

2011 (1) G.L.H. 258
MR. D. A. MEHTA AND
MS. H. N. DEVANI, JJ.

Ravindra K. JoshiPetitioner

Versus

Union of India Through Under Secretary & Ors.Respondents

Special Civil Application No. 6151 of 2010.

With

Civil Application No.5891 of 2010 And Special Civil Application No.6152 of 2010

With Civil Application No.5892 of 2010 And Special Civil Application Nos.6916 To 6922 of 2010 With Special Civil Application Nos.7770 to 7772 of 2010.

D/- 01.10.2010.

[A] CONSTITUTIONAL LAWS - Constitution of India, 1950 - Art. 14, Equality before law - Rule challenged on the ground of denial of equal protection being arbitrary, discriminatory and violative of Article 14 - Test for the Court is whether there is some difference which bears a just and reasonable to the object of legislation - Mere differentiation or inequality of protection does not amount to discrimination within the inhibition of equal protection clause under Article 14 - Selection of differentiation if unreasonable or arbitrary and irrational to the object of the legislation must be established - Burden of establishing reasonableness of classification and its nexus with the object of the legislation is on the State.

It is a well settled principle of law that when a rule is challenged as denying equal protection, the question for determination by the Court is not whether it has resulted in inequality but whether there is some difference which bears a just and reasonable relation to the object of the legislation. Mere differentiation or inequality of protection does not amount to discrimination within the inhibition of equal protection clause under Article 14 of the Constitution. To attract the attention of the clause, it is necessary to show that the selection of differentiation is unreasonable or arbitrary and that it does not rest on any rational basis having regard to the object which the legislature had in view. The Court has to examine whether the classification can be deemed to rest upon differentia discriminating the persons or things grouped from those left out and whether such differentia has a reasonable relation to the objects sought to be achieved. (*Dhan Singh v. State of Haryana, 1991 Supp (2) SCC 190*). It is also well settled that the burden of establishing the reasonableness of the

classification and its nexus with the object of the legislation is on the State. (**B. Prabhakar Rao v. State of A.P., 1985 Supp SC 432**) ([Para 45](#))

[B] TAX LAWS - Customs Act, 1962 - S. 146(2)(c) - Customs House Agent Licensing Regulations, 1984 (CHALR) - Regulation 9 - Examination of the applicant - Petitioners cleared examination and qualified for grant of licence - For all practical purposes petitioners are holding qualifications equal to that of regular licence holders and discharging similar duties - On account of the failure on the part of the concerned Commissionerates/Collectors to invite applications as per Regulation 4, the petitioners were not in a position to obtain regular licences - By virtue of the provisions of Customs House Agent Licensing Regulations (CHALR) 2004, as amended vide (Amendment) Regulation 2010, the Authority created two classes of persons viz. those who obtained licence prior to coming into force of CHALR, 2004 and those who on account of failure on the part of concerned Commissionerates to invite applications, could not obtain licence - Petitioners though qualified could not obtain licence before new Regulations came into force.

[C] TAX LAWS - Customs Act, 1962 - S. 146(2)(c) - Customs House Agent Licensing Regulations, 1984 - Regulation 9 - Petitioners could not obtain licences for the reason beyond their control as the concerned Commissionerates did not invite applications before new Regulations came into force in 2004 - The State has failed to show in what manner the petitioners are less qualified or lack the competence then that of the licence holders - The State has neither established the reasonableness of the classification nor its nexus with the object sought to be achieved by the legislation - What is the basis and how it is reasonable in differentially classifying equally qualified persons is not established - Merely differentiating on the basis of those having obtained licences prior to coming into force of the new Regulations and those who could not obtain licence on account of the failure on the part of the concerned Commissionerates, is no classification.

To establish the reasonableness of the classification and to explain that the same has a valid nexus to the object sought to be achieved by creating two classes, on behalf of the respondents it has been stated that taking a decision to conduct written examinations for persons, who had passed the Regulation 9 of CHALR, 1984, on the additional subjects, is based upon the need to ensure same competence and knowledge levels amongst successful applicants under both the Regulations; that in the present scenario of electronic filing of import and export documents in majority of Customs Stations, majority of import documents are facilitated by Risk Management System (RMS), and the rest of the documents are scrutinized by the officers based upon the risk perception; such facilitated documents do not get scrutinized by the Customs Officers. Thus a lot of faith has been imposed on the Trade. According to the

respondents in such a situation the onus on the Customs House Agents is much more to scrutinize the documents properly, before filing and to advise their clients properly. However, they can do this work more efficiently only if they are competent enough to do so. The explanation sought to be put forth on behalf of the respondents, however, fails to explain as to how the petitioners are in any manner differently situated than the regular licence holders who had qualified under CHALR, 1984, so as to be any less competent than them. If those persons who had passed the Regulation 9 examination under CHALR, 1984 and obtained regular licences at the relevant time possess the competence to act as regular licence holders, one fails to understand as to how, in absence of any other distinguishing feature being pointed out, the petitioners who too have passed the Regulation 9 examination under CHALR, 1984 and have been discharging similar duties in different capacities on behalf of the regular licence holders are any less qualified or lack the competence that the said licence holders possess. On an overall consideration of the facts of the case, the State has neither been able to establish the reasonableness of the classification nor its nexus with the object sought to be achieved by the legislation. As to what is the basis and how is it reasonable in differentially classifying equally qualified persons, merely on the basis of those having obtained licences prior to the coming into force of the new regulations and those who on account of failure on the part of the concerned Commissioner to invite applications could not get regular licences, is not coming forth. The nexus of such classification, in requiring those who had passed the Regulation 9 examination but could not obtain licences, to appear in the examination for the additional subjects, with the object sought to be achieved is also not established inasmuch as those who had already obtained licences earlier are not required to take the examination. Thus, if those persons are competent to continue holding licences and are entitled to renewal of licences under CHALR, 2004, one fails to understand as to how similarly situated persons are deemed to be not competent merely because they could not obtain licences earlier for the reasons noted hereinabove, namely, reasons beyond the control of the petitioners. Besides, in any field over a period of time with advancement, new subjects are added to the syllabus, but that does not mean that persons who have already qualified under the old syllabus are no longer qualified, merely because subsequently new subjects are added. Besides, once an old enactment is repealed and is substituted by a new one, those dealing with the same would normally acquaint themselves with the new enactment, and one does not need to pass the qualifying examination once again after having already qualified for the said purpose. ([Para 48](#))

[D] TAX LAWS - Customs Act, 1962 - S. 146(2)(c) - Customs House Agent Licensing Regulations, 1984 - Regulation 9 - Customs House Agent Licensing (Amendment) Regulations, 2010 - Regulation 2 - Mandatory requirement introduced vide Regulation 2 to again give examination in the subject stated therein which were already mentioned in CHALR, 2004 - The (Amendment) Regulations contemplate a situation whereby the

candidates successful under Regulation 9 of CHALR, 1984 are still require to appear in examination of specific subjects while candidates successful in examination conducted under CHALR, 2004 as well as persons who had been granted licences under CHALR, 1984 are not required to go through the same - Petitioners though similarly situated to the licence holders under CHALR, 1984 are now sought to be saddled with liability to appear in the examination in respect of additional subjects - It is beyond comprehension as to why the petitioners who are similarly situated persons, are required to be treated differently - Action of the Authority is on the face of it arbitrary and discriminatory and cannot be countenanced - Classification is unreasonable and has no nexus to the object sought to be achieved.

In the case of the petitioners, though they are similarly situated to the licence holders under CHALR 1984, except for the fact that they had not been granted licences as the concerned Commissionerate had not invited applications, the petitioners are now sought to be saddled with the liability to appear in the examinations to be conducted in respect of additional subjects, whereas similarly situated licence holders are not required to do so. If the case of the respondents is to be accepted, namely, that the requirement of the petitioners to appear in the additional subjects has a nexus with the object sought to be achieved, one fails to understand as to how the existing licence holders are not required to appear for the same examinations in additional subjects. In case licence holders are deemed to be qualified under the new regulations also for the purpose of continuation and extension of licence, it is beyond comprehension as to why the petitioners who are similarly situated persons, except for the fact that they were unable to obtain licences because the concerned Commissionerate did not invite applications, are required to be treated differently. Thus, the action of the respondents is, on the face of it, arbitrary and discriminatory and as such, cannot be countenanced. The fact that the petitioners, who though qualified under CHALR, 1984, due to no fault of theirs could not obtain licences under the said Regulations, are required to appear in the additional subjects when other similarly qualified persons who had obtained licence under the said Regulations are not required to appear in the said examination, gives an indication that the same has no nexus to the object sought to be achieved. If the object sought to be achieved was that all Customs House Agents should have knowledge of the said subjects, then there is no rationale behind making an exception in respect of those persons who had already obtained licences under the old Regulations from having to appear in the said examination. Thus, submission that the classification is reasonable and has a nexus to the object sought to be achieved does not merit acceptance. [\(Para 50\)](#)

[E] TAX LAWS - Customs Act, 1962 - S. 146(2)(c) - Customs House Agent Licensing Regulations, 1984 - Regulation 4 - Customs House Agent Licensing Regulations, 2004 - Regulation 8 - Circulars and Instructions -

The Board issued instructions calling upon the Commissionerates to clear up backlog of pending requests for issue of licences within a month and send a compliance report - Instructions issued are on the face of it contrary to the provisions of Regulation 4 of CHALR, 1984 which give discretion to the Commissioner to invite applications and the number of application to be invited - On the other hand vide Circular dated 31.10.2007, the Board instructed the Commissionerates that irrespective of the norms prescribed by the Board under CHALR, 1984 licence shall be issued to all those applicants who had passed the Regulation 8 examination under CHALR, 2004 - Authority cannot play hot and cold at the same time - Treatment meted out to the petitioners on the face of it discriminatory, arbitrary and violative of fundamental right under Article 14 of the Constitution - Condition imposed vide Customs House Agent Licensing (Amendment) Regulations, 2010 is quashed and set aside - Authority is directed to dispose of the applications for grant of licences treating the petitioners on par with those who have qualified under CHALR, 2004.

