

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

ADMIRALTY SUIT NO.31 OF 2015

The Board of Trustees of the Port of Mumbai, a)
body corporate constituted under the provisions)
of the Major Port Trust Act, 1963 as amended by)
the provisions of the Major Port Trusts)
Amendment Act, 1974 and having their office at)
Vijay Deep, Shoorji Vallabhdas Marg, Ballard)
Estate, Fort, Mumbai – 400 001)Plaintiff

V/s.

1. M.V. JAI JULELAL, an Indian-flat vessel)
presently lying at Port and harbour of Bombay)
alongwith her hull, gear, tackle, engines,)
machinery, bunkers, apparel, furniture, fixtures)
and all other appurtenances and Paraphernalia)
within the territorial waters of India and within)
the Admiralty Jurisdiction of this Hon'ble Court)
2. Jaisu Dredging and Shipping Limited, a)
Limited Company incorporated under the)
Companies Act, 1956 and carrying on business)
at 7 Maitri Society Uadipur, Kachch – 370 205,)
Gujarat)
3. M/s. Jaisu Shipping Company Pvt. Ltd.)
having their Head Office at Kewalramani House,)
Dinshaw Building Road, Kandla Port, Gujarat)
and also carrying on business at 401, Maradia)
Plaza, 4th Floor, Gandhi Business Centre, C.G.)
Road, Ahmedabad – 380 006, Gujarat)Defendants
4. M/s. Amrut Dredging & Shipping Limited)
having office at 8, Pavan Chambers, M.G. Road,)
Gondal – 360 311, Gujarat through Director)
Mr. Paresh C. Doshi)Defendants

Mr. Ajai Fernandes a/w. Ms. Sneha B. Pandey i/b. Motiwala and Company
for plaintiff.

Mr. Shailesh Kumar for defendant nos.1 and 4.

**CORAM : K.R.SHRIRAM, J.
DATED : 4th FEBRUARY 2021**

ORAL JUDGMENT :

1 One Advocate B.S. Nayak has sent an email on 3rd February 2021 seeking an adjournment. Mr. Nayak had entered appearance for defendant nos.2 and 3. In the said email, Mr. Nayak also stated that he has not been receiving instructions. Adjournment refused.

2 This suit originally came to be lodged on 15th April 2015 against defendant nos.1, 2 and 3 and plaintiff was claiming a sum of Rs.1,32,296/-. This amount of Rs.1,32,296/- was in two parts, i.e., Rs.9008/- as explained in paragraph 5 of the plaint and Rs.1,23,288/- as explained in paragraph 6 of the plaint.

3 On an application made by defendant no.4 on the ground that they had purchased defendant no.1 vessel before the suit was filed or an order of arrest was passed by this Court, defendant no.4 came to be added pursuant to an order passed by this Court on 26th October 2015. On 26th October 2015, plaintiff was also allowed to amend the plaint to add prayer clause – (c) (i) also corresponding to paragraph 10 of the plaint. Under prayer clause – (c) (i), plaintiff is claiming Rs.773/- per month from 1st April 2015 till defendant no.1 vessel is removed from the Port and harbour of Mumbai together with interest thereon at 16.25% p.a.

4 Plaintiff is the Board of Trustees of the Port of Mumbai. Defendant no.1 was a vessel flying Indian flag and was registered at the Port of Navlakhi, India and on the date the suit was lodged was within the Port

and harbour of Mumbai. Defendant no.2 was the owner of defendant no.1 vessel and some of the documents indicate that defendant no.3 was the owner of the vessel. It is not clear from the plaint who really was the owner of the vessel. Mr. Fernandes, however, clarifies that defendant no.2 actually was the owner of the vessel and the sale deed relied upon by defendant no.4 is between defendant no.2 as owner and defendant no.4 as buyer.

5 As averred in the plaint, some time in February 2008, plaintiff had invited a composite tender for execution of Capital Dredging for a proposed Offshore Container Terminal and Filling of the Existing Prince's and Victoria Docks by Sand Dredging, i.e., OCT Project. The work was awarded to defendant no.2 on 1st April 2009. For executing the work under the project, defendant no.3, which was also a group company of defendant no.2, brought 31 vessels including defendant no.1 vessel, dredgers, tugs, launches, hopper barges etc. However, the work could not be completed and plaintiff terminated the contract. Strangely, the averment in paragraph 4 (a) of the plaint is that the contract for OCT project was awarded to defendant no.2 but in paragraph 4 (b) it is averred that defendant no.3 was unable to complete the work within the stipulated time and therefore, the aforesaid contract with defendant no.3 was terminated with effect from 27th June 2013. Even the evidence has been led on this basis. I have to note that in paragraph 15 of the written statement filed on behalf of defendant nos.1 to 3, those defendants have expressly denied the contents of paragraph 4 (b)

as under :

“15. However the defendants deny the contentions of the paragraph 4 (b) and demands strict proof of the said contentions”.

