IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.12.2016

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THE HONOURABLE MR.JUSTICE B.RAJENDRAN

Writ Petition Nos. 36423 & 36424 of 2016
and
W.M.P.Nos.31367 to 31370 and 31372 of 2016
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W.P.No.36423 of 2016

IMC Limited
A Company incorporated under the Indian
Companies Act, 1913 having its Registered
Office at 232/A,
A.J.C.Bose Road, Kolkata,
West Bengal 700 020
Represented by its Power of Attorney Holder
Mr.K.Kannan
... Petitioner

Versus

1.Kamarajar Port Limited,
Port Administrative Building,
Vallur, Chennai 600 120
Represented by General Manager,
(CS & BD)

2.Union of India,
Represented by the Secretary,
Ministry of Shipping,
Transport Bhawan,
Sansad Marg,
New Delhi 110 001 ... Respondent

WP.No.36423/16:Writ Petition praying to Writ of Certiorarified Mandamus Calling for the records pertaining to the request for qualifications dated June 30 2016 for the development of Marine Liquid Terminal-II issued by 1st respondent and quash Clause 2.2.1 of the Request for Qualification for the Marine Liquid Terminal-II at Kamarajar Port dated June 30 2016 issued by the 1st respondent and consequently direct 1st respondent to allow the petitioner or its associates to participate in the Request for Qualifications for the development of Marine Liquid

Terminal-II at Kamarajar Port dated June 30 2016 tendering process.

W.P.No.36424 of 2016

IMC Limited
A Company incorporated under the Indian Companies Act, 1913 having its Registered Office at 232/A,
A.J.C.Bose Road, Kolkata,
West Bengal 700 020
Represented by its Power of Attorney Holder
Mr.K.Kannan
.. Petitioner

Versus

Union of India,
Represented by the Secretary,
Ministry of Shipping,
Transport Bhawan,
Sansad Marg, New Delhi 110 001
.. Respondent

Prayer in W.P.No.36424 of 2016: This writ petition is filed under Article 226 of the Constitution of India, praying for a Writ of Declaration the Policy No.PD-24018/8/2009 PD.III New Delhi-1 dated August 02, 2010 on Policy for Preventing Private Sector Monopoly in Major Ports and all consequential clauses in tenders, including Request for Qualifications for the development of Marine Liquid Terminal-II at Kamarajar Port dated June 30, 2016 issued by Kamarajar Port Limited issued pursuant to Policy No.PD.24018/8/2009 PD.III New Delhi-1 dated August 02, 2010 on Policy for Preventing Private Sector Monopoly in Major Ports be struck down as unconstitutional, arbitrary, unreasonable and having no rational basis.

For Petitioners : Mr. P.S.Raman Sr.Counsel for M/s.T.Gowthamkumar in both Writ Petitions

For Respondents : Mr.KrishnaRavindran, Standing Counsel in W.P.No.36423 of 2016(R1)

Mr.Su.Srinivasan
Assistant Solicitor General
in W.P.No.36424 of 2016 (R2)

Mr.Krishna Ravindran,
Standing Counsel
in W.P.No.36424 of 2016(R1)

COMMON ORDER

W.P.No.36423 of 2016 has been filed challenging the request for qualification dated 30.06.2016 issued by the first respondent and consequently, directing the first respondent to allow the petitioner or its associates to participate in the request for qualifications for the development of Marine Liquid Terminal-II at Kamarajar Port dated June 30, 2016 tendering process.

2. W.P.No.36424 of 2016 has been filed seeking a Writ of Declaration that the Policy No.PD-24018/8/2009 PD.III New Delhi-1 dated August 02, 2010 on Policy for Preventing Private Sector Monopoly in Major Ports and all consequential clauses in tenders, including Request for Qualifications for the development of Marine Liquid Terminal-II at Kamarajar Port dated June 30, 2016 issued by Kamarajar Port Limited issued pursuant to Policy No.PD.24018/8/2009 PD.III New Delhi-1 dated August 02, 2010 on Policy for Preventing Private Sector Monopoly in Major Ports be struck down as unconstitutional, arbitrary, unreasonable and having no rational basis.