One finds it difficult to comprehend as to how there were applicants under CHALR, 2004 when the concerned Commissionerate had not invited any applications in this regard. In fact, as can be seen from the instructions dated 31.10.2004, not only has the Board directed the Commissioners to clear the backlog of pending requests of various applicants, who had qualified as per CHALR 2004, for issue of licences, within a month but also to send a compliance report to the Board. Thus, the treatment meted out to the petitioners herein is on the face of it discriminatory inasmuch as upon applications made by the petitioners, they are told that the same would be subject to concerned Commissioner inviting applications under Regulation 4, whereas in respect of those applicants who have qualified as per the new regulations, general directions have been issued to Commissionerates to grant licences to them within a period of one month. As pointed out on behalf of the petitioners two persons have already been granted licences in Jamnagar after the coming into force of CHALR, 2004 and several persons in other States have also been granted licences under the new regime. In the circumstances, the action of the respondents is clearly arbitrary and discriminatory and violative of the petitioners fundamental rights under Article 14 of the Constitution of India and as such cannot be sustained. ([Para 52](#))

Cases referred :

1. Global Energy Ltd. v. Central Electricity Regulatory Commission, (2009) 15 SCC 570 ([Para 17](#))
2. B. P. Sharma v. Union of India, AIR 2003 SC ([Para 21](#))
3. Chandrakant Krishnarao Pradhan and another v. Jasjit Singh, the Collector of Customs, Bombay, AIR 1962 SC 204 ([Para 22](#))
4. Isak Ebinesar v. Chairman, CBEC, Writ Appeal No. 498 and 1125 of 2009,

- D/- 15.04.2009, Madras High Court ([Para 25](#))
5. D.V. Bakshi v. Union of India, (1993) 3 SCC 663 ([Para 32](#))
6. Federation of Customs House Agents Association and others v. Union of India and others, (1996) 10 SCC 136 ([Para 32](#))
7. Union of India v. International Trading Co. and another, (2003) 5 SCC ([Para 32](#))
8. Maharashtra State Board of Secondary and Higher Secondary Education v. Paritosh Bhupeshkumar Sheth, (1984) 4 SCC 27 ([Para 33](#))
9. Dhan Singh v. State of Haryana, 1991 Supp (2) SCC 190 ([Para 45](#))
10. B. Prabhakar Rao v. State of A.P., 1985 Supp SC 432 ([Para 45](#))
11. State of Kerala v. N.M. Thomas, (1976) 2 SCC 310 ([Para 46](#))

Appearance :

Mr. K. S. Nanavati, Sr. Advocate for Nanavati Associates for Petitioner
Mr. R. M. Chhaya for Respondents : 1 - 3.

Per : MS. H. N. DEVANI, J. :-

1. All these petitions have been filed with the following identically worded prayers:

"[A] Your Lordships may be pleased to issue a writ of certiorari or a writ in the name of certiorari or any other writ, order or direction quashing and setting aside Notification dated 8.4.2010 in so far as it purports to require the petitioner to mandatorily appear in the specific examination for the purpose of grant of licence;

[B] Your Lordships may be pleased to direct the respondent No.3 to exercise his power under CHALR 1984 and dispose of the pending applications of the petitioner for grant of licence;

[C] That pending the hearing and disposal of the present petition, Your Lordships may be pleased to stay the operation and implementation of Notification dated 8.4.2010 and public notice fixing date for examination dated 22.4.2010;

[D] An ex-parte ad-interim relief in terms of [C] may kindly be granted;

[E] Such other and further reliefs as may be deemed just and proper may kindly be granted."

2.

Since facts involved in all these petitions are more or less similar and the same involve common questions of law, all the petitions were heard together and are

disposed of by this common judgement. For the sake of convenience, Special Civil Application No.6152 of 2010 is treated as the lead petition and reference is made to the facts as appearing in the said petition.

3.

Before advertng to the facts of the present case, it may be necessary to refer to certain statutory provisions so as to understand the facts in proper perspective.

4.

Section 146 of the Customs Act, 1962 reads thus:

146. Customs house agents to be licensed.-

(1) No person shall carry on business as an agent relating to the entry or departure of a conveyance or the import or export of goods at any customs station unless such person holds a licence granted in this behalf in accordance with the regulations.

(2) The Board may make regulations for the purpose of carrying out the provisions of this Section and, in particular, such regulations may provide for-

(a) the authority by which a licence may be granted under this Section and the period of validity of any such licence;

(b) the form of the licence and the fees payable therefor;

(c) the qualifications of persons who may apply for a licence and the qualifications of persons to be employed by a licensee to assist him in his work as an agent;

(d) the restrictions and conditions (including the furnishing of security by the licensee) subject to which a licence may be granted;

(e) the circumstances in which a licence may be suspended or revoked; and

(f) the appeals, if any, against an order of suspension or revocation of a licence and the period within which such appeals shall be filed.

5.

In the exercise of powers under clause (c) of sub-Section (2) of Section 146, the Central Board of Excise and Customs (Board) originally framed Regulations being Customs House Agent Licensing Regulations, 1984 (the CHALR, 1984).

6.

The Regulations, which are relevant for purpose of the present petition, are reproduced hereunder:

"[2(c)] "Customs House Agent" means a person licensed under these regulations to act as agent for the transaction of any business relating to the entry or departure of conveyances or the import or export of goods at any customs station.

[4] **Invitation of application:** The Commissioner may invite applications for the grant of such number of licences as assessed by him, to act as Customs House Agents in the month of January every year by means of a notice affixed on the notice board of each Customs Station as well as through publication in at least two newspapers having circulation in the area of his jurisdiction specifying therein in the last date of receipt of application. Such application shall be for clearance work within the jurisdiction of the said Commissioner.

[6] **Conditions to be fulfilled by the applicant.** - The applicant or the person referred to in clause (b) of sub-regulations (2) and (3) of Regulation 5 as the case may be, shall prove to the satisfaction of the Commissioner that:

(a) the applicant is a graduate from a recognised University and is an employee of a licensee and that the possessed a permanent pass in Form G prescribed under regulation 20 and has the experience of work relating to clearance of goods through the Customs, for a period of not less than three years in the capacity of such a pass-holder:

Provided that the Commissioner may relax the possession of permanent pass in Form G to one year for reasons to be recorded in writing.

(b) the applicant has financial viability supported by a certificate issued by a Scheduled Bank or such other proof acceptable to the Commissioner evidencing possession of assets of the value of not less than Rs.1 lakh in the case of applicants for the grant of licence in respect of any one of the Customs Stations at Bombay, Calcutta, Madras, Cochin, Kandla, Goa, Mangalore, Tuticorin or Visakhapatnam and not less than Rs.50,000/- in the case of each of the other Customs Station, situated at places other than those specified above:

Provided that in cases where a Commissioner s jurisdiction extends to more than one Customs Station, the Commissioner may issue one licence for all the Stations or more that one such Station to be specified in the licence, waiving the need for separate compliance of the provisions of clauses (a) and (b) above for such additional Customs Stations. The Commissioner may also waive the

need for separate compliance of the requirement of Regulation 11 in such cases :

Provided further that in places where there is more than one Commissioner exercising jurisdiction over different Customs Stations and Custom House Agents licensed under the Custom House Agents Licensing Regulation 8 from the Commissioner, other than the one who has issued them the existing licence, without being required to comply with the requirements of Regulation 6 in regard to financial viability or the requirements as to fresh deposit in terms of Regulation 11.

7. Scrutiny of applications for licence.-

On receipt of application under Regulation 5, the Commissioner may make enquiries for verification of the particulars set out in the application and also such other enquiries as he may deem necessary including enquiries about the reliability of financial status of the applicant.

8. Grant of temporary licence.-

1) Any applicant whose application is received within the last date specified in Regulation 4 and who satisfies the requirements of Regulation 5 and 6, shall be permitted to operate as Custom House Agent at the Customs Station for which the applications made initially for the period of one year against temporary licence granted by the Commissioner in this regard in Form B.

Provided that when evidence is produced to the Commissioner that the applicant has already availed of two chances for qualifying in the written or oral examination prescribed in these regulations and would like to avail of the third chance as soon as the next examination is held in terms of Regulation 9 and that the applicant has been able to account for the minimum volume of work prescribed for such agents in the course of one year's working, the Commissioner may extend the aforesaid period of one year for which the temporary licence has been granted by another six months or such further period not exceeding one year to enable the applicant to avail of the third chance for qualifying in the examination in terms of Regulation 9. While granting such extension, the Commissioner of Customs shall satisfy himself that the requirements of Regulations 10(1) (a) and 10(1)(b) had been fully met by the applicant.

(2) Any person, whose application for grant of temporary licence under sub-regulation (1) of regulation 8 is rejected by the Commissioner of Customs may represent to the Chief Commissioner of Customs or Chief Commissioner of Customs and Central Excise, as the case may be against such order rejecting the grant of a temporary licence, within 30 days of the communication of the impugned order.

(3) In case the number of applicants fulfilling the conditions prescribed under regulation 6 is more than the number of licences to be issued as assessed under regulation 4, the Commissioner may adopt seniority in experience as G pass holder of such applicants as the criterion to give precedence to the applicants:

Provided that if more than one applicant has the same period of experience, the applicant who is older in age shall get precedence.

9. Examination of the applicant. - (1) The holder of a temporary licence in the case of an individual and the person or persons who will be actually engaged in the work of clearance of goods through customs on behalf of the firm or Company holding a temporary licence, as the case may be, shall be required to qualify in examination, at the earliest opportunity. Such person or persons shall be eligible to appear in the examination as soon as a temporary licence is granted and shall be permitted to avail of three chances within a period of 2 years from the date of issue of the temporary licence of payment of prescribed examination fee of (Rs.500/-) for each examination.

(2) The examination referred to in sub-regulation (1) shall include a written and oral examination and will be conducted twice every year. Each applicant would be permitted to avail of a maximum of three chances to qualify in the said examination but all such chances should be availed of within a maximum period of 2 years from the date of grant of temporary licence.

(Explanation: A person who qualifies in the written examination, but fails in the oral test linked to it, shall be treated as having failed in that chance; but he will not be required to appear in the written examination in the subsequent chances.)

(3) The examination may include questions on the following:-

(a) preparation of various kinds of bills of entry and shipping bills;

(b) arrival entry and clearance of vessels;

(c) tariff classification and rates of duty;

(d) determination of value of assessment;

(e) conversion of currency;

(f) nature and description of documents to be filed with various kinds of bills of entry and shipping bills;

(g) procedure for assessment and payment of duty;

- (h) examination of merchandise at the Customs Stations;
- (i) provisions of the Trade of Merchandise Marks Act, 1958 (43 of 1958);
- (j) prohibitions of import and export;
- (k) bonding procedure and clearance from band;
- (l) re-importation and conditions for free re-entry;
- (m) drawback;
- (n) offences under the Act,
- (o) the provisions of allied Acts including imports and Exports (control) Act, 1947 (18 of 1947), Foreign Exchange Regulation Act, 1973 (46 of 1973), Indian Explosives Act, 1884 (4 of 1884), Arms Act, 1959 (54 of 1959), Opium Act, 1879 (1 of 1878), Drugs and Cosmetics Act, 1940 (23 of 1940), Destructive insects and Pests Act, 1914 (2 of 1914), Dangerous Drugs Act, 1930 (2 of 1930) in so far as they are relevant go the clearance of goods through customs;
- (p) procedure in the matter of refund of duty paid, appeals and revision petitions under the Act.

4.

The Commissioner shall also satisfy himself whether the licensee in Form B (See Form 48 in para 5) if he is an individual, possesses, or in the case of a firm or Company, the persons who will be actually engaged in the work relating to clearance of goods through customs on behalf of that firm or Company, possess satisfactory knowledge of English and the local language of the Customs Station:

Provided that in the case of persons deputed to work exclusively in the docks, knowledge of English will not be compulsory. Knowledge of Hindi will be considered as a additional or desirable qualification.

5.

