

(2008) 10 BOM CK 0096

In the Bombay High Court

Case No : Writ Petition No. 1618 of 2008

SKS Logistics (I) Limited

APPELLANT

Vs

Mumbai Port Trust, Indira Container Terminal Private Limited
and Union of India (UOI)

RESPONDENT

Date of Decision : 01-10-2008

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1), 19(6)
Contract Act, 1872 — Section 151, 152, 161
Major Port Trusts Act, 1963 — Section 29, 34, 37, 38, 42

Citation : (2008) 6 BomCR 14 : (2008) 110 BOMLR 3445

Hon'ble Judges : P.B. Majmudar, J;A.A. Sayed, J

Bench : Division Bench

Advocate : C.U. Singh, A.S. Daver and S. Khedekar, instructed by Thakore Jariwala and Associates, for the Appellant; E.P. Bharucha and Umesh Shetty, instructed by Mulla and Mulla and Cragie Blunt and Caroe for respondent No. 1, D.D. Madon Vikram Nankani and Sushanth Murthy, instructed by Madhur R. Baya and Mandar Goswami, for the Respondent

Final Decision : Dismissed

Judgement

P.B. Majmudar, J.—Rule. Learned Counsel appearing for respective respondents waive service of Rule. With the consent of the learned Counsel appearing for the parties, the matter is taken up for final hearing at the admission stage itself.

2. By filing this petition, the petitioners have challenged the decision of respondent No. 1 by which respondent No. 2 has been granted license to handle container traffic at the Ballard Pier Station Container Terminal (BPS) at the Port of Mumbai to the exclusion of others for a period of five years from the date of the license agreement or two years from the date of commissioning of Offshore Container Terminal (OCT) whichever is earlier. According to the petitioners, the said action of respondent No. 1 amounts to conferring a monopoly upon respondent No. 2. It is also prayed that a direction may be issued to the respondents to forthwith cease and desist from in any manner preventing the

petitioners from carrying on their business of using the Berth 14 VD or any other suitable available berth in accordance with law with a further direction that the petitioners be provided with necessary logistical support such as transport etc. by respondent No. 1 for handling the containers. The petitioners also prayed for an appropriate writ, order or direction for setting aside the letter dated 28th March, 2008, issued by respondent No. 1 by which it was clarified that respondent No. 2 would handle all containers discharged/shipped from/to the petitioners gearless barges at BPS berth.

3. The petitioners are a Company, incorporated under the provisions of the Companies Act, 1956. The respondent No. 1 is in charge of all operations conducted at the Mumbai Port Trust and respondent No. 2 Company is carrying on business as BOT Operator for offshore container terminal with whom respondent No. 1 has entered into a license agreement. The case of the petitioners is that it is carrying on business of container transportation between the Mumbai Port Trust (hereinafter for brevity sake referred to as MPT) and Jawaharlal Nehru Port Trust (hereinafter for brevity sake referred to as JNPT) and in the course of its business, the petitioners carry on business of carrying the containers to and from JNPT to MPT for the last several years. According to the petitioners, these operations are trans-shipping of containers, whereby the containers unloaded from large container ships at one Port, are transhipped in small lots as per the shippers requirements to another terminal which is not too distant. It is the case of the petitioners that the operations at the MPT is being carried out by the petitioners at Berth 14 at the Victoria Dock and for the said purpose, the petitioners use barges and shore-based crane for loading and unloading the containers. It is the case of the petitioners that they are using its own small barges which do not have their own onboard cranes, which are known as Gearless Container Vessels. According to the petitioners, the petitioners are the sole and the largest shippers transporting the containers between MPT and JNPT and for the purpose of carrying on their business, the petitioners are using the logistical support from MPT by way of transport and other infrastructure. It is also the case of the petitioners that the petitioners perform an important public service by helping to decongest the Ports and Bombay Harbour and by economically transshipping small container loads from one Port to the neighbouring Port.

4. The Respondent No. 1 had floated a tender for the purpose of construction of offshore container berth and development of Container Terminal at Mumbai Port and tenders were invited by way of public notice. It is the say of the petitioners that the tenders were invited with a view to create and manage an offshore container terminal facility. As per the averments in the petition, the petitioners have made an application under the Right to Information Act for the copy of the tender and the contract. However, only tender copy was made available to the petitioners.

5. The respondent No. 2 was ultimately declared as successful tenderer and

pursuant to the same, license agreement was executed between respondent No. 1 and respondent No. 2 for building, operating and managing an Offshore Container Terminal (OCT). In paragraph 11 of the petition, it is averred by the petitioners that the said license agreement was signed on 3rd December, 2007. The said agreement envisages building, operation and management of one offshore container terminal in the Bombay Harbour and in the interregnum till the offshore container terminal is ready for operations, the licensee i.e. Respondent No. 2 was permitted to carry out developments, modifications and augmentation of the facilities of the existing Ballard Pier Station in order to give the licensee an opportunity to build up their clientele. The grievance projected by the petitioners is that as per Clause 8.50 of the said agreement, there is a provision for grant of rights to handle container traffic and by the said clause, rights have been given to respondent No. 2 to handle all container traffic in the Ballard Pier Station (BPS) to the exclusion of all others which may confer monopoly upon respondent No. 2. According to the petitioners, the entire container operations at MPT would be handled by respondent No. 2 pursuant to the 4th aforesaid license agreement. The petitioners by their letter dated December, 2007, sought a clarification on the use of Ballard Pier Station Berth and also sought a clarification whether they would be allowed to continue to operate at other berths and/or docks which would be available so that the petitioners may not be dependent on respondent No. 2 for the purpose of handling their containers which was hitherto being done independently for the last so many years. The petitioners also addressed a letter to the Chairman of MPT for seeking clarification on this aspect. The petitioners thereafter received a reply from respondent No. 1 on 17th January, 2008, stating that respondent No. 2 is likely to take over the container operations from April, 2008 and by the impugned letter dated 28th March, 2008, the petitioners were informed by respondent No. 1 in reply to the letter of petitioners dated 10th March, 2008 that all container vessels in Mumbai Port would be required to be handled at Ballard Pier Station berth and respondent No. 2 would be handling all containers discharged from the said berth. According to the petitioners, such an action on the part of respondent No. 1 is nothing but creating a monopoly in favour of respondent No. 2. The petitioners thereafter wrote a letter dated 2nd May, 2008, by way of representation to the first respondent to reconsider the said position. According to the petitioners, under the license agreement, respondent No. 1 granted rights to commence the work and the petitioner would not be permitted to avail of any facility at the MPT or at any of the Docks/Berths for the purpose of carrying on business save and except at the Ballard Pier Station with the permission of respondent No. 2. Being aggrieved by the said action of the first respondent, the petitioners have filed the present petition seeking reliefs as stated above.

