

HIGH COURT OF ORISSA : CUTTACK

W.P.(C.) Nos. 3323 & 17028 OF 2011

In the matter of applications under Articles 226 and 227 of the
Constitution of India.

IN W.P.(c) No. 3323 OF 2011

Keonjhar Nava Nirman Parishad **Petitioner.**
-Versus-
Union of India & 3 Others. **Opposite parties.**

IN W.P.(c) No. 17028 OF 2011

M/s. Subarnarekha Port Pvt. Ltd. & 2 Ors. **Petitioners.**
-Versus-
Union of India & 2 Others. **Opposite parties.**

For petitioner (s):

M/s. Narsingh Mishra, R.K. Pradhan, S.N.
Panda, B.K. Baral.
(in W.P.(C) No. 3323 of 2011)

Mr. Sanjay Sen, Sr. Adv,
M/s. S. Ratho, D. Mishra, J. Dash, & M.K.
Das. (In W.P.(C) No. 17028 of 2011)

For Opp. Parties :

Mr. Parag Tripathi, Addl. Solicitor General
Mr. Sakti Dhar Das, Asst. Solicitor General.
(for Union of India in both the writ petitions)

Mr. Ashok Mohanty, Advocate General.
(for O.P. No.2 -State of Orissa in both writ
petitions)

Mr. S.K. Kapur, Sr. Advocate,
M/s. S.K. Sarangi, B. Behera, J. Acharya &
A.K. Jena.
(for O.P.No.3 in both writ petitions)

M/s. A.K. Parija, S.P. Sarangi, B.C. Mohanty,
D.K. Das, P.K. Dash, & R.K. Tripathy.
(for intervenor-O.P.No.4 in W.P.(C) 3323/2011)

P R E S E N T:

**THE HONOURABLE CHIEF JUSTICE MR. V.GOPALA GOWDA,
AND
THE HONOURABLE MR. JUSTICE B.N. MAHAPATRA**

Date of Judgment : 25 -11-2011

V. GOPALA GOWDA,C.J. The first writ petition (W.P.(c) No. 3323 of 2011) has been filed as a Public Interest Litigation by the petitioner-organization, which is claiming to be a registered organization and is engaged in taking up various common problems of the people for seeking redressal thereof. The second writ petition (W.P.(C) No. 17028 of 2011) has been filed by the petitioners M/s Subarnarekha Port Pvt. Ltd. and two other associate companies which are companies incorporated under the Companies Act, 1956 and engaged by the Government of Orissa for development of the Subarnarekha Port project vide MOU executed on 11.01.2008 and which have made substantial investments in the development of the Subarnarekha Port and therefore, they are severely affected and prejudiced by the illegal and arbitrary action on the part of the opposite parties.

2. Both the writ petitions have been filed questioning the correctness of the Notification No. 2609(E) dated 22.10.2010 issued by the Central Government in exercise of power under Section 5 of the Indian Ports Act, 1908 and Section 2 (q) of the Major Port Trust Act, 1963 and Notification No. Adm/01250/VI dated 10.11.2010 issued by the Kolkata Port Trust (hereinafter called the 'KOPT') in exercise of power conferred by Section 132(2) of the Major Port Trusts Act, 1963 and contending that altering the limits of the Port of Kolkata to the

detriment of the interest of the people of Orissa as well as Orissa State and therefore the impugned notifications are perverse, malafide, vitiated with arbitrariness and suffer from violation of Articles 14 and 245 of the Constitution of India as well as federalism and the principle of separation of powers which are the basic structure of the constitution.

3. The grievance of the petitioner in first writ petition is that as a result of the said notifications the extension of Kolkata Port limits will not only jeopardize the development of ports in Orissa coast and severely limits the maritime activities in the State but also have serious ramification for the coastal environment. It will also deprive the livelihood of lakhs of people of Orissa State.

4. The grievance of the petitioners in the second writ petition is that the Central Government by the impugned notification dated 22.10.2010 has altered/extended southwards port area limits of the Kolkata Port Trust (hereinafter called the "KOPT") as a result of which 200 kilometers south of Haldia into the Bay of Bengal covering around 28,646 Sq. kilometers has been included in the navigable limits of the KOPT and as a result the area of several Minor Ports in north Orissa including the Port area limits of Subarnarekha Port which is being developed by the petitioner under an agreement dated 11.01.2008 executed with the Government of Orissa stands encroached upon by the KOPT. Apart from that the impugned notifications infringed upon the sovereignty of the State of Orissa over its coastal water and is also directly and substantially in conflict with a subsisting notification dated

1.12.2009 issued by the Government of Orissa under Section 5 of the Indian Ports Act, 1908.

5. The case of the petitioner in first writ petition in brief is that the State of Orissa, which is endowed with a vast coastline, was historically renowned for its great ports and maritime activities stretching far offs. History bears ample testimony of the prosperity of the ancient Orissa emanating from predominantly maritime activities and sea trades. The modern State of Orissa, which is one of the poorest States in Indian Union, is also trying to revive and establish new ports to exploit the sea trades for greater economic benefits of its millions of poor. It is stated that apart from its deep sea port at Paradeep, which is a major port, the Government of Orissa has already notified seven non-major ports in northern parts of the State, namely, Dhamra, Chudamani, Chandipur, Inchudi, Subarnarekha mouth, Bichitrapur and Bahabalpur to give a fillip to maritime activities of Orissa coast and to support a vast hinterland containing huge mineral resources and mineral based industries. While the Dhamara port is nearing completion, all other ports are in different stages of development. It is stated that India comprises of 13 major ports and around 176 non-major ports along the coast and islands. The Major Ports are under the Union List (Schedule VII) whereas the other ports are under the Concurrent List (Schedule VII) of the Constitution of India. The 13 major ports are administered by the Central Government under Ministry of Shipping and the remaining other ports which are referred to as non-major ports are administered

by the nine maritime States and three Union territories within their respective coastlines. The total volume of traffic handled by all the India Ports during 2009-10 was 849.9 million tones. Non-major ports account for around one-third of the total seaborne trade. The growth in cargo handled at Major and Non-major ports in 2009-10 was 5.8% and 35.4% respectively as compared to 2.2% and 3.3% achieved in 2008-09. The phenomenal growth in the cargo handling at non-major ports in the past year shows the importance of non-major ports in the over all economic development. As per current indications, non-major ports will have an edge over major ports due to their growth rates as a number of green field ports are coming up with huge capacities through private sector in non-major ports. The effectiveness of non-major ports in meeting the growing volume of cargo traffic cannot be overemphasized. Recognizing the importance of non-major ports, many maritime states have launched initiatives for their development, through the participation of private sector. This has led to significant growth in the cargo capacity and cargo traffic handled by the non-major ports in the past few years. It is stated that Orissa lags away behind other maritime States in developing other ports (non-major ports) and Orissa's share in the maritime trade is negligible. While the role of non-major ports in the overall economic development cannot be overstated, there is lot to be done by the State Government and the Central Government to increase Orissa's share in the maritime activities which would lead to economic development in this under developed State.

