

Apm Terminals B.V vs Union Of India & Anr on 11 May, 2011

Equivalent citations: AIRONLINE 2011 SC 598

Author: Altamas Kabir

Bench: Cyriac Joseph, Altamas Kabir

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.4270 OF 2011

(Arising out of S.L.P.(C)No.13893 of 2010)

APM TERMINALS B.V.

... APPELLANT

Vs.

UNION OF INDIA & ANR.

... RESPONDENTS

WITH

T.C.(CIVIL) NOS.36-37 OF 2010

J U D G M E N T

ALTAMAS KABIR, J.

1. Leave granted in SLP(C)No.13893 of 2010, which is being heard along with Transferred Case (Civil) Nos.36-37 of 2010. While the appeal has been filed by APM Terminals B.V. against the decision of the High Court, dismissing its writ petition, challenging the decision of the Board of Trustees for the Jawaharlal Nehru Port Trust to exclude the appellant from participating in the tender process for the development of the Fourth Container Terminal at the Bombay Port through public-private partnership, the transfer petitions have been filed by PSA Sical Terminals Ltd. for transfer of Writ Petition Nos.19851 and 19384 of 2010 pending before the Madras High Court, to this Court. As the questions involved in the writ petitions pending before the Madras High Court were the same as those raised in the appeal filed by APM Terminals B.V., we had directed the transfer petitions to be heard along with SLP(C)No.13893 of 2010, out of which the present appeal arises.

2. In the appeal, the appellant has challenged the validity and propriety of the decision taken by the Board of Trustees of the Jawaharlal Nehru Port Trust, hereinafter referred to as the "JNPT", to exclude the appellant from participating in the tender process for the Fourth Container Terminal under the JNPT, through public-private partnership, and praying for quashing of the said decision with leave to the appellant to participate in the tender process in accordance with the policy indicated in Circular No. PD-12013/2/2005-JNPT dated 26th September, 2007, issued by the Union of India. The further prayer of the appellant was to read the provisions of the said Circular into the Licence Agreement dated 10th August, 2004, executed between the appellant and JNPT, and, consequently, to release the appellant from the restrictions contained in Clause 8.31 of the Licence Agreement and/or to treat the same as not binding on the appellant. Clause 8.31 of the Licence Agreement which was executed by the Board of Trustees, JNPT, in favour of the appellant, provides as follows :

"8.31 The Licensee acknowledges and agrees that it shall forego the right to bid for either directly or indirectly, including being a Management Contractor through any associate company, whether such company is registered in India or any other country, or any company in which the Licensee has a shareholding for the Additional Facilities or existing facilities during the term of this Agreement. The Licensee also agrees that in the event of it or its parent company taking over/acquiring/amalgamating/merging with the licensee or the parent company to whom the Additional Facilities are awarded it shall be obliged to divest its stake in one of the two licenses to a third entity not linked to the Licensee within 6 months from the date of such change in control failing which it shall be deemed to be a

Licensee Event of Default. The Licensee also agrees that in the event of it or its parent company being taken over/acquired/amalgamated/merged by another licensee operating container facilities at JNPT it shall be obliged to divest the License to a third entity not linked to the Licensee within 6 months from the date of such change in control failing which it shall be deemed to be a Licensee Event of Default. The Licensee acknowledges, agrees and accepts the above as essence of this Agreement and the Licence granted to the Licensee."

3. Before the High Court, on behalf of the appellant Company, it was claimed that on account of subsequent resolutions adopted by the Board of Trustees of JNPT, which had the effect of altering the policy with regard to entrustment of operational facilities at the port to provide competition and to prevent monopolies, the provisions of Clause 8.31 would have to be reconsidered in the light of the changed circumstances. Before proceeding any further it will be worthwhile to briefly indicate the background in which the present lis has arisen.

4. The Jawaharlal Nehru Port Bulk Terminal was commissioned on 26th May, 1989, and was designed to handle goods imported in bulk, such as fertilizers, fertilizer raw materials and food grains, with the help of mechanized bulk-handling facilities. With the passage of time, the Central Government found it difficult to maintain the Bulk Terminal and decided to convert the Bulk Terminal into a Container Terminal and to remodel the same on a Build, Operate and Transfer (BOT) Basis on licence for a period of 30 years. Since 1996, it has been the policy of the Central Government to permit participation/investment by the private sector in utilizing the assets of the Port, construction and creation of additional assets, lease of equipment, pilotage, cargo handling, etc. In fact, guidelines had been issued from time to time by the Ministry of Surface Transport which was to be followed by the Major Ports for private sector participation.

In pursuance of such policy, the Central Government introduced the process of privatization, subject however, to the regulatory role of the JNPT.

Within the regulatory frame-work it was made clear that the Port authorities should ensure that private investment did not result in the creation of private monopolies and that private facilities were available to all users on equal and competitive terms.

5. The appellant is a Company incorporated under the laws of the Netherlands. Together with the Container Corporation of India Limited it formed a Joint Venture Company under the name and style of "Gateway Terminals India Pvt. Ltd." registered under the Companies Act, 1956. The said Joint Venture Company, hereinafter referred to as the "GTI", was the successful bidder in the Tender floated by JNPT for development of its existing Bulk Terminal into a Container Terminal.

Thereafter, in keeping with the guidelines issued by the Central Government in 1996, which were described as mandatory, the JNPT floated a Tender for the development of a new 600 meter Quay Length Container Terminal at Navi Mumbai and Nhava Sheva International Container Terminal, hereinafter referred to as the "NSICT", was the successful bidder in respect of the said Tender. The licence granted to NSICT to operate the first Container Terminal at JNPT culminated in a Build,

Operate and Transfer Licence Agreement dated 3rd July, 1997 between JNPT and NSICT which was to subsist for a period of 30 years from the date of the agreement.

Clause 2.3 of the said Licence Agreement provides as follows :

"The License will not bar the Licensee from participating in any subsequent bids invited by the Licensor for operation of Container Terminal."

