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

WRIT PETITION (L) NO. 565 OF 2017

M/s. Hyundai Merchant Marine India Pvt. Ltd. and Ors.	}	Petitioners
versus		
Union of India and Ors.	}	Respondents

WITH
WRIT PETITION NO. 3569 OF 2017
(APPELLATE SIDE)

M/s. ZIM Integrated Shipping Services India Pvt. Ltd.	}	Petitioner
versus		
Union of India and Ors.	}	Respondents

Mr. Janak Dwarkadas – Senior Advocate with Mr. Rohan Rajadhyaksha, Mr. Adhip Iyer, Mr. Cheryl Fernandes, Mr. Malhar Zatakia and Mr. Dirij Joshi i/b. M/s. AZB and Partners for the petitioners in WPL/565/2017.

Mr. Sujay Kantawala with Mr. Rohan Rajadhyaksha, Mr. Adhip Iyer, Mr. Cheryl Fernandes, Mr. Malhar Zatakia and Mr.Divij Joshi i/b. M/s. AZB and Partners for the petitioner in WP/3569/2017.

Mr. Anil C. Singh – Additional Solicitor General with Mr. Pradeep S. Jetly and Ms.Indrayani Deshmukh for respondent nos. 1 to 6 in both the petitions.

Mr. Vikram Nankani – Senior Advocate i/b. Mr. Sonu Tandon for respondent no. 7 in WPL/565/2017.

CORAM :- S. C. DHARMADHIKARI &
PRAKASH. D. NAIK, JJ.
DATED :- MARCH 27, 2017

P.C. :-

1. By these petitions, the petitioners are challenging certain public notices. For brevity's sake, we would take the facts from Writ Petition (L) No. 565 of 2017. The petitioners therein are agent of Container Shipping Lines/Carriers, who are engaged in the business of international carriage of containerized goods by sea.

2. All petitioners are challenging the four public notices, details of which are provided in prayer clause (A) of Writ Petition (L) No. 565 of 2017 and seeking a writ of mandamus directing respondent no.3 to forthwith withdraw these notices.

3. At the same time, they do not dispute that based on these notices and a regulation styled as the Handling of Cargo in Customs Area Regulations, 2009, public notices are issued to these petitioners.

4. The respondents to this writ petition are the Union of India, the Chief Commissioner of Customs, the Commissioner of Customs-NS-G - Mumbai Customs Zone-II, the Commissioner of Customs (General) – Container Freight Station Management Cell, Jawaharlal Nehru Customs House, Uran, District Raigad, Maharashtra. The respondent no. 5 is the Superintendent of

Customs. The respondent no. 6 is the Central Board of Excise and Customs and the 7th respondent is the Container Shipping Lines Association, which is registered under the Societies Registration Act, 1860.

5. The essential contentions in these petitions and canvassed by Mr. Dwarkadas learned senior counsel supported by Mr. Nankani and Mr. Kantawala are that by section 141 of the Customs Act, 1962 falling in Chapter XVII titled as "Miscellaneous", it is stated that conveyances and goods in a customs area are subject to the control of the officers of Customs. By sub-section (1), it is stated that all conveyances and goods in customs areas shall, for the purpose of enforcing the provisions of the Customs Act, 1962, be subject to the control of officers of the Customs. By sub-section (2), the import or export goods may be received, stored, delivered, despatched or otherwise handled in customs area in such manner as may be prescribed and the responsibility of persons engaged in the aforesaid activities shall be such as may be prescribed.

6. It is submitted that the word "prescribed" has been defined and understood by the Act to mean prescribed by regulations made under the Act (see section 2(32). By section 157 of the Act, a general power to make regulations is conferred. That is

conferred in the Board. The Board is understood to mean the Board of Excise and Customs. The Board has certain duties and obligations. It is stated that the Board is set up under the Central Boards of Revenue Act, 1963. It is submitted that the Handling of Cargo in Customs Area Regulations, 2009 would not, even by the definition of the term "Customs Cargo Services Provider", to be found in clause 2(b) of the Regulations, take within its import the present petitioners and the members of respondent no. 7 association. It is submitted that the show cause notices rely on the public notices. The public notices, in turn, rely on the provisions of the Act as understood by the authorities. The provisions of the Act and the clauses of the Regulations have been understood by the public notices to include even the petitioners and their activities. This is a complete misinterpretation and misreading of the provisions of the Act. The petitions are premised on the fact that if this is how the Act and the Regulations are permitted to be read, then, the public notices contravene the mandate thereof. The stand taken by the authorities and particularly even the Commissioner, before this court on affidavit, would indicate that he has made up his mind and no fair and impartial adjudication is possible.