According to plaintiff, plaintiff was entitled to recover a sum of Rs.9088/- towards port dues/pilotage dues/anchorage dues in respect of defendant no.1 vessel (paragraph 5 of the plaint), (b) Rs.1,23,288/- towards interest on berth hire dues in respect of defendant no.1 vessel (paragraph 6 of the plaint) and (c) Rs.773/- per month towards water conveyance and port dues (inclusive of service tax) of defendant no.1 vessel from 1st April 2015 till defendant no.1 vessel is removed from the port and harbour of Mumbai (paragraph 10 of the plaint). Plaintiff's case is it has a maritime lien on defendant no.1 vessel. Plaintiff being a Port, in my view, has a maritime lien.

6 Written statement was filed on behalf of defendant nos.1, 2 and 3 and defendant no.4 chose not to file any written statement. At the same time, defendant no.4 was permitted to cross examine plaintiff's witnesses.

The issues were framed on 22nd September 2015 as under :

1.Heard the learned Advocates for the parties and by consent, the following issues are framed in the above Suit :

(i)Whether the Suit filed by the Plaintiff is bad in law, malafide, misconceived and non maintainable as contended by the Defendants in para 3 of its Written Statement?

(ii)Whether the Defendant No.3 had completed the OCT Project as contended in para 7 of its Written Statement?

(iii)Whether the Plaintiff has terminated the Dredging Contract with the Defendant No.2 as contended by them in para 4 of the

Plaint?

(iv) Whether the Plaintiff is entitled to recover from the Defendants a sum of Rs.1,32,296/- together with interest thereon @ of 16.25% p.a. on the sum of Rs.1,17,714/- from the date of the Suit till payment and/or realization?

(v) What Order and Decree?

(vi) What costs?

There is no issue framed for prayer clause – (c) (i). Therefore, even at this stage I will add an additional issue for prayer clause – (c) (i), i.e. :

(iv) (a) Whether plaintiff proves that it was entitled to a sum of Rs.773/- per month towards water conveyance and port dues (inclusive of service tax) from 1st April 2015 till defendant no.1 vessel is removed from the Port and harbour of Mumbai together with interest thereon at 16.25% p.a.?

7 As regards issue nos.1 (i) and 1 (ii), the onus was on defendant no.3 or defendant nos.1 to 3 to prove the same. None of the defendants led any evidence. Therefore, these two issues have to be answered in negative.

8 Answering issue no.1 (iii) whether plaintiff has terminated the dredging contract with defendant no.2 as contended by them, in paragraph 4 of the plaint, plaintiff has not contended that they terminated the contract with defendant no.2 but they have terminated the contract with defendant no.3. Mr. Fernandes relies on Exhibit P-1/5 to prove termination and also submits that none of the defendants have cross examined the witnesses or challenged the witnesses with regard to this document. The document at Exhibit P-1/5 is addressed to defendant no.3 and not defendant no.2. There

is not even an averment in the plaint that plaintiff had entered into an agreement with defendant no.3. The plaint says the contract was awarded to defendant no.2 and it was defendant no.2 who arranged through defendant no.3 to bring the vessels for executing the contract. Therefore, the issue as framed has not been proved by plaintiff. Therefore, I have to answer this issue in negative.

At the same time, even if I re-frame the issue to say whether plaintiff proves that plaintiff has terminated the dredging contract with defendant no.3 as contended by them in paragraph 4 (b) of the plaint, then certainly the answer will be in affirmative relying on Exhibit P-1/5. But according to plaint the contract was entered with defendant no.2. Therefore, the plaint does not narrate the correct facts and the evidence of PW-1, who has basically reproduced the contents of the plaint in examination in chief, also does not give the correct facts.

9 As regards issue no.1 (iv), whether plaintiff is entitled to recover from defendants a sum of Rs.1,32,296/- together with interest at 16.25% p.a. on Rs.1,17,714/- from the date of the suit until payment/realisation, this amount of Rs.1,32,296/- comprises of Rs.9088/- + Rs.1,23,288/- as mentioned in paragraphs 5 and 6, respectively of the plaint.

As regards the claim for Rs.9088/- mentioned in paragraph 5 of the plaint, Mr. Shailesh Kumar in fairness states that considering the

evidence of PW-1 read with the averments in paragraph 3 of the evidence of PW-4, the answer of PW-4 to question no.37 in his cross examination and Exhibit P-1/6 and Exhibit P-1/7, the Court may allow the claim for Rs.9088/-.