6. Accordingly, NSICT was given liberty to participate in any subsequent bid for operation of the Container Terminal.

7. In 2002, JNPT floated another Tender for the development of the Second Container Terminal at JNPT and invited Requests for Qualification (RFQ) for the construction thereof. In order to prevent monopoly and promote competition, the JNPT subsequently incorporated Clause 1.3 in the Tender documents for the development of the Second Container Terminal, which reads as follows :

"Clause 1.3 : The port is desirous of entrusting the Project of redevelopment of the bulk terminal to a container terminal, on BOT basis, to another licensee other than the existing Private Terminal Operator (Licensee) at JNPT i.e. Nhava Sheva International Container Terminal (NSICT) Limited or their associates, P&O or the associates, interconnected or sister companies or either of them."

8. The net result was that NSICT was precluded from participating in the Tender for the development of the Second Container Terminal at JNPT, despite the express provisions of Clause 2.3 of the Licence Agreement.

9. The said decision of the JNPT was challenged by NSICT and its affiliate, P&O Australia Ports Pvt.

Ltd., by way of Writ Petition No.3083 of 2002 in the Bombay High Court. During the hearing of the said writ petition, the Union of India and JNPT took the stand that the 1996 Policy and the guidelines would prevail over Clause 2.3 of the Licence Agreement between the said Respondents and the NSICT. Upholding the decision of the Respondents to exclude P&O Australia Ports Pvt.

Ltd. and NSICT from participating in the bid for the development of the Second Container Terminal, the Bombay High Court dismissed the writ petition by its order dated 28th January, 2003. The said decision of the Bombay High Court was challenged before this Court, which declined to interfere with the order of the Bombay High Court. However, the Petitioner's Joint Venture Company, GTI Pvt. Ltd., was permitted to bid in the Tender for the development of the Second Container Terminal at JNPT. On completion of the bidding process, the work of development of the Second Container Terminal was awarded to GTI for a term of 30 years from the date of the Licence Agreement which also contained Clause 8.31, extracted hereinabove. In fact, before the Bombay High Court, JNPT had taken a stand that Clause 8.31 had been subsequently incorporated in the Licence Agreement in view of the guidelines promulgated in 1996, which were then in force.

10. In the meanwhile, on or about 26th September, 2007, a decision was taken by the Union of India to alter the 1996 policy and a Circular No.PD-

12013/2/2005-JNPT, was issued indicating that the JNPT should proceed to invite global competitive bidding for an independent "Stand Alone" Container Terminal to expand the Container towards North of JNPT by 330 meters, which was designated as the Third Container Terminal. It also clarified the eligibility of existing private container terminal operators at JNPT to compete and bid for any project. In the said Circular dated 26th September, 2007, it was, inter alia, indicated as follows :

"In the instant case while JNPT is in the process of undertaking the bidding for the development of the 330 metre extension of container berth towards North of NSICT project as a stand alone project on BOT basis (330 metre extension project) there are two different private BOT operators operating container terminals in JN Port. As a rational and logical consequence of the stand taken earlier it has been decided that the successful bidder of the previous container terminal on BOT basis (Maersk A/S - CONCOR Consortium) and/or their subsidiaries/allied organizations should be excluded from bidding for the 330 metre extension project. This would mean that for the next BOT container terminal in JN Port in future, the successful bidder of the 330 metre extension project would be excluded and so on.

It has also been decided that the above convention shall be followed in all Ports in its true spirit with a view to avoid monopoly and promote competition till such time a formal Policy is finalized and notified."

11. As a result of the above, neither the appellant nor its affiliates and/or subsidiaries/allied organizations were permitted to participate in the bid for the Stand Alone Container Terminal.

Thereafter, in the year 2000, the JNPT floated yet another Tender for development of the Third Container Terminal at JNPT, inviting Requests for Qualification for selection of a developer for the development of the said terminal in which it was categorically mentioned as follows:

"JNPT is desirous of entrusting this project to a Licensee other than Maersk A/S-Concor Consortium and/or their subsidiaries/allied organizations including GTIPL."

12. The explanation given for the insertion of the said clause was to implement the Circular dated 26th September, 2007. GTI's plea to allow it to participate in the bid was rejected. The appellant was, therefore, subsequently barred from participating in the Tender process for the development of the Third Container Terminal at JNPT. NSICT was, however, allowed to participate in the said Tender process for the development of the Third Container Terminal at the JNPT UN, but such Tender has not yet been finalized.

13. In the meantime, on 2nd March, 2009, JNPT floated Tender No. PD/N-14th CT/C-60/2009 and issued a global invitation of a Request for Qualification for development of the Fourth Container Terminal at JNPT. The said Tender contained the following clause.

"The successful bidder/consortium members and/or their subsidiaries/allied organizations in the project for the development of a Stand Alone Container Handling Facility with a key length of 330 meters towards North at JNPT was to be excluded from the bidding in respect of Fourth Container Terminal either as a single applicant or as a consortium."

14. On a plain understanding of the above mentioned clause, neither the appellant nor its associate companies/allied organizations and/or consortium of GTI was precluded from participating in the said Tender for the development of the Fourth Container Terminal and raising its bid therein. The appellant, thereupon, along with its letter dated 5th March, 2009, addressed to the JNPT, forwarded a Demand Draft for Rs.10,000/- towards purchase of the RFQ document for participation in the bidding process for the Fourth Container Terminal. The appellant was provided with a copy of the RFQ documents, wherein, in Clause 2.2.1(e), it was categorically stipulated as follows :

"2.2.1(e) To avoid private monopoly and to promote competition, the successful bidder/consortium members and/or their subsidiaries/allied organization in the project for the "Development of a stand alone container handling facility with a quay length of 330-m towards North at NJPT" shall be excluded from the bidding for DEVELOPMENT OF FOURTH CONTAINER TERMINAL either as a single applicant or as a consortium. Further, for the next BOT container terminal in JN Port in future, the successful bidder/consortium members in the DEVELOPMENT OF FOURTH CONTAINER TERMINAL Project would be excluded and so on."

