

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
SUIT NO. 2512 OF 2007

- 1) Naik Brothers Dryfish Private Limited, a Company incorporated and registered under the Companies Act, 1956 (No.1 of 1956) having its registered office at Naikwadi, Naik Niwas, Ferry Road, Near Jetty Madh, Via Versova, Mumbai 400061.
- 2) Devendra Atmaram Naik, aged 48 years, occupation : Business, residing at Naik Niwas, Naik Wadi, Ferry Road, Near Jetty Madh, Via Versova, Mumbai 400061.
- 3) Arati Devendra Naik, aged 44 years, occupation : Business, residing at Naik Niwas, ... Plaintiffs Naik Wadi, Ferry Road, Near Jetty Madh, Via Versova, Mumbai 400061.

Versus

- 1) Union of India, through Ministry of Fishing, Aayakar Bhavan, Marine Lines, Mumbai 400 020.
- 2) Mumbai Port Trust, Ballard Pier, Mumbai 400 001 established under Major Port Trust Act, 1963.
- 3) The President, Mumbai Port Trust, Ballard Pier, Mumbai 400 001.

- 4) Chief Chairman,
Mumbai Port Trust, Port Bhuvan,
Ballard Pier, Mumbai 400 001.
- 5) Deputy Chairman,
Mumbai Port Trust, Port Bhuvan,
2nd floor, Ballard Pier, Mumbai
400 001.
- 6) The Secretary,
Mumbai Port Trust, Port Bhuvan,
Ballard Pier, Mumbai 400 001.
- 7) The Chief Engineer,
Mumbai Port Trust, Port Bhuvan,
3rd floor, S.V. Marg, Fort,
Mumbai 400 001.
- 8) Sr.Executive Engineer,
(G.W.S.D.), Mumbai Port Trust,
Port Bhuvan, Ballard Estate,
Mumbai 400 001.
- 9) Docks Manager,
Mumbai Port Trust, Port Bhuvan,
1st floor, Ballard Pier, Mumbai
400 001.
- 10) The Chief Security Officer,
Mumbai Port Trust, Port Bhuvan,
5th floor, Yantra Bhavan, Indira
Dock, Ballard Pier, Mumbai 400
001.
- 11) Dy. Chief Engineer TEN,
Mumbai Port Trust, Port Bhuvan,
Mumbai 400 038.
- 12) Mr. Prabhu Kawad,
Chairman of M/s. Seafood Peeling
Shed Owners Association, 121,
M.B.P.T. Godown, Colaba,
Mumbai Sassoon Dock, Mumbai
400 005.
- 13) Bhau Adhav,

- M/s. Sunrise Sea Food, 11, Parkar House, 1st floor, Sassoon Dock, Colaba, Mumbai 400 005.
- 14) Salim Dange,
M/s. Sunrise Sea Food, 11, Parkar House, 1st floor, Sassoon Dock, Colaba, Mumbai 400 005.
- 15) Bhau Adhav and Salim Dange,
M/s. Samudra Seafood, Parkar House, 1st floor, Opp, Lok Satta Building, Sassoon Dock, Colaba, Mumbai 400 005.
- 16) Shri Kiran Bhalchandra Khot,
Cement Chawl, Madhavrao Rokade Marg, Mumbai 400 009.
- 17) Shri Liyakat,
C/o. M/s. Seafood Peeling Shed Owners Association, 12, M.B.P.T. Godown, Colaba, Mumbai Sassoon Dock, Mumbai 400 005.
- 18) Shri Babu Suta,
Madh Patil Galli, Via. Versova, Madh Market, Mumbai 400 061.
- 19) M/s. Seafood Peeling Shed Owners Association, 12, M.B.P.T. Godown, Colaba, Mumbai Sassoon Dock, Mumbai 400 005.
- 20) M/s. Sunrise Sea Food,
Parkar House, 1st Floor, Sassoon Dock, Colaba, Mumbai 400 005.
- 21) M/s. Samudra Sea Food,
Parkar House, 1st Floor, Sassoon Dock, Colaba, Mumbai 400 005.
- 22) Salim Dange,
M/s. Samudra Sea Food, Parkar House, 1st floor, Sassoon Dock, Colaba, Mumbai 400 005.

- 23) Dilip alias Daulat Dattatraya
Pagdae, member of M/s. Seafood
Peeling Shed Owners Association,
having his office address at 12,
M.B.P.T. Godown, Colaba,Defendants
Mumbai Sassoon Dock, Mumbai
400 005 and residing at Room
No. 46, Machimar Nagar, No.1,
Cuffe parade, Mumbai 400 005.

Mr. Sameer Shankar Kolge, Advocate for plaintiff.

Mr.U.J.Makhija, Mr. Pankaj Sutar, Mr.Rajeshwar Navalpure, Ms.Monica
Salian, i/b. Jayakar and Partners, Advocates for defendant Nos. 2 to 11.

CORAM	: N.J. JAMADAR, J
RESERVED FOR ORDERS ON	: 7th January 2020
PRONOUNCED ON	: 12th JUNE 2020

JUDGMENT :

1. This is a suit for damages to the tune of Rs.45,67,50,000/-
for breach of contract and the loss suffered by the plaintiffs on
account of alleged unlawful acts and omissions on the part of the
defendants, with interest @ 18% per annum from the date of the
institution of the suit till realization.

2. The material averments in the plaint can be stated in brief as
under :-

(a) The plaintiff No.1 is a Private Limited Company registered under the Companies Act, 1956. The plaintiff Nos.2 and 3 are the Directors of plaintiff No.1. The defendant No.1-Union of India, exercises supervisory control over defendant No.2-Port Trust. The defendant Nos. 3 to 11 are the office bearers/officials of defendant No.2.

(b) In the year 2001, the defendant No.2 had invited bids for removal and transportation of fish waste and other sea food waste, offals mixed with associated refuse etc from Sassoon Dock, Colaba vide Tender Notice No. 36/2001. The duration of the contract was of three years, i.e., 1st August 2001 to 31st July 2004. The plaintiffs had submitted its bid. M/s. Seafood Peeling Shade Owners Association-defendant No.19 had also submitted its bid. The defendant Nos.12 to 18 and 20 to 23, who deal in the business of fishing, supported the bid of defendant No.19. As the bid submitted by the plaintiffs was the lowest and the plaintiffs offered the justification for submitting the lowest quotation of Rs.1,17,855/-, the defendant No.2 accepted the bid of the plaintiffs. By communication dated 27th July 2001, the defendant No.2 conveyed the acceptance of the tender subject to the terms and conditions as incorporated in the general conditions of contract and special conditions of the contract etc. The plaintiffs complied with the requisite conditions.

(c) The plaintiffs commenced the work of removal of fish waste. However, the defendant Nos. 12 to 23 started to cause obstruction in the

execution of the said work by the plaintiffs. The defendant Nos.12 to 23 did not allow the labourers employed by the plaintiffs to remove and transport fish waste and other sea food waste, offals etc, in accordance with the terms of the Tender Notice No.36/2001. The defendant Nos.12 to 23 illegally and unauthorizedly removed and transported the fish waste, other seafood waste, offals mixed with associated refuse, from the premises of Sassoon Dock, despite the contract having been lawfully awarded to the plaintiffs. The efforts on the part of the plaintiffs to reason with defendant Nos.12 to 23 did not yield any fruits. Resultantly, the plaintiffs suffered huge loss on account of the obstructions to the execution of the work, at the hands of defendant Nos.12 to 23.

3. In the aforesaid backdrop, the plaintiffs were constrained to raise the grievance with defendant No.2. The defendant No.2 did clarify that none other than the plaintiffs were entrusted with the work of removal of the fish waste from the premises of Sassoon Dock. Yet, there was no cessation of the unlawful acts on the part of defendant Nos.12 to 23. The plaintiffs called upon the officers/officials of defendant No.2 to initiate action against the persons who were obstructing the plaintiffs in execution of the lawful work and also unauthorizedly removing the fish waste from

the premises of Sassoon Dock causing huge financial loss to the plaintiffs. The officers/officials of defendant No.2 addressed certain communications and also had meetings with the concerned stakeholders. However, the plaintiffs grievance could not be effectively addressed. Resultantly, the plaintiffs could execute the said work of removal of fish waste for the month of August 2001 only.

