TARIFF AUTHORITY FOR MAJOR PORTS

NOTIFICATION

No.TAMP/22/99-KPT - In exercise of the powers conferred by Section 49 of the Major Port Trusts Act, 1963 (38 of 1963), the Tariff Authority for Major Ports hereby disposes of the representation made by the Central Warehousing Corporation against increase in lease rent by the Kandla Port Trust as in the Order appended hereto.

ORDER

Case No. TAMP/22/99-KPT.

The Central Warehousing Corporation (CWC) … Applicant

V/s.

The Kandla Port Trust (KPT) … Non-Applicant

( Passed on this 11th day of January 2000 )

This case relates to a representation made by the Central Warehousing Corporation (CWC) against increase in lease rent by the Kandla Port Trust. It has been stated that the KPT has leased out 42,493 Sq. Mtrs. of land to the CWC for 30 years on 16 November 88. The terms of lease provide an increase in the lease rent after expiry of every 10 years provided further that the increase of first 10 years will not exceed the original ground rent and increase after 20 years of the commencement of the lease shall not exceed twice the original ground rent. The lease rent was Rs.2.70 per Sq. Mtr. per annum effective from 16 November 88. This has been increased to Rs.16/- per Sq.Mtr. per annum with effect from 1 July 94. The revised lease rent was intimated to the CWC in 1997; and, the KPT has demanded a claim with retrospective effect including interest. According to the CWC, the lease rent can be made effective only after 10 years, i.e. from 16 November 98. Moreover, this cannot exceed the original ground rent of Rs.2.70 per Sq. Mtr. per annum. They have requested to review the matter about exorbitant increase in lease rent as it is difficult for the trade to absorb.

2. The matter was referred to the KPT. In their reply, the KPT has stated that as per clause 5 of the terms and conditions of the lease, the ground rent
reserved for each plot may, at the option of the lessor, be liable to be enhanced after the expiry of every 10 years, provided that the ground rent will not exceed the original ground rent. The leases were last revised at the KPT in 1982. As per direction from the Ministry of Surface Transport (MOST), the KPT appointed a Committee which revised the rate of lease rent with effect from 1 July 94. It has been stated that the revised rate applicable to the area where the above land is situated is Rs.16/- per Sq. Mtr. per annum. The CWC has not made the payment at the revised rate; but, has continued payment of lease rent at the old rates.

3. The CWC has not executed any lease deed with the KPT so far even after 5 years. As such, the revised rate of lease rent is applicable in the case of CWC as per the KPT Board decision. The KPT has stated that since the revision of rate has been approved by the Government and is to be implemented by the port for its lessees, the CWC is liable to pay the revised rate.

4. The matter was also referred to the Gujarat Chamber of Commerce and Industry (GCCI) for their comments. In their reply, the GCCI has stated that they agree with the contention of the CWC that the increase made by the KPT from Rs.2.70 per Sq. Mtr to Rs.16/- per Sq. Mtr, per annum is at variance with the relevant clause in the Lease Agreement. As such, the action of the KPT is arbitrary and untenable.

5. A joint hearing in this case was held at Kandla on 20 September 99. During the joint hearing, the CWC made the following points:

(i) The allotment letter stipulates not more than 100% increase in the lease rental. These conditions have not been observed.

(ii) The lease deed could not be executed as there was some delay in proceeding with the construction work.

(iii) The KPT has not cleared the construction. Even the completion certificate has not been issued so far.

(iv) The terms and conditions of allotment order require completion of construction before execution of lease deed.

6. It was decided at the time of the joint hearing that the CWC will give a chronological statement of events to show that the delay was on both sides and was not excessive. The Chairman of the KPT agreed to examine whether, having condoned the delay in submission of plans by the CWC, it would be legal for the KPT now to take up that objection.

7. In their reply dated 6 October 99, the CWC has made the following submissions:
(i). Having accepted the offer of the KPT, taking over possession and carrying out the construction work as per the plan approved by the KPT, the legally binding contract had come into existence between the CWC and the KPT right from the day the offer of allotment was accepted by the CWC. The contract was binding on both the parties and was irrevocable.

(ii). Delay in completion of construction work and non-execution of lease deed at the present time is more a case of theoretical analysis and has no bearing on the contract since the delay on account of these have already been condoned by the KPT by approving the plans of the CWC in July 97.

