

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 02.08.2019

DATE OF DECISION : 22.08.2019

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

W.P.Nos.17679 and 17685 of 2019
and

W.M.P.Nos.17120 and 17126 of 2019

Waymark Container Freight Station Pvt. Ltd.,
No.14, Jaffer Street (Behind Custom House),
Parrys, Chennai-600 001.
represented by its Authorised Signatory,
Mr.A.Manimaran

..Petitioner in
both writ petitions

Vs.

1.Union of India,
Ministry of Commerce and Industry,
Infrastructure Division,
Department of Commerce,
Udyog Bhavan, New Delhi-110 011,
represented by its Under Secretary.

2.Government of India,
Ministry of Finance,
Department of Revenue,
(Central Board of Indirect Taxes and Customs),
Room No.227-B, North Block,
New Delhi-110 001
rep by its Director Customs.

3.The Commissioner of Customs,
Commissionerate VIII,
Customs House,
No.60, Rajaji Salai,
Chennai-600 001.

4.M/s.Continental Warehousing Corporation
(Nhava Sheva) Ltd.,
F5-5, 5th Floor, Pinnacle Business Park,
Shanti Nagar, Mahakali Caves Road,
Andheri East, Mumbai-400 093.

..Respondents in
both writ petitions

W.P.No.17679 of 2019 is filed under Article 226 of the Constitution of India praying to issue a Writ of certiorarified mandamus calling for the record leading to passing of Para (iv) (1) of the Decision / Order of the second respondent vide F.No.434/04/2018-Cus-IV dated 06.02.2019 (under cover of letter dated 15.03.2019) rejecting the application filed by the petitioner, quash the same and consequently direct the respondents 1 to 3 to grant permission to the petitioner for setting up a new Container Freight Station at Sendrambakkam village, Thiruvottriyur taluk, Thiruvallur District, Chennai as applied under application dated 21.10.2016 and pass such further or other orders as this Hon'ble Court may deem fit and necessary in the facts and circumstances of the case and thus render justice.

W.P.No.17685 of 2019 is filed under Article 226 of the Constitution of India praying to issue a Writ of certiorari calling for the records leading to passing of Para (i) (3) of the Decision / Order of the 2nd respondent vide F.No.434/04/2018-Cus-IV dated 06.02.2019 (under cover of letter dated 15.03.2019) allowing the application of the fourth respondent to shift their Container Freight Station (CFS) from Madhavaram, Chennai to Vallur Village, Ponneri Taluk, Tiruvallur District, quash the same and pass such further or other orders as this Hon'ble Court may deem fit and necessary in the facts and circumstances of the case and thus render justice.

For Petitioner	: Mr.P.Giridharan
For Respondents	: Mr.K.Ramanamoorthy Central Government Counsel for R-1 Mr.A.P.Srinivas, Standing Counsel for RR2 and 3 Mr.P.S.Raman, Senior Counsel for Mr.Vinod Kumar for R-4

COMMON ORDER

This common order will dispose of both these writ petitions.

2 With consent of all aforesaid learned counsel, main writ petitions are taken up, heard out and are being disposed of.

3 Subject matter of main writ petitions pertain to 'Container Freight Stations' ('CFSs' in plural and 'CFS' in singular, for brevity).

4 Short facts shorn of details and particulars not imperative for appreciating this order are that writ petitioner which is a private limited company incorporated in India is in the business of running CFSs, providing warehousing facility, that writ petitioner made an application dated 21.10.2016 to first respondent, that the application was for setting up a CFS at Sendrambakkam, that application was being processed, that on 28.11.2016, first respondent called upon writ petitioner to furnish certain documents, that writ petitioner submitted documents on 14.3.2017, that first respondent sent another communication dated 24.4.2017 seeking some more certificates, that writ petitioner submitted / replied to the same on 4.5.2017, that letter dated 29.9.2017 was sent to writ petitioner by first respondent stating that application of the petitioner was discussed in an 'Inter Ministerial Committee' ('IMC' for brevity) meeting held on 19.9.2017, that the request of the writ petitioner was deferred owing to a decision that already a large number of CFSs are functioning in Chennai, that thereafter also, there was correspondence between writ petitioner and first respondent and ultimately, first respondent sent a communication dated 23.4.2018 enclosing minutes of IMC meeting held on 10.4.2018, wherein it was inter-alia mentioned that a policy decision to encourage 'Direct Port Delivery' ('DPD' for brevity) and 'Direct Port Export' ('DPE' for brevity) had been taken. As it is a policy decision, writ petitioner did not choose to assail the same. When things stood thus, writ petitioner received a electronic mail dated 26.02.2019 from second respondent enclosing minutes of IMC meeting held on 06.02.2019 wherein it was mentioned that writ petitioner did not attend the IMC meeting held on 6.2.2019 and that the application of writ petitioner for commencing CFS in Sendrambakkam was rejected. Writ petitioner immediately responded to second respondent vide email dated 1.3.2019 stating that they never got any letter from second respondent calling upon them to attend the IMC meeting on 6.2.2019. Thereafter, writ petitioner received a letter dated 15.3.2019 from second respondent enclosing further minutes of IMC meeting held on 6.2.2019 from which it came to light that writ petitioner's application was rejected on the ground that it was very close to Chennai Port and already a policy decision had been taken to increase DPD / DPE. However, it came to light vide same minutes of IMC meeting on 6.2.2019 that IMC had given in principle approval for fourth respondent's application to shift its existing CFS from Madhavaram to Vallur village, Ponneri Taluk.

