

mm

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**SUIT NO. 3609 OF 2003
AND
SUIT NO. 3610 OF 2003**

American President Lines Ltd. & Ors. ...Plaintiffs
Vs.
The Board of Trustees of the Port of Bombay & Anr. ...Defendants

Mr. V.K. Ramabhadran a/w. Subra Karmakar for the Plaintiff No.1
in Suit No. 3609 of 2003 and Defendant in Suit No. 310 of 1995

Mr. U.J. Makhija a/w. Mr. Roshan Pinto i/b. Mulla & Mulla
for Defendant No.1

CORAM : MRS. ROSHAN DALVI, J.
Date of Reserving the Judgment : 19th January, 2015
Date of Pronouncing the Judgment : 4th February, 2015

JUDGMENT:

1. Seven issues have been framed in the suit. Issue Nos. 2 and 3 are required to be tried as preliminary issues under the provisions of Order 14 Rule 2 of the CPC. No party has filed any affidavit of evidence though the plaintiffs were directed to file the affidavit of evidence and documents, if required, with regard to the preliminary issues.
2. Counsel have argued the question of law with regard to the preliminary issues based upon the averments in the plaint. The issues are decided as follows:

3. **Issue No. 2 Re: The bar of limitation.**

The plaintiff has sued the defendants (BPT). The suit is governed by the Major Port Trust Act, 1963 (MPT Act). The suit is required to be filed within the special period of limitation under Section 120 of the MPT Act.

4. Section 120 runs thus :

**“CHAPTER XI
MISCELLANEOUS**

120. Limitation of proceedings in respect of things done under the Act. – No suit or other proceedings shall be commenced against a Board or any member or employee thereof for anything done, or purporting to have been done, in pursuance of this Act until the expiration of one month after notice in writing has been given to the Board or him stating the cause of action, or after six months after the accrual of the cause of action”.

5. The suit is required to be filed within six months of the accrual of the cause of action after notice in writing of the filing of the suit has been given. The plaintiff's suit is for a money claim of Rs.1.04 crores as the amount debited / received / appropriated by the BPT together with interest thereon. The suit is also to challenge the demand notices given by the BPT to the plaintiff. The plaintiff is a shipping company and its agents (plaintiff). The plaintiff has sued the BPT and one Nahar Industrial Enterprises Limited (defendant No.2) in respect of the consignments which arrived into the port of Mumbai under the control of the BPT for the consignees in Ludhiana. It is the plaintiff's case that it was obliged to

discharge the cargo which arrived in Mumbai. The consignee in Ludhiana had to clear the cargo. The consignee did not clear the cargo. It was left in the BPT premises in Mumbai incurring demurrage. The plaintiff claims a lien for its charges for transportation.

6. The BPT claims that the cause of action accrued when the goods arrived in the Mumbai Port.
7. It is the case of the plaintiff that the goods which arrived at the port of Mumbai were discharged in May, June and July, 1993 containing a consignment of 12 containers. The plaintiff communicated the arrival of the consignment to defendant No.2 also in June – July 1993. The containers were consigned to defendant No.2, but were not cleared by defendant No.2. After certain notices issued to the plaintiff as also defendant No.2 the BPT sold the goods as per due procedure and as per orders passed in certain prior litigations between the parties. The BPT appropriated the amounts recovered upon the sale and the plaintiff has sued for recovery of the balance amount under prayer (a) and for challenging the demand notices for the demurrage incurred upon the goods being left in the premises of the BPT under prayer (b) of the plaint.
8. It is the plaintiff's case that the BPT sold the consignment after following the procedure and the orders of the Court and

appropriated Rs.60.71 lakhs by way of levy of ground rent wrongfully without authority of law which the plaintiff has sought to recover.

9. The plaintiff could recover such a levy only after the sale contemplated under Section 61 of the MPT Act was held. Though the consignment arrived in 1993, the sale was conducted by BPT as per orders of the Court confirming the sale only on 1st October, 2002. The net sale proceeds were to be paid to the BPT without prejudice to the rights of other parties. The BPT thereafter sent demand notices on 29th May, 2003 followed by three other notices in July, 2003 demanding payment of Rs. 6.53 crores as a sale deficit inter alia from the plaintiff as also defendant No.2. The plaintiff has challenged the demand notices. The plaintiff has claimed the recovery of Rs. 60.71 lakhs as wrongfully appropriated by the BPT. This appropriation was made upon the sale which took place on 1st October, 2002.

