

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 3310 OF 2017

1. All Cargo Logistics Ltd. }
A Company registered under the }
Companies Act, 1956, having its }
Registered office at Avvashya }
House, 6th Floor, CST Road, }
Kalina, Santacruz (E), }
Mumbai 400098. }

2. Ameya Logistics Pvt. Ltd. }
A Company registered under the }
Companies Act, 1956, having its }
Registered office at village }
Dhasakhoshi Taluka Uran, }
Post Koproli Raigad, }
Maharashtra - 410 212. }

3. Apollo Logisolutions Ltd. }
A Company registered under the }
Companies Act, 1956, having its }
Registered office at Office No.303, }
Third Floor, DLF Courtyard, }
Saket, New Delhi - 110 017. }

4. Ashte Logistics Pvt. Ltd. }
A Company registered under the }
Companies Act, 1956, having its }
Registered office at 109/110, }
Mahinder Chambers, WT Patil }
Marg, Chembur, }
Maharashtra 400 071. }

5. Continental Warehousing Corporation (Nhava Sheva) Ltd. }
A Company registered under the }
Companies Act, 1956, having its }
Registered office at 405, Windfall, }
Sahar Plaza Complex, Andheri, }
Kurla Road, JB Nagar, }
Andheri (E) Mumbai 400 059. }

6. EFC Logistics India Pvt. Ltd. }
 A Company registered under the }
 Companies Act, 1956, having its }
 Registered office at 310, Al-Akbari }
 Mansion, 27, Weston Street, }
 Kolkata – 700 012. }

7. Gateway Distriparks Ltd. }
 A Company registered under the }
 Companies Act, 1956, having its }
 Registered office at Sector 6, }
 Dronagiri, Taluka Uran, }
 District Raigad, Navi Mumbai. }
 Maharashtra – 400 707. }

8. International Cargo Terminals & Infrastructure Pvt. Ltd. }
 A Company registered under the }
 Companies Act, 1956, having its }
 Registered office at Godrej Coliseum, }
 Office No. 801, 'C' Wing, Behind }
 Everard Nagar, Off. Somaiya }
 Hospital Road, Sion East, }
 Mumbai 400 022. }

9. Kerry Indev Logistics Pvt. Ltd. }
 A Company registered under the }
 Companies Act, 1956, having its }
 Registered office at New 81, }
 Old 41, Thambu (Chetty) Street, }
 Mannady, Chennai – 600 001. }

10. Ocean Gate Container Terminals Pvt Ltd. }
 A Company registered under the }
 Companies Act, 1956, having its }
 Registered office at 220, Sai }
 Commercial Centre, 2nd Floor, }
 Station Road, Govandi (East), }
 Mumbai 400 088. }

11. Take Care Logistic Park (India) Pvt. Ltd. }
 A Company registered under the }
 Companies Act, 1956, having its }

Registered office at Survey No. }
 96,1,87/3, 87/4,87/5,87/6m, }
 Mumbai – Goa Highway,Near }
 BPCL Petrol Pump, Palaspa, }
 Village, Taluka Panvel, }
 District Raigad 410 206. }

12. TG Terminals Pvt. Ltd. }
 A Company registered under the }
 Companies Act, 1956, having its }
 Registered office at 802, Sai }
 Samarth Comm Prem CHS Ltd. }
 Deonar Village Road, Near Shah }
 Industrial Estate, Govandi(East), }
 Mumbai 400 088. }

13. Seabird Marine Services }
Pvt Ltd. }
 A Company registered under the }
 Companies Act, 1956, having its }
 Registered office at 215/218, }
 Venus, Opposite Cricket Bungalow, }
 Jamnagar, Gujarat – 361 001. }

14. Adarsh Hegde, }
 S/o Mr Sudhakar Hegde, }
 Aged about 53 Yrs, Occ. Joint }
 Managing Director, having office }
 at All Cargo Logistics Logistics }
 Ltd., Avvashya House, 6th Floor, }
 CST Road, Kalina, Santacruz(E), }
 Mumbai 400 098. }

15. Ashish Dhurvendra Goel }
 S/o. Dhurvendra Prakash Goel, }
 Aged about 43 years, Occ. }
 Director, having its Registered }
 office at Ameya Logistics Pvt. Ltd. }
 Village Dhasakhoshi, Taluka Uran, }
 Post Koproli, Raigad, }
 Maharashtra 410 212. }

16. Pisipati Sri Siva Prasad }
 S/o. Prof. VGKM Pisipati }
 aged about 49 yrs, Occ. }

Director, having its }
Registered office at Apollo }
Logisolutions Ltd., Office No. }
303, Third Floor, DLF Courtyard, }
Saket, New Delhi - 110 017. }

17. Rajkumar Khemchand }
Rawlani, }
S/o. Mr. Khemchand Rawlani, }
Aged 54 yrs, Occ. Director, }
having its Registered office at }
109/110, Mahinder Chambers, }
WT Patil Marg, Chembur, }
Maharashtra - 400 071. }

18. Darayush K Jalanwalla }
S/o. Late Mr. Keki Jalanwalla, }
Aged 61 yrs, Occ. Director, }
having its Registered office at 405, }
Windfall, Sahar Plaza Complex, }
Andheri, Kurla Road, JB Nagar, }
Andheri (E) Mumbai 400 059. }

19. Kalyan Chowdhury }
S/o Late Mr Nityaranjan }
Chowdhury, Aged about 46 yrs. }
Occ. Director, having its }
Registered office at 310, Al-Akbari }
Mansion, 27, Weston Street, }
Kolkata - 700 012. }

20. Ishaan Gupta, }
S/o. Mr Prem Kishan Gupta, }
Aged 28 yrs, Occ. Director, }
having its Registered office }
Sector 6, Dronagiri, Taluka Uran, }
District Raigad, Navi Mumbai. }
Maharashtra - 400 707. }

21. Krishna B Kotak, }
S/o. Late Mr. Bhagwanbhai Kotak, }
Aged about 56 yrs, Occ. Director, }
having its Registered office at }
Godrej Coliseum, Office No. 801, }
'C' Wing, Behind Everard Nagar, }

Off. Somaiya Hospital Road, }
Sion East, Mumbai 400 022. }

22. Sivasankaran Jayaraman }
S/o. Mr Jayaraman Mahalingam }
Aged bout 59 yrs, Occ. Director, }
having its Registered office at }
New 81, Old 41, Thambu (Chetty) }
Street, Mannady, }
Chennai - 600 001. }

23. K. Sriramamurthy }
S/o. Late Mr K. Venkateswarlu, }
Aged about 64 yrs, Occ. Director, }
having its Registered office at }
Ocean Gate Container Terminals }
Pvt Ltd. 220, Sai Commercial Centre, }
2nd Floor, Station Road, }
Govandi (East), Mumbai 400 088. }

24. Iqbal Hussain Qazi, }
S/o. Mr Hussain Qazi, Aged 50, }
Occ. Director, Take Care Logistic }
Park (India) Pvt. Ltd. having its }
Registered office at Survey No. }
96,1,87/3, 87/4,87/5,87/6m, }
Mumbai - Goa Highway, Near }
BPCL Petrol Pump, Palaspa, }
Village, Taluka Panvel, }
District Raigad 410 206. }

25. Jignesh Anantray Goradia, }
S/o. Mr. Anantray Vanmalidas, }
Aged 49 yrs, Occ. Director, }
having office at TG Terminals Pvt. }
Ltd., 802, Sai Samarth Comm Prem }
CHS Ltd. Deonar Village Road, }
Near Shah Industrial Estate, }
Govandi(East), Mumbai 400 088. }

26. Yogesh Khatau Parekh }
S/o. Mr Khatau Mulji Parek, }
Aged about 44 years, Occ. Director, }
Having office at Seabird, Marine }
Segices Pvt. Ltd., 215/218, Venus, }

Opp. Cricket Bungalow, Jamnagar, }
Gujarat - 361 001 } **Petitioners**

versus

1. Union of India, }
Through the Secretary }
Ministry of Finance, Department of }
Revenue, North Block, }
New Delhi 110 001. }

2. Chief Commissioner of Customs }
Mumbai Customs Zone - II, Nhava }
Sheva, Taluka Uran, Dist. Raigad, }
Maharashtra - 400 707. }

3. Commissioner of Customs }
(Import) }
Jawaharlal Nehru Customs House, }
Nhava Sheva, Taluka Uran, }
Dist. Raigad, Maharashtra 400 707. }

4. Commissioner of Customs, }
NS-III, Mumbai Customs Zone - II, }
Jawaharlal Nehru Customs House, }
Nhava Sheva, Taluka Uran, }
Dist. Raigad, Maharashtra - 400 707. }

5. Commissioner of Customs, }
NS-I, IV & V, Jawaharlal Nehru Customs }
House, Nhava Sheva, Taluka Uran, }
Dist. Raigad, Maharashtra - 400 707. }

6. Commissioner of Customs }
NS-G, Mumbai Customs Zone, - II, }
Jawaharlal Nehru Customs }
House, Nhava Sheva, Taluka Uran, }
Dist. Raigad, Maharashtra - 400 707. }

7. Central Board of Excise & }
Customs }
North Block, New Delhi - 110 001, }

8. Container Freight Station }
Association (India) }

A company registered under the }
 companies Act, 1956, having its, }
 registered address at C/o. ULA }
 CFS, Sector- 08, Dronagiri, PO }
 Box No. 5 (JNPT), Opp. Bhendkhal }
 Village, Taluka Uran, Dist. Raigad, }
 Navi Mumbai 400 707. }

9. Speedy Multimodes Ltd. }
 A company registered under the }
 companies Act, 1956, having its, }
 registered address at JNP CFS, }
 Jawaharlal Nehru Port, Sonari }
 Village, Taluka, Uran - 400 707. }

10. Assistant Commissioner }
of Customs, }
 CFS Management Cell, }
 Jawharlall Nehru Customs House, }
 Nhava Sheva, Taluka Uran, }
 Dist. Raigad, Maharashtra 400 707. }

Respondents

Mr. Janak Dwarkadas-Senior Advocate
 with Mr. Rohan Rajadhyaksha, Mr. Adhip
 Iyer, Mr. Cheryl Fernandes and Mr. Divij
 Joshi i/b. M/s. AZB and Partners for the
 petitioners.

