased out the Chhatrapati Shivaji International Airport, Mumbai (for short `the Mumbai Airport') to Mumbai International Airport Private Limited (for short `MIAL'). Section 22A of the 1994 Act was amended by the Airports Economic Regulatory Authority of India Act, 2008 (for short `the 2008 Act') and the amended Section 22A provided for determination of the rate of development fees for the major airports under Clause (b) of Sub-section (1) of Section 13 of the 2008 Act by the Airports Economic Regulatory Authority (for short `the Regulatory Authority'). The amended Section 22A was to take effect on and from the date of the establishment of the Regulatory Authority. The Government of India, Ministry of Civil Aviation, sent a letter dated 09.02.2009 to DIAL conveying the approval of the Central Government under Section 22A of the 1994 Act for levy of development fees by DIAL at the Delhi Airport at the rate of Rs. 200/- per departing domestic passenger and at the rate of Rs. 1300/- per departing international passenger inclusive of all applicable taxes, purely on ad hoc basis, for a period of 36 months with effect from 01.03.2009. Similarly, the Government of India, Ministry of Civil Aviation, sent another letter dated 27.02.2009 to MIAL conveying the approval of the Central Government under Section 22A of the 1994 Act for levy of development fees by MIAL at the Mumbai Airport at the rate of Rs. 100/- per departing domestic passenger and at the rate of Rs. 600/-per departing international passenger inclusive of all applicable taxes, purely on ad hoc basis, for a period of 48 months with effect from 01.04.2009. The levy of development fees by DIAL as the lessee of the Delhi Airport was challenged in Writ Petition No. 8918/2009 by Resources of Aviation Redressal Association. The levy of development fees by DIAL and

MIAL as lessees of the Delhi and Mumbai Airports were challenged in Writ Petition No. 9316 of 2009 and Writ Petition No. 9307 of 2009 by Consumer Online Foundation. The Writ Petitioners contended inter alia that such levy of development fees under Section 22A of the 1994 Act can only be made by the Airports Authority and not by the lessee and that until the rate of such levy is either prescribed by the Rules made under the 1994 Act or determined by the Regulatory Authority under the 2008 Act as provided in Section 22A of the Act before and after its amendment by the 2008 Act, the levy and collection of development fees are ultra vires the 1994 Act. The Division Bench of the High Court, after hearing, held that there was no illegality attached to the imposition of development fees by the two lessees with the prior approval of the Central Government and dismissed the writ petitions by the impugned judgment and order.

Conclusions of the High Court:

5. In the impugned judgment and order, the High Court held that under Sub-section (1) of Section 12A of the 1994 Act, the Airports Authority is empowered to lease an airport for the performance of its functions under Section 12 and such a lease is a statutory lease which enables the lessee to perform the functions of the Airports Authority enumerated in Section 12. The High Court further held that Sub-section (4) of Section 12A provides that the lessee who has been assigned some functions of the Airports Authority under Sub-section (1) shall have "all" the powers of the Airports Authority necessary for the performance of such functions in terms of the lease and use of the word "all" indicates that the lessee would have each and every power of the Airports Authority for the purpose of discharging such functions including the power under Section 22A to levy and collect development fees from the embarking passengers. The High Court took the view that development fee though described as fee in Section 22A is more akin to a charge or tariff for the facilities provided by the Airports Authority to the airlines and passengers. The High Court came to the conclusion that the exercise of the power to levy and collect development fees under Section 22A was not dependent on the existence of the rules and, therefore, this power can be exercised even if the rules have not framed prescribing the rate of development fees under Section 22A (before its amendment by the 2008 Act). In coming to this conclusion, the High Court relied on the decisions of this Court in U.P. State Electricity Board, Lucknow v. City Board, Mussorie and Ors. MANU/SC/0179/1985 : (1985) 2 SCC 16, Mysore Road Transport Corporation v. Gopinath Gundachar Char MANU/SC /0327/1967 : AIR 1968 SC 464 and Sudhir Chandra Nawn v. Wealth- Tax Officer, Calcutta and Ors. MANU/SC/0032/1968 : 1969 (1) SCR 108.

Contentions on behalf of the Appellants:

6. Mr. Fali S. Nariman, learned senior counsel, leading the arguments on behalf of the Appellants, made these submissions:

(i) The conclusion of the High Court that the power under Section 22A to levy and collect the development fees from the embarking passengers can be exercised without the rules is erroneous because the language of Section 22A of the 1994 Act prior to its amendment by the 2008 Act makes it clear that development fees could be levied and collected from the embarking passengers at the airport "at the rate as may be prescribed" and the fees so collected are to be credited to the Airports Authority and are to be regulated and utilized "in the prescribed manner". Unless, therefore, the statutory rules are made prescribing the rate at which such fees are to be collected and prescribing the regulation and manner of the utilization of development fees, the power under Section 22A cannot be exercised. After the amendment by the 2008 Act, Section 22A(ii) provides that the development fee to be levied on and collected from the embarking passengers at major airports, such as the Delhi Airport and the Mumbai Airport, would be at the rate as may be determined under Clause (b) of Sub-section (1) of Section 13 of the 2008 Act. The Regulatory Authority has been established by notification dated 12.05.2009 and unless the rate of development fees is determined by the Regulatory Authority under Clause (b) of Sub-section (1) of Section 13 of the 2008 Act, the same cannot be levied and collected from the embarking passengers at the two major airports. The determination of the rate of development fees to be levied at the two major airports under Clause (b) of Sub-section (1) of Section 13 of the 2008 Act by the Regulatory Authority of India is still pending and the impugned levy of development fees by DIAL and MIAL are, therefore, ultra vires.

(ii) The purposes for which the development fees are to be levied and collected are indicated in Clauses (a), (b) and (c) of Section 22A of the 1994 Act and these are:

(a) funding or financing the costs of up gradation, expansion or development of the airports at which the fees is collected, or

(b) establishment or development of a new airport in lieu of the existing airport, or

(c) investment in the equity in respect of shares to be subscribed by the Airports Authority in companies engaged in establishing, owning, developing, operating or maintaining a private airport in lieu of the existing airport or advancement of loans to such companies or other persons engaged in such activities.

Under the 1994 Act, it is only the Airports Authority which can carry out these three purposes and not the lessee of the Airports Authority under Section 12A of the 1994 Act and, therefore, the lessee can have no power to levy and collect the development fees from the embarking passengers. He argued that the conclusion of the High Court in the impugned judgment and order, that under Sub-section (4) of Section 12A of the 1994 Act, the lessee having been assigned some of the functions of the Airports Authority has all the powers of the Airports Authority necessary for the performance of such functions in terms of the lease including the power to levy development fees under Section 22A of the 1994 Act, is therefore not correct. He referred to the various provisions of the Operation, Management and Development Agreement (for short `OMDA') and the State Support Agreement executed between the Airports Authority and DIAL/MIAL to show that the power to levy development fees from the embarking passengers have in fact not been assigned by the Airports Authority to DIAL/MIAL.

Reply on behalf of the Union of India:

7. Mr. Gopal Subramanium, learned Solicitor General appearing for the Union of India, made these submissions:

(i) Section 12A of the 1994 Act begins with a non-obstante clause and it empowers the Airports Authority to lease the premises of an airport to a third party to carry out some of its functions under Section 12 of the 1994 Act and in exercise of this power the Airports Authority and the DIAL and the Airports Authority and MIAL have entered into agreements in respect of the leases and the Airports Authority has delegated some of its functions to DIAL and MIAL in respect of the Delhi Airport and Mumbai Airport respectively. A reading of the lease agreements (OMDA) would show that the functions of operation, maintenance, development, design, construction, up-gradation, modernization, finance and management of the airports are to be carried out by the two lessees. If DIAL and MIAL have to carry out these functions under the lease agreement to develop, finance, design, construct, modernize, operate, maintain, use and regulate the use of the airports by the third party, they must have power to determine, demand, collect and retain appropriate charges from the users of the airports.

(ii) Section 22A of the 1994 Act permits the Airports Authority after previous approval of the Central Government to levy on and collect from embarking passengers at an airport development fees. Accordingly, after the lease of the two airports by the Airports Authority to DIAL and MIAL, the Central Government has conveyed its approval in the two letters dated 09.02.2009 and 27.02.2009 to DIAL and MIAL for levy of development fees by DIAL and MIAL respectively from the two airports. Such approval conveyed by the Central Government is entirely in accordance with Section 12A of the 1994 Act. In view of Sub-section (4) of Section 12A of the 1994 Act providing that a lessee who has been assigned any of the functions of the Airports Authority would have all the powers of the Airports Authority necessary for the performance of such function in terms of the lease, the power of the Airports Authority to levy the development fees has also been rightly assigned to DIAL and MIAL. A reading of the two approval letters would show that various conditions and safeguards have been incorporated in the approval letters to protect the interest of the public and to provide rigorous checks with regard to the manner in which DIAL and MIAL can deal with the fees collected by them and it will be clear from the approval letters that the fees can be utilized only for the purpose mentioned in Section 22A of the 1994 Act.

(iii) The purposes mentioned in Clauses (b) and (c), namely, "development of a new airport" and "a private airport" respectively relate to the very airport in respect of which the lease is executed and fees are collected, as it would be clear from the expression "in lieu of the airport referred to in Clause (a)". It is significant that Section 12A and Section 22A of the 1994 Act were both introduced by the same Amendment Act of 2003.

(iv) Though Section 22A of the 1994 Act, before its amendment by the 2008 Act provided that for levy of development fees "at the rate as may be prescribed" and for regulation and utilization of the development fees "in the prescribed manner", the absence of the rules prescribing the rate of development fees or the manner of regulation and utilization of development fees will not render Section 22A ineffective. The legal proposition that absence of rules and regulations cannot negate the power conferred on an authority by the legislature is settled by decisions of this Court in Orissa State (Prevention and Control of Pollution) Board v. Orient Paperdd Mills and Anr. MANU/SC/0210/2003 : (2003) 10 SCC 421, U.P. State Electricity Board, Lucknow v. City Board, Mussorie and Ors. (supra), Kerala State Electricity Board v. S.N. Govinda Prabhu and Bros. and Ors. MANU/SC/0288/1986 : (1986) 4 SCC 198, Surinder Singh v. Central Government and Ors. MANU/SC/0406/1986 : (1986) 4 SCC 667 and Mysore Road Transport Corporation v. Gop inath Gund achar Char (supra).

