

\$~1 to 4

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 22.05.2019

Pronounced on: 29.05.2019

+ CM APPLN. 14120/2019 in W.P.(C) 3070/2019

SAMSON MARITIME LTD. AND ANR. Petitioners

Through Mr.Rajiv Nayyar, Sr. Adv. with
Mr.Mahesh Agarwal, Mr.Rishi
Agarwal, Mr.Amitava R. Majumdar,
Mr.Karan Luthra, Mr.Pranjit
Bhattacharya & Ms.Manjira Das
Gupta, Advs.

versus

UNION OF INDIA AND ORS. Respondents

Through Ms.Pinky Anand, ASG with
Ms.Saudamini Sharma, Mr.Balendu
Shekhar & Mr.Sumit Teterwal, Advs.
for R-1 & 2.
Mr.Ripu Daman Bhardwaj, CGSC for
R-3 & 4.
Mr.Rajesh Ranjan, Adv. with
Ms.Kritika Sachdeva, Adv. for
Shipyards Association of India.

+ CM APPLN. 14123/2019 in W.P.(C) 3071/2019

THE GREAT EASTERN SHIPPING
COMPANY LIMITED AND ANR. Petitioners

Through Mr.Kapil Sibal, Sr. Adv. with
Mr.Mahesh Agarwal, Mr.Rishi
Agarwal, Mr.Amitava R. Majumdar,
Mr.Karan Luthra, Mr.Pranjit
Bhattacharya & Mr Adit Pujari, Advs.

versus

UNION OF INDIA AND ORS. Respondents
Through Ms.Pinky Anand, ASG with
Ms.Saudamini Sharma, Mr.Balendu
Shekhar & Mr.Sumit Teterwal, Advs.
for R-1 & 2.
Mr.Ripu Daman Bhardwaj, CGSC for
R-3 & 4.
Mr.Rajesh Ranjan, Adv. with
Ms.Kritika Sachdeva, Adv. for
Shipyards Association of India.

+ CM APPLN. 14130/2019 in W.P.(C) 3073/2019

GREATSHIP (INDIA) LTD. AND ANR. Petitioners
Through Mr.Sandeep Sethi, Sr. Adv. with
Mr.Mahesh Agarwal, Mr.Rishi
Agarwal, Mr.Amitava R. Majumdar,
Mr.Karan Luthra & Mr.Pranjit
Bhattacharya, Advs.

versus

UNION OF INDIA AND ORS. Respondents
Through Ms.Pinky Anand, ASG with
Ms.Saudamini Sharma, Mr.Balendu
Shekhar & Mr.Sumit Teterwal, Advs.
for R-1 & 2.
Mr.Ripu Daman Bhardwaj, CGSC for
R-3 & 4.
Mr.Rajesh Ranjan, Adv. with
Ms.Kritika Sachdeva, Adv. for
Shipyards Association of India.

+ CM APPLN. 14136/2019 in W.P.(C) 3076/2019

SEVEN ISLANDS SHIPPING LIMITED AND ANR. Petitioners
Through Mr.Balbir Singh, Sr. Adv. with
Mr.Mahesh Agarwal, Mr.Rishi
Agarwal, Mr.Amitava R. Majumdar,
Mr.Karan Luthra, Mr.Pranjit

Bhattacharya & Ms.Monica
Benjamini, Advs.

versus

UNION OF INDIA AND ORS.

..... Respondents

Through

Ms.Pinky Anand, ASG with
Ms.Saudamini Sharma, Mr.Balendu
Shekhar & Mr.Sumit Teterwal, Advs.
for R-1 & 2.
Mr.Ripu Daman Bhardwaj, CGSC for
R-3 & 4.
Mr.Rajesh Ranjan, Adv. with
Ms.Kritika Sachdeva, Adv. for
Shipyards Association of India.

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

ORDER

CM APPLN. 14120/2019 in W.P.(C) 3070/2019

CM APPLN. 14123/2019 in W.P.(C) 3071/2019

CM APPLN. 14130/2019 in W.P.(C) 3073/2019

CM APPLN. 14136/2019 in W.P.(C) 3076/2019

1. Vide these applications, the applicants/petitioners sought stay of the operation of Notification No. 2 of "Make in India" dated 13.02.2019 and Circular No. 2/2019 dated 22.03.2019. The same were stayed vide order dated 28.03.2019 till further orders.