The holders of a regular licence under regulation 10 may authorise one of their employees or partners or directors, to appear for the examination referred to in sub-regulation (1), on behalf of such holders of regular licence in addition to the person of their agency who has passed the examination referred to in sub-regulation (1).

10. Grant of regular licence

.(1) The Commissioner shall, on receipt of an application in Form C (See Form No.49 in Part 5), grant a regular licence in Form D (See Form 50 in Part 5) on payment of a fee of (Rs.5000/-) to such holder of a temporary licence who qualifies in an examination referred to in Regulation 9 and whose performance is found to be satisfactory with reference, inter alia, to the following: -

(1) quantity or value of cargo cleared by such licensee conforming to norms as may be prescribed by the Commissioner;

(2) absence of instances of delay either in the clearance of goods or in the complaints of misconduct including non-compliance of any of the obligations specified in Regulation 14.

(2) The Customs House Agents who are granted regular licence under Regulation 10, shall be eligible to work in all Customs Stations subject to fulfillment of the following requirements:

(a) the licensee shall make an application to the Commissioner of the concerned Customs Station where he intends to transact business for purposes of registering himself and his authorised staff;

(b) he fulfils the conditions stipulated in clause (b) of Regulation 6 relating to financial soundness and possesses the ability to provide adequate warehousing and transport facilities at the place of clearance of goods and production of evidence relating to availability of sufficient clientele at his disposal;

(c) he shall also be required to enter into a separate bond in Form D (See Form 50 in part 5) for due observation of these regulations and to furnish a separate Bank Guarantee for each Customs Stations as stipulated under Regulation 11; (he shall produce evidence of knowledge for the local language of the Customs Station, at which he wished to conduct business;).

(d) On fulfilment of the aforesaid conditions, the Commissioner of the Customs Station at which the licensee intends to transact business shall grant a licence in Form D (See Form No.50 in part 5) authorising him to transact business at that Customs Station:

Provided that no separate licence would be required in places where in addition to a Custom House handling imports by sea, there is also an international airport to handle imports by air even if under the jurisdiction of a different Commissioner.

(3) The Commissioner may reject an application for the grant of regular licence to act as Custom House Agent if the holder of the temporary licence fails to qualify in the examination in terms of Regulation 9, or the holder of temporary licence on evaluation of his performance in terms of Regulation 10 is not

considered suitable due to any other reason to be stated in the order passed by the Commissioner."

7.

Adverting to the facts of the case, the petitioner joined a Company, viz., M/s Mathurdas Narandas & Sons Forwarders Limited possessing a permanent Customs House Agent Licence in 1988 in Mumbai and later was transferred to Ahmedabad and power of attorney was granted in his favour on 6.6.1995. The petitioner thereafter appeared for the written examination prescribed under Regulation 9 of CHALR, 1984 and got qualified as per Customs Notice No.1/99 dated 23.6.1999. He later on appeared for the oral examination and got qualified as per Customs Notice No.2/1999 dated 20.10.1999. Accordingly, the petitioner received certificate of success in the examination held under Regulation 9 of CHALR, 1984. Since the licence was granted in the name of the Company, the petitioner, although being a person who had appeared and successfully cleared the examination and the criteria governing grant of licence (and otherwise possessed the qualification), was not a licence holder in his individual capacity. As the petitioner had already appeared for the examination and had already satisfactorily performed the work as Customs House Agent since 1991 under temporary licence, oral requests were made to the respondent No.3 to grant licence to the petitioner however despite repeated requests licence was not granted, and the petitioner was told that the request would be considered as and when applications are invited by the Commissioner under the Regulations. The petitioner was, therefore, constrained to continue working as a director as per Board Resolution with F Pass for M/s Mathurdas Narandas & Sons Forwarders Limited as provided for under Regulation 20(6) of CHALR, 1984 and could not independently act as a Customs House Agent. Since then the petitioner has been working under the same arrangement and is unable to take up the occupation or business of Customs House Agent on his own as there have been no invitations extended by the Commissioner under Regulation 4 of the Regulations, 1984.

8.

In the meanwhile vide Notification No.21 of 2004 - Customs (N.T.) the respondent No.2 Board framed fresh Customs House Agent Licensing Regulations, 2004 (CHALR, 2004) thereby superseding 1984 Regulation, except in respect of things done or omitted to be done before such supersession. The relevant provisions of the Regulations, 2004 are reproduced hereunder:

4. Invitation of application.

- The Commissioner of Customs may invite applications for the grant of such number of licences as assessed by him, to act as Customs House Agents in the month of January every year by means of a notice affixed on the notice board of

each Customs Station as well as through publication in at least [two newspapers, one in English and the other in vernacular language having wide circulation in the area of his jurisdiction,] specifying therein the last date of receipt of application. Such application shall be for clearance work within the jurisdiction of the said Commissioner of Customs.

5. Application for licence.-

(1) An application for a licence to act as a Customs House Agent in a Customs Station shall be made [in the form of letter to the jurisdictional Commissioner of Customs, containing details as specified in Form A] and shall, inter alia, contain the name and the address of the person applying; and

(2) If the applicant is a firm -

(a) the name and address of every partner of the firm, the firm's name, and

(b) the name of the partner or the duly authorized employee, who will actually be engaged in the clearance of goods or conveyances through the customs.

If the applicant is a(3) Company -

(a) the name of each director, managing director, manager, and

(b) the names of director, managing director, manager or the duly authorized employee, who will actually be engaged in the clearance of goods or conveyances through the customs.

6. Conditions to be fulfilled by the applicant.

- The applicant referred to in clause (b) of sub-regulations (2) and (3) of regulation 5, as the case may be, or a person who has passed the examination referred to in regulation 8, shall prove to the satisfaction of the Commissioner of Customs, that -

(a) the applicant, or his authorized employee, is a graduate from a recognized University and possesses a professional degree viz.

C.A./M.B.A./L.L.B./Diploma in Customs Clearance work from any Institute or University recognized by the Government with a working knowledge of computers and customs procedures, or is a graduate having at least three years experience in transacting Custom House Agent work as a G-Card holder, or a person who has passed the examination referred to in regulation 8, or is a retired Group A officer from the Indian Customs and Central Excise Service (IC&CES) having a minimum of ten years experience in Group A .

(b) the applicant has financial viability supported by a certificate issued by a Scheduled Bank or such other proof acceptable to the Commissioner of Customs evidencing possession of assets of value of not less than Rs. 2 lakhs;

(c) the applicant is a citizen of India.

7. Scrutiny of application for licence.

- On receipt of application under regulation 5, the Commissioners of Customs may make inquiries for verification of the particulars set out in the application and also such other inquiry as he may deem necessary, including inquiries about the reliability and financial status of the applicant.

8. Examination of the applicant.

- (1) Any applicant whose application is received within the last date specified in the notice or publication, as the case may be, referred to in regulation 4 and who satisfies the requirements of regulations 5 and 6, shall be required to appear for the written as well as oral examination conducted by the Director General of Inspection at specified centers and specified dates, twice every year, for which intimation shall be sent individually in advance before the date of examination.

Provided that an applicant who has already passed the examination referred to in regulation 8 will not be required to appear for any further examination.

(2) The applicants declared successful in written examination shall be called for oral examination.

(3) It shall be necessary for the applicant to clear written as well as oral examinations separately. An applicant who clears the written examination but fails in the oral examination linked to it, shall have to clear the oral examination within two years of the related written examination irrespective of the number of chances, and if he fails to do so, he shall be treated as having failed in the examination.

(4) An applicant shall be allowed a maximum period of seven years within which he shall pass both the written and oral examinations. No further extension of time shall be granted.

(5) Notwithstanding anything contained in sub-regulation (4), any person who holds a temporary licence granted under regulation 8 of the Customs House Agents Licencing Regulations, 1984, shall be allowed to pass the examination within a period of two years from the date of commencement of these regulations.

(6) The examination may include questions on the following :-

- (a) preparation of various kinds of bills of entry and shipping bills;
- (b) arrival entry and clearance of vessels;
- (c) tariff classification and rates of duty;
- (d) determination of value for assessment;
- (e) conversion of currency;
- (f) nature and description of documents to be filed with various kinds of bills of entry and shipping bills;
- (g) procedure for assessment and payment of duty;
- (h) examination of merchandise at the Customs Stations;
- (i) provisions of the Trade and Merchandise Marks Act, 1958 (43 of 1958), the Patents Act, 1970 (39 of 1970) and the Copy Rights Act, 1957 (14 of 1957).
- (j) prohibitions on import and export;
- (k) bonding procedure and clearance from bond;
- (l) re-importation and conditions for free re-entry;
- (m) drawback and export promotion schemes;
- (n) offences under the Act;
- (o) the provisions of allied Acts including the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992), the Central Excise Act, 1944 (1 of 1944), Foreign Exchange Management Act, 2000 (42 of 1999), the Indian Explosives Act, 1884 (4 of 1884), the Arms Act, 1959 (54 of 1959), the Narcotics Drugs and Psychotropic Substances Act, the Drugs and Cosmetics Act, 1940 (23 of 1940), Destructive Insects and Pests Act, 1914 (2 of 1914), the Dangerous Drugs Act, 1930 (2 of 1930), in so far as they are relevant to the clearance of goods through customs;
- (p) provisions of the Prevention of Corruption Act, 1988 (49 of 1988);
- (p) procedure in the matter of refund of duty paid, appeals and revision petitions under the Act.

(q) on-line filing of electronic shipping bills or bills of entry and Indian Customs and Central Excise Electronic Commerce/Electronic Data interchange Gateway (ICEGATE) and Indian Customs Electronic Data Interchange Systems (ICES).

(7) The Commissioner of Customs shall also satisfy himself whether the applicant, if he is an individual, possesses, or in the case of a firm or Company, the persons who shall be actually engaged in the work relating to clearance of goods through customs on behalf of that firm or Company, possess satisfactory knowledge of English and the local language of the Customs Station :

Provided that in the case of persons deputed to work exclusively in the docks, knowledge of English shall not be compulsory. Knowledge of Hindi shall be considered as desirable qualification.

(8) The holders of a licence under regulation 9 may authorize any one or more of their employees or partners or directors to appear for the examination referred to in sub-regulation (1) on behalf of such holders of licence, in addition to the person of their agency who has passed the examination referred to in sub-regulation (1).

9. Grant of licence.

- (1) The Commissioner of Customs shall on payment of a fee of Rs. 5,000/- grant a licence in Form B to an applicant who has passed the examination referred to in regulation 8.

(2) The Customs House Agents who are granted licences under sub-regulation (1) shall be eligible to work in all Customs Stations within the country subject to intimation in Form C to the Commissioner of Customs of the concerned Customs Station where he intends to transact business. No separate licence shall be required in places where in addition to a Customs House handling imports by sea, there is also an International airport to handle imports by air, even if under the jurisdiction of a different Commissioner of Customs.

(3) The Commissioner of Customs may reject an application for the grant of licence to act as Customs House Agent if the applicant is [convicted of] fraud or forgery, or any criminal proceedings are pending before any Court of law against him or he has been convicted in any Court of law.

