IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ADMIRALTY AND VICE-ADMIRALTY JURISDICTION

ADMIRALTY SUIT NO.10 OF 2015

The Board of Trustees of the Port
of Mumbai .. Plaintiff
Vs.
M.V. KAMAL XXXIV & Anr. .. Defendants

Mr.Ajai Fernandes a/w. Ms.Sheha Pandey I/b Motiwalla and Co. for plaintiff.

None for defendants.

CORAM : K.R.SHRIRAM, J.
DATE : 6TH JULY 2018

P.C.

1 Plaintiff is the Board of trustees at the Port of Mumbai, a statutory corporation constituted under the provisions of the Major Port Trust Act, 1963. Defendant no.1 was an Indian flag vessel registered at the Port of Surat, India. The said vessel is owned by defendant no.2.

2 Plaintiff had invited a composite tender for the execution of capital dredging for the proposed offshore container terminal and filling of the existing Prince's and Victoria Docks and sand dredging, i.e., "OCT Project". Defendant no.2 was the successful bidder. Plaintiff awarded the contract to defendant no.2 on 1st April 2009 for an estimated cost of Rs.380.36 crores. For the purpose of carrying out the work under the contract, defendant no.2 bought 31 vessels including 1st defendant vessel, dredgers, tugs, launches, hopper barges etc. The notification of award/letter dated 1st April

2009 is at Exh.P-1/4.

3 As defendant no.1 was unable to complete the work within the stipulated time, plaintiff, with effect from 27th June 2013, terminated the contract. The said contract has not been produced by any of the parties. Copy of the tender documents which are in two volumes are at Exh.P-1/16 and Exh.P-1/17.

4 Under the contract, defendant no.2 was not liable to pay any port charges, anchorage dues etc. It is plaintiff's case that since the contract has been terminated on 27th June 2013, plaintiff is entitled to anchorage dues with respect first defendant vessel, post-termination. Plaintiff, therefore, raised three invoices upon defendant no.2, which are at Exh.P-6, Exh.P-7 and Exh.P-8 for Rs.8,04,592/-, Rs.8,383/- and Rs.21,910/-, respectively. The invoice also provided for interest to be paid at 16.25% per annum from the date of the bill, if they were not paid on or before the due date mentioned therein. The bill at Exh.P-6 was to be paid on 23rd November 2013. The bill at Exh.P-7 was to be paid on 15th March 2014 and the bill at Exh.P-8 was to be paid on 19th December 2014. Therefore, plaintiff is also claiming interest at 16.25% p.a. from the due dates up to the date of the suit and further interest at 18% p.a. from the date of the suit till payment/ realization.

5 In addition to these three invoices, plaintiff had raised two other invoices which are at Exh.P-1/11 and Exh.P-1/12 for Rs.468/- and Rs.4,212/-, respectively. These invoices were towards interest on the shortfall in payments made by defendant no.2 for the port charges with respect to defendant no.1-vessel.

6 Defendant no.2 filed written statement for itself and as the owner of defendant no.1 vessel. It is the case of defendant no.2 that it had successfully completed its work under the contract and also denied that the contract was even terminated. It has also raised the defence that the suit is barred by limitation. On 26th August 2015, the Court framed the following issues:-

> *"1. Whether the Suit filed by the Plaintiff is bad in law, mala fide, misconceived and not maintainable as contended by the Defendants in Para 3 of its Written Statement ?*
>
> *2. Whether the Defendants had completed the OCT project as contended by the Defendants in Para 7 of its Written Statement ?*
>
> *3. Whether the Plaintiff has terminated the Dredging Contract with Defendant No. 2 as contended by the Plaintiffs in Para 4 of the Plaint and as denied by the Defendants in Para 8 of its Written Statement ?*
>
> *4. Whether the Plaintiff is entitled to recover sum of Rs.9,88,275/ together with interest thereon at the rate of Rs.18% p.a. on the sum of Rs.8,34,886/ from the date of Suit till payment and / or realisation ?*
>
> *5. What order ?*

6. What decree ?

7. What cost ?”

7 Plaintiff led evidence of four witnesses, viz., Captain Manoj Joshi (PW-1), Harishchandra Govind Thakur (PW-2), S.N. Sarode (PW-3) and Kapil Bakshi (PW-4).

8 Total of 16 documents on behalf of plaintiff were received in evidence and marked as '*Exh.P-2 to Exh.P-17*'. Defendants did not cross-examine any of plaintiff's witnesses and defendants also did not lead any evidence independently.

With this background, let us consider the issues framed.

9 Though an issue of limitation has not been framed but as it is raised in the written statement, this Court has to answer objection raised by defendants on the issue of limitation.