2. Being aggrieved, the respondents filed LPA Nos. 326/2019, 327/2019, 328/2019 and 331/2019 and the same have been disposed of vide order

dated 13.05.2019, whereby, requesting this Court to take-up and dispose of the applications for interim relief at the earliest. Accordingly, these applications are taken up for disposal by this common order.

3. Since reply and rejoinder have been filed in C.M. No. 14123/2019, therefore, the said application is being taken up as a lead application and the order passed in this application shall be applied in all the applications.

4. The case of the applicants/petitioners is that promulgation of Notification dated 13.02.2019 by the respondent no.1 and Circular No.02/2019 dated 22.03.2019 by the respondent no.2 which have been issued under Sections 406 and 407 of the Merchant Shipping Act, 1958 (hereinafter referred as MS Act, 1958), whereby allowed a completely alien concept of an “*Indian Built Ship*” to get commercial rights higher than an Indian Flag Vessel under the Act, 1958 and to destroy any statutory recognition and preference available to an Indian Flag Vessel over Foreign Flag Vessels.

5. Mr. Kapil Sibal, learned senior counsel appeared on behalf of applicants/petitioners submitted that the Act, 1958 was promulgated by the Parliament to encourage and promote the growth and development of ships under the Indian Flag consequent to their registration as “*Indian Ships*”. The

ACT, 1958 has no concern with the place of built of the ship. The said Act only concern itself with the ownership and registration of the ship. If the ownership is wholly Indian, it becomes an Indian Ship, otherwise it is a Foreign Ship. The DGS exercises control through the Act, 1958 upon the Indian Ships in case of emergencies or war. Indian Ships are, therefore, the second line of defence in the case of an emergency. As of the year 2002, there were 560 Indian Ships and as on date, there are 1384 Indian Ships. The Gross Tonnage has increased from approximately 68 lakh GRT in 2002 to approximately 1.25 crore GRT in 2018. All nations of the world zealously protect their national flag fleet of ships by providing incentives/benefits. This in legal terms is known as “*Cabotage Law*”. In India, cabotage exists in limited form, to promote the growth and development of Indian Ships. A Right of First Refusal (RoFR) was available to an Indian Ship wherein any customer/consumer/charterer who wished to engage a ship and had floated an enquiry/tender for the same. If an Indian Ship was available for the said business at the price quoted by the foreign flag ship, the business would be awarded to the Indian Ship. If the Indian Ship is not available or is unwilling to pick up that business at a rate which is tendered by a Foreign ship, only then a license under the Act, 1958 was granted to the Foreign Ship.

6. Learned senior counsel further submitted that by virtue of the above, the Indian Ship-owners were incentivized to invest in Indian Flag Ships which resulted in increase in the national tonnage though foreign built, as mentioned above. Under the Act, 1958, it is only the Indian character of the Ship through registration which is of concern to the DGS. By the Impugned Notification/Circular, the regime has been altered to the prejudice of the Indian Ships to the effect that there is no incentive or preference available to them in the Indian business, due to which, a ship which was originally built in India, but may be owned by a foreigner will get the first preference in Indian business. This amounts to changing the goal-post from the Act, 1958 related to the ownership of the ship to be Indian, to a goal-post completely extraneous to the Act, 1958 i.e. the place of built of the ship.

7. The impugned Notification/Circular, in respect of the preference to Indian Ships against Foreign Ships, (which was previously allowed), nullifies the RoFR. It completely ignores the Indian character of a ship being the only relevant criteria under the Act, 1958 and makes it purely consumer/charterer's choice oriented. In respect of a character floating a tender, under the Impugned Notification/Circular, the RoFR is obtained only by an Indian Built Ship, irrespective of the flag it carries. The price being

the lowest by the bidder, does not operate as a factor in allowing an Indian Ship to get the said business. Upon the making of such choice by the consumer, even a Foreign Ship gets a license to operate for Indian business, mechanically without dispute. Thus, through the Impugned Notification, the very basis of the Act, 1958 stands completely removed making the exercise violative of the aforesaid Act.

