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Regulatory Challenges in the Major Ports-Need to 'Act' Now

By Rohit Jaiswal and Abhimeet Sinha

The Government of India, which owns & operates 12 major ports in India, regulates and administers such ports through Board of Trustees and Tariff Authority for Major Ports ("TAMP") as per the provisions of the Major Ports Trusts Act, 1963("Ports Act"). Government now proposes to establish a new regulatory body for the major ports by way of a new legislation called the Major Ports Regulatory Authority Act, 2009("MPRAA"). The proposed MPRAA will be a single regulatory body for all purposes hitherto regulated by the Board of Trustees and TAMP.

The Ports Act laid down a regulatory and institutional frame work for administration of major ports in the country. The responsibility for development, management and regulation of major ports rests with respective port trusts under the Central Government. Board of Trustees appointed by the Government of India governs each major port and the composition of these Boards reflects greater Government representation compared to the private interest groups. The Trustees exercise limited power and are bound by directions on policy matters and orders from the Government of India.

In 1996-1997, policy guidelines were issued by the Government of India providing for private sector participation/investment in major ports. The Government adopted the concept of landlord to ports in terms of which the port authority owns the basic infrastructure, land, access and assets, and leases them out to operators, mostly on long term concession basis, while retaining all regulatory functions. The port trusts continued to operate one or more terminals at the ports and compete with private terminal operators. Since, the port trusts were both regulator and provider of services, in competition with the private operators, need was felt for establishment of an independent regulator to set port tariffs in order to ensure that there was no unfair competition between private sector players and the port trust.



**LEGAL
SUITE**

Government now proposes to establish a new regulatory body for the major ports by way of a new legislation called the Major Ports Regulatory Authority Act, 2009 ("MPRAA")



Pursuant to the policy guidelines, Ports Act was amended in 1997 by the Government and TAMP was set up to fix and revise port tariffs in major ports. The aim was to move towards competitive pricing and provide a level playing field to all players, at least on matters of pricing. TAMP is only an authority for fixing tariffs and has no other regulatory functions or powers. TAMP fixes both vessel related and cargo related tariffs and rates for lease of properties of port trusts and private operators located therein. All the conservancy powers in ports and all other regulatory function in regard to safety etc. are vested in the port trusts themselves.

TAMP does not have the power to improve efficiencies or lay down quality of service standards in port operations. Despite being a regulatory body, TAMP has limited autonomy. Being largely under the Central Government's control, its lack of power to regulate performances and select private parties for contracts and other services implies regulation limitations. TAMP has not

been able to enforce its own orders and call for data from port operators and it cannot compel any party to share information. There have been instances where decisions of TAMP have been challenged in courts by the port operators and its rulings have been stayed by the High Court. It has also not been granted necessary financial autonomy. TAMP has no role to play in opening up the port sector for private investment. The Act provides that while fixing tariffs the conditions under which the services to be rendered can be prescribed, however, owing to the fact that each port has its own tariff schedules and scales, the uniformity in prescribing the conditions of service could not be achieved. TAMP's mandate is restricted to tariffs for port services at the major ports, but the government retains the right to invalidate TAMP's tariff's rulings. TAMP has no power to enforce its own tariff rulings or penalize those found violating the terms and conditions governing tariffs.

Apart from the regulatory limitations of TAMP, there are problems in

regulatory framework of the Act itself. There has been no attempt to encourage competition by introducing two or more service providers. Individual port trusts formulate their own policies, so there is an absence of uniformity in regulations. Under the present regulation regime of major ports, investors and users do not have recourse to an independent regulator on matters such as dispute resolution, performance standards, consumer protection and competition; and therefore the need for a comprehensive regulatory regime for major ports.

The MPRAA's object is to provide for establishment of a Major Ports Regulatory Authority ("Regulatory Authority") to regulate rates for the facilities and services provided at the major ports and to monitor performance standards of port authorities and private operators providing such facilities and services and also to decide specific disputes between port authorities, private operators and group of users and for

matters connected therewith or incidental thereto. The Regulatory Authority will have the powers of a civil court. The regulator will have the power to call for information, investigate, and inspect the books of account or other documents of any port authority or private operator. The most redeeming feature of the proposed legislation is the provision relating to monitoring the actual performance of port authorities and private operators along with corrective/penal measures to be applied in case of non-adherence to performance norms and standards.

It is expressly provided in MPRAA that the disputes which are maintainable before a consumer disputes redressal forum under the Consumer Protection Act, 1986 or which are within the purview of Competition Act, 2002 shall not be taken up by the Authority but shall be raised before such appropriate forum.