(v) The arguments advanced by Mr. Nariman on behalf of the Appellant regarding the amendment of Section 22A of the 1994 Act by the 2008 Act were not raised before the High Court and the foundation for such a plea has also not been laid in the special leave petition. In any case the approval granted by the Central Government to DIAL and MIAL to levy the development fees for a period of three years would not be rendered automatically inoperative on the enactment of the 2008 Act amending Section 22A of the 1994 Act and therefore DIAL and MIAL continue to have the right to collect the development fees by virtue of the approvals granted by the Central Government which are saved by Section 6(c) of the General Clauses Act, 1897 despite the amendment of Section 22A by the 2008 Act. The decisions of this Court in Jayantilal Amrathlal v. Union of India MANU/SC/0043/1971 : (1972) 4 SCC 174, S.L. Srinivasa Jute Twine Mills (P) Ltd. v. Union of India and Anr. MANU/SC/1017/2006 : (2006) 2 SCC 740 and Gurcharan Singh Baldev Singh v. Yashwant Singh and Ors. MANU/SC/0040/1992 : (1992) 1 SCC 428 support this contention.

(vi) Section 2(n) of the 2008 Act defines "service provider" as any person who provides aeronautical services "and is eligible to levy and charge user development fees from the embarking passengers at any airport and includes the authority which manages the airport". This provision expressly indicates that under the 2008 Act also the entity managing the airport is eligible to levy and collect the development fees. The 1994 Act and the 2008 Act provide a statutory framework for the modernization and improvement of the aviation infrastructure of the country and should be interpreted in a harmonious manner so that they complement each other rather than conflict with each other. The Regulatory Authority constituted under the 2008 Act has already issued a public notice dated 23.04.2010 which would show that it has permitted DIAL to continue to levy the development fees at the rate of Rs. 200/- per departing domestic passenger and at the rate of Rs. 1,300/-per departing international passenger with effect from 01.03.2009 on an ad hoc basis pending final determination. The Court should not therefore interfere with the levy and collection of the development fees by DIAL and MIAL at this stage.

Reply on behalf of MIAL and DIAL:

8. Mr. Harish N. Salve, learned senior counsel, and Dr. Abhishek Singhvi, learned senior counsel, appeared for MIAL and DIAL and made these submissions:

(i) The challenge of the Appellant to the levy and collection of airport development fees by the lessees of the two airports is based on a misconception that development fees is in the nature of a tax and can be levied strictly in accordance with Section 22A of the 1994 Act, only by the Airports Authority and not by the lessee. Development fees is not really a tax but charges levied and collected by the lessee for development of facilities for the use of the airport. The lessees, which are non-government companies, have established the utility in a public-private partnership, and do not require a statutory authorization or

permission to recover such charges by way of development fee, from the passengers using the airport and the lessees do not require the support of the statutory provision of Section 22A for levy and collection of development fees. Section 11 of the 1994 Act mandates that the Airports Authority would discharge its functions on business principles and Section 12 of the 1994 Act enumerates the functions of the Airports Authority and as the Airports Authority in the discharge of its functions provides different facilities, it is entitled to collect charges for such facilities as per contractual arrangements with those who use the facilities. These charges are really in the nature of consideration from persons using the facilities provided by the Airports Authority. The nature of these charges for the facilities provided by an authority has been clarified by this Court in The Trustees of the Port of Madras v. Aminchand Pyarelal and Ors. MANU/SC /0235/1975 : (1976) 3 SCC 167, Mumbai Agricultural Produce Market Committee and Anr. v. Hindustan Lever Limited and Ors. MANU/SC/7539/2008 : (2008) 5 SCC 575, Union of India v. S. Narayana Iyer MANU/TN/0383/1969 : (1970) 1 MLJ 19 and Union of India and Ors. v. Motion Picture Association and Ors. MANU/SC/0404/1999 : (1999) 6 SCC 150. As the facilities are in the nature of monopolies, the statute imposes regulations for the charges to prevent an abuse of monopolistic position and Sections 22 and 22A of the 1994 Act reflect such statutory curtailments of the rights of the owners of the facilities to recover sums from airlines and passengers. Hence, the right to recover charges is not based on Sections 22 and 22A but flows from the ownership of the facilities. What is determined, therefore, is the charges that would be contractually recovered from the users of the facilities as was held in Aminchand Pyarelal and Ors. (supra).

(ii) Section 22 of the 1994 Act identified the heads on which charges could be recovered. Section 22A, therefore, merely adds three more heads for which funds could be raised and this is akin to adding components of a tariff. Section 22A does not change the quality and character of the recovery of charges by the owners of the facilities from the users thereof. Section 22A does not also change the nature and character of what is recovered by an airport operator from its customers. The High Court was, therefore, right in coming to the conclusion in the impugned judgment that development fees under Section 22A of the 1994 Act was in the nature of a tariff.

(iii) Section 12A of the 1994 Act (a) recognizes statutorily the power of the Airports Authority to make a lease of the premises of an airport for the purpose of carrying out some of its functions under Section 12 and (b) transfers as it were to the lessee all the powers of the Authority. As will be clear from Sub-section (4) of Section 12A of the Act, the lessee who has been assigned some functions of the Airports Authority under Section 12 of the 1994 Act has the power of the Airports Authority "necessary for the performance of such functions". The power to recover charges for the facilities at the airport in respect of which a lease is made, whether they be the charges under Section 22 or the charges under Section 22A are necessary for discharging of the functions of maintaining and upgrading the airports. Since Sub-section (4) of Section 12A itself states that the lessee shall have "all" the powers of the Airports Authority, there is no warrant to take the view that the lessee shall not have the power of the Airports Authority under Section 22A to levy and collect development fees.

(iv) The functions which have been entrusted to the two lessees, DIAL and MIAL, include the up-gradation and modernization of the airport including construction of new terminals and this will be clear from Clause 2.1 titled "Grant of Function" and Clause 8.3 titled "Master plan" of the OMDA. The relevant provisions of the State Support Agreement between the Airports Authority and the two lessees and in particular clauses 3.1 and 3.1A also deal with the recovery of such charges in the performance of the functions. It is for the discharge of these functions that development fees is levied and collected and the power to collect development fee has been passed on to the lessee under Sub-section (4) of Section 12A of the 1994 Act.

(v) Rules prescribing the rate of development fees and regulation and the manner in which the development fees will be utilized as provided in Section 22A of the 1994 Act cannot curtail the power to levy and collect development fees under Section 22A of the 1994 Act. This proposition is settled by the decisions of this Court in Orissa State (Prevention & Control of Pollution) Board v. Orient Paperdd Mills and Anr. (supra), T. Cajee v. U. Jormanik Siem and Anr. MANU/SC/0029/1960 : AIR 1961 SC 276, The Madras and Southern Maharatta Railway Company Limited v. The Municipal Council Bezwada

MANU/TN/0069/1941 : (1941) 2 MLJ 189 as approved by the Privy Council in its decision reported in MANU/PR/0034/1944 : AIR 1944 PC 71, Jantia Hill Truck Owners Association, etc. v. Shailang Area Coal Dealer and Truck Owner Association and Ors. MANU/SC/1197/2009 : (2009) 8 SCC 492, Surinder Singh v. Central Government and Ors. (supra), Meghalaya State Electricity Board and Anr. v. Jagadindra Arjun MANU/SC/0414/2001 : (2001) 6 SCC 446 and U.P. State Electricity Board, Lucknow v. City Board, Mussorie and Ors. (supra). Since the power to collect the development fee is already available to the Airports Authority or its lessees as part of its power to collect charges for the facilities, absence of a rule does not negate the power. The rule under Section 22A was to be made not for purposes of conferring the power but to regulate the rate of development fees and manner of utilization of development fee as a check on such power.

(vi) After the 2008 Act and after the notification dated 31.08.2009 bringing the provisions of 2008 Act in Chapters III and VI into force w.e.f. 01.09.2009, the Regulatory Authority has jurisdiction under Section 13(1)(b) of the 2008 Act to determine the amount of development fees in respect of major airports, such as, Delhi and Mumbai Airports. The Regulatory Authority has already commenced its functions and has undertaken the process of final determination of development fee. Till the Regulatory Authority modifies the levy of development fees, the two lessees are entitled to collect development fees as per the two letters dated 09.02.2009 and 27.02.2009 of the Central Government conveying the approval to the lessees of the two airports. The contention of the Appellant that the development fees cannot be recovered till such time as the Regulatory Authority determines the rate of development fees is misconceived. The contention of the Appellant that the development fees can be utilized only for the purposes mentioned in Section 22A of the 1994 Act is also misconceived. The approval letters of the Central Government show that the development fees can be utilized for the development of Aeronautical Assets which are Transfer Assets in terms of OMDA; and under the OMDA, these Transfer Assets shall revert to the Airports Authority on the expiry or early termination of OMDA. On a perusal of the three clauses enumerated in Section 22A of the 1994 Act, it is clear that depending on the functions assigned to the lessee, the corresponding powers to collect development fees for discharging the function also is passed on to the lessee under Sub-section (4) of Section 12A of the 1994 Act. In other words, there is a clear nexus established between the function so assigned and the power to collect the development fees.