15. Even at this stage, JNPT did not preclude the appellant from participating in the said tender in respect of the Fourth Container Terminal at JNPT.

The appellant was, thereafter, invited to participate in the process for grant of licence for the Fourth Container Terminal. However, to the surprise of the appellant, on 29th June, 2009, the appellant was informed that GTI and/or its associates/allied organizations had been disqualified from bidding for the Fourth Container Terminal in view of Clause 8.31 of the Licence Agreement. As indicated hereinbefore, it was after such decision that the appellant, who was worried about the rights and entitlements arising out of the said Circular, filed Writ Petition No.1551 of 2008 before the Bombay High Court on 29th July, 2009. The said Writ Petition was listed before the Bombay High Court on 25th August, 2009, which dismissed the same on 10th March, 2010, relying solely on the provisions of Clause 8.31 of the Licence Agreement, which disqualified the appellant from participating in the Tender process relating to the Third Container Terminal.

16. It is the said order of the High Court which has been challenged in this appeal.

17. Appearing for the appellant, Mr. F.S. Nariman, Senior Advocate, submitted that JNPT had awarded NSICT, owned by P&O Ports, the licence for the development of the First Container Terminal at JNPT. Pursuant thereto, JNPT had entered into a Licence Agreement dated 3rd July, 1997, with NSICT, wherein Clause 2.3, which provided that the said licence would not bar the licensee from participating in any subsequent bids invited by the licensor for operation of the container terminal, was incorporated. Mr. Nariman submitted that despite the 1996 Policy, which aimed at preventing monopoly and promoting competition, the Licence Agreement dated 3rd July, 1997, permitted NSICT to participate in the subsequent bids invited by the JNPT for operation of the Container Terminal.

18. Mr. Nariman submitted that on 26th September, 2007, the Union of India issued Circular No. PD-12013/2/2005-JNPT to JNPT indicating that it should invite global competitive bidding for an independent, Stand Alone Container Terminal involving a 330 meter extension of container berth towards the North of JNPT. The said Circular clarified that existing private Container Terminal Operators in JNPT would also be entitled to bid for any project but the JNPT was required to ensure that private investment did not result in the creation of private monopoly and that private facilities were available to all users on equal and competitive terms. Paragraph 5 of the 2007 Policy clearly provided that the successful bidder of the previous Container Terminal on BOT basis and/or their subsidiaries/allied organizations, should be excluded from bidding for the 330 meter extension project. The immediate fall-out of the same would mean that for the next BOT Container Terminal in JN Port in future, the successful bidder of the 330 meter extension project would be excluded and so on. What was also emphatically stated in paragraph 6 is that it had also been decided that the aforesaid guideline should be followed in all Ports in its true spirit with a view to avoiding monopoly and promoting competition, till such time a formal policy was finalized and notified. The 2007 Policy, therefore, provided that MAERSK S/T CONCOR Consortium and/or their subsidiary/allied organizations would be excluded from bidding for the Third Container Terminal and the successful bidder of the Third Container Terminal would be excluded from bidding for the next project and so on. Hence, a successful bidder would be ineligible to bid for the next but one subsequent tender after the immediate one awarded to it.

19. Mr. Nariman submitted that in accordance with the guidelines contained in the 2007 Policy, the appellant was specifically barred from participating in the tender process for the development of the Third Container Terminal at JNPT. NSICT who was the successful bidder for the first container was allowed to participate in the tender process for the development of the Third Container Terminal at JNPT, though the said tender is yet to be finalised.

20. Certain problems arose when on 2nd March, 2009, JNPT floated Tender No. PPD/M-1/4TH CT/C-60/2009 and issued a global invitation for Request for Qualification for development of the Fourth Container Terminal at JNPT, which contained a clause to the effect that the successful bidder/consortium members and/or their subsidiaries/allied organizations in the project for the development of a "Stand Alone Container handling facility with a Quay length of 330 meter towards North at JNPT should be excluded from the bidding for the development of the Fourth Container Terminal either as a single applicant or as a Consortium.

21. Mr. Nariman submitted that the Request for Qualification excludes only the successful bidder for the Third Container Terminal (which is yet to be awarded) from bidding at the tender for the development of the Fourth Container Terminal. Consequently, the appellant and/or its Associate Company/allied organizations and/or consortium of GTI were not precluded from participating in the tender for the development of the Fourth Container Terminal having been precluded from bidding for the "Stand Alone" Container Terminal, in accordance with the 2007 Policy. It was at this stage that JNPT wrote to the appellant on 29th June, 2009, indicating that it has been decided not to allow GTI Pvt. Ltd. and/or its associates to participate in the bidding for the Fourth Container Terminal. Mr. Nariman further submitted that in spite of the decision in NSICT's case, wherein the Union of India had relied on the 1996 Policy, it subsequently changed its stand on the strength of the 2007 Policy indicating that having regard to Clause 8.31 of the Agreement the appellant was barred from bidding for the Fourth Container Terminal.

22. It was submitted that the stand of JNPT was clearly wrong, arbitrary and discriminatory.

It was further submitted that the apprehension of the JNPT in regard to creation of monopoly was erroneous and unrealistic since monopoly means the power to determine one's own prices.

In the case of Ports, the prices for various Port Services are determined by the Tariff Authority for the Major Ports (TAMP) and periodically operators are required to submit their proposed prices to TAMP and cannot charge more than the TAMP approved prices for any of their services. It was urged that without the power to fix one's own price, the question of monopoly did not arise.

23. Mr. Nariman submitted that the problem has arisen on account of the fact that the tender for the Third Container Terminal is yet to be finalised, and, in the meantime the tender for the Fourth Container Terminal was floated.

