

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

WPA No. 15632 of 2019

**Sri Prabir Kumar Dhali and others
Vs.
Kolkata Port Trust and others**

For the petitioners	:	Mr. Sabyasachi Choudhury, Mr. Saptarshi Banerjee, Mr. Satadru Lahiri
For the Kolkata Port Trust	:	Mr. Anirban Roy, Mr. Ashok Kumar Jena
For the respondent nos. 4 and 5	:	Mr. Avinash Kankani
For the respondent no.6	:	Mr. Mainak Ganguly
Hearing concluded on	:	12.03.2021
Judgment on	:	07.04.2021

Sabyasachi Bhattacharyya, J:-

1. The dispute revolves around a decision taken by the Kolkata Port Trust, KoPT in short (respondent no.1), to increase the maximum permissible beam width for vessels at the Netaji Subhas Dock (NSD) from the previous existing width of 80 ft. to 82 ft. The petitioners argue that, before taking such drastic decision, particularly considering that the admitted lock gate width is 90 ft., without any scientific study or data analysis, subjects the petitioners and other dock workers to unnecessary

risk of life and limb. Learned counsel for the petitioner argues that the existing permissible beam width of 80ft. at the NSD already covers 89 per cent of the lock width, which is one of the highest in the world. 82 ft. would take it to about 91 per cent.

2. Secondly, learned counsel for the petitioners submits that a six-member committee was formed by the Director, Marine Department, KoPT on June 1, 2018, comprised of the Director himself, Harbour Master (Port), Deputy and Assistant Dock Masters and Senior Dock Pilot to identify the issues that needed to be addressed for taking vessels in excess of the then existing maximum permissible limit of 80 ft. but not exceeding 82 ft. inside NSD. The committee recorded agreement on trial operations being held for a period of six months to evaluate the prospect of admitting vessels exceeding the existing permissible beam width of 80 ft. Such period of six months was to expire on December 1, 2018. However, instead of waiting for six months, after only six days, the Director constituted a "Technical Committee" for revision of operational parameters both in the NSD and the Kidderpore Dock (KPD). Out of its four members, three were also a part of the earlier meeting dated June 1, 2018. By its report dated June 25, 2018, the Technical Committee increased the beam width of vessels of NSD to 82 ft. but did not increase the existing limit for KPD. Learned counsel argues that there is no reasonable basis for such patent contradiction with the decision of the earlier committee of six members was disclosed in the report of the

Technical Committee. The impugned decision dated June 25, 2018 does not disclose any basis for increasing the beam width, nor refers to the earlier decision dated June 1, 2018. It is contended that on all earlier occasions till the year 2013, when there was occasional passage of vessels exceeding 80 ft. beam width, objections had been raised on which action was taken and show-cause notices were issued, which were duly answered, upon which no oversized vessel was accepted thereafter.

3. Moreover, there is patent contradiction in the Technical Committee retaining the existing 70 ft. beam width for KPD, which has a lock width of 80 ft. (having 87.5 per cent occupancy) but increasing the NSD beam width to 82 ft., thus increasing the occupancy from an already high (89 per cent) to 91.1 per cent occupancy in the lock which is 90 ft. wide.
4. It is submitted by learned counsel for the petitioner that such recommendation of the Technical Committee, in the teeth of the decision taken only about a week prior to the said Committee being convened to hold trial operations for six months, was unjust and without any reasonable basis.
5. The recommendation dated June 25, 2018 was accepted by the 'competent authority', followed by issuance of a Trade Notice to that effect on July 10, 2018 in a completely arbitrary manner, thereby subjecting all the dock workers to serious risk of injury and/or death.
6. It is submitted that such increase of beam width is patently dangerous since the Kolkata Port Docks are more than 150 years old and have not

undergone any modernization to suit the increase of beam width of vessels. Operations are still being carried out manually for controlling and navigating the ships inside the Port by tugs. In contrast, the Vizag Port had implemented changes to the beam width only after the Board of Trustees of the said Port had approved a simulation study by a reputed international agency and after imparting adequate training to pilots in batches.

- 7.** Learned counsel appearing for the petitioners next contends that the Director, Marine Department (respondent no.3) does not have the authority to unilaterally take such a decision, which squarely violates Article 21 of the Constitution of India and seriously jeopardizes the lives of the petitioners and all other dock workers, apart from causing threat to the Port property.
- 8.** It is argued that the KoPT authorities sought to legitimize such illegal increase by providing incentives for the dock pilots and other officers who are willing to handle oversized vessels while, on the other hand, withdrawing legitimate allowances of the dock pilots and other officers, who are otherwise entitled, by reason of their refusal to handle oversized vessels. Such discrimination, it is contended, is in violation of Article 14 of the Constitution.
- 9.** It is next argued that the impugned trade notice on the basis of the decision dated June 25, 2018 disclosed improvement of the performance of the Port as the reason for such notice. Since the Ports-in-question are

150 years old and use traditional methods of operation due to lack of modernization, the workers would face serious risk and hazard to life and property due to such increase in the beam width of the vessels to be handled.