Rejoinder on behalf of the Appellants:

9. In rejoinder, Mr. Nariman made these submissions:

(i) Under Clause 13(i) of OMDA the lessee has undertaken to arrange for financing and/or meeting of all financial requirements through suitable debt and equity the contribution in order to comply with its obligation including development of the airport pursuant to the Master Plan and the Major Development Plans. Hence, there was no question of levy of development fees by the lessee for the purposes of development of the airport which has been leased out to the lessee. The airports belong to the Central Government and the Airports Authority has leased out the airport premises to the lessee to manage the airport. Section 38 of the 1994 Act empowers the Central Government to temporarily divest the Airports Authority of the management of the airport and Section 39 of the 1994 Act empowers the Central Government to supersede the Airports Authority. The lessee, therefore, is not the owner of the airport and is consequently not empowered to charge development fess for the development of the airport. Only a limited right has been conferred on the private lessee under Section 12A of the 1994 Act to undertake some of the functions of the Airports Authority enumerated in Clause 2.1.1 of the OMDA read with Schedule 5 and Schedule 6 which enumerate the aeronautical services and non-aeronautical services respectively.

(ii) The levy under Section 22A of the 1994 Act is for the specific purposes mentioned in Clauses (a), (b) or (c) thereof and though termed as fees, it is really in the nature of a cess and therefore there need not be any direct co-relation between the levy of fees and the services rendered as has been held by the High Court in the impugned judgment. In Vijayalashmi Rice Mills and Ors. v. Commercial Tax Officers, Palakot and Ors. MANU/SC/3847/2006 : (2006) 6 SCC 763, this Court has also held that ordinarily a cess means a tax which raises revenue which is applied to a specific purpose. This Court has held in Commissioner of

Income Tax, Udaipur, Rajasthan v. Mcdowell and Company Ltd. MANU/SC/0964/2009 : (2009)10 SCC 755 that the power to levy tax, duty, cess or fee can be exercised only under law authorizing the levy. Thus, cess is ultimately a compulsory exaction of money and must satisfy the test of Article 265 of the Constitution which declares that no tax shall be levied or collected without authority of law. This Court has also held in Ahmedabad Urban Development Authority v. Sharadkumar Jayantikumar Pasawalla and Ors. MANU/SC/0400/1992 : (1992) 3 SCC 285 that the power of imposition of tax and/or fee must be very specific and there is no scope of implied authority for imposition of such tax or fee. This position of law has been reiterated by this Court in State of West Bengal v. Kesoram Industries Ltd. and Ors. MANU/SC/0038/2004 : (2004) 10 SCC 201. Section 22A of the 1994 Act was, therefore, enacted by the Amendment Act of 2003 to specifically empower the Development Authority to impose levy and collect development fees which is to be used for the specific purposes indicated in Clauses (a), (b) and (c) of Section 22A of the 1994 Act and this power cannot be usurped by the lessee of the airport by treating it as charges for facilities.

(iii) The judgments relied on by the Respondents in support of their contention that non-framing of rules do not negate the power to levy development fees under Section 22A of the 1994 Act have been rendered by this Court in the context of enactments which are not pari materia with Section 22A of the 1994 Act. In Bangalore Water Supply & Sewerage Board v. A. Rajappa and Ors. MANU/SC/0257/1978 : (1978) 2 SCC 213, this Court has cautioned that the same words may mean one thing in one context and another in different context. This position of law has also been stated in Justice G.P. Singh's Treatise on Interpretation of Statutes, 12th Edition 2010 at pages 298-299. Hence, the judgments cited on behalf of the Respondents are of no aid to interpret Section 22A of the 1994 Act which clearly provides that the development fees can be levied and collected at the rate prescribed by the rules and are to be regulated and utilized in the manner prescribed by the rules. In Mohammad Hussain Gulam Mohammad and Anr. v. The State of Bombay and Anr. MANU/SC/0083/1961 : 1962 (2) SCR 659, a Constitution Bench of this Court has held that since Section 11 of the Bombay Agricultural Produce Markets Act, 1939 provides that rules will prescribe the maxima and the fees fixed must be within the maxima, till such maxima are fixed by the rules, it would not be possible for the Market Committee to levy fees. Similarly, in Dhrangadhra Chemical Works Ltd. v. State of Gujarat and Ors. MANU/SC/0481/1972 : (1973) 2 SCC 345, this Court has held that the framing of rules was a mandatory requirement enjoined by Section 60(a)(ii) of the Bombay Municipalities Act, 1901 before imposing a tax by a resolution passed at a general meeting.

(iv) The two letters dated 09.02.2009 and 27.02.2009 of the Government of India, Ministry of Civil Aviation, to DIAL and MIAL respectively can convey only the approvals of the Central Government under Section 22A of the 1994 Act for levy of development fees by DIAL and MIAL respectively but cannot authorize DIAL and MIAL to levy and collect development fees under Section 22A of the 1994 Act because under this provision the Airports Authority only has the power to levy and collect development fees and DIAL and MIAL have no such authority. The two letters dated 09.02.2009 and 27.02.2009 are not saved by Section 6 of the General Clauses Act, 1897 because this provision does not protect any action taken under the authority of the letter.

(v) The public notice dated 23.04.2010 issued by the Regulatory Authority pertaining to levy of development fees by DIAL regarding the fees of Rs. 200/- per departing domestic passenger and Rs. 1300/- per departing international passenger on ad hoc basis is without jurisdiction as under the 2008 Act, the Regulatory Authority alone has the power to determine the rate of development fees in respect of major airports after following the procedure laid down in Section 13 of the 2008 Act. There is no public notice issued by the Regulatory Authority so far in respect of the Mumbai Airport. The levy and collection of development fees by DIAL and MIAL at the two airports are, therefore ultra vires and may be restrained by the Court.

Relevant Provisions of Law:

10. Section 12 of the 1994 Act as amended by the Amendment Act of 2003, Section 22 of the 1994 Act, Sections 12A and 22A inserted by the Amendment Act of 2003 with effect from 01.07.2004 and Section 22A as amended by the 2008 Act, which are relevant for deciding the questions raised before us by the

parties, are extracted herein below:

12. Functions of the Authority.-- (1) Subject to the rules, if any, made by the Central Government in this behalf, it shall be the function of the Authority to manage the airports, the civil enclaves and the aeronautical communication stations efficiently.

(2) It shall be the duty of the Authority to provide air traffic service and air transport service at any airport and civil enclaves.

(3) Without prejudice to the generality of the provisions contained in Sub-sections (1) and (2), the Authority may-

(a) plan, develop, construct and maintain runways, taxiways, aprons and terminals and ancillary buildings at the airports and civil enclaves;

(aa) establish airports, or assist in the establishment of private airports by rendering such technical, financial or other assistance which the Central Government may consider necessary for such purpose. (Inserted by the Amendment Act of 2003)

(b) plan, procure, install and maintain navigational aids, communication equipment, beacons and ground aids at the airports and at such locations as may be considered necessary for safe navigation and operation of aircrafts;

(c) provide air safety services and search and rescue, facilities in co-ordination with other agencies;

(d) establish schools or institutions or centers for the training of its officers and employees in regard to any matter connected with the purposes of this Act;

(e) construct residential buildings for its employees;

(f) establish and maintain hotels, restaurants and restrooms at or near the airports;

(g) establish warehouses and cargo complexes at the airports for the storage or processing of goods;

(h) arrange for postal, money exchange, insurance and telephone facilities for the use of passengers and other persons at the airports and civil enclaves;

(i) make appropriate arrangements for watch and ward at the airports and civil enclaves;

(j) regulate and control the plying of vehicles, and the entry and exit of passengers and visitors, in the airports and civil enclaves with due regard to the security and protocol functions of the Government of India;

(k) develop and provide consultancy, construction or management services, and undertake operations in India and abroad in relation to airports, air-navigation services, ground aids and safety services or any facilities thereat;

(l) establish and manage heliports and airstrips;

(m) provide such transport facility as are, in the opinion of the Authority, necessary to the passengers traveling by air;

(n) form one or more companies under the Companies Act, 1956 or under any other law relating to companies to further the efficient discharge of the functions imposed on it by this Act;

(o) take all such steps as may be necessary or convenient for, or may be incidental to, the exercise of any power or the discharge of any function conferred or imposed on it by this Act;

(p) perform any other function considered necessary or desirable by the Central Government for ensuring the safe and efficient operation of aircraft to, from and across the air space of India;

(q) establish training institutes and workshops;

(r) any other activity at the airports and the civil enclaves in the best commercial interests of the Authority including cargo handling, setting up of joint ventures for the discharge of any function assigned to the Authority.

(4) In the discharge of its functions under this section, the Authority shall have due regard to the development of air transport service and to the efficiency, economy and safety of such service.

(5) Nothing contained in this section shall be construed as-(a) authorizing the disregard by the Authority of any law for the time being in force; or (b) authorizing any person to institute any proceeding in respect of duty or liability to which the Authority or its officers or other employees would not otherwise be subject.

22. Power of the Authority to charge fees, rent, etc.- The Authority may,-

(i) With the previous approval of the Central Government, charge fees or rent -

(a) for the landing, housing or parking of aircraft or for any other service or facility offered in connection with aircraft operations at any airport, heliport or airstrip;

Explanation. - In this sub-clause "aircraft" does not include an aircraft belonging to any armed force of the Union and "aircraft operations" does not include operations of any aircraft belonging to the said force;

(b) for providing air traffic services, ground safety services, aeronautical communications and navigational aids and meteorological services at any airports and at any aeronautical communication station;

(c) for the amenities given to the passengers and visitors at any airport, civil enclave, heliport or airstrip;

(d) for the use and employment by persons of facilities and other services provided by the Authority at any airport, civil enclave heliport or airstrip;

(ii) with due regard to the instructions that the Central Government may give to the Authority, from time to time, charge fees or rent from persons who are given by the Authority any facility for carrying on any trade or business at any airport, heliport or airstrip.

Inserted by the Amendment Act of 2003

12A. Lease by the authority.--(1) Notwithstanding anything contained in this Act, the Authority may, in the public interest or in the interest of better management of airports, make a lease of the premises of an airport (including buildings and structures thereon and appertaining thereto) to carry out some of its functions under Section 12 as the Authority may deem fit:

Provided that such lease shall not affect the functions of the Authority under Section 12 which relates to air traffic service or watch and ward at airports and civil enclaves.

(2) No lease under Sub-section (1) shall be made without the previous approval of the Central Government.

