

No. 50

New Delhi, the 28th February, 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 submitted by M/s. Larsen & Toubro Limited relating to payment of wharfage on minimum committed traffic of cement handled at their bulk cement storage and handling terminal in the New Mangalore Port, as in the Order appended hereto.

(S. Sathyam)

Chairman

Case No.TAMP/51/2000 - NMPT

M/s. Larsen & Toubro Limited - - - Applicant

Vs

The New Mangalore Port Trust - - - Respondent

ORDER

(Passed on this 14th day of February 2001)

This case relates to a representation from M/s. Larsen & Toubro Limited (L&T) requesting for a refund of Rs.2.31 crores wharfage levied by the New Mangalore Port Trust (NMPT) on account of minimum committed traffic not achieved by the L&T for the period 12 October 97 to 11 October 99. (Rs.1.71 crores for the period from 12 October 97 to 11 October 98 and Rs.60 lakhs for the period from 12 October 98 to 11 October 99).

2.1. The NMPT vide Licence Agreement dated 20 January 1997 granted licence to the L&T for use of its property for setting up of facilities for handling, storing, bagging and distribution of cement for a period of three years from 18 October 1996 to 17 October 1999.

2.2. As per Clause No.2 of Schedule-II of the said Agreement the L&T had committed a traffic of three lakh tonnes of cement per annum failing which it was required to pay wharfage and other charges for the committed traffic.

2.3. The L&T in its representation has stated that the committed traffic of three lakh tones per annum could not be achieved by it due to delay in commissioning of the Project. It has pleaded that the delay in commissioning of the Project has been beyond its control for the following reasons:

(i). Initially, the plot of land connecting with Berth No.5 which was allotted to the L&T was being used by another firm for handling imported timber logs. Vacant possession of the premises could not be handed over to the L&T till 30 November

1996. Only after the land was handed over, the L&T could take up soil testing and start construction activities.

(ii). Initially, the NMPT had agreed to sanction 250 KVA power. However, subsequently, the NMPT vide its letter dated 29 January 97 expressed its inability to supply any power; and, advised the L&T to approach the Karnataka Electricity Board which also refused supply of power. Thus, precious time was lost which further delayed commissioning of the facilities. Now the plant is based on captive power.

(iii). The year 1997 recorded unprecedented heavy rains and all construction activity had to be stopped during the monsoon season.

(iv). During the construction activity, the L&T found passage of an underground cable in the land allotted to it; and, the process of obtaining permission from the NMPT for removal of the cable and the activity of removal took an additional period of nearly two months.

(v). There were delays in getting approval from statutory authorities like the Inspector of Explosives, Inspector of Factories, Pollution and Environment Control Board which was beyond the control of the L&T.

(vi). The L&T had from time to time briefed the NMPT of the events which were delaying execution of the project and submitted requests for granting extension of time for commissioning of the facilities, which was not considered favourably.

2.4. The L&T has made the following submissions in support of its arguments:

- (i). Clause 3 under Schedule-II of the Licence Agreement stipulates that the date of commissioning will be reckoned as six months from the date of allotment of land and grace period of two months required for preparation of engineering details will be allowed. This clause further stipulates that the licence period will commence from the date of payment of Licence fee which was paid on 18 October 96. As such, the licence is deemed to have commenced from 18 October 96 though the Agreement was signed on 20 January 97.

The details concerning their Agreement are as follows:

Particulars**Date**

- (a). Signing the Agreement 20.01.97
- (b). Vacant possession of land given to the L&T 30.11.96
- (c). Land Allotment Agreement 24.04.97
- (d). Commencement of licence period (as per NMPT) 12.10.97
- (e). Commissioning of the plant 26.09.98

(ii). The L&T has further submitted that the Ministry of Surface Transport vide circular No.PT-17011/55/87-PT dated 15 February 2000, has clarified that the ports should not insist on minimum throughput guarantees. Though these guidelines have been issued in February 2000, it applies with equal force to all cases; and, accordingly, the stipulation by the NMPT for a minimum traffic of three lakh tonnes per annum is against the guidelines.

(iii). Though the L&T did not achieve the traffic of 6 lakh MT, the NMPT has not been put to any pecuniary loss whatsoever. In fact, when the L&T was not using the berth, the NMPT has made use of the berth for other cargo.

(iv). The NMPT has not incurred any expenditure to provide any additional facilities to support the Project.

2.5. The NMPT informed the L&T that the lease which expired on 17 October 99 would be extended only after the L&T paid the sum of Rs.2.31 crores. The L&T requested the NMPT to accept bank guarantee in lieu of cash and assured for making up the traffic shortfall in the future three years licence period. This request was also rejected and the L&T had reportedly no other alternative but to pay the sum of Rs.2.31 crores under protest.

