

(2010) 03 BOM CK 0157

In the Bombay High Court

Case No : Writ Petition No. 1551 of 2009

APM Terminals B.V.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 10-03-2010

Acts Referred:

Specific Relief Act, 1963 — Section 14, 16

Citation : (2010) 3 BomCR 588

Hon'ble Judges : J.N. Patel, J;C.L. Pangarkar, J

Bench : Division Bench

Advocate : Janak Dwarkadas and Rahul Narichania, instructed by Mulla and Mulla and CB and C, for the Appellant; D.J. Khambhatta, ASG. and A.M. Sethana for Respondent No. 1 and Rajiv Kumar, Karan Advani, Dinesh Pednekar and R.S. Bidkar, instructed by Advani and Co., for the Respondent

Final Decision : Dismissed

Judgement

J.N. Patel, J.—Rule. Rule returnable forthwith. By consent of the parties taken up for final hearing.

The Petitioner is a company incorporated under the laws of the Netherlands. The Petitioner and Container Corporation of India Ltd (CONCOR) formed a Joint Venture company in the name and style of Gateway Terminals India Pvt. Ltd., registered under the Companies Act, 1956. The Petitioner and CONCOR hold 74% and 26% respectively of the shareholding in GTI. GTI was the successful bidder in the tender floated by JNPT for development of its then existing bulk terminal into a container terminal.

2. The petitioner has challenged the validity and propriety of the action of the respondent No. 2 in disqualifying the petitioner from participating and/or from bidding in the tender process for the project of development of the 4th Container Terminal at JNPT through public private partnership and seeks that the said decision be quashed and set aside and the petitioner be permitted to participate in the tender process in accordance with the new policy i.e. circular

PD12013/2/2005JNPT dated 26.9.2007 issued by the respondent No. 1 be read in the licence agreement dated 10.8.2004 between GTI and the respondent No. 2 and further for a direction that respondent No. 1 or respondent No. 2 to release the petitioner from the said restriction contained in Clause 8.31 of the licence agreement and/or to treat the same as not binding on the petitioner.

3. The petitioners were informed that they are disqualified from participating in the tender process which has been notified for development of a standalone container handling facility with quay length of 330m towards North at JNPT through a private operator on BOT basis on the ground that as per Clause 8.31 of the licence agreement with M/s. GTIPL, M/s. Maersk A/S CONCOR consortium and/or their subsidiaries/allied organizations including Gateway Terminals India Pvt., Ltd., (GTIPL) shall be excluded in any form from the bidding for any future/ existing facilities at JNPT , including the proposed berth above. The petitioners were further informed in response to their letter dated 18.7.2008 that since Clause 8.31 is already available in the signed license agreement with the GTI, the contents of para2 of JNPT's letter No. PPD/MII/330Extension/2008/553 dated 18.6.2008 remain unchanged thereby disqualifying the petitioner from participating in tender No. PPD/MI/4th CT/T60/2009 Global Invitation or Request for Qualification for project of the development of the Fourth Container Terminal at JNPT through publicprivate partnership on BOT basis for a period of 30 years.

4. It is the case of the petitioner that GTI being the successful bidder in the tender floated for the redevelopment of the Bulk Terminal into a Container Terminal of Respondent No. 2 (hereinafter referred to as the 2nd Container Terminal), entered into a License Agreement dated 10th August 2004 with the Respondent No. 2 (hereinafter referred to as the "License Agreement ") for the 2nd Container Terminal. The said License Agreement is valid for a period of 30 years and is presently in subsistence. Clause 8.31 of the said License Agreement, the validity and legality of which clause, this Petitioner not being party to the said License Agreement, seeks to challenge, reads as under: "8.31 The Licensee acknowledges and agrees that it shall forgo 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 Even 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 ".

Therefore, it is the contention of the petitioner that Clause 8.31 of the said License Agreement is being misconstrued as effectively disqualifying or barring the Petitioner from participating in any tender floated by Respondent No. 2 in respect of the Container Terminal at JNPT for a period of 30 years i.e., till 2034.

5. It is the case of the petitioner that at the relevant time a private container terminal operator viz. Nhava Sheva International Container Terminal (NSICT), owned by P&O ports (later taken over by Dubai Port) also existed within the Port premises at (JNPT) Respondent No. 2 and was carrying out the development of the 1st Container Terminal at Respondent No. 2. At the time of the Petitioner bidding for the project for the 2nd Container Terminal (which was ultimately awarded to it), NSICT was not allowed to raise a bid in the tender floated for the 2nd Container Terminal. NSICT filed a Writ Petition but failed to succeed in the said Writ Petition.

6. It is the case of the petitioner that on or about 26th September 2007, the Respondent No. 1 issued a Circular No. PD12013/2/2005JNPT to Respondent No. 2 stating that the Respondent No. 2 should proceed to invite global competitive bidding for an independent, stand alone container terminal for a project viz. 330mts Extension of container berth towards North of JNPT (hereinafter referred to as the 3rd Container Terminal). It was further clarified that the eligibility of existing private container terminal operators in Respondent No. 2 to compete and bid for any project has also been examined and on the basis of the guidelines, the Respondent No. 2 should ensure that private investment does not result in the creation of private monopolies and that private facilities are available to all users on equal and competitive terms. The relevant portion of the said Circular reads as follows:

5. 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 as so on.

6. 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.

7. It is the case of the petitioner that the said Circular provides that Maersk A/ SCONCOR Consortium and/or their subsidiaries / allied organizations are excluded from bidding for the 330 mtrs extension project (i.e. 3rd Container Terminal) and the successful bidder of the 330 mtrs extension project would be excluded from bidding for the immediate next project and so on. Thus, the

successful bidder of one tender would not be eligible to bid for the immediate next tender within that port. However, the said successful bidder would be eligible to bid for the next but one subsequent tender after the immediate one awarded to it. Thus, a successful bidder of a project (X) would not be eligible to bid for the immediate next tender (Y) at JNPT. However, in a bid after that viz. (Z), it would be able to bid for the same. This procedure was precisely followed by the Respondent No. 2 in the case of NSICT. Since, NSICT were awarded the contract of the 1st Container Terminal at Respondent No. 2, they were not allowed to participate in the tender for the development of the 2nd Container Terminal (which was awarded to GTI). However, NSICT were allowed to participate in the tender for development of the 3rd Container Terminal at Respondent No. 2 (Extension of 330 mts. North at JNPT) as they were debarred as per the circular dated 26.9.2007 .