4. The plaintiffs addressed communications to various authorities but to no avail. The defendant Nos.12 to 23 continued to obstruct the plaintiffs in execution of the work, and remove the fish waste from the Sassoon Dock premises, with impunity. The defendant Nos. 2 to 11 did not take effective action against defendant Nos.12 to 23. Instead the defendant Nos.2 to 11 supported the defendant Nos. 12 to 23 in the aforesaid unlawful acts. Hence, the plaintiffs were constrained to institute the suit, bearing No. 2976 of 2002 against the defendants, in this Court, for declaration that the aforesaid contract was still valid, subsisting and binding upon defendant Nos.1 to 11 and also prayed for injunctive reliefs. In the said suit, the plaintiffs took out a notice of motion, bearing No.2462 of 2002, for ad-interim and interim reliefs. Initially by an

order dated 1st October 2003, ad-interim relief was granted restraining defendant Nos.2 to 12 from causing obstruction to the plaintiffs in the execution of the aforesaid work. By subsequent order, the said ad-interim relief came to be confirmed and continued till the disposal of the suit. Despite the aforesaid prohibitory order, the defendant Nos.12 to 23 did not allow the plaintiffs to remove the fish waste from the premises of Sassoon Dock. The plaintiffs filed a contempt petition, being Contempt Petition No.22 of 2004. The said contempt petition came to be disposed of by an order dated 10th February 2006 as the defendant Nos.12 to 23 tendered an unconditional apology.

5. The defendants had the audacity to restrain the plaintiffs from removing the fish waste in spite of the aforesaid orders and an unconditional apology tendered to the Court. Hence, the plaintiffs were constrained to institute the suit for damages. The plaintiffs assert that the plaintiffs could have earned a sum of Rs. 5,25,000/- per day by selling the fish waste which would have otherwise accumulated in the Sassoon Dock. Thus, the plaintiffs have assessed the damages at Rs.45,67,50,000/- during the said contract period of

870 days for which the plaintiffs were unlawfully restrained from removing the fish waste.

6. The suit as against defendant No.1-Union of India came to be subsequently withdrawn. The defendant No.2 to 11, 12, 18 and 19 appeared upon service of the writ of summons. The defendant No.12 did not file written statement. Hence, the suit proceeded without written statement against defendant No.12. The defendant Nos.2 to 11 and defendant No.18 and 19 have resisted the claim by filing written statements.

7. At the outset, the defendant Nos.2 to 11 have assailed the tenability of the suit for want of statutory notice under section 120 of the Major Port Trusts Act, 1963 ('The Act'). The suit is also stated to be barred by limitation as under section 120 of the Act, the suit is required to be instituted within a period of six months from the accrual of the cause of action against a Major Port Trust, post notice envisaged thereunder. Since the suit has been instituted beyond the period of limitation stipulated by section 120 of the Act, the suit deserves to be dismissed on that count only. The suit

is also stated to be bad for misjoinder of parties and/or causes of action. The defendant No.2 is the Board of Trustees of the Port of Mumbai. However, it has been misdescribed as Mumbai Port Trust. None of the defendant Nos.3 to 11 is either corporate or juristic entity. The impleadment of defendant Nos.3 to 11 as party defendants is also contended to be misconceived.

8. The defendant Nos.2 to 11 have also assailed the tenability of the suit as the previous suit being Suit No. 2976 of 2002, instituted by the plaintiffs in respect of the same subject matter was unconditionally withdrawn on 1st March 2006. No leave to institute a fresh suit on the same cause of action was sought. The plaintiffs, according to the defendant Nos.2 to 11, are thus precluded from instituting a fresh suit in respect of the same subject matter under Order XXIII of the Code of Civil Procedure, 1908 ('The Code'). The defendants thus contend that the suit is liable to be dismissed on this count as well.

9. On the merits, the defendant Nos.2 to 11 have denied the averments in the plaint adverse to their interest. Though it is not controverted that the contract to remove the fish waste was

awarded to the 1st plaintiff vide letter dated 27th July 2001, yet the scope of work is put in contest. According to the defendant Nos.2 to 11, the scope of the tender comprised of removal and transportation of fish waste, other sea food waste and offals mixed with associated refuse dumped in and around the dustbins at Sassoon Dock.

10. After about a month, the plaintiffs raised a grievance that some persons were unlawfully removing the fish waste from the precincts of Sassoon Dock. The said stand of the plaintiffs was contrary to the scope of work under the contract awarded to the plaintiffs which was restricted to removal of the fish waste etc. dumped in and around the dustbins at Sassoon Dock. In order to resolve the issue, meetings were held with the members of Seafood Peelers Shade Owners' Association, defendant No.19. It transpired that the fish waste was then being used for manufacture of poultry feed and thus fetched good value in the market. The defendant No.19 thus took a stand that the waste material generated out of the peeling of fish belonged to them and they were entitled to dispose of the fish waste on their own outside the Sassoon Dock. Resultantly, the accumulation of fish waste, in the dustbins,

decreased. The plaintiffs, on the other hand, claimed that they had the authority to remove the fish waste from the precincts of Sassoon Dock beyond the fish waste dumped in and around the dustbins.

11. The defendant Nos.2 to 11 have categorically asserted that under the terms of the contract, the plaintiff No.1 was to remove and transport fish waste from the dustbins and its surroundings. The defendant Nos. 2 to 11 never restrained the plaintiffs from removal of the fish waste in terms of the contract, as alleged by the plaintiffs. Nor the defendants permitted the members of the defendant No.19 to remove fish waste. It was denied that the officers/officials of the defendant No.2 were hand in glove with defendant No.19 and thereby caused loss to the plaintiff as alleged. The defendant Nos. 2 to 11 have contended that under the terms of the contract, the plaintiffs were entitled to remove the fish waste dumped in and around the dustbins only. The possible waste which could have been dumped in the dustbins during the contract period was a matter of business judgment. The plaintiffs had made certain incorrect assumptions about the quantity of the waste. During the

actual execution of the contract, the plaintiffs realized that there was less accumulation of the fish waste, in the dustbins, than anticipated. The defendant Nos. 2 to 11 cannot, therefore, be held liable for the alleged loss of profits, which were miscalculated by the plaintiffs on a much higher side. The claim for damages to the tune of Rs.45,67,50,000/- is thus stated to be unjustifiable, unreasonable and imaginary. On these, amongst other grounds, the defendant Nos. 2 to 11 prayed for the dismissal of the suit.

12. The defendant No.19 contested the claim by filing its written statement. The tenability of the suit was called in question on the count of the alleged non-joinder of necessary parties and misjoinder of the parties and causes of action. It was denied that the defendant No.12 was the Chairman of defendant No.19. Apart from denying the averments in the plaint adverse to the interest of defendant No.19 and its members, it was contended that the claim of the plaintiffs is based on an incorrect impression about the ‘fish waste’, which the plaintiffs harboured. The defendant No.19 firmly contends that prawn heads, fish heads and viscera of the fish are not fish waste. The defendant No.19 and its members are entitled

to the said parts of the fish, which are derived after peeling the fish, and also entitled to dispose of the same. The defendant No.19 has denied the allegations in the plaint about forcibly restraining the plaintiffs from execution of the work of removal of the fish waste. The suit is also stated to be barred by law of limitation.