Although it is a step forward that a single regulatory regime for the major ports is being proposed by way of the MPRAA, however the overriding powers of the Central Government under the MPRAA do not allow the Regulatory Authority to function as an autonomous regulatory body on the lines of the regulatory authorities under other legislations.

MPRAA does not include the basic tenet of independent regulation, which is arms' length relationship with the Government. Notably, a

committee of secretaries, including secretary of the Ministry of Shipping, would appoint the chairperson and members of the Regulatory Authority. With just one member from outside Government, this is by no means an independent committee. Further, the presence of the shipping secretary on the said committee raises questions of conflict of interest. The concession signed by the port is a creation of the Ministry of Shipping, with its full involvement in bidding and negotiations. Even if there is a semblance of an arm's length relationship in some provisions, everything is negated by Chapter IV - "Powers of the Central government." Government's powers are not just for giving policy directions. The draft says "the decision of the Central Government on whether a question is one of policy or not shall be final." The Government also has the power to supersede the Regulatory Authority and take up its role. Further, the Government's power to require modifications or cancellation of rates, if "necessary in the public interest" is not restricted by any caveat, preventing its use in normal circumstances. "Public interest" has a variety of often dangerous definitions. The provisions violate the basic principle of regulatory independence, which puts checks and balances on the executive branch of the Government from overruling the Regulatory Authority's

decisions except through the much safer legislative or judicial processes.

It's noteworthy that the MPRAA does not provide for appeal from the decisions of the Regulatory Authority. Thus, any order of the Regulatory Authority would be directly amenable to the jurisdiction of the High Court. It is advisable that the MPRAA should have the provision for the appellate authority in the lines of the telecom and securities markets sector, which would hear the appeals from the decisions of the Regulatory Authority and such appellate authority should have a technical member along with a judicial member such as retired High Court or Supreme Court judge so that there is finality to the decisions of the Regulatory Authority.

The major ports have come a long way, but there is still a long way to go. If the Government keeps itself at arm's length from the Regulatory Authority, the proposed MPRAA would help the major ports to achieve the objectives of enhancing fair play and competition, ensuring efficiencies and reducing costs. As the concept of private sector and public private partnership would evolve further, this legislation and the regulatory framework would have to gear up to meet the challenges of the ever changing environment and therefore the Government must address the same in the proposed MPRAA.



COURT ROOM

CAT- on appointment of legal heirs

By Madhu Sweta and Joju Kynady

SATISH KISHAN TAKEY Vs UNION OF INDIA

Case No: O.A.No.1838 of 2009

Court: Central Administrative Tribunal, Principal Bench, New Delhi.

Singhania & Partners on behalf of Respondent-India Security Press (now Security Printing and Minting Corporation of India Ltd).

Brief facts

The applicant's father who was employed at the Indian Security press, Nashik Road, expired on 21.10.1997. The Applicant in 2007 made an application to India Security Press seeking compassionate appointment. As per the office Memorandum dated 5.05.2003 issued by the Govt. of India, if the compassionate appointment is not provided within one year due to non availability of regular vacancy, the same may be considered within three years. After three years, if compassionate appointment is not possible to be offered to the Applicant, his case will be finally closed, and will not be considered again. Keeping this in view, Respondent rejected the Applicant's request for compassionate appointment since the above application was made after prescribed limit of three years. Against the said order, Civil Writ Petition No.41774 of 2008 was filed by Complainant before High Court of Allahabad. The High Court vide Order dated 18.08.2008 directed the Respondent to reconsider Complainant's Application. The Respondent vide Order dated 20.10.2008 reconsidered and rejected the Complainant's application, which was challenged in the present Original Application filed before the Central Administrative Tribunal.

