

No. 56

New Delhi, the 7th March, 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 submitted by M/s. Oswal Chemicals and Fertilizers Limited relating payment of wharfage on minimum guaranteed throughput of cargo handled at their captive berth, as in the Order appended hereto.

(S. Sathyam)

Chairman

Case No.TAMP/79/2000-PPT

M/s. Oswal Chemicals and Fertilizers Limited - - - Applicant

Vs

The Paradip Port Trust (PPT) - - - Respondent

ORDER

(Passed on this 14th day of February 2001)

M/s. Oswal Chemicals and Fertilizers Limited (OCFL) has submitted a representation relating to an Agreement signed between them and the Paradip Port Trust (PPT) on 27 August 1999 on hiring of a captive berth.

2.1. In its representation, the OCFL has stated that in terms of the Agreement signed on 27 August 99, the OCFL has to pay Rs.37.25 lakhs per month for berth hire charges and a telescopic rate ranging from Rs.65 per MT to Rs.25 per MT for the wharfage on the basis of quantity of cargo handled. The berth was taken over by the OCFL on the date of signing of the Agreement i.e., 27 August 99 and normal berth hire charges of Rs.37.25 lakhs are being paid to the PPT regularly irrespective of the quantity of cargo handled. Payment of wharfage is governed by clause (3) of the Agreement which reads as follows:

“That minimum guaranteed cargo of 1 million ton per annum will be effective from the date of taking over of the berth by OCFL till 31 March 2002. The guaranteed throughput will be increased to 2.5 million tons per annum with effect from 1 April 2002. In case of any shortfall, OCFL will pay wharfage for the full guaranteed cargo”.

2.2. The OCFL has further stated that while the erection of equipment on the berth was going on, a super cyclone hit Paradip on 29 October 2000 causing unprecedented damage to life and property. The equipment which were still under erection, were severely damaged. While the

equipment was under erection / repair, the OCFL handled a part of its cargo at other berths of the PPT.

2.3. The PPT has taken the first year under the above Agreement as commenced from 27 August 99 and ended on 31 March 2000 during which period OCFL could not achieve the guaranteed cargo on pro-rata basis. The PPT has, therefore, demanded wharfage dues for the shortfall quantity from the OCFL.

3. In this backdrop, the OCFL has made the following submissions for consideration of the Authority:

- (i). The word 'annum' appearing in the Agreement means a period of 12 months which has to commence from 27 August 99. As per this definition, the OCFL is to achieve the guaranteed cargo of 1.0 Million Tonnes during the period 27 August 99 to 26 August 2000.
- (ii). Had the super cyclone not disturbed its operations, the OCFL would have used its own berth and generated additional business for the PPT. Since the berth was, however, used for construction activities, which were adversely affected due to the super cyclone, the OCFL had no choice but to use other available berths of the PPT. There is no evidence to suggest that PPT's normal functioning or business was adversely affected by OCFL's usage of the other berths.
- (iii). In spite of the super cyclone which also affected OCFL's main plant, achieved a guaranteed cargo requirement of one million tonnes during the period of 12 months i.e., 27 August 99 to 26 August 2000.
- (iv). During the entire period of 27 August 99 to 31 March 2002, (i.e., the date after which the guaranteed cargo goes up to 2.5 Million Tonnes per annum), OCFL's guaranteed cargo works out to 2,597,260 tonnes. If there is any shortfall in this quantity, OCFL stands committed to pay for the same. This will be in compliance with the letter as well as the spirit of the Agreement dated 27 August 99.

4. The representation of the OCFL was forwarded to the PPT for its comments. The comments received from the PPT are summarised below:

- (i). The minimum guaranteed traffic per annum should be ascertained by taking in to account the cargo handled only in the captive berth allotted to the OCFL.
- (ii). Annum should mean the financial year, starting from 1 April to 31 March.
- (iii). In respect of the first year i.e., from 27 August 99 to 31 March 2000, the minimum traffic should be ascertained proportionately for the period, which works out to 5,97,261 MT as against the annual guaranteed traffic of 1 million ton. The actual cargo handled by the OCFL during the said period in its captive berth was 65,400 MT. Therefore, the OCFL should pay wharfage for the differential quantity i.e., [5,97,261 – 65,400] MT @ Rs.65.00 per ton which works out to Rs.3,45,70,965.00.
- (iv). As per clause-2 of Annexure-II to the Agreement dated 27 August 99, the OCFL should have paid the differential wharfage within first month of next financial year i.e. by 30 April 2000 which the party has not paid. Hence, interest at the usual rates for the default in payment should also be payable by OCFL. At present the Port collects 24% towards interest.
- (v). The word 'annum' appearing in the Agreement means the financial year of 12 months starting from 1 April of every year to 31 March of the following year. It does not mean 12 months starting from 27 August 99 as contended by the OCFL.