As regards the claim for Rs.1,23,288/- mentioned in paragraph 6 of the plaint, plaintiff is relying on two invoices being bill no.DKV/1401444/D dated 1st December 2014 for Rs.21,920/- and DKV/1407485/D dated 31st July 2014 for Rs.1,01,368/-. Mr. Fernandes states that these two invoices have not even been produced in evidence at all, let alone received and exhibited. Instead plaintiff in the evidence of PW-1 and PW-4 to prove this claim has relied upon a totally different invoice being Bill No.DKV/1112842-1 dated 22nd February 2016 for total amount of Rs.1,00,553/- (Exhibit P-1/9). This bill, Mr. Fernandes says, does not form part of the plaint and has been prepared after the suit was filed. Nothing prevented plaintiff from seeking leave to amend the plaint. Mr. Fernandes relies upon a judgment of the Full Bench of this Court in ***Sicom Ltd. V/s. Prashant S. Tanna And Ors.***¹ to submit that plaintiff has reduced its claim and a plaintiff can always reduce its claim and therefore, need not amend the plaint. In my view, this judgment is not applicable to the facts and circumstances of this case in as much as, the Full Bench was considering whether the suit would be maintainable as a summary suit if it falls within one of the classes of suits enumerated in Order XXXVII, Rule 1(2) even if the

1. AIR 2004 Bom. 186

claim made therein is not properly quantified or is in excess of what the plaintiff is entitled to. In that case, one of the contentions raised by the defendants was that there was no contract to pay interest and that the rate at which interest was claimed was excessive and not in accordance with the contract. The Court held that the plaintiff is entitled at any time to abandon or give-up a part of the claim unilaterally and the plaintiff may do so by making a statement to be recorded by the Court and without the necessity of the plaintiff making a formal application for the same by withdrawing the summons for judgment, amending the plaint and thereafter, taking out a fresh summons for judgment or otherwise. The counsel for plaintiff, therefore, sought orally to give up a part of the claim which was not within the contract and the Court said the plaintiff would still be entitled to go ahead with the application for summons for judgment by making a statement to be recorded by the Court that he is dropping a part of the claim. In the case at hand, (a) no such statement was ever made to the Court earlier and (b) it is not plaintiff's case that they are relying on the two bills mentioned in paragraph 6 of the plaint but claiming a lesser amount than mentioned in those bills. Plaintiff has not produced anywhere those two bills mentioned in paragraph 6 of the plaint but has relied on a totally new document in the evidence. It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the

party in support of the case set up by it. In the circumstances, the invoice at Exhibit P-1/9, which does not even form part of the plaint, cannot be looked into. In my view, the claim as per the averments made in paragraph 6 of the plaint for Rs.1,23,288/- or the reduced amount of Rs.1,00,553/-, therefore, cannot be granted.

10 As regards newly added issue no.1 (iv) (a), the water conveyance and port dues amount of Rs.773/- per month from 1st April 2015 till defendant no.1 vessel is removed from the port and harbour of Mumbai, defendants have not cross examined plaintiff's witnesses on this claim. Mr. Fernandes states that this amount will be payable till 10th May 2019 because that is the date on which the vessel was taken out after defendant no.4 furnished security.

11 In the circumstances, plaintiff will be entitled to the following amounts :

(a) Rs.9088/- together with interest thereon at 16.25% p.a. from the date of the suit until payment/realisation.

(b) Rs.773/- per month from 1st April 2015 till 10th May 2019 (4 years 1 month and 10 days) amounting to Rs.38,131/- together with interest thereon at 16.25% p.a. from the date of the suit till payment/realisation.

12 Mr. Shailesh Kumar states that defendant no.4 has secured plaintiff's claim by giving security of Rs.50 lakhs, in the form of Bank Guarantee for Rs.25 lakhs in favour of Prothonotary and Senior Master, High Court, Bombay and a cash deposit of Rs.25 lakhs with plaintiff.

Mr. Fernandes agrees. Mr. Shailesh Kumar states that the decretal amount in this suit can be adjusted from the amount deposited with the Port Trust. To the extent the security given by defendant no.4 has earned interest on these two amounts mentioned in paragraph 10 above, credit will certainly be given to defendants from the decretal amount.

13 Suit accordingly stands disposed with no order as to costs.
Drawn up decree dispensed with.

(K.R. SHRIRAM, J.)

Gauri A.
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by Gauri A.
Gaekwad
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