3. The case of the petitioner is that the petitioner is a company regulated under the Companies Act, 2013 and is carrying on the business of liquid bulk and port-based terminals, receipt, storage and handling of liquid bulk, providing operation and maintenance services and international trading for over seven decades. The petitioner through its affiliates, currently offered storage for bulk liquid at a number of Major and Non-Major Ports in India. The combined capacity for storage of petroleum products, liquefied gases, petrochemicals, acids and vegetable oils is in excess of one million kilo liters. The petitioner through one of its Special Purpose Vehicles at Ennore Tank Terminal Private Limited (ETTPL) is presently operating an integrated marine liquid terminal including a jetty of 360 meters continuous quay, storage, pipelines and allied facilities, with a dredged depth of up to 15 m CD (Chart Datum) to handle liquid bulk, along with bulk liquid storage tank farm. The jetty is capable of handling one medium/large vessel or two small tankers at a time.

4. In these writ petitions, the petitioner is aggrieved by the decision of the first respondent/Kamarajar Port Limited (KPL) to exclude him or any of its associates from participating in the tendering process for development of Marine Liquid Terminal-II (MLT-II). According to the petitioner, they have formed a consortium with Larsen & Toubro Limited in the year 2002 in order to participate in the Request for Qualification for selection of a developer to design, engineer, finance, construct, operate, maintain and market a common-user marine liquid terminal on build-own-transfer method. In fact, KPL also confirmed the Consortium as a qualified bidder and upon such confirmation, it was required to form a project company to undertake the development of MLT-1. In pursuance thereof, ETTPL was set up as the Special Purpose Vehicle with 74% equity participation by the petitioner and 26% equity participation by Larsen & Toubro at the time of incorporation. ETTPL was issued a letter of Intent dated 12.10.2004 and a license agreement dated 10.11.2004 entered into between the first respondent and ETTPEL to build, operate and transfer a marine liquid terminal consisting of jetty, trestle, pipelines, tank farm and other utilities.

5. While so, on 31.06.2016, KPL issued a request for qualification inviting applications from interested bidders for development of a Marine Liquid Terminal-II ("MLT-II RfQ") at Kamarajar Port. In the said request for qualification, to the shock and surprise of the petitioner, clause 22.1 (3) was included which categorically excluded ETTPL or its associates from participating in the bid. Such inclusion, according to the petitioner was based on an anti-monopoly policy issued by the second responjdent on 02.08.2010. Therefore, the petitioners have come forward with these writ petitions.

6. The learned Senior counsel for the petitioners would contend that the Anti-Monopoly Policy is applicable where there is "only one private terminal/berth operator in a port for a specific cargo". Indian Oil Corporation Limited has also been allotted a terminal at the Kamarajar Port on nomination basis on 9th June 2016 and would be permitted to handle all major liquid bulk categories that are being handled by ETTPL presently. Therefore, ETTPL is not the only berth operator at the Kamarajar Port for the same liquid bulk. It is evident that not only there are two berth operators at Kamarajar Port, but also other operators, who handled the same liquid bulk. In such circumstances, the Anti-Monopoly Policy is not applicable to ETTPL. The ETTPL informed the first respondent that the policy will not be applicable to it or its 'associates' since IOCL had been allotted the next terminal and consequently there would be two terminal operators handling the same liquid bulk. The petitioner also submitted a direct application to KPL dated August 1, 2016 whereby it had applied for extension of time for

