

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION**

**WRIT PETITION NO. 2430 OF 1996**

1. Dilip Madhusudan Ranadive  
Adult Indian Inhabitant, Residing at D/21,  
Balgovind Cooperative Housing Society,  
Taikalwadi Road, Mahim, Mumbai- 400 016.
2. Mr.Pradip Madhusudan Ranadive,  
Adult, Indian Inhabitant, residing at D/21,  
Balgovind Cooperative Housing Society,  
Taikalwadi Road, Mahim, Mumbai- 400 016.
3. M/s.Ranadive, A Partnership firm consisting  
of Petitioners 1 and 2 as the only partners  
and having its office at D/21,  
Balgovind Cooperative Housing Society,  
Taikalwadi Road, Mahim, Mumbai- 400 016. ... Petitioners.

V/s.

1. Airports Authority of India,  
A statutory Corporation constituted under the  
provisions of the Airports Authority of India  
Act 1994 having its office at Mumbai Airport,  
Mumbai 99 and its registered office at New Delhi.
2. Mumbai International Airport Private Limited,  
Chatrapati Shivaji International Airport,  
1<sup>st</sup> Floor, Terminal Santacruz (East),  
Mumbai- 400 099.
3. Bureau of Civil Aviation Security,  
Regional Deputy Commissioner of Security,  
Western Region, D/2/2, AAI Residential Colony,  
Andheri Sahar Road, Mumbai- 400 099. ... Respondents.

Ms.Snehalata Paranjpe with Mr.Amey Nabar and Mr.Gaurav Thakur  
i/b. Ms.S.M.Dandekar for the petitioners.

Ms.Kavita Anchan with Mr.S.D.Shetty and Mr.Rakesh Singh, i/b.  
M.V.Kini & Co. for the respondent No.1.

Mr.Pravin Samdani, Senior Advocate with Mr.Farid Karachiwala,  
Ms.Sneh Mehta and Mr.Manek Chheda i/b. Wadia Ghandy & Co.  
for the respondent No.2.

Mr.N.D.Sharma for the respondent No.3.

**CORAM : A.S.OKA AND RIYAZ I. CHAGLA, JJ.**

**RESERVED ON : 21<sup>st</sup> August 2017.**

**PRONOUNCED ON : 22<sup>nd</sup> December 2017.**

**JUDGMENT :**

The petitioners were carrying on business of ground handling in respect of various international airlines at Mumbai Airport. The third petitioner is a partnership firm of which the first and second petitioners are partners. The first respondent has been constituted under the Airports Authority of India Act 1994 (for short “the said Act of 1994”). The second respondent is a company. The second respondent is now managing the airport at Mumbai. The third respondent is an a department of the Central Government.

2. The first respondent was charging licence fee to the petitioners. The reason for filing the writ petition is that the first respondent threatened to terminate the licences granted to the petitioners and entry permits to the airport on the ground of failure of the petitioners to supply information demanded from them and for non payment of licence fee which was claimed with retrospective effect from 1979. The demand was made by the first respondent by a letter dated 6<sup>th</sup> December 1996 addressed to the third petitioner. By the said letter, the petitioners were called upon to pay the licence fee at the rate of 2% from the year 1979 to January 1985 and at the rate of 10% from February 1985 till March 1991. For the period commencing from 1<sup>st</sup> April 1991, the licence fee was demanded at the rate of 11%. The percentage specified was of gross turnover every year. According to the case of the petitioners, the demand for payment of licence fee was without authority of law as there is no power to impose licence fee save and except upon instructions of the Central Government as is clear from Section 22(ii) of the said Act of 1994. The contention in the petitioners was that the licence fee cannot be imposed by the Regulations of the first respondent as it is only the Central Government which has power to impose licence fee. It is contended that the rates of licence fee were never fixed by the Board resolutions of the first respondent and were never published in an official gazette.

3. The petitioners had filed Writ Petition No.2277 of 1984 against the first respondent which was disposed of along with other connected petitions. The said writ petition was *inter alia* filed for challenging withdrawal of the facility of entry pass granted to the

employees of the petitioners. In a group of petitions before this Court, there was a challenge to the International Airports Authority of India (General Management, Entry for ground handling of Air Transport Services) Regulations, 1984 (for short “the said Regulations of 1984”) brought into force by a notification dated 5<sup>th</sup> June 1984 of the first respondent and, in particular to Regulation 5(c). A portion of the Regulation 5(c) was struck down by the Division Bench of this Court by judgment and order dated 13<sup>th</sup> April 1984. While allowing the petition filed by the petitioners, it was held that the petitioners were entitled to carry on business of ground handling services at Mumbai Airport so long as the said Regulations of 1984 were in force and subject to compliance with the other provisions of law. This Court directed the first respondent herein to issue entry passes to the employees of the third petitioner herein according to law and permit them to carry on ground handling services at Mumbai Airport in respect of all those airlines which have appointed it as agent so long as the Regulations of 1984 were in operation. It is contended in the present petition that at the time of hearing of the said writ petition, no contention was raised by the first respondent that the petitioners were liable to pay licence fee or that the first respondent was entitled to withhold entry permits, if licence fee was not paid. Reliance is placed on the said judgment in the writ petition filed by the petitioners. The directives were issued by the first respondent's Chief of Commercial Services on 3<sup>rd</sup> October 1984. Those directives gave cause of action for filing the said earlier petition being Writ Petition No.2277 of 1984.

4. In 62<sup>nd</sup> meeting of the Board of the third respondent held on 3<sup>rd</sup> September 1984, it is noted that earlier Regulations of 1982 have been superseded by the said Regulations of 1984. The resolution records that the Board approved charging of licence fee at the rate of 10% of gross turnover from agencies providing ground handling services to airlines at the airport.

5. By a letter dated 4<sup>th</sup> October 1995 issued by the first respondent, the third petitioner was informed by the first respondent that it has been decided to charge licence fee at the rate of 11% on the gross turnover of the petitioners for providing ground handling services at Mumbai Airport from the date on which the third petitioner has been rendering ground handling services to the concerned airlines. The petitioners by addressing a letter dated 28<sup>th</sup> October 1996 informed the Airport Director of the first respondent that the petitioners were ready and willing to pay licence fee at the rate of 2% of the gross turnover with effect from 4<sup>th</sup> October 1995. Accordingly, a cheque in the sum of Rs.1,99,594.60 was forwarded with the said letter. By the said letter, it was pointed out that various flight kitchen operators rendering services at Mumbai Airport have not been subjected to payment of licence fee. It was also pointed out that the first respondent has provided various facilities to Cambatta Aviation with office space at the Airport itself. Moreover, they have been allotted parking facility in the open area of the airport. It was pointed out by the petitioners that they were willing to pay licence fee at the rate which is more than 2%, provided all the

facilities which are extended to Cambatta Aviation were extended to them. By a letter dated 4/5<sup>th</sup> December 1996, the first respondent informed the petitioners that the cheque was accepted without prejudice to their rights and contentions and the amount has been adjusted towards part payment of the dues payable by the petitioners. Certain information was demanded from the petitioners.

6. Along with letter dated 6<sup>th</sup> December 1996, the petitioners forwarded further amount of Rs.23,993.70 by cheque towards the licence fee at the rate of 2% per annum. On 8<sup>th</sup> November 1996, a letter was addressed by the first respondent to various airlines operating at Mumbai Airport informing them that the ground handling can be done by the agencies mentioned in the said letter which did not include the name of the third petitioner. Being aggrieved by the said letter, a contempt petition being Contempt Petition No.3 of 1996 was filed by the petitioners alleging breach of the directions issued in Writ Petition No. 2277 of 1984. By order dated 9<sup>th</sup> December 1996, the said contempt petition was disposed of as an unconditional apology was tendered by an officer of the first respondent. However, the contentions of both the parties as regards payment of licence fee were kept open.

7. As stated earlier, by a letter dated 6<sup>th</sup> December 1996 (Exh.A), the Senior Commercial Manager of the first respondent called upon the third petitioner to pay licence fee at the rate of 2% from 1979 to January 1985, licence fee at the 10% from February 1985 to March 1991 and from 1<sup>st</sup> April 1991 till the date of the letter at the rate of 11% along with

interest on the delayed payment. A threat was given to terminate the licence, if the licence fee was not paid within a period of fifteen days.

8. Along with the letter dated 6<sup>th</sup> April 1986 sent to the advocate for the petitioners, the advocate for the first respondent had provided minutes of the meeting of the Board of the first respondent which record that the Board approved the charging of licence fee at the rate of 10% on gross turnover from the agencies providing ground handling services. By a letter dated 2<sup>nd</sup> July 1986, the advocate for the first respondent informed the advocate for the petitioners that the petitioners should make payment of licence fee on whatever basis as an *ad hoc* payment until final amount is determined in consultation with the first respondent. By a letter dated 29<sup>th</sup> September/4<sup>th</sup> October 1995, the first respondent informed the petitioners that it has been decided to charge to the third petitioner licence fee at the rate of 11% of the gross turnover for providing ground handling services at Bombay Airport. By a letter dated 3<sup>rd</sup> October 1996, the petitioner requested the Airport Director of the Mumbai Airport to look into the matter and issue necessary directions for complying with the judgment and order dated 13<sup>th</sup> April 1994 in Writ Petition No.2277 of 1984.