(iii). Delay on account of non-furnishing of completion certificate by the KPT is only a technical matter and cannot be used as a weapon to penalise the CWC.

7.2. In view of the above, the KPT is bound to comply with the original terms and conditions of allotment. The CWC has, therefore, requested that the order of the KPT for increasing the lease rent may be set aside and an order passed strictly in accordance with the original terms and conditions of the allotment.

8. The KPT has submitted the following comments:

(i). As per the terms and conditions of the contract, the CWC was to start construction within a period of six months and to complete the construction with 36 months. The CWC has submitted plan on 2.6.90 after a notice was served on them. The plans were returned to them for compliance as there were a lot of deviations.

(ii). The plan was approved and the approval was conveyed to the CWC on 19 December 94. The CWC again submitted a plan for construction of a room for an electric sub-station, plans for construction of a covered godown in the year 1995. These were approved by the KPT on 27 February 96. The CWC finally submitted their revised plan vide their letter dated 27 March 97. This was approved by the KPT on 3 July 97.

(iii). The delay in getting approval was due to deficiency in the drawings submitted by the CWC. Delay in approval of the plan has not been caused by the KPT. In the case of the CWC, no completion certificate has been issued as they have not completed the construction within the stipulated period indicated in the allotment letter.
(iv). The accepted terms and conditions also provide that all rules and regulations made by the Board of Trustees under the provisions of the MPT Act with regard to the use and enjoyment of the demised premises shall be deemed to be part of the lease deed and binding over the lessee.

(v). Since revision of the rent at the rate of Rs.16/- per Sq. Mtr. per annum has been approved by the Board of Trustees and the Government, and the same has been made applicable from 1 July 94 to those lessees who have not executed the lease deed, it is fully binding on the CWC.

(vi). The CWC has been allotted another piece of land at Kandla for which they have executed the lease deed. Therefore, revised rate for ground rent is not applicable to that piece of land. The revised rate is applicable and payable by the CWC with effect from 1 July 94. Other Public Sector Undertakings such as Indian Oil Corporation Limited (IOCL), Hindustan Petroleum Corporation Limited (HPCL), Bharat Petroleum Corporation Limited (BPCL), and Gujarat State Warehousing Corporation (GSWC) are paying the revised rent to the KPT.

They have, therefore, requested that the revised rate may be made applicable to the CWC.

9. Based on the records available, and the totality of information collected during the proceedings of the case, the major issues relevant to the CWC application can be analysed as follows:-

(i). The CWC has been allotted 42,493 Sq. Mtrs. of land on a 30-year lease by the KPT on 16 November 88.

(ii). The understanding is that, until execution of a Lease Agreement, the conditions stipulated in the Allotment Letter will prevail.

(iii). The Allotment Letter stipulates the following main conditions:

(a). The lease will be for 30 years.

(b). The lease rent will be revised only in 10 years.

(c). The first increase shall not be more than 100% of the original ground rent; and, the second increase shall not be more than 200% of the original ground rent.
(d). The construction work will commence within a period of six months from the date of allotment and will be completed within 36 months.

(e). The Lease Agreement can be executed only after completion of the construction work.

(f). In the event of non-execution in time of the Lease Agreement, revisions of rent approved by the Board of Trustees will be applicable notwithstanding the schedule of revisions stipulated in the Allotment Letter.

(iv). In this case, the allotment was made on 16 November 88. In the normal course, therefore, the first revision could have been only on 16 November 98. But, the KPT ordered an increase with effect from 1 July 94 based on two considerations:

(a). The said revision has been approved by the Government.

(b). The CWC has not commenced the construction work (much less complete it) within the stipulated 36-month period. More importantly, they have not executed the Lease Agreement even upto March 97. That being so, they are not entitled to protection of the conditions stipulated in the Allotment Letter. Also, other (Public Sector Undertaking) lessees such as IOCL, BPCL, HPCL, and GSWC have accepted the said revision.

(v). The CWC has objected to the order in reference of the KPT on the following grounds:

(a). The revision with effect from 1 July 94 is not in accordance with the conditions stipulated in the Allotment Letter of revising the rent only once in 10 years. Since the allotment was made on 16 November 88, the revision could have been only on 16 November 98.

(b). Even this revision has been announced in 1997 to be applied with retrospective effect from July 94.