6. It is submitted by Mr. Narasingh Mishra, learned Senior Counsel for the petitioner that while the country needs more ports for its economic development and the Central Government should extend all help for development of non-major ports exploiting long coast line of the State of Orissa, the Opposite party No.1-Union of India is trying to scuttle such development of non-major ports of Orissa coast in stead through arbitrary extension of Kolkata port limits into Orissa territory. In the maritime agenda 2010-20, the Central Government recognized the need for development of non-major ports in Orissa and it was clearly stipulated in the agenda that the east coast ports are expected to handle over 75% of future imports with the ports in Orissa and Andhra Pradesh accounting for much of the traffic owing to steelmaking capacity being largely located in this region. Therefore, after recognition of such need and future projection, the extension of the jurisdiction of Kolkata Port by the impugned notifications is wholly unjustified as it is a colourable exercise of power and mala fide and illegal being vitiated with arbitrariness and abuse of power by discriminatory action of the opp. Party No.1. It is submitted that as per the report published in the 'New Indian Express' dated 01.02.2011, the arbitrary extension of Kolkata Port limits is a design to bail out shipping companies who want to use their old vessels for transloading operations. The report points out that the notification for extension of Kolkata port limit coincided with invitation by the Kolkata Port regarding the application for transloading. Bigger vessels which cannot come to Kolkata due to shallow draft, would now berth in the

Orissa coast and unload cargo to transloaders (old vessels) which would act as floating stock yards. It is stated that such transloading operation involving old vessels will result in increasing environmental pollution of Orissa coast with devastating consequences for its people living at coastal areas.

7. It is further submitted by Mr. Narasingh Mishra, learned Sr. Counsel for the petitioner that when the country needs more port capacity, the approach of the Central Government-Opp. Party No.1 to extend the Kolkata Port Limit is laced with naked favoritism to KOPT. To add few extra million tones to the capacity of the Kolkata Port, the Central Government is jeopardizing the development of seven modern ports in Orissa, each of which can handle much larger quantity of cargo after completion. The Central Government by extending the limit of KOPT into Orissa territory, deliberately intrude upon the State's sphere. The law is well settled that federalism in the Indian Constitution is not a matter of administrative convenience, but one of the principle, the outcome of historical process and a recognition of ground realities. The interpretation of Entries can afford to remove imbalance, so far as it can. Any conscious whittling down of the power of the State can be guarded against by the Courts. It is further submitted that the treatment of Kolkata Port in a preferential manner and allow the newer ports in Orissa to die natural death by the Central Government is wholly unjustified and illegal. It is also against larger public interest. It would have serious repercussion on the economy of the State of Orissa and deprive the livelihood of its lakhs of people,

therefore, the impugned notifications are malafide, without any cogent material to support it and is based on mere ipse dixit and it is prayed that the impugned notifications are liable to be quashed.

8. The case of the petitioners in the second writ petition in brief is that not only the petitioners but also the Government of Orissa are taking substantial steps towards ensuring development of the project by processing request for handing over the land and taking other steps as envisaged under the Concession Agreement-MOU including steps to secure environment clearance for the project. The Government of Orissa has expressly notified the Port area limits of the Subarnarekha Port by a notification (being Notification No. 8027-GPP-128-06/Com) dated 1.12.2009 in exercise of power under Section 5 of the Indian Ports Act, 1908. It is alleged that the KOPT, which is the beneficiary of the illegal action on the part of the Central Government, has illegally conspired with the Central Government to extend its jurisdiction over the Port area limit previously notified for other ports in Orissa including the Port area limit of Subarnarekha Port with an ulterior motive to secure its own commercial interest at the cost of the development of other ports in the State of Orissa. The KOPT certainly does not want any development of Minor other ports in Orissa coast because the traffic will get diverted and there is likelihood of loss of revenue as a result thereof. The KOPT after securing the Notification of the Central Government issued a Notification on 10.11.2010 under Section 132(2) of the Major Ports Act, 1963 whereby it has sought to give effect to the Notification issued by the

Central Government on 22.10.2010. The KOPT in its impugned notification dated 10.11.2010 acknowledges that the Central Government has amended its earlier notification dated 19.06.2001. As a result of such notifications the Subarnarekha Port will cease to exist as an independent non-major port as its entire port limit will now be under the jurisdiction and control of the KOPT. It is stated that Entry-27 in List-I of Schedule VII of the Constitution of India relates to Ports which are declared as Major Ports in terms of the Major Port Trusts Act, 1963 and Entry 31 in the List III of Schedule VII of the Constitution of India relates to Ports other than major ports. By virtue of that, Subarnarekha Port being a non-major port (other port) falling within the coastline of the State of Orissa, the Government of Orissa has the competence to legislate all necessary legislations and issue notifications in relation to the minor ports in Orissa. The Government of Orissa vide its Notification dated 5.4.1997 notified the port limits for the ports at Subarnarekha Mouth, Chudamani, Chandipur, Inchuri, Astaranga, Baliharichandi, Palur and Bahuda. Hence the decision of the State Government to create/ develop Minor Ports in the northern part of the State's coastline was well established as early as 1997. On 19.06.2001, the Central Government issued a notification bearing No. GSR 439(E) revising the Port area limits of the KOPT. The said notification revised the limits of the navigable channel to facilitate its trans-loading operations at Sandheads. This identifies an area for fair weather trans-loading operations in deep waters around the 20 m. contour and is far away from the Orissa coast. The said notification

prescribes a western limit of 87 Degrees 40'E and this limit ends at the eastern limit of the Subarnarekha Port of Orissa.

Mr. Sen, learned Sr. Counsel for the petitioners in 2nd writ petition submitted that, the Central Government was well aware of its jurisdictional limits and did not seek to encroach on the coastal waters of the State of Orissa while revising the port area limits of the KOPT. The said notification dated 19.06.2001 issued by the Central Government does not in any manner interfere with the ports limits in northern Orissa and all such ports had access to the open sea. The 2001 Notification of the Central Government which defines the port area of KOPT constituted a representation and expression of intent to the State Government as well as the private investors, such as the petitioners for enabling development of minor ports in Orissa under the guidance of the State Government. It is submitted that the map will disclose the impact of the impugned notification dated 22.10.2010 which illegally revises the earlier notification of 19.06.2001 and encroaches on the port area limits of the Subarnarekha Port and how the KOPT violated the jurisdictional sovereignty of the State of Orissa over its coastal waters. It is stated that the Government of India which accepted the earlier stand of the State Government, now in colourable exercise of power has tried to circumvent the right, title and interest of the State of Orissa and the private concessionaire by issuing the impugned notification dated 22.10.2010.

9. It is further submitted by Mr. Sen, learned Sr. Counsel that when the promoters and the new financial partner had resolved

all outstanding issues and were focusing entirely on the implementation of the Subarnarekha Port Project, the Central Government without prior notice or intimation, has issued the impugned notification dated 22.10.2010 altering/extending southwards jurisdictional limits of the KOPT, as a result, the entire port area limits of the Subarnarekha port has been encroached upon by the KOPT and as such Subarnarekha Port project is left without any port area limit of its own to allow entry or exit of ships/ vessels. The impugned notifications in effect are to take away the vested rights of the petitioners as well as the State Government. Therefore, it is submitted by Mr. Sen, learned Sr. Counsel that the notification dated 22.10.2010 issued by the Central Government is illegal as the Central Government has no jurisdiction to unilaterally modify port limits in a manner which takes away the area already notified for other ports in the region. The State Government is the competent authority to notify the port area limits of minor ports within its territorial jurisdiction. Therefore, the Government of Orissa in exercise of power under Section 5 of the Indian Ports Act issued a notification on 1.12.2009 in relation to the port area limit of the Subarnarekha port and the said notification is presently valid and subsisting. For that reason, it is submitted that, in relation to the other ports (non-major), the notification of the State Government dated 1.12.2009 occupies the field and there cannot be a subsequent notification of the Central Government altering the decision of the State Government in relation to the limit of the port area of the other ports (non-major ports). It is

further submitted that the Central Government does not have the jurisdiction over the State Government's notification dated 1.12.2009 in relation to the port area limits of non-major ports and such action of the Central Government is excess of jurisdiction and hence it is arbitrary and in colourable exercise of power and hence it is liable to be quashed.

