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NEW DELHI, the 11 October, 2001

Tariff Authority for Major Ports

NOTIFICATION

In exercise of the powers conferred by Section 48 of the Major Port Trusts Act, 1963 (38 of 1963), the Tariff Authority for Major Ports hereby disposes of the representation of M/s. Krishna Clearing Agency relating to imposition of demurrage on storage of wheat flour at Transit shed at the Kandla Port Trust as in the Order appended hereto.

(S. Sathyam)

Chairman

Tariff Authority for Major Ports

Case No.TAMP/86/2000-KPT

M/s. Krishna Clearing Agency ----- **Applicant**

V/s.

The Kandla Port Trust ----- **Respondent**

ORDER

(Passed on this 20th day of September 2001)

This case relates to a representation made by M/s. Krishna Clearing Agency (KCA) against imposition of demurrage charges on their storage of wheat flour at Transit Shed at the Kandla Port Trust (KPT).

2. The KCA has made the following points in its representation:

(i). The entire cargo of wheat flour was brought inside (April 96) the Port with the sole intention of shipment by nominating a ship which was withdrawn, as its principals, M/s. Eclectic Exports Limited could not offer the required quantity due to suspension of wheat supply to the flour mills by the Food Corporation of India (FCI) following a change in the Government policy.

(ii). The cargo, thus left over in the Port as unshipped, was kept inside the port with an expectation of a suitable feeder vessel to carry even the smaller available parcel ready in the port by incurring further expenditure on the shed-demurrage. Due to storage of cargo for a longer period, the cargo was damaged during the monsoon

and cyclonic weather. A part of the cargo was removed out of the port area for re-processing with port's permission to make it export worthy.

(iii). By the time the cargo was made again ready for shipment together with the part cargo, which was expected from the FCI godowns in view of the modified policy of the Government, the relevant letter of credit (L/C) had become inactive.

(iv). Despite suffering heavy financial losses, M/s. Eclectic Exports Ltd., finally managed to export the entire cargo on 20 September 96 thereby fulfilling their export obligation.

(v). In spite of repeated requests, the KPT did not grant waiver of demurrage as per the provisions of its Scale of Rates in spite of the party making all-out efforts to fulfil its export obligation.

3.1. In accordance with the procedure prescribed, a copy of the representation of the KCA was forwarded to the Kandla Port Trust and all the concerned user-organisations for comments. The comments received are summarised below:

Kandla Port Trust (KPT)

(i). The KCA had, on account of M/s. Eclectic Exports Ltd., stored a quantity of 30030 bags and 18980 bags of wheat flour each weighing 50 Kg. inside the Transit Shed for a period from 22 April 1996 to 7 June 1996 and 12 June 1996 to 4 July 1996 respectively for shipment against the vessel M.V. JAIPUR, later on amended to M.V. HUA-CHUAN. The shipment was withdrawn due to change in the Government policy.

(ii). Due to acute shortage of storage space in the Port area the cargo was not allowed to be reprocessed either at the Transit Area or at the rented godown, and was removed by the M/s. Eclectic Exports Ltd., from the Port area by making payment of the demurrage charge on survey rejected / shut-out cargo (i.e., calculated on the basis of 15 days free period and 50% rebate as applicable to export cargo).

(iii). The reprocessed cargo was transferred to M/s. Raja Rani Exports Ltd., and M/s. United Lumbers and loaded on vessel M.V. VICKO after filing fresh shipping bill. The shipping bill dated 2 May 96 in the name of M.V. HUA-CHUAN was cancelled on 6 September 96.

(iv). The representation received from the party was examined in depth and a regret reply was sent for the following reasons:

(a). The cargo which was brought to be loaded on vessel M.V. JAIPUR was taken out of the Port area, and the shipping bill was also later on cancelled; therefore, all the transactions in respect of the cargo were treated as closed.

(b). The fresh shipping bill and the arrival of the cargo from out of the Port area to load on the vessel M.V. VICKO was treated as a fresh consignment.