- 10.** Learned counsel for the petitioner argues that the action of the respondents in withholding regular allowances and issuing show-cause notices to the petitioners and other persons not willing to take such risk while incentivizing the persons who are willing to handle such oversized vessels creates a patent discrimination amongst equally ranked officers on an unreasonable basis and/or irrational criterion, hence violating the right to equality before law and equal treatment of similarly placed persons as enshrined in Article 14 of the Constitution.
- 11.** It is argued that the Director General of Shipping is the appropriate authority to deal with navigational aspects, assisted by the Nautical Advisor of the Government of India. Even if any authorized appropriate body had conducted a prior safety audit for the purpose of altering the vessel dimensions, there might have been some justification behind the increase.
- 12.** By placing reliance on the affidavit-in-reply of the petitioners, learned counsel for the petitioner submits that at least two specific instances of accident have been referred and the Accident Register had been called for but not produced by the port authorities. It has also not been explained by respondent no.1 as to why no such vessel was permitted after the year

2013. Certain illegal entries of oversized vessels on previous occasions cannot be cited as justification for increasing the regular maximum permissible size merely for the purpose of increasing the trade of respondent no.1.

- 13.** By placing reliance on the extract of Log Book annexed at pages 44 and 45 of the Affidavit-in-reply, learned counsel contends that the concern and difficulties faced in permitting passage of MV Han Ren, which was an oversized vessel, are reflected therefrom. Such concerns led to indemnification and immunity being granted by the Director, Marine Department, KoPT. Assistant Dock Master's Log Books have not been produced by the respondents on the pretext that there is no reason for disclosing the Log Book, despite such Log Book being relevant for the present purpose, as pointed out by the petitioners.
- 14.** It is argued that no oversized vessel had entered the Port subsequent to 2013 and, as such, there could not arise any question of past experience, more so, since such passage of oversized vessels was stopped post-2013 due to protests raised regarding the illegality thereof. As regards the contention of the respondents that the petitioners had, on earlier occasions, handled vessels in excess of 80 ft. at NSD, which was illegal during such period, cannot be sufficient to claim that the petitioners are barred by estoppel or waiver, since there cannot be any estoppel/waiver against the law. By placing reliance on *Waman Shriniwas Kini Vs. Ratilal Bhagwandas and Co.*, reported at AIR 1959 SC 689, learned counsel for

the petitioner submits that whenever illegality appears, whether from the evidence given by one side or the other, the disclosure is fatal to the case. At no point of time did the petitioners acquiesce to the acceptance of oversized vessels but were compelled to do so.

15. In the absence of any reasoned decision of Board of Trustees or implementation of the recommendation of the Committee dated June 1, 2018 to undertake trial operation for six months, the impugned decision taken by the Director, Marine Department, was patently illegal. Section 123 of the Major Port Trust Act, cited by the respondents, is inappropriate, learned counsel for the petitioner contends, since the power to make Regulations by the Board is subject to approval by the Central Government under Section 124 of the said Act itself. In any event, there is no such Regulation regarding vessel size, issued by the Board. The decision-making process suffers from arbitrariness and undue haste.
16. Learned counsel for the petitioners cites *Directorate of Film Festivals and others Vs. Gaurav Ashwin Jain and others*, reported at (2007) 4 SCC 737, and contends that the illegal acts of allowing oversized ships to enter NSD earlier cannot be a basis to justify the present act. Moreover, there is no regulation of the Board under Sections 123 read with Section 124 of the Major Port Trust Act in support of such increase of beam width.
17. Learned counsel next relies on *State of Orissa and others Vs. Gopinath Dash and others*, reported at, (2005) 13 SCC 495 to argue that although

policy decisions should generally be left to the Government, such rule would hold good so long as the infringement of Fundamental Right is not shown. In the present case, the petitioners categorically allege infringement of Article 21 of the Constitution, affecting the petitioners' right to life and violation of Article 14 of the Constitution in issuing threats and taking coercive measures against the petitioners while incentivizing the workers who are willing to do such illegal act.

18. Learned counsel then cites *Ugar Sugar Works Ltd. Vs. Delhi Administration and others*, reported at (2001) 3 SCC 635, wherein the Supreme Court held that arbitrariness, irrationality, perversity and *mala fide* will render the policy unconstitutional. On the same grounds, the impugned decision as well as the decision-making process ought to be interfered with by this Court.
19. Learned counsel appearing for the petitioners next cites *Parisons Agrotech Private Limited and another Vs. Union of India and others*, reported at (2015) 9 SCC 657, for the proposition that judicial restraint should be exercised with respect to policy decisions when there was an intelligible basis for issuing notifications, which is absent in the present case.
20. Learned counsel next distinguishes *Padmabati Dasi Vs. Rasik Lal Dhar*, reported at 1910 ILR 37 Cal 259, relied on by the respondents, by contending that in the said case, the civil court had applied Order XIX Rule 3 of the Code of Civil Procedure which is not relevant for the present

purpose, where the petitioners have sufficiently backed up their averments with documentary evidence and the KoPT failed to furnish Log Books in their custody which contain further proof of the danger posed by oversized vessels.