submission of queries and date of pre-qualification conference in the light of the letter sent on July 15, 2016 sent by ETTPL. The petitioner had further written to KPL through its letter dated September 29, 2016 bringing to it's notice the non-application of the Anti-Monopoly Policy to the petitioner, to modify the MLT-II RfQ and permit the petitioner, or its associate to participate in the tender process under MLT-II-RfQ. Despite repeated requests made to KPL to review and rectify the MLT-II RfQ and to allow the petitioner or its associates to participate in the tendering process for MlT-II, there is no response made. It is also further stated that the policy review note itself stated that the monopoly policy has been affecting growth of major ports and reducing competition which directly impacts the revenue generated. The capacity utilization of Major Ports has reduced and the Major Ports are losing out to minor ports which are not hit by restrictive regulations such as the Anti-Monopoly Policy. The petitioner has also written a letter dated October 6, 2016 to the 1st respondent to review the Policy, but it was not responded. According to the learned Senior counsel for the petitioner, the interpretation of the policy by KPL excluding the petitioner from participating in the bidding is hit by the vice of unreasonableness and arbitrariness which directly impact the petitioner's constitutionally guaranteed rights.

7. On the contrary, the learned Assistant Solicitor General appearing for the first respondent has filed a counter in which, it is stated that the existing anti-monopoly policy is still in force and its legality has already been considered and upheld in the decision reported in APM Terminals B.V. vs. Union of India and another reported in (2011) 6 SCC 756 and hence, the writ petition is not maintainable. In fact , the petitioner has already approached the Government seeking to grant exemption and to permit them to participate in the bidding process. De hors policy decision, the Government itself has given a reply stating that as the policy is in force such permission cannot be granted, which has also been communicated to the petitioner. The respondent has signed the MOU with IOCL for construction of Captive Jetty on 30.11.2015 and the said jetty would be exclusive of IOCL only. Subsequently, the Concession Agreement was signed with IOCL on 09,.06.2016 and IOCL is in the process of carrying on pre-project activities including DPR preparation. Therefore, the respondent would contend that it is not a multi user terminal given through bidding PPP mode, on the contrary, it is a dedicated captive oil jetty which is given on nomination basis. The proposed Marine Liquid Terminal- II is the second Terminal in the first respondent Port and the first terminal is presently being operated by the petitioner. Hence the petitioner is not permitted to bid for the second terminal also. Further, he would also contend that as per the land policy 2014 issued by the second respondent, the IOCL being a Central Public

Sector Undertaking (CPSU) is entitled for allotment of land on nomination with approval of the board of the 1st respondent. Hence the said captive jetty of IOCL cannot be considered as a second terminal as claimed by the petitioner especially when there is an urgent need for the second Marine Liquid Terminal. In view of the fact that some of the vessels carrying goods are waiting for more than 4 to 6 days, the new tender is called for. Of course, the tender document categorically excludes the petitioner or its affiliates from participating the tender process as an existing operator. The policy itself was made only to avoid private sector Monopoly in the Major Ports by consortium members and/or associates. The definition of "Associates" has been made very broad on purpose to avoid companies from deceiving the object of the Government. The learned counsel for the respondent also contend that the decision rendered in (2011) 6 SCC 756 mentioned supra would be a bar for the petitioner to file the present writ petition. Therefore, the learned counsel for the respondents would justify the exclusion of the petitioner from participating in the request for qualifications for development of Marine Liquid Terminal II and prayed for dismissal of the writ petitions.

8. The learned Senior counsel for the petitioner has filed additional affidavit stating that in a similar situation, in 2015, as regards the conversion of an iron ore terminal to a coal terminal, Chettinad International Coal Terminal Private Ltd (CICTPL) who were the sole private coal terminal operators, dealing with coal in conjunction with the coal terminals being operated by the first respondent, in sofar as IOCL is concerned, it is stated that Captive Use Policy would apply to Central/State Public Sector Undertakings to cater to the public at large to an extent of 30% of total terminal capacity. Therefore, the petitioner cannot be considered as an exclusive port handler.