9. This writ petition was originally filed for challenging the demand of licence fee made by the letter dated 6<sup>th</sup> December 1986 (Exhibit A to the petition).

10. In this writ petition, on 23<sup>rd</sup> December 1996, this Court granted interim relief in terms of prayer clauses (b) and (c) subject to petitioners undertaking to regularly pay future licence fee at the rate of 11% on the gross turnover with effect from January 1997 and also paying a sum of Rs.15 lakh in two equal installments of Rs.7,50,000/- each payable on 30<sup>th</sup> June 1997 and 31<sup>st</sup> December 1997 respectively. In the meanwhile, the first respondent came out with the Airports Authority of India (General Management and Entry for Ground Handling Services) Regulations, 2000 (for short “the said Regulations of 2000”). It appears that in the 58<sup>th</sup> Board meeting of the first respondent held on 26<sup>th</sup> December 2001, it was decided to charge 11% royalty on gross turnover from the existing ground handling agents pending final decision on award of fresh contracts. Another important development took place when the second respondent, which is a limited company, took over the management of Mumbai Airport on the basis of the execution of following documents: (1) Operation Management and Development Agreement dated 4<sup>th</sup> April 2006 (for short “OMDA”); (2) Shareholders Agreement dated 4<sup>th</sup> August 2001; (3) Lease Deed dated 26<sup>th</sup> April 2006; (4) State Support Agreement with Government of India; (5) State Support Agreement with Government of Maharashtra. The second respondent issued a circular dated 21<sup>st</sup> June 2007 enhancing the royalty from 11% to 15% of gross turnover in respect of ground handling agencies with effect from 1<sup>st</sup> July 2007. Even after the second respondent came into picture, the petitioners continued to pay an amount at the rate of 11% to the first respondent under the orders of this Court. By order dated 11<sup>th</sup> February 2009, in the Notice of Motion No.73 of 2009 taken out by the petitioners,

the Division Bench of this Court granted four weeks time to pay royalty at the enhanced rate (i.e. 15%). An email dated 3<sup>rd</sup> February 2009 was issued by the Senior Commercial Manager on behalf of the Airport Director (Commercial) recording that passes to the employees of the third petitioner will be renewed only until 3<sup>rd</sup> February 2009. By the said order dated 11<sup>th</sup> February 2009 the said email was stayed.

11. One more notice of motion was taken out by the petitioners being Notice of Motion No.156 of 2009. By order dated 13<sup>th</sup> March 2009, the Division Bench directed the second respondent to continue giving No Objection Certificate (NOC) to the employees of the third petitioner till further orders. The petitioners were directed to pay licence fee at the rate of 15% of the gross turnover directly to the second respondent instead of first respondent. The said notice of motion taken out by the petitioners was disposed in terms of the minutes of the order dated 9<sup>th</sup> April 2009 by which the petitioners were directed to pay charges/ licence fees to the second respondent as per the policies of the second respondent. The second respondent was directed to give NOC in favour of the petitioners and their employees to the Bureau of Civil Aviation Security (the third respondent) for renewal of entry passes.

12. In supersession of the said Regulations of 2000, on 18<sup>th</sup> October 2007 the first respondent brought into force the Airports Authority of India (General Management, Entry for Ground Handling Services) Regulations of 2007 (for short “the Regulations of 2007”). The said Regulations were brought into force from 1<sup>st</sup> October 2007.

13. In this petition, it is pointed out that during the pendency of the petition, the second respondent continued to demand and recover from the petitioners licence fee by terming it as “royalty/ revenue share/ damage charges” from time to time. According to the case of the petitioners, the illegal demand increased from 11% to 15% and thereafter to 17.5% and 30% respectively which have been paid by the petitioners under protest.

14. The first prayer in this petition under Article 226 of the Constitution of India is for quashing the letter dated 6<sup>th</sup> December 1996 by which a demand of licence fee was made from the petitioners. The second challenge by way of amendment is to the circular dated 21<sup>st</sup> June 2007 issued by the second respondent by which royalty was enhanced from 11% to 15% with effect from 1<sup>st</sup> July 2007. There is a prayer made against the first and second respondents to refund the amount paid by the petitioners to them with an interest at the rate of 12% per annum.

15. There is a reply filed to the petition by Shri Ashok Arora on behalf of the first respondent. Various contentions have been raised in the reply. The first contention is that the petitioners unilaterally paid licence fee at the rate of 2% of gross turnover from July 1986 to December 1986. The said amount was paid unilaterally and thereafter, the amounts were paid by the petitioners from time to time. In the reply, Shri Arora has contended that the said Regulations of 1984 provided for levy of fees on parties providing ground handling services. Reliance is placed on the

Board Resolution passed in 62<sup>nd</sup> meeting wherein the rate of fee at the rate of 10% of gross turnover was fixed. In the affidavit, the factual averments made by the petitioners in relation to Cambatta Aviation and Air Freight Ltd. have been referred. A copy of a letter dated 28<sup>th</sup> November 1996 addressed to the Accounts Manager (Rev) of the first respondent by Cambatta Aviation Limited is relied upon under which ground handling charges payable at the rate of 11% were paid. A copy of licence agreement between the first respondent and Air Freight Limited has been annexed to the said affidavit.

16. The first petitioner filed a rejoinder to the affidavit of Shri Arora. Reliance is placed on the letter dated 15<sup>th</sup> April 1996 addressed by Deputy General Manager (Com.) of the first respondent to the Airport Director enclosing therewith note prepared by the Director of Indian Audit and Accounts Department regarding non-raising of bills for ground handling charges. It is alleged that no ground handling charges have been recovered from the National Carriers till the date of filing of the petition. It is contended that though resolution was passed by the Board of Directors of the first respondent on 26<sup>th</sup> December 2001 by which it was resolved to charge licence fee at the rate of 11% of gross turnover, a demand was made from the petitioners for the said amount with effect from 1<sup>st</sup> April 1991. It is contended that even initial rate of 2% is not sanctioned by the Board Resolution. It is contended that the amount paid at the rate of 2% of gross turnover was without prejudice to the rights and contentions of the petitioners.

17. There is reply filed by Shri Raghava M. on behalf of the second respondent. Shri Raghava M. is the General Manager-Legal and authorized representative of the second respondent. The first contention raised is that the first respondent is a private entity and, therefore, a writ under Article 226 of the Constitution of India cannot be issued against the second respondent. It was further contended that with a view to enable the second respondent to discharge its functions under OMDA, a registered lease-deed dated 26<sup>th</sup> April 2006 has been entered into by and between the first respondent and the second respondent. Reliance is also placed on supplemental lease dated 15<sup>th</sup> May 2009. It is contended that the second respondent is neither a State nor an agency or instrumentality of the State. It is contended that the second respondent has a power to impose a licence fee/royalty on ground handling agencies using the premises of Mumbai Airport. It is contended that the circular dated 21<sup>st</sup> June 2007 issued by the second respondent by which percentage of licence fee/ royalty payable by all the ground handling agencies was increased from 11% to 15% is legal. It is contended that the second respondent has been authorized under the OMDA to license the premises of the Mumbai Airport for carrying out certain functions. Reliance is placed on various provisions of OMDA and contended that under the relevant clauses thereof, the second respondent has right and control over the Mumbai Airport for the purpose of non-aeronautical services. Reliance is placed on interim orders passed from time to time in the petition and, in particular the order dated 9<sup>th</sup> April 2009 in Notice of Motion No.156/2009 of which we have already made reference. The second respondent has placed reliance on Aeronautical Information

Circular (AIC) Nos.7 of 2007 and 3 of 2010 which authorised the second respondent to engage ground handling service providers on the basis of revenue sharing. The first petitioner filed a rejoinder to the affidavit in reply of the second respondent.