8. It is further submitted that the prejudice being caused to the applicants/petitioners which is as follows:-

- a. As per the Act, 1958, an “*Indian Ship*” i.e. a ship hoisting the Indian national colours statutorily has thereby conferring an “*Indian Character*” on the vessel. For the first time, the Impugned Notification introduces “*Indian Built Ship*”, as a concept extraneous/alien to the Act, 1958. By giving a without jurisdiction preference to an Indian Built Ships irrespective of the Flag of the ship, the concept of flagging/ownership has been arbitrarily obliterated which is beyond the provisions of the Act, 1958.
- b. Consequently, vessels built in India (including foreign flag) would arbitrarily/discriminatingly, get preference over Indian flag vessels in securing Indian business. The impugned Notification is irrational

inasmuch as it does not take into consideration that a player in the shipping industry cannot change his entire fleet overnight and convert it into Indian Built Ships on account of shipbuilding being a time consuming exercise and therefore, destroys the entire investment made by such players over the years and completely obliterated their right to do business.

9. It is further submitted that Foreign Built Foreign Flag Vessels have been placed at par with Foreign Built Indian Flag Vessels in the RoFR hierarchy. This destroys the very purpose of registering any ship as an Indian Flag Vessel under the Act, 1958 and is against the Preamble of the said Act and bears absolutely no nexus to the supposed Make in India policy objective of the Impugned Notification.

10. Learned senior counsel further submitted that a policy of the executive cannot destroy the legislation governing the field and any policy must be in consonance with the objective sought to be achieved by the Act, 1958 as has been held by the Hon'ble Supreme Court of India in *State of Sikkim vs. Dorjee Tshering Bhutia and Others: (1991) 4 SCC 243*. Further, the impugned Notification violates the rule of reciprocity and is therefore bad in law. An Indian Ship owner owing an Indian Flag Vessel built outside

India does not have any RoFR/preferential benefit in the country of build of his vessel; however, conversely, a foreigner owning Foreign Flag Vessel built in India has a RoFR higher than the Indian Ship. The basic notion of reciprocity underlies most legal relationships and therefore assumes crucial importance in the international arena where co-operation between sovereign states is inevitably necessary. The Foreign Flag Vessel gets benefit in its own country as well as in India, whereas, an Indian Flag Vessel is left in the lurch by being equated to a Foreign Flag Vessel in India without any reciprocal benefit being provided to an Indian Flag Vessel in the country of its built. Accordingly, the respondent nos. 1 and 2 have failed to take into account the principles of reciprocity which is crucial in international trade before opening up the market to foreign vessels, when Indian Ships are not allowed to operate in the markets of such foreign countries. This is violative of India's economic and trade policy, contradictory to its national interest and violative of the constitutional rights of the petitioner.

11. He further submits that the Impugned Notification/Circular is, therefore, violative of Articles 14, 19(1)(g) and 21 of the Constitution of India inasmuch as it seeks to treat unequals as equals (i.e. Foreign owned Ships to Indian Ships) and treats equals as unequals (i.e. Indian Built Indian

Ships as of higher preference than Indian Ships).

12. On the other hand, Ms.Pinky Anand, learned Additional Solicitor General appearing on behalf of respondents submits that impugned notifications have been issued pursuant to the “*The Make in India*” policy which is in larger public interest and does not violate any right of the petitioners and therefore no irreparable and grave harm will be caused to the petitioners. The object and purpose of the Act, 1958 is the umbrella legislation enacted with the object to promote the development of a robust mercantile marine and to ensure that the interests of the nation are best served. The preamble to the Act states:-

“An Act to foster the development and ensure the efficient maintenance of an Indian mercantile marine in a manner best suited to serve the national interests and for that purpose to establish a National Shipping Board, to provide for the registration, certification, safety and security of Indian ships and generally to amend and consolidate the law relating to merchant shipping”

13. It is submitted that “*Indian Mercantile marine*”, includes in its ambit the domestic ship-building industry. The ship-building industry and ship-repair industry being essential elements of the supply chain are important for maintenance of the national merchant fleet. Part XIV of the Act deals with the Control of Indian ships and ships engaged in coasting trade.