21. Learned counsel then distinguishes *III Income Tax Officer, Mangalore Vs. M. Damodar Bhat*, reported at AIR 1969 SC 408, on the ground that the same involved a challenge to proceedings under Section 220(3) of the Income Tax Act and the Court refused to interfere, *inter alia*, on the ground that the petitioner had merely stated in the writ petition that the order of the Income Tax Officer made under Section 220 was “arbitrary” and “capricious”, whereas in the present case sufficient particulars as to violation of rights have been provided and are borne out by the materials produced by the petitioners, vis-à-vis the KoPT withholding relevant documents in their custody.
22. Regarding *M/s. Mahabir Jute Mills Ltd., Gorakhpore Vs. Shri Shibban Lal Saxena and others*, reported at (1975) 2 SCC 818 = [AIR 1975 SC 2057], learned counsel for the petitioner submits that the court had held that it is well-settled that while the rules of natural justice would apply to administrative proceedings, it is not necessary that the administrative orders should be speaking orders unless the statute specifically enjoins such a requirement. However, the Supreme Court thought it desirable that such order should contain reasons when they decide matters affecting the rights of parties, as in the present case.

- 23.** Learned counsel for the petitioner next distinguishes *Karnataka State Industrial Investment & Development Corpn. Ltd. Vs. Cavelet India Ltd. and others*, reported at (2005) 4 SCC 456, on the ground that the ratio laid down therein was in respect of the limited scope of judicial review in commercial matters. The present case, it is contended, relates to infringement of Fundamental Rights under Articles 21 and 14 of the Constitution and commercial considerations alone could not be a basis of such a decision which affects the safety of the dock workers.
- 24.** As regards *Union of India and another Vs. P.K. Roy and others* reported at, AIR 1968 SC 850, learned counsel for the petitioner argues that no delegation of any power to the Director, Marine Department, has been shown, since there is no Regulation in that regard, nor of the Board having retained any power of approval or having occasionally approved the same, unlike the facts of the said judgment.
- 25.** Distinguishing *U. P. State Electricity Board Vs. Abdul Sakoor Hashmi and others*, reported at (1980) 3 SCC 278 = [AIR 1981 SC 1708], it is argued that the disciplinary action and threats issued in the present case are attempts to coerce the petitioners in handling oversized vessels, the decision-making process of which is the subject-matter of the present challenge. The challenge to the disciplinary proceedings is merely consequential, being dependent on the outcome of the primary challenge in the present writ petition.

- 26.** Learned counsel for the petitioner draws a line of distinction between the present case and *Haryana Financial corporation and another Vs. Jadgamba Oil Mills and another* reported at (2002) 3 SCC 496, by contending that the decision in the present case is *mala fide* and unreasonable, violating the rights of the petitioners enshrined in Article 21, which is clearly distinct from the said judgment, cited by the respondents.
- 27.** Lastly, the petitioners argue that *Gohil Visvaraj Hanubhai and others Vs. State of Gujarat and others*, reported at (2017) 13 SCC 621 applied the Wednesbury test to find out if the decision is 'rational' or 'reasonable'. The test of proportionality was also applied.
- 28.** In the present case, there is no rational basis of the impugned decision, particularly in the teeth of the decision dated June 1, 2018 to undertake trial of six months regarding beam width. The absence of any previous discretion or data/study also renders the impugned decision unreasonable.
- 29.** Learned counsel appearing for the added respondent, apart from adopting the arguments of the petitioners, submits that the added respondent is the sole employee of the KoPT who has been proceeded against departmentally by the employer for alleged non-compliance and violation of the decision to allow vessels beyond 80 ft. beam width to ply inside the lock-gate of Netaji Subhas Dock system of the KoPT. Two charge-sheets dated May 16, 2019 and September 6, 2019 have been

served on the added respondent, who has also been placed under suspension by an order dated July 9, 2019, which is still continuing. As a result, the added respondent is receiving only subsistence allowance at present.

- 30.** Learned counsel appearing for the added respondent further submits that no justification is disclosed in the documents and pleadings filed by the KoPT to show how such a decision to increase the beam width of vessels would commercially benefit the KoPT, although the Note Sheet dated June 7, 2018 and Trade Notice dated July 10, 2018 contemplate that the impugned decision was taken allegedly to meet the requirement of trade and/or to improve the performance of the Port. On the contrary, it is submitted that the vessel related charges levied by KoPT does not depend on the width of the vessel at all.
- 31.** In paragraph (xiii) of the affidavit-in-opposition of KoPT, it has been contended that the impugned decision was taken for the purpose of eradicating discrimination among employees responsible for plying of vessels and to prescribe a uniform practice. It is argued that such attempt to supplement the reasons apropos the impugned decision by way of affidavit is impermissible. Learned counsel for the added respondent places reliance on *Mohindar Singh Gill and another Vs. Chief Election Commissioner, New Delhi and others*, reported at AIR 1978 SC 851, in support of such proposition.

32. Learned counsel submits, by placing reliance on the Codified Duties of Dock Pilots (erstwhile Berthing Masters) and Assistant Dock Masters, that inward and outward movement of ships or vessels through the lock gate is carried on and undertaken by Assistant Dock Masters and Dock Pilots. Hence, the impugned decision entails imminent threats to the lives of the concerned employees.
33. It is further argued by the added respondent that the impugned decision is arbitrary and no prudent person could have arrived at the same in the given facts and circumstances, thus violating the Wednesbury principle. The decision ought to be weighed vis-à-vis the real and imminent threat to the lives of the employees who are responsible for movement of vessels inside the lock-gate.
34. On such proposition, learned counsel relies on *Om Kumar and others Vs. Union of India*, reported at, (2001) 2 SCC 586.
35. Learned counsel for respondent no.5 submits that the said respondent is not a necessary or proper party and may be removed as respondent from the writ petition.
36. It is contended that the said respondent had, by its letter dated November 22, 2019, categorically submitted that the policy formulation for determining the maximum size of vessels in relation to KPD and NSD is not within the purview of the Director General of Shipping.
37. The Director General of Shipping (respondent no.5), it is argued, is an authority appointed under Section 7 of the Merchant Shipping Act, 1958

for exercise or discharging the powers, authority or duties conferred or imposed upon the Director General by or under the 1958 Act. No violation of the said Act has been alleged by the writ petitioners.