5 In the aforesaid backdrop, instant writ petitions have been filed assailing two decisions of IMC taken on 6.2.2019, i.e., decision to reject petitioner's application for setting up CFS in Sendrambakkam and giving in principle approval to the

fourth respondent to shift its existing CFS from Madhavaram to Vallur village.

6 It is not in dispute that location where writ petitioner applied for commencing CFS, namely Sendrambakkam and location in Vallur where fourth respondent wants to shift its existing CFS are adjacent to each other. This court is informed that they are so adjacent that it can even be described as contiguous.

7 Primary and pivotal contention of writ petitioner is that if a policy decision has been taken to not to encourage CFS close to Chennai and some other Ports, the same should be applied uniformly / evenly irrespective of whether it is a case of shifting a CFS or opening a new CFS.

8 When writ petitions came up for admission, this court encapsulated / captured the submissions made on behalf of writ petitioner, granted an interim order and the same may be usefully referred to. This was on 26.6.2019 and said proceedings / order reads as follows :

"Mr.P.Giridharan, learned counsel on record for writ petitioner in these two writ petitions is before this Court.

2. Learned counsel submits that subject matter of these two writ petitions is an application by writ petitioner for setting up a 'Container Freight Station' ('CFS' for brevity) at No.7, Redhills Road, Sendrambakkam Village, Thiruvottiyur Taluk, Thiruvallor District, Chennai - 600 052 and an application by fourth respondent for shifting the existing CFS from Madhavaram to Vallur Village, Ponneri Taluk, Tiruvallur District.

3. According to learned counsel for writ petitioner, decision with regard to aforesaid application of fourth respondent was earlier taken by first respondent and it has now been taken by the second respondent albeit in a 'Inter-Ministerial Committee' ('IMC' for brevity) Meeting.

4. Vide proceedings dated 23.04.2018, fourth respondent's application for shifting its CFS was rejected by holding that such an application has to be treated as a fresh application for setting up a CFS. Subsequently, according to writ petitioner, on 06.02.2019 in IMC Meeting, there was a turn around, application of the fourth respondent was treated as request for transfer of CFS and the request was acceded to vide paragraph (i) 3 and the application of writ petitioner for setting up a new CFS at aforementioned address viz., in Sendrambakkam

Village, Thiruvottiyur Taluk, Thiruvallur District was negatived vide paragraph (iv) (1).

5. A perusal of the aforesaid proceedings reveals that the reason for rejection of writ petitioner's application has been given as a decision taken that no new facility would be opened near ports like Chennai, Nhava Sheva and Mundra due to increased focus on 'Direct Port Delivery' ('DPD' for brevity) and 'Direct Port Export' ('DPE' for brevity). In this regard, advertent to paragraph 16 of the affidavits filed in support of these writ petitions, learned counsel for writ petitioner submitted that this decision taken by respondents 1 and 2 i.e., the decision that no new facility would be opened near aforesaid Ports due to increased focus on DPD/DPE is not assailed as that is in the nature of a policy decision.

6. Having said this, learned counsel referring to the aforesaid addresses submits that the application of the fourth respondent to shift the existing CFS is such that the proposed location to which fourth respondent wants to shift CFS is closer to Chennai Port than the location in which writ petitioner has applied for setting up a new CFS. On this basis, it is submitted that the decision to not to open new facility owing to increased focus on DPD/DPE has not been applied in an even-handed manner.

7. Mr.K.Ramanamoorthy, learned Central Government Counsel accepts notice on behalf of first respondent. Mr.A.P.Srinivas, learned Senior Standing Counsel accepts notice on behalf of respondents 2 and 3. Aforesaid State Counsel request time to get instructions and make submissions.

