

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

ADMIRALTY SUIT NO.36 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. Kamal XV, 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)
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 Plaintiff is the Board of Trustees of the Port of Mumbai. Plaintiff had issued a work order dated 1st April 2009 to defendant no.3 for carrying out Capital Dredging for the proposed Offshore Container Terminal and Filling of the Existing Prince's and Victoria Docks by Sand Dredging, i.e., OCT Project. For the purpose of executing the work under the Project, defendant no.3 brought 31 vessels including defendant no.1 vessel, dredgers, tugs, launches, hopper barges etc. As defendant no.3 was unable to complete the work within the stipulated time, the contract with defendant no.3 was terminated with effect from 27th June 2013. Plaintiff had claimed against defendant nos.1, 2 and 3 three amounts, viz., (a) Rs.33,643/- towards port dues/pilotage dues/anchorage dues in respect of defendant no.1 vessel (paragraph 5 of the plaint), (b) Rs.98,163/- towards berth hire dues and interest in respect of defendant no.1 vessel (paragraph 6 of the plaint) and (c) Rs.2061/- 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. Plaintiff has also claimed interest at the rate of 16.25% p.a. which is the rate

provided in the Schedule of Rates published by the Mumbai Port Trust as approved by Tariff Authority Major Ports. Defendant no.4 had filed an application to be joined as defendant since it had purchased defendant no.1 vessel before the suit was filed. That application was allowed and pursuant to an order dated 26th October 2015, plaintiff was permitted to amend the plaint to include defendant no.4. Plaintiff also amended the plaint to add prayer clause – (c) (i) which corresponds to 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.

Defendant nos.1, 2 and 3 have filed written statement. Defendant no.4 has not filed written statement. Defendant no.4, however, cross examined plaintiff's witnesses.

3 Issues were settled 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 not 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.3 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.1,31,806/- together with interest thereon @ of 16.25% p.a. on the sum of Rs.1,16,619/- 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.?

4 Mr. Fernandes states that in issue no.1 (iii) it should be defendant no.3 and not defendant no.2. I agree with Mr. Fernandes and the issue quoted above has been accordingly corrected.

5 To prove its case, plaintiff led evidence of five witnesses, viz., Captain Manoj Joshi (PW-1), Mrs. S.N. Sarode (PW-2), Mr. Arumugan Perumal (PW-3), Mr. Kapil Bakshi (PW-4) and Mr. Hemant Rama More (PW-5). Defendants did not lead any evidence.

6 For issue nos.1 (i) and 1 (ii), the onus was on defendants to prove the same. Defendants not having led evidence, these issues have to be answered in negative.

As regards issue no.1 (iii) termination of contract by plaintiff, defendant nos.1 to 3 have denied the contents in paragraph 4 (b) of the plaint, the termination. Plaintiff through PW-1 has produced the termination notice dated 27th June 2013 which is at Exhibit P-1/6. None of the defendants have challenged this document or asked any question in cross examination to PW-1. Therefore, I will answer this issue in affirmative.

7 As regards issue no.1 (iv), i.e., whether the plaintiff is entitled to recover from the defendants a sum of Rs.1,31,806/- together with interest thereon at 16.25% p.a. on the sum of Rs.1,16,619/- from the date of the suit till payment and/or realization, my findings are as under :

As regards Rs.33,643/- claimed in paragraph 5 of the plaint, it comprises of two bills, one for Rs.10,971/- and another for Rs.22,672/-. The invoice for Rs.10,971/- is at Exhibit P-1/7. Counsel for defendant no.4 in his cross examination has confronted plaintiff's witnesses by alleging that this bill is barred by limitation. Exhibit P-1/7 is dated 17th February 2012 and it provides for interest at 16.25% p.a. from the date of the invoice if the same is not paid on or before 26th February 2012 and plaintiff has claimed interest based on this invoice. The plaint has been lodged on 15th April 2015. Therefore, in my view, the claim under this bill is barred by limitation. Mr. Fernandes submits that the cause of action arose only on the date when the contract with defendant no.3 was terminated on 27th June 2013 as stated in paragraph 21 of the plaint. I cannot agree with Mr. Fernandes because (i) the bill itself says that it was payable on 26th February 2012 and the interest has also been calculated from the due date itself. Even in the evidence of PW-5, interest has been calculated not from the date of termination of the contract but from the date of the invoice. In the circumstances, plaintiff's claim to the extent of Rs.10,971/- for bill no.7973 has to be rejected as barred by limitation.