- 38.** Learned counsel for respondent no.5 argues that Chapter 2 (2.1.2) of a manual regarding Administrative Framework has been relied on by the petitioners. However, the last paragraph in the said clause stipulates that the Director General of Shipping is required to deal with subjects pertaining to ships and not safety audits of Major Ports. The technical aspects appearing in Chapter 11, in particular Clause 11.2 (Nautical Wing), have been relied on by the petitioners to argue that matters relating to navigational and pilotage aspects of ports comes within the responsibility of the Director General of Shipping. However, it is argued that such aspects in relation to Major Ports do not come within the purview of such duties. Rather, the Major Port Trusts Act, 1963 provides for the constitution of the Port Authorities for certain major ports in India (including the Kolkata Port) and to address the administrative control and management of such ports by such authorities and for matters connected therewith.
- 39.** Learned counsel relies on the Preamble and Sections 2(f), 37 and 123(f), (j), (k), (m) and (o) of the Act in support of such argument.
- 40.** Learned counsel appearing for the Kolkata Port Trust (respondent no.1) contends that the writ petitioners cannot be termed as aggrieved and have no *locus standi* to make the writ application, which is in the nature

of a public interest litigation. The petitioner nos. 1 to 7 are Dock Pilots who have a role to play in mooring and docking of vessels and have nothing to do with the movement of the vessels through the lock-gate. The work of Dock Pilots, it is submitted, comes into operation once the vessel crosses the lock gate.

41. Moreover, it is submitted by respondent no.1 that the vessel proceeds through the channel connecting the river and the dock basin with minimal use of propellers and the movement is at a crawling pace. Assistant Dock Masters, it is submitted, are always on shore directing only how mooring lines are to be slackened or tensed to move the vessels through the lock gate.
42. It is further argued by learned counsel for respondent no.1 that the writ petition does not disclose the hazard or danger being faced by the petitioners due to the increase of beam width. It is also contended that the allegations in the writ petition as regards illegality and arbitrariness have been affirmed in the supporting affidavit as “submissions” without affirming the relevant paragraphs true to the deponent’s knowledge. As such, it is argued that no specific case of *mala fide* action on the part of respondents and/or particulars of alleged *mala fide* or arbitrariness or illegality with regard to the Trade Notice and other notices relating to movement of ships of 82 ft. beam width has been made out in the writ petition. The allegations made by the petitioners are, thus, vague in nature.

- 43.** The petitioners, it is contended by respondent no.1, are under the executive direction of the Port Authority. An employee, it is argued, cannot challenge the decision of an employer unless specific particulars are disclosed as to how and why such decision affects the fundamental rights of the employees. No such disclosure is found, it is submitted, in the present case.
- 44.** It is further argued by respondent no.1 that the writ petition suffers from delay since the initiative to increase the beam width to 82 ft. commenced on June 1, 2018. It was recorded on June 25, 2018 that for best practice, inputs and suggestions were sought from officers including Dock Pilots by the Committee but nothing was received. The writ petitioners approached this Court after one year, in July, 2019 after the direction was given effect to and Dock Pilots and Dock Masters other than the writ petitioners have been acting on the basis of such direction. The bore tide notice of December, 2019 is only a consequence of the trade circular dated January 10, 2018 and thus cannot be the cause of action of the writ petition independently.
- 45.** The notice dated May 24, 2019, is also a consequence of the action taken in June, 2018, which was also not been challenged for one year. Disciplinary action was taken against the writ petitioners for non-adherence to such directions and no final relief has been sought with regard to the disciplinary proceeding or show cause in the writ petition. In the event the disciplinary action is challenged, the subject-matter of

the writ cannot be termed as a residuary matter. By invoking of the residuary determination, the petitioners admit that the disciplinary proceeding is not under challenge.

46. Learned counsel appearing for respondent no.1 submits that none of the disciplinary actions and withholding of allowances has been challenged specifically in reliefs claimed in the writ petition, including the assessment of the writ petition no.1.
47. The writ petitioners, it is submitted, are attempting to overshadow the direction of their employer without any basis, but on mere surmise and conjecture. The executive action of an organization like the Port, if allowed to be challenged, the employer would be held at ransom by the employees on vague pretexts. The notice had been issued for wide publication to initiate movement of 82 ft. vessels and also to test movement of such vessels. Such executive action, in the present case, is in the nature of an administrative policy decision, judicial review of which can only take place only on a high degree of specific *mala fide* or illegality. As a general rule, policy decisions and administrative actions, as long as those adhere to the principle of reasonableness and have not been shown to be tainted by any *mala fide*, ought not to be intervened with even if such decision is held to be wrong by the Court. Such self-imposed restriction of courts is for the purpose of upholding the independence of the three pillars of the Constitution, it is submitted.