9. The learned counsel for the respondents, by placing reliance on the documents filed in the typed set of papers, particulary the letter letter dated 30.09.2016 sent by the second respondent to the first respondent, would contend that the first respondent has rejected the petitioner's request to participate in the tender process and such rejection is in accordance with policy of the Government.

10. I have heard the submissions made by either sides and on perused the materials available on record.

11. The main contention of the learned Senior counsel appearing for the petitioner is that the action of the first respondent in applying the Anti-monopoly Policy to exclude the petitioner from participating in the Request for Qualification for development of Marine Liquir Terminal II at Kamarajar Port is arbitrary and without application of mind to the Policy

Review Note whereby the second respondent proposed to review the Monopoly Policy in Ports Sector. The learned Senior counsel for the petitioner brought to the notice of this Court the Review of Monopoly Policy in Ports Sector whereby, according to the learned Senior counsel for the petitioner, the existing policy was sought to be reviewed in view of significant changes that have taken place over the last five years. By placing reliance on the Review of Monopoly Policy, the learned Senior counsel appearing for the petitioner would contend that the capacity utilisation of Major ports has come down during the last ten years from 2005 to 2015 and such declining trend does not support such restrictive practices such as the Monopoly Policy. Therefore, according to the learned Senior counsel for the petitioner, the Ministry of Shipping has proposed to withdraw the Monopoly Policy with respect to existing major ports and the new major ports which are proposed to be established in future. According to the learned Senior counsel for the petitioner, the Monopolicy is no longer in existence and a decision has been taken to re-consider it The learned Senior counsel for the petitioner would further contend that the restrictions imposed on the petitioner has not been placed on IOCL under the Policy and therefore it is arbitrary and unreasonable to exclude the petitioner alone from participating in the bid. The economy of the country will witness growth only if the policies of the respondents are liberalised and private players are permitted to participate in the bid of the respondents. Therefore, clause 2.2.1 of the MLT-II RIQ is bound to be struck down as arbitrary and illegal. Clause 2.2.1 (e) of the MLT RfQ, which is Extracted hereunder:

> "As per Government Policy, "if there is only one private terminal/berth operator in a port for a specific cargo, the operator of that berth, or his associates shall not be allowed to bid for the next terminal/berth for handling the same cargo in the same port (Detailed Government Policy Vide Letter dated 2nd August 2010 is enclosed in Appendix-VI. Accordingly, the existing BOT operator of Marine Liquid Terminal-I M/s.Ennore Tank Terminal Pvt Ltd or his associates shall not be allowed to bid for the Development of Marine Liquid Terminal-Ii on DBFOT basis at Kamarajar Port"

12. The learned Senior counsel appearing for the petitioner would also rely upon the Judgment of the Hon'ble Supreme Court in (2003) 5 SCC 437 (Union of India and Another vs. International Trading Co. And another, wherein it was held that change in policy decision must not be found to be arbitrary, unreasonable and irrational. He also relied on the Judgment reported in (2007) 8 SCC Page No.1 (Reliance Energy Ltd and anotehr vs Maharashtra state Road Development Corpn.Ltd

and others) wherein it was held that all when there is a necessity to provide a "level playing field" to all bidders based on the necessity to indicate norms and bench marks to ensure legal certainity, it would satisfy the test of reasonableness.

13. On the contrary, the learned Assistant Solicitor General has relied upon the Judgment of the Hon'ble Supreme Court (2011) 6 SCC 756 in APM Terminals .V. vs. Union of India and another, wherein, the ealier policy of the respondents was challenged and the appeals were dismissed . Further, the Union of India issued a new policy guideline under Section 111 of the Major Port Trusts Act, 1963, on 02.08.2010 , wherein when supreme court has brought to the notice in Paragraph-36, it is clearly stated that 2010 Policy provided that if one private container/berth operator is in a port for a specific cargo, the operator of that berth or his associates would not be allowed to bid for the next terminal/berth for handling the same cargo in the same port and that has been informed and that such contractor shall be debarred from participating in the bidding process for the eighth berth/container terminal. Further, the petitioner earlier filed writ petitions Nos.19384 & 19851 of 2010 inter alia, for a direction upon the respondents to permit the petitioner to participate in the bid process for the development of the eighth berth at Tuticorin Port as a container terminal and for a further direction upon the authorities of a Tuticorin Port Trust to provide the request for qualification documents and to quash the decision not to provide the same. It is further contended that the Honourable Supreme Court has considered all the matters in respect of the very same policy and come to a conclusion that such an embargo put against a particular erstwhile operator cannot be said to be illegal.