Mr. Anil C. Singh-Additional Solicitor
 General with Mr. Pradeep S. Jetly and
 Ms.Indrayani Deshmukh for respondent
 nos.1 to 7.

Mr. Birendra Saraf and Mr. Yuvraj K.
 Singh i/b. M/s. Desai and Diwanji for
 respondent no. 9.

**CORAM :- S. C. DHARMADHIKARI &
 PRAKASH. D. NAIK, JJ.**

**Reserved on 10th April, 2017
 Pronounced on 5th June, 2017**

JUDGMENT :- (Per S. C. Dharmadhhikari, J.)

1. Heard the learned counsel appearing for the parties. Rule. The respondents waive service. By consent, Rule is made returnable forthwith.

2. By this petition under Article 226 of the Constitution of India, the petitioners are challenging two public notices dated 9th February, 2017 and 6th March, 2017 being Public Notice Nos. 16 and 27 of 2017.

3. The petitioners are also seeking to quash and set aside a prior public notice dated 16th January, 2017 being Public Notice No. 8 of 2017.

4. There are two reliefs sought in relation to Public Notice No. 161 of 2016 dated 28th November, 2016. Unlike the above public notices, which are sought to be quashed in their entirety, as far as this public notice is concerned, the petitioners pray quashing and setting aside of para 4.9 of the same.

5. The petitioners are also seeking quashing and setting aside of appointment of respondent no. 9 as the Designated Container Freight Station (CFS) by the impugned Public Notice No. 161 of 2016 dated 28th November, 2016.

6. The petitioners are also challenging paragraphs 3.7 and 3.8 of the Facility Notice No. 63 of 2008 dated 1st September, 2008, which provides for appointment of a designated CFS.

7. Finally, by the amendment, the petitioners are seeking to challenge a tender notice dated 17th March, 2017.

8. By a writ of mandamus or any other writ, order or direction in the nature thereof, the petitioners are seeking a direction to the respondents, who are contesting the writ petition, not to enforce or apply the impugned public notices and to go ahead with the tender notice.

9. These reliefs have been claimed against the Union of India, the Chief Commissioner of Customs and other authorities and officials functional under the Customs Act, 1962 (respondent nos. 2 to 6). Respondent no. 7 is the Central Board of Excise and Customs, whereas, respondent no. 10 is the Assistant Commissioner of Customs, CFS Management Cell, Jawaharlal Nehru Customs House (JNCH), who has issued the tender notice dated 17th March, 2017. Respondent no. 8 before us is the Association of the Container Freight Stations, against whom, no relief is sought, whereas, respondent no. 9 has been joined as a party respondent simply because it has been appointed as the designated CFS for the purpose of Facility Notice No. 63 of 2008.

10. The background facts giving rise to the present petition are that in 1989, the Government of India introduced a policy for development of CFS. The need for CFS was in response to the growing volume of international trade, the need for expeditious clearance of goods at the port within minimum possible time. This was more so when the ports in India were facing congestion at their premises on account of growth in import and export volumes as a result of the liberalization of the economy. Therefore, for optimal utilisation of existing infrastructure, space and equipment the goods that landed at ports needed to be evacuated straight away without any loss of time. Accordingly, the concept of CFS was introduced and grew in importance along with the development and growth of ports. The idea in setting up of CFS, therefore, was to decongest the port.

11. The CFS has, therefore, been recognised as an extension of a customs station, set up with the main objective of decongesting the port. This was also clarified *inter alia* in Circular No. 18 of 2009 dated 8th June, 2009 issued by respondent no. 1 through respondent no. 7, copy of which is annexed as Exhibit-'A' to the petition. Even as of February, 2017, respondent no. 7 acknowledges in Circular No. 4 of 2017-Customs dated 16th February, 2017 that "CFSs are extension of the port. In the over

all ecosystem of customs clearance, the CFSs have played an important role in faster clearance of EXIM goods, as a result, bulk of the regulatory activity other than appraising has shifted to CFSs. Copy of Circular No. 4 of 2017 is annexed as Exhibit 'B' to the petition.

12. Accordingly, several CFSs, including the petitioners' have been set up and the registration and functioning of all CFSs is governed by the Handling of Cargo in Customs Area Regulations, 2009 (for short "the HCCA Regulations, 2009"). As on date, there are 34 CFSs operating with respect to Jawaharlal Nehru Port employing directly and indirectly a large local populace. The above CFSs were established pursuant to substantial investments, both, in terms of investment in infrastructure and security standards. A brief summary of the process of setting up of a CFS is outlined as under:-

- (i) An applicant desirous of obtaining permission to operate a CFS files an application in the prescribed format to the Infrastructure Division at Ministry of Commerce, New Delhi. In order to be eligible for applying, an applicant has to *inter alia* acquire a minimum of 5 acres of non-agricultural land, which requires a significant expenditure;

(ii) Upon receiving approval, the applicant is required to set up the infrastructure within one year from the date of the approval. This requires a substantial investment for constructing the CFS, which involves the following:-

- a) Construct a warehouse for storing containers;
- b) Construct a yard that either has to be concrete or with paver blocks, so as to take the weight of at least 4 containers one over the other;
- c) Construction of electrical substation, fire pump room and workshop for the maintenance of equipments and repairing of containers;
- d) Construction of administrative building where the Customs officers will be operating from. The administrative building has to be constructed keeping in mind the requirements of also housing a bank branch, cafeteria, canteen in the CFS;
- e) Purchasing and setting up of sophisticated cargo handling equipments such as cranes, reach stackers, empty handlers, truck trailers, fork lifts etc.;
- f) Purchase and set up security equipments such as CCTV cameras, sniffer dogs, metal detectors etc.

(iii) Once the infrastructure is set up, the Commissioner of Customs inspects the facility and upon being satisfied of the infrastructure and security standards, notifies the CFS under section 8 and 45 of the Customs Act, 1962;

(iv) Once the notification under section 45 of the Act is issued to the CFS, the concerned CFS has to furnish a bond to the President of India, through the Commissioner of Customs, backed by a bank guarantee representing 10% of the value of the cargo handling capacity of the relevant CFS;

(v) Upon receipt of the bond, the Commissioner of Customs issues a commencement certificate to the concerned CFS. Upon receiving such commencement certification, the CFS is permitted to begin operations.

13. Thus, significant efforts, time and expenditure is incurred in order to set up a CFS and make it operational.

14. The petitioners submit that in order to fully appreciate the controversy involved in the present writ petition, it is necessary to first briefly set out the process of import of cargo into India and the role played by a CFS in the said process, which is as follows:-

(i) The carriage of goods by sea commences upon receipt of the consignment as sealed containers from the exporter at the port of loading. The vessel with the said containers on board then sails to the Port of Discharge (POD).

(ii) Approximately 48 hours before the vessel berths at the POD, an Import General Manifest (IGM) is filed by the shipping line through the ICE Gate System, the e-Commerce Portal of respondent no. 7. The petitioners state that an IGM is a document that contains details of the Bill of Lading (BOL) i.e. BOL number, BOL date, the cargo details, the name of the consignee, marks and number on the cargo, number of packages, weight of the cargo, port of loading, port of discharge in India and final destination, container number and size of the container and also whether the containers are Full Container Load (FCL) or less than container load where cargo in the container belongs to several consignees (LCL). The IGM also indicates whether a cargo is to be sent to a CFS or to a particular Inland Container Depot (ICD). Subsequently, on account of the introduction of DPD facility, the IGM also indicates whether a container is meant for DPD (A sample IGM is annexed as Exhibit 'C' to the petition).

(iii) About 6 to 8 hours prior to the berthing of the vessel at the POD, an Import Advance List (IAL) is filed by the shipping line with the terminal. The IAL contains information like container number, weight, size, status

(laden/empty), category (hazardous/reefer etc.), POD, mode of transport (rail/road), seal number etc. Further, the IAL also provides details of the destination of the container, including the name of the port and the preferred CFS. A sample IAL is annexed as Exhibit 'D' to the petition.

(iv) Thereafter, the vessel berths at the POD. After berthing of the vessel, the customs inwards clearance takes place, where the Customs authorities board the vessel and check the vessel's documents like statutory certificates, bonded items, fuel, fresh water, crew personnel declaration etc. In some instances, the clearance may also be given prior to the berthing of the vessel to facilitate commencement of operations without any delay on berthing. This is done by boarding officer by making entry in the ICEGATE. Similar inspection and clearances also take place by immigration authorities and the Port Health Officer.