18. The learned counsel appearing for the petitioners has taken us through the pleadings and documents on record. As far as preliminary objection of second respondent regarding maintainability of the writ petition against the second respondent is concerned, she invited our attention to the decision of a Division Bench of this Court in the case of *Federation of Indian Airlines v. Airports Authority of India*<sup>1</sup>. She pointed out relevant paragraphs of the decision which hold that considering the relevant clauses of OMDA, the second respondent is amenable to writ jurisdiction under Article 226 of the Constitution of India. She invited our attention to the International Airports Authority Act, 1971 (for short “the said Act of 1971”) and, in particular Section 17 thereof. She relied upon clause (i) of Section 17. Our attention was also invited to section 22 of the said Act of 1994. She submitted that the first respondent is not empowered to charge any fees or rent without previous approval of the Central Government and in the present case, there is nothing placed on record to show that the rate of fees was fixed at 2%, 10%, 11% and 15% respectively with previous approval of the Central Government. She invited our attention to the said Regulations of 1984 and the said Regulations of 2000. She invited our attention to the definition of “ground handling” in both the said Regulations. She also

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1 2016 SCC OnLine Bom 11521

pointed out the guidelines issued for grant of permit to provide ground handling services at airports other than those belonging to the Airport Authority of India. She submitted that the levy attempted to be made by the first and second respondents is in the nature of tax. She also pointed out the pleadings regarding discrimination between certain other private agencies and the present petitioners. She tendered across the bar a statement showing the amounts so far paid by the petitioners to the first respondent which are also set out in the petition and in the rejoinder filed by the petitioners. She relied upon the decision of Calcutta High Court in the case of *Netram Agarwalla and others v. Chairman, Raigunj Municipality and others*<sup>2</sup>. She relied upon the said decision on the question whether the levy made by the first and second respondents was a tax or fee. She relied upon the decision of the Apex Court in the case of *Sreenivasa General Traders v. State of Andhra Pradesh*<sup>3</sup>. Reliance was placed on the said decision as it lays down the test for determination whether a particular levy is a tax or fee. On the same point, she relied upon another decision of the Apex Court in the case of *State of Jharkhand and others v. Tata Commins Ltd. and another*<sup>4</sup>. She invited our attention to the decision of the Apex Court in the case of *Consumer Online Foundation and others v. Union of India and other*<sup>5</sup>. This decision is on interpretation of section 22 of the said Act of 1994. The learned counsel appearing for the petitioners also relied upon the decision of the Apex Court in the case of *Binayak Swain v. Ramesh*

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2 1955 SCC OnLine Cal 177

3 (1983) 4 SCC 353

4 (2006) 4 SCC 57

5 (2011) 5 SCC 360

**Chandra Panigrahi**<sup>6</sup>. She relied upon another decision of the Apex Court in the case of **C.K.Sasakan v. Dhanalakshmi Bank Ltd.**<sup>7</sup> On the prayer for the refund of the amounts paid, the learned counsel for the petitioners relied upon what is held by the Constitution Bench of the Apex Court in the case of **Mafatlal Industries Ltd. v. Union of India**<sup>8</sup>.

19. The learned counsel appearing for the second respondent invited our attention to the various clauses of OMDA and, in particular clause dealing with aeronautical and non-aeronautical services. He pointed out specific clause (12.2) in Chapter-12 which confers powers on the second respondent to fix the charges for non-aeronautical services. He pointed out the various non-aeronautical services mentioned in Schedule-6 of OMDA. He also pointed out provisions of the lease-deed executed by and between the first and second respondents. He invited our attention to the affidavit-in-reply of the second respondent as also the affidavit of Shri S.V.Ramana filed on behalf of the Ministry of Civil Aviation of Government of India in Special Leave Petition (C) No.33863/2016. He pointed out the stand taken by the Union of India as regards the provisions of Sections 12 and 22 of the said Act of 1994 and, in particular clause (ii) of Section 22 thereof. He submitted that clause (ii) deals with non-aeronautical services as it concerns the facility for carrying on any trade or business at airport, heliport or airstrip. He submitted that for charging fees or rent for such services, prior approval of the Central Government is not necessary. He submitted that as clause (ii)

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6 AIR 1966 SC 948

7 (2009) 11 SCC 60

8 (1997) 5 SCC 536.

covers ground handling services, the first respondent and the second respondent have power to levy ground handling charges. He also pointed out that the petitioners have discontinued their operation at the Mumbai Airport from 31<sup>st</sup> March 2015 as set out in the affidavit-in-reply. He relied upon the said Regulations of 2000 and guidelines bearing No.AIC 07/2007. He relied upon the minutes of order dated 9<sup>th</sup> April 2009.

20. The learned counsel appearing for the first respondent supported the impugned action. One of the submissions of the first respondent and the second respondent, without prejudice to their rights and contentions, is that in any event, the petitioners are not entitled to refund as the same would amount to unjust enrichment. The learned counsel appearing for the petitioners, relying upon the interim orders, submitted that there is no question of unjust enrichment. The learned counsel appearing for the third respondent supported the first and the second respondents.

21. Firstly, we deal with the preliminary objection raised by the second respondent about the maintainability of writ petition against the second respondent. The said issue is no longer *res integra* as a Division Bench of this Court in the case of ***Federation of Indian Airlines v. Airports Authority of India and others*** (supra) has already decided this issue. The second respondent herein was also the second respondent in the said case. Paragraphs- 84 and 85 of the said judgment which deals with the same objection read thus:

“84. The source of the power to impose airport levy, to collect and recover it, is traced to the statute, namely, The Airports Authority of India Act. It is the statute which empowers the AAI to execute the lease bearing in mind the object and purpose for which the Act itself is made and the discretion under section 12-A(1) is conferred. The discretionary power to make a lease is to be exercised in the public interest or in the interest of better management of airports. Thus, absent these provisions, on the own showing of the respondent No.2, there could not have been any OMDA. If there could not have been OMDA, there could not have been then taking over of some of the functions of respondent No.1. These functions are defined in the statute and to be performed in accordance with the statute. It is relying upon these statutory provisions and prescription therein that the levy is sought to be justified. Therefore, it is too late in the day to contend that the issue involved in this writ petition is not a public law question, but in the realm of private law. We do not think how the second respondent could have stepped in, but for the above scheme noticed by us in detail. Thus, bearing in mind the broad object and purpose of the AAI Act, the amendments thereto and the aviation scheme and aviation policy as a whole that second respondent enters the scene and takes over these functions. It has to perform them and while performing them it cannot override the statute. The lease agreement itself cannot be read de hors the statute. Once the functions and duties traceable to the statute are to be performed and discharged, then, it is futile to urge that MIAL is not answerable to this Court's writ jurisdiction. This is not a private airport or an airport set up by the respondent No.2. The airport was already in existence and various functions were performed thereat in terms of this statute of 1994. That the amendment permits leasing and for the purpose of preserving and protecting public interest or better management of airports, then, it would not be proper to agree with Mr. Tulzapurkar that a writ petition cannot be filed and raising the above challenge.

85. Mr. Tulzapurkar's reliance on Article 12 of the Constitution of India is not proper for Article 226 of the Constitution of India empowers this Court to issue a writ in terms thereof to any person or authority, including in appropriate cases, any Government, for the enforcement of any of the rights conferred by Part III and for any other purpose. Part III of the Constitution of India contains Articles 12 to 35. The right to equality guaranteed by Articles 14 to 18, the right to freedom guaranteed by Articles 19 to 22, the right against exploitation, the right to freedom of religion, constitutional and educational rights and right to constitutional remedies. Therefore, for enforcement of any of the rights conferred by Part III and for any other purpose, a writ can be issued. Once a petition under Article 226 of the Constitution of India is filed raising the plea that the AAI Act being claimed to be the source of the levy, but that Act not permitting the imposition or the levy being beyond it, then, definitely the rights and which are in issue, include the one flowing from Article 14 of the Constitution of India. That guarantees equality before law and equal protection of laws. If there is no equality before law, as alleged, and subsequently proved or if equal protection of laws is denied though extended to similarly affected or placed parties, then, this Court will not hold its hands and refuse to issue the prerogative writs. Its power is very wide and in terms of this Article. Merely because MIAL claims to be a private entity is no answer to resist this petition. Going by the issues projected and involved, we are of the firm opinion that the writ petition raises a public law question. The entity may be private, but the question involved is a public law one. That is about the right or the power to impose the levy styled as airport levy on the airline operators. They claim that for certain services which are not rendered at the airport by them, the Airports Authority of India and, through it, the MIAL has no power, authority and jurisdiction to impose the levy. The statute does not permit such imposition is the essential contention. The levy is beyond the statutory powers and that is being

recovered by misconstruing and misinterpreting the legal provisions. To now then urge that the MIAL grants a privilege and, therefore, all this is in the realm of a contract does not impress us. Mr. Tulzapurkar's arguments are that the levy is on those airlines who provide food and beverages in flights. They apply to MIAL for a privilege for carrying on the business of supplying food and beverages to the passengers on-board the flight. There is no compulsion to provide food to passengers inflight, but still a privilege like this is sought from MIAL. However, Mr. Tulzapurkar emphasizes that MIAL is entitled to prescribe charges, fees or rent for this privilege.”