(4) Any applicant aggrieved by the order of the Commissioner of Customs passed under sub-regulation (3) may appeal to the Chief Commissioner of Customs or Chief Commissioner of Customs and Central Excise, as the case may be, within a period of thirty days from the communication of such order.

(5) The Chief Commissioner of Customs or the Chief Commissioner of Customs and Central Excise, as the case may be, may, on his own motion or otherwise,

call for and examine the records of any proceedings in which the Commissioner of Customs has passed the order under sub-regulation (3) for the purpose of satisfying himself as to the legality, propriety or correctness of such order and may pass such other orders as he may deem fit. No order under this sub-regulation shall be made so as to prejudicially affect any person unless such person is given reasonable opportunity for making a representation and being heard in his defense, if he so desires.

(6) No order shall be made under sub-regulation (5) in relation to an order passed by Commissioner of Customs under sub-regulation (3) or sub-regulation (1), as the case may be, after the expiry of one year from the date on which such order was passed by the Commissioner of Customs.

[(6A.) An appeal filed by an applicant under sub-regulation (4) shall be decided by the Chief Commissioner of Customs or the Chief Commissioner of Customs and Central Excise, as the case may be, within a period of one year from the date on which such appeal is filed.]

9.

In the new Regulations, most of the regulations are more or less the same; however, the regulation providing for the grant of temporary licence has been removed. One principal similarity in both the Regulations is that the process of applying for licence can only be initiated by the Commissioner exercising his powers and discretion under Regulation 4.

10.

Subsequently, the respondent No.1 issued clarification regarding CHALR 2004 vide Notification dated 10.6.2004 being No.42/04. It may be pertinent to reproduce question 1(b) and the answer thereto in relation to Regulation 9:

Regulation 9

11.

On 31st October, 1997 the respondent No.1 issued a Circular on the issue of Customs House Agent Licence. It may be pertinent to refer to issue No.(ii) thereunder which reads thus:

"[ii] Issue of CHA licenses to applicants who had passed the examinations under CHALR, 2004:

4. It has been represented to the Board that some of the Commissionerates have not invited applications for grant of CHA licenses, since the norms for issue of fresh license are required to be reviewed by the Board. Further, in

cases where the applicants having passed the requisite examination under Regulation 8 of CHALR, 2004, have not been granted with a CHA license. Board had also examined these issues and decided that irrespective of the norms prescribed by the Board vide F.No.502/5/92-Cus-VI dated 18.5.1994 under CHALR, 1984, concerned Commissioners of Customs shall issue CHA licenses to all those applicants who had passed the Regulation 8 examination conducted under CHALR, 2004, subject to their fulfillment of the requisite conditions as mentioned in CHALR, 2004. Board desires that the Commissioners of Customs shall clear up backlog of pending requests by various applicants who had qualified as per CHALR, 2004, for issue of licenses which have been held up by various Customs Commissionerates within a month and send a compliance report to the Board."

12.

Vide application dated 26.12.2007, the petitioner applied for grant of licence in the name of Devendra N. Thakker, which is still pending and no action has been taken thereon.

13.

Vide notification No.30 of 2010-Customs (N.T.) dated 8.4.2010, the respondent No.1 framed the Customs House Agents Licensing (Amendment) Regulations, 2010, (hereinafter referred to as the (Amendment) Regulations, 2010) retrospectively amending various regulations in the CHALR, 2004. Clause No.2 of the amendment notification which amends Regulation 8 of the CHALR, 2004, is relevant for the present purpose and reads thus:

"[2] In the Customs House Agents Licensing Regulations, 2004 (hereinafter referred to as the said Regulation) -

[i] in regulation 8,

[a] in sub-regulation (1) for the words "twice every year", the words "once every year" shall be substituted.

[b] after sub-regulation (8), the following shall be inserted, namely:-

"(9) Notwithstanding anything contained in these regulations, any person who had passed the examination conducted in regulation 9 of the Customs House Agents Licensing Regulation, 1984, and has not yet been granted license under these regulations, upon declaring successful in a written examination conducted on the following subjects, shall be deemed to have passed the examination referred to in regulation 8 for the purpose of these regulations.

[a] The Patents Act, 1970 and Indian Copyright Act, 1957;

- [b] Central Excise Act, 1944;
- [c] Export promotion schemes;
- [d] Procedure on appeal and revision petition;
- [e] Prevention of Corruption Act, 1988;
- [f] Online filing of electronic Customs declarations;
- [g] Narcotic Drugs and Psychotropic Substances Act, 1985;
- [h] Foreign Exchange Management Act, 1999"

14.

Thus, Regulation 2 of the (Amendment) Regulations, 2010 introduces a mandatory requirement for all successful candidates who had already passed the examination under CHALR, 1984, to again give examinations in the subjects stated therein, which were already mentioned in CHALR, 2004. The (Amendment) Regulations, therefore, contemplate a situation whereby the candidates successful under Regulation 9 of CHALR, 1984, are still required to appear in the examination of specific subjects as specified therein, while candidates successful in the exam conducted under CHALR, 2004 as well as the persons who had been granted licences under CHALR, 1984 are not required to go through the same. It is the categorical case of the petitioner that in the examinations conducted during the period between the introduction of CHALR, 2004 till the issuance of Notification No.30/2010 dated 8.4.2010 amending CHALR, 2004 retrospectively, no questions had been asked from the newly introduced subjects in CHALR, 2004.

15.

Subsequently another Circular being Circular No.9 of 2010-Custom dated 8.4.2010 regarding issue of Customs House Agents Licence, came to be issued. Clause (vi) of the same which is relevant for the present purpose reads thus:

"(vi) CHA licenses in respect of individuals who had passed the examination under CHALR, 1984 :

8.1. The issue of granting CHA license in respect of persons who had already passed the written and oral examinations held under Regulation 9 examination of Customs House Agents Licensing Regulations (CHALR), 1984 and are yet to be considered for issue of CHA license, was examined by the Board. On this issue, the Board in its earlier meeting had held that with the introduction of CHALR, 2004, there was no generalized case for grant of CHA licence to such

applicants having passed Regulation 9 examination under CHALR, 1984 as the requirements of educational qualification and also examination curriculum were different in the two regulations. Considering the hardships experienced by such persons and in order to remedy the situation by providing one time opportunity to qualify them for grant of CHA license, It has been decided by the Board to conduct written examination for these persons on the following additional subjects: (a) The Patents Act, 1970 and Indian Copy Right Act; 1957 (b) Central Excise Act, 1944 (c) export promotion schemes (d) Procedure on appeal and revision petition (e) Prevention of Corruption Act, 1988 and (f) online filing of electronic Customs declarations, (g) Narcotic Drugs and Psychotropic Substances Act, 1985 and (h) Foreign Exchange Management Act, 1999. The aforesaid examination would be conducted by the Directorate General of Inspection after giving due notice to these candidates. Accordingly, persons who qualify in the aforesaid examination shall be deemed to have passed under the Regulation 8 of Customs House Agents Licensing Regulations, 2004, and would be considered for grant of CHA license in terms of Regulations 9 of CHALR, 2004 by the concerned Commissionerate from where they had earlier passed the CHA examination held under CHALR, 1984.

8.2. Board also took note of the fact that these candidates had passed the CHA examination held under CHALR, 1984 based on the qualification prevailing at that relevant point of time, and that a precedent existed wherein a dispensation was prescribed vide Boards Circular No.48/2000-Customs dated 22.5.2000 for a specific period. Accordingly it was also decided by the Board that in case of Regulation 9 examination passed candidates under the CHALR, 1984, the relaxation provided in respect of educational qualifications vide Boards Circular No. 48/2000-Customs shall be extended on similar basis."

16.

Thereafter the Commissioner, Custom House, Ahmedabad issued a public notice being Public Notice No.26/2010-CUSTOMS dated 4th May, 2010 declaring examination under the newly introduced mandatory subjects for candidates qualified under regulation 9 of CHALR, 1984 which was to be held on 15th July, 2010. Being aggrieved, the petitioners have moved the present petitions seeking the reliefs noted hereinabove.

17.

Mr. K.S. Nanavati, Senior Advocate, learned Counsel for the petitioners invited attention to the provisions of Section 146 of the Customs Act, 1962 (the Act) to point out that sub-Section (2) thereof empowers the Board to make regulations for the purpose of carrying out the provisions of the said Section and that such regulations, interalia, may provide the qualifications of persons who may apply for a licence and the qualifications of persons to be employed by a licensee to assist him in his work as an agent. It was submitted that Section 146 of the

Act only empowers the Board to make regulations to regulate grant of licence in relation to entry or departure of a conveyance or import or export of goods. Thus, the Board can exercise powers only as provided under clause (a) to (f) provided under sub-Section (2) of Section 146. The said provision does not authorise the Board to assume powers to prescribe passing of an examination as a condition either for applying for licence or arrogate to itself power to hold examinations and determine the subjects. It was, accordingly, contended that to the extent the Regulations travel beyond the scope of the power of delegated legislation the same are ultra vires the provisions of Section 146 of the Act. It was further submitted that Regulations 8 and 9 of CHALR 2004 insofar as they prohibit a person from working as a Customs House Agent unless he has passed an examination prescribed by Regulations 8 and 9 are ultra vires the powers of the Board, conferred by Section 146 of the Act. Though Section 146 of the Act, empowers the Board to prescribe the qualifications, the same does not empower the Board to prescribe for qualifying examinations and syllabus for such examinations. In support of his submissions, the learned Counsel placed reliance on the decision of the Supreme Court in the case of **Global Energy Ltd. v. Central Electricity Regulatory Commission, (2009) 15 SCC 570**, for the proposition that it is now a well-settled principle of law that the rule-making power "for carrying out the purpose of the Act" is a general delegation. Such a general delegation may not be held to be laying down any guidelines. Thus, by reason of such a provision alone, the regulation-making power cannot be exercised so as to bring into existence substantive rights or obligations or disabilities which are not contemplated in terms of the provisions of the said Act. It was, accordingly, submitted that in the absence of any provision in the parent legislation which provides for passing of an examination for obtaining a licence, it cannot be introduced by way of a regulation. Placing reliance on the contents of paragraphs 27, 35, 39 and 46 of the above referred decision which read thus:

"27. The power of the regulation-making authority, thus, must be interpreted keeping in view the provisions of the Act. The Act is silent as regards conditions for grant of licence. It does not lay down any pre-qualifications therefor. Provisions for imposition of general conditions of licence or conditions laying down the pre-qualifications therefor and/or the conditions/qualifications for grant or revocation of licence, in absence of such a clear provision may be held to be laying down guidelines by necessary implication providing for conditions/qualifications for grant of licence also.

35. In the event a statute provides for licensing, in a case of this nature, the same must thus be found to satisfy the test of reasonableness. The standard for determining reasonableness of a statute so as to satisfy the constitutional scheme as adumbrated in Article 14 of the Constitution of India must receive a higher level of scrutiny than an ordinary statute. Such a higher level of scrutiny is necessary not for the purpose of determining the constitutionality of the statute alone vis- -vis the field of legislative power as envisaged under

Article 245 of the Constitution of India but also having regard to the object and purpose, the statute seeks to achieve.