10 Plaintiff's claim is based on five invoices, i.e., (i) Exh.P-1/6 dated 14th November 2013, (ii) Exh.P-1/7 dated 6th March 2014, (iii) Exh.P-1/8 dated 10th December 2014, (iv) Exh.P-1/11 dated 7th February 2013 and (v) Exh.P-1/12 , dated 9th January 2013. Exh.P-1/6 to Exh.P-1/8 are bills for anchorage charges accrued on daily basis. In any event, the suit has been

lodged on 17th January 2015. The oldest invoice is dated 9th January 2013 (Exh.P-1/12) and latest is dated 10th December 2014 (Exh.P-1/8) and both are filed within three years. Therefore, in my view, the claim under the five invoices are within limitation.

11 As regards the issues as famed on 26th August 2015, all can be answered together. The evidence of PW-1 basically reiterated the contents of the plaint. In the evidence, PW-1 mentioned about the contract being awarded to defendant no.2, that the contract was terminated on 27th June 2013 and it has raised five invoices and that these invoices not having been paid, plaintiff is entitled to interest at 16% p.a. In addition, plaintiff has also given a detailed break-up and those invoices have been received in evidence. Defendants have chosen not the cross examine plaintiff.

12 The evidence of PW-1 was taken on record on 11th January 2018. Since nobody appeared for defendants, evidence of PW-1 was closed as 'No cross'. Similarly, the evidence of PW-2 and PW-3 were taken on record on 31st January 2018, on which date again nobody appeared for defendants. The evidence of PW-4 was taken on record on 7th March 2018 read with order on 28th March 2018 and again on 7th March 2018 and 21st February 2018, nobody appeared for defendants. Therefore, evidence of PW-2, PW-3, PW-4 was also closed as no cross.

13 In the circumstances, having considered the evidence filed by plaintiff and the fact defendants have not even cross-examined plaintiff's witnesses, I am inclined to accept the evidence of plaintiff as true and correct. Therefore, the issues are answered as under :-

(1) Issue No.1 : Negative

(2) Issue no.2 : Negative

(3) Issue no.3 : Affirmative.

(4) Issue No.4 : In the affirmative subject to the clarification as under:-

14 Plaintiff is seeking to be entitled to a decree in the sum of Rs.9,88,275/- together with interest at 18% p.a. on the principal amount of Rs.8,34,888/- from the date of the suit until payment/realization.

15 So far as interest is concerned, upto the date of the suit, the invoices at Exh.P-1/6 to Exh.P-1/12 provide for interest at 16.25% p.a. Therefore, plaintiff will be entitled to interest at 16.25% on the principal amounts of each invoice from its respective due dates until the date of the suit. So for as interest from the date of the suit is concerned, in my view, plaintiff should not be entitled to any interest whatever. This is because, plaintiff has not taken any step to mitigate the losses suffered. The suit has been filed on 17th January 2015 and defendant no.1 is still lying within the limit

of plaintiff. Under Section 64 of the Major Port Trust Act, 1963, in case any part of the rates or penalties remains unpaid, the Board may cause the vessel to be sold, and, with the proceeds of such sale, shall satisfy such rates or penalties and costs, including the costs of sale. Section 64 of the Major Port Trust Act, 1963 reads as under :-

> ***"64. Recovery of rates and charges by distraint of vessel :***
>
> *(1) If the master of any vessel in respect of which any rates or penalties are payable under this Act, or under any regulations or orders made in pursuance thereof, refuses or neglects to pay the same or any part thereof on demand, the Board may distrain or arrest such vessel and the tackle, apparel and furniture belonging thereto, or any part thereof, and detain the same until the amount so due to the Board, together with such further amount as may accrue for any period during which the vessel is under distraint or arrest, is paid.*
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> *(2) In case any part of the said rates or penalties, or of the cost of the distress or arrest, or of the keeping of the same, remains unpaid for the space of five days next after any such distress or arrest has been so made, the Board may cause the vessel or other thing so distrained or arrested to be sold, and, with the proceeds of such sale, shall satisfy such rates or penalties and costs, including the costs of sale remaining unpaid, rendering the surplus (if any) to the master of such vessel on demand.*

16 From January 2013, when plaintiff terminated the dredging contract of defendant no.2, plaintiff did not exercise its power which has been conferred upon it by Section 64 of the Major Port Trust Act, 1963. Even if one may consider to be lenient, and condone the lapse on the part of

plaintiff or perhaps proceed on the basis that plaintiff may be justified in not exercising its power under Section 64 of the Major Port Trust Act, 1963, still there is no excuse for plaintiff in not taking any step even after filing this suit against defendant no.1 for sale of defendant no.1-vessel, which I am told is stilling lying grounded within the Port limits. In the circumstances, plaintiff will not be entitled for any interest from the date of the suit.

17 The suit accordingly decreed.

(K.R. SHRIRAM, J.)