(underline supplied)

In paragraph-86, the Division Bench held thus:

“86. Though this is an alternate argument, what Mr. Tulzapurkar emphasizes is that this entitlement and empowerment comes from certain authorisation. That is in terms of the primary document styled as lease deed. It also comes from several ancillary and connected documents and deeds. However, the foundation for all this is the AAI Act, 1994, and the functions discharged in pursuance thereof. It is in these circumstances that we hold that the management and administration of an airport meant for passengers and cargo carried by airline companies is the function discharged and duty performed. That is not under any private arrangement. It is futile to urge that everything in relation to the administration, management and operation of the airport is in the realm of a contract or private law. That extreme contention has not been canvassed. The only argument is that the larger issue about maintainability of the writ petition against MIAL is pending and we should observe nothing by which the stand of the MIAL in such proceedings is affected or jeopardized. We hasten to add that we have no such intent nor as a blanket proposition are we suggesting that the

MIAL in all times and under all circumstances is amenable to writ jurisdiction. Just as Mr. Tulzapurkar relies upon paragraph 102 of the judgment in the case of Life Insurance Corporation of India vs. Escorts Limited & Ors. (1986) 1 SCC 264, we are mindful that the Supreme Court has clarified that it is impossible to draw a distinction and even the Hon'ble Supreme Court has not attempted it. Such questions must be decided in each case with reference to the particular action, the activity in which the State and the instrumentality of the State is engaged when performing the action, the public law or private law character of the action and a host of other relevant circumstances. This is the precise test which is evolved by the Hon'ble Supreme Court which we are bound to apply. Having applied that, we do not think that the larger issue with reference to Article 12 of the Constitution of India could in any way be decided by us. We confine ourselves to the action in this case which we think is purely in the realm of public law. To hold that it has only a private law character would mean ignoring a host of other relevant circumstances. These circumstances are that the airline companies and their Federation has, in impugning and challenging the decision or action of respondent Nos.1 and 2, impleaded both of them. Secondly, it is their argument that the power which the second respondent relies on is derived from the first respondent and the document executed or the transactions entered into between respondent Nos.1 and 2. Respondent No.1 certainly performs a public duty and a public function. It is obliged to act in public interest. Equally, when it passes on or allows some functions to be discharged by a third party that is also obliged to act in public interest and confine itself to the law. That is referable to section 12-A. Thirdly, if some of the functions of AAI in public interest are being discharged by the MIAL and one of the important stakeholder in the scheme of the operations, maintenance and administration of the airport is the airline company, for boarding the aircraft of whom, the passengers arrive at

the airport terminal, then, any action affecting the working of these companies and which thereafter impacts or affects the passengers themselves cannot be, therefore, considered only to be a private law function or duty. Lastly, and most importantly, it is the same statute, namely, the AAI Act, 1994, which is relied upon by the second respondent to claim the authority and power to impose the airport levy and collect it and it is that very statute on which the argument of the petitioner is based, namely, its provisions do not empower collection of such levy which we are considering and, therefore, to determine the question of maintainability de hors or contrary to the statute would be impermissible. Therefore, we do not think that the writ petition can be dismissed on the grounds of maintainability.”

(underlines supplied)

Therefore, the preliminary issue raised by the second respondent is already concluded against the said respondent.

22. Even otherwise, the said decision which binds this Court is material and relevant. We must note that in the said case before the Division Bench, the challenge was to the payment demanded from various airlines of levy of 13% of gross turnover of food items/articles which are uplifted from Chhatrapati Shivaji International Airport, Mumbai and sold on-board for domestic and international airlines. The Division Bench considered Sections 12 and 12A of the said Act of 1994, which reads thus:

**“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;

(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 centres 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 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 facilities as are, in the opinion of the Authority, necessary to the passengers travelling by air;

(n) form one or more companies under the Companies Act, 1956 (1 of 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) authorising the disregard by the Authority of any law for the time being in force; or

(b) authorising 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.

12-A. 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 premise 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 relate 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 functions in terms of the lease.”

It was further held that the source of power to impose airport levy, to collect and to recover, is traceable to the said Act of 1971 and the said Act of 1994. The Division Bench also rejected the argument canvassed on behalf of the second respondent of acquiescence. In paragraph- 94, the Division Bench held thus:

“94. We are unable to accept this argument of Mr.Tulzapurkar for no amount of acquiescence or silence can be construed as submission to the power, authority and jurisdiction of parties like the second respondent if there is none in law. In other words, there is neither estoppel against law nor acquiescence or waiver can be allowed as a defence, when the challenge raised is to the lack of power or authority to recover any sum or amount particularly in the nature referred above. Lastly, we are in writ jurisdiction and when an action is challenged as being violative of the mandate of Article 14 and 19(1)(g), 265 of the Constitution of India, then, all the more, the defence raised cannot prevent the constitutional court from adjudicating the issue or challenge.”

(underline supplied)

Thereafter the Division Bench proceeded to deal with clauses (i) and (ii) of Section 22 of the said Act 1994. In paragraph- 118, the Division Bench held thus:

“118. After this comes clause (ii) which once again must be seen as the power of the authority. The authority with

due regard to the instructions that the Central Government may give to it 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. Thus, these fees or rent is charged from persons who are given by the authority any facility for carrying on a trade or business at any airport. This provision once again must be read not in isolation but harmoniously with all other provisions of the Act falling in separate chapters and particularly those functions which the authorities may discharge in terms of section 12(1) and (2). The authority thus manages the airports, civil enclaves and aeronautical communication stations and it is expected to do all this efficiently. It is its duty to provide air traffic service and air transport service at any airport and civil enclave. It, in its discretion may carry out various activities and take such steps and measures as would enable it to provide an efficient management and administration at the airports. This shall be done so far as may be on business principles. To then urge that for the services and facilities to be provided in the above manner, the authority may charge fees or rent from persons who are given the facility, particularly of carrying on any trade or business at any airport, heliport or airstrip without the previous approval of the Central Government may be partially correct but completely side tracking or ignoring the Central Government would be improper and an incomplete reading of the enactment. The Central Government may give instructions to the AAI from time to time in relation to the charging of fees or rent from persons, who are given any facility for carrying on any trade or business, by the authority. The Central Government in terms of these instructions and its general supervising power give instructions, but merely because specific instructions to AAI are not on record and, therefore, there is absolute power or authority in either the AAI or the second respondent would mean they can fix the fees or rent without any interference by even the Central Government. That would be doing

violence to the plain and unambiguous provision of the Act, namely the AAI Act. There may not be instructions and expressly issued for this purpose, but the authority has to be guided by the AAI Act itself. Its object and purpose cannot be brushed aside so as to justify the charging of fees or rent. We are in complete agreement with Mr. Dwarkadas that these provisions and particularly section 22 cannot be read as enabling levy of a charge, fees or rent. The provision enables charging of fees or rent. They are not independent heads and, therefore, levy of each of them is unjustified and unsupportable. The provision cannot be distorted and read in this manner.”

(underline supplied)

In paragraph- 123, the Division Bench held thus:

“123. Therefore, to our mind, it cannot be said that the second respondent as far as the air traffic and air traffic operations by the airline companies are concerned, render any facility for carrying on their trade or business. What is contemplated by section 22 (ii) is the facility for carrying on any trade or business. The charge of rent or fees is from persons who are given by the authority any facility for carrying on any trade or any business at any airport. This facility given by the AAI to such persons and that function in turn being taken over by the second respondent would not take within its import the services rendered by the airline operators to the passengers and the flying public. The persons contemplated by clause (ii) of section 22 are those who are carrying on trade or business at the airport. To enable them to carry on any trade or business, facilities are given by the AAI and which power, in turn, is now vesting in a limited sense with the second respondent. It is for that the fees or rent can be charged. The question raised is whether the petitioners before us are such persons as are contemplated and covered by this clause. We think not. We hasten to clarify that this would not be so in all cases and in all circumstances for the authority may charge fee or rent

from persons who are given any facility for carrying on any trade or business at any airport, heliport or airstrip and such persons may include the airline companies. It is common ground that the airline companies set up their ticketing centres, information kiosks, booth for assisting passengers, particularly in medical emergencies and would use either the common facilities or some special amenities meant for its crew and staff. The authority may be justified in charging rent and including in it all these components. This rent is charged essentially for use of the airport premises for the purpose of setting up the centres, kiosks, booths etc. Therefore, when airline companies utilise or use the airport premises in such manner obviously if any rent is charged they have to pay it and even to MIAL and MIAL is so empowered to recover it.”

(underline supplied)

Ultimately, as regards the authority of second respondent to levy fees, in paragraph- 132, the Division Bench held thus:

“132. We have already and in great details referred to the object and purpose of the AAI Act, how that is achieved by the various provisions of which we prefer a harmonious reading that it is only in terms of the statute that this lease is created. The making of the lease itself is permissible on account of the powers conferred by the statute. That is also not absolute as we have noted above. The lease cannot override the provisions of the Act or render them nugatory and meaningless. No provision in the statute can be read in isolation and its scheme rendered redundant by the process desired by the second respondent. Therefore, OMDA is not the source of the power. If that source is to be found it must be found in the statutory instrument. OMDA is nothing, but incorporating the lease that is contemplated by section 12-A with the relevant details. The broad contents of the lease are traceable to the statute itself. Therefore, we do not think that the charge for non-aeronautical services and its

wide definition as is found in OMDA would be the source. If we read the OMDA de hors or by brushing aside the statute, then, that would mean the functions and some of them or restricted in nature having been assigned to joint venture company of which AAI continues to be a part and parcel, would confer independent power or authority to charge the fee. If the statute does not invest respondent Nos.1 and 2 to charge fees, then, no amount of reliance on OMDA is of assistance.”