(vi). The handling of OCFL's cargo in PPT's other berths can under no circumstances be categorized as cargo handled at captive berth.

(vii). The super cyclone had affected everybody including the Port. While the effects of the super cyclone of October 99 on the Port and its users are not denied, concessions and relief, claimed by one affected party from another does not appear to be justified.

(viii). The guaranteed traffic will be revised to 2.5 million tons per annum with effect from 1 April 2002. However, the OCFL's guaranteed traffic need not be ascertained for the entire period i.e., 27 August 99 to 31 March 2002. The guaranteed traffic is to be ascertained in the manner and mode in which it is described in the Agreement which is on annual basis, first proportionately for the financial year 1999-2000 and for subsequent financial years @ 1 million ton per annum. Any other interpretation would violate the letter and spirit of the Agreement dated 27 August 1999.

5. This Authority vide its Order dated 5 December 98 had approved a proposal of the PPT for fixation of tariff for the berth to be taken on lease by the OCFL. At the request of the PPT, made with the concurrence of the OCFL, this Authority modified some provisions of its Order dated 5 December 98 vide its Order dated 13 August 99.

6. A Joint hearing in this case was held on 20 Nov. 2000 in Delhi. At the joint hearing following submissions were made:—

M/s. Oswal Chemicals and Fertilizers Limited (OCFL)

(i). Negotiations were on from mid-98. However, there was an inordinate delay from the PPT side to conclude the Agreement.

(ii). TAMP notification was also in mid-99; and, then, there was a subsequent modification.

(iii). There are no financial year connotations to the minimum guarantee clause.

(iv). We are not claiming any relief. We only want proper interpretation of the agreement.

(v). Due to the Cyclone, we suffered nearly Rs. 50 crores loss. PPT suffered relatively much less. If at all, we must get relief; and not the PPT.

(vi). In spite of cyclone, we have paid berth hire without a break.

(vii). The Agreement was (provisionally) settled relatively much earlier. Government clearance was delayed. Agreement signed in August 99. Otherwise we would have got at least 4 to 5 months more.

(viii). Our berth was damaged; and hence could not be operated. We operated other berths, which were 'free'. PPT has not lost anything.

(ix). Even if they insist on 31 March 2002 (and not 26 August 2002), let them club 99-2000 and 2000-01.

(x). In the first year (i.e. 12 months) we have done 1 million tonnes. Our hands, therefore, are clean. Our intention in honouring this Agreement cannot, therefore, be in doubt at all. Please apply the Agreement in its true spirit.

(xi). The change made in clause 2 of annex - I is without TAMP approval and is not known to us; we do not agree; it cannot be relied upon. Although we have signed it, it cannot be held against us. We have signed it in good faith because the draft of the Agreement had been agreed in great detail. The agreed draft was in the memory of the PPT computer. All secretarial services for execution of the Agreement were provided by the PPT.

(xii). The Agreement says, in case of short fall, the OCFL will pay for the full guaranteed cargo. That means, the entire 3 year block has to be seen together. Otherwise, the word 'FULL' is no significance.

(xiii). The spirit of the Agreement was a special package and additional business to the PPT, which is not just promised; but actually guaranteed.

(xiv). Even when we use other berths, we have been paying the berth hire for both the berths. This proves our bonafides. The PPT has not lost anything. If at all, it has gained a berth hire.

Paradip Port Trust (PPT)

- (i). OCFL is a good customer. We wish to have hassle free long term relationship with them. Please, therefore, sort out the confusion.
- (ii). Initially the understanding was about a 3 year period amounting to 36 months. Delay in government approval made was to reduce it to about 2 ½ years.
- (iii). This Agreement is all about the dedicated berth. Its provisions cannot apply to other berths.
- (iv). There is no clause in the Agreement about 'force majeure'.
- (v). Due to Cyclone the OCFL has suffered. So have we. Why should we give relief to them? They should get it from their insurers.
- (vi). The OCFL says that the Agreement does not talk about 'only captive berth'. In the same way, we can also say that the Agreement does not talk about counting the traffic of other berths.
- (vii). TAMP order says wharfage rate will be with effect from 1 April 99. This shows what was in reference was a financial year.
- (viii). The addition in clause 2 of annex-I to the Agreement does not make any substantive change. Only the payment schedule is affected. Both parties have agreed to it. We made a mistake in not obtaining TAMP's approval. But we do not have any malafied intentions. Please consider it now and approve it.
- (ix). For our argument about adopting the financial year, we have relied on:
 - (a). TAMP's order about rates being with effect from 1 April 99; and
 - (b). The addition of clause 2 of annex-II to the agreement.
- (x). The OCFL has defaulted. It should, therefore, pay interest at the rate of 24% with effect from 1 May 2000.