8. It is the case of the petitioner that on 2nd March 2009, the Respondent No. 2 vide a Global Invitation of Request for Qualification floated a Tender No. PPD/MI/4thCT/T60/2009 for development of its 4th Container Terminal at (JNPT) the Respondent No. 2.

9. The said Tender No. PPD/MI/4thCT/T60/2009 floated on 2nd March 2009 inter alia contains the following clause:

The successful bidder / consortium members and / or their subsidiaries / allied organization in the project for the "Development of a standalone container handling facility with a quay length of 330m towards North at JNPT" shall be excluded from the bidding for DEVELOPMENT OF FOURTH CONTAINER TERMINAL either as a single applicant or as a consortium".

It is therefore, contended by the petitioner that on a plain reading and interpretation of the said Tender No. PPD/MI/4thCT/T60/2009 dated 2nd March 2009, the Petitioner is not precluded from participating in the said Tender and raising its bid as it did not bid for tender floated for 330M (Third Container Terminal) Extension towards North at JNPT. It is the case of the petitioner that on the basis of the said Circular issued by Respondent No. 1, and on the basis of the said Tender No. PPD/MI/4thCT/T60/2009, the Respondent No. 2 also issued the Tender document to the Petitioner. On 2nd / 4th March 2009, the Respondent No. 2 addressed a letter to the Petitioner informing them that the Tender No. PPD/MI/4thCT/T60/2009 was available on the website of Respondent No. 2 i.e. www.jnport.com and also enclosing a copy of the Global Notice in respect of the Tender No. PPD/MI/4th CT/T60/2009. The Petitioner was also allowed by the Respondent No. 2 to participate in the prebid meeting (the 1st Stage of the Tendering process). The Petitioner also attended the prebid meeting held by the Respondent No. 2 for finalizing the technical bids submitted by various bidders including the Petitioner. According to the petitioner by its letter dated 5th March 2009 requested the Respondent No. 2 to issue the RFQ document and forwarding a demand draft for Rs. 10,000/ (Rupees Ten Thousand only) for purchase of the RFQ document and for their participation and qualification in the forthcoming

bidding process for the 4th Container Terminal. Accordingly, the petitioner was issued the said RFQ document by the Respondent No. 2. The relevant clause of the said RFQ document reads as under:

2.2.1.(e) : To avoid private monopoly and to promote and/ or their subsidiaries / allied organization in the project for the "Development of a standalone container handling facility with a quay length of 330m towards North at JNPT" 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.

10. Subsequent thereto, the Petitioner vide its letter dated 27th March 2009 requested for further information/ clarification on the RFQ document and also forwarded their list of queries to the Respondent No. 2.

11. It is the case of the Petitioner that certain clarifications were sought on the RFQ document. The Respondent No. 2 vide their letter dated 8th April 2009 also forwarded the amendments to the RFQ document and informed that the same shall form a part of the RFQ document.

12. It is the further case of the petitioner that vide an email dated 13th April 2009 addressed by the Respondent No. 2 to the Petitioner, the Respondent No. 2 invited the Petitioner to attend the preapplication conference to be held on 15th April 2009. In reply to the said email, the Petitioner addressed their email to the Respondent No. 2 on the same day confirming that the Petitioner would be participating in the said meeting.

13. It is the case of the petitioner that suddenly and to the surprise of the Petitioner, the Petitioner received a letter dated 29th June 2009 from the Respondent No. 2 stating that GTI and/or its associates/ allied organizations are disqualified from bidding for the 4th Container Terminal in view of the said License Agreement entered into between GTI and the Respondent No. 2.

14. It is the case of the petitioner that immediately on receipt of the said letter dated 29th June 2009, the Petitioner considered its contents and addressed a letter dated 7th July 2009 to the Respondent No. 1 pointing out that the Circular was issued by the Respondent No. 1 to ensure that monopoly is avoided and to promote competition at all ports, to the effect that a successful bidder for a particular terminal project in a port will not be allowed to participate in the immediate next facility tendered for within that port. Further, vide the said letter the Petitioner mentioned that while they are barred from participating in the tender for 330 mts of berth (the 3rd Container Terminal) at Respondent No. 2, they must be allowed to participate in the future facilities tendered at that port. The Petitioner vide its said letter also requested the Respondent No. 1 to intervene and allow the Petitioner and its subsidiaries and/or associates to participate in the tender process for development of the 4th Container Terminal

at Respondent No. 2.

15. It is the case of the petitioner that till date of filing of the petition the Respondent No. 1 has not responded to the said letter dated 7th July 2009 addressed by the Petitioner and has purported to disqualify and/or bar the petitioner from participating further in the said Tender No. PPD/MI/4thCT/T60/2009 dated 2nd March 2009 on and after 29th June 2009, namely in the submission of its bidding documents, participation in the bidding process and/or the opening of the qualification papers submitted / accepted by Respondent No. 2 scheduled for 31st July 2009. As the petitioners were deprived from participating in the said tender it will visit them with grave harm, prejudice and injury, they have filed this petition on the ground that the respondent by interpretation of Clause 8.33 of the licence agreement entered into between GIT and respondent No. 2 by ignoring the circular dated 26.9.2007 has permanently restrained the petitioner and its associates from participating in said tender and for all time which is unfair, unreasonable and wrongful and an excessive restraint on the petitioner's fundamental rights as enshrined under Article 19(1)(g) of the Constitution of India. It is further contended that the said Clause 8.33 is patently discriminatory and ultra vires Article 14 of the Constitution of India.

16. It is contended that Clause 8.31 of the said License Agreement as is sought to be presently enforced is patently discriminatory and ultra vires Article 14 of the Constitution of India inasmuch as on the one hand, it seeks to prohibit and/or bar the Petitioner's right to bid either directly or indirectly for additional and existing facilities during the term of the said License Agreement which is 30 years w.e.f. 10th August 2004, whereas on the other hand, after the issuance of the Circular No. PD12013/2/2005JNPT dated 26th September 2007 by Respondent No. 1, all other successful companies/ bidders though ineligible to bid for the immediate next tender within that port, are held to be eligible to bid for the next but one subsequent tender after the immediate successful one. Thus whilst for a period of 30 years the Petitioner are sought to be disqualified or barred from participating in any tender floated by Respondent No. 2 for its Container Terminals, other successful bidders/ companies are held to be entitled to participate and bid in tenders for the subsequent tender next after the immediate successful one.