(underline supplied)

23. It is in the light of the law laid down by the Division Bench that the controversy on merits has to be decided. The first and second respondents derive their power to levy licence fee only from the said Acts of 1971 and 1984. The said power is not derived by the second respondent under OMDA. Thus, the act of the first and second respondents of imposing or levying licence fee must be supported by the said statutory provisions.

24. In the earlier part of the judgment, we have referred to the decision of this Court in Writ Petition No.2277/1984 filed by the petitioners. In the said writ petition, it was noted that the third petitioner commenced its business in the year 1979, initially of baggage handling of Gulf Air passengers. Later on, the third petitioner started handling of Saudi Airlines crew baggage. Thereafter, the third petitioner entered into agreements with various airlines for ground handling services including the services of providing wheel chairs and stretchers. In the said writ petition, it is held by this Court that the petitioners' business will be

governed by the Regulations of 1984. As far as business carried out of ground handling services is concerned, the Government of India has issued an order on 18<sup>th</sup> January 1972 in exercise of powers under rule 72A of the Aircraft Rules, 1971 directing that no person shall enter into or remain in the movement area for operating any vehicle or other equipment for ground handling, ramp handling and traffic handling of any aircraft at any Government aerodrome except as provided in paragraph-2 thereof. Clause (ii) of paragraph- 2 provides that entry into and remaining into movement area for operating any vehicle or other equipment for ground handling including ramp handling and traffic handling of any aircraft shall be restricted to operator agency which was engaged in the performance of such handling of such aircraft immediately before the date of publication of the said order subject to such condition as may be prescribed from time to time by the Director General of Aviation. In relation to international airport at Mumbai, Calcutta and Madras, the International Airports Authority of India (General Management of Ground Handling of Air Transport Services) Regulations, 1982 were published. The said Regulations seek permit to entry into and remaining into movement area as provided in the Government Order dated 18<sup>th</sup> January 1972. The said Regulations of 1984 contained similar provisions. The said Regulations of 2000 expanded the scope of ground handling activities. Clause (e) of regulation 2 of the said Regulations of 2000 reads thus:

“2. Definitions.- In these regulations, unless the context otherwise requires:

(a) to (d) ..... ..

(e) “Ground Handling” means

- (i) ramp handling and will include activities as specified in Annexure 'A' to the Regulations;
- (ii) traffic handling and will include activities as specified in Annexure 'B' to the Regulations;
- (iii) any other activity designated by the Chairman to any part either of ramp handling or traffic handling.”

Annexure-A deals with ramp handling which includes aircraft handling, aircraft servicing, aircraft cleaning. It also includes loading and unloading of passengers' baggage, transshipment of passengers' baggage, operation of loading/uploading equipment, loading and off loading export, import as well as transshipment cargo from the aircraft. Regulations 4 and 5 of the said Regulations of 2000 read thus:

- “ 4. Entry into and remaining in the movement area/ terminal building at any airport/ civil enclave for providing ground handling services or for operating any vehicle or equipment shall be restricted to;
- (a) the operator or the owner of aircraft(s) or his bonafide whole time employees or any of the designated agency under Regulation 3 authorised by it for handling its own aircrafts;
  - (b) any other Operator or Agency who or which has been specially permitted in writing by the Authority to undertake ground handling activities through their bonafide whole time employees;
  - (c) the bonafide whole time employees of National Carriers or any of the designated agencies under Regulation 3 authorised by them;
  - (d) the bonafide whole time employees of Airports Authority of India or a designated agency authorized by it.

5. The Board of AAI will lay down terms and conditions (including financial consideration), eligibility criteria for ground handling agency (both financial and technical) and number of such agencies to be appointed at each airport keeping in view the safety, security demand, available infrastructure, land and other relevant consideration.”

We must note here that Annexure-B to the said Regulations include services to the passengers and baggage handling at the airport terminus.

25. A circular was issued by the Director General of Civil Aviation on 28<sup>th</sup> September 2007 for guidance under the title “Grant of Permission for Providing Ground Handling Services at Airports other than those belonging to the Airports Authority of India”. Clause 2A of the said circular permits selection of ground handling service providers at metropolitan airports at Delhi, Mumbai, Calcutta and Hyderabad.

26. The Airports Authority of India (General Management, Entry for Ground Handling Services) Regulations, 2007 contain similar definition of ground handling in regulation 2(e) which is similar to the same definition in the said Regulations of 2000. Regulations 3 and 4 of the said Regulations of 2007 are on par with the corresponding Regulations in the said Regulations of 2000. On 2<sup>nd</sup> June 2010, the Director General of Civil Aviation issued guidelines (IAC) in supersession of earlier guidelines (IAC) of 28<sup>th</sup> September 2007.

27. We must note here that none of these Regulations or guidelines which are referred above confer a specific power on the first respondent Airports Authority of India to charge fee or rent. As stated earlier, firstly, the said statutory power is found in section 17 of the said Act of 1971 wherein it is provided that-

“ **17. 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 air-strip.

Explanation.- In this sub-clause “aircraft” does not include an aircraft belonging to the Indian Defence Services and “aircraft operations” do not include operations of any aircraft belonging to the said Services;

b) for the amenities given to the passengers and visitors at any airport, heliport or airstrip;

(c) for the use and enjoyment by persons of facilities and other services provided by the Authority at any airport, 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.”

The said Act of 1971 was repealed by the said Act of 1994. Section 22 of the said Act of 1994 reads thus:

**“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 for rent from persons who are given by the Authority any facility for carrying on any trade or business at any airport, heliport or airstrip.”

Section 22 of the said Act of 1994 is already interpreted by a Division Bench of this Court. In the case of *Consumer Online Foundation and another v. Union of India and others* (supra), the Apex Court dealt with

section 22 of the said Act of 1994. In paragraph 20, the Apex Court held thus:

**“20. 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.”**

(emphasis added)

As far as clause (i) of Section 22 is concerned, assuming that the same is applicable to the ground handling services rendered by the third petitioner, previous approval of the Central Government for fixing the fees/ charges at 2%, 10%, 11% and 15% respectively is admittedly not produced on record. However, clause (i) of Section 22 applies to services or amenities offered by the first respondent or second respondent in connection with the aircraft operations at any airport. It applies to charging of fees or rent by the Airport Authority or the second

respondent, as the case may be, from those persons for whose benefit services or facilities as set out in the sub-clauses (a) to (d) of clause (i) are provided by the first or second respondents. Clause (i) is not applicable to the demand of fees from the petitioners. The petitioners have been allowed facility to carry on business of providing ground handling services at the Mumbai airport by the first respondent and thereafter, by the second respondent. Thus, the power to collect licence fee or rent from the petitioners will be under clause (ii) of section 22 and not under clause (i). The business carried on by the ground handling services agencies on the basis of their agreements with the airlines will be covered by clause (ii). The second respondent on the basis of the lease executed under Section 12-A can exercise power to levy fees only under the said Act of 1994 and not otherwise. As far as the demands subject matter of this petition are concerned, it is not shown that the same are either contrary or inconsistent with any instructions of the Central Government. There is no requirement of clause (ii) of Section 22 of the said Act of 1994 or clause (ii) of Section 17 of the said Act of 1971 to seek prior instructions of the Central Government before charging licence fee by exercising the power under clause (ii). The affidavit dated 11<sup>th</sup> May 2017 of Shri S.V.Ramana filed on behalf of the Central Government in SLP(C) No.33063 of 2016 takes the same stand. This affidavit shows that till that day, the Central Government had not issued instructions to the contrary.

28. The issue is dealt with in paragraph- 118 of the decision of the Division Bench in the case of ***Federation of Indian Airlines v. Airports Authority of India*** (supra). The Division Bench has held that

the Central Government may give instructions to the first respondent from time to time in relation to charging of fees or rent from persons who are given any facility for carrying on a trade or business at any airport by the Authority. The Division Bench held that merely because specific instructions given to the first respondent by the Central Government are not on record, it does not mean that there is absolute power or authority either in the first or second respondent. The Division Bench held that the provisions of section 22 merely enable charging of fees or rent but the provisions cannot be read as enabling levy of a charge, fees or rent. In paragraph- 123, the Division Bench observed that the first respondent or second respondent can charge rent for use of the airport premises for the purpose of setting up the centres, kiosks, booths etc. It was observed that-

“.....What is contemplated by section 22 (ii) is the facility for carrying on any trade or business. The charge of rent or fees is from persons who are given by the authority any facility for carrying on any trade or any business at any airport. This facility given by the AAI to such persons and that function in turn being taken over by the second respondent would not take within its import the services rendered by the airline operators to the passengers and the flying public. The persons contemplated by clause (ii) of section 22 are those who are carrying on trade or business at the airport. To enable them to carry on any trade or business, facilities are given by the AAI and which power, in turn, is now vesting in a limited sense with the second respondent. It is for that the fees or rent can be charged.”