10. The plaintiff filed a writ petition challenging the appropriation on 30th August 2003 about 10 months after the appropriation. For claiming the appropriation of Rs.60.71 lakhs against the BPT, the plaintiff is required to sue within six months of the accrual of the cause of action. That cause of action would accrue on 1st October, 2002. The plaintiff was obliged to give notice in writing to BPT to sue stating the cause of action.

11. In the case of **V.M. Salgaocar & Bros. Vs. Board of Trustees of Port of Mormugao & Anr. (2005) 4 SCC 613 at page 627** It is held that the twin requirements of the giving of one month's notice and filing of the suit within six months of the accrual of the cause of action must be read conjunctively and not alternatively as then it would defeat the very object of the provision.
12. The writ petition itself was filed after the special period of limitation under Section 120 of the MPT Act and after which this suit has come to be filed.
13. In the case of **Kewal Kishan Aggarwal & Ors. Vs. Board of Trustees of The Port of Mumbai & ors. 2013(5) Mh.L.J. 451** this Court held that the suit was barred by the law of limitation under Section 120 of the MPT Act when not only the suit, but the prior writ petition itself came to be filed and notice contemplated under Section 120 of the MPT Act itself came to be given after the period of limitation expired.
14. It is, therefore, seen that the suit is barred by the law of limitation under Section 120 of the MPT Act. It may be stated that the plaintiff's claim for money decree to be paid by the BPT upon the alleged wrongful appropriation cannot be recovered. However, the challenge to the demand notices may be agitated by the plaintiff as a defence to the suits filed by the BPT in this Court. **Issue No.2** is, therefore, answered in the **affirmative** holding that

the suit is barred by the law of limitation.

15. **Issue No.3 Re: Notice under Section 120 of the MPT Act.**

The plaintiff is required to give a certain notice to the defendants after the filing of the suit under the aforesaid provision.

16. In the case of **V.M. Salgaocar & Bros. Vs. Board of Trustees of Port of Mormugao & Anr. (2005) 4 SCC 613** at page 628 this notice has been held to be mandatory and a precondition to the filing of the suit. It has been held in that case that since the suit was filed without giving the notice it was not maintainable.

17. In that case the BPT informed the plaintiff that the plaintiff was entitled to a partial rebate. In reply thereto the plaintiff stated that it was entitled to a full rebate. The BPT declined the plaintiff's demand for full rebate. The plaintiff claimed that the refusal of the rebate was the cause of action. It was therefore, held that the cause of action arose upon the refusal of the BPT to grant full rebate. The plaintiff's letter earlier asking for full rebate cannot be treated as notice under Section 120 of the MPT Act. It was observed in para 28 at page 627 of the judgment that the illegal levy / refusal of rebate was made by the BPT on the date after the plaintiff's letter claiming the full rebate. Hence it was held that the cause of action arose for the first time on that day and therefore, the earlier letter could not be taken to be the statutory notice which required the cause of action to be set out therein. It also

observed that in the plaint there was no averment that the notice was given under Section 120 of the MPT Act. In that case the plaintiff contended that it was not prevented by Section 120 from filing the suit. Hence also it was observed that the earlier letter could not be treated as the notice.

18. In this case, of course, the plaintiff does not contend that the notice need not be given. The plaintiff has contended that the filing of the writ petition challenging the debit / appropriation made by the defendant constitutes the statutory notice upon the claim that the purpose and object of the notice is to put the BPT to notice of a proposed claim and to save it from incurring legal costs in connection with the claim. However the writ petition itself was filed 10 months after the sale of the consignment and the consequent appropriation. Though notice was not required to be given to challenge the appropriation by way of a writ, notice cannot be given after the suit is barred by the special law of limitation under Section 120 by taking recourse to a writ petition for the ultimate relief by way of a money decree.

19. In the case of **Omprakash Tulsiram Aggarwal & Ors. Vs. Board of Trustees of the Port of Bombay 1991 Mh. L. J. 945** a writ petition similarly filed was observed to be malafide. In para 4 of the judgment it has been observed that having allowed the limitation prescribed by Section 120 of the MPT Act to expire the petitioners cannot seek the assistance of a writ Court to enforce a

contractual right governed by the MPT Act. Though the writ petition could not be barred by the law of limitation, the principle was held applicable to consider the point of laches. Hence it was observed that the suit was required to be filed within six months of the accrual of the cause of action and having failed to file the suit within the statutory period the petitioner cannot circumvent the bar of limitation by filing a writ petition outside the period of limitation.