17. It is contended that whilst the Petitioner and/or its bidding for any subsequent tender, the other successful companies / bidders for other projects therein are eligible to bid for the next but one immediate tender within that port and would be eligible to bid for such subsequent tender after the immediate one. This places other companies/ bidders in an unduly advantageous position as compared to the Petitioner who would be disqualified and/or barred for 30 years i.e. till the year 2034 thereby ensuring diminution of competition in the teeth of the Respondent No. 1's Circular No. PD12013/2/2005JNPT dated 26th September 2007.

18. The petitioners have also taken a stand that the respondent No. 2 should be

directed to release the petitioner of the restraint of Clause 8.31 of the licence agreement and/or treat the same as not binding on the petitioner as it is contrary to its own policy and/or guidelines and/or law and having altered the policy by issuing the guidelines/policy dated 26.9.2007 as permitting successful bidders to bid for the next but one container terminal, which fact is evidenced by the participation of NSICT in the bidding for the 3rd container terminal and, therefore, the petitioners are entitled to a writ of mandamus or any other appropriate writ, direction or order directing the respondent No. 1 and/or respondent No. 2 to relieve the petitioner from the said restriction contained in Clause 8.31 of the license agreement and/or treat the same as not binding on the petitioner.

19. In reply, the respondent No. 2 have taken a stand that the petitioners have based their entire case on the circular dated 26.9.2007 issued by respondent No. 1. The petitioners have no right to bid directly or indirectly for construction of the container terminal during the term of agreement i.e. for a period 30 years in view of the specific Clause 8.31 of the Licence Agreement dated 10.8.2004. It is the case of the respondent No. 2 that as per the policy of respondent Nos. 1 and 2, which is in accordance with the guidelines issued by the Government of India the Petitioners have been disqualified / barred from bidding process for subsequent tenders in respect of the construction of container terminals in Respondent No. 2 Port during the subsistence of the term of their license agreement with a specific purpose of avoiding private monopoly and for promoting competition. The above policy has been formulated keeping in mind standard policies followed by different ports all over the world and keeping in mind the public interest involved. The decision to exclude the Petitioners from the bidding process has been taken in the interest of preventing private monopoly or concentration of power in a single private party. It is further contended that the Respondent's action of disqualifying the petitioner bidding for the 4th terminal as discriminatory and/or violative of the fundamental rights of the petitioner is erroneous, fallacious and deserves to be rejected. It is contended by respondent No. 2 that in Writ Petition No. 3083 of 2002 this Court has upheld the policy of Respondents of excluding existing private container terminal operators for reasons of public interest which has also been upheld by the Supreme Court. The respondents have justified their decision of disqualifying the petitioners from participating in bid process for construction of the 4th Container Terminal on the basis:

(a) Jawaharlal Nehru Port Bulk Terminal was commissioned on 26th May 1989. The Port has two terminals, the container terminal and bulk terminal. The Bulk Terminal was designed to handle imported fertilizers, fertilizer raw materials and food grains through a mechanized bulk handling facility. Fertilizers like DAP, MOP and fertilizer raw materials like Sulphur and rock phosphate which are corrosive in nature were also designed to be handled at the bulk terminal.

(b) By and large it was envisaged by Respondent No. 2 that the expenditure for

maintaining the bulk Terminal, the structures at the bulk terminal and other equipments was not economically viable. The expenditure of repairs, maintenance and administrative overheads further rendered the bulk terminal economically unviable. Respondent No. 2 therefore decided to convert the bulk terminal into a container terminal. It was decided by Respondent No. 2 to redevelop the bulk terminal into a container terminal on Built, Operate and Transfer (BOT) basis for a license period of 30 years.

(c) Since 1996 the policy of the Government of India has been to permit participation/investment by the private sector in the leasing of assets of the port, construction/creation of additional assets, lease of equipments, pilotage, etc. The Ministry of Surface Transport has issued guidelines to be followed by Major Ports for private sector participation in the major ports. As per the policy and guidelines, the Respondent No. 2 has started the process of privatization. The said privatization is permitted subject to the regulatory role of Respondent No. 2. The published guidelines pertaining to the regulatory role framework are as follows:

REGULATORY FRAMEWORK

The Port will continue to maintain its regulatory role under Major Port Trust Act, 1963. However for the purpose of fixing and revising port tariffs, an independent Tariff Regulatory Authority will be set up. The tariff so fixed would be a ceiling and both the private entrepreneurs and the port would be free to charge less than such notified tariff." Till such a Regulatory Authority is set up, the present procedure, namely, that of Ports fixing the tariffs with the approval of Central Government will continue. result in the creation of private monopolies and that private facilities are available to all users on equal and competitive terms. However, in the case of berths constructed or taken on lease by private entrepreneurs, they would be permitted to give priority berthing to their own ships and they would service other ships on a first come first served basis.

The private entrepreneurs will be obliged to protect the national interests like national security whenever necessary and required, and also honour priority berthing orders of Central Government, in this regard. The private entrepreneurs will also abide by the various statutory requirements on the protection of the environment, antipollution measures, safety, conservancy, etc. and also abide by the directives issued by the Government/Port in this regard from time to time.

The Ports will with the approval of the Central Government take steps to frame regulations under relevant sections of Major Port Trust Act consist with these guidelines to enable private sector participation in Port sector.

Till such regulations are framed cases will continue to be governed by these guidelines.

20. It is further contended by respondent No. 2 that after due consultation with the Ministry of Law, Government of India, the Ministry of Shipping had decided

that M/s. GTIPL and/or their Associates should not be allowed to participate in the bidding for the development of the 4th container terminal. The Respondent No. 2 accordingly vide their letter dated 1st December 2009 communicated to the Petitioners as well as the CONCOR the decision of the Ministry of Shipping. Therefore, according to them it is just, right and equitable in public interest that the petitioners are not allowed to participate in bidding process in respect of the 4th container terminal.