(v) Thereafter, the terminal (utilising its own facilities, staff, equipment etc.) discharges the cargo and simultaneously loads export cargo on the vessel.

(vi) In cases where cargoes are meant for CFS, an Equipment Interchange Receipt (EIR) is issued by the

terminal and is usually given to the representative of the CFS at the terminal (normally the driver of the trailer appointed by CFS). This document is issued by terminal when the cargo exits the terminal gate. A sample EIR is annexed as Exhibit 'E' to the petition.

(vii) The containers, with the cargo, are then evacuated from the port by the CFS under a Customs Bond given by the CFS for the completion of the customs formalities as required by applicable laws. As aforesaid, the system of evacuation of the containers from the port to a CFS was put in place on account of several factors, including to ease the congestion at the port due to the lack of available area at the port/terminal itself to handle the large volumes of import cargo arriving each day.

(viii) The consignee approaches the shipping line's local office at the POD for a delivery order by submitting the fully discharged original BOL and clearing dues of the shipping lines. This delivery order is addressed to the custodian i.e. Port Terminal, CFS or ICD instructing them to give physical delivery of the cargo to the consignee. The delivery order is then presented to the CFS for taking delivery of the container from the CFS. A sample delivery order is annexed as Exhibit 'F'.

(ix) Thereafter, the consignee completes the Customs documentation and requirements after which the Customs authorities give an endorsement 'out of charge' on the bill of entry to the consignee. The CFS thereafter delivers the cargo to the consignee against the delivery order.

15. The petitioners further submit that by a circular dated 24th November, 2005, being Circular No. 42 of 2005-Cus., respondent no. 7 introduced the Accredited Clients Programme (ACP). Under the ACP, respondent no. 7 decided to introduce a system called Risk Management System (RMS). As per the aforesaid circular, the objective of ACP was to grant assured facilitation to importers who have demonstrated capacity and willingness to comply with the laws the Customs Department is required to implement. Under the RMS, bills of entry filed by importers in the Exchange Data Interface (EDI) system of the Indian Customs authorities would be processed for risk and a larger number of consignments would be allowed clearance based on the importer's self assessment without examination. At this stage, this facility was available only to certain select importers who fulfilled the prescribed criteria. The main criterias were as follows:

- (i) The importer should have imported goods worth Rs.10 crores or paid duty equivalent to Rs.1 crore in the previous financial year;
- (ii) The importer should have filed at least 25 bills of entry in the previous financial year in one or more Indian Customs stations.

The said circular formed part of Public Notice No. 64 of 2005 (PN 64/2005) dated 12th December, 2005 issued by respondent no. 3, copy of which is annexed at Exhibit 'G'.

16. On 1st September, 2008, respondent no. 3 issued Facility Notice No. 63 of 2008. That notice, *inter alia*, provided for DPD facility (i.e. for importers to take delivery directly from the port terminal) to ACP importers (as per Public Notice No. 64 of 2005) and to 100% Export Oriented Units (EOUs) for FCL containers covered by the RMS or where no examination is required. The petitioners state that under the DPD facility, delivery of the containers would be done at the port itself and therefore, such containers would not travel to a CFS for completion of the Customs formalities. Facility Notice No. 63 of 2008 provided for importers, who satisfy the aforesaid criteria, to apply for DPD facility to respondent no. 3 in the prescribed form. It also provided for the procedure that would be followed under the DPD facility.

17. The petitioners submit that in this context, it is relevant to note that in the year 2008, the numbers of ACPs were limited to about 15 in number and the volume of DPD container traffic, therefore, was minimal. In fact, until June, 2016 only 26 importers were permitted to avail of the DPD facility. However, as elaborated, later, the number of importers eligible for DPD facility has suddenly been extended to more than 700 importers.

18. On 11th September, 2008, respondent no. 3 issued Public Notice No. 66 of 2008, whereby, Speedy/respondent no. 9 was appointed as the “designated CFS” for the purposes of moving DPD containers not cleared from the port as per the procedure prescribed in Facility Notice No. 63 of 2008. It is pertinent to note that Speedy/respondent no. 9 was appointed as the designated CFS arbitrarily without any due process and without giving any opportunity to other CFSs like the petitioners. It is further significant to note that no reasons/grounds whatsoever have been indicated in Public Notice No. 66 of 2008 in support of the appointment of Speedy/respondent no. 9 alone as the designated CFS and for the exclusion of all other CFSs. Copy of Public Notice No. 66 of 2008 is annexed as Exhibit ‘I’ to the petition.

19. The petitioners further submit that this optional DPD facility, though it included the appointment of Speedy/respondent no. 9 as the designated CFS in the most arbitrary manner, did not cause serious threat to the business and existence of other CFSs like the petitioners at that point of time.

20. The petitioners state that on account of Public Notice No. 161 of 2016, there has been a rise in the volume of DPD container traffic. As a result of this, the business of CFSs, including the petitioners, was significantly impacted since a significant number of containers, which would otherwise hitherto have passed through CFSs such as the petitioners, would no longer come to the petitioners on account of being earmarked as DPD i.e. delivery at the port itself. It is significant to note that on account of Public Notice No. 161 of 2016, requiring clearance of the containers from the port within 48 hours, there was an increase in the number of DPD containers that were sent to the designated CFSs i.e. Speedy/respondent no. 9 on account of not being collected within the period of 48 hours prescribed by Public Notice No. 161 of 2016, as illustrated in further details below.

21. On 28th November, 2016, respondent no. 4 issued Public Notice No. 161 of 2016 with effect from 1st December, 2016, extending the DPD facility to a list of 467 named importers from

26 importers as late as July, 2016 by relaxing the eligibility requirements specified in Facility Notice No. 63 of 2008. Further, Public Notice No. 161 of 2016 sets out the procedure for the DPD facility and changed the time period of 24 hours prescribed by Facility Notice No. 63 of 2008 for clearance of DPD containers to 48 hours.

22. On 9th December, 2016, respondent no. 8 addressed a detailed letter to respondent no. 2 regarding the above mentioned Public Notices, wherein, it contended that the appointment of respondent no. 9 as designated CFS to receive all DPD containers, which were not cleared in 48 hours, was arbitrary and amounted to discrimination against its members. Respondent no. 8 also set out the prejudice caused to CFSs on account of the fact that with the relaxation of the norms for importers to avail of DPD facility, the number of containers which would go to Speedy/respondent no. 9 as the designated CFS on account of not being cleared from the port in 48 hours would also increase. Moreover, respondent no. 8 also made certain suggestions to the DPD system, including allowing shipping lines to choose the CFS of their choice or to allow CFSs to bid for clearance of containers whose dwell time is more than 48 hours. Respondent no. 8 also requested for a meeting with respondent no. 2 to further explain their position. A

copy of the letter dated 9th December, 2016 addressed by respondent no. 8 to respondent no. 2 is annexed as Exhibit 'K'.

23. Instead of considering the legitimate grievance put forth by respondent no. 8, on 19th December, 2016, respondent no. 5 issued Public Notice No. 180 of 2016 and extended the DPD facility to a further list of 214 named importers mentioned in Annexure 'A' to Public Notice No. 180 of 2016. The petitioners state that as a result of Public Notice No. 180 of 2016, the number of DPD containers increased still further, resulting also in a concomitant further increase in the number of DPD containers sent preferentially to Speedy/respondent no. 9 on account of not being cleared in 48 hours from the port. Copy of Public Notice No. 180 of 2016 is annexed as Exhibit 'L' to the petition.

24. On 23rd September, 2016, respondent no. 8 addressed another letter to respondent no. 2 reiterating their concerns and suggestions as set forth in the letter dated 9th December, 2016. Copy of the letter dated 23rd December, 2016 is annexed as Exhibit 'M' to the petition.

25. On 27th December, 2016, respondent no. 5 issued an advisory to all CFSs, including the petitioners with regard to the DPD facility. In the said advisory, respondent no. 5 directed that

FCL containers imported by importers who have been accorded the DPD facility as per Public Notice No. 161 of 2016 and Public Notice No. 180 of 2016, which are facilitated by RMS and meant for DPD, shall not be accepted at any CFS. Respondent no. 5 also stated that non-compliance of this by a CFS would be viewed seriously and action shall be initiated as per the Customs Act, 1962. A copy of the advisory dated 27th December, 2016 is annexed as Exhibit 'N' to the petition.

26. On 16th January, 2017, respondent no. 6 issued Public Notice No. 8 of 2017, whereby, it was reiterated that in cases where DPD containers are not cleared by the DPD importers within 48 hours, the terminals should transfer the same to the designated CFS i.e. respondent no. 9, unless otherwise directed by the Customs. However, Public Notice No. 8 of 2017 went further and also directed that an importer eligible for DPD must give advance intimation of at least 72 hours to the shipping line, *inter alia*, regarding the DPD code of the importer and the preferred CFS of the importer. The petitioners state that notwithstanding a preferred CFS being indicated by the importers, with the exception of containers that are 'out of charge' i.e. where the import/customs formalities have been completed, all the DPD containers that are not out of charge and are not cleared in 48

hours are being sent to Speedy/respondent no. 9. Further, Public Notice No. 8 of 2017 also directed that where such advance intimation for availing of the DPD facility is not given by the importer, then, in respect of importers who hold PDP permissions, the terminal should identify their containers and earmark them as being DPD (i.e. even where the importer has not opted for DPD for the said container) and if such containers are not collected from the port in 48 hours and are eligible for the RMS facility, the same should be transferred to Speedy/respondent no. 9. Public Notice No. 8 of 2017 further clarifies that only in the event that a container is not RMS facilitated, the DPD facility would not be available for the same and the container would be routed through a CFS.