Consequently, the Fourth tender was treated by the concerned Respondents to be the tender for the Third Container Terminal which meant that the appellant Company stood disqualified from participating in the said tender also, since under the 2007 Policy it could only participate in the next but one subsequent tender after the one awarded to it, thereby suffering double prejudice on account of no fault on its part. Mr. Nariman submitted that to debar the appellant Company from participating in both the Third as well as the Fourth Container Terminals was not justified and it should be allowed to participate in the Fourth tender in accordance with Clause 2.3 of its Licence Agreement. Furthermore, if the stand taken on behalf of the Respondent was to be accepted, despite the supersession of the 1996 Policy by the 2007 Policy, the appellant would also be barred from participating in future tenders for 30 years by virtue of Clause 8.31 of the Licence Agreement, which would only have the effect of reducing the extent of competition which is, in fact, the object of the 2007 Policy of the Union of India.

24. Mr. Nariman also contended that Clause 8.31 of the Licence Agreement had been imposed upon the appellant based on the principles of public policy and keeping in mind the then prevailing Policy of the Government of India, i.e., the 1996 Policy and not out of the free will of the parties. In any event, Clause 8.31 of the Licence Agreement would have to be read with the 2007 Policy and could

not be read in isolation.

25. Mr. Nariman urged that when the tender for the Second Container Terminal was floated by the Respondent No.2, it relied heavily on the 1996 Policy to prevent NSICT from bidding at the said tender. When NSICT challenged the said decision by filing a writ petition in the Bombay High Court, the Respondents successfully urged before the Court in the said Writ Petition that the 1996 Policy would prevail over Clause 2.3 of the NSICT contract. On the other hand, as stated hereinbefore, in Writ Petition No.1551 of 2009 filed by the appellant, the Respondents took a contrary stand by contending that Clause 8.31 of the Licence Agreement would prevail over the 2007 Policy.

26. Mr. Nariman lastly contended that by allowing the appellant to raise the technical bid and to participate in the pre-bid meeting for the development of the Fourth Container Terminal, the Respondents had given the appellant cause for legitimate expectation of being eligible to bid for and be awarded the contract. Mr. Nariman submitted that the Respondents had acted in a manner engineered to preclude the appellant from participating in the tender for the development of the Fourth Container Terminal at JNPT.

27. Appearing for the Petitioner, PSA Sical Terminals Ltd., in Transferred Case Nos.36-37 of 2010, learned Senior Counsel, Ms. Nalini Chidambaram urged that, although, there was a good deal of similarity in the issues raised in the Special Leave Petition filed by APM Terminals B.V. and the Transferred Cases filed by PSA Sical Terminals Ltd., the substantial question in the Transferred cases was whether a contractual right could be superseded by a general policy decision under Section 111 of the Major Port Trusts Act, 1963, without any legislation. In other words, in the facts of this case, could the Petitioner with whom a Licence Agreement had been signed on 15th July, 1998, by the Respondent No.2, Tuticorin Port Trust, with the previous sanction of the Central Government under Section 42(3) of the Major Port Trusts Act, 1963, be prevented from participating in the tender for additional facilities in the Tuticorin Port, by virtue of a policy decision taken in the teeth of the provisions of the Licence Agreement which vested the Licensee with the right to participate in future tenders.

28. Ms. Chidambaram urged that after the policy of liberalization adopted by the Central Government, the Port Trusts permitted private operators to operate Container Terminals on a Build, Operate and Transfer basis, through a process of tender. PSA Sical participated in the Tender invited by the Tuticorin Port Trust in 1997 for operating the Seventh Berth at Tuticorin, which was the First Container Terminal and was granted licence to operate the said Berth for 30 years. During the subsistence of the guidelines issued by the Government of India on 28th October, 1996, the Tuticorin Port Trust entered into a Licence Agreement with the Petitioner on 15th July, 1998, to operate the Seventh berth and specifically granting a right to the Petitioner to participate in any subsequent bids invited by the said Trust for operation of additional facilities in the same port under Clauses 2.3 and 6.2.3 of the Licence Agreement. For the sake of convenience, the said two clauses in the Licence Agreement are reproduced hereinbelow :

"2.3 License Period The Licence Period shall be for the period of 30 years (including the time taken for the erection of container handling equipments at the Container

Terminal) commencing from the Date of Award of License.

The license will not bar the licensee from participating in any subsequent bids invited by the licensor for development, designing, engineering, constructing, equipping, maintaining and operating any berth or related facility at the port".

"6.2.3 The Licensor agrees that it shall not commission additional berths for handling containers until the traffic potential does not appear to exceed 90% of the maximum volume 1, 25,000 TEUs. Provided however that the Licensor shall always consider future expansions of the container berths to reasonably match the market demands and allow the Licensee to participate in its operation without any discrimination. This condition shall be applicable only within the port limits of the Licensor as notified under Indian Ports Act, 1908 and Major Port Trusts Act, 1963."

29. Ms. Chidambaram submitted that it would, therefore, be evident from the above clauses that notwithstanding the 1996 guidelines, while executing the Licence Agreement, the Tuticorin Port Trust consciously granted the Petitioner a specific right to bid in Tenders for future development in the same port and did not consider that the same would result in the creation of a private monopoly.

30. It was submitted that at about the same time, the issue relating to the disqualification of Nhava Sheva International Container Terminal (NSICT), which was operating the Container Terminal at the JNPT and its Associate or interconnected or sister companies, including P&O Ports, from participating in the bid for the re-development of the Bulk Terminal into a Container Terminal at JNPT was taken up for consideration by the Bombay High Court. In the said matter, the JNPT took the stand that since P&O Ports was controlling 48% of the Container traffic in India and was operating the existing private Container Terminals at Jawaharlal Nehru Port Trust and Chennai, a policy decision had been taken by the Port Trusts of the JNPT to debar an existing operator from bidding for the next Container Terminal with the object of avoiding concentration of control in one party and to increase competition and efficiency in the public interest. The said proposal was forwarded to the Central Government which approved the same vide its letter dated 11th November, 2002.