10. Mr. Narasingh Mishra, learned Sr. counsel for the petitioner contended that the impugned notifications challenged by the petitioner in the Public Interest Litigation petition will affect the economic development of the Orissa State as the extension of the KOPT limits 200 k.m. south of Haldia, is going to block the entire coast of North Orissa where seven ports, namely, Dhamara, Chudamani, Chandipur, Inchudi, Subarnarekha South, Bichitrapur, & Bahabalpur are in different stages of development. By extending the limits of KOPT, access of vessels to the aforesaid ports will be blocked. By an additional affidavit dated 5.5.2011 the petitioner has submitted that extension of area of KOPT will deprive employment to the people of Orissa, besides loss of revenue to the State. It is submitted in the additional affidavit that the revenue loss to the State will be approximately Rs.684 crores per year and loss of employment would approximately be 875. Therefore, the extension of the area of KOPT by the impugned notifications will definitely affect the interest of the people of Orissa. So far as the attempt has been made by the Union of India and KOPT during their submission to the court that since there is no physical obstruction, entering of vessels, to the non-major

ports, will not be prevented in any way is not at all correct. Learned counsel for the petitioner, referring to Section 31 of the Indian Ports Act and Sections 38, 49(B) and Section 50(B) of the Major Port Trust Act and paragraph 30 of the writ petition, contended that the averments made by the petitioner in the first writ petition at paragraphs 9 and 30 and in paragraphs 1 to 4 of the additional affidavit dated 5.5.2011 have not been disputed either by the Union of India or by KOPT. Therefore, there is no dispute that entering of vessels to seven non-major ports of Orissa coast will be subjected to the control of the KOPT i.e. O.P. No.3 if the impugned notifications are not quashed.

11. It is further submitted by Mr. Mishra, learned Sr.counsel that Port limits are notified under the Indian ports Act, 1908 and Sections 4 & 5 of the said Act provide for notification and alteration of Port limits. It may be seen that Section 4 lays down although in a disjointed manner, the purposes for which Port limits are fixed, they include : (1) to cover any part of any navigable river or Channel which leads to port (Section 4.1.a); (2) Section 4.3 defines "Convenience of traffic"; (3) Section 4.3 defines "Safety of Vessels"; (4) "Maintenance of the good governance of the port and its approaches" (Section 4.3) Section 5 provides for alteration of Port Limits, but it would be prudent to infer that the alteration serves the same purposes as fixation under Section 4.2. The Government under Sections 4 & 5 of the Indian ports Act can fix port limits. "Government" has been defined in Section 3(9) as Central

Government for 'Major Ports' and State Government for 'other Ports' so far as the power of fixing or altering limits is concerned. Since both the Governments derive their powers from the same Central legislation, the powers can be said to be equal in respect of the ports under each one's control.

12. Mr. Narasingh Mishra, learned Sr. Counsel submitted that the KOPT limits were last fixed/altered in 1977, 2001 and then 2010. A perusal and comparison of these notifications would show that the notifications have three parts- one pertaining to the port per se, the other pertaining to rivers and channels leading to the port. However, the limits of all the three above constitute port limits under the Indian Ports Act which include rivers and channels leading to the port. It is in respect of these rivers of Kolkata port has been substantially extended and expanded in 2010 so much so that it encroaches into the pre notified limits of certain ports and even the onshore location of two of the proposed ports and in all cases it surrounds the ports of Orissa north of Paradeep in such a manner that no ship can enter these ports without passing through the Kolkata port limits. Mr. Mishra, learned Sr. Counsel contended that the extension of port limits of KOPT is grossly illegal for following more reasons that the extended limits encroach into the pre notified limits of number of ports of Orissa including the onshore location of two of the proposed ports. The contention of the opposite parties to the effect that a central notification overrides a notification of the State Government is misleading and not at all correct. The question of repugnancy or overriding due to conflict

between central law and State law, would arise when there is a conflict between the two laws. In the instant case all the notifications, both of the State and Union Governments are under the same provision of the same central law which gives power to the appropriate Government to notify the port limits and the State Government of Orissa has appropriately and legally notified the limits of the ports of Orissa in exercise of its constitutional powers and powers conferred under the statute. Opposing the contention of the opposite parties that the extension of KOPT is purely for transloading, Mr. Mishra submitted that it is purely unacceptable for the reason that it is not the provisions of Indian Ports Act and Indian Major Ports Act. It provides levy of charge on every ship passing through the port limits of Kolkata. Further, so far as transloading is concerned, it is not necessary that transloading to take place within the port limits of receiving port, such transloading can take place within the limits of any other ports.

13. The Indian Ports Act, 1908 is a Central legislation, under which certain powers are vested in the State Government and once the power vested in the State Government is exercised under Section 5 of the Indian Ports Act, the right has accrued and such right can not be divested by a notification issued by the Central Government. On a reading of the provisions of the Indian Ports Act, it cannot be contended that there is any conflict of power between the State Government and Central Government. The power of the State Government and Central Government has been clearly defined by a Central legislation and therefore, it is binding both on the Central

Govt. and State Government and once the vested power with the State Government is exercised fixing and notifying the port area, such notification cannot be cancelled or modified by the executive action such as by issuing the notification by the Central Government. It is further submitted that before issuing the impugned notification dated 22.10.2010, the Union of India should have consulted and discussed with the Government of Orissa. However, instead of doing that, it is now contended that the Union of India is willing and prepared to direct O.P. No3-KOPT not to charge any fee for using the KOPT area, which is quite illegal and such statement indicates that the Central Government is admitting its mistake. The mandate of law as enumerated in Section 31 of the Indian Ports Act and Sections 49(B) and 50(B) of the Major Port Trust Act cannot be taken away, either by any executive instruction or by any notification of the Central Government. Therefore, it is submitted by Mr. Narasingh Mishra, learned Sr. Counsel that the impugned notifications are liable to be quashed.

14. On behalf of the Government of Orissa, counter affidavit has also been filed supporting the case of the petitioners. It is submitted by the learned Advocate General Mr. Ashok Mohanty that the main constitutional issue involved in these cases is when the Notifications are issued by the Government of Orissa in exercise of its power under Section 5 of the Indian Ports Act, 1908 for development of other ports in its north coast at Dhamra, Chudamani, Inchudi, Chandipur, Bahabalpur, Subarnarekha mouth and Bichitrapur vide Notification Nos. 1691 dated 11.3.1998, 2380 dated 5.4.1997, 2780

dated 5.4.1997, 5230 dated 3.4.1991, 8027 dated 01.12.2009 and 7847 dated 24.11.2009 respectively and are still in force and duly recognized by various Departments of the Government of India, can the Ministry of Shipping, Government of India, issue the impugned notification 22.10.2010 delimiting /altering the limits of the KOPT encroaching upon the limit of such ports notified and developed by the Government of Orissa.

15. Learned Advocate General submitted that the Government of India as well as the KOPT for some obvious reasons have issued the impugned notifications claiming the entire northern coastal territory of Orissa State whereby taking away the constitutional & statutory rights of the State of Orissa without following any procedure known under the law and the said unilateral act of Union of India in the guise of delimiting the KOPT is per se illegal, unconstitutional, arbitrary and without jurisdiction and therefore, the same are liable to be quashed.

