

# THE HIGH COURT OF SINDH, KARACHI

## Suit No. 1237 of 2022

[Alhaushabi Stevedores (Pvt) Ltd & others versus Federation of Pakistan & others]

Plaintiffs : Alhaushabi Stevedores (Pvt) Ltd & 02 others through Mr. Mayhar Kazi, Advocate.

Defendant No.1 : Federation of Pakistan through Mr. Mubashir Mirza, Assistant Attorney General for Pakistan.

Defendant No.2 : Port Qasim Authority through M/s. Ali T. Ebrahim and Ms. Nazia Hajra, Advocates.

Defendant Nos. 3 to 6 : Fauji Akbar Portia Marine Terminals Limited & 03 others through M/s. Khawaja Shams-ul-Islam and Imran Taj, Advocates.

Defendant No.7 : Nemo.

Dates of hearing : 02-11-2022, 10-11-2022, 28-11-2022 & re-hearing on 12-07-2023

Date of decision : 17-07-2023

## ORDER

**Adnan Iqbal Chaudhry J.** - Subject matter of the suit is the Implementation Agreement dated 03-09-2007 between Port Qasim Authority [PQA - Defendant No.2] and Fauji Akbar Portia Marine Terminals Ltd. [FAP - Defendant No.3], whereby the PQA granted to the Defendant No.3 a concession/right for a period of 30 years to design, construct, operate, manage and maintain a grain and fertilizer terminal at Port Qasim for handling “dry cargo (except when containerized).....” and “to demand, collect and retain tariff charges from the customers for usage of the Terminal and charges for the services in accordance with the provisions of this Agreement”. As a part of such agreement the PQA granted to the Defendant No.3 the exclusive right to handle dry cargo at Port Qasim in the following terms and on the following condition:

*“3.1(b) PQA hereby agrees that no other concession in respect of the Cargo shall be granted to any person/terminal/jetty by PQA until the Cargo throughput exceeds 3.8 million tons per annum in each of the preceding three (3) consecutive years.*

*3.26 Subject to the provisions of Article 3.1 (b), upon completion of the Project and successful commissioning of the Terminal, the handling of the Cargo will not be permitted by PQA at any other berths at the Port including berths of Marginal Wharf.”*

2. The ‘Marginal Wharf’ referred to in article 3.26 above is separate from the terminal of the Defendant No.3 and is managed by the PQA. The Plaintiffs 1 and 2 are stevedores who claim to be licensed by the PQA for stevedoring at Port Qasim. The Plaintiff No.3 provides transportation for cargo within Port Qasim and is usually engaged for such purpose by the clients of the Plaintiff No.1.

3. While the Defendant No. 3 handles dry cargo at the terminal dedicated to it under the Implementation Agreement, however, when that terminal is not readily available to a customer/vessel for such purpose, as for example when it is already occupied by another customer/vessel, then the arrangement between the PQA and the Defendant No.3 *vide* SOP dated 11-05-2015 is that the PQA permits the vessel waiting in line to berth at the Marginal Wharf for loading or unloading cargo provided that the Defendant No.3 issues a NOC.

4. The case of the Plaintiffs is that the exclusivity granted to the Defendant No.3 under the Implementation Agreement is being misused as follows. First, for issuing an NOC as aforesaid to enable a vessel to berth at the Marginal Wharf, the Defendant No.3 levies a charge on the shipper or receiver of the cargo. Mr. Mayhar Kazi, learned counsel for the Plaintiffs submitted that such charge is levied at an arbitrary rate; that it is not a charge envisaged in the Implementation Agreement; and that given the exigency in the loading/unloading of the vessel, in practice it is usually the stevedore/contractor engaged for the purpose, such as the Plaintiffs 2 and 3 who have to pay such charge at the outset before they can bill their client for the same. Secondly, and that being the thrust of the Plaintiffs’ case, since May 2022, for shipments of rice cargo from the

Marginal Wharf the Defendant No.3 stipulates in its NOC that the shipper can engage only the services of the stevedore/sub-contractor nominated by the Defendant No.3, *viz.* the Defendants 4 to 6. Per the Plaintiffs' counsel, such stipulation in the NOC practically ousts the Plaintiffs from business at the Marginal Wharf.

5. In the aforesaid circumstances the Plaintiffs pray for a declaration that they are entitled to handle dry cargo at the Marginal Wharf; that the action of the Defendant No.3 preventing them is unlawful; and then for consequential injunctions. By CMA No. 12258/2022 under Order XXXIX Rules 1 and 2 CPC, the Plaintiffs pray *"to restrain the Defendants from preventing the Plaintiffs from handling dry bulk cargo at the marginal wharf at Port Qasim for their clients subject to payment of uniform NOC charges across the board."*

6. Opposing the injunction application, Mr. Khawaja Shams-ul-Islam, learned counsel for the Defendant No.3 submitted that the Plaintiffs being strangers to the Implementation Agreement have no *locus standi* to file the suit; that the charge levied by the Defendant No.3 for issuing the NOC for the Marginal Wharf is not on the Plaintiffs but on the shipper or receiver of the cargo, none of whom have any issue with the same; that the exclusivity granted to the Defendant No.3 under the Implementation Agreement entitles it to nominate a stevedore if dry cargo is handled anywhere at Port Qasim; that such nomination at the Marginal Wharf is only for handling 'dry' cargo and not all cargo, and thus there is no question of ousting the Plaintiffs from business. Mr. Ali Ebrahim, learned counsel for the PQA, acknowledged that the Defendant No.3 has the exclusive right to handle dry cargo at the Port Qasim in line with the Implementation Agreement and the SOP dated 11-05-2015.