6. The petition has been resisted by respondent No. 1-MPT by filing reply. As per the averments in the reply, under the provisions of Section 42 the Major Port Trusts Act, 1963 (hereinafter referred to as the Act), as amended, the Board of

Trustees of respondent No. 1 is authorised to undertake services in respect of landing goods between vessels in the Ports and wharves, piers, quays or docks belonging to or in the possession of respondent No. 1 and to receive, remove, shift, transport, store or deliver goods brought within the premises of respondent No. 1. It is averred in the reply that as per Section 42 (3) and 3 (a) of the said Act, respondent No. 1 with the previous sanction of the Central Government, can authorize any person to perform any of the services mentioned in Sub-section (1) on such terms and conditions as may be agreed upon and also to enter into any agreement or other arrangement, whether by way of partnership, joint venture or in any other manner with any body, corporate or any other person to perform any of the services and functions assigned to respondent No. 1 under the said Act on such terms and conditions as may be agreed upon. According to respondent No. 1, under the provisions of Section 34 of the Act, respondent No. 1 is entitled to enter into contracts as provided thereunder. In paragraph 11 of the reply of first respondent, it is averred that as per the guidelines issued by the Central Government and in exercise of the statutory powers and duties vested/enjoined upon respondent No. 1 for the purpose of expansion of port infrastructure and with an objective of efficient handling of sea borne traffic and particularly container traffic on account of increasing foreign and coastal trade and also for the purpose of improving the efficiency, productivity, quality of service and competency in port services, in or about August, 2004, a conscientious decision was taken to re-invite tenders for participation of private sector for construction of offshore container berth and development of container terminal on built, operate and transfer basis in Mumbai Harbour and also for operation of Ballard Pier Station container terminal. Accordingly, the grant of license for operations of the Ballard Pier Station to the eligible bidders was for a period of five years from the date of signing of the license agreement or two years from the date of commissioning of the terminal whichever is earlier thereafter the said Ballard Pier Station Terminal would be transferred back to respondent No. 1. As per the reply, various bidders submitted their bids and ultimately the contract was awarded to respondent No. 2 who was the successful bidder. 3rd Subsequently, a full-fledged license agreement was entered into on December, 2007, between respondent No. 1 and respondent No. 2. As per Clause 8.50 of the agreement, during the period when respondent No. 2 is in possession of the said terminal, in the case of gearless container vessels, full exclusivity to handle container traffic at the Port of Mumbai is granted in favour of respondent No. 2 for a maximum period of 5 years from the date of award of license or 2 years from the date of commissioning of offshore container berth whichever is earlier. In paragraph 16 of the reply, it is averred that under Article 8 and Clause 8.1 and Sub-clause (vii) of the license agreement, respondent No. 2 is bound and liable to take charge of the goods and/or containers discharged from the vessels and give necessary receipts for the same u/s 42 of the Act and respondent No. 1 is bound and liable to manage and operate the project facilities and services on a common user basis open to any and all shipping lines, importers, exporters, shippers, consignees and receivers and refrain from indulging in any unfair and

discriminatory tactics against any user or potential user thereof provided that the said restriction would not prevent respondent No. 2 from engaging the selective tariff discounting or rebating in order to optimise respondent No. 2's sustainable profitability in accordance with sound business practices. It is mandatory on the part of respondent No. 2 as per Article 8 Clause 8.1, Sub-clause (xiii) of the license agreement to obtain approval of Tariff Authority in the matter of Tariff Fixation. It is also the say of respondent No. 1 in the reply that by letters dated 17th January, 2008 and 28th March, 2008, respondent No. 1 clarified to the petitioners that respondent No. 2 would handle all containers, discharged/shipped from the gearless barges of the petitioners at the Ballard Pier Station berth and that the container handling in Mumbai port would be performed at BPS berth. As per the averments in para 20 of the reply, the petitioners like several other owners of gearless container vessels are permitted and entitled to discharge their containers at the said BPS on payment of requisite tariff as approved by the Tariff Authority on non-discriminatory basis and that except the petitioners, no other owners of gearless container vessels have raised any objection regarding centralization of container traffic handling operations, inter alia, in respect of gearless vessels at the said BPS to the exclusion of all other areas in MPT. In paragraph 29 of the reply, it is averred by respondent No. 1 that the tender was floated not only for the purpose of construction of offshore container berth and development of container terminal at Mumbai Port but also for the purpose of handing over of one of the existing container berth in Indira Dock for handling containers for a defined period till the new terminal becomes operational which may help the operator to have regular cash flow so as to build up the traffic during the construction period. It is stated in paragraph 31 that by no stretch of imagination it can even be conceived that by awarding the said license in respect of the said BPS to respondent No. 2, any monopoly has been created by respondent No. 1. The respondent No. 2 is bound and liable to offer their services to all users on non-discriminatory basis and subject to the traffic control by the tariff authorities and the petitioners are at liberty to carry on their container transportation business through their gearless vessels from the said container terminal at BPS. On these and such other averments, the petition has been resisted by respondent No. 1.