It is further submitted that the Government of Orissa have no other way than to support the cause of the petitioners as the matter could not be resolved administratively in the discussion with the Union Government. The State Government have tried their level best to administratively resolve the so called dispute through negotiations with the Union Ministry of Shipping and in this regard several rounds of discussions were held, but the matter could not be settled. It is the submission of the Union of India & KOPT that the terms and purpose and intent of the notification is that it will facilitate transloading for KOPT. However, they lost their sight to the extent

that for the purpose of transloading no prudent Government would issue such a notification which would have greater ramification and resultant damages would be more on the part of the State of Orissa. Therefore, it is crystal clear that either there is no valid reason or there must be some malafide motive behind the notifications which was never disclosed by the Union of India & KoPT. The Union of India and KoPT have exceeded their jurisdiction in issuing the impugned notifications. Admittedly, the Government of Orissa had issued valid notifications as stated earlier completely in accordance with Section 5 of the Indian Ports Act, 1908 under the power and authority guaranteed under Entries 31 & 32 of List III of Schedule VII of the Constitution of India which is also recognized by the Union of India and the same has been acted upon. The impugned notifications have been issued encroaching upon the territorial jurisdiction of the Government of Orissa and giving a complete go bye to the provisions of law. The collusive submissions made by the Union of India & KOPT would only demonstrate an undemocratic, unreasonable and unconstitutional approach to the effect that the Union of India have unlimited power and authority to delimit a major port by imposing unreasonable restriction upon the Government of Orissa, which matters are exclusively under the purview and control of State Government under the provisions of Section 3(9) read with Sections 4 & 5 of the Indian Ports Act. Therefore, it is a clear case of excessive exercise of jurisdiction and power by the Union of India and KOPT in issuing the impugned notifications and as such the same are liable to

be set aside.

16. Mr. Mohanty, learned Advocate General further submitted that the question of “repugnancy” would not arise in this case since the Government of Orissa exercised its power in accordance with law as stated supra and has been acted upon and also recognized by the Union of India. Under these circumstances, the Union of India has no legislative competence to issue the impugned notification. Further, there is no restriction imposed under Article 162 of the Constitution of India against the State of Orissa with regard to the territorial port claim. The necessary provisions are already available in Sections 3(9), 4 and 5 of the Indian Ports Act, 1908, which preceded the Constitution of India, thereby recognizing the State Government’s power, unless and until the parliament passes subsequent enactment in that regard. The claim of the Union of India that the Major Port Trust Act, 1963 empowers the Union of India, in terms of Article 162 is not acceptable, since the said Act deals with the management and governance of Major Ports and not about fixing the port limits of Minor Ports.

17. Mr. A.K. Parija, learned Sr. Counsel, on behalf of the intervener-opp. Party No.4-Dhamara Port, supporting the stand taken by the petitioners as well as the Government of Orissa contended that the impugned notifications have been issued by the Central Government and KOPT in excess of jurisdiction and the same are ultra virus being hit by Sections 1,3(9), 4 and 5 of the Indian ports Act, 1908.

18. On the other hand the Union of India-O.P. No.1 in the Ministry of Shipping & Transport has filed counter affidavit traversing the averments made by the petitioners in the writ petitions, however not denied the publication of the impugned notifications. It is stated in the counter that the entire North Eastern Part of the country including the land locked countries like Nepal and Bhutan have to move their cargo through Kolkata Port which is a major port under the Central Government. However, being a riverine port, that port suffers from perennial draft restrictions for which most of the large bulk carriers carrying cargo destined/generated from that port is forced to make two ports called by lighterage/topping up of approximately 40%-50% of the cargo at Paradeep port, which is then carried by rail and road to their final destinations. The trade, however, has always preferred that the entire cargo be brought to Haldia because of low freight and better rail connectivity as compared to the neighbouring ports. Moreover, transportation of cargo by sea is always cheaper and eco-friendly than the alternative modes of transportation like rail and road. Therefore, the shipping industry has been requesting the KOPT to make alternative arrangement for handling the entire cargo nearer to the port and transport them through sea river route. It is further stated that in terms of Territorial waters, Continental Shelf, Exclusive Economic Zone & Other Maritime Zones Act, 1976, no State has any jurisdiction on the territorial waters of India and territorial waters are the exclusive jurisdiction of Central Government. However, the State of Orissa vehemently opposed KOPT plan to

undertake lighterage operation in 2005 outside the limit of Dhamra Port on the plea that this would adversely affect the business prospects of non-major ports on the Orissa coast limits which were notified by it in an arbitrary manner without due consideration of the existing limits of other major and non-major ports in the vicinity. The Government of Orissa also have not consulted the Ministry of Shipping before issuance of any such notifications.

19. Denying the averments made at paragraphs 1 to 8 of the writ petition, it is stated by the O.P.No.1 that by extension of the limits of KOPT there will neither be any physical boundary in the sea nor will there be any obstruction for the vessels to have free access to any port of Orissa. KOPT neither intends to handle cargo that is destined for any Orissa Port nor will impose any restrictions legally or financially on any vessel destined for other ports for their free passage while passing through the limits of KOPT. Therefore, the extension of the limit of KOPT has no bearing whatsoever for movement of ships to any other port, their operation, further expansion and development. In reply to paragraph 11 of the writ petition, it is stated that the transshipment facilities being set up by KOPT could also be gainfully utilized by the trade carrying cargo for all neighbouring ports. The transshipment facilities will help the trade in reducing the cost of import & export as the vessel could be serviced to their full capacities and thus would overcome the issue of low draft availability. It is stated that the Government of India has taken a conscious decision to promote transportation of cargo by barges through the National

Waterways, so as to reduce congestion on rail & road, transportation cost and to reduce pollution. The transloader and all vessels associated with the operation will be certified by the statutory authorities with regard to their safety as well as from pollution angle. Therefore, there is no scope of any increase in the environmental pollution as alleged in the writ petition.

20. In reply to paragraphs 13 to 16 of the writ petition, it is submitted by Mr.P. Tripathi, learned Addl. Solicitor General that the Central Government is fully empowered to issue such notifications in exercise of its powers under Section 5 of the Indian Ports Act, 1908 and Clause (q) of Section 2 of the Major Port Trust Act, 1963. The Central Government has also the powers to alter the limits of any port by uniting with that port, any other port or any part of any other port under the provisions of Section 5 of the Indian Ports Act 1908. The action taken by the Central Government is for the interest of public and for reducing the outflow of national exchequer towards high cost of transportation of goods. Therefore, it is prayed that both the writ petitions are devoid of any merit and liable to be dismissed.

21. One counter affidavit has also been filed by the KOPT-O.P.No.3 traversing the averments made by the petitioners and supporting the counter filed by the Union of India. Questioning the maintainability of the first writ petition, it is stated by the KOPT that the said writ petition is actually proxy litigation for the purpose of achieving the private interest of the parties who are in control of the ports of Dhamra and Chudamani seems to have been similarly

divested by the State of Orissa. It is self evident that no public interest is intended to be achieved in the above writ petition and it is therefore fit and proper that the same should be summarily rejected.