13. Resistance is put-forth by defendant No.18 as well. The suit is stated to be barred by the provisions contained in Order XXIII of the Code. In view of the unconditional withdrawal of the previous suit, being Suit No.2976 of 2002, in the absence of leave to institute a fresh suit in respect of the same subject matter, the instant suit is not tenable. The defendant No.18 has categorically denied that he had ever interfered with the removal of the fish waste from the dustbins by the plaintiffs in accordance with the terms of the contract. It is contended that there was no obligation either on defendant No.18 or any of the members of defendant No.19 to dump the waste material generated out of peeling of fish in the dustbins. The claim of the plaintiffs that the entire material generated out of peeling of fish constituted the fish waste and the plaintiffs alone had the right to dispose of the said fish waste irrespective of the place where the said waste was generated, was

stated to be untenable and beyond the terms of the contract awarded to the plaintiffs.

14. In the backdrop of the aforesaid rival pleadings, issues were settled by an order dated 2nd December 2011. I have reproduced the issues with my findings against each of them for the reasons to follow :

<i>Issues</i>	<i>Findings</i>
<i>(1) Whether the plaintiffs prove that defendant Nos.12 to 23 have illegally and unlawfully prevented the plaintiffs to collect fish waste, offals mixed with refuse etc as per Tender No.36/2001 dated 1st August 2001 granted in favour of the plaintiffs, from the premises of Sassoon Docks, Colaba, Mumbai and thus causing loss and damage to the plaintiffs?</i>	: In the negative.
<i>(2) Whether the plaintiffs prove that the defendant Nos.2 to 11 have failed to take action against the defendant Nos.12 to 23, despite numerous complaints to them, and thus the defendant Nos.2 to 11 are jointly and severally liable to pay damages as claimed in the suit?</i>	: In the negative.
<i>(3) Whether the plaintiffs prove that they are entitled to damages of Rs.45,67,50,000/- as more particularly mentioned in prayer clause (a) to the plaint, due to the illegal acts of the defendants?</i>	: In the negative.

(4) <i>Whether the defendant Nos.2 to 11 prove that the suit is barred by the law of limitation as mentioned in para 1 of the written statement?</i>	:	In the affirmative.
(5) <i>Whether the defendant Nos.2 to 11 prove that the suit is bad for want of notice under section 120 of the Major Port Trust Act, and as more particularly mentioned in para 2 of the written statement?</i>	:	In the affirmative.
(6) <i>Whether the defendant Nos.2 to 11 prove that the suit is bad for misjoinder of parties/cause of action, and as more particularly mentioned in para 3 of the written statement?</i>	:	In the negative.
(7) <i>Whether the defendant Nos.2 to 11 prove that the present suit is not maintainable as per Order XXIII of the Code of Civil Procedure, 1908 in view of withdrawal of earlier suit No.2976 of 2002 filed by the plaintiffs in this Court?</i>	:	In the negative.
(8) <i>What relief and order?</i>	:	<i>The suit stands dismissed.</i>

15. In order to substantiate the averments in the plaint, the plaintiffs have examined Mr. Devendra Atmaram Naik (P.W.No.1), the Director of plaintiff No.1. The plaintiffs have also tendered a number of documents for the perusal of the Court. Most of the documents evidence the exchange of correspondence between the

plaintiffs and defendant No.2 and its officers/officials as well as the communications addressed by the plaintiffs to various authorities raising the grievances in respect of the subject contract. The defendant Nos.2 to 11 have not led any evidence in the rebuttal. The evidence of defendant No.18 was closed by the Court for default. Initially the defendant No.19 had sought time to lead evidence. The defendant No.19 also failed to lead evidence and thus the evidence of defendant No.19 was also closed by order dated 17th July 2018.

16. Before advertizing to deal with the contentious issues, it may be advantageous to note the uncontroverted facts. There is not much controversy over the fact that the defendant No.2 had invited tender vide notice No. E-36 of 2001 under the caption ‘removal and transporting of fish and other seafood waste, offals mixed with associated refuse etc. from Sassoon Dock’ for the period 1st August 2001 to 31st July 2004. Indisputably, the plaintiff No.1 was the lowest bidder. Since, the bid quoted by the plaintiffs was abnormally low, i.e., 96.47% below the tender price, the plaintiffs were asked to offer justification. There is not much controversy

over the fact that vide communication dated 18th July 2001, the plaintiffs apprised the defendant No.2 that since the fish waste is used for manufacturing poultry feed, the plaintiffs would generate profit therefrom and thus the plaintiffs were ready to execute the contract for the quoted price. It is incontrovertible that vide communication dated 27th July 2001, the defendant No.2 conveyed the acceptance of the bid submitted by the plaintiffs for the said work. Indisputably, the plaintiffs commenced the work of removal of fish waste with effect from 1st August 2001.

17. The controversy between the parties revolves around the exact scope of the work which was awarded to the plaintiffs and the alleged acts and omissions on the part of the defendants which restrained the plaintiffs from executing the said work and exploiting the fish waste to the full potential for the contract period of 1st August 2001 to 31st July 2004 and consequent liability of the defendants to pay damages for the loss allegedly suffered by the plaintiffs.

Issue Nos.4 and 5

18. As a serious challenge was mounted on behalf of defendant Nos.2 to 11 to the tenability of the suit for the breach of the statutory requirement postulated by section 120 of the Major Port Trusts Act, 1963 and the said legal challenge goes to the root of the matter as well, it would be apposite to consider and determine issue Nos.4 and 5, initially.

19. The learned counsel for the defendant Nos.2 to 11 urged that the suit is barred by law of limitation as it has been instituted after six months of the alleged accrual of the cause of action and without giving the notice disclosing the cause of action statutorily prescribed thereunder. The failure to give notice renders the suit incompetent, urged the learned counsel for the defendant Nos. 2 to 11.

20. In order to appreciate these twin challenges which are nested in the provisions contained in section 120 of the Act, 1963, recourse to the said provision becomes imperative. It reads as under :

“Section 120 -- Limitation of proceedings in respect of things done under the Act.—No suit or other proceeding 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”.

21. A bare perusal of the aforesaid provision would indicate that it provides twin interdict against institution of suit or other proceedings against the Port Trust. On the one hand, a suit cannot be instituted without giving one month's notice in writing. On the other hand, the suit has to be instituted within a period of six months from the accrual of the cause of action. In the case at hand, the tender in question was floated and the contract was executed by the defendant No.2 in discharge of its functions as a Port Trust. The question which thus wrenches to the fore is whether the instant suit is untenable for want of notice, and also barred by law of limitation?

22. The learned counsel for the plaintiffs would urge that the aforesaid provision has no application to the facts of the instant case. As regards the period of limitation, Mr. Sameer Kolge, the

learned counsel for the plaintiffs would urge that the period of limitation would commence from the expiry of the period of contract, i.e., 30th July 2004. Since the suit was instituted on 18th July 2007, the suit is well within the period of limitation. On the aspect of the pre-suit notice contemplated by aforesaid section, it was submitted that a specific notice is not warranted by the said provision. An endeavour was made to draw home the point that in view of the lengthy correspondence exchanged between the plaintiffs and defendant No.2 and its officers/officials, it cannot be said that the defendant No.2 was unaware of the dispute and suffered any prejudice for want of notice under section 120 of the Act.

23. It would be contextually relevant to note that in para No. 64 of the plaint, the plaintiffs have averred that since the order was passed by this Court in above-named contempt petition on 10th February 2006 and the learned Magistrate had passed an order in a criminal complaint filed by the plaintiffs on 13th March 2006 reserving the liberty to the plaintiffs to seek damages, the cause of action can be said to have arisen to the plaintiffs on the strength of the aforesaid orders and thus the suit instituted by the plaintiffs on

18th July 2007 is within the statutory period of limitation. At the second breath, it was averred by the plaintiffs that the suit instituted on 18th July 2007, being within three years from the expiry of the tender period, i.e., 31st July 2004, it was not barred by law of limitation.

24. From the tenor of the averments in the plaint and the submissions canvassed across the bar, it becomes evident that the plaintiffs endeavoured to impress upon the Court that the period of limitation for seeking damages is three years and the time commences to run, firstly, from the dates of the order passed by this Court in contempt petition (10th February 2006) and the order passed by the learned Magistrate in the criminal complaint filed by the plaintiffs (13th March 2006) and, secondly, from the date of the expiry of the tender period (31st July 2004).