31. Ms. Chidambaram submitted that since P&O Ports and its associates were controlling 48% of the Container business in India, the Bombay High Court upheld the policy of the Central Government aimed at preventing monopolisation of the container business in India by a private party. Ms. Chidambaram submitted that the appeal filed by P&O Ports before this Court was also dismissed, with this Court upholding the comprehensive guidelines that were issued by the Government of India, Ministry of Surface Transport on 26th October, 1996.

Ms. Chidambaram, however, urged that the P&O Ports' case was decided on facts which were specific to P&O Ports and could not, therefore, be treated as a precedent for the Petitioner's case. However, the question as to whether a policy decision could supersede the contractual right was not considered by the Bombay High Court or by this Court.

32. Ms. Chidambaram submitted that on 31st May, 2005, the Tuticorin Port Trust invited Tenders for development of Berth No.8 into a Container Terminal and permitted the Petitioner to participate in the tender process. The tender process remained incomplete for over four years and in 2007 a draft policy was formulated to promote inter port and intra port competition in which it was stipulated as follows :-

"Wherever the second terminal is to be set up at the same major port, or first terminal in an adjacent major port e.g. JN Port and Mumbai, Chennai and Ennore Ports, the existing terminal operator would be excluded to ensure competition. If there are a minimum of two private operators in any major port, no restriction would be placed on the existing operators to bid for the subsequent terminal, subject to the condition that a single private operator will not be allowed to operate more than two terminals at the same Major Port including terminals at adjacent major port."

33. Further to the aforesaid approved policy, the Government of India wrote to the Tuticorin Port Trust that it had been decided to debar the existing operator, the Petitioner herein, who was operating the first Private Terminal, from the bidding process for the second Container Terminal at Tuticorin Port in line with the aforesaid policy decision. The Petitioner was, therefore, denied permission from further participation in the tender for the 8th Berth on account of the aforesaid policy, notwithstanding the specific provision in the Licence Agreement permitting the Petitioner to participate in subsequent Tenders.

34. The Petitioner challenged the aforesaid decision denying permission to the Petitioner from participating in the bid for the 8th Berth in Writ Petition No.9746 of 2009. The learned Single Judge dismissed the Writ Petition relying on the decision in the P&O Ports case. In the Writ Appeal No.996 of 2009 filed by the Petitioner against the decision of the learned Single Judge of the Madras High Court, it was submitted on behalf of the Union of India that the need for having a second Private Container Terminal had been reassessed and that it had been decided to scrap the project at the RFP stage itself. The Petitioner's writ appeal was, therefore, dismissed as infructuous.

35. Subsequently, the Union of India issued a new policy guideline under Section 111 of the Major Port Trusts Act, 1963, on 2nd August, 2010, and immediately thereafter on 4th August, 2010, the Tuticorin Port Trust floated re-tender for the 8th Berth and restrained the Petitioner from participating therein in keeping with the new policy guidelines. Ms. Chidambaram submitted that the 2010 Policy provided that if there was one private Container/Berth Operator in a Port for a specific cargo, the Operator of that Berth or his Associates would not be allowed to bid for the next Terminal/Berth for handling the same cargo in the same Port. Ms. Chidambaram submitted that the Petitioner was informed of the said decision of the Tuticorin Port Trust by its letter dated 21st August, 2010.

36. Aggrieved by the aforesaid decision to debar the Petitioner from participating in the bidding process for the 8th Berth/Container Terminal, the Petitioner filed Writ Petition Nos.19384 of 2010 and 19851 of 2010, inter alia, for a direction upon the Respondents to permit the Petitioner to participate in the bid process for the development of the 8th Berth at Tuticorin Port as a Container

Terminal and for a further direction upon the authorities of the Tuticorin Port Trust to provide the Request for Qualification documents and to quash the decision not to provide the same.

37. In the background of the aforesaid facts, Ms. Chidambaram contended that a right given to a contractor could be nullified only by a legislation specifically indicating that the agreement stood nullified and not by a general policy decision.

Ms. Chidambaram submitted that while the 1996 Policy categorically indicated that the Port should ensure that private investment did not result in the creation of private monopolies, in the Licence Agreement with the petitioner Clauses 2.3 and 6.2.3 were included giving the Petitioner a right to participate in the bid for additional Container Terminals in the same Port.

38. Ms. Chidambaram submitted that a draft Policy was prepared by the Central Government on 10th February, 2005, to promote inter port and intra port competition, but the said Policy was never notified and remained a draft. However, based on the draft Policy, the Tuticorin Port Trust invited tenders for the 8th Berth/Container Terminal at Tuticorin and allowed the Petitioner to participate in the tender process for about 3 years until it suddenly took a unilateral decision to debar the Petitioner from the bidding process on the strength of a communication received from the Deputy Secretary, Ministry of Shipping, dated 22nd May, 2009. Ms. Chidambaram submitted that in between the aforesaid decision by which the Petitioner was debarred from participating in the bidding for the 8th Berth/Container Terminal at Tuticorin, the Vizag Port on 5th June, 2008, took a decision to shortlist the existing BOT Operators while recording that the same should not be taken as a precedent.

39. Ms. Chidambaram submitted that it was unreasonable on the part of the Respondents to debar the Petitioner from participating in the 8th Berth/Container Terminal without formalising a formal policy with regard to the intention of promoting competition and avoiding monopoly. It was also urged that P&O Ports, which had earlier been debarred from participating in the bidding for the Second Container Terminal at the JNPT, was allowed to participate in the bid for the Third Container Terminal, although the P&O Ports and its Associates were controlling 48% of the Container Terminal business in India and by allowing it to participate in the Third Tender, the Central Government was, in fact, going back on its desire to eliminate monopoly by private Operators within the Indian Ports.