3. Subsequently, the L&T citing reference of the NMPT's letter No.2/92/95-EB22 dated 29 January 1996 whereby the Port had expressed its no objection to concede to the L&T's request and treat the date of commissioning as the date of commencement of licence period subject to the condition that the licence fee is payable from the date of taking over the land, made a request to the NMPT to refund a sum of Rs.1.71 crores stated to have been recovered in excess.

4.1. A copy of the representation received from the L&T and also its letter dated 1 July 2000 were forwarded to the NMPT for its comments.

4.2. The NMPT had sent their reply on 2 August 2000, stating that the L&T had also represented the same issue to the Ministry of Surface Transport (MOST). The NMPT has forwarded to us the comments furnished by it to MOST.

4.3. A summary of the comments of the NMPT is given below:

(i). Land measuring 11700 sq. mt. was allotted to the L&T on a short-term licence basis for three years. The land was handed over on 18 October 1996 and a licence deed was executed for the period from 18 October 1996 to 17 October 1999.

(ii). As per the terms and conditions of allotment, the Licensee has to pay wharfage and other charges for the committed traffic, even if it fails to achieve the volume.

(iii). Date of commissioning of the plant is taken as 12 October 97 as per the conditions of allotment.

(iv). The request of the L&T for extension of time upto 1 February 98 for commissioning the plant was not considered by the Port as per the terms and conditions of licence deed. On 13 November 97, the Port conveyed its decision that the L&T should make good the loss in wharfage charges, if there would be any shortfall in committed traffic during the period from 12 October 97 to 11 October 98.

(v). The L&T commissioned its plant on 26 September 98; and, during the period upto 11 October 98, it handled only 15000 tonnes. Accordingly, a claim of Rs.1.71 crores for shortfall in committed traffic has been preferred against the L&T.

(vi). In the meantime, the lease expired on 17 October 99. It was decided by the Board that extension of lease would be considered only if the L&T made good the shortfall in the minimum guaranteed traffic relating to the previous period.

(vii). The L&T vide its letter dated 6 March 2000 requested to refer the matter of payment of Rs.2.31 crores for arbitration and pending resolution of the issue to extend the lease and to reduce traffic commitment to 2.25 lakh MT per annum.

(viii). The Board decided that the L&T should pay Rs.2.31 crores in cash and Bank Guarantee would not be accepted. It was also decided that the licence would be renewed only after the L&T deposited the amount.

(ix). The L&T issued a cheque for Rs.2.31 crores under protest and requested the port to refer the case for adjudication to an appropriate Authority like the TAMP.

(x). The Board on 26 May 2000 resolved to refer the dispute to an arbitrator in the Ministry of Law as per the Agreement.

(xi). The licence for the land has since been renewed for a further period of 3 years from 18 October 1999 to 17 October 2002 on the same terms and condition with revised licence fees.

4.4. The arguments of the NMPT against the delay in commissioning of the plant are summarised below:

(i). Notices were issued to clear timber logs on allotment of land to the L&T. The L&T agreed to take over the land on 18 October 1996 accepting that these timber logs would not come in their way of preliminary engineering works such as survey, soil investigation. Timber logs were subsequently cleared in the month of November 96. Delay in clearance of a few timber logs could not affect the L&T work relating to preliminary engineering works.

(ii). The NMPT could not sanction power in view of shortage of bulk supply from the Karnataka Electricity Board. There is no clause in the Agreement binding the Port to make available the electricity to the L&T. The Port cannot take responsibility for the delay in installation of the L&T genset.

(iii). The existence of underground power cable in that portion of land was not foreseen in advance. Arrangements were made to reroute the cable as soon as it was noticed.

(iv). The L&T had submitted foundation drawing in January 97 which was approved by the NMPT on 13 February 97. As per the terms and conditions of the Agreement, eight months time was allowed for construction activity. Accordingly, the date for committed traffic was reckoned as 12 October 97, and hence no further extension of commissioning of plant was considered by the NMPT.

(v). As per the terms of the Agreement, it was the L&T's responsibility to obtain necessary statutory clearances as required by law.

(vi). The L&T's argument about heavy rains in 1997 is factual. But the reasons are beyond the control of the Port.

(vii). Wharfage charges demanded by the NMPT for shortfall in the committed traffic of 3.00 lakh MT was as per the terms and conditions of the Agreement. This is not a compensation claim as alleged by the L&T.

5. A copy of the reply received from the NMPT was forwarded to the L&T for information / comments. A copy of the representation of the L&T and a copy of comments from the NMPT were also forwarded to the Kanara Chamber of Commerce and Industry (KCCI) for its comments.