25. The learned counsel for the defendant Nos.2 to 11 submitted with tenacity that the claim of the plaintiffs that the period of limitation for claiming damages against defendant No.2 is three years from the accrual of cause of action is in teeth of the express provisions of section 120 of the Act, 1963, extracted above, which

prescribes a special period of limitation. In the backdrop of the provisions contained in section 29(2) read with section 3 of the Limitation Act, the Court is enjoined to dismiss a suit instituted against a Port Trust after six months of the accrual of the cause of action. Thus, according to the learned counsel for the defendant Nos.2 to 11, even if the case of the plaintiffs is taken at par, (though the said claim of accrual of cause of action is seriously contested by the defendant Nos.2 to 11), the suit is hopelessly barred by limitation.

26. In order to bolster up the aforesaid submission, the learned counsel for the defendants Nos. 2 to 11 placed a strong reliance on a judgment of the Supreme Court in the case of *V.M. Salgaocar & Bros. Vs. Board of Trustees of Port of Mormugao & Anr.*¹. In the said case, the suit instituted by the appellants (plaintiffs) challenging the levy of surcharge was dismissed by the District Court, South Goa on the ground that the same was not maintainable for want of notice under section 120 of the Act, 1963 and that it was barred by limitation. The Supreme Court, after

1 (2005) 4 SCC 613

considering the import of the provisions contained in section 120 of the Act, 1963, postulated that there are two requirements, namely, one, the suit has to be filed within six months of the accrual of the cause of action, and, two, it has to be preceded by one month's notice and both the requirements have to be read conjunctively and not alternatively. The observations of the Supreme Court in para Nos. 27 and 28 are instructive and are thus extracted below :

"27 The Major Port Trust Act, 1963 is a special Act and Section 120 of the said Act provides limitation of proceedings in respect to the things done under the Act. A perusal of this Section shows there are two requirements in the Section and both the requirements have to be read conjunctively and not alternatively. The suit has to be filed within six months of the accrual of the cause of action and it has to be preceded by one month notice. Admittedly, in the present case formal notice under Section 120 had not been issued. It was contended by the learned senior counsel that requirement of Section 120 of the Act would be satisfied if the plaintiff before filing the suit complies with one of the two requirements herein. This submission has been made on the basis that the word 'or' occurs between giving of the notice in writing and the filing of the suit after six months of the accrual of the cause of action. The Andhra Pradesh High Court in The Shipping Corporation of India Ltd. Vs. The Union of India and another [(1976) A.P. 261] has taken the view that the two requirements of the said Section have to be read conjunctively and not alternatively. That not only the suit has to be filed after the accrual of cause of action it has to be preceded by one month's notice given in the prescribed manner. The word 'or' employed between the two clauses in the Section if read

alternatively would defeat the very object and intention of the said provision and would lead to absurdity. We respectfully agree with the view expressed in the aforesaid judgment and endorse the same.

28 Even on facts we find that the letter dated 12.04.1984 cannot be treated as a notice under [Section 120](#) of the Act. The respondent Board by its letter dated 06.04.1984 had informed the appellant that the appellant has become eligible to receive the rebate of Rs.7,09,835/- @ Re.1/- per tonne for having turned over the plot allotted to it 6.39 times during the financial year 1983-84. In reply thereto, the appellant by their letter 12.04.1984 set out various arguments to justify the ground for full rebate and requested for the refund of the entire sum of Rs.62,46,584.10 paise. In reply thereto, the respondent Board by its letter dated 16.06.1984 declined the request of the appellant contained in its letter dated 12.04.1984. The appellant in para 30 of its plaint has stated that the illegal levy/refusal of rebate was made on 16.06.1984. Thus the cause of action arose to the appellant for the first time on 16.06.1984 and, therefore, the letter dated 12.04.1984 by no stretch of imagination can be said to be a notice under [Section 120](#) of the Act, which requires the cause of action to be set out in the said statutory notice. In the plaint there is no averment to the effect that the appellant had given the notice under [Section 120](#). Appellant in paragraph 31 has taken the stand that the appellant was not prevented by [Section 120](#) and [121](#) of the Act from filing the suit. If that be the case, then the letter dated 12.04.1984 cannot be treated as a notice under [Section 120](#) of the Act. Requirement of giving of notice under [Section 120](#) is mandatory and a pre condition to the filing of the suit, and since the suit was filed without giving the notice the same was not maintainable. The cause of action arose to the appellant on 16.06.1984 and the present suit was filed on 11.09.1986 which is

much beyond the period of six months provided for filing the suit. The suit is thus held to be not maintainable in the present form as well as barred by limitation.”

(emphasis supplied)

27. In the aforesaid case, the Supreme Court also considered the constitutionality of the aforesaid provision, which prescribes a very shorter period of limitation of six months, in the context of the challenge based on violation of Article 14 and 19 of the Constitution. Upholding the constitutionality of the said provision the Supreme Court held that a provision of the Act providing for a shorter period of limitation cannot be declared to be unconstitutional simply because in some of the Statutes a longer period of limitation has been prescribed for the redressal of the litigants grievances.

28. In the process, the Supreme Court expounded the rationale of the provision and the object it seeks to achieve. The observations of the Supreme Court in para Nos.34, 35 and 40 are of significance.

They read as under :

“34 The question of considering the rationale of Section 87 of Bombay Port Trust squarely arose in the said case as the contention was raised by the Additional Solicitor General

therein that if the argument of the respondent in the said case was accepted, it would amount to misreading the purpose of Section 87 of the Bombay Port Trust Act and similar provision in many statutes calculated to protect public officers and institutions on a special basis. (see paragraph 7 of the judgment). The Major Port Trusts Act, 1963 charges the port authorities with a well thought out duties and functions in respect of providing port facilities and equipment and providing services for receiving, landing and shipping of goods or passengers from and upon sea going vessels. As a result of these multifarious functions, major ports and their officers are faced and burdened with an explosive amount of litigation. The object of Section 120 is two fold, i.e. provision of giving one month's notice setting out the cause of action is to give the port authorities an opportunity to consider the merits of the case of the aggrieved party and make amends when possible to save litigation. To ensure that legal action against port authorities and its officers is initiated expeditiously when evidence is fresh and does not obliterate the probative material for honest defence.

35 The classification has a reasonable nexus to the object, it seeks to achieve. The submission made on behalf of the appellant that though a suit may be filed within six months, the trial of the suit could take place long after this and that the evidence would never be fresh at that stage is fallacious in as much as once the suit is filed against a party, the party is put on notice and will, therefore, gather the relevant documentary evidence when fresh and preserve such evidence for the trial whenever the same would take place.

.....

40 A provision of the Act providing for a shorter period of limitation cannot be declared to be unconstitutional simply because in some of the Statutes a longer period of limitation has been prescribed for the redressal of the litigants

grievances. The legislation enacted for the achievement of a particular object or purpose need not be all embracing. It is for the legislature to determine what categories it would embrace within the scope of legislation and merely because certain categories which would stand on the same footing as those covered by the legislature are left out would not render the legislation of any law being discriminatory and violative of the fundamental rights guaranteed under [Article 14](#) and [19\(1\)\(g\)](#) of the Constitution.”

(emphasis supplied)

29. A useful reference in this context can also be made to another judgment of this court in the case of *American President Lines Ltd. & Ors. Vs. The Board of Trustees of the Port of Bombay & Anr.*², wherein, these twin questions of the suit being not tenable for want of notice under section 120 of the Act, 1963 and it being barred by law of limitation were considered. This Court followed the pronouncement of the Supreme Court in the case of *V.M. Salgaocar & Bros.* (supra), and held that a suit instituted beyond the period of six months from the date of sale of the consignment by Port Trust for recovery of the ground rent and demurrage was barred by limitation. The observations of the Court in para Nos. 11, 13 and 14 are relevant and thus extracted below :

“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

² (2015) 4 Bom. C.R. 415

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.

.....

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.”