It is stated by the KOPT that the territorial waters along the coast lines do not belong to the coastal states such as Orissa but are under the exclusive control of the Central Government. No state has any constitutional powers or rights to define the limits of any port along its waterfront; and the power to do so is exclusively vested in the Central Government. In particular, the Government of Orissa has no power, authority or jurisdiction to fix the limits of the ports along its waterfront and any action to this effect is out of its jurisdiction. The KOPT is a major port within the meaning of Major Port Trust Act and is under the direct control of the Central Government. The limits of the territorial waters forming part of the KOPT were earlier prescribed by notifications, the last of which was published in the year 2001 which shows the limits of the KOPT. Thereafter, on 22.10.2010 the Government of India by virtue of powers under Section 5 of the Indian Ports Act published a Notification prescribing an extension of the limits of the KOPT in the manner and to the extent specified therein. Consequent to the said Notification, the KOPT published the Notification dated 10.11.2010. It is submitted that the said notifications have been published extending the limits of the KOPT so as to enable the transloading operation system to be installed and become functional for the purpose. Therefore, the extension of the limits of the KOPT has no connection or relevance or bearing

whatsoever with the movement of any ships or vessels to or from any port of Orissa or the operation, future expansion or development of any port in Orissa. Traversing the averments made in the writ petitions, at paragraph 11 of its counter the KOPT stated that the KOPT has no objection or impediment to put in the way of development of the State of Orissa or any new ports by the State Government and any aspersions or allegations in this behalf is wholly wrong. Therefore, it is submitted that the case of the petitioners is entirely speculative, pretentious and without any substance and both the writ petitions are liable to be dismissed.

22. Mr. S.K. Kapur, learned Sr. Counsel on behalf of the KOPT submitted that the impugned notification is within the jurisdiction of the Central Government for the reason that "major port" is a subject matter of Entry 27 of List I of the VIIth Schedule of the Constitution of India and "other ports" are the subject matter of Entry 31 of List III of the VIIth Schedule. Hence, whether it be in the Union List (in respect of Major Ports) or the Concurrent List (in respect of other ports), the Union Government is constitutionally empowered to legislate in respect of both. It is submitted that under Section 3(8) of the Indian Ports Act, the Central Government is empowered to determine as to which port would be a major port, and under Section 5 of the said Act, the Central Government is empowered to alter the limits/delineate a Major Port. After the Central Government notifies and delineates a "major port", it is only the residuary of the Ports as also the residuary of the limits which a State Government is empowered to notify for

such 'other ports'. Hence, it is submitted that in the instant case, the Central Government, having notified the limits of the KoPT, it is only the residuary or the available area that is available with the State Government within which it can notify the limits of 'other ports'.

23. It is further submitted by Mr. Kapur, learned Sr. counsel that the Central Government's power to notify and delineate a Major Port's limit under Section 5 of the Indian Ports Act is not subservient to the power of the State Governments to notify the limits of an "other port". In fact, constitutionally, the primacy vests in the Union of India cannot be overridden or taken away by exercise of any rights of the State. Hence only after the Central Government notifies and delineates a Major Port, could the jurisdiction of the State Government would commence. It is therefore submitted that, as in the present case, it is only after the Central Government has notified and delineated the limits of the KoPT the jurisdiction of the State Government would commence to delineate the "other ports". It is clear that if there is any conflict between the two, there can hardly be any doubt that the Central Government notification under Section 5 would prevail. Mr. Kapur further submitted that notifications are issued by the Governments as delegates of the legislature. They are thus delegated legislation. The delegated legislation cannot stand on a higher footing than legislation. In case of competing legislations (including delegated legislation) of the Centre and the States, under Articles 246 and 254 the legislation of the centre (including delegated legislation) must supersede and override the legislation (including

delegated legislation) of the State. In this regard, Mr. Kapur, placed reliance upon the judgment of the Supreme Court in the case of Deep Chand Vs. State of U.P. & Ors., AIR 1959 SC 648.

24. On the basis of the aforesaid rival legal contentions urged on behalf of the parties, the following points would arise for our consideration in these writ petitions.

- (1) Whether the exercise of power by the Central Government in issuing the impugned notification in relation to Major Port extending/altering the limits of KOPT encroaching upon the other-ports (non major ports) in the State of Orissa, which have already been notified by the State Government fixing its limits in exercise of its powers under Section 5 of the Indian Ports Act, 1908, is legal ?
- (2) Whether the impugned notification issued by the Central Government altering the limits of KOPT will prevail over the notifications issued by the State Government in relation to the 'other ports' in exercise of its power and whether such notification can be treated as repugnant to the notification issued by the Central Government and the principle of repugnancy as provided under Article 254 is applicable?
- (3) Whether the Central Government in exercise of its power under Section 5 can alter the limits of any ports to which the act is inforce or applicable without consultation with the State Government / lessees who are having lease hold rights over such other ports and whether it would be violative of principles of natural justice ?
- (4) Whether the exercise of power by the Central Government under Section 5 of the Indian Ports Act

invading upon the other ports of the Orissa coastal line is violative of Article 14 and is arbitrary, unreasonable and against the doctrine of proportionality ?

- (5) Whether the subsequent notification issued by the KOPT basing on the notification of the Central Government dated 22.10.2010 and in exercise of power conferred by Section 132(2) of the Major Port Trusts Act, 1963 altering the limits of the Port of Kolkata is legal and valid ?
- (6) What order ?

25. Before considering the questions formulated above, it is necessary to mention here that in the counter affidavit filed in the first writ petition on behalf of the KOPT certain allegations abusing the petitioner were made at paragraphs 3(b) to 3(e) which were taken exception by Mr. Mishra, learned Sr. Counsel for the petitioner, who submitted on 21.6.2011 that the KOPT may take steps either to delete those averments which are totally unnecessary for the purpose of determining the issue in this case, otherwise the Court may exercise its power under Order 6, Rule 16 of the CPC to strike down the said averments. By order dated 21.6.2011 this Court directed the KOPT to justify the said allegation. When the matter was again taken up on 15.9.2011, this Court again directed the KOPT to file affidavit to substantiate the allegations against the petitioner in the said paragraphs along with documents. Further on 23.9.2011 the matter was taken up however the KOPT did not take any steps regarding deletion of the said allegations nor filed any affidavit substantiating

the same. Starting from 21.6.2011 repeatedly chances were given directing the KOPT either to produce sufficient documents to substantiate the allegations against the petitioner at paragraphs 3(b) to 3(e) of the counter or to file petition for striking down the said averments. However, till the last date of hearing, KOPT did not comply with the same. Therefore, we have no other alternative than to expunge the said allegations and hence the same are expunged.

Point No.1 :

26. This point is required to be answered in favour of the petitioners and the State Government for the following reasons.

First of all it may be noted the undisputed fact that the impugned notifications have been issued altering the limits of the KOPT encroaching upon the other ports area in respect of which notifications have already been issued by the State Government much prior to the notifications of the Central Government. It is also evident from the counter submitted by the Union of India as well as KOPT that the said notifications have been published extending the limits of the KOPT so as to enable the transloading operation system and the purpose and intent of the notifications is that it will facilitate transloading for KOPT.

27. In view of the legal submissions made by Mr. P. Tripathi, learned Addl. Solicitor General on behalf of the Union of India, Mr. Ashok Mohanty, learned Advocate General for the State, Mr. A.K. Parija, learned Sr. Counsel on behalf of Dharma Port, Mr. Mishra, learned Sr. Counsel for the petitioner in first writ petition and Mr. Sen,

learned Sr. Counsel for the petitioners in connected 2nd writ petition, it is necessary to extract the relevant definitions and provision of Indian Ports Act, 1908 and Major Port Trusts Act, 1963.

