

CHAPTER VI: MINISTRY OF PORTS, SHIPPING AND WATERWAYS

Syama Prasad Mookerjee Port

6.1 Undue benefit to a private party by levying lower rate of compensation charges

Syama Prasad Mookerjee Port, Kolkata suffered a loss of revenue of ₹7.66 crore due to non-levy of requisite compensation charges i.e., three times of the applicable Schedule of Rates on unauthorised occupant, M/s Orient Papers and Industries Limited.

Syama Prasad Mookerjee Port, Kolkata (Port) (formerly Kolkata Port Trust) granted (May 1978) long term lease of land measuring 12,140.562 square meter at Taratala Road, Kolkata to M/s Air Conditioning Corporation Limited (lessee) for a period of 30 years for the purpose of an engineering factory. As per the agreement (July 1981), the above lease was extendable for a period of 30 years' subject to compliance of all terms and conditions by the lessee. During the lease period, the Port found unauthorised construction as well as sub-letting in 41 *per cent* of the above leased out land by Air Conditioning Corporation Limited without prior permission of the Port. Air Conditioning Corporation Limited was also irregular in paying lease rental as per the terms of the agreement. The Port, therefore, issued (July 2005) an ejectment notice to Air Conditioning Corporation Limited followed by filing a plaint before Estate Officer under Public Premises (Eviction of Unauthorised Occupants) Act, 1971 for eviction.

During the pendency of such plaint, the lessee approached the Port (March 2008) for renewal of the existing lease for 30 years as the same was expiring in April 2008, which was turned down (September 2008) by the Port. In the meantime, the lessee was merged (April 2009) with Orient Papers and Industries Limited who continued to occupy the land in an unauthorised manner after expiry of lease from April 2008 to 11 September 2018.

The Port, however, levied compensation charges on Orient Papers and Industries Limited for such unauthorised occupation at 'single rate' instead of 'three times of the lease rent' as contained in Land Policy Guidelines except for the period from June 2012 to August 2012 and August 2016 to June 2017. Orient Papers and Industries Limited again requested (March 2014) the Port for renewal of lease and regularisation of their unauthorised occupancy of the land. Board of Trustees, however, decided (July 2015) not to renew the lease in favour of Orient Papers and Industries Limited but to allot the above land through tender-cum-auction process by offering Orient Papers and Industries Limited the First Right of Refusal in line with Land Policy Guidelines, 2014. Orient Papers and Industries Limited, however, did not accept the offer of First Right of Refusal.

The order of eviction against Orient Papers and Industries Limited was passed by the Estate Officer in July 2017 which, inter alia, mentioned that:

- The occupation of Orient Papers and Industries Limited became unauthorised as per Public Premises (Eviction of Unauthorised Occupation) Act, 1971.
- Orient Papers and Industries Limited would be liable to pay compensation charges for wrongful use and enjoyment of the Port property upto the date of handing over of the same to the Port authority.
- No relief against forfeiture of lease due to failure of Orient Papers and Industries Limited to remedy the breach (unauthorised construction and occupation) in due time.
- To vacate the land forcibly, if required, by applying force.

In this connection, Audit observed the following:

- Orient Papers and Industries Limited proposed (August 2018) to surrender the land occupied by them along with the structure valuing ₹3.65 crore unauthorisedly constructed thereon. This proposal was subject to refund of increased compensation charges amounting to ₹1.12 crore paid to the Port during the period from June 2012 to August 2012 and August 2016 to June 2017. The Port accepted the proposal and refunded the amount, which was not in conformity with the eviction order of the Estate Officer.
- Non-levying of three times of the lease rent as contained in Land Policy Guidelines except for the period from June 2012 to August 2012 and August 2016 to June 2017 was also in violation of the eviction order.
- Further, the Port could not take possession of the land on 31 August 2018 due to non-availability of security guards. The possession was finally taken over by the Port authority on 11 September 2018.

Thus, undue benefit of ₹7.66 crore was extended to a private party by levying lower rate of compensation charges and by non-compliance to Estate Officer's eviction order in letter and spirit.

The Port stated (January 2021) that Orient Papers and Industries Limited was 'in-principle' not a trespasser using the land without authorisation as they were actively engaged for renewal of the lease.