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

- (i). This Authority had fixed tariffs for the captive berth to be taken on lease by the OCFL at the Paradip Port through its order dated 5 December 1998. At that time, the Government clearance for the project had not materialised. This Authority passed the order ahead of Government clearance for the project since the tariff case had matured for consideration. This Authority's approval in this case was, however, subject to clearance of the project by the Govt.

Along with the approval for the tariffs, this Authority also approved a draft Agreement signed between the PPT and OCFL for allotment of the captive berth. Even though the draft Agreement was notified in December 98, there was considerable delay in obtaining project clearance; and, ultimately, the Agreement was signed on 27 August 1999.

- (ii). The OCFL has now represented seeking this Authority to clarify the provisions in the Agreement approved by it earlier. The issues to be decided are:
 - (a). Whether the word 'annum' appearing in the Agreement relating to the minimum guaranteed throughput refers to a period of 12 months commencing from the date of taking over of the berth or a financial year.
 - (b). Whether the OCFL cargo handled at the other berths of the PPT, when the captive berth could not be used, will also be reckoned for the purposes of computing minimum guaranteed throughput.
 - (c). Whether the minimum guaranteed throughput should be calculated on yearly basis or for the entire period from the date of taking over of the berth to 31 March 2002 (i.e. the date from which the quantum of guaranteed cargo is revised).
- (iii). The PPT has maintained that the minimum guaranteed throughput shall be assessed on a financial year basis. In support of its position, it has argued that the TAMP order dated 5 December 98 specifies the wharfage charges to take effect from 1 April 1999; and, the clause 2 of Annex-I to the Agreement which says the wharfage for full guaranteed cargo shall be paid by the OCFL within first month of the next financial year.

The Agreement approved by this Authority does not contain any stipulation regarding payment of wharfage for full guaranteed cargo within the first month of the next financial year. The relevant portion of the Agreement approved by this Authority reads as follows:

"There will be escalation at the rate of 10% on the rates in every 3 years over the previous wharfage rate. A minimum guaranteed cargo of one million tones per annum will be effective from the date of taking over of the berth till 31.3.2002 and a minimum guaranteed cargo of 2.5 million tones per annum will be affective from 1.4.2002. In case of any shortfall, M/s. OCFL will pay wharfage for full guaranteed cargo".

The addition made to specify the payment of wharfage within first month of next financial year has been done without this Authority's approval and without even the knowledge of the other party to the Agreement viz. the Applicant. The PPT's argument that the addition in the clause 2 of Annex-I to the Agreement does not make any substantive change except prescribing a payment schedule is not correct. The PPT itself has relied on this clause to define the minimum guaranteed

throughput period as financial year. There may not be any malafied intention behind the additions made to the agreement. This addition, however, has definitely resulted in providing a new interpretation to the approved clause in the Agreement, which was not, perhaps, intended.

- (iv). The PPT has mentioned that with the Agreement the additions made has been signed by the OCFL also. The OCFL, however, argued that it had signed the Agreement in good faith because the draft of the Agreement had been agreed in great detail and also because secretarial services for the execution of the Agreement was provided by the PPT.

Irrespective of the fact that both the parties had signed the Agreement this Authority cannot recognise any deviations made in the Agreement approved by it. That being so, due consideration can only be given to the conditions approved by this Authority earlier for incorporation in the Agreement.

The PPT has also referred to the effective date of wharfage rates prescribed in the TAMP Order dated 5 December 98. It is to be recognised that the Order was passed in December 1998. The prescription of wharfage from 1 April 99 was made since this Authority was lead to believe about early completion of all formalities and, therefore, did not anticipate at that time that the Agreement would be signed only in August 1999. In any case, the effective date of wharfage charges will have no relevance for calculation of minimum guaranteed throughput. The minimum guaranteed cargo, as defined in the Agreement itself, will be effective from the date of taking over of the berth. The minimum guarantee clause in the Agreement stipulates a throughput of 1 million tonnes with effect from the date of taking over of the berth till 31 March 2002 and a minimum guarantee cargo of 2.5 MT per annum with effect from 1 April 2002. The reference to 31 March 2002 and 1 April 2002 are with reference to change in the quantum of minimum guaranteed cargo and not to define the period during which the guaranteed throughput is to be achieved. The words 'per annum' have nowhere in the Agreement been defined to mean a financial year. That being so, it must be held to mean a period of 12 months starting from the date of taking over of the berth which is the normal manner of computing such time-frames in lease agreements.