7. On behalf of respondent No. 2 an affidavit in reply has also been filed. In para 5 of the said reply, it is stated that the concession under the license agreement was granted under a tendering process and the petitioner did not participate in the said tendering process and, therefore, the petitioner has no locus to file the present petition. In paragraph 8 of the reply it is averred that the project is a purely commercial venture aimed at the development of the Mumbai Port as a preferred port of call for container cargo. The right to exclusively handle container cargo has been accorded by respondent No. 1 on respondent No. 2 for valuable consideration, the consideration being the payment of an upfront fees of Rs. 4.50 crores, an annual license fee of Rs. 600 per square meter per annum (subject to 5% escalation every year) and a share of actual revenue with a floor

as per Article 112 of the License Agreement. According to respondent No. 2, the project also requires them to develop and equip the BPS with a minimum of 1,50,000 TEUs of container traffic to be handled at the end of the second year, which is about 250% of the current volume handled at the port. Such grant of exclusivity is also consistent with the country's stated economic policy on infrastructure development. It is also averred in the reply that the decision of respondent No. 1 to make the Ballard Pier Station the exclusive berth for handling containerised cargo simultaneously with the development and enhancement of the handling capacity of the BPS as also the engineering, construction, operation of the OCT is consistent with the objective of the offshore container terminal project, which is to develop the Mumbai Port as a world-class facility for handling containerised cargo with a capacity to handle over 1 million TEUs per annum, up from the current 60,000 TEUs per annum. It is also the say of respondent No. 2 that the petitioners are one of the several line operators who have been loading/unloading containers at berth 14 on the Victoria Dock. The petitioners are not container terminal operator. The said berth has also never been allotted to the petitioners either exclusively or preferentially or otherwise and the petitioners cannot claim any rights over the said berth or claim an alternative berth. On the aforesaid averments, respondent No. 2 prayed for dismissal of the petition in limine.

8. We have heard the learned Counsel appearing for the parties at length. We have gone through the documents forming part of petition as well as the license agreement which is also produced on record. We have also considered the various judgments cited at the Bar by the learned counsel for the parties.

9. By order dated 30th June, 2008, a Division Bench of this Court recorded the statement made on behalf of respondent Nos. 1 and 2 by which they had agreed to give copies of the license agreement to the petitioners. Subsequently, the license agreement is already handed over to the petitioners which also forms part of the record.

10. Mr. Singh, learned Counsel appearing on behalf of the petitioners, submitted that respondent No. 1 has no right to create monopoly in favour of respondent No. 2. Mr. Singh submitted that the petitioners are operating small barges and the petitioners have invested considerable amount in having its own crane and also engaged number of employees in carrying out the transshipment of containers. Mr. Singh submitted that Berth No. 14 at Victoria Docks has already been allotted to the petitioners and now the petitioners cannot be compelled not to use the said berth. Mr. Singh submitted that the petitioner is not challenging the contract awarded to respondent No. 2 but his grievance is only regarding creating monopoly in favour of respondent No. 2 by which respondent No. 2 has given exclusive right of container traffic in the Ballard Pier Station to the exclusion of others. It is submitted by Mr. Singh that there is no clarity as to what will happen after five years as this exclusivity is given only for five years. Mr. Singh submitted that the exclusivity clause provided in the agreement is to

be read in such a manner that it can only be an arrangement between respondent No. 1 and respondent No. 2 i.e. licensor and licensee in connection with the handling of container traffic at the Port of Mumbai, but others are not prevented from using such facility at the Port of Mumbai. Mr. Singh submitted that in case the exclusivity clause is interpreted otherwise, then it may result in monopoly in favour of respondent No. 2 which is not permissible. According to Mr. Singh, petitioners handle their own container and now they will have to depend upon respondent No. 2 and, therefore, such action is in clear violation of Article 19(1)(g) of the Constitution. It is submitted by Mr. Singh that petitioners are paying necessary charges to the Mumbai Port Trust for operating crane at 14 Victoria Dock. It is submitted by Mr. Singh that in the tender document exclusivity clause was not mentioned. In the circumstances, it is not open for respondent No. 1 to create monopoly in favour of respondent No. 2 and the said action on the part of respondent No. 1 is required to be struck down as being violative of Article 19(1)(g) of the Constitution. Mr. Singh submitted that the manner in which the monopoly as is sought to be created is illegal, null and void. The action of directing the Petitioners to take berth facility from respondent No. 2 is contrary to the Ministry's guidelines for private sector participation and also contrary to the provisions of the Act and violative of Article 14 of the Constitution of India. Mr. Singh also relied upon various judgments in order to substantiate his say that the action of respondent No. 1 in giving exclusive right to respondent No. 2 would be hit by Article 19(1)(g) of the Constitution of India.

