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New Delhi, the 26 September, 2001

Tariff Authority for Major Ports

NOTIFICATION

In exercise of the powers conferred by Sections 48 and 49 of the Major Port Trusts Act, 1963 (38 of 1963), the Tariff Authority for Major Ports hereby disposes of the representation of M/s. T. Arumai Durai & Co., relating to licensing of JD I berth at the Chennai Port as in the Order appended hereto.

(S. Sathyam)

Chairman

Tariff Authority for Major Ports

Case No.TAMP/29/2001-CHPT

M/s. T. Arumai Durai & Company

Applicant

Vs

The Chennai Port Trust (CHPT)

Respondent

ORDER

(Passed on this 30th day of August 2001)

This case relating to a representation made by M/s. T. Arumai Durai & Co., about certain issues relating to an agreement entered into between them and the Chennai Port Trust (CHPT) for licensing of JD I berth along with transit shed and its back up area for a period of 20 years from 13 July 1998.

2. In their representation, M/s. T. Arumai Durai & Co., have given the following points:

- (i). JD I berth was allotted to them on lease under an agreement signed between them and the CHPT along with the transit shed (JD I shed) and its back up area for a period of 20 years from 13 July 1998.
- (ii). Under clause (f) of Article III of the Agreement which deals with berth reservation charges, the CHPT has directed to them to pay the berth reservation charges equivalent to one day's average berth hire charges or 25% of the berth hire charges of the vessel's total stay in the berth whichever is higher.
- (iii). These charges are payable in advance before commencement of each year.
- (iv). As per the agreement, the berth reservation charges @ 25% of the berth hire charges was calculated and the amount was remitted for the first year of operation. However, for the second and

third year of the operation, the CHPT demanded remittance of 50% of the berth hire charges as berth reservation charges as per the communication received from the MOST. This is contrary to the agreement condition signed by them with the CHPT.

- (v). The TAMP vide its order dated 22 March 2000, stated that berth reservation charges would be levied only at 25% of berth hire charges notwithstanding the communication from the MOST.
- (vi). The licensing of berths to private parties was done through a tendering process. The tender document does not envisage payment of berth reservation charges. Only a throughput commitment and payment of license fee were mentioned in the tender documents.
- (vii). The CHPT may be directed to levy only 25% of the berth hire charges as was done in the first year operation. The TAMP may also examine the larger question whether the berth reservation charges itself is payable or not in view of the tender conditions not mentioned anything about the berth reservation charges.
- (viii). The CHPT has also given the JD I transit shed along with the back up area for storage and handling of the cargo at the license fee payable as per the Scale of Rates. The rates charged as rental for the JD I shed and back up area are, however, more than the rates prescribed in the Scale of Rates as given below:

S. No.	Location	Area in sq. mtr.	Rental charges	
			As per the agreement	As per the Scale of Rates
1.	Shed area with AC sheet roofing	3602	Rs.60 per sq.mt.	Rs.30 per sq. mt.
2.	Platform with AC sheet roof	506	Rs.30 per sq.mt.	Rs.20 per sq. mt.

- (ix). The rental that is being charged is more than what has been stated in the Scale of Rates (1992 edition). In spite of various representations the over-charging has not been corrected so far.
 - (x). As per the license agreement (Article III – Clause 1 of the agreement) the licence fee shall be refixed in 3 years as per the base fixed by the CHPT and the same shall bear an escalation @ 5% per annum compounded annually.
 - (xi). The CHPT may be directed to levy lease rental as per its Scale of Rates and to refund the excess money collected by it so far.
3. The representation of M/s. T. Arumai Durai & Co. was forwarded the CHPT and all concerned representative bodies of Port users for comments. The comments received are summarised below:

Tamil Chamber of Commerce (TCC)

- (i). As per the tender documents, payment of Berth Reservation charges has not been envisaged. The TAMP has to consider whether the 25% of berth reservation charges is to be continued.
- (ii). 50% of berth reservation charges recovered from second and third year as per the Ministry's advice is not in order.

- (iii). Both in the tender conditions and the Agreement, it is mentioned that the rental charges payable is only as per Scale of Rates. The TAMP may consider to advise the Port Trust to charge as per Scale of Rates only.

The Chennai Custom House Agents Association (CCHAA)

- (i). The CHPT can collect charges only as per the agreement and should not exceed beyond the scope of the agreement.
- (ii). In the absence of any escalation clause, it is incorrect to collect 50% of the berth hire charges.
- (iii). As regards payment of berth reservation charges, it should have been addressed before entering into an agreement. Having entered into an agreement, it would be incorrect to question the very basis. The deviation between the tender document and the agreement should have been questioned before finalising the agreement.
- (iv). When the Agreement was signed, the 1992 edition of Scale of Rates was very much in operation. Having signed the Agreement, it is incorrect to rely on the Scale of Rates now. Before entering the agreement, the rates for the back up area should have been finalised.