28. Section 2(q) of the Major Port Trusts Act, 1963 defines **"port"** to mean any major port to which the Act applies within such limits as may, from time to time, be defined by the Central Government for the purposes of the Act by notification in the Official Gazette, and, until a notification is so issued, within such limits as may have been defined by the Central Government under the provisions of the Indian Ports Act; where as Section 3(4) of the Indian Ports Act, 1908 defines **"port"** includes also any part of a river or channel in which this Act is for the time being in force. Section 3(8) of the Indian Ports Act defines **"major port"** means any port which the Central Government may by notification in the Official Gazette declare, or may under any law for the time being in force have declared, to be a major port; and Section 3(9) defines **"Government"**, as respects major ports, for all purposes, and, as respects other ports for the purposes of making rules under clause (p) of section 6(1) and of the appointment and control of port health officers under section 17, means the Central Government, and save as aforesaid, means the State Government. Further, the Indian Ports Act is referable to Entry 31 of List III (Concurrent List) of the Schedule VII of the Constitution, which reads thus :

"31. Ports other than those declared by or under law made by Parliament or existing law to be major ports."

29. In the cases in hand the notifications issued in the year 1977, 2001 and so also the impugned Notification issued by the Central Government are in relation to Major Port of KOPT at Kolkata in the West Bengal State and no doubt the same is based on the existing law, namely, the Indian Ports Act, 1908 but not for 'other ports' (non-major ports) in respect of which notifications have already been issued by the State Government much earlier. The said conclusion can be arrived at by careful reading and interpretation of the statutory provisions under Section 5 as well as the definition of "Major Port" and "Government" under Section 3 of the Indian Ports Act, 1908. Section 5 of the Act with its explanation is relevant to be extracted, which reads thus :

"5. Alteration of limits of ports. (1) The [Government] may, subject to any rights of private property, alter the limits of any port in which this Act is in force.

[Explanation.--For the removal of doubts, it is hereby declared that the power conferred on the Government by this sub-section includes the power to alter the limits of any port by uniting with that port any other port or any part of any other port.]

(2) When the [Government] alters the limits of a port under sub-section (1), it shall declare or describe, by notification in the Official Gazette, and by such other means, if any, as it thinks fit, the precise extent of such limits.

As per the definition clause referred to supra "port" is an exclusive definition both in respect of 'major ports' and 'other ports' as it defines any part of a river or the channel in which the Indian Ports Act is for the time being in force. In respect of the 'major ports' the Central Government is empowered as per the definition by giving Notification

under Section 5 in the official gazette to declare as such including alteration of limits of the 'major ports'. A careful reading of definition of term "Government" under Clause 3(9) so also Section 5 of the Indian Ports Act, 1908 along with its explanation, referred to supra, would show that the State Government is empowered to issue notification and declaration in relation to 'other ports' in the coastal line of the respective States. In the instant case, it is not in dispute that the Notification in relation to KOPT which is a major port is issued /published by the Central Government in the official gazette declaring as such in exercise of its power under Section 4 and impugned notification under Section 5 respectively. The State Government also in relation to seven other ports in the coastal line of Orissa has also issued notifications as such in exercise of its statutory power under Section 5 read with Section 3(9) of the Indian Ports Act. Therefore, it is clear that the State Government has issued the notifications in accordance with Section 5 of the Indian Ports Act under the power and authority guaranteed in Entry 31 & 32 of List III of the VIIth Schedule of the Constitution. Indisputably the Indian Ports Act, 1908 is a pre-constitutional law which is in existence. The Major Ports are declared by issuing notification by the Central Government and other ports by the State Government has to be interpreted in view of the inclusive definition of Section 3(4) of the Indian ports Act. Therefore, the notifications issued both by the Central Government in relation to KOPT and the State Government for other ports is in exercise of their statutory power under Section 4 & 5 read with Section 3(9) of the

Indian Ports Act. Reliance is placed upon Section 2(q) of the Major Port Trusts Act, 1963 which is enacted from the Entry 27 of the List I of the VIIth Schedule. The said entry reads thus :

"27. Ports declared by or under law made by Parliament or existing law to be major ports, including their delimitation and the constitution and powers of port authorities therein."

The definition 'Port' under Section 2(q) of the Major Port Trusts Act, 1963 is relevant to be extracted, which reads thus :

"2(q) "port" means any major port to which this Act applies within such limits as may, from time to time, be defined by the Central Government for the purposes of this Act by notification in the Official Gazette, and, until a notification is so issued, within such limits as may have been defined by the Central Government under the provisions of the Indian Ports Act."

30. In view of the above, it is clear that the limits of the Major Port could not be fixed by the Central Government by issuing notification by encroaching upon the limits of the other ports under Section 5 of the Indian Ports Act. Further the Major Port Trusts Act, 1963 is from the List-I enacted by the Parliament which is inclusively applicable to the 'Major Ports'. There is a reference to the notification in respect of 'Major Ports' and such notification could be only under Sections 5 of the Indian Ports Act, originally declaring the 'Major ports' and altering its limit. Therefore, the submissions on behalf of the Union of India and KOPT, to the extent that the Central Government has got primacy power over the State Government in alteration/fixation of the Port limits and for that reason extending/altering the limits of KOPT by the impugned notification is

perfectly legal and valid, cannot be accepted by this Court. If such submission is accepted, the inclusive definition of 'Port' which includes 'major ports' and 'other ports' or 'Government' includes both Central Government and State Government in relation to 'major ports' and 'other ports' respectively will become nugatory and power conferred upon the State Government will become meaningless. Such interpretation is not permissible in law. Hence the point No.1 is answered against the Union of India and KOPT.

Point No.2 :

31. It is submitted by the learned Addl. Solicitor General that the notifications issued by the State Government under Section 5 in relation to 'other ports' conflicted with the notification that is issued by the Central Government altering the limits of the 'Major Ports' and further Section 2(q) of the Major Port Trusts Act is applicable in the instant case altering the limits of Major Port of KOPT and as the State Government's notifications are in conflict with the Central Government notification, it amounts to repugnancy under Article 254 of the Constitution of India. In this regard learned Addl. Solicitor General has also placed reliance upon the proviso to Article 162 of the Constitution of India. Article 162 reads thus:

"162. **Extent of executive power of State :-**
Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws.

Provided that in any matter with respect to which the Legislature of a State and parliament has power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by

this Constitution or by any law made by parliament upon the Union or authorities thereof.”

With reference to the said provision, he placed reliance upon the proviso contending that the executive power of the State shall be subject to and limited by executive power expressly conferred by the Constitution or by any law made by Parliament on the Union or authorities thereof.

32. Reiterating and supporting the said submission, Mr. Kapur, learned Sr. Advocate on behalf of the KOPT also placed reliance upon various decisions of the Supreme Court in the cases of Deep Chand VS. State of U.P. & Ors., AIR 1959 SC 648; State of Orissa & Anr. Vs. M/s. M.A. Tulloch & Co., AIR 1964 SC 1284; Fertilizers & Chemicals Travancore Ltd. Vs. Kerala State Electircity Board & Anr., (1984) Supp. SCC 28; State of West Bengal Vs. Kesoram Industries Ltd. & Anr., (2004) 10 SCC 201; and Offshore Holdings Pvt. Ltd. Vs. Bangalore Development Authority & Ors., (2011) 3 SCC 139.

33. The said contentions of Mr. Tripathi, learned Addl. Solicitor General and Mr. Kapur, learned Sr. Advocate cannot be accepted for the following reasons.

Article 254 of the Constitution provides the inconsistency between laws made by Parliament and laws made by the State Legislature and regarding repugnancy it clarifies that if any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of

the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2) the law made by Parliament, shall prevail over the law made by the Legislature of the State.

However, in the instant case the Indian Ports Act, 1908 is relatable to Entry No. 31 of the Concurrent List and from the said existing law, in exercise of power under Section 5 of the Indian Ports Act, notifications have been issued both by the Central Government and State Government in respect of KOPT and 'other ports' in the coastal line of State of Orissa, respectively.