48. In this context, learned counsel for respondent no.1 relies on the following judgments :

- (i) *Directorate of Film Festivals and others Vs. Gaurav Ashwin Jain and others* reported at (2007) 4 SCC 737;
- (ii) *State of Orissa and others Vs. Gopinath Dash and others* reported at (2005) 13 SCC 495;
- (iii) *Ugar Sugar Works Ltd. Vs. Delhi Administration and others* reported at (2001) 3 SCC 635;
- (iv) *Parisons Agrotech Private Limited and another Vs. Union of India and others* reported at (2015) 9 SCC 657;
- (v) *Union of India and another Vs. P.K. Roy and others* reported at AIR 1968 SC 850; and
- (vi) *Haryana Financial Corporation and another Vs. Jagdamba Oil Mills and another* reported at (2002) 3 SCC 496.

49. In support of the proposition that particulars are required to be provided while alleging any *mala fide* and vague allegations cannot be accepted and that the writ petitioners ought to have supported such allegations with some basis (which is absent in the present case), learned counsel relies on the following judgments:

- (i) *Padmabati Dasi Vs. Rasik Lal Dhar*, reported at, 1910 ILR 37 Cal 259;
- (ii) *III Income Tax Officer, Mangalore Vs. M. Damodar Bhat*, reported at, AIR 1969 SC 408.

50. In support of the proposition that administrative orders need not be speaking, learned counsel for respondent no.1 relies on *M/s. Mahabir Jute Mills Ltd., Gorakhpore Vs. Shri Shibban Lal Saxena and others*, reported at (1975) 2 SCC 818 [= AIR 1975 SC 2057].
51. In support of the argument that any delay in approaching the Court for safeguarding any right would render a writ petition not maintainable, learned counsel places relies on *Karnataka State Industrial Investment & Development Corpn. Ltd. Vs. Cavelet India Ltd. and others*, reported at (2005) 4 SCC 456. In *U. P. State Electricity Board Vs. Abdul Sakoor Hashmi and others*, reported at (1980) 3 SCC 278 = [AIR 1981 SC 1708], the Supreme Court held that where it can be implied that a public authority has power, the same ought to be exercised to overcome regular challenges through regular executive decisions.
52. The test of reasonableness, it is argued, in executive decisions, has to be on the basis of violation of an outrageous nature, which would shock the conscience of a reasonable man, as laid down in *Gohil Visvaraj Hanubhai and others Vs. State of Gujarat and others*, reported at (2017) 13 SCC 621. It is argued that the present case is not of such a serious nature.
53. The executive direction was passed for the betterment of revenue and trade and ought not to be interfered with at the instance of the writ petitioners, it is submitted.
54. Respondent no.1 contends that the writ petitioners have not furnished any basis or disclosed any document in support of the allegations that

the Technical Committee formed of Dock Pilots, Dock Masters etc. like the petitioners had no expertise, that hydro-dynamic evaluation was required to be done and that the safety and health policy has been violated.

- 55.** The lock-gate is admittedly 90 ft. wide and the beam width has been fixed at 82 ft., leaving 8 ft. space to manoeuvre. Such change, it is argued, would enure to the benefit of the trade and commerce of the Port. The Port is a revenue-generating authority and has to consider evolving at every stage. Vessels have become technically advanced, considering which the impugned direction was passed. The 2014 Circular clearly indicates that 80 ft. was to be on a regular basis, obviously allowing discretion to be exercised by the authorities to allow vessels in excess thereof. This was also published on the website for wide circulation. As such, there was no cap of 80 ft. to the beam width. Since the circulation was not wide enough, ships with 82 ft. beam width were not regularly docking at NSD, thereby affecting the business of the Port. As such, the regular limit of beam width accepted by the Port has only been increased to 82 ft.
- 56.** The Trade Circular of June, 2018 was issued for circulation to attract ships of beam width up to 82 ft. at NSD.
- 57.** Respondent no.1 adopts the argument of respondent no.5, that the appointment of the Director General of Shipping is under the Merchant Shipping Act, enacted for the purpose of regulating vessels in India and

has nothing to do with the actions at ports. The writ petitions are barred by the principles of acquiescence and estoppel in view of not having given any recommendation, as notified by the authorities to do, although the authorities were not legally bound to do so. Moreover, it is argued that the writ petitioners have themselves moved vessels in excess 80 ft. and there has been no incident of any threat to life and property.

- 58.** While alleging that scientific data has not been produced for the increase in beam width as per common practice, no particulars regarding such common practice has been mentioned by the petitioners. Respondent no.1 contends that from page 40 of the document pertaining to Vizag Port Marine Department, relied on by the writ petitioners, indicates that vessels of 330 meters had been permitted without any simulation study. In such case also, the Marine Department took a call, which shows that the said Department is the authority to decide on the size of the vessels to be handled.
- 59.** Learned counsel for respondent no.1 lays stress on the sequence of events to indicate that appropriate steps were taken in issuance of the impugned Trade Notice. The first objection received from the Association was on July 26, 2018, although without any particulars or basis. Hence, the petitioners were aware in July, 2018 itself about such direction and moved court after a year, in July, 2019.
- 60.** Regarding the query of court about the authority of the respondents to issue the Trade Notice, learned counsel for respondent no.1 submits that

the writ petitioners have not shown any illegality in the system; rather, they accepted that the same person has always formulated such trade directions and granted allowances in the past and that the trade circulation of 2014 was issued by the Harbour Master, who was below in rank to the respondent no.3.