7. Heard the learned counsel and perused the record with their assistance.

8. *Prima facie*, by way of articles 3.1(b) and 3.26 of the Implementation Agreement, and subject to the condition of through-

put stipulated therein, the PQA has granted to the Defendant No.3 the exclusive concession/right to handle dry cargo at Port Qasim for a period of 30 years, which right is subsisting. The case of the Plaintiffs is essentially that though such exclusivity granted to the Defendant No.3 is confined to operations at its dedicated terminal, it is being abused by it to extend operations to the Marginal Wharf and deprive the Plaintiffs of stevedoring business at the Marginal Wharf. In my view, the issue raised by the Plaintiffs falls squarely within the realm of antitrust law, or as referred to in this jurisdiction, the Competition Act, 2010. That much is also reinforced by the certificate dated 06-11-2020 issued by the Competition Commission under sections 5 and 9 of the Competition Act, 2010 whereby the exclusivity clause of said Implementation Agreement has been exempted from the application of section 4 of said Act.

9. The Plaintiffs themselves have pleaded in para 16 of the plaint that the *“Defendant No.3 has abused its dominant position by colluding with the Defendants 4-6 to form a monopoly over the provision of stevedoring services at the marginal wharf.”* The phrase ‘dominant position’ is defined in section 2(e) of the Competition Act, 2010 as:

“dominant position” of one undertaking or several undertakings in a relevant market shall be deemed to exist if such undertaking or undertakings have the ability to behave to an appreciable extent independently of competitors, customers, consumers and suppliers and the position of an undertaking shall be presumed to be dominant if its share of the relevant market exceeds forty percent;.....”

10. Sub-section (1) of section 3 of the Competition Act prohibits the abuse of dominant position, and sub-sections (2) and (3) explain what may constitute abuse of dominant position. Section 30 envisages proceedings by the Competition Commission where it is satisfied that there has been or is likely to be a contravention of any provision of Chapter II, which includes section 3, and to make such orders specified in section 31 as it may deem appropriate and to impose penalties. Section 31 then provides:

**“31. Orders of the Commission.—** The Commission may in the case of ---

(a) an abuse of dominant position, require the undertaking concerned to take such actions specified in the order as may be necessary to restore competition and not to repeat the prohibitions specified in Chapter II or to engage in any other practice with similar effect; .....

Section 32 also empowers the Competition Commission to issue interim orders. Section 37(2) enables an undertaking to file a complaint with the Competition Commission of facts that constitute a contravention of the provisions of Chapter II. Sections 41 to 44 provide a hierarchy of appeals, and section 59 stipulates that the provisions of the Competition Act shall have overriding effect.

11. Therefore, where an undertaking alleges that another undertaking is abusing its dominant position to adversely affect the business of the complaining undertaking, the Competition Act, 2010 provides a special remedy before a special forum for redressal. As discussed by this Bench in *Syed Zain ul Abideen v. Federal Board of Revenue* (PLD 2021 Sindh 130) and *Pakistan Petroleum Ltd. v. Pakistan* (2022 PTD 1742), when special law envisages exclusive jurisdiction by a special forum, then the remedy of a suit before a civil court (be that the High Court exercising original jurisdiction over suits) is impliedly barred under section 9 CPC, unless of course the case attracts one of the established exceptions to the ouster of jurisdiction.<sup>1</sup>

12. It was not contended by the Plaintiffs that they or the Defendants 2 and 3 are not 'undertakings' covered by section 2(q) of the Competition Act, 2010, or that the special forum provided by said Act does not otherwise have jurisdiction over the case of the Plaintiffs. The only argument advanced by the Plaintiffs' counsel purporting to be in that regard was that the certificate issued by the Competition Commission to exempt the exclusivity of the Defendant No.3 from section 4 of the Competition Act itself stipulates that there shall be no abuse of dominant position. While that is correct, I do not see how that stipulation in the exemption certificate becomes a

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<sup>1</sup> For the exceptions to the ouster of jurisdiction of a civil court, see *Abbasia Cooperative Bank v. Hakeem Hafiz Muhammad Ghaus* (PLD 1997 SC 3); and *Searle IV Solution (Pot.) Ltd. v. Federation of Pakistan* (2018 SCMR 1444).

ground to avoid the jurisdiction of the Competition Commission under sections 30 and 31 of the Competition Act which empower it to check alleged abuse of dominant position.

13. Having concluded that the remedy of the Plaintiffs is before the Competition Commission under the Competition Act, 2010 and not before this Court, CMA No. 12258/2022 is dismissed and the plaint is rejected under Order VII Rule 11(d) CPC.

**JUDGE**

Karachi  
Dated: 17-07-2023