7. Once the controversy is understood in this manner, then, a writ petition under Article 226 of the Constitution of India is the only remedy available to the petitioners. The petitioners should not be understood to have questioned only the show cause notices pending and the adjudication. Their attempt should not be confused with some others, who try to stall and prolong a adjudication into the show cause notices by questioning them. Therefore, even before the show cause notices are adjudicated that such parties approach this court in its inherent and writ jurisdiction under Article 226 of the Constitution of India. Their motive is apparent and clear. They wish to prolong and defeat the adjudication of the notices and then the delay is inevitable. Mr.Dwarkadas submits that more fundamental challenges are raised and to the jurisdiction/competence of the officers, who are seeking to apply the Act and the Regulations to the petitioners' activities. That is how their understanding would come in the way of an impartial and fair adjudication. The fate of the petitioners is virtually sealed going by the language of the public notices and the communications, which have been addressed by the authorities to some of the petitioners.

8. Mr. Nankani would add to these submissions by contending that at a certain port, namely, at Madras, although the position is

that the importer may have some contractual arrangement with parties, but who do not in any manner fit the bill, still, the Act and the Regulations are applied and a stand is adopted which has forced those persons and functioning at that port in resorting to litigation.

9. Mr. Kantawala relied upon certain communications from the Deputy Commissioner of Customs, who not only justifies the issuance of the show cause notices, but spells out the stand of the authorities. He would, therefore, submit that the writ petitions be entertained.

10. Upon such petitions, a preliminary objection is raised to the maintainability thereof by the learned Additional Solicitor General. He would submit that whatever may be the contentions and raised on the point of jurisdiction and maintainability of the proceedings, still, these petitions essentially impugn the show cause notices. The matter is at that stage itself. The petitioners can raise all contentions based on the jurisdiction and maintainability of the proceedings before the competent authority. There is no need to entertain these petitions. Even if an adjudication order is passed, there are remedies to challenge the same in the event it is adverse to the interest of the petitioners. Today, at this stage, this court must not express any

opinion on the merits of the controversy or the maintainability of the proceedings and equally on the competence and jurisdiction of the authorities under the Customs Act, 1962. The petitioners need not have any apprehension of coercive recoveries of taxes, interest or penalty until and unless an adjudication order is passed. All the more, therefore, the writ petitions need not be entertained.

11. After having heard the parties at some length, we find much substance in the objection of the learned Additional Solicitor General.

12. The petitioners have narrated the nature of their activities. They have also highlighted the role if they play at the port. They clarify that the Act applies only to those, who import the goods and desire to clear them either for export or for home consumption. If the petitioners contend that their business, their activities would not bring them within the purview of the Act of 1962, then, we do not see how by mere issuance of the show cause notices and addressed to them are they precluded from raising this challenge. Even if they are summoned, they can submit a written defence or, as styled in the show cause notices, a written statement of defence raising therein all contentions and without prejudice to the same, appear before the adjudicating authority.

We have no doubt in our mind that despite issuance of the Regulations, Circulars of the Board, the public notices and the contents of the show cause notices reflecting the version of the authorities of these documents, an adjudication order would have to be passed and would be passed considering all the contentions of the petitioners. An opportunity will have to be given to the petitioners to challenge the jurisdiction and competence of the officials, the maintainability of the proceedings, in which, the issue of applicability of the Customs Act, 1962 and the Regulations under section 157 of the Act, styled as Handling of Cargo in the Customs Area Regulations, 2009 would arise. That would arise and if the petitioners raise these issues and press them during the adjudication of the show cause notices, it is clear that the adjudicating body or the officer would have to deal with them and render a finding on the same irrespective of whether any of the authorities empowered to administer and manage the Act have taken a certain view. Even if the Regulations are in place, public notices are issued and there are certain communications addressed to the representatives of the association, still an obligation and duty, which is to hold a fair, proper and just adjudication of the show cause notice, would have to be performed by the adjudicating authority. He can neither brush aside the contentions nor refuse to deal with them. He would have to assign satisfactory reasons at the end of the adjudication while dealing with these contentions and if not inclined to accept them. Similarly, it goes without saying, an opportunity of personal hearing will be given to the petitioners, at which, they or their representative can specifically argue these points and raise the above contentions. Once these clarifications have come from the authorities themselves and the learned Additional Solicitor General assures the court that no recoveries will be effected pending adjudication, then, all the more, we need not entertain these petitions. With the aforesaid clarifications, they are disposed of. There would be no order as to costs.

13. In the light of the fact that such petitions, as are disposed of by us, were brought before this court and were pending for some time, we extend the time to furnish the statement of defence by four weeks from today. Within this added time, the petitioners can respond to the show cause notices by filing the written statement of defence. If it is filed, the same be taken on record and the delay be appropriately condoned.

(PRAKASH.D.NAIK, J.) **(S.C.DHARMADHIKARI, J.)**