30. In view of the phraseology of section 120 of the Act, 1963 which prescribes a special period of limitation, for achieving the object that the Port Trust are not flooded with litigation and the legal action against the Port Authorities and its officers are initiated with an element of expedition so that Port Trust is in a position to effectively contest the proceedings when the evidence is fresh and

the time lag does not affect its defence, the suits and proceedings against the Port Trust are required to be instituted within the said period of limitation. Once it is conceded that, in view of the provisions contained in section 29(2) of the Limitation Act, the suit would be governed by the special period of limitation prescribed in section 120 of the Act, 1963, section 3 of the Act enjoins the Court to dismiss the suit instituted after the prescribed period of limitation.

31. In the case at hand, from the own showing of the plaintiffs, the suit is instituted much beyond the period of six months from the date of the accrual of the cause of action as claimed in the plaint. The suit was instituted beyond the period of six months not only from the order passed by this Court in contempt petition (10th February 2006) and the learned Magistrate (13th March 2006) but also the expiry of the period of contract (31st of July 2004). Even this claim of the plaintiffs of accrual of the cause of action is not free from infirmities. It is the claim of the plaintiffs that the plaintiffs were restrained from removal of fish waste from 1st September 2001 itself. Thus, the cause of action for the plaintiffs

to sue for a damages can be said to have arisen when the plaintiffs were allegedly restrained from executing the work under the contract. Even if the case of the plaintiffs is construed rather generously and it is assumed that the plaintiff could wait till the expiry of the period of contract (i.e. 31st July 2004) and then sue for damages, then also in view of the special period of limitation prescribed by section 120 of the Act, 1963, the suit is hopelessly barred by limitation.

32. As indicated above, section 120 of the Act, 1963, mandatorily provides for a pre-suit notice. It is not the claim of the plaintiffs that they had given a pre-suit notice within the meaning of section 120 of the Act, 1963, disclosing therein the cause of action. The averments in the plaint, on the contrary, indicate that the plaintiffs claimed that they had given a notice under section 80 of the Code of Civil Procedure on 28th June 2007 to defendant Nos.1 to 11. The learned counsel for the defendant Nos.2 to 11 was justified in canvassing a submission that the said pre-suit notice under section 80 of the Code dated 28th June 2007 was not placed on record and proved in evidence by the plaintiffs. Even otherwise, according to

the learned counsel for the defendant Nos. 2 to 11, the said notice is of no avail.

33. In opposition to this, the learned counsel for the plaintiffs attempted to salvage the position by advancing a submission that in the backdrop of the nature of the dispute between the parties and the exchange of lengthy correspondence, a specific notice under section 120 of the Act, 1963 was not required to be given. I find it rather difficult to accede to this submission. Indubitably, the plaintiffs had instituted suit, being Suit No. 2976 of 2002. The plaintiffs assert that the cause of action for the said suit was distinct from the cause of action for the instant suit. The plaintiffs had not sought damages in the said suit No. 2976 of 2002 which came to be withdrawn. This stand of the plaintiffs that the instant suit is based on a distinct cause of action does more harm than good to the case of the plaintiffs as regards the challenge based on absence of pre-suit notice, under section 120 of the Act, 1963. If the instant suit is based on a distinct cause of action, the plaintiffs were statutorily enjoined to give notice disclosing the cause of action so as to facilitate the defendant No.2 to make amends. As

the said notice is held to be mandatory, the non-compliance thereof is fatal to the tenability of the suit.

34. It would be contextually relevant to make reference to the observations of this Court in the case of *American President Lines Ltd. & Ors.* (supra), wherein distinction between the requirement of the notice under section 80 of the Code and section 120 of the Act, 1963 was pointed out. This Court had, *inter-alia*, held that requirement of notice under section 120 of the Act, is different from notice under section 80 of CPC. There is no power to dispense with notice under section 120 of the Act, 1963 unlike the notice under section 80 of the Code. Thus, there can be no deemed notice under section 120 of the Act, 1963. Nor the notice can be given after the expiry of period of limitation.

35. The following observations of this Court in the case of *American President Lines Ltd. & Ors.* (supra) are of material significance. They read as under :

“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 7 S.3609/2003 & 3610/2003(1)-judgment 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 8 S.3609/2003 & 3610/2003(1)-judgment 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.”

36. In view of the aforesaid enunciation of the legal position, the submission on behalf of the plaintiffs that, in the facts of the case, in view of the previous proceedings and the correspondence between the parties, pre-suit notice under section 120 of the Act, 1963 was not necessary, does not deserve countenance. The submission based on the premise of deemed notice thus deserves to be repelled.

37. The conspectus of the aforesaid consideration is that the suit is barred by law of limitation and untenable as well for want of notice under section 120 of the Act, 1963. Hence, I am persuaded to answer issue Nos.4 and 5 in the affirmative.

Issue No.6

38. The defendant Nos. 2 to 11 have raised the ground of mis-

joinder of parties and causes of action. The defendant No.2, as impleaded, is not the statutory body incorporated under the Major Port Trusts Act, 1963 but the correct name of the 2nd defendant is the Board of Trustees of the Port of Mumbai. In addition, the defendants contend that the defendant Nos. 3 to 11 have been improperly impleaded as the party defendants to the suit. It is true that the plaintiffs, despite the aforesaid stand of the defendant Nos.2 to 11, especially as regards the correct name of defendant No.2, have not taken any pains to amend the cause-title of the plaint. The impleadment of the defendant Nos.3 to 11 in their official capacity, as projected by the plaintiffs, may not be strictly warranted for the determination of the real question in controversy between the parties. However, this mis-joinder of parties, even if assumed to be established, does not render the suit untenable. In view of provisions contained in Order I Rule 9 of the Code, mere mis-joinder does not defeat a suit and the Court is competent to adjudicate the matter in controversy between the parties, who have a real contest. Thus, without delving more on this aspect, I am persuaded to answer issue No.6 in the negative.

Issue No. 7

39. Mr. Makhija, the learned counsel for the defendant Nos.2 to 11 urged with a degree of vehemence that the instant suit is an abuse of the process of Court. The plaintiffs having withdrawn Suit No. 2976 of 2002 unconditionally and without leave of the Court to institute a fresh suit in respect of the same cause of action, could not have instituted the instant suit, urged Mr.Makhija. Inviting the attention of the Court to the notice dated 28th June 2002 which was issued prior to the institution of the previous suit, wherein the plaintiffs had claimed that if the plaintiffs were restrained from removing and transporting fish waste, they would be constrained to adopt suitable legal proceedings against the defendants and also claim damages, it was urged that the instant suit is based on the very same cause of action on the strength of which the previous suit was instituted. Thus, according to Mr.Makhija, the interdict contained in Order XXIII Rule 1(4) of the Code comes into play with full force. Resultantly, the suit is untenable.

40. To lend support to this submission, the learned counsel for the defendant Nos.2 to 11 placed reliance on a judgment of the Supreme Court in the case of *Bakhtawar Singh & Anr. Vs. Sada*

Kaur & Anr. ³. In the facts of the said case, the Supreme Court was confronted with the question as to whether the plaintiffs/appellants were permitted to withdraw the suit in accordance with the provisions contained in Order XXIII, of Rule 1(3) of the Code and whether, in the facts and circumstances of the said case, the plaintiffs/appellants were entitled for exclusion of time under section 14 of the Limitation Act. Answering the question in the negative, the Supreme Court concluded that no case for fresh institution of the suit on the same cause of action and for the same relief, after the withdrawal of the earlier suit, was made out by the plaintiffs/appellants, in accordance with the provisions of sub-rule (3), Rule 1 of Order XXIII of the Code.

41. With respect, the aforesaid pronouncement does not govern the facts of the instant case. In the said case, the Court had permitted the plaintiffs to withdraw the suit with liberty to institute a fresh suit on the same subject matter. The justifiability of the said order was considered by the Supreme Court. In the case at hand, indubitably, the previous suit was withdrawn on 1st March 2006 unconditionally. It is not the claim of the plaintiffs that they

3 (1996) 11 Supreme Court Cases 167

had sought for and obtained leave to institute a fresh suit on the same subject matter.