39. The superior Courts would ensure that the subordinate legislation has been framed within the four corners of the Act and is otherwise valid. The issue therefore which arises for our consideration is as to whether the delegation having been made for the purpose of carrying out the object, could the limitation be imposed for ascertaining as to whether the applicant is fit and proper person and disregarding his creditworthiness. There cannot be any doubt whatsoever that a statute cannot be vague and unreasonable.

46. It is now a well-settled principle of law that essential legislative functions cannot be delegated. The delegatee must be furnished with adequate guidelines so that arbitrariness is eschewed. On what basis and in particular, keeping in view the possible loss of reputation and consequently the business of an applicant for grant of licence would suffer, it was obligatory on the part of Parliament to lay down requisite guidelines therefor".

it was submitted that the Customs Act is a fiscal statute which provides for levy of customs duty on import or export of goods and that the object and purpose of the Act has nothing to do with the qualification of Customs House Agents. It was accordingly, contended that the qualification, if any, should find place in the Customs Act itself and that essential legislative function cannot be delegated. If passing of an examination was a condition precedent for granting a Customs House Agent licence, the Legislature would have provided for such a qualification/condition for passing an examination and would not have left the same to the delegate.

18.

Next, it was contended that Section 146 of the Act does not confer any power on the Board to frame regulations which empower the authority to decide the maximum number of Customs House Agents who can be granted licences to work as such, nor give any guidelines as to how such numbers shall be fixed. The Act also does not authorize the Board to empower the authority to make it a condition that a person, who otherwise holds the qualifications or works as Customs House Agent, cannot even apply or offer himself for an examination unless the authority (in the present case, the Commissioner of Customs) invites applications. It was, accordingly, submitted that Regulation 4 is ultra vires Section 146 of the Act. It was contended that there cannot be any arbitrary ceiling on the number of persons who may be allowed to engage in the business of Customs House Agent and that such a restriction creates a monopoly in favour of a few and keeps really meritorious persons from engaging themselves in a profession, business or occupation of their choice. The right to enter such business also cannot be made dependent on the whims and caprice of an officer by leaving to his arbitrary decision whether or not to

invite applications from persons interested in working as Customs House Agents or arbitrarily fixing the ceiling on the maximum number of Customs House Agents that may be issued licenses. It was submitted that arbitrariness of the regulations is amply clear from the fact that, in the Ahmedabad region, after 1996, the concerned Commissioner has not invited any applications and persons like the petitioners, having passed the examination in the year 1999 etc. and having requested the Jurisdictional Commissioner of Customs to grant a licence, have still not been able to obtain licences and with a change in the regulations are now being compelled to appear in the examinations for the newly added subjects. It was submitted that it is only on account of the failure on the part of the respondents to invite applications that despite having passed the examination under Regulation 9 of CHALR 1984 and having been working with regular licence holding companies/firms, etc., the petitioners are now being compelled to appear in a fresh examination for newly added subjects. That the action of the respondents is clearly arbitrary and unreasonable and therefore, violative of Article 14 of the Constitution of India. It was urged that the petitioners belong to a class of persons who had appeared in the examination and have been working as Customs House Agents in various capacities. To require such persons to again appear in the examination after several years of experience when a Customs House Agent holding a regular licence is not required to do so, is clearly discriminatory as the same treats equals as unequals. The learned Counsel further submitted that the (Amendment) Regulations, 2010 seek to create inequality between the successful candidates under CHALR, 1984 and candidates appearing under CHALR, 2004 by making it mandatory for the successful candidates under CHALR, 1984 to appear for the examination on subjects as mentioned in the (Amendment) Regulations, 2010 while those candidates who have appeared for the examination under CHALR, 2004 have never been asked questions pertaining to such subjects as is evident from the examination papers annexed to the petition.

19.

Next, it was contended that vide its preamble, CHALR, 2004, while superseding CHALR, 1984, clearly saves things done or omitted to be done under CHALR, 1984. That despite the clear declaration in its preamble, the CHALR, 2004 read with the (Amendment) Regulations 2010, clearly imply that the successful candidates under Regulation 9 examination of CHALR, 1984 would lose their right to apply for a licence unless they pass the specific examination as contemplated under the (Amendment) Regulations, 2010. It was submitted that it is only after the success in the examination that the Commissioner scrutinizes the result as well as the candidate to decide whether the candidate deserves the licence or not. As per the saving clause, all acts which have been done or are left to be done are saved despite the supersession. This clearly implies that once the candidates are successful in the examination under Regulation 9 of CHALR, 1984, the process of scrutiny of the candidate for the

issuance of a licence has already begun and can only culminate into the Commissioner either granting a licence or refusing to grant a licence. The candidate, as contemplated under the preamble, is not required to reappear in a separate specific examination to reinstate the right at the stage at which it was already pending and had crystallized under CHALR, 1984, as by virtue of the preamble the crystallized right was already saved.

20.

It was further submitted that despite having the ability to satisfy each and every criteria and condition as required of them under the Regulations, that of financial status, experience, proficiency, reliability and success in examination, the petitioners, by virtue of the provisions of CHALR 2004 as amended vide the (Amendment) Regulations, 2010, become ineligible for a licence till clearance of the examination as contemplated in the (Amendment) Regulations, 2010 which illegally seeks to take away the pre-existing right bestowed under CHALR, 1984, which the petitioners had acquired. It was pointed out that although the petitioners are required to appear in a separate examination under the (Amendment) Regulations, 2010, the petitioners have been granted an identity card under Form "F" as per CHALR, 2004, whereas during the regime of the CHALR, 1984, the equivalent corresponding identity card would be issued in Form "I". Procedurally, the I.D. Cards are issued after grant of licence, while in the present case, the petitioners have been treated at par with the successful candidates of examination conducted under CHALR, 2004

21.

Reliance was placed upon the decision of the Supreme Court in the case of **B. P. Sharma v. Union of India, AIR 2003 SC 3863**, and more particularly to paragraph 15 thereof to submit that there must be a direct and proximate nexus or a reasonable connection between the restriction imposed by the Regulations and the object sought to be achieved. It was submitted that the (Amendment) Regulations, 2010 read with Regulation 8 of the CHALR, 2004 insofar as the same require the petitioners and other similarly situated persons who have passed Regulation 9 examination and have been doing the work of Customs House Agents in different capacities, to pass the examination in the additional subjects introduced for the first time by the 2004 Regulations as a condition of being considered for grant of regular licence under Regulation 9 is violative of Article 14 of the Constitution. It was submitted that a large number of persons similarly situated to the petitioners have been granted regular licences in other Collectorates.

22.

Referring to the decision of the Supreme Court in the case of **Chandrakant Krishnarao Pradhan and another v. Jasjit Singh, the Collector of**

Customs, Bombay, AIR 1962 SC 204, and more particularly to paragraph 3 thereof it was pointed out that when Section 202 of the Sea Customs Act, 1878 came to be amended by the Sea Customs (Amendment) Act, 1955, the original licences, whether permanent or temporary, became ineffective after the date specified by the Central Government. It became necessary for all persons to apply for licences granted in accordance with the Rules framed under sub-Section (2) of the amended Section 202. It was submitted that similarly all persons qualified under CHALR, 1984 ought to have been given equal treatment whereas in the facts of the present case the persons who have passed the examination held under regulation 9 of CHALR, 1984 and have been granted licence are not required to pass the examination held under Regulation 8 of CHALR 2004 read with the impugned (Amendment) Regulations, 2010 to continue to work as Customs House Agents or for renewal of their licences. The petitioners who have also passed the Regulation 9 examination and are working as Customs House Agents as authorised representatives of licensed Customs House Agents and licensed Customs House Agents fall in the same class. Thus the classification made and differential treatment meted out to the petitioners is therefore, violative of Article 14 and impose an unreasonable restriction on the fundamental rights of the petitioners under Article 19(1)(g) of the Constitution.

23.

It was, accordingly, submitted that despite the fact that the petitioners are similarly situated to those persons who had acquired licenses under CHALR 1984, merely because of failure on the part of the concerned Commissioner to invite applications before the coming into force of CHALR, 2004, the petitioners are now sought to be discriminated against and are required to appear in an examination for additional subjects after having already cleared the qualifying examination several years ago. It was urged that considering the fact that even for the examination held under CHALR 2004, no question had been asked from the newly added subjects, it is apparent that the petitioners are sought to be discriminated against even in relation to the candidates who have so far appeared and cleared the examination under regulation 9 of CHALR 2004. It was submitted that, in the circumstances, the action of the respondents in requiring the petitioners to appear in the examination for additional subjects after such a length of time is irrational, discriminatory and arbitrary, and as such, requires to be quashed and set aside as being violative of the petitioners' fundamental rights under Article 14 of the Constitution of India.

24.

Learned Counsel for the petitioners further submitted that the petitioners having passed the Regulation 9 examination under CHALR, 1984 have an accrued right to consideration of their application for grant of licence in the light of the eligibility criteria laid down in CHALR, 1984 both on the principle of

legitimate expectation and also on the ground that the said right which has already accrued in their favour is not affected by coming into force of CHALR, 2004. It was, accordingly, urged that the (Amendment) Regulations, 2010 to the extent the same purport to affect the accrued right of the petitioners is violative of Articles 14 and 19(1)(g) of the Constitution of India being discriminatory and being an unreasonable restriction on the fundamental rights of the petitioners.

25.

The petitions were vehemently opposed by Mr. R. M. Chhaya, learned Senior Standing Counsel for the respondents. Referring to the affidavit in reply filed on behalf of the respondents, it was submitted that CHALR 2004 came to be framed pursuant to the recommendations made by the Kelkar Committee which was considered by the Board in the public interest. It was pointed out that the Committee had recommended that there should be review of the technical qualifications of the Customs House Agents to include knowledge of computer, Prevention of Corruption Act, etc. It is in these set of circumstances that in the new regulations, various new subjects have been introduced in the light of the recommendation made by the Kelkar Committee. Reliance was placed upon a decision of the Madras High Court in **Writ Appeal No.498 and 1125 of 2009** and other writ petitions, wherein it had been held that candidates having passed examinations under Regulation 9 of the CHALR 1984, presently seeking Customs House Agents licences cannot be treated to have passed the examinations under CHALR, 2004 unless they have actually passed the examination prescribed under CHALR, 2004. It was pointed out that based upon the decision of the Madras High Court, the Board decided to conduct written examination for those persons who had passed the Regulation 9 Examination under the earlier Regulations, that is, CHALR 1984 in respect of the following additional subjects:

- (a) The Patent Act, 1970 and Indian Copyright Act, 1957;
- (b) Central Excise Act, 1944;
- (c) Export promotion schemes;
- (d) Procedure on appeal and revision petition;
- (e) Prevention of Corruption Act, 1988;
- (f) Online filing of electronic Customs declarations;
- (g) Narcotic Drugs and Psychotropic Substances Act, 1985;
- (h) Foreign Exchange Management Act, 1999"

26.