- 61.** Learned counsel argues that the port-in-question is governed by the Major Port Trusts Act, 1963, read with the Indian Port Act, 1908, and Rules framed thereunder. Under Sections 7 and 8, a Conservator is appointed by the Government which, in the present case, was initially the Port Authorities and thereafter, by way of the Kolkata Port Rules, the Director, Marine Department. Section 7(1) allows the Government (in this case the State Government) to appoint such officer. Under Rule 2(11) of the Rules, the Director, Marine Department has been allowed to carry out all directions and actions under the Indian Port Act, 1908. Rule Nos. 4 and 12 of the Kolkata Port Rules provide for mooring, docking and anchoring of vessels, which are for the movement of ships through the lock gate into the dock basin. The Director, Marine Department has full authority to give directions under Rule 12 with regard to beam width. Being an executive direction, it is argued, the entire process is under the supervision of the Chairman under the 1963 Act, Section 22(2) of which empowers the Chairman to exercise all supervision and control over the acts of all employees of the Board which includes the Director, Marine Department. Thus, the decisions,

directions and actions taken by the Director, Marine Department were approved by the Chairman of the Port Trust.

62. Learned counsel appearing for respondent no.1 further argues that the documents on which the added respondent relies on post-hearing, evidences that the Chairman had been delegated powers also by the Board of Trustees. However, such practice of introducing documents and/or a new case by way of subsequent pleadings (in the present case, not even by pleadings) has always been deprecated by this Court, it is submitted.
63. Regarding *Waman Shriniwas Kini* (supra), relied on by the petitioners, learned counsel for respondent no.1 places reliance on paragraph 13 of the report to indicate that the plea of waiver was not allowed to be taken as it was in contravention of a statutory provision and would militate against the policy which the statute prohibited and made illegal. In the present case, no such policy or statute has been violated by the impugned increase of beam width to 82 ft.
64. It is argued that, in the absence of any specific allegation of violation of any Rule or law by the respondent, the reliance on *Mohindar Singh Gill* (supra) is also misplaced.
65. Learned counsel for respondent no.1 submits that the writ petition ought to be dismissed.
66. At the outset, the respondent-authorities have raised an objection that the disciplinary action taken against the petitioners and added

respondent are not challenged in the instant writ petition. If so, this Court does not have jurisdiction, taking the residuary determination, to adjudicate such question. However, in the present case, the primary challenge is against the decision to increase beam width of vessels for NSD to 82 ft. and the actions taken pursuant thereto are merely consequential. Thus, there is no bar to a Judge taking up residuary matters to adjudicate the legality and validity of the impugned decision and come to ancillary findings regarding the action taken pursuant thereto, which are merely consequential to the main relief.

- 67.** The first question which arises for adjudication is whether the petitioners have *locus standi* to move the instant writ petition. In this context, the Codified Duties of the Officers and Employees of respondent no.1, as annexed to the written notes of arguments of the added respondent, have to be looked into. Not only are those relevant for the present purpose, since the same was published and downloaded from the KoPT website itself, the documents cannot be labelled as private documents, since the respondent no.1 was all along having full knowledge of their own publications. Rather, respondent no. 1 suppressed such document which has direct relevance to the issue at hand.
- 68.** It is clearly indicated in the said Code that the duties of Assistant dock Masters include taking ships in and out through lock gates. Berthing Masters (now Dock Pilots) also assist the Assistant Dock Masters in working ships in and out of lock gates. Hence, the petitioners are

directly affected by the decision to increase the beam width of the vessels entering and exiting the NSD.

- 69.** Moreover, since a violation of the right to life as enshrined in Article 21 of the Constitution of India comprises the grievance in the present writ petition, the Court has ample jurisdiction to examine the veracity of such executive decision. Employer-employee relationship, as portrayed by the respondent no.1 in its arguments, reflects a feudal mind-set. No executive order, if violative of the fundamental right to life, is immune from judicial review under Article 226 of the Constitution. Such a mind-set is unbefitting of an authority discharging public duties.
- 70.** In the present case, the impugned Trade Notice dated July 10, 2018 and all related notices are vitiated by arbitrariness on several scores. It is seen from the materials-on-record that the minutes of a meeting convened by the Director, Marine Department (DMD), being the respondent no.3 herein on June 1, 2018 had clearly suggested that the officers present in the said meeting agreed to trial operations for a period of six months to evaluate the prospect of operating vessels exceeding the existing permissible beam width of 80 ft. but not exceeding 82 ft. The said Technical Committee, comprised of Assistant Dock Masters and Dock pilots, also suggested certain allowances for oversized vessels to be paid to Assistant Dock Masters, Dock Pilots and Deputy Dock Masters as and when engaged for such work.