8. In the light of the aforesaid narrative, issue notice to respondent No.4 returnable in a fortnight i.e., by 10.07.2019. Private notice is also permitted.

9. In the interregnum, aforesaid para (i)(3) of the aforementioned impugned proceedings/decision/order dated 06.02.2019, i.e., permission given to 4th respondent for shifting CFS shall be kept in abeyance till the next listing.

10. For the purpose of clarity, para (i) (3) of proceedings/decision/order dated 06.02.2019, which is kept in abeyance reads as follows:

3	Shifting of CFS by M/s.Continental Warehousing Corporation (Nhava Sheva) Ltd. from Madhavaram, Chennai to Vallur Village, Ponneri Taluk, Thiruvallur District.	The Developer informed that the reason for change of location of their CFS is that Corporation of Chennai has expanded its limits and the CFS facility survey number is falling under residential zone now. Further, Corporation of Chennai has constructed another Mofussil Bus Stand at about a kilometer from the existing CFS facility, which once fully functional, may create huge traffic related problems that may affect operational efficiency of the CFS. Member from Logistics opined that such proposal should be treated as fresh proposal and traffic analysis of the new location needs to be provided for any further decision. However, other members of IMC viewed the proposal as merely that of shifting from one location to another. In view of this, IMC accorded 'in principle approval' to the proposal for shifting the existing CFS from Madhavarm, Chennai to Vallur Village, Ponneri Taluk, Thiruvallur District. The developer would submit the detailed report on traffic at the proposed location. Concerned Customs field formation shall submit feasibility report. Issuance of Lol would be
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In other words, aforesaid paragraph (i) (3), which has been extracted and reproduced supra, shall be kept in abeyance till the next listing, which shall be on 10.07.2019. For the sake of specificity, it is made clear that there shall be an order of interim stay as prayed for in W.M.P.No.17126 of 2019 in W.P.No.17685 of 2019 till 10.07.2019.

11. List this matter on 10.07.2019."

9 Thereafter, respondents entered appearance and fourth respondent has filed a counter affidavit. To be noted, respondents 1 to 3, who are official respondents, chose not to file counter affidavits, but made brief submissions at the Bar. Suffice to say that brief submissions of official respondents 1 to 3 were not in the nature of supporting or opposing writ petitioner's or fourth respondent's case, but they were only submissions in the nature of briefly setting out the stated position of official respondents. In other words, official respondents 1 to 3 did not take any adversarial position qua writ petitioner or fourth respondent. Therefore, for the purpose of clarity and specificity with regard to certain aspects of stated position of official respondents, this Court made proceedings dated 17.7.2019 which reads as follows :

"Mr.A.P.Srinivas, learned Senior Standing counsel for respondents 2 and 3, is to get instructions in this matter.

2.Besides whatever is deemed appropriate qua this lis, learned revenue counsel is to get instructions on the following specific aspects and report to this Court:

a)Number of 'Container Freight Stations' ('CFS' in singular and 'CFSS' in plural for brevity), which are now functioning qua Chennai and Ennore Ports.

b)Whether the policy to encourage DPT, DPE would permit one more CFS in addition to existing CFSS qua Chennai and Ennore Ports.

c)When the list of existing CFSS are given, it shall be made clear as to whether it includes the fourth respondent's CFS, which is now said to be functioning at Madhavaram.

d)The tentative date on which the agenda for the next meeting touching upon subject matter of instant writ petition is likely to be finalised.

e)Any other information considered relevant by the second respondent.

List this matter on 25.07.2019."

10 In response to aforesaid 17.7.2019 proceedings, a copy of written instructions to standing counsel of official respondents was placed before this court and the same reads as follows :

"a) There are 35 CFSSs and 2 CWCs are functioning under this Jurisdiction. Out of them 2 CFSSs are directly linked with Kattupalli Port remaining 33 CFSSs and 2 CWCs are directly linked with Chennai Port. However, all the CFSSs and CWCs are handling containers of all Ports through Transshipment Module.

b) The Central Board of Indirect Taxes and Customs (CBIC) is targeting to raise the Direct Port Delivery of the total volumes. In such cases movement of containers to CFSSs/CWCs would come down and their business would definitely come down. Moreover, even now 10 CFSSs and two CWCs are performing very low business when compare to other CFSSs.

c) The number of CFSSs referred at above includes the CFS which is now functioning at Madhavaram and figuring as 4th respondent of the subject Writ Petition.

d) The tentative date of the next agenda for granting permission for setting up of CFS has to be ascertained from the Ministry through Board and will take some time. As Inter-ministerial Committee (IMC) decides the feasibility of new CFSSs in which area.

e) The decision of granting permission to shift the Continental Warehousing Corporation (Nhava Sheva) is on the basis that their existing CFS at Madhavaram would be closed on functioning of the same at its new location. By allowing shifting of said CFS to new location, there will not be any change in the number of CFSSs/CWCs functioning in this jurisdiction."