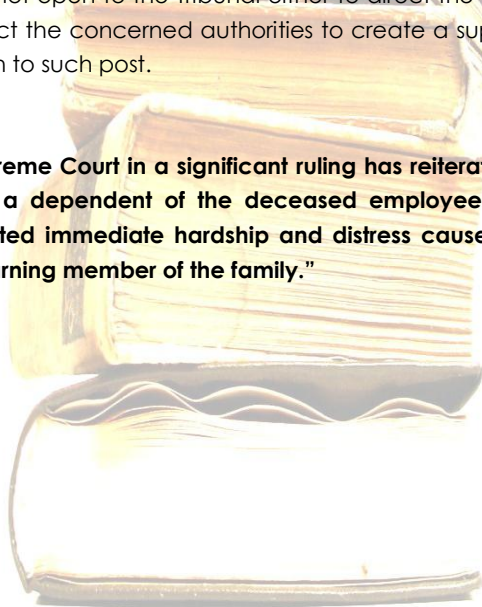
Point(s) of Law

1. Compassionate appointment, as is well-settled, is not a vested right nor can it be claimed as a matter of right. Appointment on compassionate grounds should be strictly in accordance with the scheme/rules and regulations framed for that purpose.
2. The object of the Compassionate Appointment scheme is to grant appointment on compassionate grounds to a dependent family to relieve financial destitution and to help it get over the emergency.
3. The Compassionate employment cannot be claimed and offered after lapse of a long period of time as it would be reasonable to contend that the immediate financial crisis facing the family after the loss of the bread-earner has been tided over.
4. In the absence of a vacancy, it is not open to any authority to appoint a person to any post under Compassionate ground. It will be gross abuse of the powers of a public authority to appoint persons when vacancies are not available.

Decision

Based on the aforesaid points of law, the Tribunal dismissed the Original Application filed by the Complainant both on the grounds of limitation under section 21 of the Administrative Tribunals Act, 1985 and also on merits. The Tribunal held that the very object of appointment of a dependent of the deceased employees who die in harness is to enable the family to get over the sudden financial crisis which it faces at the time of sudden demise of the earning member of the family. It was also held that Compassionate appointment is not a vested right which can be exercised at any time in future but has to be strictly followed according to the schemes and rules formulated for the appointment. Further it is the prerogative of the executive to lay down the policy with respect to Compassionate appointments. The learned Tribunal referred to the various decisions passed by the Hon'ble Supreme Court in similar matters held that, if the Tribunal finds that a person is qualified to be appointed to a post under kith and kin policy, the Tribunal should only give a direction to the appropriate authority to consider the case and is not open to the Tribunal either to direct the appointment of any person to a post or direct the concerned authorities to create a supernumerary post and then appoint a person to such post.

The Hon'ble Supreme Court in a significant ruling has reiterated that "The very object of appointment of a dependent of the deceased employees who die in harness is to relieve unexpected immediate hardship and distress caused to the family by sudden demise of the earning member of the family."



Newsquest

Ashok Leyland defence arm ties up with Krauss-Maffei

Ashok Leyland Defence Systems (ALDS), a newly formed company in which the Hinduja flagship Ashok Leyland holds 26% stake, has formed a strategic alliance with Krauss-Maffei Wegmann GmbH & Co KG, Munich, Germany, at the International Defence Exhibition (IDEX) at Abu Dhabi, to co-operate in the development of advanced defence systems for the Indian defence establishment as well as other defence forces worldwide. The scope of the co-operation will initially include the development of armoured wheeled vehicles, recovery vehicles, artillery and combat systems, bridge laying systems and other similar products. ALDS brings to this strategic alliance the expertise and experience of designing and developing defence vehicles that has made Ashok Leyland the largest supplier of logistics vehicles to the Indian Army with over 60,000 of its Stallion vehicles forming the Army's veritable logistics backbone.



Highways body moves towards pre-qualification of firms

Highway developers can now apply to the National Highways Authority of India (NHAI) to get pre-qualified for projects that will be bid during a year. The NHAI has invited applications for annual pre-qualification (RFAQ) from companies. They can apply for pre-qualification as a single entity or as a consortium. The companies that get pre-qualified at the RFAQ stage do not have to submit detailed application for project specific qualification (RFQ) stage. At present, for each project, NHAI invites requests for qualification – a process that takes three to four months.

CCI can make M&A's in banking sector easier

Corporate Affairs Minister Salman Khurshid said the CCI can perhaps make mergers and acquisitions of banks easier and asserted that it is wrong to say the anti-monopoly watchdog will not understand the objectives of consolidation in the sector. "I do not think there is any problem; people have assumed that the Competition Commission of India (CCI) will not understand the intricacies and the objectives of what bank consolidation is all about. Perhaps, the CCI will make consolidation easier," Khurshid said on whether the banking sector would be kept out of the ambit of the Competition Act.



India's Lanco Infratech to acquire Australia's Griffin Coal for A\$730 million

India's foremost infrastructure firm, Lanco Infratech is to acquire Australia's Griffin Coal. According to the ET report, the investment is for a consideration of A\$730 million, about Rs 3,400 crore. Lanco's move comes amidst previous similar moves by Indian firms keen on securing resource supplies for their Indian units. According to the ET, it is the second biggest investment by an Indian company in Australia, after Adani Enterprises acquired Linc in August 2010 for \$2.7 billion. Speaking to ET, Lanco's chief financial officer, Suresh Kumar, said the acquisition of Griffin Coal will cater for about 30 per cent of Lanco's

overall coal needs to the year 2015.