29. Hence, clause (ii) of Section 22 is applicable to the petitioners who have been allowed to carry on business of ground handling services at the airport. Now we come back to the factual aspect of the case. Exh.A to the petition is a letter dated 6<sup>th</sup> December 1996 issued by the first respondent to the third petitioner. It calls upon the petitioners to pay licence fee at the rate of 2% (from the year 1979 to January 1985), at the rate of 10% (from February 1985 till March 1991) and at the rate of 11% (from 1<sup>st</sup> April 1991 up to date). A copy of the Board Resolution of the first respondent fixing licence fee at the rate of 2% is not placed on record. The petitioners addressed a letter dated 28<sup>th</sup> October 1996 to the Airport Director of Mumbai Airport in which they have specifically stated that they are ready and willing to pay licence fee at the rate of 2% of gross turnover with effect from 4<sup>th</sup> October 1995 when for the first time demand for licence fee was made. In fact, a cheque representing the said amount was forwarded along with the said letter dated 28<sup>th</sup> October 1996. Even in the letter dated 6<sup>th</sup> December 1996, the petitioners again expressed their willingness to pay the amount at the rate of 2% and, in fact, an amount of Rs.23,993.70 was forwarded along with the said letter. The resolution of the Board of the first respondent fixing the licence fee at 2% is not placed on record. In fact no such resolution is referred in the affidavit filed by Shri Ashok Arora on behalf of the first respondent. But the tenor of the letters dated 28<sup>th</sup> October 1996 and 6<sup>th</sup> December 1996 shows that the petitioners unconditionally accepted to pay fee at the rate of 2% from 4<sup>th</sup> October 1995. Hence, no relief can be granted as regards the payment of amount at the rate of 2% from 4<sup>th</sup> October 1995. But, the petitioners are not liable to pay at the said rate for a period prior to 4<sup>th</sup> October 1995.

30. The Board of the first respondent in its 62<sup>nd</sup> meeting held on 3<sup>rd</sup> September 1984 passed a resolution of charging licence fee of 10% of gross turnover from the agencies providing ground handling services to the airlines. A proposal moved before the Board is also annexed. In the said proposal it is mentioned thus:

“7. .... Keeping in view the profitability of ground handling services, the fee of 2 percent is considered to be too insignificant and low. It is understood that Singapore Air Terminal Services (SATS) are paying 10% of their gross turn over from ground handling services to the Singapore Airports Authority. This agreement has come to an end the new agreement is likely to provide for even higher share. It is proposed that IAAI may fix a licence fee or 10% of the gross turn over as fee for permitting ground handling services. This will be in addition to the payment of licence fee for any specific space provided to the agency for this purpose. This rate will apply to national carriers as well as private agencies. There is no proposal to charge any fee for ground handling services provided by any airline for its own operations.

8. To sum up the following proposals are put up for Board's approval:-

- a) Acceptance in principle for IAAI to enter the business of ground handling at international airports and preparation of a phased programme.
- b) Charging a licence fee of 10% gross turn over from agencies providing ground handling service to airlines. This will apply to private agencies as well as national Carriers and shall be in addition to licence fee for any specific space provided for the purpose.”

31. The demand for payment of the fees at the rate of 10% could have been made from 3<sup>rd</sup> September 1984. But, the demand was for the first time made from the petitioners on 6<sup>th</sup> December 1996 with retrospective effect from February 1985. But, the petitioners were made aware of the Board Resolution by a letter dated 6<sup>th</sup> April 1986 addressed by the Advocate for the first respondent to the petitioners and in fact, a copy of the Resolution was enclosed with the said letter. But, the petitioners never challenged the said resolution. There is no challenge to this resolution even in this petition filed in the year 1996. Thus, there is no merit in the challenge to the levy at the rate of 10% .

32. Exh.E is the letter dated 29<sup>th</sup> September/ 4<sup>th</sup> October 1995 by which the third petitioner was informed by the Deputy General Manager that it was decided to charge licence fee at the rate of 11% of gross turnover for providing ground handling services at Mumbai Airport. In fact, by the said letter, a demand was made for payment of licence fee at the rate of 11% of gross turnover from the date of commencement of the business. The first respondent in its reply has not relied upon any such resolution passed prior to 26<sup>th</sup> December 2001. There was no Board decision taken as on 4<sup>th</sup> October 1995 to charge fee at the rate of 11%. There is no reference in the said letter to any resolution passed by the Board of the first respondent authorizing or fixing the said rate. In absence of any such resolution, levy at the rate of 11% could not have been made. A meeting of the Board of the first respondent was held on 26<sup>th</sup> December 2001. Exh.O-18 is a letter dated 1<sup>st</sup> April 2002 addressed by the General Manager (Commercial) to the Airport Director of the Indira

Gandhi International Airport at New Delhi. It is stated therein that in the Board meeting held on 26<sup>th</sup> December 2001, it was decided to charge 11% royalty on gross turnover from the existing ground handling agents. Thus, the rate of 11% will be applicable from 26<sup>th</sup> December 2001.

33. Now we come to the further increase made from 11% to 15% of the gross turnover. The said circular was issued by the second respondent on 21<sup>st</sup> June 2007 by which licence fee/ royalty was increased from 11% to 15% with effect from 1<sup>st</sup> July 2007. The second respondent was well within its power to do so by virtue of clause (ii) of section 22 of the said Act of 1994.

34. Thus, the demand for levy of licence fee at the rate of 2% of annual turnover for a period prior to 4<sup>th</sup> October 1995 is illegal. However, the demand of licence fee at the rate of 10% from 3<sup>rd</sup> September 1984 is lawful. There is no legal basis for charging the same at the rate of 11% till 26<sup>th</sup> December 2001 as a decision was taken by the Board of the first respondent on 26<sup>th</sup> December 2001. The second respondent is justified in demanding the licence fee at the rate of 15% from 1<sup>st</sup> July 2007. For any subsequent increase, there is no specific challenge to the same in the petition. Thus, the first respondent was entitled to recover licence fee at the rate of 10% of the annual turnover from 3<sup>rd</sup> September 1984 till 26<sup>th</sup> December 2001. From 1<sup>st</sup> July 2007, the levy at the rate of 15% is justified. The licence fee at the rate of 2% cannot be recovered for the period prior to 4<sup>th</sup> October 1995. Once we hold this, the failure of the first/second respondents to recover licence fee or royalty from another

person at the same rates will not help the petitioners. The argument of discrimination will not hold good. The said respondents were entitled to charge the fees as per decisions taken on 3<sup>rd</sup> November 1984, 26<sup>th</sup> December 2001 and 21<sup>st</sup> June 2007 (effective from 1<sup>st</sup> July 2007) respectively.

35. Now we must deal with the other argument canvassed that amount charged is in fact a tax and not fee. A tax is a payment for raising general revenue and it is a burden. It is based on principle of ability or capacity to pay as held by the Apex Court in the case of *Jharkhand and others v. Tata Commins Ltd.* (supra). In the case of *Sreenivasa General Traders v. State of Andhra Pradesh* (supra), the Apex Court laid down the test of determination whether a particular demand is a tax or a fee. Paragraphs- 31 and 32 of the said decision read thus:

“31. The traditional view that there must be actual quid pro quo for a fee has under gone a sea change in the subsequent decisions. The distinction between a tax and a fee lies primarily in the fact that a tax is levied as part of a common burden, while a fee is for payment of a specific benefit or privilege although the special advantage is secondary to the primary motive of regulation in public interest. If the element of revenue for general purpose of the State predominates, the levy becomes a tax. In regard to fees there is, and must always be, correlation between the fee collected and the service intended to be rendered. In determining whether a levy is a fee, the true test must be whether its primary and essential purpose is to render specific services to a specified area or class; it may be of no consequence that the State may ultimately and indirectly be benefited by it. The power of any legislature

to levy a fee is conditioned by the fact that it must be 'by and large', a quid pro quo for the services rendered. However, corelationship between the levy and the services rendered (*sic or*) expected is one of general character and not of mathematical exactitude. All that is necessary is that there should be a "reasonable relationship" between the levy of the fee and the services rendered. If authority is needed for this proposition, it is to be found in the several decisions of this Court drawing a distinction between a 'tax' and a 'fee'. See: *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* 1954 SCR 1005: AIR 1954 SC 282: 1954 SCJ 335, *H. H. Sudhundra Thirtha Swamiar v. Commissioner for Hindu Religious and Charitable Endowments, Mysore* 1963 Supp 2 SCR 302: AIR 1963 SC 966; *The Hingir-Rampur Coal Co. Ltd. v. State of Orissa* (1961) 2 SCR 537: AIR 1963 SC 459; *H. H. Shri Swamiji of Shri Admar Mutt v. Commissioner, Hindu Religious and Charitable Endowments Department* (1980) 1 SCR 368: (1979) 4 SCC 642: 1980 SCC (Tax) 16; *Southern Pharmaceuticals and Chemicals, Trichur v. State of Kerala* (1982) 1 SCR 519: (1981) 4 SCC 391: 1981 SCC (Tax) 320 and *Municipal Corporation of Delhi v. Mohd. Yasin* AIR 1983 SC 617: (1983) 3 SCC 229: 1983 SCC (Tax) 154.