27. Therefore, Public Notice No. 8 of 2017 has the effect of overriding the choice of CFS mentioned in the IGM and the compelling/forcing the DPD facility on the DPD eligible importers even if they have not opted for DPD and directs that if such RMS facilitated containers are not cleared in 48 hours, the same will be sent to Speedy/respondent no. 9. A copy of Public Notice No. 8 of 2017 is annexed as Exhibit 'O' to the petition.

28. Further, on 16th January, 2017, respondent no. 6 also issued Public Notice No. 9 of 2017, which, *inter alia*, recorded the

representations made by various importers on difficulties faced by them on account of the compulsory imposition of DPD facility on all RMS facilitated containers. Public Notice No. 9 of 2017, *inter alia*, states that importers find it difficult to make the logistical arrangements necessary to evacuate RMS facilitated containers through DPD from the terminal, because of the following reasons.

- (i) Difficulty in the arrangement of a transporter;
- (ii) Risk of theft;
- (iii) Issue of insurance;
- (iv) Two shift handling charges being charged by private terminal operators.
- (v) Dealing with non-RMS containers;
- (vi) Requirement of temporary storage for Customs cleared cargo or warehousing facility, owing to lack of storage space in the importers factory premises;
- (vii) Cash flow issues due to insufficient funds for payment of Customs duty and delivery order charges;
- (viii) Occasional requirement to de-stuff/shift containers to other modes of transport;
- (ix) Requirement to affix RSP/MRP stickers before clearance.

29. The above reasons indicate that importers were finding the compulsory imposition of DPD facility difficult and burdensome, rather than facilitating the ease of business for such importers. A copy of Public Notice No. 9 of 2017 is annexed as Exhibit 'P' to the petition.

30. On 16th January, 2017, respondent no. 8 addressed another letter to respondent no. 2 in response to the abovementioned advisory dated 27th December, 2016, issued by respondent no. 5 to CFSs to the effect that serious action would be taken against CFSs if containers, which are earmarked for DPD, are accepted by a CFS. Respondent no. 8 indicated that CFSs do not move the containers from the port on their own (the same being on the basis of the IGM filed by the importer/shipping line) and therefore, action against the CFSs is misconceived. The said letter once again reiterated the legal contentions against the designation of Speedy/respondent no. 9 as the designated CFS in the context of the DPD facility. A copy of letter dated 16th January, 2017 addressed by respondent no. 8 is annexed as Exhibit 'Q' to the petition.

31. On 18th January, 2017, respondent no. 6 addressed a letter to respondent no. 8 in response to the above letters addressed by respondent no. 8. In this letter, respondent no. 6 stated as follows:-

- (i) That the procedure prescribed in Public Notice No. 161 of 2016 for moving DPD containers to Speedy/respondent no. 9 in the event that they are not cleared in 48 hours will apply only to provide for circumstances of exceptional nature i.e. when any DPD importer could not clear goods within 48

hours of landing. Respondent no. 6 also stated that in view of the various measures taken to provide ease of doing business, extension of DPD of (sic.) a large number of importers, it is expected that most of the consignment (sic.) will normally be cleared in 48 hours. The Petitioners state that this is totally false and contrary to the ground reality, which is that with each step taken by the Customs authorities to increase the DPD container traffic, the container traffic being sent to Speedy/respondent no. 9 on account of the said containers not being cleared in 48 hours is also increasing.

- (ii) That Speedy/respondent no. 9 was appointed as the designated CFS purportedly on account of the fact that it is the closest CFS to the port and therefore, transporting the containers to Speedy/respondent no. 9 would avoid congestion on the roads. The petitioners state that this is a clear afterthought since Public Notice No. 66 of 2008 which appoints Speedy/respondent no. 9 as the designated CFS does not mention any such reason. In any event, respondent no. 6 has totally failed to appreciate that there are other CFSs, including the petitioners, which are within a comparable distance from the port and, in any event not at such great distance as to exclude them from being eligible to receive DPD traffic that has not been cleared in 48 hours.

- (iii) That as per Public Notice No. 161 of 2016, a DPD importer has been allowed to ask for a change in CFS subject to the same being allowed by Additional/Joint Commissioner in charge of RMS facilitated centre and therefore, the appointment of a designated CFS is not arbitrary or unfair. The petitioners state that this contention ignores the fact that in reality the said permissions are not granted as a matter of course (in fact, as few as 28 permissions have been granted till date) and in any event, the period of 48 hours is largely insufficient to obtain this permission and therefore, the DPD containers nevertheless end up going to the designated CFS i.e. Speedy/respondent no. 9 at the end of 48 hours.
- (iv) That no contract has been awarded to any particular entity and therefore, there is no question of tender. The petitioners state that this contention ignores the fact that by appointing Speedy/respondent no. 9 as the designated CFS and directing all DPD traffic towards Speedy/respondent no. 9 alone, a monopoly has arbitrarily and unfairly been created in favour of a single designated CFS in respect of those DPD containers which are not cleared by importers within the prescribed period of 48 hours and that this designated CFS has been appointed without giving any opportunity to any other CFS to bid or compete for the same.

32. A copy of the letter dated 18th January, 2017 addressed by respondent no. 6 to respondent no. 8 is annexed as Exhibit 'R' to the petition.

33. On 9th February, 2017, respondent no. 6 issued Public Notice No. 16 of 2017, whereby, it was reiterated that in cases where importers eligible for the DPD facility of RMS facilitated containers do not obtain clearance from respondent nos. 2 to 6 i.e. a Customs "out of charge" is not received in respect of the said containers, the importers would not be permitted to choose their CFS. As detailed hereinabove, several importers are unable to obtain an "out of charge" from respondent nos. 2 to 6, within the stipulated time period on account of various difficulties beyond their control. A copy of Public Notice No. 16 of 2017 is annexed as Exhibit 'S' to the petition.

34. Additionally, respondent no. 2, during a meeting held on 19th January, 2017 with all stakeholders of the port, including the petitioners, directed all CFSs, including the petitioners to support DPD facilitation of RMS containers and stated that any containers not cleared by the importers within a period of 48 hours would be subjected to stringent examination. A copy of the minutes of the meeting held on 19th January, 2017 are annexed as Exhibit 'T' to the petition.

35. On 6th March, 2017, respondent no. 5 issued Public Notice No. 27 of 2017, which, *inter alia*, placed the obligation on CFSs, including the petitioners of ensuring that all DPD containers which were marked to a particular CFS as per the IGM, were only evacuated to the CFS after they had obtained Customs “out of charge” and further to ensure that the containers were only released to DPD importers once they had certified that a delivery order had been issued to the importer. A copy of Public Notice No. 27 of 2017 is annexed as Exhibit ‘U’ to the petition.

36. The petitioners filed the present petition on 16th March, 2017 in this court and a copy of the petition was served upon the respondents on 17th March, 2017. Immediately, on receipt of the copy of the petition, respondent nos. 1 to 6 issued a limited tender notice dated 17th March, 2017 through respondent no. 10 for inviting bids from all CFSs registered as Customs Cargo Service Provider (CCSP) under the HCCA Regulations, 2009 for being appointed as the designated CFS for delivery of DPD containers from port terminals of JNCH, Nhava Sheva to CFSs, if the importers fail to clear their respective DPD containers from the port terminals within a period of 48 hours of the containers landing in the port terminal. A copy of the limited tender notice dated 17th March, 2017 is annexed as Exhibit ‘W’.

37. There is an affidavit in reply filed to this writ petition by the Commissioner of Customs, Nhava Sheva (General).

38. First of all, it is stated that the Public Notice No. 16 of 2017 dated 9th February, 2017 has been issued by the Jawaharlal Nehru Customs House, CFS Management Cell, Nhava Sheva, Taluka Uran, District Raigad, by which, in addition to various other measures undertaken to reduce the dwell time and transaction cost to the importers/trade, additional facility, in terms of direct port delivery code and importer's choice of CFS code has been permitted to the importers/trade. This has resulted in a dramatic reduction of DPD containers not cleared from Customs within 48 hours. In the Month of February, 2017, the number of such DPD containers going to Speedy/respondent no. 9 was 7215 containers, which got reduced to 3568 containers in the period of 1st March to 22nd March, 2017. In one month, this figure of DPD containers not cleared within 48 hours has reduced by 30% and it is foreseen to be reducing still further in the coming days. Interestingly, the figure of the DPD containers for which the importer has chosen the other CFS including the petitioners, stands at 2049 containers in the month of February. That has dramatically increased to 7698 containers till 22nd March, 2017. Thus, reliance is placed on a copy of the data sheet with regard to

clearance of DPD containers from the port terminal. Therefore, there cannot be any grievance and if at all there was one, it has been redressed. Hence, the petition be rejected.

39. Then, it is explained in the further paragraphs that the rationale and the reason for extending DPD to RMS facilitated cargo (where no examination is required) is that earlier such containers were routed through CFSs only for the purpose of verification of container number, seal number and condition of seal. As the containers are routed through CFSs, charges enumerated in para 4 at page 157 have to be paid. In other words, such particulars can be verified inside the port terminal (before clearance from port) and DPD was extended so as to reduce both, time and cost.