(3) Any money, payable by the lessee in terms of the lease made under Sub-section (1), shall form part of the fund of the Authority and shall be credited thereto as if such money is the receipt of the Authority for all purposes of Section 24.

(4) The lessee, who has been assigned any function of the Authority under Sub-section (1), shall have all

the powers of the Authority necessary for the performance of such function in terms of the lease.

Inserted by the Amendment Act of 2003

22A. Power of Authority to levy development fees at airports.-- The Authority may, after the previous approval of the Central Government in this behalf, levy on, and collect from, the embarking passengers at an airport, the development fees at the rate as may be prescribed and such fees shall be credited to the Authority and shall be regulated and utilized in the prescribed manner, for the purposes of-

(a) funding or financing the costs of up gradation, expansion or development of the airport at which the fees is collected; or

(b) establishment or development of a new airport in lieu of the airport referred to in Clause (a); or

(c) investment in the equity in respect of shares to be subscribed by the Authority in companies engaged in establishing, owning, developing, operating or maintaining a private airport in lieu of the airport referred to in Clause (a) or advancement of loans to such companies or other persons engaged in such activities.

As amended by the 2008 Act

22A. Power of Authority to levy development fees at airports.-- The Authority may,--

(i) after the previous approval of the Central Government in this behalf, levy on, and collect from, the embarking passengers at an airport other than the major airports referred to in Clause (h) of Section 2 of the Airports Economic Regulatory Authority of India Act, 2008 the development fees at the rate as may be prescribed;

(ii) levy on, and collect from, the embarking passengers at major airports referred to in Clause (h) of Section 2 of the Airports Economic Regulatory Authority of India Act, 2008 the development fees at the rate as may be determined under Clause (b) of Sub-section (1) of Section 13 of the Airports Economic Regulatory Authority of India Act, 2008,

and such fees shall be credited to the Authority and shall be regulated and utilized in the prescribed manner, for the purposes of-

(a) funding or financing the costs of up gradation, expansion or development of the airport at which the fees is collected; or

(b) establishment or development of a new airport in lieu of the airport referred to in Clause (a); or

(c) investment in the equity in respect of shares to be subscribed by the Authority in companies engaged in establishing, owning, developing, operating or maintaining a private airport in lieu of the airport referred to in Clause (a) or advancement of loans to such companies or other persons engaged in such activities.

Our conclusions with reasons:

11. The conclusion of the High Court in the impugned judgment that the lessee of the airport has the power of the Airports Authority under Section 22A to levy and collect development fees from the embarking passengers by virtue of Sub-section (4) of Section 12A of the Act is contrary to the legislative intent of the Amendment Act of 2003. On a perusal of Section 22A of the 1994 Act inserted by the Amendment Act of 2003, we find that the purposes for which the development fees are to be levied and collected from the embarking passengers at an airport are:

(a) funding or financing the costs of up-gradation, expansion or development of the airports at which the fees is collected, or

(b) establishment or development of a new airport in lieu of the airport referred to in Clause (a), or

(c) investment in the equity in respect of shares to be subscribed by the Airports Authority in companies engaged in establishing, owning, developing, operating or maintaining a private airport in lieu of the airport referred to in Clause (a) or advancement of loans to such companies or other persons engaged in such activities.

Though Airports Authority can utilize the fees levied by it, for all or any of these purposes mentioned in Clauses (a), (b) and (c) of Section 22A, what can be assigned by the Airports Authority to a lessee under a lease entered into under Section 12A of the 1994 Act is the power to levy fees for the purposes mentioned in Clause (a) of Section 22A of the 1994 Act.

12. The functions of the Airports Authority under Clause (aa) of Sub-section (3) of Section 12 also inserted by the Amendment Act of 2003 to establish airports, or assist in the establishment of private airports by rendering such technical, financial or other assistance which the Central Government may consider necessary for such purposes cannot be assigned to the lessee under Section 12A of the 1994 Act. The Amendment Act of 2003 which also inserted Section 12A therefore provides in Sub-section (1) of Section 12A that the Airports Authority can make a lease of the premises of an airport (including buildings and structures thereon and appertaining thereto) to carry out "some" of its functions under Section 12 as the Airports Authority may, in the public interest or in the interest of better management of airports, deem fit. Obviously, "a lease of premises of an airport" as contemplated in Sub-section (1) of Section 12A cannot include establishing an airport or assisting in establishment of private airports as contemplated in Clause (aa) of Sub-section (3) of Section 12 of the Act.

13. To enable the Airports Authority to perform its statutory function of establishing a new airport or to assist in the establishment of private airports, the legislature has thought it fit to empower the Airports Authority to levy and collect development fees as will be clear from Clauses (b) and (c) of Section 22A of the 1994 Act. Such development fees levied and collected under Section 22A can also be utilized for funding or financing the costs of up-gradation, expansion and development of an existing airport at which the fees is collected as provided in Clause (a) of Section 22A of the Act and in case the lease of the premises of an existing airport (including buildings and structures thereon and appertaining thereto) has been made to a lessee under Section 12A of the Act, the Airports Authority may meet the costs of up-gradation, expansion and development of such leased out airport to a lessee, but this can be done only if the rules provide for such payment to the lessee of an airport because Section 22A says that the development fees are to be regulated and utilized in the manner prescribed by the Rules. Since the lessee of an airport cannot be assigned the function of the Airports Authority to establish airports or assist in establishing private airports in lieu of the existing airports at which the development fees is being collected, the lessee cannot under Sub-section (4) of Section 12A have the power of the Airports Authority under Section 22A of the 1994 Act to levy and collect development fees. This is because Sub-section (4) of Section 12A provides that the lessee can have all those powers of the Airports Authority which are necessary for performance of such functions as assigned to it under Sub-section (1) of Section 12A in terms of the lease. Moreover, since we have held that the function of establishment and development of a new airport in lieu of an existing airport and the function of establishing a private airport are exclusive functions of the Airports Authority under the 2004 Act, and these statutory functions cannot be assigned by the Airports Authority under lease to a lessee under Section 12A of the Act, the lease agreements, namely, the OMDA and the State Support agreement could not make a provision conferring the right on the lessee to levy and collect development fees for the purpose of discharging these statutory functions of the Airports Authority. We, therefore, do not think it necessary to refer to the clauses of the OMDA and the State Support Agreements executed in favour of the two lessees to find out whether the right of levying and collecting the development fees has been assigned to the lessees or not.

14. The High Court was not correct in coming to the conclusion in the impugned judgment that the development fees to be levied and collected under Section 22A of the 1994 Act is in the nature of tariff or charges collected by the Airports Authority for the facilities provided to the passengers and the airlines. It will be clear from a bare reading of Sections 22 and 22A that there is a distinction between the charges, fees and rent collected under Section 22 and the development fees levied and collected under Section 22A of the 1994 Act. The charges, fees and rent collected by the Airports Authority under Section 22 are for

the services and facilities provided by the Airports Authority to the airlines, passengers, visitors and traders doing business at the airport. Therefore, when the Airports Authority makes a lease of the premises of an airport (including buildings and structures thereon and appertaining thereto) in favour of a lessee to carry out some of its functions under Section 12, the lessee, who has been assigned such functions, will have the powers of the Airports Authority under Section 22 of the Act to collect charges, fees or rent from the third parties for the different facilities and services provided to them in terms of the lease agreement. The legal basis of such charges, fees or rent enumerated in Section 22 of the 2008 Act is the contract between the Airports Authority or the lessee to whom the airport has been leased out and the third party, such as the airlines, passengers, visitors and traders doing business at the airport. But there can be no such contractual relationship between the passengers embarking at an airport and the Airports Authority with regard to the up-gradation, expansion or development of the airport which is to be funded or financed by development fees as provided in Clause (a) of Section 22A. Those passengers who embark at the airport after the airport is upgraded, expanded or developed will only avail the facilities and services of the upgraded, expanded and developed airport. Similarly, there can be no contractual relationship between the Airports Authority and passengers embarking at an airport for establishment of a new airport in lieu of the existing airport or establishment of a private airport in lieu of the existing airport as mentioned in Clauses (b) and (c) of Section 22A of the 1994 Act. In the absence of such contractual relationship, the liability of the embarking passengers to pay development fees has to be based on a statutory provision and for this reason Section 22A has been enacted empowering the Airports Authority to levy and collect from the embarking passengers the development fees for the purposes mentioned in Clauses (a), (b) and (c) of Section 22A of the Act. In other words, the object of Parliament in inserting Section 22A in the 2004 Act by the Amendment Act of 2003 is to authorize by law the levy and collection of development fees from every embarking passenger de hors the facilities that the embarking passengers get at the existing airports. The nature of the levy under Section 22A of the 2004 Act, in our considered opinion, is not charges or any other consideration for services for the facilities provided by the Airports Authority. This Court has held in Vijayalashmi Rice Mills and Ors. (v. Commercial Tax Officers, Palakot and Ors. (supra) that a cess is a tax which generates revenue which is utilized for a specific purpose. The levy under Section 22A though described as fees is really in the nature of a cess or a tax for generating revenue for the specific purposes mentioned in Clauses (a), (b) and (c) of Section 22A.