It was pointed out that the said subjects are covered under the syllabus prescribed for examination under regulation 8 of CHALR, 2004 and were not covered in the syllabus prescribed for examination under regulation 9 of CHALR, 1984. Thus, the decision of the Board to conduct written examination for persons, who had passed the Rule 9 examination under earlier regulations, that is, CHALR 1984, on the said additional subjects, is based upon the need to ensure the same competence and knowledge levels amongst successful applicants under both CHALRs. The examination would be conducted by the Directorate General of Inspection after giving due notice to these candidates. Accordingly, persons who qualify in the aforesaid examination shall be deemed to have passed under the Regulation 8 of the Customs House Agents Licensing Regulations, 2004, and would be considered for grant of Customs House Agent licence in terms of Regulation 9 of CHALR, 2004 by the concerned Commissionerate from where they had earlier passed the CHA examination held under CHALR, 1984.

27.

Next it was submitted that the task of inviting applications has been left to the wisdom of the individual Commissioner of Customs, who in turn decides the interval or duration of the period in the matter of inviting applications based on the necessity and nature of work in each Customs House. It was further submitted that a candidate taking the Customs House Agent examination is expected to have a certain minimum knowledge of laws and issues which he might encounter in the course of his work and can be reasonably expected to have awareness of the same. Therefore, it is essential for the candidates successful in the regulation 9 examinations under the CHALR, 1984 to undertake separate written examination specifically on the subjects mentioned therein for the purpose of granting licence. It was contended that the Director of a Company holding a regular CHA licence as an authorized person of a Company and an individual who had cleared the Regulation 9 examination but is yet to get a licence, are two different classes of persons, altogether. They cannot be equated with each other and are unequal to begin with.

28.

As regards the contention raised on behalf of the petitioners that the scope of the regulations gets limited to those mentioned in sub-paragraphs (a) to (f) of Section 146(2) of the Act, it was submitted that the word used in sub-Section (2) is "may" which makes it amply clear that the scope of such regulations do not get limited to those mentioned in clauses (a) to (f) enumerated thereunder. That Section 146(2)(d) of the Act clearly lays down that the Board may make regulations which may provide for the restrictions and conditions subject to which a licence may be granted. That the Board, in exercise of the said power,

has prescribed the restriction on the number of licences for which Commissioner of Customs may invite applications as per his assessment of the requirement under Regulation 4. Further, the passing of examination under CHALR 1984 and satisfying the requirements of Regulations 5 and 6 of the CHALR, 2004, would not *ipso facto* entitle a person to grant of a licence and the regulations provide for a condition that such persons can apply for a licence only when applications for licences have been invited by the Commissioner of Customs vide regulation 4. It was submitted that, thus, the above restrictions and conditions are not ultra vires Section 146 of the Act.

29.

Next it was submitted that the provisions contained in Regulation 4 of CHALR, 1984 as well as Regulation 4 of CHALR, 2004, vest discretion in the Commissioner of Customs to invite applications for grant of such number of Customs House Agent licences as assessed by him, to act as Customs House Agent. The petitioners are not being denied the right to engage themselves in a profession, occupation, vocation, trade or business of their choice. However, a reasonable restriction in the form of qualification in certain additional subjects that are extremely relevant to customs clearance work and which does have a rational nexus with the nature of business or occupation, has been prescribed. Lack of knowledge of basics of the additional prescribed subjects in the changed global economic scenario, viz., The Patents Act, 1970, Indian Copyright Act, 1957, Narcotic Drugs and Psychotropic Substances Act, could lead to export/import of certain goods that are against the public interest. That all applicants who have undertaken examination under CHALR, 2004 are required to possess knowledge of the said additional subjects, as the said subjects were already covered by the prescribed syllabus. Thus, the requirement laid down for the petitioners to appear in the additional subjects examination cannot in any manner be said to be an unreasonable restriction so as to violate the rights of the petitioners under Article 14 of the Constitution of India. It was submitted that Article 14 of the Constitution can be invoked qua equals and that a number of candidates had appeared in the Regulation 9 examination under CHALR, 1984 conducted by the Customs Commissionerate, Ahmedabad during the period from 1999 to 2003 and were declared successful. However, none of them have been granted licences to act as Customs House Agents. Thus, the petitioners have been given equal treatment with all the candidates, who are on the same pedestal, as none of the candidates have been granted a licence.

30.

It was contended that if an applicant is appearing in the examination as a proprietor, then he is intending to possess a licence in his own name and not in the name of partnership firm or a Company. The Director of a Company, holding a regular CHA license as an authorized person of the Company and an

individual, who had cleared the regulation 9 examination but is yet to get a licence, are altogether two different classes of persons. They cannot be equated with each other and are unequal to begin with. Thus, the contention of the petitioners that equals have been treated as unequal, is incorrect and without any basis whatsoever. It was submitted that CHALR, 2004 do not provide for any restrictions on the number of the Customs House Agents. That the Board is of the view that, ideally, no restriction should be placed on the number of Customs House Agents operating in the Customs Houses and the market forces should govern the number of proficient and qualified persons required to carry out the job of Customs House Agents commensurate with the volume of import/export cargo. The Board also has not found any justification in prescribing a turnover based criteria for ascertainment of the number of Customs House Agent licences required to be issued at a particular Custom House/Station, inasmuch as the practice of undertaking Customs House Agent services on the basis of Form "C" intimation is already in vogue and would render such exercise meaningless. The Board, therefore, has decided against fixing a numeric criterion governing the number of Customs House Agent licenses being issued. Hence, there is no ceiling on the maximum number of Customs House Agents that can be licensed in terms of the Regulations or the instructions issued by the Board, which has been clarified vide paragraph 3 of Circular No.09/2010 dated 8.4.2010.

31.

It was further submitted that once the Board has vide CHALR, 2004, changed the eligibility criteria, by including additional subjects in the syllabus, and the same is given effect to taking note of the present day intricacies of law, which the Customs House Agents are bound to have knowledge; the natural corollary of this would be to ask the Regulation 9 passed candidates (of CHALR 1984) to get acquainted with the additional laws and qualify for the same. That the Notification No.30/2010-Customs (NT) seeks to do the same and the rationale behind issuance of the said notification is to seek equality in the competence and knowledge level of candidates who have passed the Regulation 8 examination under CHALR 2004 with that of those who passed regulation 9 examination under CHALR 1984. It was further contended that regulation 8 lays down that, "*The Examination may include questions on the following*". Thus, it is not mandatory that in all question papers, questions from all topics covered in the syllabus must be asked. It was contended that there was no pre-existing right which has been taken away by CHALR, 2004 from the petitioners, because, no such pre-existing right existed in the first place. It was submitted that the said issue is directly covered by the judgement dated 15.4.2009 rendered by the Madras High Court in the case of **Isak Ebinesar v. Chairman, CBEC**. It was submitted that the Form "F" card is given to the applicant who has given the examination and passed the written and oral examination and is employed by Customs House Agent. The Form "F" does not confer upon the petitioner the right to grant of licence under the Regulations.

32.

Reliance was placed upon the decision of the Supreme Court in the case of **D.V. Bakshi v. Union of India, (1993) 3 SCC 663** wherein questions relating to interpretation of Regulations 8 and 9 of the Customs House Agents Licensing Regulations, 1984 had been raised. However, the said decision pertains to interpretation of the said regulations and is not relevant to facts of the present case. Reliance was also placed upon the decision of the Supreme Court in the case of **Federation of Customs House Agents Association and others v. Union of India and others, (1996) 10 SCC 136** wherein the validity of Regulation 8 of the Customs House Agents Licensing Regulations, 1984 had been called in question on the ground that it provided for the grant of temporary licence before the applicant qualified at the prescribed examination and enables the holder of such temporary licence to work on a par with the regular licensees who had got the licence after passing the requisite examination. The issue involved in the said case, has no relevance to the controversy in issue in the present case, hence the said decision does not come to the aid of the respondents in any manner. Reliance was placed upon the decision of the Supreme Court in the case of **Union of India v. International Trading Co. and another, (2003) 5 SCC 437** for the proposition that the doctrines of promissory estoppel and legitimate expectation cannot come in the way of public interest. Public interest has to prevail over private interest.

33.

Reliance was placed upon the decision of the **Maharashtra State Board of Secondary and Higher Secondary Education v. Paritosh Bhupeshkumar Sheth, (1984) 4 SCC 27**, for the proposition that it is a common legislative practice that the Legislature may choose to lay down only the general policy and leave it to the delegate to make detailed provisions for carrying into effect the said policy and effectuate the purposes of the statute by framing rules/regulations which are in the nature of subordinate legislation. It was accordingly, submitted that Section 146 of the Act lays down a general policy and it is left to the delegate to make detailed provisions for carrying it into effect to effectuate the purpose of the statute. Accordingly, the Board has framed regulations making provision for passing of an examination as per the syllabus prescribed by the Board to give effect to the provisions of Section 146 of the Act. That as such, the Board has not transgressed the scope of the powers delegated to it and the Regulations as framed are well within the bounds of the powers delegated to the Board and do not call for any interference.

34.

In conclusion, it was submitted that similarly situated persons to the petitioners had not been given differential treatment under the CHALR 2004 or

under the Notification No.30/2010 dated 8.4.2010, and as such, there is no violation of any of the fundamental rights of the petitioners including the rights guaranteed under the provisions of Article 19(1)(g) or Article 14 of the Constitution. That, the petitions being devoid of merit, deserve to be rejected.

35.

In rejoinder, Mr. K. S. Nanavati, learned Senior Advocate submitted that the decision of the Madras High Court has been rendered in a different set of facts and would not be applicable to the facts of the present case. That the Madras High Court has directed the Board to examine the issue and to come up with a Scheme for extending to the petitioners therein the same benefits as conferred upon similarly placed persons in Delhi, Punjab & Haryana, and in the case of their failure, the Central Government should take appropriate steps under Section 161 of the Customs Act. That even while rejecting the petition of the petitioners therein, the Court was sensitive to the plight of the petitioners therein, and had directed the CBEC to examine the issue and come up with a scheme for extending to the petitioners therein the same benefits as conferred on similarly situated persons in certain other States. Attention was invited to the additional affidavit made by the petitioner of Special Civil Application No.6152 of 2010, wherein it had been pointed out that he had come across two entities in Jamnagar, who despite being similarly situated, have been granted licence by the Commissioner after the new regulations, that is, CHALR, 2004, came into force. That these two entities had cleared Regulation 9 examination under CHALR, 1984 and regular licences were not issued to them during that regime. As per the information of the petitioner, the two entities were given licenses after CHALR, 2004 came into force while he as well as other similarly situated persons were sought to be denied the same right.

36.

Having regard to the facts and circumstances of the case as well as the rival contentions advanced on behalf of the respective parties, the Court is of the view that it is possible to decide these petitions without entering into larger controversy as to whether the Board is empowered to prescribe for a qualifying examination for the grant of Customs House Agent's license, hence, the contentions raised in this regard are not dealt with, leaving it open to the parties to agitate the said issue in an appropriate case, if so required.