The contention of the Management regarding the status of Orient Papers and Industries Limited not being an unauthorised occupant was not tenable as Orient Papers and Industries Limited continued to occupy the land even after expiry of the lease tenure in April 2008 without any authority, which fulfills the criteria mentioned in definition of unauthorised occupation by a person in the Public Premises (Eviction of Unauthorised Occupants) Act, 1971. Moreover, the Port also remained silent on the reason behind levying of the compensation charges at three times of the lease rent applicable as per prevailing Schedule

of Rate on Orient Papers and Industries Limited during the period from June 2012 to August 2012 and August 2016 to June 2017, which was correctly levied. Further, the Estate Officer also clearly mentioned in his eviction order that Orient Papers and Industries Limited was an unauthorised occupant. Thus, the Management's acceptance of proposal of Orient Papers and Industries Limited instead of execution of Estate Officer's eviction order was not commercially prudent and failed to safeguard their financial interest leading to loss of revenue of ₹7.66 crore.

The matter was referred to the Ministry in February 2021; their reply was awaited (September 2021).

Visakhapatnam Port Trust

6.2 Loss of revenue towards demurrage charges

Visakhapatnam Port Trust failed to initiate timely action for realisation of demurrage charges resulting in loss of ₹2.09 crore, besides valuable space remaining blocked for more than six years.

Section 61 read with Section 62 of the Major Port Trusts Act, 1963 (the Act) stipulates that the Board may sell by public auction any goods or a part thereof, on expiry of two months from the time when these goods have passed into its custody, to recover any rates/ rent payable to the Board in respect of such goods. Further, as per Section 63(1)(c), in case of such auction, the charges due to the Board in respect of demurrage charges could be recovered only for a period of four months from the date of landing.

M/s Siva Industries and Holdings Limited (Importer), imported (28 November 2013) 20,000 metric tonnes (MT) of Steam (non-coking) coal¹ with assessable value of ₹6.40 crore in vessel M.V. Loretto. The cargo was stacked at the back up area of West Quay (WQ) - 4 Berth of the Visakhapatnam Port as the relevant customs duty paid documents along with Port commercial documents for the aforesaid quantity of cargo could not be furnished to the Visakhapatnam Port Trust (VPT) before the expiry of the free period of five days² (3 December 2013) for the imported consignment by the concerned Customs House Agent.

Despite repeated reminders by the VPT (March 2014/ June 2014), the Importer did not submit the required documents and, therefore, was not allowed to clear the goods. In July 2014, the Importer paid the customs duty of ₹23.45 lakh but disputed payment of the demurrage charges and sought to pay (September 2014) only licence fee³. VPT clarified

¹ Steam Coal, also known as Thermal Coal or Non-Coking Coal, is suitable for electric power production. Steam Coal is ground into a fine powder that burns quickly at high heat and is used in Power Plants to heat water in Boilers that run Steam Turbines.

² Free period of five days is provided as per Clause 4.6.1 of the Scale of Rates. During this period, no demurrages are leviable.

³ License fee is the amount collected from a port user for allotment of a plot meant for stacking EXIM cargo. This fee is collected per week per 100 sq. m.

(October 2014) that cargo was stacked under “Transit Terms⁴” and as such demurrage charges of ₹5.70 crore (until October 2014) needed to be paid for the cargo to be cleared. Subsequently, VPT intimated (January 2015/ February 2015) that the cargo was frequently catching fire and causing smoke and pollution and needed to be cleared. However, the Importer did not pay the demurrage charges and the cargo remained in VPT’s custody.

In March 2015, the Importer filed a Writ Petition in the Hon’ble High Court of Andhra Pradesh praying to declare the action of VPT in not permitting them to lift the cargo from the licensed plot on the ground that demurrage charges were payable, as illegal, arbitrary and contrary to the claims of Scale of Rates.⁵ A counter to this writ petition was filed by VPT in April 2015. Subsequently, VPT obtained (July 2016) a legal opinion, on conducting auction of the cargo, which advised that if proper procedures for conducting an auction under the relevant provisions of the Act were followed, there should be no legal impediment in conducting the auction as there was no interim order of the Court preventing VPT from taking any action regarding the cargo. As a consequence, VPT contemplated (August 2016) to conduct auction of the said cargo and to adjust the proceeds towards the arrears of demurrages.