15. Once we hold that the development fees levied under Section 22A is really a cess or a tax for a special purpose, Article 265 of the Constitution which provides that no tax can be levied or collected except by authority of law gets attracted and the decisions of this Court starting from The Trustees of the Port of Madras v. Aminchand Pyarelal and Ors. . (supra), cited on behalf of the Union of India and DIAL and MIAL on the charges or tariff levied by a service or facility provided are of no assistance in interpreting Section 22A. It is a settled principle of statutory interpretation that any compulsory exaction of money by the Government such as a tax or a cess has to be strictly in accordance with law and for these reasons a taxing statute has to be strictly construed. As observed by this Court in Ahmedabad Urban Development Authority v. Sharadkumar Jayantikumar Pasawalla and Ors. (supra), it has been consistently held by this Court that whenever there is compulsory exaction of money, there should be specific provision for the same and there is no room for intendment and nothing is to be read or nothing is to be implied and one should look fairly to the language used. Looking strictly at the plain language of Section 22A of 1994 Act before its amendment by the 2008 Act, the development fees were to be levied on and collected from the embarking passengers "at the rate as may be prescribed". Since the rules have not prescribed the rate at which the development fees could be levied and collected from the embarking passengers, levy and collection of development fees from the embarking passengers was without the authority of law. For this conclusion, we are supported by the Constitution Bench judgment of this Court in Mohammad Hussain Gulam Mohammad and Anr. v. The State of Bombay and Anr. (supra). In that case, the Court found that Section 11 of the Bombay Agricultural Produce Markets Act, 1939 provided that the market committee may levy market fees subject to the maxima as prescribed and the Court held that unless the State Government fixes the maxima by rule, it is not open to the committee to fix any fees at all. We are also supported by the decision of a three judges Bench of this Court which held in Dhrangadhra Chemical Works Ltd. v. State of Gujarat and Ors. (supra) that the mandatory provision in Section 60(a)(ii) of the Bombay Municipalities Act, 1901 requiring framing of rule for imposition of tax not having been complied with, the imposition of tax was illegal. In Principles of Statutory Interpretation, 12th Edition, at Page 813,

Justice G.P. Singh states:

> There are three components of a taxing statute, viz., subject of the tax, person liable to pay the tax and the rate at which the tax is levied. If there be any real ambiguity in respect of any of these components which is not removable by reasonable construction, there would be no tax in law till the defect is removed by the legislature.

Thus, the rate at which the tax is to be levied is an essential component of a taxing provision and no tax can be levied until the rate is fixed in accordance with the taxing provision. We have, therefore, no doubt in our mind that until the rate of development fees was prescribed by the Rules, as provided in Section 22A of the 1994 Act, development fees could not be levied on the embarking passengers at the two major airports.

16. The High Court, in our considered opinion, was not correct in coming to the conclusion in the impugned judgment that the exercise of the power to levy and collect development fees under Section 22A was not dependent on the existence of the rules and, therefore, this power could be exercised even if the rules have not been framed prescribing the rate of development fees under Section 22A of the 1994 Act. The High Court has relied upon the decision of this Court in U.P. State Electricity Board, Lucknow v. City Board, Mussorie and Ors. (supra). In that case, the High Court was called upon to interpret Section 46(1) of the Electricity (Supply) Act, 1948, which provided that a tariff to be known as the Grid Tariff shall, in accordance with any regulations made in this behalf, be fixed from time to time by the Board. The High Court held that it only provides that the Grid Tariff shall be in accordance with any regulations made in this behalf and that means that if there were any regulations, the Grid Tariff should be fixed in such regulations and nothing more and, therefore, the framing of regulations under Section 70(h) of the Act cannot be a condition precedent for fixing the Grid Tariff. The language of Section 22A of the 1994 Act is different. It clearly states that the Airports Authority may levy on and collect from the embarking passengers at the airport the development fees at the rate as may be prescribed. Hence, unless the rate is prescribed by the rules, the Airports Authority cannot collect the development fees.

17. The High Court has also relied on the decision of this Court in Mysore Road Transport Corporation v. Gopinath Gundachar Char (supra). In that case, the Court was called upon to interpret the provisions of the Road Transport Corporations Act, 1950. Section 45(1) of that Act provided that a Corporation may, with the previous sanction of the State Government, make regulations, not inconsistent with the Act and the rules made there under, for the administration of the affairs of the Corporation and in particular, providing for the conditions of appointment and service. The Court has held that in the absence of regulations framed under Section 45 laying down the conditions of service, the Corporation can still appoint officers or servants as may be necessary for the efficient performance of its duties on such terms and conditions as it thinks fit and it cannot be held that unless such regulations are framed under Section 45, the Corporation would have no power to appoint officers and servants and fix the conditions of service of its officers and servants. From the language of Section 22A of the 1994 Act, on the other hand, we find that there is no room whatsoever for the Airports Authority to levy and collect any development fees except at the rate prescribed by the Rules.

18. The High Court has also relied on the decision of this Court in Sudhir Chandra Nawn v. Wealth-Tax Officer, Calcutta and Ors. (supra). In that case, Section 7(1) of the Wealth Tax Act, 1957 was challenged as ultra vires the Parliament on inter alia the ground that no rules were framed in respect of the valuation of lands and buildings and this Court repelled the challenge and held that Section 7 only directs that the valuation of any asset other than cash has to be made subject to the rules and does not contemplate that there shall be rules before an asset can be valued and failure to make rules for valuation of a type of asset cannot therefore affect the vires of Section 7. In Section 22A of the 1994 Act, on the other hand, the levy or development fees was to be at the rate as prescribed by the Rules and hence could not be made without the rules. All other decisions starting from T. Cajee v. U. Jormanik Siem and Anr. cited on behalf of the Union of India, DIAL and MIAL on this point are cases where the statutory power could be exercised without the rules or the regulations, whereas the power under Section 22A of the 1994 Act to levy development fees could not be exercised without the rules prescribing the rate at which development fees

was to be levied.

19. Section 22A of the 1994 Act before its amendment by the 2008 Act specifically provided that the development fees may be levied and collected at the rate as may be prescribed by the rules. Hence, the rate of development fees could not be determined by the Central Government in the two letters dated 09.02.2009 and 27.02.2009 communicated to DIAL and MIAL respectively. Under Section 22A of the 1994 Act, the Central Government has only the power to grant its previous approval to the levy and collection of the development fees but has no power to fix the rate at which the development fees is to be levied and collected from the embarking passengers. Hence, the levy and collection of development fees by DIAL and MIAL at the rates fixed by the Central Government in the two letters dated 09.02.2009 and 27.02.2009 are ultra vires the 1994 Act and the two letters being ultra vires the 1994 Act are not saved by Section 6 of the General Clauses Act, 1897.

20. After the amendment of Section 22A by the 2008 Act with effect from 01.01.2009, the rate of development fees to be levied and collected at the major airports such as Delhi and Mumbai is to be determined by the Regulatory Authority under Clause (b) of Sub-section (1) of Section 13 of the 2008 Act and not by the Central Government. The Regulatory Authority constituted under the 2008 Act has already issued a public notice dated 23.04.2010 permitting DIAL to continue to levy the development fees at the rate of Rs. 200/- per departing domestic passenger and at the rate of Rs. 1,300/- per departing international passenger with effect from 01.03.2009 on an ad hoc basis pending final determination under Section 13 of the 2008 Act. This public notice dated 23.04.2010 has been issued by the Regulatory Authority under the 2008 Act long after the impugned decision of the High Court upholding the levy and it has not been challenged by the Appellants. Hence, the question of examining the validity of the said public notice dated 23.04.2010 issued by the Regulatory Authority pertaining to levy and collection of development fees by DIAL does not arise. But no such public notice has been issued by the Regulatory Authority under the 2008 Act pertaining to levy and collection of development fees by MIAL. Hence, MIAL could not continue to levy and collect development fees at the major airport at Mumbai and cannot do so in future until the Regulatory Authority passes an appropriate order under Section 22A of the 1994 Act as amended by the 2008 Act.

21. Having held that the levy and collection of development fees by DIAL and MIAL at the rates fixed by the Central Government in the two letters dated 09.02.2009 and 27.02.2009 are ultra vires the 1994 Act and that MIAL could not continue to levy and collect of development fees at the major airport at Mumbai without an appropriate order passed by the Regulatory Authority, the question is whether there is need to pass any consequential direction for refund of the development fees collected by DIAL and MIAL pursuant to the two letters dated 09.02.2009 and 27.02.2009 of the Central Government and the development fees levied and collected by MIAL after the amendment of Section 22A by the 2008 Act.

22. This Court has held in Orissa Cement Ltd. v. State of Orissa MANU/SC/0381/1991 : AIR 1991 SC 1676 that a finding regarding the invalidity of a levy need not automatically result in a direction for a refund of all collections thereof made earlier and that the Court has, and must be held to have, a certain amount of discretion to grant, mould or restrict the relief in a manner most appropriate to the situation before it in such a way as to advance the interests of justice. In the facts of this case,the development fees have been collected by DIAL and MIAL on the basis of the two letters dated 09.02.2009 and 27.02.2009 of the Central Government from the embarking passengers at Delhi and Mumbai and these embarking passengers, from whom the development fees have been collected, cannot now be identified nor can they be traced for making the refund to them. Further there is significantly no prayer for refund in any of the three writ petitions. However, it is necessary to ensure that the development fees levied and collected are utilized only for the specific purposes mentioned in Section 22A of the 1994 Act. In our considered opinion, interests of justice would be met if DIAL and MIAL are directed to account to the Airport Authority that the development fees so far levied and collected by them have been utilized for the purposes mentioned in Clause (a) of Section 22A of the 1994 Act.

Reliefs:

23. In view of the foregoing, we allow these appeals as follows:

(i) We hold that development fees could not be levied and collected by the lessees of the two major airports, namely, DIAL and MIAL, on the authority of the two letters dated 09.02.2009 and 27.02.2009 of the Central Government from the embarking passengers under the provisions of Section 22A of the 1994 Act.

(ii) We declare that with effect from 01.01.2009, no development fee could be levied or collected from the embarking passengers at major airports under Section 22A of the 1994 Act, unless the Airports Economic Regulatory Authority determines the rates of such development fee.

(iii) We direct that MIAL will henceforth not levy and collect any development fee at the major airport at Mumbai until an appropriate order is passed by the Airports Economic Regulatory Authority under Section 22A of the 1994 Act as amended by the 2008 Act.

(iv) We direct that DIAL and MIAL will account to the Airports Authority the development fees collected pursuant to the two letters dated 09.02.2009 and 27.02.2009 of the Central Government and the Airports Authority will ensure that the development fees levied and collected by DIAL and MIAL have been utilized for the purposes mentioned in Clause (a) of Section 22A of the 1994 Act.