21. The Respondent No. 1 has in their reply raised a preliminary issue as to the maintainability of the petition by placing reliance on the decision of the Supreme Court in the case of Puravankara Projects Ltd. Vs. Hotel Venus International and Others, wherein it was held that tender terms are contractual and privilege of the Government inviting tenders and Courts have no jurisdiction to judge as to how tender terms are required to be framed and it is contended that in view of the specific provision contained in commercial agreement between two parties, the petitioners cannot be permitted to participate in the bidding process on the basis of the guidelines issued by the Ministry of Shipping on 26/9/2007 which are effective prospectively. Moreover, the existing policy of the Government of India is in public interest aimed at curtailing monopoly in major ports. It is for the respective ports to ensure proper implementation of the Government Policy. In case, the petitioner is allowed to bid then this would open doors for a number of cases from the bidders who had not applied for the bidding in connection with redevelopment of the bulk terminal into a container terminal which was awarded to GTIPL. This would thereby set a wrong precedent. Moreover, this may have implications in various other ports also where private operators are running the container terminals/cargo berths.

22. It is their case that, when JNPT invited global tenders for its project relating to development of a standalone container handling facility with the quay length of 330 meters towards north at JNPT , the third PPP Project at the Port, in June 2008 it was specifically brought out in the notice inviting tenders and the Request for Qualifications document that M/s Maersk A/S CONCOR Consortium and / or their subsidiaries / allied organizations including GTIPL were not eligible to bid for the project. Following clause was incorporated in the RFQ document to this effect:

To avoid private monopoly and to promote competition, the successful bidder in the last container terminal for which the concession was awarded by the JNPT viz., Maersk A/s CONCOR consortium and/or their subsidiaries / allied organizations including GTIPL at JNPT shall be excluded from the bidding for the development of a standalone container handling facility with the quay length of 330 meters towards north project. Further, for the next BOT container terminal in JN Port in future the successful bidder of the 330 m extension project would be excluded.

In addition, the JNPT vide its letter dated 18th June 2008 addressed to M/s Gateway Terminals India Pvt. Ltd., was specifically conveyed that as per the

Clause 8.31 of the License Agreement with M/S GTIPL, M/s Maersk A/SCONCOR consortium and/or their subsidiaries/ allied organizations including GTIPL shall be excluded in any form from bidding for any future / existing facilities at JNPT , including the proposed above berth.

23. It is further contended that the guidelines issued by the Ministry of Shipping by letter dated 26.9.2007 stating that the M/Shipping has conveyed that a rational and logical consequence to the stand taken earlier, the successful bidder of the previous container terminal on BOT basis, at Major Ports, and/or their subsidiaries/allied organizations should be excluded from bidding for the next container terminal on BOT basis. The above convention shall be followed in all major ports in its true spirit with a view to avoid monopoly and promote competition till such time a formal policy is finalized and notified and that GTI was told by the Port that since Clause 8.31 was already available in the signed license agreement *ibid*, as conveyed vide letter of 18th June 2008, M/s Maersk A/ SCONCOR consortium and/or their subsidiaries/ allied organizations including GTIPL shall be excluded in any from bidding for any future / existing facilities at JNPT, including the proposed above berth.

24. The Ministry of Shipping after considering all related facts conveyed to the Chairman, JNPT on 18/6/2009 that GTIPL and/or its associates may not be allowed to participate in the bidding process for the development of the 4th container terminal at JNPT in view of the Clause 8.31 of the license agreement signed between GTIPL and JNPT. Therefore, the JNPT , vide its letter dt. 29/6/2009 conveyed the decision not to allow participation of M/s. GTIPL and/or its associate in the bidding for the 4th Container Terminal. Accordingly, the petitioner was also informed that they cannot participate in the bidding for the 4th container Terminal. Aggrieved by the decision of the JNPT , the petitioner vide its letter dt. 7/7/2009 approached the Ministry of Shipping with the request to intervene in the matter and allow the participation of M/s. GTIPL and its associates (M/s. APM Terminal) in the development of 4th Container Terminal at JNPT. The representation of the petitioner has been duly considered and examined by the Ministry of Shipping in consultation with the Ministry of Law. While the representation of the petitioner was being considered by the Ministry of Shipping, the JNPT was advised to suitably extend the date for receiving the RFQ for the 4th Container Terminal which was 31st July, 2009 in pursuance to this directions of the Ministry of Shipping, the JNPT extended the RFQ due date to 31/8/2009. As the consultation with Law Ministry took some more time, the port was again obliged to extend the date further to 30th December, 2009 and subsequently to 31st December, 2009. When the consultation with the Law Ministry was completed, the Ministry of Shipping informed the JNPT that the issue regarding participation of GTIPL and/or its associate in the bidding process for the 4th Container Terminal had been reexamined in consultation with the Ministry of Law and Justice and based on the advice rendered by that Ministry, it has been decided that the decision of the Ministry conveyed vide letter dt. 18/6/2009 prevails. In support the GTIPL and/or its associate including the

petitioner was not allowed to participate in the bidding process.

25. It is contended by respondent No. 1 that the petitioner has termed the Clause 8.31 of the LA signed on 10/8/2004 between GTIPL and JNPT as unfair, arbitrary, unreasonable and wrongful. By putting a permanent bar in future against the petitioner despite the circular of Ministry of Shipping dated 26/9/2007 an excessive restraint is put on the petitioners fundamental rights to carry on trade and business under Article 19(1)(g) of the Constitution of India. In this connection, it may be stated that the agreement dated 10/8/2004 was signed by the GTIPL with their free will and taking into consideration all the relevant aspects relating to their right to carry on their trade and business. They cannot now claim that the Clause 8.31 of the agreement put an excessive restraint on their fundamental right. In so far as the Ministry of Shipping circular dated 26/9/2007 is concerned, it is applicable from a prospective date. It cannot be given an effect from a retrospective date. In this connection, kind attention is invited to the letter No. PD11015/2/2006VPT dated 1/10/2008 which was issued to further clarify the instructions contained in the Ministry's letter dated 26/9/2007. In the last para of the letter, the ports have been clearly instructed that the RFQ for projects that will be bidded out in future should be spaced out appropriately as deemed fit. This letter substantiate the fact that the instructions contained in Ministry's letter dated 26/9/2007 are applicable prospectively.

26. It is the contention of respondent No. 1 that the petitioner has not been allowed by the respondent No. 1 & 2 to participate in the bidding process by virtue of the Clause 8.31 of the license agreement and the policy between GTIPL and JNPT. The interpretation of that clause is unambiguous. The circular dt. 26/9/2007 does not nullify the specific provision of a contractual obligation between the two parties. Hence, the interpretation of circular dt. 26/9/2007 is also lucid and clear. However, it cannot be treated to overrule the specific provisions of a commercial agreement signed between the two parties.