40. Ms. Chidambaram urged that it would be apparent from the changing policies adopted by the Central Government that they were made to suit a particular situation and possibly a particular tenderer. It was submitted that even though the First Respondent was entitled to change its policies from time to time, such changes had to be informed by reason, which was absent in the instant case. Ms. Chidambaram added that the decision in the P&O Ports' case could not be taken to be a precedent as far as the Petitioner, PSA Sical Terminals Ltd., was concerned, since P&O Ports was not a party to the Licence Agreement at JNP and had no contractual right to bid for the Second Container Terminal there. Although, NSICT had such a right in view of Clause 2.3 of its Licence Agreement to bid for Container Terminal No.7, it did not assert its right and the same was not also considered in the judgment delivered by the High Court.

41. In support of her submissions, Ms. Chidambaram first referred to the decision of this Court in Delhi Cloth & General Mills Ltd. Vs. Rajasthan State Electricity Board [(1986) 2 SCC 431], wherein the High Court had quashed the decision of the Rajasthan Electricity Board to charge uniform tariff despite the prevailing concessional rates granted to a consumer under an agreement, upon holding that only a legislative amendment could override a contractual right by specifically overriding the contractual terms. Ms. Chidambaram also referred to the decision of this Court in PTC India Ltd. Vs. Central Electricity Regulatory Commission [(2010) 4 SCC 603], wherein, in the context of determination of tariff under the Electricity Act, 2003, this Court held that the making of a Regulation under Section 178 of the Act became necessary because a Regulation made under Section 178 had the effect of interfering with and overriding the existing contractual relationship between the regulated entities. This Court held that a Regulation under Section 178 is in the nature of subordinate legislation which could even override the existing contracts, including Power Purchase Agreements, which had to be aligned with a Regulation under Section 178 and could not have been done only on the basis of an order of the Central Commission.

42. Ms. Chidambaram reiterated that while the Central Government was entitled to alter its policies regarding participation of candidates in the bid process for the Second Container Terminal at the Tuticorin Port, such alteration would have to be informed by reason and not on the whims of the authorities, which is so apparent in the facts of the present case. Accordingly, in the absence of a formal policy regarding the participation of candidates in the bid process for the Second Container Terminal of the Tuticorin Port Trust and, in particular, the Petitioner, which was covered by Clause 2.3 of the Licence Agreement, the Petitioner could not have been barred from participating in the tender process for being awarded the contract for the Second Container Terminal at Tuticorin Port. Ms. Chidambaram submitted that the decision of the Tuticorin Port Trust Authorities to debar the Petitioner from participating in the tender process suffered from the view of Wadnesbury unreasonableness and was liable to be quashed.

43. The learned Solicitor General, Mr. Gopal Subramaniam, appearing for the Union of India in both the matters, submitted that the case of the appellant, APM Terminals B.V., and that of the Petitioner, PSA Sical Terminals Ltd., stand on a similar footing, despite Ms. Chidambaram's efforts to prove otherwise. The learned Solicitor General submitted that the same policy decisions taken by the Central Government in regard to private participation in the development and operation of Container Terminals in the Major Indian Ports governed both the cases, though at different ports.

The learned Solicitor General submitted that on 26th October, 1996, the Union of India issued guidelines for all Major Port Trusts regarding private sector participation in the major ports. In the preamble of the said guidelines it was indicated that in order to improve efficiency, productivity and quality of service, as well as to bring in competitiveness in port service, it had been decided to throw open the port sector to private sector participation. It was, however, made clear in Clause 4 of the policy statement that ports would have to ensure that private investment did not result in the creation of private monopolies and that private facilities were available to all users on equal and competitive terms.

44. Pursuant to the said policy decision, the JNPT decided to convert the Bulk Terminal which had been commissioned on 26th May, 1989, and had been designed to handle imported fertilizers, fertilizer raw materials and food grains through mechanized bulk handling facilities, into a Container Terminal on Build, Operate and Transfer (BOT) basis on licence for a period of 30 years. Tenders were invited and, ultimately, NSICT proved successful and was granted such licence by the JNPT for the First Container Terminal. The learned Solicitor General submitted that at the said point of time, Clause 2.3 was included in the Licence Agreement which provided that the Licence Agreement to NSICT would not prevent it from participating in any subsequent bid invited by JNPT for operation of Container Terminals. However, in order to give effect to its policy decision to prevent private monopolisation, the JNPT floated another Tender on 28th October, 2002, for construction of a Second Container Terminal in which Clause 1.3 of the Tender documents provided that JNPT was desirous of entrusting the project to another Licensee other than the existing Licensee at JNPT or its associates and interconnected or sister companies.

The learned Solicitor General submitted that in the said process, GTI, a Joint Venture Company of APM Terminals and CONCOR proved to be the successful bidder.

45. Mr. Subramaniam also indicated that Clause 1.3, referred to hereinabove, was challenged by NSICT in Writ Petition No.3083 of 2002, before the Bombay High Court which dismissed the same and upheld the decision to exclude NSICT. The said decision of the Bombay High Court was also upheld by this Court.

46. The learned Solicitor General submitted that in the agreement entered into with GTI it was specifically mentioned in Clause 8.3 that the Licensee would forego the right to bid for, either directly or indirectly, the additional facilities or existing facilities, during the term of the agreement. It was submitted that certain other conditions were also stipulated in the said clause which were aimed at preventing private monopolisation of the facilities of the port.

47. The learned Solicitor General submitted that in keeping with its aforesaid policy decision, while allowing the JNPT to invite Global Tenders for a "Stand Alone" project, the Central Government reminded JNPT of the Government policy formulated in October, 1996, to ensure that private investment did not create private monopolies. It was also clarified that the policy adopted to exclude the existing container operator from the tender for the next container, would continue till such time a formal policy was finalised and notified. It was submitted that in the light of such decision, a Global invitation was issued by JNPT on 2nd March, 2009, for development of the Fourth Container Terminal at JNPT, and those who had been permitted to participate for the Third Container Berths were excluded. The learned Solicitor General submitted that it was only a question of fortuitous circumstances which resulted in the tender for the Third Container Terminal remaining unfinalised.