(c). The cargo after shifting from the Port areas was transferred to M/s. Raja Rani Exports Ltd., and M/s. United Lumbers in part. Also, M/s. Eclectic Exports Ltd., had closed their business during 1997 and established a new company called M/s. Commodities Exchange Corporation Ltd., New Delhi. That being so, the argument of M/s. Eclectic Exports Ltd., to extend the free period of 30 days or grant of any waiver of demurrage could not be entertained.

Gandhidham Chamber of Commerce & Industry (GCCl)

(i). This is an old case of demurrage charges in respect of wheat flour. The cargo was brought inside the Port for shipment per M.V. 'HUA-CHUAN' which was ultimately withdrawn due to change of Government policy as the FCI could not supply the remaining quantity.

(ii). The matter has already been taken up with the Chairman (KPT) requesting him to re-consider the matter and grant 30 days free period excluding Sunday/holidays and condone the delay caused for the cargo detained in the Port due to the circumstances beyond their control and to waive the demurrage charges amounting to Rs.46,24,690/-.

Kandla Custom House Agents' Association (KCHAA)

(i). The KPT must go into the merit of the case and the genuineness of the problems which the exporter faced in the instant case.

(ii). The KPT has since September 1996 did not even think it fit to communicate any of its decisions on the subject matter to the parties concerned which is inexcusable.

(iii). The KPT shall interpret the Scale of Rates in a practical manner so as to ensure that no exporter and / or its agent is put through unnecessary hardship and financial losses as is happening in the instant case.

3.2. The Kandla Port Steamship Agents' Association has not sent any comments.

4. A copy each of the comments received from the KPT and the representative bodies of port users was sent to the KCA as feed back information.

5.1. A joint hearing in this case was held on 12 April 2001 at the KPT premises. At the joint hearing the following submissions were made:

M/s. Krishna Clearing Agency (KCA)

(i). We had continuously been appealing to the KPT. They have not heard our plea at all.

(ii). We have given a written submission. All documents are there to show that the cargo was the same.

- (iii). The KPT has given waiver in other similar cases. Why discriminate against us?
- (iv). If it is treated as the same cargo, our claim for remission will be enhanced.
- (v). We will give a list of cases where, under similar circumstances, the Board of Trustees of the KPT had given remissions.

The Kandla Port Trust (KPT)

- (i). They were to export 7000 MT of wheat flour. They could not assemble the entire cargo. The vessel, therefore, left without the cargo.
- (ii). May be, the FCI had changed its system; but, the KPT is not concerned with that.
- (iii). They took back the cargo for cleaning and reaggregation. For this period they were given all available benefits and, were charged only the demurrage leviable.
- (iv). The final export was a different transaction involving different parties. Even if it is treated as the same transaction, there is no particular benefit to accrue. The demurrage of Rs.46 lakhs would not go down.
- (v). The fact that the Port could not allot them space does not make any difference. This case has been treated as export of the same cargo from inside the port and all the benefits admissible have been given.

The Kandla Custom House Agents' Association (KCHAA)

- (i). We have given our response vide our letter dated 4 January 2001. Please take that into account.
- (ii). The bona fides of the exporter are clear. They had to take the cargo out because the KPT could not allot them space.

5.2. The KCA filed a written submission giving the chronology of the events relating to the export of the wheat flour along with the copies of all the relevant documents in this regard.

5.3. At the joint hearing it was decided that the KCA would furnish the information about the cases in which, under similar circumstances, the Board of Trustees of the KPT had given remissions. The KPT had been required to give a note on how the similar cases were dealt with earlier; and, if, as alleged by the KCA, there were a comparative cases, then the KPT might explain the reasons for giving differential treatment to the KCA.

6. The KPT has informed that the KCA's reference was relating to the two cases of M/s. Liladhar Pasoo Forwarders, considered for remission of

demurrage charges by the Board of the KPT, which are not similar to the case of the KCA in reference. The gist of these cases is as follows:

(i). M/s. Liladhar Pasoo Forwarders had on behalf of M/s. Satnam Overseas Limited had stored a quantity of 3000 tonnes of Basmati rice in the transit shed for the period between 18 April 1997 to 2 May 1997 for shipment to Jeddah in May 1997, which could take place only in September 1997. The consignment was delayed an account of non-opening of L/C by the foreign buyer despite its verbal and written confirmation; and, hence, the demurrages to the extent of Rs.87 lakhs was accrued to the party, which would have been to the extent of Rs.1.36 lakhs only had the party removed the cargo from transit-account to rental- account. This case was considered by the Board of Trustees of the KPT and it was decided to waive 80% of the demurrage charges accrued on the advice of the Government to examine the case under Section 53 of the MPT Act, 1963 for extending some concession to the export cargo.