37.

The controversy involved in the present case is, therefore, as to whether the action of the respondents in requiring the petitioners to appear in the additional subjects prescribed under CHALR, 2004 is arbitrary and discriminatory and as such, is violative of the petitioners' fundamental rights under Article 14 of the Constitution of India.

38.

On a perusal of the provisions of CHALR, 1984, it is apparent that the same provide for the Commissioner to invite applications for grant of such number of licences as assessed by him to act as Customs House Agent in the month of January every year in the area of his jurisdiction for clearance work within the jurisdiction of the said Commissioner. Regulation 5 of the said Regulations provides for application for a licence to act as a Customs House Agent in a customs station. Regulation 6 provides for the conditions to be fulfilled by the applicant. Regulation 7 provides for scrutiny of applications for licence received under Regulation 5 by the Commissioner, and provides for making all inquiries for verification of the particulars set out in the application as well as such other inquiries as the Commissioner may deem necessary, including the inquiries about the reliability and financial status of the applicant. Regulation 8 makes provision for grant of temporary licence. Under the said provision, the applicant whose application is received within the last date specified in Regulation 4 and who satisfies the requirements of Regulations 5 and 6, shall be permitted to operate as Custom House Agent at the Customs station for which the application is made, initially for a period of one year and for such extended period in terms of the provisions of the said regulation. Regulation 9 makes provision for examination of the applicant, and provides that the holder of a temporary licence in the case of an individual and the person or persons who will be actually engaged in the work of clearance of goods through customs on behalf of the firm or Company holding a temporary licence, as the case may be, shall be required to qualify in examination at the earliest opportunity. Such person or persons shall be eligible to appear in the examination as soon as a temporary licence is granted and shall be permitted to avail of three chances within a period of 2 years from the date of issue of the temporary licence on payment of prescribed examination fee for each examination. Regulation 9 also provides for the subjects in which the applicants are required to clear the examination. Regulation 10 makes provision for grant of regular licence to such holder of a temporary licence who qualifies in an examination referred to in Regulation 9 and whose performance, is found to be satisfactory with reference to the conditions enumerated thereunder. Thus, under the Scheme of CHALR, 1984 initially upon receipt of an application to act as Customs House Agent, provision was made for grant of a temporary licence upon satisfaction of the requirements of Regulations 5 and 6, and a holder of a temporary licence was required to appear in the examination prescribed under Regulation 9 within the period prescribed thereunder. A holder of a temporary licence, who qualified in an examination referred to in Regulation 9 and whose performance was found to be satisfactory with reference to the conditions stipulated in Regulation 10, could be granted a regular licence in Form "D" by the Commissioner on receipt of an application in Form "C".

39.

Under CHALR, 2004, Regulation 4 which is similarly worded to Regulation 4 of CHALR, 1984 provides for invitation of applications. Regulation 5 makes provision for application for licence and is also similarly worded to Regulation 5 of CHALR, 1984. Regulation 6 of the CHALR, 2004 makes provision for conditions to be fulfilled by the applicant. Regulation 7 makes provision for scrutiny of applications for licence and is similarly worded to Regulation 7 of CHALR, 1984. Whereas Regulation 8 of CHALR, 1984 which makes provision for grant of temporary licence, has been done away with in CHALR, 2004. Regulation 8 of CHALR, 2004 makes provision for examination of the applicant, which is more or less *in pari materia* to Regulation 9 of CHALR, 1984, except that the same provides for certain additional subjects in respect of which questions may be asked in the examination. Regulation 9 makes provision for grant of licence in Form "B" to an applicant who has passed the examination referred to in Regulation 8. Thus, the basic difference between the two Regulations is, firstly, that in the new Regulations, the provision for temporary licence has been done away with and an applicant who has passed the examination referred to in Regulation 8 is qualified to the grant of a licence to act as Customs House Agent. The other difference is in the subjects in relation to which the questions will be asked in the examination. The additional subjects are the Patent Act, 1970, the Copyrights Act, 1957, the Central Excise Act, 1944, the Prevention of Corruption Act, Online Filing of Electronic Shipping Bills or Bills of Entry and Indian Customs and Central Excise Electronic Commerce/Electronic Data Interchange Gateway (ICEGATE) and Indian Customs Electronic Data Interchange Systems (ICES) and instead of the Imports & Exports Control Act, 1947, Foreign Exchange Regulation Act, 1973, Opium Act, 1978 as prescribed under CHALR, 1984, in CHALR 2004, the Foreign Trade Development & Regulation Act, 1993, the Foreign Exchange Management Act, 2000 and the Narcotics Drugs & Psychotropic Substances Act have been introduced.

40.

Regulation 9 of CHALR, 2004 provides for grant of licence in Form "B" to an applicant who has passed the examination referred to in Regulation 9, however, the same does not specify as to what would be the position of those candidates who have already cleared the examination under Regulation 9 of CHALR, 1984. The preamble to CHALR, 2004 provides for supersession of CHALR, 1984 "*except as respect things done or omitted to be done before such supersession*".

41.

The Board vide clarification dated 10.6.2004, has clarified that those who have not been granted licences under CHALR, 1984 till 23.4.2004 lose their right and have to meet the qualifications and pass the examination under Regulation 8 of the CHALR 2004. Subsequently, by virtue of the (Amendment) Regulations

2010, under Regulation 8 of CHALR, 2004, sub-regulation (9) has been inserted, which provides that any person who had passed the examination conducted in Regulation 9 of the Customs House Agents Licensing Regulations, 1984, and has not yet been granted licence under the said Regulations, upon declaring successful in a written examination conducted on the subjects specified thereunder, shall be deemed to have passed the examination referred to in Regulation 8 for the purpose of CHALR 2004. Pursuant to the said amendment in the Regulations, the Commissioner of Customs, Ahmedabad has issued Public Notice No.26/2010-Customs calling upon the candidates who had already qualified under Regulation 9 of CHALR, 1984, but have not got Customs House Agent licence to appear in the Customs House Agent examination in respect of additional subjects for the presently prescribed course curriculum under CHALR 2004. The examination was scheduled to be held on 15th July 2010.

42.

The main grievance ventilated in the present petitions is that the petitioners along with others have qualified under Regulation 9 of CHALR, 1984 for the grant of Customs House Agent licence. However, on account of failure on the part of the concerned Commissioner in inviting applications for grant of licence, the petitioners though being qualified in all other respects, were not in a position to obtain licences despite having made applications in this regard. Now in view of the newly framed regulations, the petitioners are sought to be discriminated against and are required to pass an examination in additional subjects, whereas similarly situated persons who had qualified under Regulation 9 of CHALR, 1984 and had already obtained licences under the said Regulations, are not required to appear in the said examination. According to the petitioners, they are qualified under CHALR, 1984 on par with the licence holders who were qualified under the said Regulations. When, the licence holders who were granted the licences under CHALR, 1984 are not required to appear in the additional subjects and are permitted to continue with their old licences, and even in case of renewal of licence, they are not required to appear in the additional subjects examinations, the condition prescribed for the petitioners to appear in the examination to qualify for getting Customs House Agent licence is clearly arbitrary and discriminatory and as such, is violative of the petitioners' fundamental rights under Article 14 of the Constitution of India.

43.

In this regard, it may be pertinent to note that those persons who had acquired licences under CHALR, 1984 had passed the same qualifying examination, namely, under Regulation 9 of CHALR 1984 similar to the present petitioners who have been working as agents of licence holders and are otherwise qualified for grant of licence. The only difference between the petitioners and those

persons holding licence under CHALR, 1984 is that on account of failure on the part of the concerned Commissioner to invite applications for grant of Customs House Agent Licence, the petitioners were unable to get licences prior to the coming into force of the new regulations, viz., CHALR, 2004. The petitioners are otherwise in all other aspects similarly situated to the licence holders under the CHALR, 1984. The issue that arises for consideration is as to whether the provisions of CHALR, 2004 read with the (Amendment) Regulations, 2010 and the clarification issued by the Board, requiring the petitioners to appear in examination of additional subjects for the qualifying to apply for a licence under CHALR, 2004 are arbitrary and discriminatory so as to be violative of the petitioners rights under Article 14 of the Constitution.

44.

In the case of ***Union of India v. International Trading Co. and another, (2003) 5 SCC 437***, the Apex Court has held that while the discretion to change the policy in exercise of the executive power, when not trammled by any statute is wide enough, what is imperative and implicit in terms of Article 14 is that a change in policy must be made fairly and should not give the impression that it was done arbitrarily or by any ulterior criteria.

45.

It is a well settled principle of law that when a rule is challenged as denying equal protection, the question for determination by the Court is not whether it has resulted in inequality but whether there is some difference which bears a just and reasonable relation to the object of the legislation. Mere differentiation or inequality of protection does not amount to discrimination within the inhibition of equal protection clause under Article 14 of the Constitution. To attract the attention of the clause, it is necessary to show that the selection of differentiation is unreasonable or arbitrary and that it does not rest on any rational basis having regard to the object which the legislature had in view. The Court has to examine whether the classification can be deemed to rest upon differentia discriminating the persons or things grouped from those left out and whether such differentia has a reasonable relation to the objects sought to be achieved. (***Dhan Singh v. State of Haryana, 1991 Supp (2) SCC 190***). It is also well settled that the burden of establishing the reasonableness of the classification and its nexus with the object of the legislation is on the State. (***B. Prabhakar Rao v. State of A. P., 1985 Supp SC 432***)

46.

In ***State of Kerala v. N.M. Thomas, (1976) 2 SCC 310***, it was held thus :

"24.

Discrimination is the essence of classification. Equality is violated if it rests on unreasonable basis. The concept of equality has an inherent limitation arising from the very nature of the constitutional guarantee. Those who are similarly circumstanced are entitled to an equal treatment. Equality is amongst equals. Classification is, therefore, to be founded on substantial differences which distinguish persons grouped together from those left out of the groups and such differential attributes must bear a just and rational relation to the object sought to be achieved.

31.

The rule of parity is the equal treatment of equals in equal circumstances. The rule of differentiation is enacting laws differentiating between different persons or things in different circumstances. The circumstances which govern one set of persons or objects may not necessarily be the same as those governing another set of persons or objects so that the question of unequal treatment does not really arise between persons governed by different conditions and different sets of circumstances. The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position and the varying needs of different classes of persons require special treatment. The legislature understands and appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based upon adequate grounds. The rule of classification is not a natural and logical corollary of the rule of equality, but the rule of differentiation is inherent in the concept of equality. Equality means parity of treatment under parity of conditions. Equality does not connote absolute equality. A classification in order to be constitutional must rest upon distinctions that are substantial and not merely illusory. The test is whether it has a reasonable basis free from artificiality and arbitrariness embracing all and omitting none naturally falling into that category.

47.