(v) We further direct that henceforth, any development fees that may be levied and collected by DIAL and MIAL under the authority of the orders passed by the Airports Economic Regulatory Authority under Section 22A of the 1994 Act as amended by the 2008 Act shall be credited to the Airports Authority and will be utilized for the purposes mentioned in Clauses (a), (b) or (c) of Section 22A of the 1994 Act in the manner to be prescribed by the rules which may be made as early as possible.

(vi) Nothing stated herein shall come in the way of any aggrieved person challenging the public notice dated 23.04.2010 issued by the Airports Economic Regulatory Authority in accordance with law.

(vii) The impugned judgment of the High Court is set aside and the Writ Petitions filed by the Appellants are allowed with these directions.

(viii) There shall be no order as to costs.

(ix) I.A. No. 3 in Civil Appeal arising out of S.L.P. (C) No. 23541 of 2009 for impleadment stands rejected.

2007 APTEL 223*

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY, NEW DELHI
(APPELLATE JURISDICTION)

Karnataka Power Transmission Corporation Limited
v.
Karnataka Electricity Regulatory Commission, Bangalore and Ors.

APPEAL NO. 84 OF 2006
DECIDED ON: 29.08.2006

Coram

E. Padmanabhan, Member (Judicial) and H.L. Bajaj, Member (Technical)

Jurisdiction — Whether KERC acted with authority, fairly and reasonably in interfering with the internal management and domain of the Appellant Transmission utility with respect to its commercial plan — Held, there is no parallel provision in Section 86 or any other provisions in the Electricity Act, 2003 which will enable the Commission to regulate the investment approval for generation, transmission, distribution and supply of electricity within the State — Legislature has left it to the utilities to decide their plans of investment or improvement of system or expansion to meet the demand of power within their area including up gradation and maintenance for a better and quality generation, transmission or supply as the case may be — KERC not acted reasonably or fairly by interfering with the internal, commercial, management and domain of the transmission utility with respect to its commercial plan

Appointment of Committee — Held, when the Technical Experts and Engineers, have applied their mind with respect to their proposal and plan it is not for the Commission to examine by appointing another expert Committee — Appointment of expert committee by Regulator at the stage of proposal to invest is neither warranted nor justified as the plan to invest, estimate of investment and the program of up gradation or extension or development of transmission system is exclusively within the domain of transmission utility

Consumers — Whether the consumers have any say with respect to proposal to invest for up gradation of Transmission system better maintenance and quality service — Held, consumers interest do not arise at this stage for consideration — Nor they could be an objector in respect of proposal or plan or investment by utility — Liability of the consumers, if any, arise only when Regulatory Commission subject to its prudent check allows such expenditure, while fixing the annual Revenue requirement and determining the tariff — Till then, the consumers have no say and there could be no objection from their side

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* MANU/ET/0039/2006

Labour cost — Disallowance — Whether the disallowance of a portion towards labour cost is sustainable — Commission has disallowed the portion of labour cost and — Commission has disallowed the labour cost such as bonus / exgratia, cost of supplying electricity to its employees to pass through in the tariff — Said conclusion of the Commission well founded — No illegality or error on the said disallowance

ROE — Disallowance — Whether disallowance of ROE on reserves and surplus is sustainable and legal — Grievance of Appellant that return on equity is not given with respect to reserves and surplus — Commission allowed return on equity only for a sum of Rs. 682.55 crore while the capital base of ROE was Rs. 897 crore as affirmed in the previous year — During years 2005-06, Commission allowed ROE on reserves & surplus as well — Now there is no reason or justification to treat differently and deny the Appellant with respect to its claim of ROE on reserves & surplus — Reserves & surplus also form part of share capital and the Regulatory Commission ought to have allowed ROE — Question answered in fvour of appellant

Depreciation and Rate of Depreciation — Disallowance of — Whether disallowance of depreciation and rate of depreciation adopted by Commission is liable to be interfered in this appeal — Appellant claimed depreciation at 7.5 per cent while the Commission allowed depreciation @ 3 per cent on basis of notification issued by CERC — Held, statutory regulations is in force and it has to be implemented — CERC modified rate of depreciation but that does not over rule statutory regulation which is binding on the Commission who has framed — Statutory regulation which was in force alone applies — Draft policy referred to also will not change the situation and it is the statutory regulation which was in force on the crucial date which has to be followed — So long the statutory Regulations are in force and remains un—amended, it is obligatory to allow depreciation at the rate provided in the statutory regulations — There cannot be a deviation from the Regulations — Question answered in favour of the Appellant

Reduction of transmission loss — Whether any interference called for with respect to reduction of transmission loss directed by the Commission — Commission has issued directions to reduce transmission losses to the level of 4.06 per cent and this is not an impossibility — It is for the utility to improve its performance and reduce the transmission loss — The Commission is well founded in issuing direction in this respect — Question answered against the Appellant

Held

[1] There is no parallel provision in Section 86 or any other provisions in The Electricity Act, 2003 which will enable the Commission to regulate the investment approval for generation, transmission, distribution and supply of electricity within the State, and it is not as if it is the repository of entire

power or authority to control the whole spectrum of Transmission or Distribution including financial management of utilities or it has the power to micromanage the affairs of the utilities. [p. 229, para 7 i]

[2] Respondents is unable to point out any provison in this respect. Provisons of 2003 Act has made a deviation and that being the position we are at loss to know how the Commission could take upon itself to examine the sagacity of investment proposed by utility in development or up gradation or maintenance of its system, by engaging a team of experts to review or study the merits of the proposal or plans to invest. [p. 230, para 8 b]

[3] The only provison, if at all which has a relevance is Section 86(2), which is advisory in nature. This being the position it is obviously clear that the legislature has left it to the utilities to decide their plans of investment or improvement of system or expansion to meet the demand of power within their area including up gradation and maintenance for a better and quality generation, transmission or supply as the case may be. [p. 230, para 9 c]

[4] We are unable to appreciate the procedure adopted by the Commission in appointing a Committee to examine the proposal or to find out whether it is feasible or not to implement the investment proposal. [p. 230, para 10 c]

[5] Further when the Technical Experts and Engineers, have applied their mind with respect to their proposal and plan it is not for the Commission to examine by appointing another Expert Committee. [p. 230, para 11 g]

[6] The appointment of an expert committee by the regulator at the stage of proposal to invest is neither warranted nor justified as the plan to invest, estimate of investment and the program of up gradation or extension or development of transmission system is exclusively within the domain of transmission utility. [p. 231, para 15 g]

[7] The consumers interest also do not arise at this stage for consideration nor they could be an objector in respect of proposal or plan or investment by utility as the liability of the consumers, if any, arise or there could be a passing by way of return on equity or interest etc. as such contingency arises only when the Regulatory Commission subject to its prudent check allows such expenditure, while fixing the annual Revenue requirement and determining the Tariff. Till then, the consumers have no say and there could be no objection from their side. When the consumers complain poor service or failure to maintain supply, to face such a situation the utility has to plan in advance, invest in advance, execute the project or scheme for better performance and maintain. [p. 233, para 22 i]

[8] The Karnataka Electricity Regulatory Commission has not acted reasonably or fairly in interfering with the internal, commercial, management and domain of the transmission utility with respect to its commercial plan and proposal to invest a substantial sum. We have made ourselves clear and in the future years to come the Commission will take this into consideration and will act accordingly. The point "A" is answered in the above terms. [p. 234, para 23 b]

[9] Commission has disallowed the portion of labour cost and we do not find any illegality or error on the said disallowance. The Commission has disallowed the labour cost such as bonus/exgratia, cost of supplying electricity to its employees to pass through in the Tariff. Identical orders have been passed by the Commission in the earlier tariff orders and we do not see any justification to interfere with the said conclusion of the Commission as it is well founded. [p. 234, para 23 b]

[10] The Commission has allowed return on equity only for a sum of Rs. 682.55 crore while the capital base of ROE was Rs. 897 crore as affirmed in the previous year. In this respect the request of the utility has been negatived on the ground that details have not been furnished. Even during the years 2005-06, the Commission has allowed ROE on reserves & surplus as well. Now there is no reason or justification to treat differently and deny the Appellant with respect to its claim of ROE on reserves & surplus. Reserves and surplus also form part of the share capital and the Regulatory Commission ought to have allowed ROE on Rs. 143.14 crores as well and disallowance with respect to Rs. 48 crores or there about is not proper and we direct the Commission to allow Rs. 48 crores and allow ROE 14 per cent on the said sum. Point "B" is answered in favour of the Appellant and there will be consequential direction as prayed for. [p. 234, para 24 d]

[11] It should not be forgotten that statutory regulations as framed by the 1st Respondent is in force and it has to be implemented. It may be that CERC has modified the rate of depreciation but that does not over rule the statutory regulation which is binding on the Commission who has framed. The statutory regulation which was in force alone applies. [p. 234, para 26 i]

[12] Further reliance has been placed on Government of India draft Tariff policy in the matter of depreciation by the Commission in support of its conclusion. The draft policy referred to also will not change the situation and it is the statutory regulation which was in force on the crucial date which has to be followed. But in our view so long the statutory Regulations are in force and remains un-amended, it is obligatory to allow depreciation at the rate provided in the statutory regulations. There cannot be a deviation from the Regulations. [p. 234, para 26 a]

[13] Taking up the point "E" we are of the considered view that with respect to the direction issued by Commission to reduce the transmission losses, no interference is called for. The Commission has issued directions to reduce transmission losses to the level of 4.06 per cent and this is not an impossibility. It is for the utility to improve its performance and reduce the transmission loss. The Commission is well founded in issuing direction in this respect and hence point "E" is answered against the Appellant. [p. 234, para 28 e]

Legislations referred to

Electricity Act, 2003, Sections 42, 43, 61 to 66, 86, 86(1)(a) to (k), 86(2). 86(4) and 91(4)

Electricity Regulatory Commissions Act 1998, Section 22(2) and 22(2)(a) to (f)

Karnataka Electricity Reforms Act, 1999, Sections 11 and 12

Counsel

For Appellant/Petitioner/Plaintiff: M.G. Ramachandran, Adv., Saumya Sharma and Taruna Singh Baghel, Advs.