(ii). In the other case, M/s. Liladhar Pasoo Forwarders made a shipment of the rice on 23 May 1996 and 30 May 1996 per vessel MV Harmony B and M.V. Kapitan K, out of which some cargo was shutout which was kept partly at the godown on rental terms and the balance in the transit shed on transit terms. The cargo kept at the godown was cleared on 14 June 1996. With respect to the balance cargo, the shipper had submitted all the related documents including Customs permission; however, grant of permission at the Traffic Manager's office was delayed by more than a month resulting in accrual of a huge amount of demurrage. The Board of Trustees remitted 80% of the demurrage charges on the basis of the guidelines prescribed by the Government vide its letter No.PR-14013/23/89-PG dated 24 January 1992, which stipulates consideration of waiver of demurrage charges in case the port is not able to deliver the goods in time.

7. With reference to the totality of information collected during the processing of this case, and based on the arguments advanced at the joint hearing, the following position emerges :-

(i). (a). The case arises from a petition filed by M/s. Krishna Clearing Agency (KCA), a Clearing, Forwarding, and Shipping Agent's company in Kandla, acting on behalf of M/s. Eclectic Exports Limited.

(b). The case pertains to the year 1996. The Petitioner was handling an export cargo (viz., wheat flour) of M/s. Eclectic Exports Limited. Because of some problems, the export could not be effected resulting in levy of demurrage on the unexported cargo. The case is about the levy of this demurrage as also about concessions available to export cargo.

(ii). The grounds of the petition are as follows:

(a). The Petitioner was not to blame for the lapse. Problems came in the way of the export because of third party actions/inactions.

(b). The special considerations shown (e.g., grant of extra free time and a 50% rebate in demurrage) to encourage exports were unjustly denied in this case.

(c). The significance of the fact that the (same) cargo was in fact subsequently exported has been ignored.

(d). Relief through remission granted on earlier occasions to affected parties in similar circumstances has been discriminately denied in this case.

(iii). The Petitioner was to export about 7,000 MT of wheat flour. They had aggregated about 2,500 MT. The balance could not be aggregated because of a change in the Government policy halting supply of wheat by the FCI to flour mills. As a result, the shipment could not move. It is the Petitioner's contention that the entire blame is thus on the Government and on the FCI; and, it will be unfair to penalise them in the circumstance.

It is not reasonable for an exporter to cite such extraneous factors in support of a claim against a Port Trust. Even if it is a fact that there was indeed a change in the Government policy interrupting supply of wheat to the exporter, it has to be viewed as a legitimate business risk faced by the exporter; it cannot be used as an argument to require the Port Trust to absorb the consequential hardships. As it happens, the Petitioner does not seem to have covered well his flanks to protect himself against such business risks and other eventualities. The recounting below of some of the more relevant facts governing this case will throw more light on the gaps in the Petitioner's performance.

(iv). The following sequence of facts governing this case can be seen to be more meaningful:

(a). There was no fixity about the sailing schedule. The shipment was originally against vessel *M.V. JAIPUR*; it was later changed to *M.V. HUA-CHUAN*.

(b). Even during the three month period (April 96 – July 96) the Petitioner could aggregate only about 2,500 MT of cargo as against the required 7,000 MT.

(c). Instead of making strident efforts to come up with alternative arrangements, the cargo was allowed to lie in the port area and get damaged in the monsoon season.

(d). The damaged cargo had to be taken out of the port area for re-processing to make it export-worthy.

(e). In the meanwhile, the Letter of Credit relating to the transaction became inactive.

(f). Even as the cargo was being re-processed, it was transferred by the Petitioner to M/s. Raja Rani Exports Limited and M/s. United Lumbers.

(g). In the circumstance, the Shipping Bill in the name of *M.V. HUA-CHUAN* (dated 2 May 96) was cancelled on 6 September 96.