11. Mr. Bharucha, learned Counsel appearing for respondent No. 1 submitted that it can never be said that any monopoly is created by respondent No. 1 in favour of respondent No. 2. Mr. Bharucha submitted that the petitioners are not handling cargo as cargo is being handled by respondent No. 1 and that is why the petitioners are paying charges for handling cargo to respondent No. 1. It is submitted by Mr. Bharucha that the petitioners are not having any vessel having crane facility. The petitioners are required to take permission separately for each and every barge. Mr. Bharucha submitted that all throughout respondent No. 1 has retained its control and ultimately if any damage is done to any container, it is the respondent No. 1 who is liable for the same. Mr. Bharucha has relied upon Section 29 which deals with transfer of assets and liabilities of Central Government, etc. to the Board. Mr. Bharucha also relied upon Sections 37 and 38 of the Act which read thus:

37. (1) When any dock, berth, wharf, quay, stage, jetty or pier erected at any port of port approaches under the provisions of this Act has been completed with sufficient warehouses, sheds and appliances for receiving landing or shipping goods or passengers from and upon sea-going vessels, the Board may, after obtaining the approval of the Collector of Customs and by notification published in three consecutive issues of the Official Gazette, declare that such dock, berth, wharf, quay, stage, jetty or pier is ready for receiving, landing and shipping or for landing or for shipping goods or passengers from and upon sea-going vessels.

(2) As from the date of the publication of such notification for the third time, it shall be lawful for the Board, from time to time, when there is room at such dock, berth, wharf, quay, stage, jetty or pier, or order to come alongside of such dock, berth, wharf, quay, stage, jetty or pier for the purpose of landing and shipping goods or passengers or for landing or for shipping the same, any sea-going vessel within the port or port approaches which has not commenced to discharge goods or passengers, or which being about to take in goods or passengers, has not commenced to do so. Provided that before making such order, the Board shall have regard, as far as possible, to the convenience of such vessel and of the shippers, in respect of the use of any particular dock, berth, wharf, quay, stage, jetty or pier;

Provided further that if the Board is not the conservator of the port, the Board shall not itself make the order as aforesaid but shall require the conservator of the port, or other person exercising the rights, powers, and authorities of the conservator of the port, to make such order.

38. When a sufficient number of docks, berths, wharves, quays, stages, jetties or piers have been provided at any port or port approaches as aforesaid, the Board may, after obtaining the approval of the Collector of Customs and by notification published in three consecutive issues of the Official Gazette, direct that no goods or passenger shall be landed or shipped from or upon any sea-going vessel within the port or port approaches otherwise than at such docks, berths, wharves, quays, stages, jetties or piers, except with the sanction of the Board and in accordance with such conditions as the Board may specify.

It is submitted by Mr. Bharucha that respondent No. 1 can always regulate the traffic and respondent No. 1 can divert any vessels at any jetty. Reference is also made to Section 42 of the Act which reads thus:

42. (1) A Board shall have power to undertake the following services:

(a) landing, shipping or transshipping passengers and goods between vessels in the port and the wharves, piers, quays or docks belonging to or in the possession of the Board;

(b) receiving, removing, shifting, transporting, storing or delivering goods brought within the Board's premises;

(c) carrying passengers by rail or by other means within the limits of the port or port approaches, subject to such restrictions and conditions as the Central Government may think fit to impose;

(d) receiving and delivering, transporting and booking and despatching goods originating in the vessels in the port and intended for carriage by the neighbouring railways, or vice versa, as a railway administration under the Indian Railways Act, 1890; and

(e) piloting, hauling, mooring, remooring, hooking, or measuring of vessels or

any other service in respect of vessels.

(2) A Board may, if so requested by the owner, take charge of the goods for the purpose of performing the service or services and shall give a receipt in such form as the Board may specify.

(3) Notwithstanding anything contained in this section, the Board may, with the previous sanction of the Central Government, authorise any person to perform any of the services mentioned in Sub-section (1) on such terms and conditions as may be agreed upon.

(4) No person authorised under Sub-section (3) shall charge or recover for such service any sum in excess of the amount specified by the Authority, by notification in the Official Gazette.

(5) Any such person shall, if so required by the owner, perform in respect of goods any of the said services and for that purpose take charge of the goods and give a receipt in such form as the Board may specify

(6) The responsibility of any such person for the loss, destruction or deterioration of goods of which he has taken charge shall, subject to the other provisions of this Act, be that of a bailee under Sections 151, 152 and 161 of the Indian Contract Act, 1872.

(7) After any goods have been taken charge of and a receipt given for them under this Section, no liability for any loss or damage which may occur to them shall attach to any person to whom a receipt has been given or to the master or owner of the vessel from which the goods have been landed or transhipped.

It is submitted by Mr. Bharucha that simply because the petitioners are having their own crane facility at 14 Vitoria Docks, that itself is not a ground by which the petitioners can compel the respondents to allow them to use their own crane. He submitted that crane is nothing but a motor vehicle. Mr. Bharucha submitted that if any vessel which may have crane facility, respondent No. 1 is making berth available to such vessels. Those vessels which may not have crane facility, they are required to go wherever they are asked to go by respondent No. 1 as ultimately it is for the respondent No. 1 to handle the cargo. Mr. Bharucha submitted that respondent No. 1 has already been followed the power u/s 42(3) of the Act. It is submitted that it cannot be said that any fundamental rights of petitioners are violated in any manner and, therefore, it cannot be said that there is violation of Article 19(1)(g) of the Constitution on the part of respondent No. 1 to manage and handle the container operations at the Port of Mumbai. It is submitted by Mr. Bharucha that since the petitioners' vessels are not having crane facility, they were permitted to put crane at the jetty but simply because the petitioners were allowed to use their own facility, that itself will not create any right in favour of the petitioners as every time as and when vessel comes, petitioners are required to apply separately and required to make the necessary payments. It is submitted by Mr. Bharucha that Berth 14 VD has never been