Since GTI had been granted licence for the Second Container Terminal, it was only in keeping with the policy decision of the Respondents that the appellant, APM Terminals B.V., was barred from participating in the Tender for the Third Container Terminal and was allowed to participate in the bid for the Fourth Container Terminal. If the Tender process for the Third Container Terminal had been concluded, the present situation would not have arisen. It is only because of the fact that the

Tender for the Third Container Terminal could not be concluded that the Tender for the Fourth Container Terminal was treated to be the Tender for the Third Container Terminal and as a result, the appellant stood disqualified.

48. The learned Solicitor General submitted that the Central Government was only following its decision to ensure healthy competition and to prevent the concentration of control of the Major Port Trusts in the hands of the private sector which could result in unintended discrimination, since the private operators had been given the right to give priority berthing to their own ships and other ships could be serviced on a 'First come First served' basis.

49. Countering the submissions made by Mr. Nariman and Ms. Chidambaram regarding the doctrine of legitimate expectation and the right of the Government to alter its policy, the learned Solicitor General referred to the decision of this Court in Punjab Communications Ltd. Vs. Union of India & Ors. [(1999) 4 SCC 727], wherein, it was held that a change in policy could defeat a substantive legitimate expectation if it could be justified on Wednesbury reasonableness. The learned Solicitor General, therefore, submitted that the decision taken by the Government to prevent private monopoly in the handling of port activities was fully justified and could have an overriding effect over contractual terms arrived at by the Government with a private party.

50. On behalf of the JNPT, it was submitted by Mr. Vikas Singh, learned Senior Advocate, that the challenge thrown to the order passed by the Bombay High Court, upholding the decision of JNPT to exclude the appellant from participating in any Tender for development of the port facilities for a period of 30 years from the date of signing of the agreement, was fully justified. Mr. Vikas Singh submitted that in view of Clause 8.3.1 of the Agreement entered into between JNPT and the appellant, it was not open to the appellant to resile from the same. Furthermore, global tenders had been invited for the construction of the Fourth Container facility on 2nd March, 2009 and as per the said agreement, the appellant remained ineligible to participate in the said Tender also. Mr. Vikas Singh submitted that it is no doubt true that originally the appellant was provided with RFQ documents, but subsequently it was informed that in view of Clause 8.3.1 in its Agreement dated 10th August, 2004, it was not entitled to participate in the tender process for the Fourth Container facility.

51. While adopting the submissions made by the learned Solicitor General, Mr. Vikas Singh also submitted that since the Tender for the Third Container facility had not been proceeded with, the Tender for the Fourth Container Terminal would be treated to be the Tender for the Third Container Terminal from which the appellant and its associates stood excluded on account of the existing policy dated 26th September, 2007.

52. Mr. Vikas Singh submitted that while deciding the Writ Petition filed by NSICT, neither the Bombay High Court nor this Court had the benefit of the subsequent Constitution Bench decision of this Court in PTC India Limited Vs. Central Electricity Regulatory Commission [(2010) 4 SCC 603], in which this court had held that "regulatory intervention into the existing contracts across-the-board could have been done only by making Regulations under Section 178 and not by passing an Order under Section 79(1)(j) of the 2003 Act". Mr. Vikas Singh submitted that the appeal

filed by APM Terminals B.V. was without merit and was liable to be dismissed.

53. We have carefully considered the submissions made on behalf of the respective parties and are ad idem with the learned Solicitor General that the appeals and the Transferred Cases raise the same issue and the only difference between the two is that the appellant had not referred to or sought the benefit of Clause 2.3 of its agreement, which permitted it to participate in future tenders in relation to development work within the port area, while in the petitioner's case the same formed the main plank of its claim. In substance, the question that we are faced with is whether despite the contractual right vested in the appellant as well as in the petitioner in the Transferred cases to participate in future tender processes for developmental work within the port area, such right could be taken away and/or curtailed by a unilateral policy decision of the Central Government. The further question in the case of the appellant is whether having been debarred from participating in the bid for the Third Container Terminal in JNPT, it could also be excluded from the bidding process of the Fourth Container Terminal.

54. Both the Bombay High Court as well as this Court have held that in public interest it was open to the Government to alter its policies in order to subserve the common good and that contractual rights would have to give way to the greater public interest, which in this case was to prevent the creation of private monopolies in the management of port facilities in the Major Ports in the country, as this could have far-reaching and disastrous consequences as far as shipping in such ports was concerned. As already indicated hereinabove, the policy decision of 26th October, 1996, made provision for privatisation and also gave private operators the right to give priority berthing to their own ships. The said decision had the potential of substantially disrupting the schedule of other ships intending to use the port facilities and could discourage foreign ships from coming to Indian Ports and thereby disturb the very pattern of the shipping trade in India.

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

56. The High Court also took note of the fact that certain shipping agents and their associates had expressed concern regarding the increased tariff charged by the appellant at its container terminals at JNP and the possibility of a monopoly being created by it in the country. The High Court took note of the fact that port authorities all over the world had woken up to the possibility of private monopolies controlling the use of port facilities in such a manner so as to benefit their own ships to the detriment of world-wide shipping as a whole.

The High Court took note of the fact that P&O Ports itself had been excluded from bidding for the Third Container Terminal in the Port of Melbourne on the ground that it would give the said operator a position of dominance which was to be avoided in the interest of the shipping industry at large.

Two other examples of Port Klang in Malaysia and Bhabange Port in Thailand, were also taken note of by the Bombay High Court where different independent operators were appointed to promote competition.

57. It is precisely for such reason that it had become necessary for the Central Government to alter its policy decision regarding entrusting control of the container terminals in the major ports of India in a manner so as to eliminate monopolisation and to encourage competition. The decision of the High Court was duly endorsed by this Court in SLP(C)No.7488 of 2003 and it was observed that the High Court had rightly dismissed the writ petition.