(h). When the re-processed cargo was brought into the port again for export, it was treated by the KPT as a fresh consignment covered by a new Shipping Bill.

(i). Ultimately, the exporters M/s. Eclectic Exports Limited closed their business and established another Company M/s. Commodities Exchange Corporation.

(v). The Petitioner has once again sought to shift the blame for the whole thing on to the Port by alleging that refusal of permission to re-process the cargo within the port area was responsible for its (forced) evacuation from the port area and all the consequential complications. This is indeed a most extraordinary stand for any exporter to take. As argued by the KPT, there was acute shortage of storage space inside the port even for export-worthy cargo; that being so, there was very little manoeuvrability for the port to permit re-processing of damaged cargo within the port area. It has to be recognised in this context that, in any case, the port area is not meant for 'processing' activities.

The evacuation of the cargo in the circumstance was inevitable. And, its declaration as 'rejected / shut-out' cargo was a natural corollary resulting in 'closure' by the KPT of the original transaction.

(vi). When the re-processed cargo re-entered the port it was naturally treated as a fresh consignment covered by a new Shipping Bill. The Petitioner has contended that this was unfair since the cargo was exactly the same. This contention is just not tenable for the reason that the cargo had been transferred to another party and all the documents relating to the transaction had also changed. The fact remains that the first consignment was not exported.

Incidentally, as has rightly been stressed by the KPT, even if the cargo is treated as the same, it will not entail any particular benefit to the Petitioner; the demurrage will still be the same.

It is noteworthy in this connection that, notwithstanding the fact that the cargo was taken out of the port area for re-processing, the KPT continued to treat it as export cargo and extended the benefits available viz., 'free period' as for export and a 50% rebate in demurrage applicable to export cargo.

(vii). Treating the whole case as one transaction without any interruption may have some implication for the Petitioner's claim for remission; the request may become more tenable; but, that is a matter entirely within the discretion of the Board of Trustees. It shall not be possible (or, even, appropriate) for this Authority to attempt to adjudicate on matters within the purview of the Board of Trustees under Section 53 of the Major Port Trusts Act.

(viii). The GCCI and the KCHAA have strongly supported the case of the Petitioner with observations about 'circumstances beyond the control or the KCA', 'merits of the case', 'genuineness of the export's problems', etc. While all this may be factually correct, as has earlier been cited in this analysis, these are arguments extraneous to the KPT's considerations. The KPT does not get any grant-in-aid from the Government; it is expected to be self-reliant financially. It cannot, therefore, afford to lose its legitimate revenue earnings because of business problems of importers/ exporters.

(ix). The Petitioner has cited two earlier cases to allege discriminatory treatment. As can be seen from the facts given by the KPT [please see paragraph 6 above], the consideration shown to M/s.Liladhar Pasoo Forwarders in their case pertaining to vessels *M/V. HONEY B* and *M.V. KAPITAN K* was because of the delay caused by the Traffic Manager's office. That being so, the Petitioner cannot seek to draw any benefit by citing it as a precedent.

In the other case where M/s. Liladhar Pasoo Forwarders had acted on behalf of M/s. Satnam Overseas Limited, the KPT had shown special consideration to grant remission. Only, the 'advice of the Government' has been cited by the KPT as a reason for the special consideration. This response of the KPT cannot be said to hold much force because this was also a case of delay in export due to recalcitrance of a third party which cannot justify any demand for the port to forgo its legitimate revenue earnings. In the event, the Petitioner can have a genuine grievance that the same standards are not being applied to grant of remission in their case.

Be that as it may, grant of remission is entirely within the discretion of the Board of Trustees; it is not a matter open for adjudication by this Authority. Parties aggrieved by such (allegedly) arbitrary Orders under Section 53 of the Major Port Trusts Act have to seek redress in the appropriate court of law. Neither can this Authority do anything about it nor can it be cited as a precedent to seek from this Authority concessions in tariffs.

8. In the result, and for the reasons given above, and based on a collective application of mind, this Authority finds no merit in the petition of M/s. Krishna Clearing Agency; and, accordingly, rejects it.

(S. Sathyam)

Chairman