4. The CHPT intimated that it would not attend the joint hearing on licensing of JD I and JD V berth at the CHPT for the following reasons:

- (i). The berth reservation charges has been increased from 25% to 50% as per Government directions conveyed vide its letter No. PT-11033/7/95-PT dated 1 April 99.

The Government vide its letter dated 15 February 2001 have clarified that the berth reservation charges required to be collected at the rate of 50% only with effect from 8 March 95 and the instruction were issued with the approval of the competent authority and at that time the TAMP was not even constituted. The TAMP has no authority to quash the order of the Government.

- (ii). The licence fee for storage area has been fixed as per the Government guidelines and also in terms of Section 49(3) of Major Port Trusts Act, 1963.
- (iii). The licensing of JD I and JD V berth of the CHPT was done by an Agreement and the licensees – M/s. A C T India, and M/s. T. Arumaidurai & Co., had signed the agreement after going through it thoroughly. The parties to the Agreement should have raised the objection before signing of the Agreement. The Agreement holds good in all respects both for berth reservation charges and storage charges according to various clauses, articles and interpretations in the Agreement.

5. A copy each of the comments received from the representative body of the port users was sent to the CHPT and M/s. T. Arumai Durai & Co. as feed back information.

6. In view of the fact that the issues involved are exactly the same, this case and the case relating to the representation submitted by M/s. A C T India were bracketed and taken up together and a joint hearing was held at the CHPT premises on 9 May 2001. Contrary to their stand notified earlier, the CHPT also participated in the joint hearing. At the joint hearing, the following submissions were made:

M/s. Arumai Durai & Company

- (i). We agree totally with the A C T India.

- (ii). We do not come under any particular Berth Reservation Scheme. Any Steamer Agents can pay 25% to get a berth reserved. We are a 20 year licensee. We can not be equated with any Steamer Agents.
- (iii). There is a clause in the Agreement which says, if commercial interests are crucially affected, both parties can jointly discuss to readjust the terms. We want this facility.
- (iv). We also have the same problem about classification of the lands. Please clarify and resolve the dispute.

M/s. A C T India

- (i). As regards Berth Reservation Charge (BRC) is concerned, the CHPT should go by the Agreement. They can not charge 50% in place of 25% and, retrospectively at that.
- (ii). If the BRC is revised, we can then be required to pay.
- (iii). A larger issue involved is that the notice inviting tender did not refer to BRC. The Agreement can not go against the Tender Notice.
- (iv). The TAMP can fix BRC. Earlier Government orders can not restrict TAMP's authority.
- (v). There is an error in classifying the land allotted to us. We use it for storage and not for office accommodation. The CHPT must revise the rate with reference to the notified rates.
- (vi). There is no scope for retrospective revision. The increase from 25% to 50% casts a huge financial burden. Had we known about 50% of increase, we might not have come.
- (vii). There is a specific provision about BRC in the Agreement. There is no clause about revision of BRC other than through TAMP Order.
- (viii). Tender Notice says, everything is to be according to Scale of Rates. How the CHPT say today that some special rate was applied?

The Chennai Port Trust (CHPT)

- (i). There is specific provision in the BRC Agreement. That issue cannot be reopened.
- (ii). There is also a provision in the Agreement about increasing the 25% BRC. We have already sent a proposal to the TAMP.
- (iii). Government order issued in the year 1995 about raising BRC to 50% was not received by us. We acted in 1999 when we received a reminder. We have now retrospectively applied it with reference to the Government directive although TAMP had come into being by then.
- (iv). Rate for land allotment varies with each Agreement. There is no application of any notified rate commonly for all cases.
- (v). This is a deliberate separate arrangement. They signed the Agreement. One year later, they are objecting. It shall not be allowed.

- (vi). There is a BR Scheme for short periods for any Shipping Agents. M/s. A CT India/ M/s. T. Arumai Durai have been given the BR facility for much longer periods. The two can not be equated.

Tamil Chamber of Commerce (TCC)

- (i). These are more of legal issues. TAMP may decide.
- (ii). These Agreements are meant for fuller, proper utilisation of berths. Sudden increases like this do not promote such an arrangement. Otherwise, there will be arbitration leading to further complication.

7. Earlier today, this Authority has passed an Order in the matter relating to the petition filed by the CHPT for a review of this Authority's Order dated 22 March 2000 with respect to the observations made therein about Berth Reservation Charge. In that case, it has already been decided for stated reasons to modify the earlier observation (made in the Order dated 22 March 2000) about berth reservation charge remaining static at 25% of the applicable berth hire and allow it to be increased to 50% as ordered by the (then) Ministry of Surface Transport. That being so, the CHPT's arguments about this Authority's competence to decide on Berth Reservation Charges, etc., are not considered again as a part of this case.