Reserve Bank of India ready to let big firms set up banks

Regulatory nod for new licenses only after laws are changed to give central bank power to supersede boards The Reserve Bank of India (RBI) is ready to allow big industrial houses to set up banks, but only after it gets the power to supersede boards of banks that are not being run properly. RBI also wants the right to oversee the operations of the promoting company and any affiliates that will have business relationships with the bank.



Companies may have to induct at least one female independent director

Coinciding with International Women's Day, the Corporate Affairs Ministry on Tuesday said it would make it mandatory for companies having five or more independent directors to have at least one female independent director. Companies having five or more independent directors would have to necessarily have at least one female independent director, Corporate Affairs Minister Murli Deora said. The proposal would be part of Companies Bill 2009, which is expected to be tabled in the current session of Parliament.

Government to hike defence budget

In the backdrop of evolving Asian security scenario, defence modernisation is poised to get a massive boost in the coming fiscal with the Budget likely to increase capital acquisition allocation by almost 25 per cent. Defence Ministry officials said that the Finance Ministry has agreed to a "significant jump" in the capital acquisition outlay to nearly Rs 560 billion in 2011-12 from revised provision of Rs 450 billion in the current fiscal. The enhanced outlay is seen as being in sync with the defence spending by India's immediate neighbours, especially China which has been increasing its outlays by double digits over the last two decades.



Maharashtra to invest in ports, coastal security

The Maharashtra government will spend around Rs 8.27 billion on developing ports along with the western coast, with a port in Ratnagiri, K Shankararayan, Governor, said in an inaugural speech of the budget session. He said apart from developing ports, the state will invest in coastal security. The government has set up 12 special coastal police stations and will build seven more to provide protection along the coast and establish a marine security academy at Raigadh. The governor said the state will ensure funds for Naxal-affected areas are utilized.



Nigeria invites Indian investment in energy, banking and financial sector

The Nigerian Government has invited Indian industry to invest in the country's power, oil and gas and the banking and financial sectors which have been deregulated and thrown open to private sector investment. The Nigerian Foreign Minister, H Odein Ajumogobia expressed this while addressing at an industry round table organized by Federation of Indian Industry (FICCI) in New Delhi.

India ahead of US on energy efficiency: Report

India is making more progress than the US in increasing the country's energy efficiency, a report said. 'India's Clean Revolution' was launched by international NGO The Climate Group (TCG). The report suggested that the rate of increase of India's private investment in clean energy will be 736 percent over the next 10 years, three times that of the US or China. Further, low cost labour and highly skilled manufacturing base will make India a major hub for clean technologies. 'Only a clean industrial revolution can guarantee long term prosperity for any nation and nowhere is this truer than in India. The low carbon economy offers huge economic opportunities,' TCG's chief executive officer Mark Kenber said.



SYNAPSE



Lenders Legal counsel to PFC for Rs. 26.55 loan

S&P acting as Lender Legal counsel to Power Finance Corporation for providing financial assistance of Rs. 26.55 billion to M/s Ind-Barath Energy Utkal Ltd. for setting up 660 MW coal based thermal power project at Sasthavinallur at Pallakurichi Villages in Tamil Nadu.

Legal advisor in consortium with PFCCL

S&P is assisting Power Finance Corporation Consulting Limited (PFCCL) on Legal & Regulatory related aspects for selection of developer for setting up of 2-125 MW Unit 3 & 4 of Giral TPP under "Case-2" of Guidelines for determination of Tariff by Bidding process for procurement of Power Distribution Licensees: issued by Ministry of Power, Govt of India.



Legal Counsel to Mormugao Port Trust, Goa

Acting as legal advisor to 'Mormugao Port Trust' for "Providing Transaction Advisory Services for Development of a 8MMTPA Iron Ore Export Terminal at Mormugao Port" for selection of a developer. The RFQ stage is now complete and the RFP has been issued to the qualified applicants.

S & P hosted the Asian TerraLex Members Meet this year between the 24-27th Feb 2011, S & P is the Indian Representative of TerraLex, a global network of 160 top independent law firms and 15,000 attorneys in nearly 100 countries and 41 US States. TerraLex lawyers guide clients through the challenges of global business. Member firms interact seamlessly, providing clients with the global reach and local expertise one needs to meet any challenge, anytime, anywhere.



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