27. It is the contention of respondent No. 1 that the NSICT which is already operating a container terminal at JNPT does not have any clause forbidding them to participate in the additional or existing facilities whereas the petitioner has signed an agreement which debars him from bidding in such facilities. It is not possible to relieve the petitioner from the said restriction contained in Clause 8.31 of LA as such a step may affect those bidders who may not have participated in the bidding process for the bulk terminal for the project only because this restriction was included in the draft LA. Moreover, as stated earlier, the policy guidelines contained in this Ministry's letter dt. 26/9/2007 cannot be given effect from a retrospective date. Such a move can also impact the LA signed by private operators in other major ports during the period before September, 2007. The LA between GTIPL and JNPT signed on 10th August, 2004 is a commercial contract, hence, modification of any clause of the agreement may have impact on the other clauses also and sought that the petition be dismissed.

28. In rejoinder, the petitioner has contended that the respondent No. 1 is acting contrary to its policy of encouraging competition and preventing monopoly and that the contentions of Respondent No. 1 in its Affidavit under Reply are clearly inconsistent and contradictory which is demonstrated by the following:

(a) NSICT (owned by Dubai Ports) was awarded the contract for the 1st Container Terminal. Clause 2.3 of the license agreement with NSICT inter alia reads as under:

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

(b) Despite the aforesaid freedom expressly reserved by the license agreement in favour of NSICT permitting NSICT to bid in future for any other container terminal at JNPT, on account of its declared policy and in consonance therewith i.e. policy dated 26th October 1996 (hereinafter referred to as the "1996 policy"), NSICT was not permitted by Respondent No. 1 to bid for the 2nd Container Terminal.

(c) The principal ground on which the Union of India refused permission to NSICT to bid for the 2nd Container Terminal was the 1996 policy, which according to the Union of India, unless enforced, would result in perpetuating/ creating a monopoly in favour existing terminal contractors.

(d) NSICT's attempt to challenge the refusal by the Union of India to allow it to bid for the 2nd Container Terminal was stoutly resisted by the Union of India in the course of W.P No. 3083 of 2002 filed by NSICT inter alia against the Union of India.

(e) The following observations extracted from the order and judgment dated 28th January 2003 of a Division Bench of this Hon'ble Court (Exhibit "B", Affidavit in Reply of Respondent No. 2 dated 7th December 2009), illustrate the above:

? On 26th October 1996, the Central Government issued guidelines to be followed by Major Port Trusts and for private sector participation in Major Ports.

? It is the case of the respondents that the petitioners were specifically excluded from participating in the said tender in view of the policy of the Government of India to prevent creation of private monopolies in ports sector. According to the respondents the decision to exclude the existing operator of container terminal at JNP was taken at the level of Ministry of Shipping in consultation with the Ministry of Law.

? Therefore it is in public interest to ensure that there is a spread of risk brought about by having more than one operator and not allowing concentration of work in one operator only. It is the duty of the respondent No. 1 to ensure promotion of healthy competition and give opportunity to other operators. If the petitioners are permitted to bid and if they are successful in the bid it would lead

concentration of large chunk of container operation in India and especially at JNP. Therefore, the policy decision was taken not to permit the petitioner and their associate companies to bid with a view to promote intra port competition and to enhance the efficiency for better services.

(f) The Petitioner, who had not been awarded any contract in respect of a Container Terminal at JNPT , was not only permitted to bid for the 2nd Container Terminal but came to be awarded the contract. This was on 10th August 2004.

(g) As is now the admitted position, in keeping with the 1996 policy, Respondent No. 2, inserted a clause - Clause 8.31 into the license agreement dated 10th August 2004 between Gateway Terminals India Pvt. Ltd. and Respondent No. 2 (hereinafter referred to as the "License Agreement") which reads as under:

8.31. The Licensee acknowledges and agrees that it shall forgo 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 Even 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."

(h) The fact that this Clause 8.31 was inserted not of the Petitioner's or JNPT's i.e. the contracting parties - free will, but on account of the 1996 policy is borne out of following statement which appears in para 12(l) of Respondent No. 2 " s Affidavit in Reply dated 7th December 2009:

In view of the clear policy and guidelines issued by the Government of India that the ports should ensure that the private investment does not result in a creation of private monopolies and to promote competition and also in view of the challenge to the said guidelines and policy by the earlier licensee by way of a Writ Petition No. 3083 of 2002 , the Respondents incorporated a specific clause in the said License Agreement dated 10th August 2004....

(i) By a Circular No. PD12013/2/2005JNPT dated 26th policy"), the Respondent No. 1 altered the 1996 policy by providing that even existing contractors would be entitled to bid for setting up of a container terminal at the same port albeit for the next but one already awarded to the successful contracting party.

(j) The background to the change in the 1996 policy, as altered by the 2007 policy, is to be found in the Chibber Committee report, referred to in the Petitioner's Affidavit dated 12th January 2010.

(k) The Petitioner, therefore, rightly contends that, the Petitioner would also be extended the benefit of the 2007 policy. This legitimate expectation of the Petitioner was fortified by the fact that the Union of India, which had succeeded in debarring NSICT in bidding for the 2nd Container Terminal -on account of the 1996 policy permitted NSICT to bid for the 3rd Container Terminal in keeping with the 2007 policy. NSICT is also allowed to bid for the tender for the 4th Container Terminal.

(l) Despite this, the Respondent No. 2 nevertheless by its letter dated 1st December 2009 addressed to the Petitioner (Exhibit "A", page 3, Petitioner's Affidavit dated 4th December 2009) interalia stated as under:

This is in continuation to our earlier letter dtd. 7th Aug" 2009. After reexamination of the issue in consultation with the Ministry of Law, Govt. of India, it has been decided by the Ministry of Shipping that M/s. GTIPL and or their associates may not be allowed to participate in the bidding for the development of the 4th container terminal.

(m) It is thus apparent that the legitimate expectation of the Petitioner has been denied illegally, arbitrarily and in a wholly discriminatory manner. Whereas on the one hand, the Union of India succeeded in overriding the contractual terms contained in Clause 2.3 of NSICT's license agreement dated 3rd July 1997, by relying upon the 1996 policy, at the same time is unwilling to extend the benefit of the 2007 policy to the Petitioner by relying upon Clause 8.31 of the License Agreement.