40. Then, it is stated that the petitioners are challenging various public notices, some notifications and circulars issued by the Central Board of Excise and Customs, facilitation notices, but they forget that they are Customs Cargo Service Providers within the meaning of HCCA Regulations, 2009 made by the Central Board of Excise and Customs in exercise of powers conferred by sub-section (2) of section 141 read with section 157 of the Customs Act, 1962. In para 8 of this affidavit, the notifications of the Ministry of Shipping and Transport (Port Wing) are referred.

It is then stated that one CFS attached Jawaharlal Nehru Port Trust (JNPT) is operated by respondent no. 9. The petitioners are covered by the above regulations and then reference is made to regulation 2(b) and regulation 7(2) of the HCCA Regulations, 2009, by which, the Jurisdictional Commissioner of Customs can regulate movement of import/export containers. Thus, in exercise of the powers conferred by section 141(2) of the said Act and Regulation 7(2) of the HCCA Regulations, 2009, Facility Notice No. 63 of 2008 dated 1st September, 2008 was issued. Then, para 3.8 of the facility notice is referred, by which, all concerned were informed that the commissioner of Customs would notify the designated CFS. The Commissioner of Customs, JNCH issued Public Notice No. 66 of 2008 dated 11th September, 2008 notifying Speedy Multimode Ltd. as the designated CFS.

41. The justification for the issuance of these notices is provided in para 11 of this affidavit, which reads as under:-

“11. I say that the Commissioner of Customs, JNCH, considering the administrative requirement of nominating a CFS in a transparent manner, decided that it would be appropriate to nominate a CFS closest to the Port Terminal. Therefore, Speedy Multimodes Ltd., CFS, which is located nearest to the Port Terminal was designated as default CFS. Further Commissioner of Customs, JNCH notified Speedy Multimodes Ltd., as the designated CFS due to it being owned by JNPT and which accordingly falls under the domain of Tariff Authority For Major Ports [for short TAMP]. TAMP Regulations put a ceiling on what Speedy Multimodes Ltd., CFS can charge. It cannot charge in an arbitrary manner. This decision was taken by the

commissioner of Customs, JNCH, considering Public Interest, so that any default evacuation of containers [beyond 48 hours] will avoid congestion on the road and also to reduce the Transaction cost of Importers/Trade.”

42. Then, what is relied upon is a letter of the Chairman, JNPT dated 29th November, 2016, copy of which is annexed as Exhibit ‘6’ to the affidavit in reply. It is stated that as per the information available to Customs, petitioner nos. 1 to 13 do not fall under the domain of Tariff Authority for Major Ports. This gives them the liberty to charge market rates, and/or more, and on their terms. Thus, it is stated that subsequent public notices issued by the Commissioner and impugned in the petition envisage that if the DPD containers were not cleared within 48 hours, they should be moved to the designated CFS in public interest and for the reasons mentioned in paras 9 to 11 of the reply affidavit.

43. Further, the justification provided for the impugned actions is that the same is in line with the view expressed by the Madras High Court in the case of *Container Shipping lines association vs. Union of India*¹. A copy of this judgment is annexed as Exhibit ‘7’ to the affidavit. Hence, what is objected to is the designation of respondent no. 9, but if one bears in mind the object and purpose of the public notices, particularly of doing business and reducing the transaction cost of the port users/DPD clients, then, the

¹ 2014(213) ELT 19

interest of all stakeholders is sufficiently protected. Now, there was a demand from respondent no. 8 and other CFSs that it would be in the interest if the designation of CFS is done through a process of limited tender. That is how, to make the procedure more transparent, it was decided to float a limited tender. That would allow all CFSs to participate in a transparent manner.

44. In paragraphs 16, 17 and 19 of this affidavit in reply, it is urged as under:-

“16. I say that in this regard, a Limited Tender Notice for inviting bids from all CFS registered as CCSP with JNCH, has been floated, on 17-03-2017 by JN Custom House for designation of CFS for delivery of DPD Containers from Port Terminals of JNCH, Nhava Sheva to CFS, if not cleared beyond the prescribed period and under certain other circumstances. Hereto annexed and marked as **Exhibit 8** is a copy of the Limited Tender Notice.

17. I say that in this regard, the Limited Tender Notice documents have already been received by 27 CFS out of the currently operating 33 CFS including Petitioner Nos. 1, 2, 5, 6, 7, 8, 9, 10 and 13 on 17-03-2017 itself and the last date of submission is 30-03-2017. Hereto annexed and marked as **Exhibit 9** is a copy of the sheet showing receipt of Tender documents by 27 CFS.

19. I say that the petition is devoid of merits, and deserves to summarily reject. I say that it is the importers who bear the costs towards logistic expenses. They are not aggrieved. It is the CFS who have approached this Honourable Court. I say that the Petitioners have failed to make out a case for the intervention of this Honourable Court in exercise of its extra ordinary jurisdiction under Article 226 of the Constitution of India. I say that the actions of the Revenue are all aimed at achieving the single object of facilitating all stakeholders. Without prejudice to what is stated above, I will now deal with the various paras of the petition as under.”

45. It is finally contended that the petitioners have misrepresented the facts and projected incorrect perception. The Customs House has *sou moto* extended the DPD facility to more than 700 importers and there are no cases where any importer is aggrieved against the extension of DPD to them. Further, there is no reason for any importer to be aggrieved as this facility is intended to reduce their transaction time and cost considerably. The monthly total imports of containers through JNPT and other port terminals being at approximately 1,20,000 Twenty Feet Equivalent Units (TEU), even if 40% of the import containers are cleared as DPD containers, which is around 48,000 TEUs, there would be approximately cost saving up to Rs.48 crores to the importers/trade. Thus, how the petitioners can be aggrieved against extension of DPD to importers by Customs or by terminals has not been clarified. Thus, there being no right vesting in the petitioners, the petition is motivated and filed for purely commercial considerations. The rest of the paragraphs in the affidavit contain denials and explanations as to how, by the measures taken for smooth administration of the port and in a transparent manner, the interests of all stake holders are protected. The importers have been provided an option to indicate choice of CFS. For all these reasons, the writ petition is misconceived and should be rejected outright. The private

interest of the petitioners cannot override overall public interest. For these reasons, the writ petition be dismissed. In the passing, it is mentioned that the choice of the CFS is available to importers and the procedure to avail the option is also very simple. There is no need to visit the office and by e-mails, the same is finalized.

46. To this affidavit in reply, which is filed on 23rd March, 2017 and is fairly lengthy and detailed, a rejoinder affidavit is submitted by the petitioners. The rejoinder states, apart from reiterating the challenge in the writ petition and grounds of such challenge, that the writ petition is opposed by contending that there is a limited tender notice dated 17th March, 2017 issued, whereunder, the registered CFSs have been called upon to submit their bids for delivery of DPD containers. This ensures transparency and protection of public interest. Secondly, respondent no. 9 has been designated due to it is owned by JNPT and which falls under the domain of Tariff Authority under Major Ports. However, these grounds are baseless and without any merits. The issuance of tender notice does not redress the grievance of the petitioners, as set out in the petition nor does it render the petition infructuous. The petitioners do not contend that they should be appointed as a designated CFS or there should be a limited tender. The petitioners are not confining nor

restricting their challenge to the appointment of respondent no. 9 as designated CFS. They are aggrieved by the impugned public notices because they override the choice of the importers. If the importers indicate their choice of the preferred CFS and if they wish to send their containers to it, then, such a choice cannot be interfered with. Once the DPD eligible importers have indicated a preferred CFS in their IGM, then, their containers should be sent to the preferred CFS irrespective of whether or not it is “out of charge”, namely, cleared for Customs from the port within 48 hours. From the reply, it appears that the respondents are agreeable to DPD eligible containers, regardless of whether such container has received an “out of charge” from Customs, being delivered to the CFSs of the importers choice after expiry of 48 hours period within which they are to be cleared by the importers as per Public Notice No. 161 of 2016. However, this stand is contrary to Public Notice No. 27 of 2017, which clarifies that only those containers which have received an “out of charge” from Customs within 48 hours can be sent to the CFS preferred by the importer and in the event that such “out of charge” is not received for that container, the same will be sent to the designated CFS. Thus, requiring all DPD containers to go to a single designated CFS is arbitrary, illegal and unconstitutional interference with the right of the petitioners to carry on their

trade, regardless of the method, by which such a designated CFS has been appointed. The petitioners do not have an equal opportunity to participate in the DPD regime created by the impugned public notices. Instead of allowing all the petitioners as well as other CFSs an equal opportunity to participate in the DPD regime, the impugned public notices seek to limit participation in the same to a single designated CFS, which is discriminatory, arbitrary and violative of the mandate of Article 14 of the Constitution of India. Therefore, it is not as if a limited tender notice being issued that the grievances of the petitioners do not survive. The petitioners state that the challenge has been misconstrued and misinterpreted by the contesting respondents. If the appointment of respondent no. 9 is misused to benefit that entity, then, that is a larger challenge and which survives very much for consideration. Respondent no. 9 continues to be a private entity even if it may fall under Tariff Authority for Major Ports. The respondents have, till date, never raised any objection about the charges levied by the petitioners on the imports and therefore, they cannot falsely contend that there is a ceiling on the amount charged by respondent no. 9 to the importers. There is no reduction of cost either. Hence, the impugned action is not in public interest and deserves to be struck down. This affidavit in rejoinder is filed on 30th March, 2017.