58. Insofar as the decision taken by the Central Government to alter its policy regarding the grant of licence for operating the container terminals in the Major Ports in India as against the contractual right embodied in the form of Clause 2.3 in the agreements executed or entered into between the Central Government and the appellant and the petitioner in the Transferred Cases, is concerned, the said controversy is no longer valid in regard to the appellant, since such point had not been taken on its behalf in the writ petition before the Bombay High Court. However, the same has been taken as a specific point on behalf of the petitioner in the Transferred Cases as far as the Tenders for the Second Container Terminal at the Tuticorin Port are concerned. The said question has to be considered in the light of Article 14 of the Constitution and the greater public interest as against the contractual right of the individual.

59. The provisions of Clause 2.3 in the Agreements signed between the Tuticorin Port Trust and PSA Sical cannot be read in isolation of the other provisions in the agreement which prevented the Licensee from bidding for other work within the port area during the period of the licence. In fact, in our view, the change in policy to prevent private mobilization has been held to be justified by the Bombay High Court as well as this Court. In the absence of any arbitrariness in effecting such change in policy and keeping in mind the larger public interest, we are of the view, that the Central Government was within its powers to strike a balance with regard to the control of the port facilities so that the same did not come to be concentrated in the hands of one private group or consortium which would be in a dominant position to control not only the rights of tariff, but also the entry of ships, not belonging to such group, into the Major Ports and thereby give an undue advantage to its own ships over other shipping agencies.

60. Normally, the Courts do not interfere with policy decisions of the Government unless they are arbitrary or offend any of the provisions of the Constitution. In the present cases, the adoption of such a course would, in our view, be apposite.

61. It has been the consistent view of this Court that a change in policy by the Government can have an overriding effect over private treaties between the Government and a private party, if the same

was in the general public interest and provided such change in policy was guided by reason.

Several decisions have been cited by the parties in this regard in the context of preventing private monopolisation of port activities to an extent where such private player would assume a dominant position which would enable them to control not only the berthing of ships but the tariff for use of the port facilities. In both the cases under consideration, the same set of entrepreneurs are interested in gaining control over the different container terminals to the exclusion of other players. The Central Government in its Ministry of Shipping and Transport, therefore, took a decision not to permit licensees who have been granted a licence for running one of the container terminal berths from participating in the bid process for the immediate next container terminal, with the intention of promoting healthy competition for the benefit of the shipping industry and the ports in India as well. The decision to alter its policy is based on sound reasoning and the Central Government has taken such decision for the benefit of the consumers as a whole. The changed policy would also have the effect of preventing cartelisation and dominant status, which could inevitably affect the ultimate pricing of consumer goods within the country. As was held in *Shimnit Utsch India Private Ltd. Vs. West Bengal Transport Infrastructure Development Corporation Limited and Ors.* [(2010) 6 SCC 303], the Government was entitled to change its policies with changing circumstances and only on grounds of change a policy does not stand vitiated.

62. It was further held that Government has the discretion to adopt a different policy, alter or change its policy to make it more effective. The only qualifying condition is that such change in policy must be free from arbitrariness, irrationality, bias and malice and must be in conformity with the principle of *Wednesbury* reasonableness. Although, it has been urged by Ms. Chidambaram that such change in policy could be effected only by way of legislation, such a submission, if accepted, could stultify the powers of the Central Government to alter its policies with changing circumstances for the benefit of the public at large. It is not as if the right of a licensee to bid for a further container terminal berth has been excluded for the entire period of the Licence Agreement but in order to ensure proper competition and participation by all intending tenderers, the said policy has also been altered to enable such licensees to bid for the next but one tender as and when invited.

63. However, as far as the appellant is concerned, it is because of certain fortuitous circumstances that it came to be excluded from the tender process for the Fourth Container Terminal. If the tender process for the Third Container Terminal had been concluded, the various complications could have been avoided since under the revised policy, the appellant was entitled to participate in the alternate bids. The appellant having been excluded from one bid on the basis of an existing policy, cannot be debarred from participating in the next bid, by taking recourse to a different yardstick.

Such a course of action would be contrary to public policy. Accordingly, the authorities of the JNPT shall allow the appellant to continue to participate in the tender process for the Fourth Container Terminal and the decision to the contrary conveyed to the appellant on 29th June, 2009, is quashed.

64. As far as PSA Sical Terminals Ltd. is concerned, Ms. Chidambaram's submission as to the applicability of the doctrine of legitimate expectation is at best an expectation if there are cogent grounds to deny the same. The said doctrine has been explained by this Court in *Sethi Auto Service*

Station Vs. Delhi Development Authority [(2009) 1 SCC 180], and it was held that the appellant in the said case had certain expectations which were duly considered and favourable recommendations had also been made, but the final decision-making authority considered the matter when the policy had undergone a change and the cases of the appellants therein did not meet the new criteria for allotment laid down in the new policy. It was also observed that the concept of legitimate expectation has no role to play where State action is based on public policy and in the public interest, unless the action taken amounted to an abuse of power.

65. As we have indicated earlier, the Central Government was within its powers to adopt a policy to prevent the port facilities from being concentrated in the hands of one private group or consortium which could have complete control over the use of the facilities of the ports to the detriment of the shipping industry as a whole. The decision taken by the Tuticorin Port Trust Authorities to exclude PSA Sical Terminals Ltd.

from bidding for the 8th Berth Container Terminal cannot, therefore, be said to be arbitrary or unreasonable so as to warrant interference. In fact, the position of PSA Sical Terminals Ltd. is no different from that of A.P.M. Terminals B.V. which had been excluded from the bid for the Third Container Terminal at JNPT.

66. In the aforesaid circumstances, the appeal filed by APM Terminals BV is allowed and the decision of the Bombay High Court is set aside.

However, we are also of the view that the decision of the Madras High Court does not call for any interference and the Transfer Cases filed by PSA Sical Terminals Limited are accordingly dismissed, but without any order as to costs.

66. All interim orders are vacated.

.....J. (ALTAMAS KABIR)J.
(CYRIAC JOSEPH) New Delhi, Dated: 11.05.2011.