31. There is no generic difference between a tax and a fee. Both are compulsory exactions of money by public authorities. Compulsion lies in the fact that payment is enforceable by law against a person in spite of his unwillingness or want of consent. A levy in the nature of a fee does not cease to be of that character merely because there is an element of compulsion or coerciveness present in it, nor is it a postulate of a fee that it must have direct relation to the actual service rendered by the authority to each individual who obtains the benefit of the service. It is now increasingly realized that merely because the collections for the services rendered or grant of a privilege or licence are taken to the consolidated fund of the State

and not separately appropriated towards the expenditure for rendering the service is not by itself decisive. Presumably, the attention of the Court in the *Shirur Mutt* case was not drawn to Article 266 of the Constitution. The Constitution nowhere contemplates it to be an essential element of fee that it should be credited to a separate fund and not to the consolidated fund. It is also increasingly realized that the element of quid pro quo in the strict sense is not always a sine qua non for a fee. It is needless to stress that the element of quid pro quo is not necessarily absent in every tax : Constitutional Law of India by H. M. Seervai, Vol. 2, Second Edn., p. 1252, paras 22, 39.”  
(underline supplied)

36. The Apex Court observed that a tax is levied as a part of a common burden, while a fee is a payment for a specific benefit or privilege. However, co-relation between levy and service rendered or expected should be of the general character and not of mathematical exactitude. In the present case, initially the first respondent and thereafter, the second respondent allowed the third petitioner to conduct its business in the premises of the airport and earn income. The members of the staff of the third petitioner were allowed entry inside the airport. Therefore, there is *quid pro quo* between levy of licence fee and the facility provided by the first and the second respondents. Hence, the demand under challenge is not by way of a tax.

37. We have already referred to interim orders passed from time to time. On the basis of the interim orders, the petitioners have deposited the amount demanded at the rate of 10%, 11% and 15% respectively.

Deposit of the amounts on the basis of interim orders/ interim orders in terms of minutes, by no stretch of imagination can be said as admission or waiver. Now the question is whether the petitioners are entitled to refund. The learned counsel appearing for the petitioners relied upon the decision of the Apex Court in the case of **Mafatlal Industries Ltd. v. Union of India** (supra) and, in particular paragraph- 108 thereof. Paragraph- 108 reads thus:

“ 108. The discussion in the judgment yields the following propositions. We may forewarn that these propositions are set out merely for the sake of convenient reference and are not supposed to be exhaustive. In case of any doubt or ambiguity in these propositions, reference must be had to the discussion and propositions in the body of the judgment.

(i) Where a refund of tax duty is claimed on the ground that it has been collected from the petitioner/plaintiff - whether before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991 or thereafter - by misinterpreting or misapplying the provisions of the Central Excises and Salt Act, 1944 read with Central Excise Tariff Act, 1985 or Customs Act, 1962 read with Customs Tariff Act or by mis-interpreting or mis-applying any of the rules, regulations or notifications issued under the said enactments, such a claim has necessarily to be preferred under and in accordance with the provisions of the respective enactment before the authorities specified thereunder and within the period of limitation prescribed therein. No suit is maintainable in that behalf. While the jurisdiction of the High Courts under Article 226 - and of this Court under Article 32 - cannot be circumscribed by the provisions of the said enactments, they will certainly have due regard to the legislative intent evidenced by

the provisions of the said Acts and would exercise their jurisdiction consistent with the provisions of the Act. The writ petition will be considered and disposed of in the light of and in accordance with the provisions of Section 11-B. This is for the reason that the power under Article 226 has to be exercised to effectuate the rule of law and not for abrogating it.

The said enactments including Section 11-B of Central Excises and Salt Act and Section 27 of the Customs Act do constitute "law" within the meaning of Article 265 of the Constitution of India and hence, any tax collected, retained or not refunded in accordance with the said provisions must be held to be collected, retained or not refunded, as the case may be, under the authority of law. Both the enactments are self-contained enactments providing for levy, assessment, recovery and refund of duties imposed thereunder. Section 11-B of the Central Excises and Salt Act and Section 27 of the Customs Act, both before and after the 1991 (Amendment) Act are constitutionally valid and have to be followed and give effect to. Section 72 of the Contract Act has no application to such a claim of refund and cannot form a basis for maintaining a suit or a writ petition. All refund claims except those mentioned under Proposition (ii) below have to be and must be filed and adjudicated under the provisions of the Central Excises and Salt Act or the Customs Act, as the case may be. It is necessary to emphasize in this behalf that Act provides a complete mechanism for correcting any errors whether of fact or law and that not only an appeal is provided to a Tribunal - which is not a departmental organ - but to this Court, which is a civil court.

(ii) Where, however, a refund is claimed on the ground that the provision of the Act under which it was levied is or has been held to be unconstitutional, such a claim, being a claim outside the purview of the enactment, can be made either by way or a suit or by

way of a writ petition. This principle is, however, subject to an exception: where a person approaches the High Court or Supreme Court challenging the constitutional validity of a provision but fails, he cannot take advantage of the declaration of unconstitutionality obtained by another person on another ground; this is for the reason that so far as he is concerned, the decision has become final and cannot be reopened on the basis of a decision on another person's case; this is the ratio of the opinion of Hidayatullah, C.J. in *Tilokchand Motichand*, (1969) 1 SCC 110: (1969) 2 SCR 824: AIR 1970 SC 898 and we respectfully agree with it.

Such a claim is maintainable both by virtue of the declaration contained in Article 265 of the Constitution of India and also by virtue of Section 72 of the Contract Act. In such cases, period of limitation would naturally be calculated taking into account the principle underlying Clause (c) of Sub-section (1) of Section 17 of the Limitation Act, 1963. A refund claim in such a situation cannot be governed by the provisions of the Central Excises and Salt Act or the Customs Act, as the case may be, since the enactments do not contemplate any of their provisions being struck down and a refund claim arising on that account. In other words, a claim of this nature is not contemplated by the said enactments and is outside their purview.

(iii) A claim for refund, whether made under the provisions of the Act as contemplated in Proposition (i) above or in a suit or writ petition in the situations contemplated by Proposition (ii) above, can succeed only if the petitioner/plaintiff alleges and establishes that he has not passed on the burden of duty to another person/other persons. His refund claim shall be allowed/decreed only when he establishes that he has not passed on the burden of the duty or to the extent he has not so passed on, as the case may be.

Whether the claim for restitution is treated as a constitutional imperative or as a statutory requirement, it is neither an absolute right nor an unconditional obligation but is subject to the above requirement, as explained in the body of the judgment. Where the burden of the duty has been passed on, the claimant cannot say that he has suffered any real loss or prejudice. The real loss or prejudice is suffered in such a case by the person who has ultimately borne the burden and it is only that person who can legitimately claim its refund. But where such person does not come forward or where it is not possible to refund the amount to him for one or the other reason, it is just and appropriate that that amount is retained by the State, i.e., by the people. There is no immorality or impropriety involved in such a proposition.

The doctrine of unjust enrichment is a just and salutary doctrine. No person can seek to collect the duty from both ends. In other words, he cannot collect the duty from his purchaser at one end and also collect the same duty from the State on the ground that it has been collected from him contrary to law. The power of the Court is not meant to be exercised for unjustly enriching a person. The doctrine of unjust enrichment is, however, inapplicable to the State. State represents the people of the country. No one can speak of the people being unjustly enriched.

(iv) It is not open to any person to make a refund claim on the basis of a decision of a Court or Tribunal rendered in the case of another person. He cannot also claim that the decision of the Court/Tribunal in another person's case has led him to discover the mistake of law under which he has paid the tax nor can he claim that he is entitled to prefer a writ petition or to institute a suit within three years of such alleged discovery of mistake of law. A person, whether a manufacturer or importer, must fight his own battle and must succeed or fail in such

proceedings. Once the assessment or levy has become final in his case, he cannot seek to reopen it nor can he claim refund without re-opening such assessment/order on the ground of a decision in another person's case. Any proposition to the contrary not only results in substantial prejudice to public interest but is offensive to several well established principles of law. It also leads to grave public mischief. Section 72 of the Contract Act, or for that matter Section 17(1)(c) of the Limitation Act, 1963, has no application to such a claim for refund.