42. Under sub-rule (3) of Rule 1 of Order XXIII, the Court may permit a plaintiff to withdraw from a suit or part of the claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of the claim, if the Court is satisfied that the suit must fail by reason of some formal defect or there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of the said suit or part of the claim. Sub-rule (4), in the aforesaid backdrop, provides that when the plaintiff abandons any suit or part of claim under sub-rule (1) or withdraws from the suit, without permission, referred to in sub-rule (3), the plaintiff shall be precluded from instituting a fresh suit in respect of such subject matter.

43. The linchpin of the aforesaid provision, which precludes the institution of a fresh suit, is “subject matter”. If the subsequent suit is not in respect of the very same subject matter as that of the previous suit, then the embargo contained in sub-rule (4) does not

operate. The expression “subject matter” does not, however, mean the “suit property”. The expression subsumes in its fold cause of action and relief claimed. Unless the cause of action and the relief claimed in the second suit are the same as in the first suit, it cannot be said that the subject matter of the second suit is the same as that in the previous suit. Neither the mere identity of the property nor mere identity of some of the issues in the two suits does bring about an identity of the subject-matter in the two suits.

44. The aforesaid position was illuminatingly postulated by the Supreme Court in the case of *Vallabh Das Vs. Dr. Madan Lal & Ors.*⁴. The observations of the Court in para No. 5 are material. They read as under :

“5. Rule 1, Order 23, Code of Civil Procedure entitles Courts to permit a plaintiff to withdraw from the suit brought by him with liberty to institute a fresh suit in respect of the subject-matter of that suit on such terms as it thinks fit. The term imposed on the plaintiff in the previous suit was that before bringing a fresh suit on the same cause of action, he must pay the costs of the defendants. Therefore we have to see whether that condition governs the institution of the present suit. For deciding that question we have to see whether the suit from which this appeal arises is in respect of the same subject-matter that was in litigation in the previous suit. The expression “subject-matter” is

4 (1970) 1 SCC 761

not defined in the Civil Procedure Code. It does not mean property. That expression has a reference to a right in the property which the plaintiff seeks to enforce. That expression includes the cause of action and the relief claimed. Unless the cause of action and the relief claimed in the second suit are the same as in the first suit, it cannot be said that the subject-matter of the second suit is the same as that in the previous suit. Now coming to the case before us in the first suit Dr. Madan Lal was seeking to enforce his right to partition and separate possession. In the present suit he seeks to get possession of the suit properties from a trespasser on the basis of his title. In the first suit the cause of action was the division of the status between Dr. Madan Lal and his adoptive father and the relief claimed was the conversion of joint possession into separate possession. In the present suit the plaintiff is seeking possession of the suit properties from a trespasser. In the first case his cause of action arose on the day he got separated from his family. In the present suit the cause of action, namely, the series of transactions which formed the basis of his title to the suit properties, arose on the death of his adoptive father and mother. It is true that both in the previous suit as well as in the present suit the factum and validity of adoption of Dr. Madan Lal came up for decision. But that adoption was not the cause of action in the first nor is it the cause of action in the present suit. It was merely an antecedent event which conferred certain rights on him. Merely identity of some of the issues in the two suits do not bring about an identity of the subject-matter in the two suits. As observed in *Rukma Bai v. Mahadeo Narayan*, ILR 42 Bom 155= (AIR 1917 Bom 10 (1)) the expression “subject-matter” in Order 23, Rule 1, Code of Civil Procedure means the series of acts or transactions alleged to exist giving rise to the relief claimed. In other words “subject-matter” means the bundle of facts which have to be proved in order to entitle the plaintiff to the relief claimed by him. We accept as correct the observations of Wallis, C. J., in *Singa Reddi v. Subba Reddi*, ILR 39 Mad 987=

(AIR 1918 Mad 512 (2)) (FB) that where the cause of action and the relief claimed in the second suit are not the same as the cause of action and the relief claimed in the second suit are not the same as the cause of action and the relief claimed in the first suit, the second suit cannot be considered to have been brought in respect of the same subject matter as the first suit.”

45. Reverting to the facts of the case, it would suffice to note that apart from the contention in the written statement that the instant suit is barred by the provisions contained in Order XXIII of the Code as the previous suit was withdrawn unconditionally and without leave to institute a fresh suit in respect of the same cause of action, no endeavour was made on behalf of the defendant Nos. 2 to 11 to substantiate the said contention. The defendant Nos. 2 to 11 could have placed the copy of the plaint in the previous suit on the record of the Court and demonstrated that the instant suit is indeed in respect of the very same subject matter. No effort was made to draw home the point that the cause of action in the previous suit is the same as in the instant suit. Admittedly, in the previous suit, the plaintiffs had not sought damages and the said suit was instituted for declaration and injunctive reliefs. For want of efforts on the part of the defendant Nos. 2 to 11, on whom the onus to establish the applicability of the interdict contained in

Order XXIII, by placing relevant material on record, lay, the Court is not equipped to conclusively determine the said issue. Hence, I am persuaded to answer issue No.7 against the defendant Nos. 2 to 11.

Issue Nos. 1 to 3 :

46. This propels me to the contentious issues rooted in facts. At the hub of the controversy is the scope of the work awarded to the plaintiffs under the terms of the contract in pursuance of Tender Notice No. 36 of 2001. The learned counsel for the plaintiffs would urge that the plaintiffs have laid voluminous evidence to substantiate their claim that the defendant Nos.12 to 23 unlawfully restrained the plaintiffs from collecting the fish waste, offals mixed with refuse etc. in accordance with the contract. In contrast, none of the contesting defendants have led any evidence in the rebuttal. As the claim of the plaintiffs has, in a sense, gone unimpeached, according to the learned counsel for the plaintiffs, the issue Nos.1 and 2 are required to be answered in the affirmative.

47. Per contra, the learned counsel for the defendant Nos.2 to 11 would submit that the claim of the plaintiffs is unworthy of

acceptance if weighed in the light of the evidence led by the plaintiffs themselves. In this view of the matter, the fact that the defendants have not led any evidence is of no consequence. From the documents relied upon by the plaintiffs, it becomes abundantly clear that the plaintiffs claim of having been awarded the contract to remove the fish waste from the precincts of Sassoon Dock is far from truth. To add to this, the plaintiff No.2- Mr. Devendra Atmaram Naik (P.W. No.1) has conceded in the cross examination that the contract was restricted to removal of the waste dumped in the dustbins and the surrounding area. Thus, the plaintiffs have failed to establish that they were entitled to remove the waste from the precincts of Sassoon Dock and, once such inference is drawn, the edifice of the plaintiffs' case gets dismantled, urged the learned counsel for the defendant Nos.2 to 11.

48. The pivotal question that wrenches to the fore is the exact scope of work awarded to the plaintiffs under the contract in pursuance of tender notice No. 36 of 2001. Recourse to the documentary evidence, especially the tender notice and the conditions of contract annexed thereto becomes imperative. The

tender notice No. 36 /2001 issued by defendant No.2 (Exh.'B')

indicates the scope of work as under :

“Loading, transporting and taking away the fish and other seafood waste, offals mixed with associated refuse from the fish waste dustbins at Sassoon Dock to anywhere outside the M.B.P.T. premises in closed container, Motor Lorries having the water proof metallic container body made up of Steel/G.I. Sheets/aluminum plates on day-to-day basis, including Sundays and holidays, and according to the requirements starting from 08.00 a.m. to late in night, till the dustbins are completely cleared at the end of the day.”

49. The period of contract was three years, commencing from 1st August 2001 to 31st July 2004. The estimated cost indicated therein was Rs.33,48,000/-.

50. The object of contract is indicated in clause 5 of the tender notice.

It reads as under :

“Clause 5 : The main object of the contract is to maintain a high degree of cleanliness at Sassoon Dock, Colaba on day basis work to be carried out comprises briefly as follows :-

Removal of fish and other seafood waste etc.