11 As far as fourth respondent is concerned, primary and pivotal submission of fourth respondent, as articulated in the hearing (notwithstanding several averments made in the counter affidavit besides grounds / contentions canvassed in the counter affidavit), was that the writ petitioner and 4th respondent are not similarly placed entities. In other words, it is the specific say of learned senior counsel for fourth respondent that while application of writ petitioner was for commencing new CFS, application of fourth respondent was for shifting an existing CFS and therefore, the two are not comparable. To put it differently, the pivotal submission of fourth respondent was

to the effect that two applications not being similar, the argument predicated by putting the same on same pedestal tantamounts to comparing Apples and Oranges or comparing chalk and cheese.

12 From the narrative thus far, this court is of the clear and considered view that these two writ petitions now turn on a very narrow compass. This court now proceeds to discuss the issue that falls for consideration and to set out dispositive reasoning for returning a verdict.

13 As already alluded to supra, the decision of official respondents to encourage DPD / DPE being policy decision is not under challenge. Factual position that location where writ petitioner wants to commence CFS and location where fourth respondent wants to shift its existing CFS are virtually adjacent to each other and equidistant from Port is also not in dispute.

14 It is the stated position of official respondents that it makes no difference qua convenience of trade or public safety with regard to locations of writ petitioner and fourth respondent. Therefore, it follows as a sequitur that official respondents are neither interested nor indifferent to the location.

15 In this backdrop, this court has no difficulty in accepting the argument that the nature of applications of writ petitioner and fourth respondent are different as one is for a new CFS and the other is for shifting the existing CFS. This court also notices that the location is one in which official respondents are neither particular nor indifferent. Therefore, it boils down to commercial interests of writ petitioner and fourth respondent.

16 This court has also noticed that it is the stated position of official respondents that shifting of CFS from Madhavaram by fourth respondent is subject to the condition that fourth respondent will close down the existing operations in Madhavaram. Therefore, if the request of fourth respondent for shifting is acceded to, the number of CFSs will not increase. On the contrary, if the application of writ petitioner and their request for opening a new CFS is acceded to, the number of CFSs will increase at least by one.

17 Be that as it may, what is of utmost relevance is the reason that has been given for rejecting writ petitioner's proposal to set up a new CFS. According to 6.2.2019 minutes of IMC, the reason is that it is very near to Chennai Port and already a decision has been taken that no new facility would be

opened near Ports like Chennai, Nhava Sheva and Mundra due to increased focus on DPD / DPE. Relevant portion of 6.2.2019 minutes is 3.1(iv) and the same reads as follows:

(iv) Developer not attended/responded

S.No.	Name of the proposals	Decision of the IMC
1	Setting up of CFS at Chennai by M/s Waymark CFS Pvt. Ltd.	Developer neither attended the IMC meeting nor submitted any status report of the proposal. The IMC decided that project is located very near to Chennai and already it has been decided that no new facility would be opened near ports like Chennai, Nhava Sheva and Mundra due to increased focus on DPD/DPE. Thus, IMC decided to reject the proposal.

(Underlining made by this Court to supply emphasis and highlight)

18 Therefore, if proximity to Chennai port is the determinant, than to that extent writ petitioner and fourth respondent stand on the same footing and are comparable. Therefore, this court is of the view that it would be appropriate that IMC first clarifies as to whether proximity of the location qua Port is the sole determinant or an additional CFS is also a determinant with regard to decision to encourage DPD / DPE. In the considered view of this Court, minutes seen in isolation can be construed as complete picture of decision to encourage to DPD / DPE though the minutes talks only about proximity of location and does not say anything about number of CFSs. This court has also reminded itself that the decision to encourage DPD / DPE is not under challenge. Thereafter, i.e., post such clarification, it would be appropriate to proceed further with regard to in principle approval given to fourth respondent and also consider the application of writ petitioner after such clarification. The reason why this court is of the view that it would be appropriate to consider the application of writ petitioner even if IMC decides that number of CFSs is also a determinant is that there is still a possibility of fourth respondent's in principle approval not being carried to its logical end for one reason or the other. The other reason which impels this court to believe that it would be appropriate to consider the application of writ petitioner is, from the narrative of facts set out supra, it will be clear that the application of writ petitioner which was made on 21.10.2016 was under active consideration of official respondents by calling for documents vide several correspondence. Another more

important reason is, official respondents have not denied or disputed writ petitioner's averment that writ petitioner did not get any intimation calling upon them to attend the meeting on 6.2.2019. Therefore, this court deems it appropriate that writ petitioner is given an opportunity to attend the ensuing meeting.