6. A joint hearing in this case was held at the NMPT on 22 September 2000, which was attended by the L&T, the NMPT and the KCCI. At the joint hearing, the following submissions were made:

M/s. Larsen & Toubro Limited

(i). Land was allotted on 18 October 96. However, there were supervening events which caused delay in commissioning of the plant only by September 1998.

(ii). The supervening events were statutory clearances and related to site conditions attributable to the NMPT which are given below:

- (a). Timber logs blocking our access to the land.
- (b). Shifting of power cable and pipelines.
- (c). Unprecedented rains in 1997.
- (d). Work could start only in late 1997.
- (e). Supply of power was complicated. This led to unexpected requirement for procurement of DG sets having a long lead time.
- (f). There were delay in environment clearance and other clearances.

(iii). The NMPT explains its delay by attributing them to unanticipated circumstances. The same consideration may be given to us.

(iv). There was no malafide on our side. The delays in no way benefited us. We tried our best with clear intention. It is not fair and equitable to penalise us for delays caused by supervening circumstances.

(v). 26 September 98, must be considered as the material date after reckoning for delays.

(vi). Government had subsequently said that the minimum level of throughput need not be linked to lease. Thereby the intention of the Government was clear to speed up infrastructure development. Although this circular was issued later, it must be seen to clarify an intent that was already there.

(vii). Law of contract says that no party can claim compensation / damage for loss not actually suffered. Two High Court rulings are being filed by us in support of this. The NMPT has to prove its 'loss'. It is an open berth and the NMPT has been using it. Where is the loss? The NMPT cannot have a contract for unjust enrichment.

(viii). This levy of damage will amount to revision of wharfage. The TAMP, therefore, has jurisdiction and must consider this. We, therefore, want adjudication.

(ix). Loss caused by labour strikes, loss caused by compensation to labours, etc., are not directly related to this project. These are consequential in nature.

(x). If there is a ruling of the Bombay High Court about 'liquidated damages' not requiring proof, by all means, it can be relied upon.

(xi). If legal redress is available to us against TAMP order to be passed, it has to remain open. But, right now it is hypothetical.

(xii). Letter of the NMPT to the L&T dated 29 January 97 is an indication of an understanding about supply of power.

(xiii). The Kerala / Andhra Pradesh High Court have enunciated a principle of law. In the absence of any contrary ruling, the NMPT, even though it is located in Karnataka will be bound by it. The Authority must adopt this principle in this case.

Kanara Chamber of Commerce and Industry (KCCI)

- (i). The Licence Deed is an expression of mutual understanding. The intention has to be seen. We find the L&T's intention to be sincere.
- (ii). Delays were not attributable to the L&T. It was not a case of delay caused on commercial consideration.
- (iii). After commissioning, the L&T has reached a high level of performance.
- (iv). The L&T has invested a lot which proves its seriousness.
- (v). These kind of delays are there in all cases. These are not attributable to any casualness or negligence on the part of the L&T.

The New Mangalore Port Trust (NMPT)

- (i). 1995 Government Guidelines requires a tendering process. Even for leases less than 30 years, Government approval was required.
- (ii). The L&T readily and voluntarily offered to incorporate a minimum performance clause.
- (iii). There was a twelve-day labour strike causing loss of revenue, loss of image and, therefore, loss of potential business. The payment of compensation had to be made to workers, that is, for loss of work relating to handling of bulk or bagged cement.
- (iv). 'Liquidated damages' do not require loss to be proved.
- (v). The Licence Deed provides for arbitration. The L&T has opted for adjudication. TAMP must decide about the L&T pursuing one line of redress only.
- (vi). We have been very sympathetic and all reasonable accommodation was given. We have fully cooperated with the L&T.
- (vii). The L&T delays are due to unforeseen problems and we have discounted such delays.
- (viii). We are pursuing a claim of compensation. The L&T challenges maintainability of that. At the same time, the L&T talks of TAMP jurisdiction to deal with this as a case of increasing wharfage on cargo that did arrive. This is self-contradictory and is, therefore, not acceptable.

7.1. At the joint hearing the L&T has cited the rulings of the Kerala and Andhra Pradesh High Courts in support of its case.

7.2. The Kerala High Court in State of Kerala – Vs – M/s. united Shippers and Dredgers Ltd. (AIR 1982; Kerala 281) *inter alia*, observed as follows:

“In a case where the party complaining breach of contract has not suffered legal injury in the sense of sustaining loss or damage, there is nothing to compensate him for; there is nothing to recompense, satisfy or make amends. Therefore, he will not be entitled to compensation.”