14. The learned Assistant Solicitor General would also contend that Clause 4 of the policy statement that ports would have to ensure that private investment did not result in the creation of private monopolies and that private facilities were available to all users on equal and competitive terms. Therefore, the Hon'ble Supreme court categorically has held that the rejection in that case was valid. The above said Judgment of the Hon'ble Supreme court in paragraphs Nos.59, 60, 62, 63, 70 and 73 which are extracted as hereunder:

> 59. Both the Bombay High Court as well as this Court have held that in public interest it was open to the Government to alter its policies in order to subserve the common good and that contractual rights would have to give way to the greater public interest, which in this case was to present the creation of private monopolies in the management of port facilities in the major ports in the country,

as this could have far-reaching and disastrous consequences as far as shipping in such ports was concerned. As already indicated herein above, the policy decision of 26.10.1996 made provision for privatization and also gave private operators the right to given priority berthing to their own ships. The said decision had the potential of substantially disrupting the schedule of other ships intending to use the port facilities and could discourage foreign ships from coming to Indian ports and thereby disturb the very pattern of the shipping trade in India.

60. While disposing of Writ Petition No.8083 of 2002, filed by P & O Australia Ports Pty.Ltd ., against the Board of Trustees of JNPT, the Division Bench of the Bombay High Court examined the question raised herein at length. It found that the appellants were handling container terminals in Karachi and Sri Lanka and also at JNP and Chennai, thereby exercising control over 48% of the container traffic in India. The High Court held that the two existing terminals at JNP and chennai are the biggest container terminals in the country and if the appellant and the petitioner in the transferred cases were permited to operate the new container terminals also, they would have virtual monopoly of the container traffic in the entire country which would not be in the public interest.

62. The High Court took note of the fact that P&O Ports itself had been excluded from bidding for the third container terminal in the Port of Melbourne on the ground that it would give the said operator a position of dominance which was to be avoided in the interest of the shipping industry at large. Two other examples of Port Klang in Malaysia and Bhabange Port" in Thailand were also taken note of by the Bombay High Court where different independent operators were appointed to promote competition.

63. It is precisely for such reason that it had become necessary for the Central Government to alter its policy decision regarding entrusting control of the container terminals in the major ports of India in a manner so as to eliminate monopolisation and to encourage competition. The decision of the High Court was duty endorsed by this Court in

SLP 9C) No.7488 of 2003 and it was observed that the High Court had rightly dismissed the writ petition.

70. Although, it has been urged by Ms.Chidambaram that such change in policy could be effected only by way of legislation, such a submission, if accepted, could stultify the powers of the Central Government to alter its policies with changing circumstances for the benefit of the public at large. It is not as if the right of a licensee to bid for a further container terminal berth has been excluded for the entire period of the licence agreement but in order to ensure proper competition and participation by all intending tenderers, the said policy has also been altered to enable such licensees to bid for the next but one tender as and when invited.

73.As we have indicated earlier, the Central Government was within its powers to adopt a policy to prevent the port facilities from being concentrated in the hands of one private group or consortium which could have complete control over the use of the facilities of the ports to the detriment of the shipping industry as a whole. The decision taken by the Tuticorin Port Trust Authorities to exclude PSA Sical Terminals Ltd., from bidding for the eighth berth container terminal cannot, therefore, be said to be arbitrary or unreasonable so as to warrant interference. In fact, the position of PSA Sical Terminals Ltd is no different from that of APM Terminals B.V.Which had been excluded from the bid for the third container terminal at JNPT.