34. The primary requirement for Article 254 to come into play is that there must be an inconsistency between a 'law made by the Parliament' and a 'law made by a Legislature of a State' on the same subject matter from the entry in the concurrent list. The notifications issued by the Central and the State Governments respectively cannot, by any stretch of imagination, be treated as 'either law made by the Parliament and State Legislature'. So when there is no conflict between two competing statutes and when the conflict is confined to two orders/notifications issued by two independent authorities, both acting in exercise of the powers delegated to them by another authority, the help of this provision cannot be invoked. Nor can a conflict between two such orders/notifications be referable to Article 254, for it is a well known principle of law that provisions of law cannot be extended by analogy. (***See Piara Kishen Vs. Crown, AIR 1951 Punjab 409***).

35. *A Division Bench of the Allahabad High Court in the case of Mittra Nand Kaushik and another Vs.. State of U.P. and others, reported in AIR 1982 Allahabad 451 held as under :*

"15. In order to decide the question of repugnancy it must be first shown that the two enactments contained inconsistent provisions, and that they cannot stand together- An obvious inconsistency about the requirement leading to two different legal result when applied to the same facts is the primary requirement for finding out repugnancy."

In *M. Karunanidhi v. Union of India*, reported in AIR 1979 SC 898, a Constitution Bench of the Supreme Court has laid down the test for determining the question of repugnancy and held as under :

"It is well settled that the presumption is always in favour of the constitutionality of a statute and the onus lies on the person assailing the Act to prove that it is unconstitutional. Prima facie, there does not appear to us to be any inconsistency between the State Act and the Central Acts. Before any repugnancy can arise, the following conditions must be satisfied:

1. That there is a clear and direct inconsistency between the Central Act and the State Act.
2. That such an inconsistency is absolutely irreconcilable.
3. That the inconsistency between the provisions of the two Acts is of such nature as to bring the two Acts into direct collision with each other and a situation is reached where it is impossible to obey the one without disobeying the other."

36. In view of the above it is clear that the question of repugnancy or overriding due to conflict between central law and State law, would arise when there is a conflict between the two laws or statutes. In the instant case all the notifications, both of the State and Union are under the same provision of the same central law which gives power to the appropriate Government to notify the port limits.

The State Government of Orissa has appropriately and legally notified the limits of the ports of Orissa in exercise of its constitutional powers and powers conferred under the statute. Therefore, it cannot also be said that the impugned notification issued by the Central Government under Section 5 of the Indian Ports Act, altering the limits of the KOPT will prevail over the notifications issued by the State Government in relation to 'other ports', which is also in exercise of its statutory power under Section 5 of the Indian Ports Act, 1908.

37. Further, the reliance placed by the learned Sr. Advocate Mr. Kapur upon the various decisions of the Supreme Court referred to supra have no application to the instant case for the following reasons.

38. In the case of Kailash Nath (supra), the Supreme Court while dealing with an illegal imposition of tax by the State Government observed that a notification which has been made in accordance with the power conferred by the statute has statutory force and validity.

There is no dispute that a notification which has been made in accordance with the power conferred by the statute has no statutory force. In the instant case, notifications made by both the State Government and Central Government are in exercise of their statutory power under Section 5 of the Indian Ports Act. Therefore, the question does arise in the case in hand that whether the Central Government can issue any notification extending/altering the limits of the 'major port' encroaching upon the pre-notified limits of other

ports of the State Government which are duly notified by the State Government in exercise of its statutory power? Therefore, the case of Kailash Nath (supra) is not applicable to the present case.

39. In Deep Chand (supra), the Constitution Bench of the Supreme Court decided the principles of repugnancy. In the said case the test is restricted to two statutes and not notifications and other delegated legislation. Referring to the Nicholas' test of repugnancy the Constitution Bench held that repugnancy between two statutes may be ascertained on the basis of the following three principles: (1) Whether there is direct conflict between the two provisions; (2) Whether Parliament intended to lay down an exhaustive code in respect of the subject-matter replacing the Act of the State Legislature and (3) Whether the law made by Parliament and the law made by the State Legislature occupy the same field.

In the instant case the subject matter is clearly defined in Section 5 of the Indian Ports Act, 1908, wherein the Central Government, as per the definition of 'Government' under Section 3(9), has power over 'major ports, and the State Government has power over 'other ports' in its State. Further, the actual conflict has arisen out of notifications issued by the Central Government and State Government in exercise of the similar power vested under Section 5 of the Indian Ports Act and not out of any 'competing statutes' or 'provisions'. In the instant case all the notifications, both of the State and Union are under the same provision of the same

central law which gives power to the appropriate Government to notify the port limits and the State Government of Orissa has appropriately and legally notified the limits of the ports of Orissa in exercise of its constitutional powers and powers conferred under the statute. Therefore, the question of repugnancy will not be attracted in this case and hence the case of Deep Chand (supra) has no application to the present case.

40. In M.A. Tulloch & Co. (supra) the Supreme Court held that repugnancy arises when two enactments both within the competence of the two Legislatures collide and when the Constitution expressly or by necessary implication provides that the enactment of one legislature has superiority over the other then to the extent of the repugnancy the one supersedes the other. However, in the instant case both the notifications issued by the State Government as well as the Central Government are in exercise of power under the same provision of the Act and further, as explained above, the Central Government cannot alter the limits of the 'major port' encroaching upon the limits of 'other ports' in respect of which the State Government has issued notifications in exercise of the power vested under the said provision. Therefore, the case of M.A. Tulloch & Co.(supra) has also no application to the instant case.

41. The cases of Ram Chandra Mawa Lal(supra), I.T.C. Ltd. (supra), Kesoram Industries Ltd. (supra), and Offshore Holdings Pvt. Ltd. (supra) have also no application for the reason that the said cases

also involve the question of repugnancy of two statutes as well as law made by the parliament and state legislature.

Point Nos. 3 & 4 :

42. These points are also required to be answered against the Union of India and KOPT for the following reasons. It is an undisputed fact that much earlier to the impugned notifications issued by the Central Government, the State Government had issued the notification in exercise of its statutory power under the Indian Ports Act, 1908 in relation to seven other ports in the State of Orissa fixing its limits. It is also evident from the map produced by them. It is also an undisputed fact that the alteration of the limits by the KOPT encroaches upon the other ports which are established in the coastal line of Orissa State. Therefore, the Central Government could not have extended the limits of the KOPT, which is a major port, encroaching into the pre-notified limits of other ports of the Government of Orissa in exercise of the self same power under Section 5 of the Indian Ports Act, 1908 in view of explanation to the above provision.

43. It is a fact that some of the ports, as per the Central Government guidelines, have been leased out by the Government of Orissa to some private parties for better management and development and the developmental works are in progress. Some of the affected private parties are the parties in these proceedings opposing the impugned notifications.