20. Mr. Ramabhadran on behalf of the plaintiff attempted to draw an analogy to Section 80 of the CPC which requires notice to be issued to Government. He relied upon the case of **Beohar Rajendra Sinha & Ors. Vs. State of M.P. & Ors. & Vice Versa 1969(1) SCC 796** to show that it was deemed to have been given in certain circumstances. This misses the point that under Section 80(2) of the CPC the notice itself can be waived by the Court in case of urgency. The requirement of notice under Section 80 of the CPC is, therefore, wholly different from the notice under Section 120 of the MPT Act which is held to be mandatory even if the object of both the notices would be the same: There being no power in the Court to grant leave to sue without notice for any reason, under the MPT Act, there can be no deemed notice under Section 120 of the MPT Act. Notice cannot also be given after the expiry of period of limitation by way of a writ petition.

21. It may be stated that that the exclusion of the period taken by

the filing of the writ petition under Section 14 of the Limitation Act would also be no avail because the writ petition itself challenging the appropriation was filed more than six months after the appropriation came to be made.

22. Mr. Ramabhadran argued that if the suit is dismissed for want of the statutory notice the Court may allow the plaintiff to file a suit again after giving notice and exclude the period taken up by the plaintiff for filing the writ petition. This argument is also inconsequential because the writ petition itself was filed after the statutory period of limitation under Section 120 of the MPT Act. Hence even if Section 14 is construed broadly as urged by Mr. Ramabhadran as held in the case of **Union of India & Ors. Vs. West Coast Paper Mills Ltd. & Anr. (2004) 3 SCC 458** and in the case of **Haldiram Bhujawala & Anr. Vs. Anand Kumar Deepak Kumar & Anr. (2000) 3 SCC 250** no exclusion of any period would save bar of limitation of any suit. Besides it is only when the suit is withdrawn and another suit is filed on the same cause of action with liberty of the Court that the period of exclusion under Section 14 of the Limitation Act can be considered by the Court in such suit if and when filed. It is not for this Court to consider that aspect. If the suit is dismissed as not being maintainable for want of the statutory notice, the plaintiff cannot be allowed to sue again under the aforesaid provisions of the CPC.

23. Consequently reliance upon the case of **Haldiram**

Bhujiawala & Anr. Vs. Anand Kumar Deepak Kumar & Anr. (2000)3 SCC 250 is misplaced because the plaintiff has not applied for withdrawal of the suit to file a fresh suit as in that case when the partnership firm not being registered and the suit being barred under Section 69(2) of the Partnership Act, 1932 the plaintiff could sue afresh subject to registration of the firm and subject to the law of limitation including Section 14 of the Limitation Act, the suit having been failed not on account of lack of jurisdiction of the Court but for “other cause of like nature”.

24. The reliance upon **Union of India & Ors. Vs. West Coast Paper Mills Ltd. & Anr. (2004) 3 SCC 458** is also misplaced because that was the suit which was contended to be hopelessly barred by limitation. It was in that suit the exclusion of time under Section 14 was considered. Therefore, if and when the plaintiff files another suit after this suit held to be not maintainable as aforesaid, the Court may consider the exclusion of the period of limitation as per the facts of that case, the writ petition being the first action of the plaintiff itself having been filed after the period of limitation expired.

25. Mr. Ramabhadran relied upon judgment in the case of **Eastern Coalfields Limited Vs. Sanjay Transport Agency & Anr. (2009) 7 SCC 345** to show that this Court itself must grant the exclusion of time needed to be considered in the future suit. In that case a party sought to refer the dispute to arbitration and

sought appointment of Arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996. The relevant Chief Justice appointed the Arbitrator. The appointment was challenged in appeal. It was held that the arbitration clause was not applicable to that case. Hence that party could legitimately sue in a Civil Court. The Supreme Court observed in the last para of the judgment that the party would be at liberty to approach the civil Court for adjudication for resolving the disputes between the parties arising out of the contract for which the party would get the benefit of Section 14 of the Limitation Act. This was only reiteration of the position in law. The party would nevertheless have to claim the exclusion of the time taken by seeking reference of the dispute to arbitration by the appointment of Arbitrator which would be considered by the Court, if and when such suit was filed. In this case it is seen that no future litigation would be within the special law of limitation governing the cause of action of the plaintiff. As aforesaid, it is seen that the writ petition which is stated to constitute notice was itself filed after the period of limitation expired. Even excluding the period taken up by the writ petition or by this suit, the bar of limitation cannot be saved. Hence **issue No.3** is answered in the **affirmative** holding that the suit is barred under Section 120 of the MPT Act. Since the notice contemplated thereunder has not been given within the period of limitation prescribed thereunder.

26. Consequently both the suits are dismissed.

(ROSHAN DALVI, J.)