19 Writ petitioner also made one more submission that another entity which goes by the name Seahorse CFS applied for a new CFS at the very location where fourth respondent now intends to shift, application of Seahorse CFS was rejected, but Seahorse CFS is now the lessor qua fourth respondent. In other words, it is writ petitioner's submission that Seahorse whose application was rejected has now camouflaged its application and has come in in the garb of shifting by taking umbrage under fourth respondent. In other words, it is writ petitioner's say that Seahorse is riding on fourth respondent's back and attempting to gallop past writ petitioner in setting up a new CFS. This, in the considered view of this court is too far fetched a submission as the factum that lessor of fourth respondent was an applicant qua new CFS and that it was rejected cannot become an impediment for said Seahorse becoming lessor qua fourth respondent.

20 Sum totality of the discussion thus far also leads this court to the considered conclusion that writ petitioner cannot impede the application of fourth respondent for shifting, though writ petitioner is entitled to say that it should be given an opportunity as there is no disputation that there is nothing to demonstrate that writ petitioner was called / put on notice to attend 6.2.2019 meeting.

21 Therefore, it would be appropriate to direct official respondents to give one more opportunity to the writ petitioner to represent its case for setting up CFS vide its application dated 21.10.2016. This will obviously be after setting aside the rejection in 3.1(iv)1 of 6.2.2019 minutes extracted supra. In the ensuing meeting or prior to the meeting, IMC shall clarify whether the proximity of location is the lone determinant or number of CFSs is also a determinant qua decision to encourage DPD / DPE and thereafter take a decision. In other words, it would be appropriate that there is an agenda in the ensuing IMC meeting to consider the application of writ petitioner and also further consider the shifting application of fourth respondent.

22 In the result, following order is passed :

(a) W.P.No.17679 of 2019 is partly allowed setting aside the rejection order qua writ petitioner with a consequent direction that official respondents / IMC shall send communication

to writ petitioner to attend ensuing meeting, besides including an agenda in ensuing IMC to consider writ petitioner's application dated 21.10.2016 for setting up a CFS from the point where the process last stood.

(b) W.P.No.17685 of 2019 is dismissed holding that it is open to official respondents / IMC to take up processing of shifting application of fourth respondent by including a suitable agenda in the ensuing meeting.

(c) The decision in two instant writ petitions vide (a) and (b) supra are with a common rider that official respondents / IMC shall clarify to writ petitioner and fourth respondent in the ensuing meeting or prior to the same as to whether determinant for implementing the policy to encourage the DPD / DPE is qua location, i.e., proximity to Chennai Port or number of CFSs or both and thereafter decide the application of writ petitioner and application of fourth respondent for shifting its existing CFS on this basis.

(d) For the purpose of abundant clarity and specificity, it is made clear that in the ensuing meeting, there will be one agenda for further considering the in principle approval given to shifting application of fourth respondent and another agenda for considering the writ petitioner's application dated 21.10.2016 for setting up CFS from where it is last stood.

(e) Though obvious, it is mentioned for clarity that both agendas shall be decided by first respondent / IMC keeping in mind the observations made in this order.

23 Decision :

With the aforesaid directions and observations, W.P.No.17679 of 2019 is partly allowed and W.P.No.17685 of 2019 is dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1.The Under Secretary.

Union of India,
Ministry of Commerce and Industry,
Infrastructure Division,
Department of Commerce,
Udyog Bhavan, New Delhi-110 011,

2.The Director Customs.

Government of India,
Ministry of Finance,
Department of Revenue,
(Central Board of Indirect Taxes and Customs),
Room No.227-B, North Block,
New Delhi-110 001

3.The Commissioner of Customs,

Commissionerate VIII,
Customs House,
No.60, Rajaji Salai,
Chennai-600 001.

+1 cc to M/s.K.Ramamoorthy, Advocate Sr.No. 72570

+1 cc to M/s.A.P.Srinivas, Advocate Sr.No.77189

+1 cc to M/s.P.Giridharan, Advocate Sr.No.71976

+1 cc to M/s.Vinod Kumar, Advocate Sr.No. 71943

AKM/18.09.19/13P- 8C /

order in
W.P.Nos.17679 and 17685 of 2019