44. It is also a fact that if the 'other ports' area of the Government of Orissa is encroached upon by the KOPT extending its limits, not only the interest of State of Orissa but also the private companies/lessees who are having the lease hold rights will be grossly affected. It is an well settled principles of law that an affected party should be given an opportunity before taking any decision affecting the interest of the said party. In the instant case, there is neither any consultation with the State Government or its lessees before exercising power under Section 5 by the Central Government in altering the limits of the KOPT which transgresses into the vested rights of both the State of Orissa as well as its lessees and the same is also in violation of principles of natural justice. In this regard, it would be worthwhile to refer to the Constitution Bench decision of the Supreme Court in the case of *Maneka Gandhi Vs. Union of India*, reported in AIR 1978 SC 597, wherein the Supreme Court held as under :

" It is well established that even where there is no specific provision in a statute or rules made thereunder for showing cause against action proposed to be taken against an individual, which affects the rights of that individual, the duty to give reasonable opportunity to be heard will be implied from the nature of the function to be performed by the authority which has the power to take punitive or damaging action. This principle was laid down by this Court in the *State of Orissa v. Dr (Miss) Binapani Dei*¹⁴⁶ in the following words:

"The rule that a party to whose prejudice an order is intended to be passed is entitled to a hearing applies alike to judicial tribunals and bodies of persons invested with authority to adjudicate upon matters involving civil consequences. It is one of the fundamental rules of our constitutional set-up that every citizen is protected

against exercise of arbitrary authority by the State or its officers. Duty to act judicially would, therefore arise from the very nature of the function intended to be performed: it need not be shown to be superadded. If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power. If the essentials of justice be ignored and an order to the prejudice of a person is made, the order is a nullity. That is a basic concept of the rule of law and importance thereof transcends the significance of a decision in any particular case.'"

45. In the case of the Sheel Kr. Roy Vs. Secretary, Ministry of Defence, (2007) 12 SCC 462, the Supreme Court held that the doctrine of proportionality is one of the grounds on the basis whereof the power of judicial review could be exercised.

46. In the case of Om Kumar & Ors. Vs. Union of India, (2001) 2 SCC 386, the Supreme Court placing much reliance upon the various decisions of the Foreign Courts very lucidly elaborated the doctrine of proportionality and held as under :

"28. By "proportionality", we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least-restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the court will see that the *legislature* and the *administrative authority* "maintain a *proper balance* between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve". The legislature and the administrative authority are, however, given an area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not is for the court. That is what is meant by proportionality.

29. The above principle of proportionality has been applied by the European Court to protect the rights guaranteed under the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 and in

particular, for considering whether restrictions imposed were restrictions which were "necessary" — within Articles 8 to 11 of the said Convention [corresponding to our Article 19(1)] and to find out whether the restrictions imposed on fundamental freedoms were more excessive than required. (*Handyside v. UK*). Articles 2 and 5 of the Convention contain provisions similar to Article 21 of our Constitution relating to life and liberty. The European Court has applied the principle of proportionality also to questions of discrimination under Article 14 of the Convention (corresponding to Article 14 of our Constitution). (See *European Administrative Law* by J. Schwarze, 1992, pp. 677-866)

32. So far as Article 14 is concerned, the courts in India examined whether the classification was based on intelligible differentia and whether the differentia had a reasonable nexus with the object of the legislation. Obviously, when the courts considered the question whether the classification was based on intelligible differentia, the courts were examining the validity of the differences and the adequacy of the differences. This is again nothing but the principle of proportionality. There are also cases where legislation or rules have been struck down as being arbitrary in the sense of being unreasonable [see *Air India v. Nergesh Meerza* (SCC at pp. 372-373)]. But this latter aspect of striking down legislation only on the basis of "arbitrariness" has been doubted in *State of A.P. v. McDowell and Co.*

33. In Australia and Canada, the principle of proportionality has been applied to test the validity of statutes [see *Cunliffe v. Commonwealth* Aust LJ (at 827, 839) (799, 810, 821)]. In *R. v. Oakes* Dickson, C.J. of the Canadian Supreme Court has observed that there are three important components of the proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly, the means, must not only be rationally connected to the objective in the first sense, but should impair as little as possible the right to freedom in question. Thirdly, there must be "proportionality" between the effects of the measures and the objective. See also *Ross v. Brunswick School District No. 15* (SCR at p. 872) referring to proportionality. English Courts had no occasion to apply this principle to legislation. The aggrieved parties had to go to the European Court at Strasbourg for a declaration.

34. In U.S.A., in *City of Boerne v. Flores* the principle of proportionality has been applied to legislation by stating that "there must be congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end".

35. Thus, the principle that *legislation* relating to restrictions on fundamental freedoms could be tested on the anvil of "proportionality" has never been doubted in India. This is called "primary" review by the courts of the validity of legislation which offended fundamental freedoms.

III-A Proportionality and Administrative Action (in England)

36. In administrative law, the principle of "proportionality" has been applied in several European countries. But, in England, it was considered a *future possibility* in the *GCHQ case* by Lord Diplock. In India, as stated below, it has always been applied to administrative action affecting fundamental freedoms."

In the case of *Teri Oat Estates (P) Ltd. v. U.T., Chandigarh*, (2004) 2 SCC 130, the Supreme Court held as under :

"The doctrine of primary review was held to be applicable in relation to the statutes or statutory rules or any order which has the force of statute. The secondary review was held to be applicable inter alia in relation to the action in a case where the executive is guilty of acting patently arbitrarily. This Court in *E.P. Royappa v. State of T.N.* noticed and observed that in such a case Article 14 of the Constitution of India would be attracted. In relation to other administrative actions as for example, punishment in a departmental proceeding, the doctrine of proportionality was equated with *Wednesbury* unreasonableness

47. In the instant case, undisputedly the impugned notification has been issued by the Central Government altering the limits of the KOPT in exercise of its power under Section 5 of the Indian Port Trusts Act, 1908 without consulting with the State Government and its lessees which affects the vested rights of the State Government and its lessees, and has got serious civil consequences upon them. Therefore the impugned notification is vitiated in law and also is in

violation of the principles of natural justice and Article 14 of the Constitution as the same would amount to arbitrary, unreasonable, unfair & a colourable exercise of power and the principle of doctrine of proportionality would be aptly applicable to the case on hand as it encroaches the limits of other ports of the State, even assuming without admitting that the Central Government has got power to issue notification.

Point Nos.5 & 6 :

48. In the instant case, it is an undisputed fact that the Government of India has published the impugned Notification on 22.10.2010 prescribing an extension of the limits of the KOPT in the manner and to the extent specified therein. Consequent thereto, basing on the said Notification, the KOPT published the Notification dated 10.11.2010.

49. It is settled legal proposition that if initial action is not in consonance with law, the subsequent proceedings would not sanctify the same. In such a fact situation, the legal maxim "*sublato fundamento cedit opus*" is applicable, meaning thereby if in a case foundation is removed, the superstructure falls.

50. In the case of Badrinath Vs. State of Tamil Nadu & Ors., AIR 2000 SC 3243, the Apex Court observed that once the basis of a proceeding is gone, all consequential acts, actions, orders would fall to the ground automatically.

51. In C. Albert Morris Vs. K. Chandrasekaran & Ors., (2006) 1 SCC 228 the Apex Court held that a right in law exists only when it has a lawful origin. A person can be said to have a right to something when it is possible to find a lawful origin for that right.

52. Therefore, if the initial notification of the Government of India impugned herein is bad in law, the subsequent notification of the KOPT cannot survive and KOPT cannot claim any right over the same.

53. Considering all the fact situation of the case referred to supra, all the points are answered against the Union of India and KOPT and in view of the above, the writ petitions are allowed. The impugned Notification No. 2609(E) dated 22.10.2010 issued by the Central Government is hereby quashed. As we have quashed the said notification, the impugned Notification No. Adm/01250/VI dated 10.11.2010 issued by the Kolkata Port Trust is also accordingly quashed.

In the result, the writ petitions are allowed.

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Chief Justice.

B.N. Mahapatra, J. I agree.

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Judge

Orissa High Court, Cuttack
The 25th day of November, 2011/A.Dash