47. It is on the above material that we have to consider the rival contentions.

48. Mr. Dwarkadas, learned senior counsel appearing for the petitioners, invited our attention to all the public notices to submit that it is the importers' choice to select a CFS. However, what the respondents now stipulate is that if the containers are not cleared, failure to do so would result in the same being removed to respondent no. 9. Mr. Dwarkadas would submit that such facilities, as are now sought to be introduced or created, have been so done by issuing an executive fiat. There is no compliance with the statutory requirement.

49. Mr. Dwarkadas then submits that the impugned actions violate the petitioners' fundamental right guaranteed by Article 19(1)(g) of the Constitution of India. Mr. Dwarkadas also submits that there is a violation of the mandate of Article 14 of the Constitution of India, inasmuch as by failure to clear the containers even by the DPD mode within the stipulated time results in no penalty on the importers, but it deprives the petitioners of their rights for all such containers, which are not cleared, irrespective of the choice of the importers, are then sent to respondent no. 9. This is a clear discrimination in favour of respondent no. 9 and against the petitioners on no rationale or

reasonable basis. In other words, the advantage or benefit derived by respondent no. 9 is to the detriment of the petitioners. The authorities have, assuming but without admitting, attempted to subserve larger public interest, but that is not served at all. It is the interest of the private entity-respondent no. 9, which is protected. This being a disincentive to the importers, it is the petitioners who have to suffer. This is unduly harsh and unreasonable step, which violates the mandate of Article 14 of the Constitution of India. Mr. Dwarkadas then submits that there is no public purpose being achieved, as the congestion at the port has not been reduced at all by the impugned actions. Mr. Dwarkadas submits that respondent no. 9's interest cannot be compared with the petitioners for the petitioners cannot be compensated by issuance of a limited public tender. The petitioners' grievances and as highlighted in the petition have not be redressed. Now, by an administrative order or act and without the sanction of law, the impugned actions have been taken. Once the petitioners have pointed out the lack of power or jurisdiction in the authorities to take the impugned actions and measures, then, the writ petition must succeed.

50. On the other hand, Mr. Anil Singh, learned Additional Solicitor General would submit that the petitioners are not

importers. The importers are not complaining at all. It is the importers, who bear the financial burden. That is not to be borne by the petitioners at all. It is in these circumstances that all the actions have been taken in larger public interest and to reduce the congestion at the port. The clearance of the cargo is expedited. The petitioners have no vested right and they cannot, in the process of challenging the measures initiated by the authorities, seek to further their commercial interest. If at all an importer has indicated his choice of a CFS and that choice of the importer is not respected, then, the importer has ample opportunities to seek legal assistance. The importer is not doing any such thing. If at all the petitioners submit that the actions of the authorities prejudice or frustrate the reciprocal obligations to be discharged by them and the importers, then, they can proceed against the importers by approaching a civil court. Surely, there is no violation of the mandate of Articles 14 and 19(1)(g) of the Constitution of India. Hence, the writ petition be dismissed.

51. For appreciating these contentions, a reference will have to be made to the Customs Act, 1962. It is an Act to consolidate and amend the law relating to Customs. The Statement of Objects and Reasons to the unamended and amended act would indicate as to how the enactment provides for the levy of duties of Customs.

That is to discourage smuggling. Further, the trade has been pressing for certain changes and facilities. It is in these circumstances that the earlier Act was amended and later on, by Amendment Act 55 of 1991, certain provisions relating to warehousing of goods after import, without payment of duty, were proposed to be amended. By the Statement of Objects and Reasons to the Amendment Act 55 of 1991, it is clarified that the imported goods may be stored in bonded warehouses till their actual clearance for home consumption on payment of appropriate duty or their re-export without payment of duty to any foreign port. There is a difficulty because of the existing provisions. Therefore, the Bill seeks to curtail the period of warehousing, prescribe the increased rate of interest on duty leviable on the warehoused goods, ensure prompt payment of duty and impose interest on delayed payments of duty. There is a desire to expedite the realization of revenue and discourage indiscriminate warehousing of imported goods. Once the changes ensure prompt payment of duties by imposing a time limit, then, we do not see how there is any difficulty presented by the impugned measures.

52. The definitions are contained in Chapter I in section 2 and “customs airport”, “customs port” and “customs station” are the

words and expressions duly defined. The word “examination” is inclusively defined in section 2(17) to mean, in relation to any goods, measurement and weighment thereof. The Act also contains the definition of the term “smuggling” in section 2(39). There are other definitions, which are substituted by Act 28 of 2016 to words “warehouse” in section 2(43) and “warehoused goods” in section 2(44). By Chapter II, the officers of Customs and their classes are indicated. By Chapter III, appointment of Customs ports, airports etc. is dealt with. By Chapter IV, section 11 is inserted, which deals with prohibitions on importation and exportation of goods. Chapter IV-A deals with detection of illegally imported goods and prevention of the disposal thereof. Likewise, Chapter IV-B provides for prevention or detection of illegal export of goods. There is a power to exempt and conferred by section 11-N, which is contained in Chapter IV-C.

53. Chapter V deals with levy of and exemption from Customs duties and Chapter V-A indicates the amount of duty in the price of goods etc. for the purpose of refund. By Chapter V-B, there is a regime created of advance rulings. By Chapter VI, provisions are enacted relating to conveyances carrying imported or exported goods. It is common ground that sections 29 to 43, which are contained in this Chapter deal with “arrival of vessels and

aircrafts in India” to “exemption of certain classes of conveyances from certain provisions of this Chapter”. By Chapter VII, clearance of imported goods and export goods is a matter dealt with. The goods in transit have to be dealt with in the manner set out in Chapter VIII. Then comes an important Chapter and namely Chapter IX dealing with “warehousing”. There, licencing of public and private warehouse and special warehouse is provided. Section 60 deals with permission for removal of goods for deposit in warehouse. Section 61 deals with period for which goods may remain warehoused. Then, there are various aspects which are enumerated in sections 64 to 73-A relating to warehoused goods. Chapter X is titled as “drawback”. Chapter XI enacts special provisions regarding baggage, goods imported or exported by post and stores. By Chapter XII, provisions relating to coastal goods and vessels carrying coastal goods are enacted. Chapter XIII deals with searches, seizure and arrest. Chapter XIV deals with confiscation of goods and conveyances and imposition of penalties. We are not concerned with Chapter XIV-A dealing with settlement of cases and Chapter XV dealing with appeals and revision so also Chapter XVI dealing with offences and prosecutions. The miscellaneous provisions are contained in Chapter XVII and section 141 falling thereunder reads as under:-

141. Conveyances and goods in a customs area subject to control of officers of customs. – (1) All conveyances and goods in a customs area shall, for the purpose of enforcing the provisions of this Act, be subject to the control of officers of customs.

(2) The imported or export goods may be received, stored, delivered, dispatched or otherwise handled in a customs area in such manner as may be prescribed and the responsibilities of persons engaged in the aforesaid activities shall be such as may be prescribed.

54. A bare perusal of this section, which was renumbered by insertion of sub-section (1) and sub-section (2) by Act 18 of 2008, would indicate that all conveyances and goods in a customs area shall, for the purpose of enforcing the provisions of this Act, be subject to the control of officers of Customs and the imported and export goods may be received, stored, delivered, dispatched or otherwise handled in a Customs area in such manner as may be prescribed and the responsibilities of persons engaged in the aforesaid activities shall be such as may be prescribed. The word “conveyances” is defined in section 2(9) to include a vessel, an aircraft and a vehicle. The word “customs area” has been defined in section 2(11) to mean the area of a customs station and includes any area in which imported goods or export goods are ordinarily kept before clearance by Customs authorities. “Customs port” means any port appointed under clause (a) of section 7 to be a customs port and includes a place appointed under clause (aa) of that section to be an inland container depot.

“Customs station” is defined in section 2(13) to mean any customs port, customs airport or land customs station. Finally, the word “prescribed” is defined by section 2(32) to mean prescribed by regulations made under this Act and the word “regulations” is defined in section 2(35) to mean the regulations made by the Board under any provision of this Act. Thus, what we have before us is a scenario where neither the power to make regulations nor the regulations themselves are challenged. However, for a completion of the legal regime, we reproduce section 157 of the Customs Act, 1962, which reads as under:-

157. General power to make regulations. - (1) Without prejudice to any power to make regulations contained elsewhere in this Act, the Board may make regulations consistent with this Act and the rules, generally to carry out the purpose of this Act.

(2) In particular and without prejudice to the generality of the forgoing power, such regulations may provide for all or any of the following matters, namely:-

(a) the form of a bill of entry, shipping bill, bill of export, import manifest, import report, export manifest, export report, bill of transshipment, declaration for transshipment, boat note and bill of coastal goods;

(ai) the manner of export of goods, relinquishment of title to the goods and abandoning them to customs and destruction or rendering of goods commercially valueless in the presence of the proper officer under clause (d) of sub-section (1) of section 26-A;

(aii) the form and manner of making application for refund of duty under sub-section (2) of section 26-A;

(aa) the form and manner in which an application for refund shall be made under section 27;

(b) the conditions subject to which the transshipment of all or any goods under sub-section (3) of section 54, the transportation of all or any goods under section 56 and the removal of warehoused goods from one warehouse to another under section 67, may be allowed without payment of duty;

(c) the conditions subject to which any manufacturing process or other operations may be carried on in a warehouse under section 65;

(d) the manner of conducting audit of the assessment of duty of the imported or export goods at the office of the proper officer or the premises of the importer or exporter, as the case may be.