7.3. In Nagpur Nagarik Sahakari Bank Ltd. Vs Union of India (AIR 1981; AP 153), the Andhra Pradesh High Court, *inter alia*, observed as follows:

“Where the Court is unable to assess the compensation, the sum named by the parties, if it is regarded as a genuine pre-estimate, may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty. Further, where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him.”

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

(i). The Licence Agreement between the parties contains two distinctive but inter-related features – one, licence to use the NMPT land and another to handle cement cargo at least to the prescribed minimum level. The Lessor gets licence fee for the land allotted and enjoys the guarantee envisaged by the Agreement to the extent of assured income from wharfage on cargo handled. There is no dispute between the parties on the period of licence for the land. The issue presented before this Authority is to determine the effective date from which the minimum guaranteed throughput of cargo needs to be reckoned with.

(ii). The case has been taken up by this Authority based on a representation from the L&T. However, the NMPT has objected to the intervention of this Authority citing the arbitration clause in the Agreement. While arbitration calls for consent of both the parties, adjudication does not require such consent; it can be initiated on the strength of an appeal calling for such action from the adjudicator. That being so, the NMPT objection is misplaced and dismissed.

It is noteworthy in this context that this Authority was not in existence when the Agreement was finalised. Hence, the entry about 'arbitration'. But, now that a duly constituted, statutorily autonomous Authority is in position to adjudicate, the L&T have chosen to go for adjudication. In the circumstances, there can be no reasonable objection to the choice made by the L&T. Nothing will be particularly gained by the L&T by approaching this Authority; equally, nothing will be particularly lost by the NMPT by not going in for arbitration.

(iii). The NMPT has, however, a valid point when it objects to the L&T claiming access to different courses of redress. As has been described above, the circumstances governing this case do give scope for the L&T to choose 'adjudication' in spite of a specific entry in the Agreement about 'arbitration'. But, once having made such a choice, the L&T cannot go back to the 'arbitration' process notwithstanding the stipulation concerned in the Agreement. But, it will not be reasonable to expect the L&T to forego its right of access to a court of law if it is aggrieved by this Authority's decision in this case. As has been rightly stressed by the L&T, its access to redress in courts of law will remain open.

(iv). After dismissing this objection of the NMPT, it is necessary to examine whether this Authority has jurisdiction to adjudicate in this case. As has been pointed out at paragraph 8(i) above, the issues involved are relating to use of port properties and wharfage on cargo handled. It will definitely be of relevance to consider the L&T's argument that levy of wharfage on shortfall in the minimum guarantee throughput amounts to increase in wharfage on cargo that did arrive. Under these circumstances, this Authority's jurisdiction to adjudicate in a matter relating to wharfage charges cannot be questioned.

(v). The L&T have entered into a Licence Agreement with the NMPT and this Agreement does contain a provision relating to minimum guarantee throughput. This being the factual position, the L&T argument for not insisting upon a minimum throughput guarantee enunciated in the guidelines, stated to have been issued by the Ministry of Surface Transport (MOST) on 15 February 2000, is not reasonable. A perusal of the copy of the guidelines dated 15 February 2000 issued by the MOST reveals that they will have prospective application in future licence / lease cases only.

By way of abundant caution, it is to be clarified that the guidelines stated to have been issued by the MOST have been brought to the notice of this Authority for the first time in the instant case. This Authority does not know the legal sanctity of these guidelines; neither had the Government consulted this Authority before prescribing these guidelines. This Authority therefore, reserves its comments on these guidelines; and, decides to take up the issue with the Government separately. In this backdrop, this Authority's reference to these guidelines in the instant case must only be seen for the limited purpose of dealing with the arguments of the L&T.

- (vi). (a). At the time of the joint hearing, two rulings – one of the Kerala High Court and another of the Andhra Pradesh High Court – have been cited on behalf of the L&T to bolster its case.

The substance of the Kerala High Court ruling cited (AIR 1982; Kerala 281), as has been stated already in paragraph 7.2. above, is that a party claiming compensation for breach of contract has to establish the actual loss. The ruling cited is not applicable to this case because what is involved here is not a subjective action taken by the NMPT with reference to any breach of contract by the L&T. The Agreement itself contains a specific clause (Clause No.2 of Schedule II) requiring the L&T to make the said payment in case of default. In other words, what is involved is an action taken by the NMPT for specific performance of the Agreement willingly executed by the L&T.

Incidentally, as has been correctly contended by the NMPT, there have also been identifiable losses suffered by it:

(aa). Loss of revenue due to the 12-day labour strike caused by the mechanised cement handling project introduced by the L&T.