allotted to the petitioners. It is submitted that even if respondent No. 1 is getting their work done through its agent, it cannot be said that any monopoly has been created. Mr. Bharucha also relied upon guidelines which are at page 74 of the petition. Mr. Bharucha submitted that now the only change is that instead of asking respondent No. 1 every time, the petitioner will have to ask respondent No. 2 regarding permission. It is submitted that respondent No. 1 can always lease and enter into lease agreement regarding its assets and statute also permit the same. It is submitted that the petitioners are not prevented in any manner from carrying out their business and such rights of the Petitioners are not infringed in any manner, though the petitioners may have to undergo some inconvenience. The petitioners are also permitted to book their own cargo but they have no fundamental right to insist that they can put their crane only at a particular berth. It is also submitted that the petitioners have no inherent right to place their crane at a particular place at Victoria Dock. It is also submitted that by giving license per se cannot be said to be an act of creating any monopoly and respondent No. 2 has merely substituted respondent No. 1 for five years for handling cargo regarding gearless vessels. It is submitted that this being a policy decision same cannot be challenged by the petitioners. It is submitted that the apprehension of the petitioners that their business would be closed is absolutely without any basis. It is the prerogative of respondent No. 1 as to which container should be sent at which port. Reliance in this connection is placed on Clause 8.50 of the license agreement. It is submitted by Mr. Bharucha that the control has still been retained by respondent No. 1. It is submitted that respondent No. 1 has never said that respondent No. 2 will handle cargo of any particular company then in such a case one can say that monopoly is created. Respondent No. 1 has not adopted any discrimination in any manner. It is submitted that it is not the right of the petitioners to compel that their vessel is to be given particular berth. Mr. Bharucha submitted that in the circumstances, the petition deserves to be dismissed in limine.

12. Mr. Madon, learned Counsel appearing for respondent No. 2 has submitted that it can never be said that any monopoly is created in favour of respondent No. 2 and merely a concession is given to respondent No. 2 under the tendering process. It is submitted that since the petitioners have not taken part in the tender process, they cannot challenge the decision of respondent No. 1. It is submitted that no monopoly can be created by inviting tenders that if any work is allotted by inviting tenders, it can never be said that any monopoly is created. Mr. Madon has submitted that no grievance initially was made by the petitioners and, therefore, after the tender process is over, petitioners cannot make any grievance. The petition, therefore, suffers from delay and laches. It is submitted by Mr. Madon that the petitioners had taken part in the tender process only in view of the exclusivity clause. If there was no such clause, they would not have taken part in the bid. It is submitted that a Request for Proposals (RFP) was issued on 23rd June, 2005 and this was made known to everyone on that very day. It is submitted that tenders were invited by way of public notice. On 3rd

December, 2007 license agreement was signed and on 28th March, 2008 communication was sent to the petitioners. It is submitted that the petition is required to be rejected on the ground of delay and laches. It is submitted that if the petitioners are not challenging the tender, no relief can be given to the petitioners. It is submitted by Mr. Madon that the petitioners can still bring their cargo to the jetty and their business can never be said to be disturbed in any manner. If the petitioners insist that they have right to place their crane only at a particular berth, then that may amount to creating monopoly in their favour. On these and such other averments, Mr. Madon submits that there is no substance in the petition and the petition is required to be dismissed.

13. The questions which require consideration are: (i) whether the exclusive clause provided in the said license agreement creates monopoly in favour of respondent No. 2, (ii) whether rights of petitioners under Article 19 can be said to be infringed, (iii) whether the petitioners will be prohibited from carrying on its business in any manner, and (iv) whether the exclusivity granted to respondent No. 2 for a period of five years from the date of award of license or two years from the date of commissioning of OCT whichever is earlier, to handle the gearless container vessels at the BPS is arbitrary and by the said action whether a monopoly can be said to be created in favour of respondent No. 2?

14. It is not in dispute that the licensor i.e. Bombay Port Trust owns and operates, inter alia, the container terminal namely Ballard Pier Station Container Terminal (BPS) and for the purpose of operation and management including necessary developments, modifications and augmentation of facilities of BPS and for development, construction, operation and management of an Offshore Container Terminal in the Mumbai Harbour, applications were invited by respondent No. 1-licensor from the interested parties on 25th November, 2004. This aspect has been mentioned in the license agreement. In response to the said invitation, respondent No. 1 received applications from various parties. The petitioners did not participate in the said process and, as argued by Mr. Singh, the petitioners were not interested in the matter of development, construction, operation and management of the Offshore Container Terminal. Ultimately the application of respondent No. 2 was accepted and subsequently an agreement was arrived at between the parties. As per the said license agreement, license is granted to respondent No. 2 for the BPS project for a period of five years commencing from the date of award of license or two years from the commissioning of OCT project whichever is earlier. Both the BPS and OCT is part and parcel of the same agreement. Accordingly, respondent No. 2 is permitted to handle the traffic upto a period of five years and they will be in charge and possession of BPS for the said purpose. Clause 8.50 of the license agreement provides as under:

8.50 Licensee and Licensor Rights to Handle Container Traffic

The Licensee and Licensor shall have right to handle container traffic at the Port of Mumbai in the following manner:

(i) For the period the Licensee is in possession of BPS.

(a) Gearless Container Vessels Full exclusivity is granted for a maximum period of 5 years from the Date of Award of License for 2 years from the date of Commissioning of OCT whichever is earlier, for gearless vessels to the Licensee.

(b) Geared Container Vessels. Licensor will have option to handle geared container vessels provided the BPS is occupied and a gearless container vessel is waiting for berth.