Section 406 provides for the requirement of licence to be granted by the Director General to Indian ships and ships chartered by Indian citizens/Indian companies/societies registered in India. Section 407 deals with the requirement of licensing of ships other than an Indian Ship or a ship chartered by Indian citizens/Indian companies/societies registered in India for engaging in coasting trade. The Department of Industrial Policy and Promotion issued orders dated 15.06.2017 and 28.05.2018 under Rule 153(iii) of the General Financial Rules, 2017 to encourage 'Make in India' and promote manufacturing and production of goods and services in India with a view to enhancing income and employment. These orders introducing the Make in India policy have not been assailed by the petitioner. The instant Shipping Development Circular No. 02/2019 has been issued in furtherance of the Make In India policy and in exercise of powers vested with the Director General of Shipping under Section 406 and 407 of the Act, 1958.

14. It is further submitted that the Maritime cabotage is generally defined as sea transport of passengers and goods between two ports located in the same country. Cabotage restrictions are practised world over. There are several explanations for cabotage restrictions. Cabotage restrictions

ensure economic growth and social well-being by developing local capacity in several segments of the maritime transport value chain, including ship-building and repair. India has been trying to give impetus to its struggling coastal trade, and to that end, Circular no. 02/2002 dated 08.11.2002 was issued which gave *inter alia* guidelines for grant of licence to foreign flag vessels. This circular was issued in exercise of powers under Section 406 and Section 407 of the Act, 1958 introducing the Provision for Right of First Refusal (RoFR) defined as “*right which accrues to a bidder in the tendering process- who offers an Indian Flag vessel and whose rate though not being the lowest – to be awarded the tender, subject to his matching of the lowest rate offered by a bidder, who offers a foreign flag vessel.*”

15. She further submitted that RoFR is a part of the Cabotage principle of protecting domestic coastal trade. The modalities of RoFR are the prerogative of the State Machinery and are not dependent upon the principle of reciprocity between two nations. There is no universal definition of “*Cabotage*” and there are no universal standard guidelines to be followed while framing a Cabotage policy. It has to be tailored to each nation’s specific needs and requirements. RoFR is a means to achieve a specific goal which differs according to the regional requirements and

economic needs of each nation. In the present situation, the Goal sought to be achieved is the development of the Indian Ship Building Industry which is currently flailing, despite the fact that India has a Coastline of approximately 7500 Kms and there is immense potential for a domestic ship building industry to thrive.

16. It is further submitted that the growth of the shipbuilding sector has been stunted in India due to lack of sustained support and requisite public investment in the maritime sector. In 2017, the thrust of the Government was to encourage and promote domestic manufacture of goods. To that end, the Government decided to implement, the Make in India Policy, wherein thrust was given to procure locally made goods and services, as much as was possible. By the notification dated 13.02.2019, it was decided that the chartering of ships/vessels etc. through open/global tender process should give preference to bidders who offer Indian built ships. Aforesaid notification and circular dated 22.03.2019 is a policy support measure to promote indigenous ship building industry. The Indian ship-building industry suffers from various policy constraints and an adverse tax structure, which has not encouraged the growth of this industry to the desired extent. Only about 6.5% of India's EXIM (Export-Import) trade is

carried by Indian flag ships, of which the Indian built ships are negligible in number.

17. Learned Additional Solicitor General further submitted that there are two instances under which the RoFR may be exercised are:

- (i) The L1 bidder is a Foreigner or an entity registered outside India, offering a ship not built in India.
- (ii) The L1 bidder is a Citizen of India or Company registered in India or Society registered in India or Indian Shipping Company/organization with a vessel registered/flagged in India, offering a ship not built in India.
- (iii) From amongst the bidders eligible to exercise RoFR, the priority to exercise this Right would lie in sequence from the lowest to the highest bidder within the margin of purchase preference. The exercise of RoFR would cease as soon as an eligible bidder in order of priority matches L1. The first priority would be given to any bidder who offers an Indian built ship. In case none of the bidders offering Indian built vessels matches the L1 price, then RoFR would be offered to bidders who are either citizens of India or Companies

registered in India or Societies registered in India or offering a vessel flagged in India or outside. In case none of the bidders eligible to exercise RoFR matches the L1 quote, then the charter shall be awarded to the L1 bidder.