8. With reference to the totality of information collected during the processing of this case, and taking into account the arguments advanced at the joint hearing, the following position emerges:

- (i). M/s. T. Arumai Durai & Co., have been given a 20-year Agreement (with effect from 13 July 1998) under the Berth Reservation Scheme.
- (ii). Unlike in the case of M/s. ACT India, the specific Agreement signed by M/s. T. Arumai Durai & Co. incorporates a clause (under Berth Reservation Charges) stating "In the event of any revision of the rates, the difference shall be collected or refunded from the date of implementation of such revision". That being so, the benefit available to M/s. ACT India of a specific condition stipulated in the contract (i.e., the Agreement) prevailing over any subsequent Order of the CHPT (or, even, of the Government), will not be available to the petitioner (i.e., M/s. T. Arumai Durai & Co.,) in this case.
- (iii). M/s. T. Arumai Durai & Co., argued at the joint hearing that the Berth Reservation Scheme will not be relevant since the tender documents relating to their case did not refer to the Scheme at all. This argument would have been acceptable had they not executed subsequently an Agreement that cited the Berth Reservation Scheme in particular. Having done that, they will now be estopped from avoiding the Berth Reservation Scheme. They will have to be found to be bound by it. If at all, it is only be the others who failed to win the contract that can complain about (alleged) deviations from arrangements envisaged in the tender documents. Since the subsequent reference to the Berth Reservation Scheme amounted only to introduction of a steady long-term arrangement based on considerations not only of payments but equally of sustained performance and not of any dilution of the terms and conditions notified earlier, this Authority will not like to take *suo motu* cognizance of this issue.
- (iv). The petitioner had also represented about the License Fee for the transit sheds and their back-up areas being far in excess of the rates notified in the Scale of Rates. While this claim is factually correct, the CHPT has explained it away by saying that it is only strictly following the rates specified in the Agreement. The confusion has arisen, as suggested by the HCC at the joint hearing, due to inherent contradictions in the Agreement, in this case by a statement in Clause (h) of Article-III ('License and Authority') which stipulates that the transit shed and its back-up

area “shall be provided to Licensee for Storage and handling of their cargo mix, **at the License Fee applicable as per the Scale of Rates**”. This general clause (h) is contradicted by Clause (l) which is a specific clause for ‘license fee for transit shed and its back-up area’ which states that “the license fee is enclosed in Schedule-I which shall be paid by the Licensee and such fee is payable in advance before commencement of each year for Berth”. The legal position will be that both the Licensor and the Licensee in this case will be bound by the conditions of contract contained in the specific Agreement. The affected party cannot choose to follow this dictum only in respect of the Berth Reservation Scheme where it suits them to do so and choose to go under the Scale of Rates where it does not suit them. Application of the provisions of the Agreements will have to be consistent in respect of both the issues. While it is true that the general Clause (h) in Article-III of the Agreement has caused (avoidable) confusion, the specific Clause (l) relating to ‘license fee for transit shed and its back-up area’ will have to be found to have an over-riding impact. That being so, there is no substance in the representation in this regard.

- (v). At the joint hearing, a reference was made to an error in the classification of the land allotted; the land allotted for cargo storage has been treated as land for office accommodation. This is a plain factual matter not involving any issue for adjudication. This Authority accordingly advises the CHPT to get the area inspected for a (final) settlement of facts.
- (vi). The petitioner has sought to invoke the clause that provides for re-adjustment of terms based on a joint discussion where commercial interests are crucially affected. In the light of the analysis given above, it will not be necessary to pursue this proposition at all.
- (vii). Although the case of the Bengal Tiger Lines is not one of the contentious components of these proceedings, reference has also been made to their Agreement under the Berth Reservation Scheme; and, in their context, a suggestion has been made that the Port must give ‘volume discounts’ for better performance just as it imposed ‘penalties’ for under-performance. Since the Berth Reservation Scheme in all its details is not under scrutiny in these proceedings, this Authority does not go into these details. That can happen as and when this Authority decided to take up the Berth Reservation Scheme / berth reservation charge for substantive consideration. But, significantly, at the joint hearing in this case on 18 June 2001, the CHPT responded positively to this suggestion to say that there can be a review of the Berth Reservation Scheme to introduce this incentive. For the time being, therefore, it is decided that this issue may be left for the Lines to take up this thread towards further negotiations with the CHPT.

9. In the result, and for the reasons given above, and based on a collective application of mind, this Authority decides the following:

- (i). The representation of M/s. T. Arumai Durai & Co. against enhancement of the berth reservation charge is rejected.
- (ii). The representation of M/s. T. Arumai Durai & Co., about excessive charge of ‘license fee for transit shed and its back-up area’ is rejected.
- (iii). The CHPT is advised to get the storage area inspected for a (final) settlement of the dispute about classification of the land allotted.
- (iv). The CHPT is advised to make appropriate amendments to Clause (h) under Article-III of the Agreement form so as to eliminate the apparent antithesis to Clause (l) *ibid* so that such cases in future do not encounter this anomalous situation.

(**S. Sathyam**)

Chairman

[[List of Ports](#) | [List of Orders](#)]