55. Once we have a general power to make regulations so as to carry forward the object and purpose of the Act or carry out the same additionally by invoking sub-section (2) of section 157, the Board can make regulations consistent with the Act so as to set conditions subject to which the transshipment of all or any goods under sub-section (3) of section 54, the transshipment of all or any goods under section 56 and the removal of warehoused goods from one warehouse to another under section 67 may be allowed without payment of duty. JNCH, without dispute is a Custom area.

56. Now we refer to the relevant regulations. They have to be read together with the sections appearing in Chapter IX of the Customs Act, 1962 and all sections and provisions preceding and following the same. If all these are read together and harmoniously, then, it is apparent that the regulations empower

regulating the movement of cargo in customs area. That also enables regulating the movement of cargo and containers from the terminal to the CFS in the larger interest of trade and public. Mr. Singh learned Additional Solicitor General is right in referring to the HCCA Regulations, 2009. They have been made by the Central Board of Customs in exercise of the powers conferred by section 141 read with section 157 of the Customs Act, 1962.

57. Since we have referred to all the provisions of the Act in the foregoing paragraphs by highlighting the object and purpose thereof so also the Act itself, it is apparent that the reliance placed on the two sections, namely, 141(2) and 157 of the Customs Act, 1962 is apposite. By Regulation 2(b), the expression “customs cargo service provider” is defined to mean any person responsible for receipt, storage, delivery, dispatch or otherwise handling of imported goods and includes a custodian and persons as referred to in section 141(2) of the Customs Act, 1962. Once the handling of the cargo in customs area is in accordance with the regulations and the regulations are specifically made for that purpose, then, it is futile to contend that the officials in-charge of implementing the Act and the Regulations cannot issue the public notices. The public notices

and the notifications referred above in *extenso* have been issued in accordance with the provisions of the Customs Act, 1962. We have referred to the entire Act only to appreciate the argument of Mr. Dwarkadas that by an executive fiat or administrative act, the whole legal regime has been altered. There is no power to do so, according to him, nor is the Commissioner conferred with the jurisdiction to do so. We are unable accept his arguments for more than one reason. The Regulation 7(2) enables the Commissioner of Customs to regulate the entry of goods in the customs area for efficient handling of such goods. There is a discretionary power conferred in the commissioner by this regulation. Further, the handling of goods in the customs area is a matter specifically dealt with by sub-section (2) of section 141. Thus, regulations can be made so as to prescribe the manner in which the imported or export goods may be received, stored, delivered, despatched or otherwise handled in the customs area. The regulations can also set out the responsibilities of persons engaged in the aforesaid activities. Once the regulations deal with such matters, then, it is not necessary that separate provisions have to be made for each matter covered by sub-section (2) of section 141. Section 141(2) itself enables the Commissioner to exercise control. The provisions of the Customs Act, 1962 have to be enforced so as to carry out its object and purpose and the

goods in the customs area are subject to the control of officers of Customs. They can, with the aid of these regulations and framed by the Board, control the receipt, storage, delivery, despatch or otherwise handling of the imported or export goods in customs area. If sub-section (2) of section 141 enables the Board to make regulations for this purpose so as to assist the officers of Customs in performing their functions and duties, then, all the more there is no substance in the contentions of Mr. Dwarkadas that the officials lack the power or jurisdiction to issue the impugned notices. The impugned notices are referable to the regulations which are made under the provisions of the Act. Therefore, issuance of public notices is implicit and inherent in the exercise of the enabling power of ensuring proper handling of the goods in the customs area and the larger power of control vesting in the officers of the Customs.

58. We have also perused the impugned notices. The petitioners have annexed copies thereof. By Circular No. 18 of 2009 at page 69 of the paper book, the Central Board of Excise and Customs has dealt with the subject of designation of customs clearance facilities as ICDs or CFSs. The Board circular dated 8th June, 2009 purports to clarify the issue with reference to the legal provisions. In paras 8 and 9, the circular issues advise to

the Jurisdictional Commissioners. If the proposed facility is required to be approved as an ICD or CFS and whether such facility fulfills the laid down guidelines, infrastructure requirements specified in the HCCA Regulations, 2009 has to be ensured. It is the Jurisdictional Commissioner who must record the necessary decision based on the above satisfaction. The circular clarifies that the competent authorities for regulation of ICDs or CFSs are the concerned Jurisdictional Commissioners.

59. Then, there is Circular No. 4 of 2017 dated 16th February, 2017, copy of which is annexed as Exhibit 'B' at page 73 of the paper book. The subject of this circular is Expansion of 24x7 customs clearance and clarification of levy of MOT charges in CFSs attached to 24X7 port. We need not refer to this circular in further details, but suffice it to indicate that the Central Board of Excise and Customs has empowered the Jurisdictional Commissioners, by proper authorization, to provide such facility as is required for ensuring early clearance of the goods.

60. Annexure 'H' is a copy of Facility Notice No. 63 of 2008. The subject of this notice is "facility of direct port delivery to select importers". The notice notifies for the information of trade and public that direct port delivery for imported cargo will be permitted for reputed importers having ACP status vide Public

Notice No. 64 of 2005 and to 100% EOUs on a selective basis. The DPD permission will be granted by the Commissioner of Customs (Import) JNCH, on the basis of application by individual importers. The facility notice sets out the complete procedure in that behalf. The facility notice is dated 1st September, 2008 and the petitioners, in the petition itself, have referred to these arrangements made. They also refer to Public Notice No. 66 of 2008, whereby, respondent no. 9 was notified as a designated CFS. Thus, it is apparent that on 11th September, 2008 itself the appointment of respondent no. 9 was notified. Beyond alleging that the appointment of respondent no. 9 is arbitrary and that is made without any opportunity to the petitioners or other CFSs, we do not find any challenge raised to these arrangements. The only pleading is that the DPD facility was optional and though respondent no. 9 was notified as a designated CFS in a arbitrary manner, that did not cause serious threat to the business and existence of the CFSs like the petitioners at that point of time.

61. We are of the view that this silence of the petitioners and parties like them for more than 8 years is eloquent enough. This only indicates that so long as there is no threat to their business opportunity or their commercial interest, the petitioners or their representative association do not complain. The complaint now is

motivated by pure commercial considerations. In these circumstances, the contesting respondents are right in their submission that we cannot take into account the petitioners' commercial consideration or business prospects in dealing with the challenge raised in the writ petition. Article 19(1)(g) of the Constitution of India protects certain rights and particularly to practice any profession or to carry on any occupation, trade or business. However, clause (6) of Article 19 enables placing of reasonable restrictions on this freedom. This clause clarifies that nothing in sub-clause (g) of clause (1) of Article 19 shall affect the operation of any existing law insofar as it imposes or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by sub-clause (g). The freedom, therefore, is not absolute. In the interest of general public, the law may impose restrictions on the freedom of the citizen to start or carry out his business. Such a law cannot be, therefore, struck down as violative of the mandate of Article 19(1)(g) of the Constitution of India. A business loss to a particular person or diminution in profits cannot be, therefore, the ground on which any action, which is in public interest, can be interfered with. Therefore, at the instance of the petitioners, the present public notices cannot be quashed and set aside.

62. In the public notices, copies of which are annexed to the petition, the first one that is referred is Public Notice No. 161 of 2016 dated 28th November, 2016. A copy of this notice is annexed as Exhibit 'J' at page 91 of the paper book. It states that extension of facility of direct port delivery to main importers and other steps taken for ease of doing business is contemplated because the direct port delivery facility reduces the time and cost of the importers considerably. In order to reduce dwell time and cost associated with import at Nhava Sheva, it has been decided to extend DPD permission to importers as mentioned in Annexure 'A' enclosed to this public notice subject to the conditions set out in this public notice. It is clarified that this facility has been extended to the said importers on the basis of the volume of transactions and on the basis of assessment made by the office of the Commissioner of Customs, NS-III, Mumbai Customs Zone-II, JNCH, Nhava Sheva regarding their ability to comply with the conditions as specified in this public notice. However, such permission for DPD may be withdrawn by the Jurisdictional Commissioner of Customs at any time in case of failure of adherence to the conditions or any violation.

63. The 8th respondent to the writ petition addressed a letter in representative capacity. Thus, the CFS Association of India

complained to the Chief Commissioner of Customs that the association is registered as non-profit making body. It represents the interest of 24 CFSs, who are its members. The designation of Speedy in Public Notice No. 161 of 2016 read with Public Notice No. 66 of 2008 has the effect of arbitrarily and unreasonably discriminating against the members of the association. They do not enjoy a level playing field for providing their services. However, it is apparent from a reading of this representation at page 107 of the paper book that the same refers to the earlier Public Notice No. 66 of 2008 dated 11th September, 2008. We have already set out as to how no grievance was raised for more than 8 years when the arrangement and particularly of designation of respondent no. 9 was holding the field. Suddenly, on account of the Public Notice No. 161 of 2016 that such a representation was addressed.