- 71.** However, instead of waiting for the trial period of six months, a further Technical Committee was constituted on June 7, 2018, comprised of three of the members who were part of the previous meeting held on June 1, 2018, for the purpose of examining several issues, including increasing the beam of vessels for NSD to 84 ft from the existing 80 ft.
- 72.** The said Technical Committee, in its report dated June 25, 2018, opined that the NSD entry-exit and internal movement of vessels of beam not exceeding 82 ft. can be considered, subject to the fulfillment of the conditions set out therein. However, at the same time, the Committee was not in favour of increasing the existing limit of 70 ft. for regular shipping for the safety of lock gates in respect of the KPD, considering the “technical nature” of work inside KPD.
- 73.** Such suggestion was accepted, allegedly by the ‘competent authority’, as reflected in a notice dated July 10, 2018 issued by the respondent no.3. Among other issues, it was decided that container and general cargo vessels with beam up to 25 m. (82 ft.) would be accepted at NSD. The meagre precautions of appropriate fending arrangements at inner lock entrance and a third tug being provided were the only safeguards suggested with regard to such increase of beam width.
- 74.** On the same date, that is, July 10, 2018, respondent no.3 issued a trade notice wherein it was observed that, in order to improve the business of the Port, it had been decided to accept container and general cargo

vessels with beam width up to 82 ft. at NSD with immediate effect, thereby granting a seal of legitimacy to the notice dated July 10, 2018.

- 75.** The petitioners argue, citing the example of the Vizag Port, that detailed safety audit reports and adequate modernization and improvement in infrastructure preceded a similar increase in beam width for the said Port. In the present case, however, no such safety audit was conducted, even in the teeth of the report submitted by the previous committee, substantially comprised of the same members which took the subsequent decision on June 25, 2018, which was only six days prior to the formation of the new Technical Committee. The previous report dated June 1, 2018 had categorically recorded that the officers present had agreed to trial operations for a period of six months to evaluate the prospect of admitting vessels exceeding the existing permissible beam of 80 ft. However, the said suggestions were given in an unduly hasty manner by constitution of a fresh Technical Committee comprised mostly of the members of the previous Committee, which opined that the regular permissible beam width of vessels would be increased to 82 ft. Although the Technical Committee report dated June 25, 2018 suggested that the said decision would be reviewed after six months of implementation, the expression 'implementation' clearly indicated that, instead of a trial run of six months, the beam width was being increased with immediate effect.

- 76.** The notice dated July 10, 2018 and Trade Notice issued on even date, both by the Director, Marine Department, regularized the beam width of container and general cargo vessels to a maximum limit of 82 ft.
- 77.** Although executive orders need not necessarily contain detailed reasons, there is no indication of the basis on which the beam width was increased, giving a complete go-bye to a prior trial to ascertain the safety measures and the infrastructural developments required for such increase.
- 78.** The width of the lock gate at NSD is 90 ft. Hence, increasing the beam width to 82 ft. would leave only 4 ft on each side of the vessel on an average.
- 79.** Such increase effectively increases the beam width to about 91 per cent of the entire width of the lock gate, without any prior trial or precautionary measures being undertaken. Not only has it been argued by the petitioners that the said percentage is one of the highest in the world, the absence of any trial regarding safety measures exposed the petitioners and other employees of the NSD to the evident risk of life and limb. To further legitimize such hasty decision to increase the beam width right away, allowances were provided for officers willing to undertake the risk. Such incentivization itself betrays the risk involved in plying vessels of 82 ft. beam through the lock-gates.
- 80.** Contrary to the submissions of respondent no.1, the Code of Rules of respondent no.1 itself indicates clearly that the Assistant Dock Masters

and Dock Pilots have a direct involvement in the plying of vessels in and out of the lock gate. Such involvement would *ex facie* expose the said employees to serious risk of losing their lives, thereby patently violating the right to life as enshrined in Article 21 of the Constitution of India. Without any back-up research or trial, the said decision, taken in hot haste, violated the Fundamental Right to life of the petitioners and other port employees. Such right is not conferred by the Constitution of India but is implicit in any civilized society. The Constitution only recognizes such right in Article 21.

- 81.** The respondent nos. 1 to 4 have cited certain stray examples of entry of vessels above the maximum permissible limit of 80 ft., which was the previous maximum, to justify the decision. However, the petitioners have sufficiently established that specific instances of accident in such cases find mention in the relevant Log Books. Despite having challenged the veracity of such Log Books, managed by the Assistant Dock Masters, the respondent-authorities failed to produce the Accident Registers which would have established beyond doubt whether there was any proximate nexus between the accidents and the beam width of the vessels involved.
- 82.** The Log Books entries cited by the petitioners raise a strong presumption of direct correlation between the accidents and the beam width of the vessels.
- 83.** In any event, the stray instances of entry and exit of oversized vessels through the NSD lock gate, prior to the impugned notices, was *de hors*

the Regulations of the KoPT itself, which fixed the maximum beam width at 80 ft. Such stray and irregular violations of the regular maximum limit cannot be cited as justification for the contention advanced by the respondent-authorities that such increase would not affect the safety of the petitioners.