18. Thus, category 1 is Indian built ship offered by Citizen of India/Indian Company/Society Registered in India irrespective of whether the vessel is Indian Flagged or Foreign Flagged for this category the paramount requirement is the vessel should be built in India which is in consonance with the object and nexus envisaged in the Make in India policy. The notification dated 13.02.2019 and circular issued thereto is issued in pursuance.

19. Category II is in absence of any vessel from the aforementioned category I RoFR will be accorded to the bidders who mandatorily are Indian Citizens/Indian Company/ Society registered in India irrespective of the vessel being Indian Flagged or Foreign Flagged. All the petitioners who own Indian Flagged vessel built outside India fall in Category II. Apart from entities like the petitioners, who are offering foreign flagged vessels manufactured outside India, those Indian Citizens/Indian Companies/Societies registered in India will also be able to compete with

the entities like the petitioners. The only difference between the petitioners and other Indian Citizens/ Indian company/ Society registered in India will be regarding ownership of such vessels. The Indian Flagged vessels are necessarily owned by the petitioners. However, the other category is of Indian entities offering hired or chartered foreign vessels. This category ensures object and nexus of Make in India order of the Government of India, to promote maritime services offered by Indian Citizens/Indian Companies/ Societies Registered in India.

20. To strengthen her arguments, learned ASG has relied upon the case of *Bhavesh D. Parish vs. Union of India: (2000) 5 SCC 471* whereby observed that while considering an application for staying the operation of a piece of legislation, and that too pertaining to economic reform or change, then the courts must bear in mind that unless the provision is manifestly unjust or glaringly unconstitutional, the courts must show judicial restraint in staying the applicability of the same.

21. Also relied upon the case of *Delhi Development Authority vs. Skipper Construction Co. (P) Ltd.: (1996) 4 SCC 622* whereby the Hon'ble Supreme Court has held that before making the order, the court must be satisfied that it is a case which calls for such an order.

22. In case of *State of W.B. vs. Calcutta Hardware Stores: (1986) 2 SCC 203* whereby the Hon'ble Supreme Court has observed that deprecating the cursory manner of passing such interlocutory orders for the mere asking, should have passed the impugned order in the manner that they did.

23. In case of *BALCO Employees' Union (Regd.) vs. Union of India: (2002) 2 SCC 333* whereby held that process of disinvestment is a policy decision involving complex economic factors. The Courts have consistently refrained from interfering with economic decisions as it has been recognised that economic expediencies lack adjudicative disposition and unless the economic decision, based on economic expediencies, is demonstrated to be so violative of constitutional or legal limits on power or so abhorrent to reason, that the Courts would decline to interfere.

24. The fact remains that the Act, 1958 governs ownership of and not where the ship is built. This essential difference seems not appreciated by the respondents. The proposed new regime under the impugned Notification, in fact attempt to create a scenario wherein a Foreign Built, Foreign Owned, Foreign Flag Vessel is treated on the same pedestal as a Foreign Built, Indian Owned and Indian Flagged vessel. This has no nexus

to the purported and ostensible objective of the impugned notification which is to further the interest of the Ship Building Industry in India. The impugned notification seeks to do is to do away totally with the existing protection which is provided to Indian Ships to have a right to do Indian business by matching the lowest rate quoted by the Foreign Flag Ships. The protection was to promote Indian Flag Ships to further the objective of the Act, 1958 and increase Indian tonnage. The impugned regime has no connection with giving any encouragement to the shipbuilding industry. The new regime creates a scenario when an Indian Flag Vessel owned and offered by an Indian citizen/Indian Company/ Indian Society is placed on the same pedestal as Foreign Flag Vessel offered by an Indian citizen/ India Company/ India society in its capacity as a mere “*charterer*” which does not require registration under the Act, 1958. This clearly is not linked to the ostensible objective or the policy of “Make in India” and also amounts to treating unequals as equals. As per the impugned notification dated 13.02.2019, the respondent has created the following classes of priority which is not envisaged within the scheme of the Act, 1958:

- (a) An Indian Built Ship irrespective of its Flag would get first priority to do business in India.

(b) An Indian Ship and a Foreign Flag Ship have been equalised so long as the Foreign Flag Ship is chartered by an Indian Citizen/Indian Company/Indian Society.