(c) Combi Vessels All Combi vessels shall continue to be handled by the Licensor. It is clarified that only containers of non-geared combi vessels shall be handled by the Licensee and all other cargo (including containers on geared combi vessels) shall be handled by the Licensor.

(ii) For the period of five years after licensee hands over BPS to the Licensor.

(a) The Licensor will handle container vessels at Indira Dock including BPS with a cap of 250,000 (two hundred fifty thousand) TEUs/annum. This cap is applicable for the period of 5 years under consideration or after operator attains throughout of 90% of the designed capacity of the new berths under OCT, whichever is earlier, and the Licensee shall have the right to inspect the records of the Licensor to ensure that the cap of 250,000 (two hundred fifty thousand) TEUs/ annum is adhere to.

(b) This cap of 250, 000 (two hundred fifty thousand) TEUs/annum will not apply in case the licensee delays commissioning of berths under OCT beyond five years from date of award of license; and

(c) During these 5 years, all combi vessels shall continue to be handled by MbPT even after reaching the traffic of 250,000 (two hundred fifty thousand) TEUs/ annum. It is clarified that during this period all cargo (both containers and non containerised cargo of all combi vessels shall be handled by the Licensor

15. It is thus clear that so far as right to handle container traffic at the Port of Mumbai is concerned, exclusivity is granted to respondent No. 2 for a maximum period of five years from the date of award of license or for two year from the date of commissioning of OCT whichever is earlier for the gearless vessels. So far as geared container vessels are concerned, respondent No. 1 is having its option to handle geared container vessels provided the BPS is occupied and a gearless container is waiting for berth. So far as combi vessels are concerned, all combi vessels shall continue to be handled by the licensor. This arrangement is only till commissioning of OCT and if it takes more than five years, the licensee is not permitted to handle container traffic at BPS. We find considerable substance in the argument of Mr. Bharucha and Mr. Madon that the contract has been awarded to respondent No. 2 by respondent No. 1 after due evaluation of the tender and after due approval of the Central Government on BOT basis. It cannot be disputed that by giving such license in favour of respondent No. 2, the petitioners are prevented in any manner from carrying on its business of handling container

traffic. Instead of applying to the Port Trust, the petitioners will have to apply to respondent No. 2 from time to time for the purpose of their handling of containers. It is required to be noted that the petitioners are not having geared container vessels and container traffic has to be handled by respondent No. 2- licensee as per the agreement. We find substance in the argument of Mr. Bharucha that it is for the Port Trust to divert the traffic and nobody can insist that they should be allowed to operate only through a particular place. It is required to be noted that there is nothing on record to show that 14 Victoria Docks has been allotted to the petitioners. The said berth has never been allotted to the Petitioners either exclusively or preferentially or otherwise and the petitioners cannot claim any rights over the said berth. Considering the license agreement, in our view, it cannot be said that Clause 8.50 creates any monopoly in favour of petitioners as petitioners cannot insist that their cargo should be handled only in a particular manner and at a particular place. Petitioners will have to be treated similarly with others. It may be true that the petitioners may get some inconvenience but that itself is not a ground for striking down the decision taken by respondent No. 1 to give exclusive right of handling container traffic at BPS in connection with gearless vessels to respondent No. 2. Pertinently no other parties having gearless container vessels have raised any grievance in this behalf.

16. Considering the nature of agreement and considering the facts and circumstances, in our view, it can never be said that the business of the Petitioners from carrying the containers to and from JNPT to Mumbai Port Trust is affected in any manner. The exclusivity clause is to be considered only in connection with the arrangement made between the licensor and licensee regarding handling container traffic in a particular manner. It is not possible for us to accept the contention of Mr. Singh that since offshore terminal is to be constructed for bigger vessels, it is not necessary to give management of BPS to respondent No. 2 which is for smaller vessels. The decision taken by respondent No. 1 by which respondent No. 2 has been awarded the exclusive right to handle gearless container vessels at the BPS berth does not suffer from any arbitrariness. It is also required to be noted that as per the provisions in the Act, it is always open to respondent No. 1 to enter into agreement for handling container traffic at the Port of Mumbai.

17. At this stage, reference is required to be made to certain decisions cited by Mr. Singh. Mr. Singh relied on the decision of the Supreme Court in the case of Mannalal Jain Vs. The State of Assam and Others, . That matter was in connection with the grant of license for dealing in rice and paddy under the provisions of the Assam Foodgrains (Licensing and Control) Order, 1961. In the said case license was granted only to co-operative societies and license has been denied to the petitioner. Thus, a monopoly has been created in favour of the Co-operative Societies. It has been held by the Supreme Court that Clause (e) of paragraph 5 cannot be held to be bad on the ground of class legislation but the passing of an order under the sub-clause on the footing of creating a monopoly

in favour of co-operative society will amount to discrimination and denial of the guarantee of equal protection of law. Such an order will be bad as violating the rights of the petitioner guaranteed under Articles 14 and 19(1)(g) of the Constitution. In the instant case, however, considering the license agreement and considering the fact that the exclusivity is granted to respondent No. 2 only for the purpose of handling the container traffic for a period for which even tenders were invited, the said action, in our view, on the part of respondent No. 1 cannot be said to be an act of creating monopoly in favour of respondent No. 2 as the monopoly cannot be created by inviting tenders. It is not possible for us to accept the submission of Mr. Singh that at the time of inviting tenders, the said aspect was not mentioned and that exclusivity is given later on in the agreement. The petitioners had in fact not taken part in the bid and even Mr. Singh has fairly submitted that the petitioners are not interested in the construction of offshore container terminal. So far as handling of cargo is concerned, it is only Mumbai Port Trust who is in charge of the same and in that view of the matter, respondent No. 1 can enter into license agreement with respondent No. 2.