For KERC: Neil Hildreth, Adv.

For Federation of Karnataka Chamber of Commerce & Industry (FKCCI): Rohit Rao, Ananga Bhattacharya, Advs., and M.G. Prabhakar, Managing Committee Member

Ratio Decidendi

""Legislature has left it to the utilities to decide their plans of investment or improvement of system or expansion therefore KERC has not acted reasonably or fairly in interfering with the internal, commercial, management and domain of the transmission utility with respect to its commercial plan and proposal to invest a substantial sum."

"So long the statutory Regulations are in force and remains un-amended, it is obligatory to allow depreciation at the rate provided in the statutory regulations. There cannot be a deviation from the Regulations."

JUDGMENT

E. Padmanabhan, Member (J) and H.L. Bajaj, Member (T)

1. This is an appeal preferred by Karnataka Power Transmission Corporation Ltd., a State of Karnataka undertaking, engaged in transmission of electricity in the State apart from discharging the functions of State Load Despatch Centre in the State. On 30th November, 2005, the Appellant moved the Karnataka State Regulatory Commission for approval of its annual Revenue requirements for the financial year 2006-2007 (1st April, 2006 to 31st March, 2007) and also for determination of transmission Tariff. After following the procedure prescribed and after holding public hearings, the Commission by its Order dated 7th April, 2006 approved the annual requirements to the extent of Rs. 681.46 crores as against the Appellants' proposal of Rs. 991.74 crores while leaving gap of Rs. 310.28 crores. Being aggrieved and also aggrieved by certain other disallowances the present appeal has been preferred by the Appellant transmission utility advancing a number of contentions.

2. On behalf of the first Respondent Commission a reply has been filed to reiterate and sustain its views and order. Respondent No. 20 also filed a detailed reply in support of the Order appealed against.

3. Mr. M. G. Ramachandran the learned Counsel appearing for Appellant, advanced the following contentions:

(i) The State Commission erred in disallowing interest and financial charges of Rs. 318.60 crores claimed by Appellant and restricting the same to Rs. 276.44 crores.

(ii) The State Commission ought not to have reduced the quantum of investment when it is within the domain of the utility to plan and

estimate required capital investment for improvement of the system and its maintenance and when there is no imprudence, the Commission has no authority to interfere with such proposal, as at the appropriate time it is for the Appellant to satisfy the Commission when it seeks for consequential return on investment, depreciation etc. The state commission having issued several directions to improve quality of service and reliability of power ought not to have slashed down the proposal to invest to create the infrastructure on the inference and assumption that it may not be possible to implement the proposals as ambitious.

(iii) The State Commission misdirected itself in appointing a Committee to review and examine the capital investment proposal and act on the recommendations of the said Committee, when such planning and proposal falls within the domain and internal management, in respect of which no one has the authority to interfere or review and give different proposal to invest less. It is submitted that when the Appellant has technical experts and Engineers, on its employment, and it is their planning, estimate and proposal which deserve acceptance. Further merely because the investment was lesser in the earlier years, is not a ground to hold that the proposal is a day dream or too ambitious and not capable of achievement and slashed down the proposal without reason or rhyme. It is pointed out that even the Committee constituted by the State Commission has not pointed out, that those works are not required at all. The capacity of the Appellant to execute the work could be tested by allowing the investment and even if the work remains incomplete, no one else including consumer is prejudiced by such delay. The State Commission failed to appreciate the specific plea to invest is as required by the standards prescribed by the Central Electricity Authority to maintain the ratio of investments in transmission and distribution qua-generation, the ratio of substations to be maintained qua the area, automation of the system etc. The Commission failed to notice that the Appellant has to cater to the unrestricted peak load of 7007 MW and peak capability of the transmission system of 6200 MW as detailed in the letter dated 21st March, 2006 submitted by Appellant.

(iv) The State Commission erred in restricting depreciation to Rs. 120.33 crores as against the claim of Rs. 260.85 crores claimed for no valid and tenable reason.

(v) The disallowance of ROE is a misdirection.

(vi) The reduction of transmission loss to 4.06 per cent is incapable and not called for.

(vii) The reduction of employees cost is not called for and it is totally unjustified.

(viii) The refusal to allow capitalisation claimed is erroneous.

4. Per contra the learned Counsel for first Respondent and Mr. M.G. Prabhakar representing FKCCI contested each and every one of the points urged by Mr. M.G. Ramachandran, as untenable, devoid of merits and no

interference is called for in this appeal. In this appeal the following points arise for consideration:

a A. Whether KERC acted with authority, fairly and reasonably in interfering with the internal management and domain of the Appellant Transmission utility with respect to its commercial plan and proposal to invest Rs. 2700 crores during 2006-2007? Whether the consumers have any say with respect to proposal to invest for up gradation of
b Transmission system better maintenance and quality service?

B. Whether the disallowance of ROE on reserves and surplus is sustainable and legal?

C. Whether the disallowance of a portion towards labour cost is sustainable?

c D. Whether the disallowance of depreciation and rate of depreciation adopted by Commission is liable to be interfered in this appeal?

E. Whether any interference is called for with respect to reduction of transmission loss directed by the Commission?

F. To what relief, if any?

d 5. On the first point the learned Counsel for the Appellant, while stating that it may not be possible to execute the work even if the entire amount claimed is approved in this appeal as substantial portion of the year is over. However, the learned Counsel persuades us to settle the legal position as the very question may surface in the next year or following years. Hence, we are examining the first point.

e 6. The functions of the State Commission are enumerated in Section 86(1)(a) to (k) of The Electricity Act, 2003. We notice from the above provision that the role played by the Commission in slashing the investment is not one of the enumerated function Section 86(2) provides that the Commission shall advise the State Government on all or any of the matters enumerated in
f Clauses (i) to (iv) of the said Sub-section. Section 86(4) provides that the State Commission shall be guided by the National Electricity Policy, National Electricity Plan and Tariff Policy. Section 61 to 66 provides for framing Tariff regulations and determination of Tariff. These provisions are also silent in this respect.

g 7. In contrast, Section 22(2) of The Electricity Regulatory Commissions Act, 1998, since repealed provided that the State Govt. may confer functions enumerated Clause (a) to (f) of Sub-section (2) of Section 22. Section 22(2)(a) reads thus:

22.(2)(a) to regulate the investment approval for generation, transmission, distribution and supply of electricity to the entities
h operating within the State;

xxx xxx xxx

There is no parallel provision in Section 86 or any other provisions in The Electricity Act, 2003 which will enable the Commission to regulate the investment approval for generation, transmission, distribution and supply
i of electricity within the State, and it is not as if it is the repository of entire

power or authority to control the whole spectrum of Transmission or Distribution including financial management of utilities or it has the power to micromanage the affairs of the utilities.

8. The learned Counsel appearing for the contesting Respondents is unable to point out any provison in this respect. Provisions of 2003 Act, has made a deviation and that being the position we are at loss to know how the Commission could take upon itself to examine the sagacity of investment proposed by utility in development or up gradation or maintenance of its system, by engaging a team of experts to review or study the merits of the proposal or plans to invest.

9. The only provison, if at all which has a relevance is Section 86(2), which is advisory in nature. This being the position it is obviously clear that the legislature has left it to the utilities to decide their plans of investment or improvement of system or expansion to meet the demand of power within their area including up gradation and maintenance for a better and quality generation, transmission or supply as the case may be. It is the commercial decision of the utility and its source to raise funds which falls within the domain of the utility and not liable to be interfered, except at the stage when utility claims for return on such investment, interest on capital expenditure and depreciation. It is at that stage the Commission shall undertake a prudent check and if deemed fit allow the claim. In appropriate cases the Commission may disallow such claims of utility and it is for the utility to bear the brunt of such investment and it cannot pass it on to consumers.

10. We are unable to appreciate the procedure adopted by the Commission in appointing a Committee to examine the proposal or to find out whether it is feasible or not to implement the investment proposal. It is being commented as a day dream on the part of utility. Yet they are within the domain, commercial decision and internal management of the utility and there is time enough for the Commission to undertake prudent check when the utility comes forward to claim return on such investment. in its annual Revenue requirement and till then the proposal to invest is well within the domain of the utility. It is sufficient if the utility confirms its proposal to invest.

11. Further when the Technical Experts and Engineers, have applied their mind with respect to their proposal and plan it is not for the Commission to examine by appointing another expert Committee. No expert agrees with another expert as presumably either add or comment. By this it shall not be taken that we are commenting upon the expert Committee appointed by Commission. Even the Committee did not opine that the proposed capital investments are not at all required or otherwise not suitable nor an efficient proposal.

12. All that it is being pointed that it may not be possible to execute. Here again it is within the domain and control of the utility. Assuming that the utility has a dream, it is expected that it will wake up with determination and act, lest the State which owns the undertaking will not spare and

accountability of the utility is unending to the State, State Legislature and Audit by The Accountant General. The power demand is increasing by leaps and bounds and quality has to be maintained and this compels the utility to update its transmission system including reduction in transmission loss ordered by the Commission. It is not for the Commission to throw its spanner in the wheels of the utility when it has proposed to invest for the improvement and expansion of system after a study by its Technical Team and when its board has approved the investment proposals.

13. Section 11 of The Karnataka Electricity Reforms Act, 1999 also does not spelt out such power on the Commission, as it only enables the Commission to require licensee to formulate respective plans and schemes for promotion of transmission, generation etc. Section 12 of The Karnataka Electricity Reform Act, saves the power of State Government to issue policy directives concerning electricity in the State including the overall planning and coordination. Thus, viewed from any angle, the power of the Commission to interfere with the proposal of investment by the transmission corporation or for that matter a distribution licensee as well cannot be assumed.

14. The approach that consequent to the slashing of the investment proposal, interest and financial charges for the financial year 2007 has been reduced or saved at an average rate of 8.5 per cent for six months amounting to Rs. 40.1 crores is no reason at all. Mere proposal to invest will not involve the liability either interest or finance charges eo instanti, but such charges may have to be incurred only when the amount is actually invested as planned. Till the investment is complete the utility is not entitled to claim either finance or interest or return on the investment.