In view of the discussion above, it can reasonably be concluded that the minimum guaranteed cargo shall be reckoned for a block of 12 months commencing from 27 August 1999. Since the quantum of minimum guaranteed throughput will undergo a change with effect from 1 April 2002, the period of calculation of such throughput can also be changed with effect from that date. This means, for the period from 27 August 2001 to 31 March 2002, the quantum of minimum guaranteed cargo can be reckoned with on a *pro rata* basis.

The method adopted by the PPT shifts this *pro rata* calculation to the initial period of commencement of operation, in view of its interpretation of the relevant clause to mean a financial year. Apart from the correct interpretation of the words 'per annum' as narrated above, it is also relevant here to consider that any operator must be given some lead time to consolidate his operations. Bearing this also in mind, the *pro rata* calculation to be applied after completion of two years of operation is reasonable. It is noteworthy that this approach also tallies with the spirit of the Agreement. Different quantum of minimum guaranteed throughput has been prescribed for the period before and after 31 March 2002 in the Agreement with a view to allow the OCFL to stabilize its operations over a period of time.

- (v). The Agreement is specifically with reference to the captive berth. Clause 8 of the Agreement makes the OCFL solely responsible for safe handling of the cargo at the berth and to cover by an insurance any and every loss caused on account of its cargo handling. It is to be admitted that the Agreement is silent about the delay or loss due to force majeure.

It has to be recognised that the OCFL installations at the berth were severely damaged by the cyclone in October 1999. The berth was not available to the OCFL for its operations. The OCFL continued to bring cargo during this period but could handle these cargoes only at some other berth available. The OCFL's argument is that because of their operations at other berths, which were free, the PPT has not lost anything. The PPT has not produced any record to counter this argument.

The OCFL has not requested to exclude this period for the purpose of calculating minimum guaranteed cargo. The OCFL has requested for allowing credit to it in the minimum guaranteed throughput for the cargo handled during this period, which have been handled at the other berths since the captive berth was out of commission. As pointed out by the OCFL, it has paid berth hire charges for the captive berth in addition to charges on actual berth occupied. The PPT's cargo targets have also not suffered, as a result of this.

Since the total quantum of cargo brought in by the OCFL is relevant which the true intention behind allotment of the captive berth, it is reasonable for the PPT to consider the cargo handled at other berths by the OCFL, when the captive berth was not available for use, for the purposes of determining the minimum guaranteed throughput.

While this is sympathetic and (possibly) reasonable way of interpreting the Agreement, the fact remains that the Agreement was all about the dedicated berth and did not contain any force majeure clause. Having signed such an Agreement it is not open to the Applicant to agitate this issue if the port trust is not willing to accommodate such an arrangement. This Authority, therefore, sticks to its line of reasoning and rejects this demand of the Applicant.

- (vi). In view of the discussion in paragraph 7 (iv) above, the question of considering the whole period from 27 August 99 to 31 March 2002 for the purpose of determining minimum guaranteed throughput does not arise. The minimum guaranteed throughput will be counted on the basis of cargo handled during a 12 month period from the date of taking over of the berth.

8. In the result, and for the reasons give above, and based on a collective application of mind, this Authority decides on the issues raised for its adjudication as follows:

- (i). The words 'per annum' referred to in the minimum guaranteed throughput clause shall refer to a 12 month period from the date of taking over of the berth. In other words, for the purpose of determining minimum guaranteed throughput phase-I of the contract-period shall be divided as,

27 August 1999 to 26 August 2000;

27 August 2000 to 26 august 2001; and,

27 August 2001 to 31 March 2002.

- (ii). The Agreement provides for counting of cargo handled only at the dedicated berth. It will not be open to this Authority to ignore this specific position. In view of the extraordinary circumstances governing this case, however, the Applicant can reasonably plead to include the cargo handled at other berths for calculation of the minimum guaranteed throughput when the captive berth was not available for use and due to force majeure conditions at that. But, it will be for the PPT to decide whether it can provide such a relief to the OCFL.

- (iii). The OCFL request for treating the entire period from 27 August 99 to 31 March 2002 for the purpose of determining the shortfall in the minimum guaranteed throughput is devoid of any merit and is rejected.

(S. Sathyam)

Chairman

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