Removal of fish and other seafood waste, offals etc. Dumped in or around the dustbins at Sassoon Dock in, “PURPOSE BUILT CLOSED CONTAINER”, motor lorries daily and regular intervals every day including loading and unloading and transporting the waste anywhere outside B.P.T. area.....”.

51. In the general conditions of contract under clause (2), the nature of work was again spelled out as under :

“the nature of work is to remove anywhere outside the M.B.P.T. area, the fish and other seafood waste, offals etc. Which are dumped in and around the dustbins daily including Sundays and holidays at regular intervals in ‘PURPOSE BUILT’ closed containers, motor lorries.....”

52. Under the special conditions of contract, it was stipulated that under the said contract, “fish and other seafood waste, offals associated Kachara etc. which are dumped in and around the dustbins at Sassoon Dock are to be removed in ‘PURPOSE BUILT’ closed containers motor lorries.”.

53. Under clause 5 of the special conditions of contract, the point at which the property in the waste material passes to the contractor was specifically addressed. It reads as under :

“DISPOSAL OF FISH AND OTHER SEAFOOD WASTE :

The fish and other seafood waste dumped into the dustbin and/or loaded into the lorry will be contractors property after it is moved away from the Port Trust estate and he is free to make further use of it or dispose it off in any manner subject to compliance with local/ State/ Central Government Rules/Bye-laws/Legislation.”

54. If the aforesaid clauses of the contract document, are read in

juxtaposition with each other, it becomes evident that there was no ambiguity about the scope of work. The nature of work was indicated in the tender notice under the caption of ‘schedule of quantities and rate’. It was specifically provided that the removal of the fish waste was to be from the dustbins at Sassoon Dock. In the last line of the schedule, it was provided that the contractor was to remove the waste till the dustbins were completely cleared at the end of the day. Clause 5 of the tender notice extracted above, again underscore the fact that the waste which was dumped in or around the dustbins was to be removed. The general conditions and special conditions of contract make it abundantly clear that the scope of work was to remove the fish waste dumped in and around the dustbins.

55. Faced with the aforesaid description of the scope of work in the contract document, the learned counsel for the plaintiffs attempted to wriggle out of the situation by canvassing a submission that though the contract document specifies the place from where the fish waste was to be removed yet the object of the contract cannot be lost sight of. The contract work was entrusted

with the object of removing fish and other seafood waste from the premises of the Sassoon Dock so as to maintain cleanliness and high standard of hygiene. The parties understood that the contract was for the purpose of the removal of fish waste from the entire precincts of the Sassoon Dock. The plaintiffs were thus entitled to remove the fish waste from the entire premises of Sassoon Dock though a particular place was provided in the aforesaid contract document.

56. The controversy as regards the place/area from where the plaintiffs were to collect the fish waste has its genesis in the purpose to which the fish waste could be put to. This aspect has to be considered through the prism of the abysmally low bid submitted by the plaintiffs. As indicated above, the estimated cost of the work was approximately Rs.33,48,000/-. This amount was estimated to be paid by the defendant No.2 to the contractor for removal of the fish waste from the dustbins in the Sassoon Dock. The plaintiffs submitted a bid of Rs.1,17,855/-. The bid worked out to 96.47% below the tender price. On being called upon to offer justification, the plaintiffs vide letter dated 18th July 2001 (Exh.'C')

claimed that it was possible to generate profit, despite such lowest quote, as the fish waste was used for manufacturing poultry feed. It thus becomes evident that the primary consideration for the plaintiffs for executing the said contract was not the remuneration to be paid by the defendant No.2 but the profit which the plaintiffs would generate by disposing of the fish waste in the market.

57. If the aforesaid backdrop is kept in view, then the insistence of the plaintiffs for the larger catchment area to collect the fish waste becomes crystal clear. In contrast, the contesting defendants contend that the contract awarded to the plaintiffs was restricted to the removal of waste from the dustbins and the members of defendant No.19 Association were entitled to dispose of the fish waste generated at their godown.

58. Having noted the genesis of the dispute, it would be now apposite to consider the submission on behalf of the plaintiffs that the parties understood and intended that the contract was for removal of fish waste from the entire precincts of the Sassoon Dock.

59. At the outset, it is necessary to note that when the plaintiffs had raised the grievances that they were being restrained from removing the fish waste from the premises of Sassoon Dock by letters dated 1st September 2001 (Exh.'H') and 10th September 2001 (Exh.'I'), simultaneously, there appeared to be a counter-grievance at the instance of M/s.Sunrise Sea Foods –defendant No.20, against the plaintiffs. The Chief Security Officer of the defendant No.2, vide communication dated 11th September 2011 Exh.'K' informed the defendant No.20 that the contract given to the plaintiffs was for removal of fish waste from the dustbins only and the contractor was not permitted to forcibly remove or acquire the fish parts (head) as waste material from any of the registered godowns in the Sassoon Dock complex. These exchange of communications in the wake of the controversy lead to an inference that immediately after the commencement of the contract, there was a dispute about the scope of the work entrusted to the plaintiffs under the terms of the contract.

60. The manner in which Mr. Devendra Atmaram Naik

(P.W.No.1) fared in the cross examination provides legitimate answers to many a questions which bear upon the aforesaid controversy. Mr.Devendra Atmaram Naik (P.W.No.1) was candid enough to concede, in the cross examination, that the contract was to remove and transport fish waste from dustbins and its surroundings. Mr.Devendra Atmaram Naik (P.W.No.1) endeavoured to extricate from the consequence of the aforesaid answer by asserting that the contract was to take 2 to 5 trucks of fish waste, in off-season, and 4 to 7 trucks of waste, in peak season. To a pointed question, as to whether the plaintiffs were to collect fish waste, offals etc. from the dustbins and the area surrounding the dustbins or from anywhere else, Mr. Devendra Naik (P.W.No.1) replied that the waste was to be collected from the dustbins and its surrounding area only. He went on to add that they were to fill 7 lorries per day. However, Mr.Devendra Atmaram Naik (P.W.No.1) went on to admit in no uncertain terms that the plaintiffs were only entitled to remove fish waste which was actually deposited in the dustbins and its surrounding. It was further elicited in the cross examination of Mr.Naik (P.W.No.1) that fish waste was also segregated in the godowns of the suppliers and those suppliers were not bound to put such fish waste and seafood waste into the

dustbins and its surroundings, at Sassoon Dock.

61. The aforesaid admissions indicate that the plaintiffs were aware and understood that the contract was for removal of the fish waste which was deposited in and around the dustbins. Conversely, the suppliers who peeled the fish in their godowns also removed the waste which apparently had monetary value in the market. The claim of the plaintiffs that the plaintiffs were entitled to remove the fish waste which was generated anywhere within the precincts of Sassoon Dock is thus negated not only by the terms of the contract but the aforesaid clear and explicit admissions.

62. An endeavour was made on behalf of the plaintiffs to draw home the point that the terms of the contract provided that the quantity of the waste per day would be 2 to 5 lorry loads, during off-season, and 4 to 7 lorry loads, during peak season. This, according to the plaintiffs, implied that the contractor would be able to collect and transport the aforesaid quantity of fish waste. The basis of this claim appears to be in the special conditions of the contract wherein it was indicated that, on an average, the

aforesaid quantity of fish waste is generated in off-season and peak season, respectively.

63. It is imperative to note that there is a disclaimer added in the immediate succeeding line. It provides that :

“The tenderer should however satisfy themselves as regards the quantity of fish waste dumped in the dustbins and to be removed every day from the dustbins and the figure was only indicative and the trustees did not accept any liability whatsoever in this regard for variation in the quantity of material available for removal whatsoever.”