15. The further approach that it is obligatory for the Commission to keep the cost of the power at the lowest possible level is not a proper approach. Being a regulator, the Commission has to approach such issues as a regulatory measure and not as if the Commission is there to protect the consumers alone. When the Commission expects the utility to upgrade its system of transmission or distribution or quality of service, it follows automatically that utility has to invest in upgradation, maintenance for providing quality service. This could be by way of balancing and not by approaching the issue as if the consumer has to pay at the lowest rate. When the consumer expects quality service, the consumer should be prepared to pay a reasonable charge and here the role of Regulator is vital and it has to balance between the two. If timely capital investment is not made to improve the system then the quality of service by the utility cannot be complained either by consumers nor it could be commented by Regulator. The appointment of an expert committee by the regulator at the stage of proposal to invest is neither warranted nor justified as the plan to invest, estimate of investment and the program of up gradation or extension or development of transmission system is exclusively within the domain of transmission utility.

16. Even if the proposal to invest is over ambitious, the utility might improve itself or act in such an improved speed to execute the work, but that does not mean that the utility or its managers or top brass should

not have imagination or over ambitious which target they set up for themselves to achieve in the course of the year. It follows that as and when the project is executed and investment is made, the same will have financial implications on the sector and Consumer Tariff but that has to be balanced by the first Respondent. The regulator is not going to approve the expenditure or approve the financial charges just for asking and the regulator has to satisfy itself by a prudent check with respect to capital investment and in case they contribute for the quality or development or providing better service, the regulator may include and pass on the consequences of such investment to the consumers. Day by day demand increases and number of consumers are also increasing. The utility has to serve a number of metropolitan cities where the need for power is ever increasing. Therefore, the transmission utility has to estimate or at least imagine and estimate the requirements in advance for the future years to serve the consumers.

17. To decry the utility and its technical experts or engineers is also not called for as it is for them to rise up to their planning and implement it. The expert committee has not stated that the proposed investment is not required at all and none of the proposals have been commented as not called for by the expert committee appointed by the Regulator. The efficiency to implement the projects or investments, if the utility fails to achieve, then it cannot pass on the consequences of such investment to the consumers. The investment made on the earlier years cannot be a basis to restrict investment for the current year 2007 or the following years.

18. The reference made to the National Electricity Policy and in particular to the draft policy dated 16th March, 2005 may not be of any consequence. The utility has proposed to undertake expansion of its network after a study. The draft tariff policy has not been understood properly and at any rate it was only a draft which will not supersede or over rule the statutory provisions of The Electricity Act, 2003 or Regulations. Reliance made on Section 91(4) of The Electricity Act, 2003 is a misconception. There is no quarrel with the impartiality of the regulator. It is the jurisdictional issue or the scope of regulator's power vis-à-vis the utilities internal management and functions and its plans. Legally there could be none who could complain about such proposals nor they could have a say.

19. A reference is made to license condition No. 12, in our view such a condition referred to by the first Respondent just provides that the licensee shall not make any investment except in economic and efficient manner. This will not in any manner could be used as a trump card to interfere with the proposals or future investment plans of the utility. The utility might have placed its investment plan before the Commission but this does not mean that the Commission has a full and complete authority to decide as to when and how the projects are to be executed or when it should not be executed. A condition might have been imposed in the license under the earlier enactment and The Electricity Act, 2003 has made the difference. The claim of the first Respondent that it is empowered to interfere with

investment proposal made by the Appellant and substitute its recommendations in respect of the same in our considered view is far fetched. If such a stand is to be sustained then utility will be a depart mart of the Commission and the Commission may not be exercising its power or functions as a regulator but as a head of the utility. This is not the object of the 2003 Act. It shall not be lost sight that the regulator has no budget or funds of its own to invest nor it could interfere with the micro management of the utility.

20. The preamble of the Act, shall not be lost sight of, where in it has been emphasized that the object of the Act being to take measures conducive to development of the electricity industry, promote competition there in, protecting interest of consumers and supply with electricity to all areas etc. A question may be raised as to the effectiveness of capital investment and further question that if such investment is found to be a waste or otherwise not required which may result in waste of funds of utility. This over looks the fact that the utility being a State undertaking is controlled by its Board and responsible officials of the State and it is subject to the control and approval of the State in such matters which provides funds for such investments or over see such investments. For all these reasons we are not persuaded to accept the line of reasoning assigned by the Commission.

21. The Commission overlooked the fact that the Appellant being transmission utility transmitting power through out the State for the bulk supply as well as distribution as an obligation to maintain the supply as well as quality supply and when the demand increase, either at the level of distribution or at the level of bulk supply it is the transmission licensee who should provide for the supply. This obviously means that the transmission utility has to plan in advance and should be in a position to supply power as demanded from time to time. Section 42, 43 of The Electricity Act, 2003 also should not be lost sight of. To meet the ever increasing demand consequent to development and improvement in the status of the consumer public, industrialization, computerization, heavy industries and requirement increases by geometric proportion, it is for the transmission utility or such other utility to estimate the future demands as well, besides improving the quality and standard of maintenance. This is possible only if the utilities have the freedom to plan with respect to their investment, standardization, upgrading of the system. For such a course it is within the domain of those utilities to undertake to plan, invest and execute the projects or schemes of transmission etc. If the view of the Commission is to be sustained, as already pointed out, the same would mean for each and every investment an approval has to be sought by the utility in advance which is not the objective of the Act.

22. The consumers interest also do not arise at this stage for consideration nor they could be an objector in respect of proposal or plan or investment by utility as the liability of the consumers, if any, arise or there could be a passing by way of return on equity or interest etc. as such contingency

arises only when the Regulatory Commission subject to its prudent check allows such expenditure, while fixing the annual Revenue requirement and determining the tariff. Till then, the consumers have no say and there could be no objection from their side. When the consumers complain poor service or failure to maintain supply, to face such a situation the utility has to plan in advance, invest in advance, execute the project or scheme for better performance and maintain.

23. The Karnataka Electricity Regulatory Commission has not acted reasonably or fairly in interfering with the internal, commercial, management and domain of the transmission utility with respect to its commercial plan and proposal to invest a substantial sum. We have made ourselves clear and in the future years to come the Commission will take this into consideration and will act accordingly. The point "A" is answered in the above terms.

24. Taking up the point "B" it is the grievance of the Appellant that return on equity is not given with respect to reserves and surplus. The Commission has allowed return on equity only for a sum of Rs. 682.55 crore while the capital base of ROE was Rs. 897 crore as affirmed in the previous year. In this respect the request of the utility has been negatived on the ground that details have not been furnished. Even during the years 2005-06, the Commission has allowed ROE on reserves & surplus as well. Now there is no reason or justification to treat differently and deny the Appellant with respect to its claim of ROE on reserves & surplus. Reserves & surplus also form part of the share capital and the Regulatory Commission ought to have allowed ROE on Rs. 143.14 crores as well and disallowance with respect to Rs. 48 crores or there about is not proper and we direct the Commission to allow Rs. 48 crores and allow ROE 14 per cent on the said sum. Point "B" is answered in favour of the Appellant and there will be consequential direction as prayed for.

25. Taking up the point "C", the Commission has disallowed the portion of labour cost and we do not find any illegality or error on the said disallowance. The Commission has disallowed the labour cost such as bonus / exgratia, cost of supplying electricity to its employees to pass through in the Tariff. Identical orders have been passed by the Commission in the earlier Tariff orders and we do not see any justification to interfere with the said conclusion of the Commission as it is well founded.

26. Taking up point "D" namely disallowance of depreciation and rate of depreciation, the Appellant has claimed depreciation at 7.5 per cent while the Commission has allowed depreciation @ 3 per cent on the basis of the notification issued by CERC. The Commission proceeded on the premise that the Appellant utility has to compute the depreciation for financial year 2006-07 as per rates indicated in the amended Tariff regulations. It should not be forgotten that statutory regulations as framed by the first Respondent is in force and it has to be implemented. It may be that CERC has modified the rate of depreciation but that does not over rule the statutory regulation which is binding on the Commission who has framed. The statutory regulation which was in force alone

applies. Further reliance has been placed on Government of India draft Tariff policy in the matter of depreciation by the Commission in support of its conclusion. The draft policy referred to also will not change the situation and it is the statutory regulation which was in force on the crucial date which has to be followed. But in our view so long the statutory Regulations are in force and remains un-amended, it is obligatory to allow depreciation at the rate provided in the statutory regulations. There cannot be a deviation from the Regulations. In the circumstances we modify the Order of the Commission and direct that for the year 2006-2007 the Appellant shall be entitled to 6 per cent depreciation or at the rate as provided in the Tariff regulations framed by KERC and the Commission shall implement the same while under taking truing up exercise. Hence, point "D" is answered in favour of the Appellant.

27. The amendment if any is after the crucial date and it has no application to the year in question and the amendment is not retrospective as well. The utility is well founded in seeking for depreciation as per the existing regulations. Hence, the view of the Commission deserves to be interfered and there will be a direction to allow depreciation in terms of regulations which existed on the date of application. Same reasoning applies to return on equity and in this respect there will be a modification of the Tariff Order both in respect of depreciation and return on equity and the regulator Commission shall while undertaking truing up exercise shall give effect to this direction.

28. Taking up the point "E" we are of the considered view that with respect to the direction issued by Commission to reduce the transmission losses, no interference is called for. The Commission has issued directions to reduce transmission losses to the level of 4.06 per cent and this is not an impossibility. It is for the utility to improve its performance and reduce the transmission loss. The Commission is well founded in issuing direction in this respect and hence point "E" is answered against the Appellant.

29. In the result appeal is allowed in part in respect of point "A", "B" and "D". In other respects we decline to interfere with the Order passed by KERC. The parties shall bear their respective costs in the appeal.

Pronounced in open Court on this 29th day of August 2006.