VPT approached (March 2017) M/s MECON, the then valuers’ of VPT, to fix the reserve price of steam coal to conduct auction. M/s MECON quoted (January 2018) ₹18.50 lakh for conducting the tests and arriving at the reserve price. Subsequently, as the quoted price of M/s MECON was on higher side, VPT constituted a Committee (September 2018) to reassess the quality of steam coal. The Committee observed (October 2018) that most of the cargo had undergone internal combustion due to self-ignition, as it is one of the properties of steam coal, and hence, there may be presence of ash content in the bottom layers of the cargo stacked at the area. The Committee, therefore, recommended for a lab test and volumetric analysis for ascertaining the actual grade of cargo so as to fix a reserve price, which is essentially needed to proceed for auction.

Based on the recommendation of the Committee, a limited tender enquiry was floated in November 2018 and M/s Therapeutics Chemical Research Corporation was awarded work order in March 2019 which conducted the lab tests, analysed the quality and actual quantity available and submitted a report in May 2019 wherein it was concluded that there was no steam coal and hence, fixing of the reserve price was not possible. VPT initiated action (October 2019) to write-off the amount recoverable from the Importer, as the cargo had burnt in its totality. Stockpile was still lying under Customs charge at VPT till

⁴ *Areas under the jurisdiction of Traffic manager are of two types: one within the custom bound area and other outside the custom bound area. The area within the custom bound area adjacent to berth is allotted for a temporary period so as to ensure quick clearance of cargo from wharf/quick feeding to the vessel. This is called ‘Transit Terms’. For import cargo it is five days and for export cargo it is 30 days. Penalty is imposed as Demurrage, which is collected per tonne for the cargo lying in transit plot beyond free period.*

⁵ *The tariff rates as approved by Tariff Authority for Major Ports (TAMP) is called Scale of Rates.*

31 December 2019 and amount of demurrage charges accumulated until then works out to ₹40.62 crore⁶.

In this regard, Audit observed that VPT did not take timely action for realisation of demurrage charges. Initiating action for auction of steam coal in time, on completion of two months as per Sections 61 and 62 of the Act, was all the more important in this case since steam coal is self-combustible in nature. Had VPT initiated timely action for the auction of steam coal, it could have realised at least ₹2.09 crore⁷, from realisation of auction proceeds under Section 63(1)(c) of the Act.

Ministry stated (March 2021) that the Act provides for conducting of public auction ‘any time after expiry of two months’ hence there is no stipulated period within which public auction is to be completed. As per Section 59 of the Act, the Board had a lien on such goods and may seize and detain the same, until such rates and rents are fully paid. Ministry also stated that there were several instances where importers had paid custom duty and taken delivery of cargo after lapse of a considerable time after payment of huge demurrage charges.

It was also stated that self-igniting nature of cargo cannot be the reason for Port proceeding for early auction since cargo was not abandoned by the Importer and a petition filed by the receiver in respect of cargo was still pending in the Hon’ble Court. Responsibility of protecting the cargo wholly rests with Importer/ their handling agents and VPT is not responsible for loss, damage, destruction of cargo and that this incidence was first of its kind at VPT.

Reply of the Ministry needs to be viewed in light of the following facts:

A combined reading of Sections 59 to 63 reveals that legal framework has provided a two months’ time to the importer to remove his goods and maximum period for which Port is allowed to recover demurrage is four months. Therefore, entire process of disposal of uncleared goods has to be completed within four months to protect the financial interest of the Port. Contention of Ministry that self-igniting nature of cargo cannot be the reason for early auction is not acceptable as due to this very nature cargo frequently caught fire in this case. Also, the legal case filed by the Importer, stated as an impediment for taking timely action, was pending even when VPT initiated auction and continues to be pending (December 2020) for admission in the Hon’ble High Court of Andhra Pradesh since March 2015.

⁶ *This amount was worked out by VPT though as per Section 63(1)(C) of MPT Act, charges due to the Board in respect of demurrage charges could be recovered only for a period of four months from the date of landing.*

⁷ *The demurrage charges are restricted to be recovered only for the period of four months, as per Sec. 63(1)(c) of the Act, which amounts to ₹2.09 crore for the period from 4 December 2013 to 4 April 2014. Hence, though the accumulated demurrage charges until 31 December 2019 work out to ₹40.62 crore, only an amount of ₹2.09 crore would be recoverable.*

Thus, failure to take timely action for realisation of demurrage charges, as required under the Act, resulted in loss of revenue of ₹2.09 crore besides valuable space remaining blocked for more than six years.

Cochin Port Trust

6.3 Avoidable reimbursement of tax

Failure to avail exemption resulted in avoidable reimbursement of Kerala Value Added Tax of ₹1.84 crore.