(c). The increase in rent is from Rs.2.70 per Sq. Mtr. per annum to Rs.16/- per Sq. Mtr. This amounts to a 600% increase which is in gross violation of the conditions stipulated in the Allotment Letter that the (10-yearly) revision shall not be more than 100% of the original ground rent.
(d). The Lease Agreement has not been executed as the construction work can not be completed. And, the construction can not be completed because of delays in clearance of the plans by the KPT which has delayed commencement of the construction work.

(vi). Although the construction has been completed within 36 months after clearance of the construction plans, the KPT has not issued a completion certificate.

10.1. In the light of the facts cited above, the CWC has contended that the conditions stipulated in the allotment letter shall be deemed to have been complied with in spirit. Admittedly, the construction work did not commence within six months of the allotment. But, the commencement was delayed because of difficulties on both sides. And, the construction work has been completed within 36 months after clearance of the construction plans by the KPT.

10.2. It has to be recognised in this context that, by giving clearance to the construction plans on 3 July 97, the KPT had implicitly condoned the delay involved. If it were not so, they should have refused to consider the (revised) plans submitted by the CWC on 27 March 97.

11.1. (a). It does emerge from the analysis above that there has been a delay by the CWC in completing the construction work which has delayed execution of the Lease Agreement. But, having entertained and cleared the (revised) construction plans of the CWC in July 97, the KPT cannot now legitimately cite the said delay as a reason for not executing the Lease Agreement or for not (even) issuing a completion certificate. They will have to be held to be estopped from taking recourse to this lacuna.

(b). Significantly, the KPT’s clearance order of July 97 cannot even be said to be a one-time routine order not amounting to any such condonation of the delay. It is evident from the facts presented that the construction plan was first approved in December 94 (i.e., 6 years after the original allotment). This was followed by subsequentSUPPLEMENTARY clearances in 1995 (for construction of a room for electric sub-station) and 1996 (for construction of a covered godown). And, a revised plan for total work was finally cleared in July 97. All of these actions cannot be said to have been taken in a routine manner without application of mind to their implications for the contractual conditions. It will only be reasonable to conclude that the orders of the KPT in reference were deliberate decisions after a careful application of mind. On this reckoning, the CWC’s contention is that by giving clearance to the construction plans on 3 July 97, the KPT had implicitly condoned the delay involved.
(c). Flowing from this finding, it has to be held that the CWC is not liable for the delay in execution of the Lease Agreement.

(d). Consistently, with such a finding, it has to be held that, in the event, the revision of rent approved by the Government cannot be enforced in this case before expiry of 10 years after the date of original allotment, much less with a 3-year retrospective effect.

11.2. The KPT argument that they have to apply this revision because it has been approved by the Government is not acceptable for the reason that conditions of contract cannot be revoked or altered arbitrarily and retrospectively by any one party to the contract. Even if there is a valid order passed on Government approval, it cannot supersede a specific condition stipulated in the contract. And, in this case, such a specific condition is stipulated in the Allotment Letter which, until execution of the Lease Agreement, has to be held to be a contract for all purposes.

11.3. Reference to acceptance of the revision order by other (Public Sector Undertaking) lessees such as IOCL, HPCL, BPCL, and GSWC is not relevant as the case of CWC will have to be governed by the conditions stipulated in their contract and not by the conduct of any other lessees.

12. In the result, and for the reasons given above, the objection raised by the CWC appears to be valid and acceptable. The contentions of the KPT are clearly untenable. In the given facts and circumstances of the case, the KPT may have to be required to abide by the Allotment Letter, and thereafter, by the Lease Agreement when it is executed.

13. With reference to the analysis given above and based on a collective application of mind, the following decisions are taken:

   (i). The KPT is required to abide by the Allotment Letter and, thereafter, by the Lease Agreement when it is executed.

   (ii). The first revision can be effective only after 10 years from the date of allotment i.e., with effect only from 16 November 1998.

   (iii). The rate can be increased to the extent of 100% only. Accordingly, the rate fixed by the KPT at Rs.16/- per Sq. Mtrs. per annum is not valid, and with retrospective effect from 1 July 94 at that.

   (iv). The rate of lease rent for the land is fixed at Rs.5.40 per Sq. Mtr per annum with effect from 16 November 1998.

S.SATHYAM, Chairman
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