18. Mr. Singh has placed reliance on the decision of the Supreme Court in the case of *Rashbihari Panda etc. Vs. State of Orissa*, . In the said case, the Supreme Court after considering the provisions of Orissa Kendu Leaves (Control of Trade) Act, 1961, held that the schemes evolved by the Government were violative of the fundamental rights under Articles 14 and 19(1)(g) of the Constitution because the schemes gave rise to a monopoly in the trade of Kendu leaves to certain traders and singled out other traders and new entrants for discriminatory treatment. As pointed out earlier, in the instant case, respondent No. 2 has been granted license to handle container traffic at BPS for a period of five years from the date of the license agreement or two years from the date of commissioning of OCT whichever is earlier and the petitioners" are not prevented in any manner from carrying out their business. Moreover, the tariffs for handling the cargo are not affected which tariffs are regulated by the Tariff Authority.

19. Mr. Singh has thereafter relied a decision of the Supreme Court in the case of *Saghir Ahmad v. The State of U.P. and Ors.* 1955 SCC 707 The Supreme Court has held that all public streets and roads vest in the State, but the State holds them as trustees on behalf of the public. The members of the public are entitled as beneficiaries to use them as a matter of right and this right is limited only by the similar rights possessed by every other citizen to use the pathways. The State as trustees on behalf of the public is entitled to impose all such limitations on the character and extent of the user as may be requisite for protecting the rights of the public generally but subject to such limitations the right of a citizen to carry on business in transport vehicles on public pathways cannot be denied to him on the ground that the State owns the highways. In the said case the restrictions laid down in the U.P. Transport Act, 1951 was held to be not justified as reasonable restrictions are imposed in the interest of the general public. It has been held by the Supreme Court that whether the restrictions are reasonable or not would depend to a large extent on the nature of the trade and the conditions

prevalent in it.

20. Further Mr. Singh has relied on the decision given by this Court in the case of P & O Australia Ports Pvt. Ltd. and Ors. v. The Board of Trustees of the Jawaharlal Nehru Port Trust decided on 28th January, 2003. In the aforesaid case, challenge was to the global tender notice inviting pre-qualification bids for the redevelopment of the Bulk Terminal into a Container Terminal at Jawaharlal Nehru Port on a Build, Operate and Transfer basis for a licence period of 30 years. The petitioners and their associates and interconnected companies of that case were held to be disqualified to participate in the bid as per Clause 1.3 of the tender notice. The petitioners challenged the said action by way of writ petition. Petitioners bid being the highest was accepted and licence agreement was entered into between the second petitioner and the first respondent which agreement provided concession to the second petitioner to operate container terminal for a period of 30 years, at the end of which entire assets would be transferred back to the first respondent free of cost. Thereafter in connection with the redevelopment of the bulk terminal at JNPT, advertisement was published in October, 2002. Clause 1.3 provides that the Port is desirous of entrusting the project of redeveloping of the bulk terminal to a container terminal, on BOT basis, to another licensee other than the existing private terminal operator at JNPT. The petitioner of that petition was already informed by the authority that in order to avoid concentration of control with one private party and to increase competition and efficiency and to prevent monopoly in public interest, the Board has decided to exclude the petitioners from bidding for the new container terminal. In that case it has been held that the decision to exclude the petitioners is based on national interest which is the paramount consideration. Upon consideration of the material, the respondents have come to the conclusion that it is not desirable to give control of the entire container handling to one single private party and it is essential to provide competition not only to increase the efficiency in the service and avoid concentration of control in one single party but also to cut the cost of handling at the lowest to make import export trade economical and to avoid a situation of monopoly existing operator should not be permitted or allowed to bid for second terminal. It has been further held that where a right is conferred on a particular individual or group of individuals to the exclusion of others, the reasonableness of restrictions has to be determined with reference to the circumstances relating to the trade or business in question. Canalisation of a particular business in favour of specified individual has been held reasonable by the Apex Court where vital interests of the community are concerned or when the business affects the economy of the country. Ultimately the Court found in that case that the decision taken by the Port Trust to exclude the petitioners from participating the bid for new container terminal was taken in public interest. In the instant case, it cannot be said that the decision to give license in question to respondent No. 2 for handling container traffic for a period of five years can be said to be in any way unreasonable or that it may create monopoly in any manner.

21. On behalf of respondent No. 1, reference is made to a decision of the Supreme Court in the case of Association of Registration Plates Vs. Union of India (UOI) and Others, . In paragraphs 40 and 41 the Apex Court observed thus:

40. Selecting one manufacturer through a process of open competition is not creation of any monopoly, as contended, in violation of Article 19(1)(g) of the Constitution read with Clause (6) of the said Article. As is sought to be pointed out, the implementation involves large network of operations of highly sophisticated materials. The manufacturer has to have embossing stations within the premises of the RTO. He has to maintain the data of each plate which he would be getting from his main unit. It has to be cross-checked by the RTO data. There has to be a server in the RTO's office which is linked with all RTOs in each State and thereon linked to the whole nation. Maintenance of the record by one and supervision over its activity would be simpler for the State if there is one manufacturer instead of multi-manufacturers as suppliers. The actual operation of the scheme through the RTOs in their premises would get complicated and confused if multi- manufacturers are involved. That would also seriously impair the high security concept in affixation of new plates on the vehicles. If there is a single manufacturer he can be forced to go and serve rural areas with thin vehicular population and less volume of business. Multi-manufacturers might concentrate only on urban areas with higher vehicular population.