(n) This is nothing but a case of "pick and choose" and utter duplicity on the part of the Respondent No. 1.

(o) At the same time, when seen in the context of para 5 of the Petitioner's Affidavit dated 12th January 2010, it is apparent that the bogey of fostering a monopoly is destroyed when it is found that Dubai Port has been awarded directly/ indirectly 5 contracts all over India, to the knowledge of Respondent No. 1, and as and when the 3rd Container Terminal at JNPT is taken up for bidding is likely to be awarded the same, in the event of they being found to be the highest bidder.

And, therefore, it is contended that Clause 8.31 of the licence agreement should not come in the way of the petitioner from bidding for any tender until the year 2034. Otherwise, the effect of the said clause is that whereas other successful bidders during the next two decades would, under the existing 2007 policy, be successful bidders for tenders floated by Respondent No. 2 and operate one (if not more) terminals, the Petitioner until the year 2034, is precluded from bidding for any tender for a Container Terminal at JNPT , which according to the

petitioner, is clearly contrary to the existing policy, which the Respondents claim is in public interest and aimed at curtailing monopoly in major ports. The petitioners are also denied that if the Petitioner is allowed to bid it would open doors for a number of cases from bidders who had not applied for the bidding in connection with redevelopment of the bulk terminal into a Container Terminal which was awarded to the Petitioner and it says that the petitioner is deprived of its right to participate in the tender contrary to the object and guidelines contained in the 2007 policy which is to promote competition and prevent monopoly and benefits associates like NSICT whose agreement dated 3.7.1997 does not contain clause

8.31 and that there are no other bidders who may not have participated owing to Clause 8.31 of the licence agreement. The parties who have not signed a license agreement can never be precluded from bidding for other tenders. Since the said new 2007 policy has superseded the earlier 1996 police, the same should apply to the petitioner.

29. Mr. Dwarkadas, the learned Counsel appearing for the petitioner submitted that on the one hand the respondents seek to enforce a published guideline in the year 1996 and impose it upon the petitioner, and conveniently disregards the subsequent circular in which the respondent No. 1 has clearly permitted the successful bidder of a tender to raise its bid for the next but one subsequent tender after the immediate one awarded to it. This, according to the learned Counsel, is clearly arbitrary, unreasonable and discriminatory. Pertinently, in case of NSICT (now taken over by Dubai Port) who were successful for the 1st Container Terminal have been permitted to raise their bid for the 3rd Container Terminal which the Respondent No. 2 claims is still to be finalised. It is submitted that the very fact that NSICT has not been precluded by the Respondent No. 2 from bidding in the tender for the 3rd Container Terminal only goes to show that the Respondent No. 2 is acting in an arbitrary, discriminatory and capricious manner. It is further contended by the learned Counsel that the respondents action and conduct militates against the Circular of 2007 and their concern to avoid private monopoly and promote competition. It is submitted that the said Circular debars only those successful bidders who have applied for the immediate next tender and not for the tenders subsequent to the immediate next tender. It is contended that the avowed object which is sought to be achieved has to eliminate monopoly stands defeated by disqualifying the petitioner and that the decision of this Hon'ble Court passed in the Writ Petition No. 3083 of 2002, (decided on 28.1.2003) is not applicable in the facts and circumstances of the present case as the petitioner's case is on an entirely different footing. It is submitted that in the P & O case, they were the successful bidders for the 1st Container Terminal at JNPT and wanted to bid for the immediate next tender for the 2nd Container Terminal at JNPT. P & O were already controlling 48% of the container traffic in India. Had P & O succeeded in the tender for the 2nd Container Terminal, it would in effect have controlled an overwhelming percentage of container traffic in India and could have held both the Container

Terminals that were to be developed. The said Circular issued in 2007 has since permitted the successful bidders from bidding for the tender subsequent to the immediate next tender and if P&O has been permitted to bid for the tender for the 3rd Container Terminal then there is no reason why the petitioner cannot be permitted to do so. Mr. Dwarkadas laid emphasis on the fact that as the public policy adopted in the year 1996 stands superseded by the circular issued in 2007, Clause 8.31 becomes redundant and the petitioner cannot be denied right to participate in the tender. Mr. Dwarkadas emphasised that by virtue of the change in the policy, Clause 8.31 of the said agreement not being consistent with the interest of the public, its application would stand eclipsed as the said clause no longer protects public interest and that the restraint is unreasonable as it tends to injure the public by depriving free and fair competition. Mr. Dwarkadas has also drawn our attention to the correspondence between the parties in support of his contention and submitted that in the light of the draft policy of 2010, the Court has to adopt a liberal construction and relieve the petitioner of the restraint imposed by Clause 8.31 of the license agreement which was specifically incorporated in view of the published guidelines of the Government of India to prevent private monopoly and promote equal and competitive terms. In light of the circular which prevents a party to bid for the one but next terminal and, therefore, Clause 8.31 is unreasonable restriction, discriminatory and does not treat equal business opportunities.

30. Mr. Khambata, the learned ASG., submitted that in the judgment rendered by this Court in Writ Petition No. 3083 of 2002 it has been held that the decision to exclude (the petitioners in that case) from participating in the bid for the new container terminal was taken in public interest. By placing reliance on the circular of 2007 that there was no previous agreement between the parties imposing such a restraint, this was upheld by the Supreme Court. It is submitted that the respondent No. 1 has taken a specific stand in their affidavit in reply that the guidelines/policy of the government was to eliminate monopoly and promote competition and that the same is being consistently followed. Mr. Khambata has also drawn our attention to the decision of the Supreme Court rendered in the case of *Puravankara Projects Ltd. v. Hotel Venus International and Ors.* (supra) wherein it has been held :

23. There is a vital distinction between the administrative and contractual law decisions.

29. The difference between administrative law and contractual law was succinctly stated in *Indian Oil Corporation Ltd. Vs. Amritsar Gas Service and Others*, . It was noted in paras 9, 10 and 11 as follows:

9. The argument advanced by Shri Harish Salve on behalf of the appellant Corporation to the validity of the award are these. The first contention is that the validity of the award has to be tested on the principle of private law and the law of contracts and not on the touchstone of constitutional limitations to which the Indian Oil Corporation Ltd., as an instrumentality of the State may be

subject since the suit was based on breach of contract alone and the arbitrator who proceeded only on that basis to grant the reliefs. It is urged that for this reason the further questions of public law do not arise on the facts of the present case. The next contention is that the relief of restoration of the contract granted by the arbitrator is contrary to law being against the express prohibition in Sections 14 and 16 of the Specific Relief Act. It is urged that the contract being admittedly revokable at the instance of either party in accordance with Clause 28 of the agreement, the only relief which can be granted on the finding of breach of contract by the appellantCorporation is damages for the notice period of 30 days and no more. It was then urged that the reasons given in the award for granting the relief of restoration of the distributorship are untenable, being contrary to law. Shri Salve contended that the propositions of law indicated in the award and applied for granting the reliefs disclose an error of law apparent on the face of the award. It was also urged that the onus of proving valid termination of the contract was wrongly placed by the arbitrator on the appellant Corporation instead of requiring the plaintiffrespondent 1 to prove that the termination was invalid. It was also contended that the failure of the arbitrator to consider and decide the appellantCorporation's counterclaim when the whole suit was referred for decision constitute legal misconduct.

10. In reply, Shri Sehgal on behalf of respondent 1 contended that there is a presumption of validity of award and the objections not taken specifically must be ignored. This argument of Shri Sehgal relates to the grievance of the appellant relating to placing the onus on the appellantCorporation of proving validity of the termination. This contention of Shri Sehgal must be upheld since no such specific ground is taken in the objections of the appellant. Moreover, there being a clear finding by the arbitrator of breach of contract by invalid termination, the question of onus is really of no significance. The other arguments of Shri Sehgal are that the termination of distributorship casts stigma on the partners of the firm; counter claim of the appellant Corporation was rightly not considered since it was not made before the order of the reference; the reference made being of all disputes in the suit, the nature of relief to be granted was also within the arbitrator's jurisdiction; and interest also must be awarded to the respondent.

11. We may at the outset mention that it is not necessary in the present case to go into the constitutional limitations of Article 14 of the Constitution to which the appellantCorporation as an instrumentality of the State would be subject particularly in view of the recent decisions of this Court in *Dwarkadas Marfatia and Sons v. Board of Trustees of the Bombay, Mahabir Auto Stores v. Indian Oil Corporation* and *Shrilekha Vidyarathi v. State of U.P.* This is on account of the fact that the suit was based only on breach of contract and remedies flowing there from and it is on this basis alone that the arbitrator has given his award. Shri Salve is therefore right in contending that the further questions of public law basis on Article 14 of the Constitution do not arise for decision in the present case and the matter must be decided strictly in the realm of private law rights

governed by the general law relating to contracts with reference to the provisions of the Specific Relief Act provided for nonenforceability of certain types of contracts. It is, therefore, in this background that we proceed to consider and decide the contentions raised before us.

In essence, it was held that tender terms are contractual and it is the privilege of the Government which invites its tenders and Courts did not have jurisdiction to judge as to how the tender terms would have to be framed.

32. In Assistant Excise Commissioner and Others Vs. Issac Peter and Others, this Court highlighted that the concept of administrative law and fairness should not be mixed up with fair or unfair terms of the contract. It was stated in no uncertain terms that duty to act fairly which is sought to be imported into a contract to modify and/or alter its terms and/or to create an obligation upon the State Government which is not there in the contract is not covered by any doctrine of fairness or reasonableness. The duty to act fairly and reasonably is a doctrine developed in administrative law field to ensure the rule of law and to prevent failure of justice when the action is administrative in nature.

and submitted that it will not be proper for this Court to alter terms of the contract in exercise of its power of judicial review. He has further relief upon the case of Radhakrishna Agarwal and Others Vs. State of Bihar and Others, , in order to meet the contention of the petitioners that they have been discriminated and submitted that the Supreme Court while considering the question of violation of Article 14 has held :

10. It is thus clear that the Erusian Equipment & Chemicals Ltd."s case (supra) involved discrimination at the very threshold or at the time of entry into the field o,f consideration of persons. with whom the Government could contract at all. At this stage, no doubt, the State acts purely in its executive capacity and is bound by the obligations which dealings of the State with the individual citizens import into every transaction entered into in exercise of its constitutional powers. But, after the State or its agents have entered into the field of ordinary contract, the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines rights and obligations of the parties inter se. No question arises of violation of Article 14 or of any other constitutional provision when the State of its agents, purporting to act within this field, perform any act. In this sphere, they can only claim rights conferred upon them by contract and are bound by the terms of the contract only unless some statute steps in and confers some special statutory power or obligation on the State in the contractual field which is apart from contract.

It is submitted by the learned ASG that if at all the petitioners want that Clause 8.31 of the license agreement deserves to be deleted they have an alternative remedy by way of a reference under the Arbitration and Conciliation Act and they cannot seek the same in this case and placed reliance on the case of the Supreme Court in the case of State of U.P. and others Vs. Bridge and Roof Co.

(India) Ltd., .

31. It is contended on behalf of respondent No. 2 that though the petitioners were informed of their exclusion in any form from bidding for any future/existing facilities at JNPT by letter dated 18.6.2008 (chose to file the petition in July/August, 2009) and as there is substantial delay, the petition can be dismissed on this count alone.

32. It is further submitted that as held in the case of Dhampur Sugar (Kashipur) Ltd. Vs. State of Uttranchal and Others,

The High Court was right in considering the facts and circumstances in their entirety and in holding that the action of the authorities could not be said to be illegal or otherwise objectionable. Although earlier an application made IGL was rejected but it was because of the policy then in force. Since the policy was thereafter changed, grant of licence in favour of IGL could not be objected to by the appellant.

It is well settled that public authorities must have liberty and freedom in framing policies. Although the discretion is not absolute, unqualified, unfettered or uncanalised and judiciary has control over all executive actions, it is also well established that courts are ill equipped to deal with these matters. In complex social, economic and commercial matters, decisions have to be taken by governmental authorities keeping in view several factors, and it is not possible for courts to consider competing claims and conflicting interests and to conclude which way the balance tilted. There are no objective justiciable or manageable standards to judge the issues nor can such questions be decided on a priori considerations.