64. The aforesaid indicative quantity of the waste material to be collected and transported out of Sassoon Dock was, as expressly mentioned, for the purpose of giving an indication of the resources to be employed by the contractor for execution of the said work. To urge that the said approximation of quantity of waste, constituted an assurance of the quantity of waste material which the contractor would be able to collect is simply preposterous. It would be contextually relevant to note that Mr.Devendra Atmaram Naik (P.W.No.1) conceded in unequivocal terms that the defendant No.2 did not undertake or assure the plaintiffs of any particular quantity. He went on to further admit

that there was no stipulation in the contract as to what would happen if there was no fish waste to fill in 2 to 5 lorry loads (off season) and 4 to 7 lorry loads (peak season).

65. The aforesaid admissions erode the claim of the plaintiffs that under the terms of the contract, they were entitled to carry seven lorry loads of fish waste. This inference is of critical significance as the claim for damages is based on the premise that the plaintiffs were entitled to carry seven lorry loads of waste every day and that would have fetched an income of Rs.5,25,000/- per day.

66. Did the defendant Nos. 2 to 11 restrain the plaintiffs from removing the waste from the dustbins? Mr.Devendra Atmaram Naik (P.W.No.1) admitted that there was only one dustbin in the Sassoon Dock. He went on to concede that the defendant No.2 did not prevent the plaintiffs from removing fish waste which was deposited in dustbins and its surrounding areas, during the contract period. Though Mr. Devendra Atmaram Naik (P.W.No.1) further admitted that the plaintiffs were allowed to take whatever fish

waste was deposited in the dustbins and its surrounding area, during the contract period, yet, he endeavoured to wriggle out of the situation by affirming that the defendant Nos.12 to 23 removed the said fish waste.

67. The aforesaid admissions lead to an inescapable inference that, at no point of time, the defendant Nos.2 to 11 restrained the plaintiffs from removing the waste which was dumped in and around the dustbins. The real dispute was not over removal of the waste dumped in the dustbins. The controversy was about the claim of the plaintiffs to fish waste generated, and disposed of, at the godowns where the fish was peeled. Was there any obligation upon the members of defendant No.19 to deposit the fish waste in the dustbin? This question is required to be considered from two perspectives. One, from the point of view of the defendant No.2 –Port Trust. Two, from the perspective of the members of defendant No.19-Association. For defendant No.2, the object was to ensure that the waste is properly removed and disposed of from the precincts of the defendant No.2 so as to maintain cleanliness and hygiene. For the members of defendant

No.19, the fish waste generated in the godowns, after peeling the fish, was of monetary value. Unless there was obligation upon the members of defendant No.19 to dump the fish waste, which was generated in the godowns as well, in the dustbins, the plaintiffs could not lay claim over the waste, which was generated in the godowns.

68. For an answer, again recourse to the cross-examination of Mr. Devendra Atmaram Naik (P.W.No.1) becomes inevitable. It was brought out in the cross examination of Mr.Devendra Atmaram Naik (P.W.No.1) that, at no point of time, the plaintiffs raised grievance with the defendant No.2 that the members of defendant No.19-Association were not depositing the waste in dustbins and its surrounding areas at Sassoon Dock. Mr.Devendra Atmaram Naik (P.W.No.1) admitted with candour that under the contract which was entered into between the plaintiffs and defendant No.2, no obligation was cast upon the members of defendant No.19 to put seafood waste, offal etc. into dustbins and its surrounding areas at Sassoon Dock. It was further elicited that the members of defendant No.19 were not bound to put fish waste and seafood waste into the

dustbins.

69. In the backdrop of the aforesaid admissions, it becomes abundantly clear that the members of the defendant No.19 – Association were not enjoined, under the terms of the contract or otherwise, to dump the fish waste in the dustbins. The reason is not far to seek. The fish waste had monetary value. The members of the defendant No.19 – Association claimed that they had a legitimate right to dispose of the fish waste which was generated after peeling the fish in their respective godowns.

70. It is not the case that the plaintiffs were unaware of the said interest of the members of defendant No.19 in the fish waste. It was brought out in the cross-examination of Mr.Devendra Atmaram Naik (P.W.No.1) that he worked as a sub-contractor with defendant Nos.12 to 23 for removing the fish waste from the premises of Sassoon Dock from 1995-96 till August 2001. The plaintiffs were thus aware of the business dynamics and the value which the fish waste commanded.

71. In the totality of the circumstances, it becomes evident that the genesis of the dispute was in the plaintiffs claim to collect the fish waste from the area beyond the dustbin and its surrounding. There was no corresponding obligation on the members of defendant No.19 to deposit the fish waste in the dustbins and forego the right to the waste generated in their respective godowns. Resultantly, in the face of the documentary and oral evidence adverted to above, I am afraid to accede to the claim of the plaintiffs that under the terms of the contract, they were entitled to remove the fish waste from the entire precincts of the Sassoon Dock. The scope of work was restricted to removal of fish waste from the dustbin and its surrounding areas.

72. The learned counsel for the plaintiffs lastly urged that the order passed by this Court in the previous suit and contempt petition, wherein the defendant Nos. 12 to 23 had tendered unconditional apology established beyond the pale of controversy that the defendant Nos. 12 to 23 had prevented the plaintiffs from collecting the fish waste.

73. The aforesaid submission is required to be appreciated in the

backdrop of the fact that the first ad-interim order dated 16th September 2020 in Notice of Motion No. 2462 of 2002 was restricted to the dustbin and its surrounding areas, as it excluded the portion bracketed in red (*from the premises of Sassoon Dock at Colaba, Mumbai including*) from prayer clause (b). On 1st October 2003, the notice of motion was made absolute in terms of prayer clause (b) as the defendants did not file any reply. The Court noted that it was submitted on behalf of the plaintiffs that the plaintiffs were given the right to remove the fish waste from the entire area of Sassoon Dock. Thus the motion was made absolute in terms of prayer clause (b), in its entirety. In Contempt Petition No. 22 of 2004, the Court noted the aforesaid developments and after recording the unconditional apology of defendant Nos.12 to 23, the contempt petition was disposed of. It was further noted that so far as defendant Nos. 2 to 11, there was no contempt.

74. The order passed by this Court, wherein the defendant Nos. 12 to 23 were held to be in contempt and the contempt petition came to be disposed of on the basis of unconditional apology, in my view, cannot be considered shorn of context. It is trite that the parties are bound to obey the orders passed by the

Court irrespective of the correctness or otherwise of the orders. Thus, though by order dated 1st October 2002, the notice of motion was made absolute in terms of prayer clause (b), which covered the entire precincts of Sassoon Dock, beyond the area for which the contract was awarded to the plaintiffs, the defendants were bound to obey the said order passed by the Court until it was varied and/or set aside. From this standpoint, the unconditional apology tendered by the defendant Nos. 12 to 23 cannot be pressed into service to bolster up the case that the plaintiffs had the right to collect the waste from an area beyond the dustbins and its surroundings, especially when the plaintiffs have failed to establish the said fact at the trial.

Issue No.3 :

75. For the foregoing reasons, I am inclined to answer issue Nos.1 and 2 in the negative. In view of negative findings on issue Nos. 1 and 2, the claim of the plaintiffs for damages becomes unsustainable. Even otherwise, as indicated above, the claim for damages is on the assumption that the plaintiffs were entitled to collect and transport seven lorry loads of fish waste per day, which was found to be without any evidence to rest on. The measure of

damages claimed by the plaintiffs is the profits which the plaintiffs could have generated by selling the fish waste in the market. In the context of the facts which emerge, the case set up by the plaintiffs was of rags to riches, literally and figuratively. For the said purpose, the plaintiffs professed to expand the cashment area and collect fish waste, to which they were not entitled to, by using the contract as a medium for generating huge profit. The terms of the contract, however, do not support this entrepreneurial adventure. Issue No.3 is, therefore, required to be answered in the negative.

76. The upshot of the aforesaid discussion and the findings on issue Nos. 1 to 7 is that the plaintiffs are not entitled to recover damages from the defendants. Resultantly, the suit deserves to be dismissed.

77. Hence, the following order :

O R D E R

- (i) The suit stands dismissed with costs.
- (ii) Decree be drawn accordingly.

(N. J. JAMADAR, J.)