- 84.** On the contrary, incentivization for compliance of the increased beam width rule and curtailment of otherwise legitimate financial benefits of those who did not comply, itself are indicators of the *mala fides* involved. On a previous occasion, when there was an objection regarding the plying of vessels beyond 80 ft beam width, the Director, Marine Department himself had indemnified such operations. Such indemnity, in conjunction with the allowances provided for handling vessels of beam width beyond 80 ft., are sufficient proof of the risk involved.
- 85.** The subsequent penal action taken against the petitioners and, in particular, the added respondent, was patently *mala fide*, since the Port Authorities, on the one hand, admitted the risk involved by providing incentives and allowances for plying oversized vessels and, on the other hand, penalizing employees who were unwilling to take such risk.
- 86.** In view of the decision to increase beam width being patently arbitrary and violative of Article 21 of the Constitution, the respondent-authorities could not have taken the plea of estoppel/waiver. The previous plying of oversized vessels was violative of the then existing norms of the KoPT and such plying was done by the employees concerned under compulsion,

keeping in view the dominant position of the employer, that is, the KoPT vis-à-vis its employees. Such stray, involuntary participation on the part of the petitioners could not be construed as a conscious relinquishment of their fundamental rights constituting waiver.

- 87.** As far as the argument of non-interference by courts with policy decisions is concerned, all the judgments cited on that proposition, as indicated above, clearly lay down that it is the general rule that policy decisions are not interfered with by courts. However, such non-interference, even as per the said reports, has to satisfy the test of reasonableness. The patent arbitrariness and *mala fides* adopted in the decision-making process involved in increasing the beam width in hot haste itself justifies judicial review and scrutiny by the court under Article 226 of the Constitution of India. Tested on such touchstone, the decision of respondent no.3 and the consequent Trade Notice for increasing beam width on a regular basis up to 82 ft. were untenable in law and violative of fundamental rights of the employees.
- 88.** The fetters restricting the courts from interfering even with policy decisions provide window of exception, which are satisfied in the present case.
- 89.** Moreover, every executive action cannot be elevated to the level of 'policy decision'. In the present case, there was utter absence of any policy decision as such. Respondent no.3 forcibly implemented a decision in his executive capacity which would affect the consistent previous policy

of the KoPT to retain the maximum beam width at 80 ft. No subsequent technical advancement/automation/infrastructural modernization or change in circumstances has been cited on behalf of the respondent-authorities to justify such executive decision, which would be beyond the jurisdiction of the Director, Marine Department. What the Director did in the garb of a mere executive order was to put in place a regulation which ought to have been the subject-matter of an actual valid policy decision, to be taken by the highest authorities.

- 90.** As far as the authority of respondent no.3 to take such a major decision, flouting all safety measures, the respondent-authorities have failed to convince this Court of such power being vested in the Director, Marine Department. Respondent no.1 cites a notification dated June 27, 1995 issued by the Ministry of Surface Transport, in particular, Rules 4 and 12 thereof, to argue that the Director had the authority to take such a major decision affecting the safety of the employees.
- 91.** However, Rule 4 clearly stipulates that the powers of the Director, Marine Department or Traffic Manager or Harbour Master (Port) or General Manager (Operations) or Manager (Marine Operations) are confined to the movement to and from any berth, mooring or anchoring in the Port.
- 92.** Rule 12, on the other hand, empowers the Director to prescribe the manner in which a person shall moor a sea-going vessel, and not to determine the dimensions of the vessels to be allowed through the lock gate of the NSD. Such a decision, having grave impact on the safety

standards, ought to have been taken at the highest level, at least involving the Board of Trustees and Chairman of the KoPT, that too, after extensive research on the safety measures and infrastructural development as well as modernization required for increasing the beam width. In the absence of any such measures, the Director, Marine Department did not have the authority to implement such a major decision in hot haste, thereby endangering the lives of the employees.

93. The grant of incentives, rather than being egalitarian, is directly violative of the right to equality enshrined in Article 14 of the Constitution of India. It is somewhat ridiculous that those who are willing to take the risk of life and limb would be getting incentives for such act while employees of reasonable prudence, who would not choose to do so, would be penalized by disciplinary action and cuts in allowances to which they are even otherwise entitled. Hence, the impugned decision to increase the beam width on a regular basis and consequential coercive measures tainted by arbitrariness and *mala fides* and are *ex facie* violative of Articles 14 and 21 of the Constitution of India.
94. There is sufficient evidence on record to substantiate the allegation of the risk associated with the increase in beam width to above 80 ft., which were utterly overlooked and all safety measures flouted by respondent no.3 in issuing the impugned trade notice by accepting the proposal of the second Technical Committee for increase of beam width.

- 95.** As far as the powers of respondent no. 5 are concerned, the arguments advanced with regard to such powers of the Director General of Shipping being confined to the Merchant Shipping Act, 1958 is violated.
- 96.** It is the Major Port Trusts Act, 1963 which governs the operation of ports and, as such, the Director General of Shipping may have no direct role to play in taking decisions on the safety measures and dimensions of vessels in respect of the Major Ports.
- 97.** However, such absence of power of the Director General, Shipping does not *ipso facto* validate the impugned decision taken by respondent no.3 for the reasons as discussed above.
- 98.** Accordingly, WPA 15632 of 2019 is allowed, thereby setting aside the impugned Trade Notice dated July 10, 2018 and all consequential notices pertaining to increase of the beam width of vessels for the Netaji Subhash Dock to 82 ft. on a regular basis. All actions taken consequent to such notices are automatically invalidated in view of the notices themselves being set aside.
- 99.** There will be no order as to costs.
- 100.** Urgent certified copies, if applied for, be furnished to the parties upon due compliance of requisite formalities.

(Sabyasachi Bhattacharyya, J.)