Testing the facts of the present case on the anvil of the principles enunciated in the aforesaid decisions, the undisputed facts are that the petitioners herein have cleared the examination held under Regulation 9 of CHALR, 1984 and were otherwise qualified for grant of licence under the said Regulations subject to scrutiny of certain conditions. The petitioners are also working in some capacity or the other, whether as director, partner, power or attorney, etc. of regular licence holders. Thus, for all practical purposes the petitioners are holding qualifications equal to that of regular licence holders and have been discharging similar duties. On behalf of the respondents no other distinguishing feature has been pointed out to indicate anything to the contrary. Thus, the petitioners were discharging functions on par with the regular licence holders, except the fact that as the concerned

Commissionerates/Collectorates did not invite applications as envisaged under Regulation 4 of the Regulations, between the period since the petitioners cleared the Regulation 9 examination and the coming into force of CHALR, 2004 on supersession of CHALR, 1984, the petitioners were not in a position to obtain regular licences as contemplated under Regulation 10 of CHALR, 1984. By virtue of the provisions of CHALR, 2004 as amended vide (Amendment) Regulations, 2010 the respondents have sought to create two classes of persons, viz., those who have obtained licences prior to the coming into force of CHALR, 2004 and those who on account of failure on the part of the concerned Commissionerates to invite applications under Regulation 4 of CHALR, 1984, though qualified, could not obtain licences before the new Regulations came into force. As noted hereinabove, the burden of establishing the reasonableness of the classification and its nexus with the object of the legislation is on the State.

48.

To establish the reasonableness of the classification and to explain that the same has a valid nexus to the object sought to be achieved by creating two classes, on behalf of the respondents it has been stated that taking a decision to conduct written examinations for persons, who had passed the Regulation 9 of CHALR, 1984, on the additional subjects, is based upon the need to ensure same competence and knowledge levels amongst successful applicants under both the Regulations; that in the present scenario of electronic filing of import and export documents in majority of Customs Stations, majority of import documents are facilitated by Risk Management System (RMS), and the rest of the documents are scrutinized by the officers based upon the risk perception; such facilitated documents do not get scrutinized by the Customs Officers. Thus a lot of faith has been imposed on the Trade. According to the respondents in such a situation the onus on the Customs House Agents is much more to scrutinize the documents properly, before filing and to advise their clients properly. However, they can do this work more efficiently only if they are competent enough to do so. The explanation sought to be put forth on behalf of the respondents, however, fails to explain as to how the petitioners are in any manner differently situated than the regular licence holders who had qualified under CHALR, 1984, so as to be any less competent than them. If those persons who had passed the Regulation 9 examination under CHALR, 1984 and obtained regular licences at the relevant time possess the competence to act as regular licence holders, one fails to understand as to how, in absence of any other distinguishing feature being pointed out, the petitioners who too have passed the Regulation 9 examination under CHALR, 1984 and have been discharging similar duties in different capacities on behalf of the regular licence holders are any less qualified or lack the competence that the said licence holders possess. On an overall consideration of the facts of the case, the State has neither been able to establish the reasonableness of the classification nor its nexus with the object sought to be achieved by the

legislation. As to what is the basis and how is it reasonable in differentially classifying equally qualified persons, merely on the basis of those having obtained licences prior to the coming into force of the new regulations and those who on account of failure on the part of the concerned Commissioner to invite applications could not get regular licences, is not coming forth. The nexus of such classification, in requiring those who had passed the Regulation 9 examination but could not obtain licences, to appear in the examination for the additional subjects, with the object sought to be achieved is also not established inasmuch as those who had already obtained licences earlier are not required to take the examination. Thus, if those persons are competent to continue holding licences and are entitled to renewal of licences under CHALR, 2004, one fails to understand as to how similarly situated persons are deemed to be not competent merely because they could not obtain licences earlier for the reasons noted hereinabove, namely, reasons beyond the control of the petitioners. Besides, in any field over a period of time with advancement, new subjects are added to the syllabus, but that does not mean that persons who have already qualified under the old syllabus are no longer qualified, merely because subsequently new subjects are added. Besides, once an old enactment is repealed and is substituted by a new one, those dealing with the same would normally acquaint themselves with the new enactment, and one does not need to pass the qualifying examination once again after having already qualified for the said purpose.

49.

On behalf of the respondents, it has been submitted that the persons already holding Customs House Agent licences and the petitioners who are yet to obtain a licence are two different classes of persons and cannot be equated with each other; that the new subjects have been introduced in the light of the recommendations of the Kelkar Committee and that the additional subjects are based upon the need to ensure the same competence and knowledge level amongst successful candidates under both the Regulations. Thus, the object sought to be achieved by the impugned (Amendment) Regulations, is to ensure that the petitioners who had passed the qualifying examination under CHALR, 1984 gain knowledge of the additional subjects as according to the respondents, these were the subjects knowledge of which was essential in case of all Customs House Agents and as such the same has a direct nexus to the object sought to be achieved, namely, that the Customs House Agents should be properly qualified. However, the explanation put forth by the respondents fails to explain as to how if the petitioners, because they have not passed examination in the additional subjects, are not competent and qualified to obtain licences under CHALR 2004, the licence holders who were already holding licences prior to the new regulations coming into force are qualified to continue with such licences.

50.

In the case of the petitioners, though they are similarly situated to the licence holders under CHALR 1984, except for the fact that they had not been granted licences as the concerned Commissionerate had not invited applications, the petitioners are now sought to be saddled with the liability to appear in the examinations to be conducted in respect of additional subjects, whereas similarly situated licence holders are not required to do so. If the case of the respondents is to be accepted, namely, that the requirement of the petitioners to appear in the additional subjects has a nexus with the object sought to be achieved, one fails to understand as to how the existing licence holders are not required to appear for the same examinations in additional subjects. In case licence holders are deemed to be qualified under the new regulations also for the purpose of continuation and extension of licence, it is beyond comprehension as to why the petitioners who are similarly situated persons, except for the fact that they were unable to obtain licences because the concerned Commissionerate did not invite applications, are required to be treated differently. Thus, the action of the respondents is, on the face of it, arbitrary and discriminatory and as such, cannot be countenanced. The fact that the petitioners, who though qualified under CHALR, 1984, due to no fault of theirs could not obtain licences under the said Regulations, are required to appear in the additional subjects when other similarly qualified persons who had obtained licence under the said Regulations are not required to appear in the said examination, gives an indication that the same has no nexus to the object sought to be achieved. If the object sought to be achieved was that all Customs House Agents should have knowledge of the said subjects, then there is no rationale behind making an exception in respect of those persons who had already obtained licences under the old Regulations from having to appear in the said examination. Thus, submission that the classification is reasonable and has a nexus to the object sought to be achieved does not merit acceptance.

51.

Moreover, it may be pertinent to note that the Board has issued instructions on 31.10.2007 as well as 8.4.2010, calling upon the Commissionerates to clear up backlog of pending requests by various applicants who had qualified as per CHALR, 2004 for issue of licences which have been held up by various Customs Commissionerates within a month and send a compliance report to the Board. Thus, the instructions issued by the Board are on the face of it contrary to the provisions of Regulation 4 of the Regulations which vests in the Commissioner the discretion as to when to invite applications and the number of applications to be invited. In the circular dated 8.4.2010, the Board has expressed the view that no restriction should be placed on the number of Customs House Agents operating in the Custom Houses and the market forces should govern the number of proficient and qualified persons required to carry out the job of Customs House Agent commensurate with the volume of import/export cargo. In the circular dated 31.10.2007, the Board has instructed the Commissionerates that irrespective of the norms prescribed by

the Board under CHALR, 1984, the concerned Commissioners of Customs shall issue Customs House Agent licence to all those applicants who had passed the Regulation 8 examination conducted under CHALR, 2004, subject to their fulfillment of the requisite conditions as mentioned in CHALR 2004. Thus, it is apparent that the respondents are blowing hot and cold at the same time. When it comes to dealing with the applications made by the petitioners despite the Commissioners not having invited applications, it has been contended on behalf of the respondents that in the light of the provisions of Regulation 4, licences can be issued only as and when the concerned Commissioner invites applications in respect of the same even if the applicants may be qualified in all respects. Whereas, as regards the persons who have qualified under CHALR, 2004, despite the fact that Regulation 4 of the CHALR, 2004 also prescribes for applications being invited by the concerned Commissioner and is *in pari materia* to the provisions of Regulation 4 of CHALR, 1984, the Board has thought it fit to override the said regulation and has directed the Commissioners of Customs to clear the backlog of pending applications by various applicants who had qualified as per CHALR, 2004.

52.

One finds it difficult to comprehend as to how there were applicants under CHALR, 2004 when the concerned Commissionerate had not invited any applications in this regard. In fact, as can be seen from the instructions dated 31.10.2004, not only has the Board directed the Commissioners to clear the backlog of pending requests of various applicants, who had qualified as per CHALR 2004, for issue of licences, within a month but also to send a compliance report to the Board. Thus, the treatment meted out to the petitioners herein is on the face of it discriminatory inasmuch as upon applications made by the petitioners, they are told that the same would be subject to concerned Commissioner inviting applications under Regulation 4, whereas in respect of those applicants who have qualified as per the new regulations, general directions have been issued to Commissionerates to grant licences to them within a period of one month. As pointed out on behalf of the petitioners two persons have already been granted licences in Jamnagar after the coming into force of CHALR, 2004 and several persons in other States have also been granted licences under the new regime. In the circumstances, the action of the respondents is clearly arbitrary and discriminatory and violative of the petitioners fundamental rights under Article 14 of the Constitution of India and as such cannot be sustained.

53.

For the foregoing reasons, the petitions succeed and are, accordingly, allowed. The Customs House Agents Licensing (Amendment) Regulations, 2010 issued vide Notification No.30/2010 dated 8.4.2010, insofar as the same impose a condition upon those persons who had passed the examination conducted

under Regulation 9 of the Customs House Agents Licensing Regulations, 1984 and have not been granted licence under the said Regulations, to clear the examination in additional subjects to be deemed to have passed the examination referred to in Regulation 8 for the purpose of Customs House Agents Licensing Regulations 2004, is hereby quashed and set aside. Consequently, the petitioners are entitled to be considered for grant of Customs House Agent licences without having to clear the examination in the additional subjects. In the light of the instructions issued by the Board in respect of the applications made by the applicants who had qualified as per Customs House Agents Licensing Regulations 2004, the respondent No.3 is directed to dispose of the applications/pending applications of the petitioners for grant of licences treating the petitioners on a par with the applicants who have qualified under CHALR, 2004, subject to their fulfilling other requirements under the Regulations. Rule is made absolute accordingly with no order as to costs.

54.

In the light of the order made in the main petition, Civil Applications No.5891 and 5892 of 2010 praying for stay of the impugned notification do not survive and are, accordingly, disposed of.

At this stage, on behalf of the respondents, a request has been made for staying the operation of the judgment by Mr.R.M.Chhaya, learned Senior Standing Counsel. Considering the request made by the learned Counsel, the operative part of the judgement, except to the extent indicated hereinafter, is stayed for a period of eight weeks from today. The direction to the respondent No.3 to dispose of the applications of the petitioners for grant of licence shall continue and the grant of licence, if any, shall be subject to the final outcome of any proceedings preferred against the present judgement.

(AY) (Petitions allowed)