It is well settled that every power must be exercised bona fide and in good faith. In other words, every action of a public authority must be based on utmost good faith, genuine satisfaction and ought to be supported by reason and rationale. It is, therefore, not only the power but the duty of the court to ensure that all authorities exercise their powers properly, lawfully and in good faith. If powers are exercised with oblique motive, bad faith or for extraneous or irrelevant considerations, there is no exercise of power known to law and the action cannot be termed as action in accordance with law. But a court of law is not expected to propel into "the uncharted ocean" of government policies. Once it is held that the Government has power to frame and reframe , change and rechange , adjust and readjust policy, the impugned action cannot be declared illegal, arbitrary or ultra vires the provisions of the Constitution only on the ground that the earlier policy had been given up , changed or not adhered to. It also cannot be attacked on the plea that the earlier policy was better and suited to the prevailing situation.

33. The crucial issue which arises for our consideration is as to entered between GIT and respondent No. 2 disqualifies the petitioner from participating in any tender floated by respondent No. 2 in respect of container terminal at JNPT for a

period of 30 years i.e. till 2034.

34. The petitioner has been disqualified solely on the ground that as the petitioner is a party to the license agreement dated 10.8.2004 which contains a restraint clause i.e. Clause 8.31 wherein it has been specifically acknowledged and agreed to by GIT , a joint venture company of the petitioner, that it shall forgo 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. At that time the petitioner has entered into the contract in spite of the term of restraint for a period of 30 years i.e. till 2034 which has been assailed primarily on the ground that the said agreement came to be entered into between the parties pursuant to the guidelines issued in the year 1996 by Ministry of Shipping to be followed by the Ports for Private Sector Participation in Major Ports so as to ensure that private investment does not result in creation of private monopoly. Thereafter the Ministry of Shipping has issued guidelines under letter No. PD12013/2/2005JNPT dated 26.9.2007 wherein it has been mentioned that a formal policy is to be finalized and notified and in the meantime in view of subsequent change in the policy carried out by the Government, the blanket restriction was modified and accordingly as per 2007 policy even existing contractors were permitted to bid for setting up of a container terminal at the same port albeit for the next but one already awarded to the successful contracting party and, therefore, the petitioner was also to be extended the benefit of the 2007 policy. It has been specifically pointed out that the Union of India had succeeded in debarring the petitioner from participating in the bid on account of 1996 policy but permitted NSICT to bid for the third container terminal in keeping with 2007 policy as they were also to bid for the fourth container terminal and , therefore, the petitioner has been denied illegally, arbitrarily and in wholly discriminatory manner the right to bid for the tender for the fourth container terminal.

35. It is further contended that even otherwise it being an ad hoc policy, the respondents ought to have given a liberal construction to Clause 8.31 as it was done in the case of NSICT.

36. It is submitted that the stand taken by the respondents by enforcement of Clause 8.31 goes contrary to the well accepted principle of reasonableness.

37. In so far as the case of the petitioner that due to change restriction, has to be put to test by considering the policy which was in vogue on the date when the parties entered into the contract and the said restriction was imposed and on the relevant date i.e. 10.2.2004 when GIT which was a joint venture company of the petitioner and Container Corporation of India Ltd. , and at the relevant time the 1996 police was in vogue and in keeping with the said policy, the respondent No. 2 have inserted Clause 8.31 into the license agreement dated 10.8.2004 between GTI and Respondent No. 2 and, therefore, the petitioner cannot raise a plea that

it operates unfairly in the circumstances on the unveil of new policy as issued in the circular of 2007 for the reason that the petitioner as well as others who participated in the tender have entered into the contract being fully aware of the Respondent No. 2 restraining the successful party to be awarded the contract to bid for similar contract for a period of 30 years in future and the said restriction was evenly applicable to all who participated in the tender process. Now having entered into a contract, the petitioner cannot be permitted to invoke the test of reasonableness by pleading doctrine of proportionality on having lost their right to participate in the subject contract which is much more substantial than what they received by entering into. It was for the petitioner to weigh the pros and cons before entering into the contract.

38. A subsequent change in the public policy will not to operate during the continuance of the contract and there is no provision in the contract that in such a contingency the covenant imposing restraint on the right of the petitioner to bid for future contract will not be applicable nor the circular of 2007 provides for discharging the covenant of restraint in the contract entered into between the parties as per the policy of 1996.

39. It is a well accepted principle of restraint of trade, if reasonably necessary, shall prevail unless contrary to public policy. It is not the matter of debate that the policy that was in vogue at the time was not in larger public interest and, therefore, it cannot be said, as tried to be contended, that Clause 8.31 of the agreement dated 10.8.2004 with JNPT for the development of an existing bulk Terminal at JNPT into a Container Terminal on BOT basis was not part of the contract and was inserted under duress. A person after claiming a contract taking into account its term, cannot later be allowed to assail validity of its terms or the rules constituting the terms of the contract by invoking the extraordinary jurisdiction of the High Court under Article 226 of the Constitution of India. It is now well settled by catena of decisions *Orissa State Financial Corporation Vs. Narsingh Ch. Nayak and Others*, that Court cannot rewrite or replace an existing contract by passing directions under its power of writ jurisdiction. The Additional Solicitor General appearing for the respondents has pointed out that if at all the petitioners find that the terms of the contract require any modification the same cannot be sought in this petition as the agreement dated 10.8.2004 itself provides for inhouse remedy for settlement of disputes and that the appropriate forum for modifying the terms of the contract would be either to go to Civil Court or invoke the arbitration clause in the agreement. [(i) *State of Orissa and others Vs. Narain Prasad and others*, etc. etc., and (ii) *Pimpri Chinchwad Municipal Corporation and Others Vs. Gayatri Construction Company and Another*,

40. We, therefore, do find that the decision of the respondents to disqualify the petitioner from bidding for the tender by referring to Clause 8.31 of the license agreement dated 10.8.2004 entered into between M/s. Gateway Terminal India Private Limited and the respondent No. 2 is just and proper. The same does not call for any interference. Therefore, the petition is dismissed. Rule stands

discharged.

41. After we have dismissed the petition, the learned Counsel for the petitioner submitted that the interim order in respect of stay of processing the tender be extended for a period of four weeks. The learned Counsel for the Respondents strongly objects to the stay of processing the tender on the ground that the work of the terminal would further be delayed, if the time is extended. In order to be fair, we are extending the interim arrangement for a period of two weeks from today.