25. The Impugned Notification issued under the Act, 1958 needs to operate within the confines of said Act and not beyond it. The Impugned Notification seeks to provide RoFR to ships already built in India prior to the date of the impugned notification irrespective of such Indian built ships being foreign flag or Indian flag. It seems giving RoFR to ships already built in India before the date of the impugned notification does not incentivise future shipbuilding in any manner whatsoever thereby defeating the objective of “*Make in India*”. The foreign ship owners invest in Indian shipping Companies and set up 100% subsidiaries under the FDI regime to flag vessels in India and set up offices in India only to take advantage of RoFR Regime thereby increasing not only the Indian Tonnage, but to provide additional revenue, foreign exchange, tax and employment in India. The dilution of the RoFR Regime may reduce foreign direct investment in shipping in India.

26. For Indian Flag Vessels the requirement is to have a full compliment of Indian National Seafarers. Thus, under the impugned notification, the

Government may be looser on revenue and deprive Indian Seafarers of employment. The objective of the Act, 1958 is to equate Foreign Flag Ships with Indian Flag Ships thus making India as a rare exception amongst maritime nations which gives no preference to its domestic flag vessels over foreign flag vessels in respect of Indian trade. All ships which have been registered under the Act, 1958 prior to the date of the impugned notification would not be granted any protection whatsoever for being an Indian Flag Ship and therefore, they can be left to idle without business. The previous regime only allowed Indian Flag Ships with limited protection to do the Indian business by matching the lowest rate quoted by a Foreign Flag Ship i.e. without any price preference. The new RoFR regime would enable a foreign flag ship to secure the Indian business without any weightage/consideration being given to the Indian Flag as Indian Flag Ships are equalised in the RoFR hierarchy with Foreign Flag Ships. The impugned regime seems to have any nexus to the object sought to be achieved of India being a Maritime Force.

27. As stated by the counsel for the petitioner that respondents have ignored the public interest at stake *inasmuch* as the impugned regime intends to incentivise the moribund shipbuilding industry comprising of 20

active shipyards which are plagued by financial difficulties by devastating a buoyant Indian shipping industry comprising of 200 odd shipping companies employing thousands of Indian citizens and supporting ancillary industries and having invested around INR 68,000 crores to increase Indian Tonnage and have altered their position based on the declared regime by the Government of India.

28. In *Halliburton Offshore Services Inc. Vs. Principal Officer of Mercantile Marine Department: (2017) 14 SCC 238*, the Hon'ble Supreme Court has held as under:-

“54. Registration of ship is a means of bestowing nationality upon the ship which is an age old practice in maritime industry. By registration under the M.S. Act, 1958, a ship is recognised as an Indian Ship and becomes entitled to fly Indian Flag and is thus eligible to claim the benefits, privileges, advantages or protection enjoyed by Indian Ships under the Act. Flag of the ship is the prima facie or visible evidence of registry. Under customary international law, ships are regarded as part of the territory of the Flag State-an extension of the country or floating island. Registration, therefore, operates as a bridge between the ships and the mainland and extends nationality rights to the Ship; it serves as a legal institution linking the ship to a State. The flag-state or the State of registry, has the right to exercise jurisdiction over the ship, is responsible for it and has the right to protect it. Therefore, there is no gainsaying that registration of a ship casts serious responsibilities on the registering State. For this very reason, it is important to ensure that all the requisites for registration of a ship are

strictly complied with, be it an Indian ship or ship built abroad entitled to become Indian ship.”