15. The petitioner has come forward with this writ petition mainly contending that clause 22.1 (3) of the tender excluded petitiner or its associates from participating in the bid. Such inclusion, according to the petitioner, was based on an anti-monopoly policy issued by the second responjdent on 02.08.2010. On careful perusal of the order passed by the Honourable Supreme Court mentioned above, it is evident that in public interest, it will be always open to the Government to alter its policies in order to subserve the common good and that contractual rights would have to give way to the greater public interest, including creation of monopolies in the management of port facilities in the major ports in the country. It was specifically held by the Honourable Supreme Court that the Central Government was within its powers to adopt a policy

to prevent the port facilities from being concentrated in the hands of one private group or consortium which could have complete control over the use of the facilities of the ports to the detriment of the shipping industry as a whole. Similar was the case in hand and by applying the above decision to this case, the respondent has specifically excluded the petitioner from participating in the bid only in public interest and it cannot be said to be arbitrary and discriminatory. The respondents are also justified in contending that the contract is not in respect of multi user terminal but it is a dedicated captive oil jetty on nomination basis especially when the petitioner is already holding a contract. As rightly pointed out by the respondents, the proposed terminal is the second terminal in the first respondent port and the first terminal is presently being operated by the petitioner. The petitioner therefore was rightly excluded from operating the other terminal in the port.

16. The argument of the learned Senior counsel for the petitioner is Indian Oil Corporation is already allotted a terminal at the Kamarajar Port and permitted to handle all major liquid bulk categories and therefore the petitioner is not the only berth operator at the Port for the same liquid bulk. Such an argument cannot be accepted. Indian Oil Corporation is one of the wings of government and awarding contract in their favour cannot be construed as a second terminal on need basis. In such circumstance, the petitioner cannot be equated with Indian Oil Corporation in the matter of awarding of contract. Moreover, according to the respondents, Indian Oil Corporation was given the contract to cater to the need of the public. In any event, it is purely a policy decision of the Government and such decision cannot be normally interfered with by this Court in this writ petition unless it is shown that the so-called decision is arbitrary and discriminatory.

17. It is also to be mentioned that the Supreme Court has considered an identical case including the change of policy in the context of challenge to the existing policy. The argument of the learned senior counsel for the petitioner that as on date the policy is sought to be changed but not amended, hence, the original policy would apply to the petitioner and they cannot be excluded from the contract is not acceptable. The policy itself was made only to avoid private sector monopoly in Major Port by consortium members and associates. Further, as pointed out by respondents, Indian Oil Corporation was not given the contract by participating in the tender notification along with others. Whereas, it was given the contract exclusively on preferrential allootment on the basis of the policy decision. Therefore also, when such a policy has been taken by the respondents, the arguments raised on behalf of the petitioner cannot be accepted.

18. The petitioner's claim has been rightly rejected for non participation. No doubt the Hon'ble Supreme court as well as this Court has time and again held that a policy decision of the government or instrumentality of the government cannot be interfered with by substituting their own reason. Therefore, in matters of this nature, exercise of judicial review on the part of this Court is limited. In any event, the claim of the petitioner was rejected only on the basis of the policy decision taken by the respondents and against such decision, this Court is not inclined to interfere.

19. Accordingly, both the writ petitions are dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

kkd/rsh
To
1. The General Manager
   Kamarajar Port Limited,
   Port Administrative Building,
   Vallur, Chennai 600 120
   CS & BD)

2.The Secretary
  Union of India,
  Ministry of Shipping,
  Transport Bhawan,
  Sansad Marg,
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+1 cc to Mr.Gowthamkumar Advocate sr 74383
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WP Nos. 36423 & 36424/2016

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