(v) Article 265 of the Constitution has to be construed in the light of the goal and the ideals set out in the Preamble to the Constitution and in Articles 38 and 39 thereof. The concept of economic justice demands that in the case of indirect taxes like Central Excises duties and Customs duties, the tax collected without the authority of law shall not be refunded to the petitioner- plaintiff unless he alleges and establishes that he has not passed on the burden of duty to a third party and that he has himself borne the burden of the said duty.

(vi) Section 72 of the Contract Act is based upon and incorporates a rule of equity. In such a situation, equitable considerations cannot be ruled out while applying the said provision.

(vii) While examining the claims for refund, the financial chaos which would result in the administration of the State by allowing such claims is not an irrelevant consideration. Where the petitioner-plaintiff has suffered no real loss or prejudice, having passed on the burden of tax or duty to another person, it would be unjust to allow or decree his claim since it is bound to prejudicially affect the public exchequer. In case of large claims, it may well result in financial chaos in the administration of the affairs of the State.

(viii) The decision of this Court in *STO v. Kanhaiya Lal Mukundlal Saraf* 1959 SCR 1350 AIR

1959 SC 135 (1958 9 STC 747 must be held to have been wrongly decided insofar as it lays down or is understood to have laid down propositions contrary to the propositions enunciated in (i) to (vii) above. It must equally be held that the subsequent decisions of this Court following and applying the said propositions in Kanhaiyalal have also been wrongly decided to the above extent. This declaration - or the law laid down in Propositions (i) to (vii) above - shall not however entitle the State to recover to taxes/duties already refunded and in respect whereof no proceedings are pending before any authority/Tribunal or Court as on this date. All pending matters shall, however, be governed by the law declared herein notwithstanding that the tax or duty has been refunded pending those proceedings, whether under the orders of an authority, Tribunal or Court or otherwise.

(ix) The amendments made and the provisions inserted by the Central Excises and Customs Law (Amendment) Act, 1991 in the Central Excises and Salt Act and Customs Act are constitutionally valid and are unexceptionable.

(x) By virtue of Sub-section (3) to Section 11-B of the Central Excises and Salt Act, as amended by the aforesaid Amendment Act, and by virtue of the provisions contained in Sub-section (3) of Section 27 of the Customs Act, 1962, as amended by the said Amendment Act, all claims for refund (excepting those which arise as a result of declaration of unconstitutionality of a provision whereunder the levy was created) have to be preferred and adjudicated only under the provisions of the respective enactment. No suit for refund of duty is maintainable in that behalf. So far as the jurisdiction of the High Courts under Article 226 of the Constitution - or of this Court under Article 32 - is concerned, it remains unaffected by the provisions of the Act. Even so, the Court would, while exercising the jurisdiction under the said

articles, have due regard to the legislative intent manifested by the provisions of the Act. The writ petition would naturally be considered and disposed of in the light of and in accordance with the provisions of Section 11-B. This is for the reason that the power under Article 226 has to be exercised to effectuate the regime of law and not for abrogating it. Even while acting in exercise of the said constitutional power, the High Court cannot ignore the law nor can it over-ride it. The power under Article 226 is conceived to serve the ends of law and not to transgress them.

(xi) Section 11-B applies to all pending proceedings notwithstanding the fact that the duty may have been refunded to the petitioner/plaintiff pending the proceedings or under the orders of the Court/Tribunal/Authority or otherwise. It must be held that *Union of India v. Jain Spinners* (1992) 4 SCC 389 and *Union of India v. I.T.C.* 1993 Supp 4 SCC 326 have been correctly decided. It is, of course, obvious that where the refund proceedings have finally terminated - in the sense that the appeal period has also expired - before the commencement of the 1991 (Amendment) Act (19-9-1991), they cannot be re-opened and/or governed by Section 11-B(3) [as amended by the 1991 (Amendment) Act]. This, however, does not mean that the power of the appellate authorities to condone delay in appropriate cases is affected in any manner by this clarification made by us.

(xii) Section 11-B does provide for the purchaser making the claim for refund provided he is able to establish that he has not passed on the burden to another person. It, therefore, cannot be said that Section 11-B is a device to retain the illegally collected taxes by the State. This is equally true of Section 27 of the Customs Act, 1962.”

(underlines supplied)

What is held by the Apex Court is in the context of illegal collection of tax. By order dated 23<sup>rd</sup> December 1996, the learned single Judge of this Court granted interim relief subject to condition of petitioners regularly paying licence fee at 11% of gross turnover. By further order dated 11<sup>th</sup> February 2009 in Notice of Motion No.73/2009, the petitioners were granted time of four weeks to pay licence fee at the enhanced rate from 1<sup>st</sup> July 2007. Thus, on the basis of interim orders passed by this Court, the petitioners have paid fees at the rate of 11% and 15%.

38. Now the question is whether the petitioners are entitled to refund. We have held that the demand for levy of licence fee at the rate of 2% of annual turnover is illegal. However, the petitioners paid the amount at the rate of 2% without any demur from 4<sup>th</sup> October 1995. Moreover, there is no challenge to the demand made at the rate of 2% from the aforesaid date. However, for a period prior to the said date, no such demand can be validly made. The demand of licence fee at the rate of 10% from 3<sup>rd</sup> September 1984 is lawful. However, there is no legal basis for increasing the same to 11% till 26<sup>th</sup> December 2001. The second respondent is justified in demanding the licence fee at the rate of 15% from 1<sup>st</sup> July 2007. If there is any subsequent increase, there is no specific challenge to the same in the petition. Thus, the first respondent was entitled to recover licence fee at the rate of 10% of the annual turnover from 3<sup>rd</sup> September 1984 till 26<sup>th</sup> December 2001. From 26<sup>th</sup> December 2001, the first respondent and from the date of execution of the OMDA, the second respondent were entitled to claim fee at the rate of 11%. From

1<sup>st</sup> July 2007, the levy at the rate of 15% is justified. There is no material placed on record by the petitioners to show whether or not the payments made by them at the rates of 2% (prior to 4<sup>th</sup> October 1995), 10% (prior to 3<sup>rd</sup> September 1984), 11% (prior to 26<sup>th</sup> December 2001) and 15% (prior to 1<sup>st</sup> July 2007) have been recovered by the petitioners from the airlines or agencies which employed them. We, therefore, propose to direct the Director of Civil Aviation to appoint a competent officer to make an adjudication on the question whether the petitioners have recovered the aforesaid amounts paid to the first or second respondents, from the companies or airlines which employed the third petitioner. Only if the petitioners satisfy the competent officer that the amounts have not been recovered from third parties, the petitioners will be entitled to refund. Even, the computation of the amount of refund with interest will have to be made by the said officer. The refund will carry interest at the rate of 6% per annum from the respective dates of payment.

39. Accordingly, the petition must succeed in part and we pass the following order:

- (I) We declare that demand for licence fee at the rate of 2% from the petitioner for the period prior to 4<sup>th</sup> October 1995 is illegal. We declare that the demand of licence fee at the rate of 10% with effect from 3<sup>rd</sup> September 1984 is lawful. However, there is no legal basis for demanding the Licence fee at the rate of 11% till 26<sup>th</sup> December 2001. The second respondent

is justified in demanding the licence fee at the rate of 15% from 1<sup>st</sup> July 2007. The first respondent was not competent to demand licence fee at the rate of 2% for the period prior to 4<sup>th</sup> October 1995. The first respondent was entitled to recover licence fee at the rate of 10% of the annual turnover from 3<sup>rd</sup> September 1984 till 26<sup>th</sup> December 2001. From 26<sup>th</sup> December 2001, the recovery at the rate of 11% was lawful. From 1<sup>st</sup> July 2007, the levy at the rate of 15% is justified.

- (II) We direct the Director of Civil Aviation to appoint a competent officer of the appropriate rank to make an adjudication on the question of quantum of amounts paid by the petitioners which were not payable by them as per the findings recorded above. He will ascertain whether any amount in excess of what is payable in terms of what is held in clause (I) above was paid by the petitioners. The officer so appointed will decide whether the petitioners have recovered the said excess amount, if any, from the companies or airlines which employed them. Only if the petitioners satisfy the competent officer that the excess amount has not been recovered by the petitioners from third parties, to that extent, the petitioners will be entitled to refund. Even, the

computation of the amount of refund with interest will have to be made by the said officer. The refund will carry simple interest at the rate of 6% per annum from the respective dates of payment. He shall fix the liability of the first and second respondent;

- (III) The appointment of such officer shall be made within a period of one month from today. He shall pass a reasoned order after giving an opportunity of being heard to the Petitioners and the first and second respondents and after examining the record. The order shall be passed within a period of three months from today;
- (IV) The amounts as determined as above shall be paid by the first/second respondents to the petitioners within a period of one month from the date of the said order;
- (V) Rule is made partly absolute on above terms. No costs.

**(RIYAZ I. CHAGLA, J.)**

**(A.S.OKA, J.)**