41. The fifteen years' contract period has also been supported by the Union of India and State authorities. We find great substance in the submissions made on the data supplied as a justification for awarding the contract for a long period of 15 years. There would be a huge investment required towards the infrastructure by the selected manufacturer and the major return would be expected in initial period of two years although he would be bound down to render his services for future vehicles periodically for a long period. Looking to the huge investment required and the nature of the job which is most sophisticated, requiring network and infrastructure, a long term contract, if thought viable and feasible, cannot be faulted by the court. If there are two alternatives available of giving a short-term or a long-term contract, it is not for the court to suggest that the short-term contract should be given. On the subject of business management, expertise is available with the State authorities. The policy has been chalked out and the tender conditions have been formulated after joint deliberations between the authorities of the State and the intending manufacturers. A contract providing for technical expertise, financial capability and experience qualifications with a long term of 15 years would serve the dual purpose of attracting sound parties to stake their money in undertaking the job of supply and safeguard the public interest by ensuring that for a long period the work of affixation of security plates would continue uninterrupted in fulfilment of the object of the scheme contained in Rule 50. Our considered opinion, therefore, is that none of the impugned clauses in the tender conditions can be held to be arbitrary or discriminatory deserving their striking down as prayed for on behalf of the petitioner.

22. Mr. Madon has relied on the decision of the Supreme Court in the case of Krishnan Kakkanth Vs. Government of Kerala and others, . The observations of the Supreme Court in the said case in paragraphs 27 and 28 may be noted:

27. The reasonableness of restriction is to be determined in an objective manner and from the standpoint of the interests of general public and not from the standpoint of the interests of the persons upon whom the restrictions are imposed or upon abstract consideration. A restriction cannot be said to be unreasonable merely because in a given case, it operates harshly and even if the persons affected be petty traders (Mohd. Hanif Quareshi and Others Vs. The State of Bihar,). In determining the infringement of the right guaranteed under Article 19(1), the nature of right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, enter into judicial verdict (Laxmi Khandsari and Others Vs. State of U.P. and Others, , D.K. Trivedi and Sons v. State of Gujarat 1986 SCC Supp. 20 and Harakchand Ratanchand Banthia and Others Vs. Union of India (UOI) and Others,

28. Under Clause (1) (g) of Article 19, every citizen has a freedom and right to choose his own employment or take up any trade or calling subject only to the limits as may be imposed by the State in the interests of public welfare and the other grounds mentioned in Clause (6) of Article 19. But it may be emphasised that the Constitution does not recognise franchise or rights to business which are dependent on grants by the State or business affected by public interest (Saghir Ahmad Vs. The State of U.P. and Others,).

23. Mr. Madon submitted that the petitioners rights to carry on their trade or business has not been affected in any manner and they cannot challenge the policy decision simply on the ground that it may result in some inconvenience to them as they may not be able to operate through their own crane. Mr. Madon, in order to substantiate his say, has relied upon a decision of the Supreme Court in the case of Delhi Science Forum and others Vs. Union of India and another, , that the policy decision of the Government should not be interfered with. The Supreme Court has held that unless any party aggrieved satisfies the Court that the ultimate decision in respect of the selection has been vitiated, normally courts should be reluctant to interfere with the same. Mr. Madon has submitted that once it is held that the Port Trust is entitled to enter into a license agreement, this Court would not interfere with such a policy decision, if such policy decision is taken in the larger interest of respondent No. 1.

24. In the case of Indian Drugs and Pharm and Others Vs. Punjab Drugs Manufactures Association and Others, , it has been held by the Supreme Court that there was no monopoly as regards the decision taken by the State Government to purchase certain medicines for government hospitals and dispensaries only from public sector companies or companies in which the State had substantial interest. The Supreme Court has held that there was no

monopoly created under the impugned policy of the State Government. Therefore, the question of offending Article 19(1)(g) or 19(6) does not arise and the directions to purchase certain medicines from the public sector undertakings for use in the government hospitals and dispensaries would not amount to an act of arbitrariness and as such there is no violation of Article 14 of the Constitution.

25. In our view, by entering into license agreement with respondent No. 2 by respondent No. 1, the petitioners' right to carry on business is not in any way affected. Considering the facts of the case, in our view, it cannot be said that the petitioners' right to carry on their trade is infringed in any manner by permitting respondent No. 2 to manage and operate BPS for a particular period. It cannot be said that simply because a lease agreement is entered into between respondent No. 1 and respondent No. 2, any fundamental right of the petitioners under Article 19(1)(g) of the Constitution is violated by the impugned action. It is not possible for us to accept the argument of Mr. Singh that there is no logic for allowing respondent No. 2 to manage the BPC for a period of five years for handling container traffic. The insistence of petitioner that they must be allowed to operate on its own way through their own crane, in our view, is not justified. As stated earlier, it cannot be said that any monopoly is created in favour of respondent No. 2. Considering the nature of the contract which is granted for a maximum period of five years or till offshore container terminal becomes operational, it can never be said that any monopoly has been created. The Respondent No. 1 is entitled to enter into contract and such contract, as stated earlier, has been given only after inviting public advertisements and inviting tenders and with the approval of the Central Government. The petitioners have not participated in the said bid or objected to the terms and conditions of the tender. The petitioners have not even challenged the license agreement entered into between respondent No. 1 and respondent No. 2 in the petition but has only challenged the communication dated 28th March, 2008, sent by respondent No. 1 to the petitioners. Considering the aforesaid aspect, we do not find any substance in this petition and no reliefs as prayed for by the petitioners in the present petition can be granted. Petition, being devoid of any merit, is accordingly dismissed. Rule is discharged. No order as to costs.