“74. If we carefully analyse the provisions of Part V of the Act, in the context of the definitions of important terms contained in Section 3 of the Act, we find that "ownership" of the ship is central to the scheme. As per Section 21 of the Act for the purpose of this Act, a ship shall not be deemed to be an Indian ship unless owned wholly by persons to each of whom the description in Section 21 Clauses (a) to (c) applies. The inevitable corollary is that the ship shall be deemed to be an Indian ship, if it is wholly owned by the persons who are the citizens of India or qualify under Clause (b) or (c) of Section 21. However, such a proposition cannot hold good as status of an Indian ship can be obtained only by complying with the procedure for registration of ship, laid down in the Act and Rules. Therefore, 'ownership by an Indian' is a pre-requisite of provisional as well as final registration. Forms 3 to 5 contained in Schedule I to 1960 Rules deal with Declaration of Ownership by Individuals, Declaration of Ownership by Joint Owners and Declaration of Ownership on behalf of a company respectively. As per Section 27, 'the owner of every Indian ship' in respect of which an application for registry is made shall cause such ship to be surveyed by a surveyor. 'The owner of an Indian ship' who applies for registry under the Act shall, before registry, Under Section 28 mandate marking of the ship permanently. Section 29 directs the owner of the vessel to furnish a declaration of ownership of the ship containing, inter alia, specification of the time and place where the ship was built. Section 30 mandates filing of a builder's certificate with the particulars of the ship, like proper denomination, tonnage etc. as indicated in Section 30. A careful analysis of the provisions of Part V of the Act, in particular Section 20 to Section 32, makes it clear that ownership of the ship and completion of construction of

the ship i.e. the ship being 'fully built' are central to Part V.”

29. In ***Brij Mohan Lal vs. Union of India: (2012) 6 SCC 502***, the

Hon’ble Supreme Court has held as under:

“Certain tests, whether this Court should or not interfere in the policy decisions of the State, as stated in other judgments, can be summed up as:

(I) If the policy fails to satisfy the test of reasonableness, it would be unconstitutional.

(II) The change in policy must be made fairly and should not give impression that it was so done arbitrarily on any ulterior intention.

(III) The policy can be faulted on grounds of mala fide, unreasonableness, arbitrariness or unfairness etc.

(IV) If the policy is found to be against any statute or the Constitution or runs counter to the philosophy behind these provisions.

(V) It is de hors the provisions of the Act or Legislations.

(VI) If the delegate has acted beyond its power of delegation.”

30. Under Section 21 of the Act, 1958 only an Indian Ship is statutorily recognised. Under Section 68, only an Indian Ship is entitled to the benefits and advantages under the Act. The respondents in the garb of the purported new regime cannot efface the Statute and incorporate a totally new and alien concept and category which is not recognised by the Act itself.

31. On the one hand, the respondents contend that the impugned notification and the circular have been issued in exercise of the statutory

power under Section 406 and 407 of the MSA, however, on the other hand, the respondents contend that the impugned notification is a policy decision. The impugned notification being one under Sections 406 and 407 cannot efface and obliterate the ethos and legislative intent of the Act, 1958.

32. It is pertinent to mention that under the previous regime which has been in place for the last more than two decades, the Foreign Flag Ships have been participating in Indian Trade and Entrepreneurs who are not ship owners or who do not have the capacity to own ships have been participating in inquiries through the charter of both Indian Ships and Foreign Flag Ships. The impugned notification may result in increase in Shipping Capacity as also chartering of Ships by non-ship owners. The Indian Ships are a Class by itself and equalisation of Indian Ships with Foreign Flag Ships amounts to treating unequals equally which is violative of Article 14 of the Constitution of India.

33. It is pertinent to mention here that globally coasting trade is exclusively reserved for National ships bearing the national Flag of that jurisdiction (commonly referred to as “cabotage”) for e.g. the United States of America, China, Brazil, Japan etc. As stated in rejoinder, in fact, 80% of the countries in the world have cabotage restrictions. No country in the

world gives same treatment to the National ships compared with Foreign Flag Vessels. The effect of the impugned Regime would be that the entire Indian trade would fall in the hands of Foreign Flag Vessels and Indian Ships would be rendered completely out of the market.

34. It is pertinent to mention here that in spite of the protection, only about 6% of the business was done by the Indian Flag Ships which underscores the prevalence of unfettered competition by foreign flag vessels in the Indian market.

35. In view of above discussion, I am of the opinion that prima facie the impugned notification and circular are against the Scheme of the Act, 1958, therefore, order dated 28.03.2019 is made absolute.

36. I hereby make it clear that the discussion and observations made by this Court in passing this order, are not on the merit of the writ petitions and shall not be referred at the time of final disposal by either of the parties.

37. The applications are disposed of, accordingly.

(SURESH KUMAR KAIT)
JUDGE

MAY 29, 2019
rhc/ab