(ab). Loss of image (and, the consequential loss of potential business) caused by the said labour strike.

(ac). The system of 'compensatory payments to the port labour' that the NMPT has had to introduce to get the L&T project accepted.

In view, however, of the inapplicability of the Court ruling in reference as described earlier, it is not necessary for this Authority to go into these details of losses.

- (b). The substance of the Andhra Pradesh High Court ruling cited (AIR 1981; AP 153), as has been already described in paragraph 7.3. above, is that where a party claims not penalty but compensation, it must prove the loss suffered besides helping the court to assess the compensation amount as reasonable. For the same reason given in respect of the Kerala High Court ruling discussed in (a) above, here, again, the ruling about proving the loss suffered does not relevant to this case.

What is involved in this case evidently is a claim for compensation and not imposition of a penalty. The claim for compensation is for loss of an opportunity cost. The said loss in this case is capable of precise estimation; and, the Agreement has precisely estimated it also. That being so, there is no problem in this case of a reasonable pre-estimation of the compensation. The Agreement stipulates payment of wharfage (which is a precise rate notified in the Gazette of India) for a committed throughput (which again is a precise figure quoted in the Agreement itself). In the event, the amount in reference cannot but be held to be a genuine pre-estimate of the compensation.

In view, however, of the inapplicability of the Court ruling in reference as described earlier, it is not necessary for this Authority to go into these details of losses.

- (c). It is also relevant here to recognise that the two rulings cited are of the High Courts of Kerala and Andhra Pradesh whereas the case pertains to the NMPT which is located in Karnataka. That being so, in the normal course, the rulings of High Courts of other States are not binding for the disposal of the NMPT case. And, for the reasons given above about the inapplicability of these rulings to this case, the request of the L&T to adopt

the pith and substance of these rulings as the principle governing this case is not accepted.

(vii). It is relevant to examine the arguments put forth by both the parties for and against the delay in commissioning of the project. The delay caused on account of non-removal of timber logs and clearance of underground cable and pipelines is definitely attributable to the NMPT. On the other hand, the port is not reasonably held responsible for the delay in the L&T acquiring statutory clearances.

Even though the NMPT has denied its responsibility for supply of power quoting the absence of any express provision in this regard in the Agreement, the L&T has referred to a 1996 letter of the NMPT which gives an understanding about the NMPT assurance on supply of power. Since both the NMPT and the State Electricity Board could not sanction the required power, the L&T had to commission a captive power unit. This has definitely contributed in a major way to the delay in commissioning the Project. However, the circumstances leading to the delay clearly show that it is not due to any casualness on the part of the L&T and hence it cannot justifiably be attributed to the L&T. Likewise, heavy rains in 1997, which the NMPT also admits, is a *force majeure* condition and the L&T deserves relief on this account. As has rightly been contended by the L&T, it will not be fair and equitable to penalise it for delays caused by supervening events.

(viii). With the delay mentioned above, the project was commissioned on 26 September 1998. Having invested the money in the project, it is incomprehensible for anyone to believe that the L&T has intentionally delayed the commissioning of the project due to its laxity. The delay, except on obtaining the statutory clearances, is definitely beyond the control of the L&T. It is also relevant here to recognise that the L&T has in no way benefited by the delay involved. In other words, there were apparently no commercial considerations influencing the delays. Further, the fact that it has been able to reach a high level of performance after commissioning the plant must be seen to establish its bona fides. It is, therefore, reasonable to reckon with the date of commissioning of the plant as the cut-off date for calculation of traffic throughput.

(ix). The NMPT letter dated 29 January 96 unambiguously states that the date of commissioning of the plant can be taken as the date of commencement of the licence period, but the licence fee is payable from the date of taking over the land. No doubt, the Licence Agreement which has been executed subsequently does not contain such a provision. This letter, however, does give a clear indication of a long-term arrangement of licence. It is to be recognised that the port is gaining substantial revenue on account of the licence fee for the land, cargo-related charges and vessel-related charges with the commissioning of the L&T project and without any additional investment from its side at that. Viewed in this perspective, the NMPT should look at this Agreement in the context of its long-term implications and allow the investor a reasonable lead period to fully gear up his operations.

9. In the result, and for the reasons given above, and based on a collective application of mind, this Authority directs the NMPT to reckon with the traffic handled with effect from 26 September 1998 i.e., the date of commissioning of the project, for the purpose of determination of the minimum committed traffic under the Licence Agreement; and, if necessary thereafter, to refund the excess, if any, in the recoveries made, to make good the shortfall in wharfage charges with reference to the minimum committed traffic.

(S. Sathyam)

Chairman