64. Then, we have on record another Public Notice No. 180 of 2016 dated 19th December, 2016, which is at page 110 of the paper book. This public notice refers to the prior public notices and states that the DPD facility reduces the time and cost for importers considerably. In order to reduce dwell time and cost associated with import at Nhava Sheva, it has been decided to extend DPD permission to importers as mentioned in Annexure 'A'

enclosed to this public notice. The other conditions mentioned in public notice dated 28th November, 2016 will remain the same. Therefore, there is an enlargement and extension of facility to those importers whose names are mentioned in Annexure 'A'. Yet again, the eighth respondent association complains, by addressing a letter dated 23rd December, 2016 Annexurer 'M'. Once again the same grievance is raised that the members of respondent no. 8 are deprived because of the designation of respondent no. 9. It is suggested in this representation that the member CFSs, who are equipped with appropriate facilities, infrastructure and manpower will be in a position to offer the same services as respondent no. 9. Therefore, the member CFSs also be permitted to receive DPD container traffic. It is apparent that the CFS association does not have a real, genuine and serious grievance about the facility and designation of respondent no. 9, but desire a participation and involvement of their members as well.

65. The reference is then made to an advisory dated 27th December, 2016 issued by the fifth respondent, copy of which is at page 132 of the paper book. That reads as under:-

No. S/22-Gen-100/2016-17AM(I)
27.12.2016

Date

To,

The Manager,
Navkar Corporation Ltd.
Somatane on kon - Sarla Road
Taluka Panvel, Dist. Raigad

Gentlemen,

Subject: Advisory in respect of Direct Port
Delivery - Reg.

Please refer to the facility of 'Direct Port Delivery' extended to many Importers at this Custom House vide Public Notice No. 161/2016 dated 28.11.2016 and Public Notice No. 180/2016 dated 19.12.2016 along with importers who have been granted permission for 'Direct Port Delivery' earlier to the Public Notices mentioned above.

In this connection, you are hereby directed that FCL containers imported by Importers who have been accorded 'Direct Port Delivery' as mentioned above and which have been facilitated by RMS and are meant for 'Direct Port Delivery' shall not be accepted at CFS.

Non compliance of the above direction will be viewed seriously and action will be initiated as per the provisions of the Customs Act, 1962.

(Dhirendra Lal)
Addl. Commissioner of Customs
(Import)
NS - I, III & V

66. Then, what we have on record are two public notices dated 16th January, 2017. They are Public Notice Nos. 8 and 9 of 2017. The copies of these notices are annexed as Exhibit 'O and Exhibit 'P' at pages 133 and 137 of the paper book.

67. In the first notice of 2017 (Public Notice No. 8 of 2017 dated 16th January, 2017), the office of the Commissioner of Customs

refers to the representations by various stakeholders/members from trade and then states that as a measure of trade facilitation and ease of doing business, the points raised by these persons have been examined and point-wise clarification/procedural requirements are set out in this public notice. In Public Notice No. 9 of 2017, there is a reference made to meetings with the CFSs within the jurisdiction of JNCH, at which, their views were solicited in order to find a solution to logistic arrangements. It was discussed that the JNPT is already preparing a logistic solution in the form of engaging 5-7 major transporters, who will provide transport services to DPD clients in efficient manner and evacuation of containers from terminal will take place on best pick up basis. This will facilitate further rationalisation of shifting charges being charged by terminal operators. The DPD clients can avail the aforesaid logistic solution. Then, various suggestions on this aspect are referred and further directions have been issued.

68. Once again, respondent no. 8 addressed a representation and raised the very grievance. The association insisted on complete transparency, but in principle does not seem to be opposing the logistic arrangements. We do not see any reason for the contesting respondents to consider these grievances

favourably. The public notices only lay down a policy and when the policy decision is aimed at reducing the port congestion, facilitating the expeditious movement of imported cargo and by which, there is an ease of doing business, then, all the more we do not see any reason to interfere with the same. There is a clarification given by the office of the Commissioner of Customs on 18th January, 2017 at page 143 of the paper book and which states that the procedure in regard to clearance of containers beyond 48 hours has been prescribed in Public Notice No. 161 of 2016. It provides for circumstances of exceptional nature when any DPD importer could not clear goods within 48 hours of landing. Therefore, only in exceptional circumstances, the procedure as prescribed in aforesaid public notices will be applicable. Thus, the expectation was that the consignment/cargo should be cleared within 48 hours and if for exceptional reasons it cannot take place, then, there are clear directions in that regard. There is a justification provided, namely, that as an administrative arrangement for nominating a CFS in transparent manner, the CFS closest to the port terminal has been nominated. Hence, Speedy Multimode CFS, which is located nearest to the port terminal was designated as default CFS. This was done considering public interest so that any default evacuation of containers (beyond 48 hours) will avoid

congestion at the port. We are satisfied that these clarifications were issued because of the representation of the stakeholders, including respondent no. 8.

69. Then, we have Public Notice No. 16 of 2017, by which, certain clarifications about the DPD facility have been issued, particularly a measure is conceived so as to facilitate trade and it is aimed at ease of doing business. Point wise clarification/procedural requirements set out in this Public Notice No. 16 of 2017 dated 9th February, 2017, therefore, carries the matter further. However, the basic policy decision has already been taken by earlier public notices. This point-wise clarification further elaborately sets out the procedural requirements. There are meetings held with the stakeholders as well.

70. It is in these circumstances that we do not find any reason to interfere with the said public notices. Even Public Notice No. 27 of 2017 dated at Exhibit 'U' at page 153 refers to these very aspects. It is not necessary to repeat what we have already held hereinabove. As far as this Public Notice No. 27 of 2017 is concerned, it came to be issued because there was a request from the stakeholders to devise a system so that container is released to DPD importer only after issue of delivery order even in case where CFS is logistic service provider. Therefore, the further

documents that are required to be obtained by DPD importer, before the consignments are cleared, would ease the movement in the sense if advance intimation is submitted by DPD importer to shipping lines, then, the shipping lines can access the CFS. That is how this public notice has been issued. It has been issued by those dealing with administration of the port and the operations at the same. In other words, those officers, who are empowered by the Customs Act, 1962 and those who are administering the port and managing affairs at the same are acting in coordination so that there is ease of doing business. None of the importers have any complaint. If they obtain the facilities to which they are entitled, they are going to be benefited. They are also going to be benefited by expeditious clearance of the imported goods. In the circumstances, when the officials competent to exercise powers under the Customs Act, 1962 have taken policy decisions as set out in the public notices, then, all the more, we are disinclined to interfere with the same in our extraordinary, equitable and discretionary jurisdiction under Article 226 of the Constitution of India. We do not find anything arbitrary, unreasonable or unfair in the actions of these respondents. All the more, when they have ensured transparency in the process of designation. The representation that is made and copy of which is at page 154-A of the paper book would indicate that not only the petitioners and

respondent no. 8 are aggrieved and dissatisfied with the public notices, but when the Commissioner introduced transparency in the designation or appointment of CFS for DPD containers from port terminals of JNCH, even that is objected to by some of the petitioners/members of the association. There cannot be any grievance when the public notices ensure transparency and openness in the matter of designation of CFS. Now the concerned and interested CFSs can participate and place their bids. Though it is rightly termed as a limited tender, still, it takes care of the grievance of the association that respondent no. 9 is arbitrarily chosen and to the detriment of the other CFSs. Now other CFSs have an opportunity to participate in the appointment or designation process. Even then they are complaining because they do not want a designation at all. They do not want a designation for they are not interested in early or expeditious clearance of the consignments at the port and reduce the congestion at the port. If there is a confusion, chaos and delay then, that may be advantageous to the petitioners, but it would be certainly detrimental to the public interest. The larger public interest has to be subserved and once that is ensured, then, the same prevails over the commercial or business interests of the petitioners. For their commercial or business motives, a decision taken in public interest cannot be interfered with. The mandate

of Articles 14 and 19(1)(g) of the Constitution of India are not violated. The limited tender notice dated 17th March, 2017 is really in furtherance of the policy measures and enunciated in the public notice. That is why when that limited tender notice was published, it referred to the relevant paragraphs of the public notices and states that the detailed terms and conditions of the limited tender notice are mentioned in Annexure 'A'. The limited tender is to invite offers under the bids especially for designation of CFSs for delivery of DPD containers from port terminals of JNCH, Nhava Sheva to CFSs, if not cleared beyond prescribed period and certain other circumstances as specified in the public notices. It is in that sense the participation in the limited tender is not restricted nor does it perpetuate the alleged monopoly of respondent no. 9. Even the respondent no. 9 cannot claim a absolute right simply because it can only receive such containers/goods which are not cleared by the importers within the above time limit of 48 hours. Thus, there is a arrangement devised to move such cargo/goods out of the port. If such is the intent and purpose and which is sought to be achieved and when we find that even the members of respondent no. 8 association and some of the petitioners have favourably responded to this tender, then, all the more, we are disinclined to interfere in writ jurisdiction.

71. As a result of the above discussion, the writ petition fails. Rule is discharged. However, there would be no order as to costs.

72. At this stage, Mr. Dwarkadas prays for continuation of the arrangement prior to issuance of the limited tender and the latest public notice No. 27 of 2017. This request is opposed by Mr. Jetly by pointing out that the public notice has already been given effect to, and equally, the limited tender and bids called for pursuant thereto. Thus, the bids were received. They were duly scrutinized and even the work order has been issued according to Mr. Jetly. In view of the instructions received by Mr. Jetly, and particularly on account of our reasoning in the judgment, the request of Mr. Dwarkadas cannot be accepted. The request is refused.

(PRAKASH.D.NAIK, J.)

(S.C.DHARMADHIKARI, J.)