Ministry of Shipping - Government of India initiated Sagarmala programme to enhance the performance of the country's logistics sector through port-led development. Multiuser Liquid Terminal (Terminal) at Puthuvypeen SEZ at Cochin Port Trust (CoPT) area was one among various projects included in Sagarmala programme. Hence, CoPT entered (March 2013) into a Memorandum of Understanding (MoU) with Indian Oil Corporation Limited (IOCL) for construction, operation and maintenance of the Terminal. As per the MoU, IOCL could use the Terminal for a maximum of 161 days in a calendar year for import of LPG, LNG etc., and for the remaining 204 days CoPT could utilise the terminal to supply fuel to the vessels coming into the port area. Hence, CoPT decided to create bunker supply facility⁸. Construction of Barge⁹ Jetty was proposed (May 2013) for handling bunkers. Accordingly, CoPT and IOCL entered (April 2014) into a Concession Agreement (CA) for construction, operation and maintenance of the Terminal.

As per Clause 6.4 of CA, CoPT was to take up the work for construction of Terminal, and Barge Jetty. The first work was to be taken up on behalf of IOCL, while the Barge Jetty was to be constructed for its own use. CoPT invited tenders (November 2014) for construction of both Terminal as well as Barge Jetty and awarded the contract (July 2015) to M/s RKEC Projects (P) Limited (M/s RKEC) for an amount of ₹217.32 crore on Engineering, Procurement and Construction (EPC) basis. Fund of ₹182.76 crore required for construction of Terminal was to be funded by IOCL and CoPT was to invest ₹34.56 crore for construction of Barge Jetty. The Board of CoPT accorded post facto approval for the construction of Barge Jetty at a cost of ₹34.56 crore in August 2015.

As per Section 6(7)(b) of the Kerala Value Added Tax (KVAT) Act, 2003, work contract (being deemed sale) awarded by any developer to a contractor for setting up a unit in the SEZ area is exempted from KVAT in the hands of contractor. As per Rule 12C (2) of KVAT Rules, 2005, every dealer who makes any sale to an industrial unit in any SEZ under section 6(7)(b) of KVAT shall obtain a declaration in Form No. 43 duly signed and sealed by the buyer.

⁸ A facility to supply fuel for use by ships, and includes the shipboard logistics of loading fuel and distributing it among available bunker tanks.

⁹ Floating vessels generally towed or tugged along with other vessels mostly used in smaller water parts like rivers, lakes or canals for transportation/ transfer of cargo.

Audit observed that CoPT did not issue Form 43 to M/s RKEC for construction of Barge Jetty and hence M/s RKEC claimed ₹1.84 crore towards payment of KVAT for the period September 2015 to June 2017 and the same was reimbursed by CoPT. Whereas IOCL issued Form 43 to M/s RKEC for construction of Terminal and availed exemption from payment of KVAT.

Hence, failure to issue Form 43 to M/s RKEC resulted in avoidable reimbursement of KVAT of ₹1.84 crore.

The Management replied (August 2020) that it had sought clarification (February 2016) from Commercial Tax Department whether construction of Barge Jetty was exempted under KVAT Act. It further stated that the VAT was reimbursed in order to complete the project in time. Further, the clarification from the Commercial Tax Department was received in March 2018 after the implementation of Goods and Service Tax, but by that time M/s RKEC had already filed KVAT returns.

The reply of the Management is not acceptable in view of the following:

- (i) The Commercial Tax Department clarified (January 2014) that development activity of SEZ by the developer himself was covered under Section 6(7)(b) of KVAT Act, which exempted any development work in SEZ area from KVAT. The matter was further deliberated in December 2014 and it was held that CoPT can avail tax exemption treating the construction of Barge Jetty as setting up of unit.
- (ii) In respect of construction of Infrastructure facilities in SEZ, the Commercial Tax Department passed (March 2010) an order providing exemption to Petronet LNG Limited, a co-developer of SEZ at Puthuvypeen, from payment of KVAT. This order was only reiterated by the Commercial Tax Department (March 2018) in reply to the application filed by CoPT in February 2016.

Thus, failure of CoPT to issue Form 43 resulted in avoidable reimbursement of KVAT to the contractor (M/s RKEC) of ₹1.84 crore.

The matter was referred to the Ministry in January 2021; their reply was awaited (September 2021).