The invoice no.832 for Rs.22,672/- (Exhibit P-1/8) and the eight invoices mentioned in paragraph 6 of the plaint (Exhibit P-1/12 to Exhibit P-1/19, respectively), in my view, plaintiff has proved the claim. Plaintiff has relied on the evidence of PW-1 and PW-5. In his cross examination, PW-1 for explanation sought has said that accounts personnel will be able to answer. Therefore, plaintiff led evidence of PW-5. In the cross examination of PW-5, Mr. Shailesh Kumar has proceeded on the basis that there is no proof that these bills were served upon defendant no.3. First of all Mr. Shailesh Kumar was not concerned for defendant no.3. Secondly the counsel for defendant no.3 in his cross examination has not challenged the witness to prove that these bills were delivered to defendant no.3. Moreover, PW-5, in response to question no.12 by Mr. Shailesh Kumar, has stated *“However, if required the despatch record can be produced to establish service of the bill upon defendant nos.1 and 3 or its Agent”*. Mr. Shailesh Kumar did not call upon the witness to produce those despatch records and the only inference that can be drawn for Mr. Shailesh Kumar not calling upon the witness to produce the despatch records is that, if produced, it will be prejudicial to the interest of Mr. Shailesh Kumar’s client or it may show that the bills have been served upon defendant nos.1 and 3 or its Agent. Moreover, PW-5, in his examination in chief, in paragraph 3 has stated as under :

“3. I have personally re-checked the calculation made in the said bills. I have to further state that these bills are audited. I hereby tender certified true copies of the relevant pages of the SORs (effective from

2006 & 2011) approved by TAMP in respect of the Port Dues and Pilotage Dues which has been marked as Exhibit P-1/1- and P-1/11.....”

These positive averments of PW-5 have not been challenged in the cross examination.

8 As regards issue no.1 (iv) (a), water conveyance charges, PW-5, in his examination in chief, has stated that it is as per Section 2.11 read with Note No.4 to Section 2.15 of the Schedule of Rates (Exhibit P-1/11). No question is asked challenging this claim.

In the circumstances, not only the bill no.832 mentioned in paragraph 5 of the plaint or the eight bills mentioned in paragraph 6 of the plaint but also the claim in paragraph 10 of the plaint relating to prayer clause – (c) (i) has been proved by plaintiff.

9 In the evidence of PW-1 and PW-5, I have to mention plaintiff has inserted another document being Exhibit P-1/9 claiming a further sum of Rs.14,638/- being bill no.DN-3613 dated 29th October 2015. This bill is not part of the plaint. Even if the bill has been raised subsequent to filing of the plaint, nothing prevented plaintiff from applying to the Court for leave to amend the plaint, which plaintiff has not done. 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. As this bill is not

part of the claim in the plaint, the Court cannot grant this amount of Rs.14,638/-.

10 Accordingly, for claim made in prayer clause – (c) of the plaint, suit is decreed in the sum of Rs.1,20,835/- together with interest at 16.25% p.a. on Rs.1,09,342/- from the date of the suit until payment/realisation.

11 Plaintiff is also entitled to, as per prayer clause – (c) (i), Rs.2061/- per month from 1st April 2015 till 10th February 2017, which is the date on which first defendant vessel sailed. The date of sailing is not disputed by Mr. Shailesh Kumar but what Mr. Shailesh Kumar submits is that this amount was paid. Mr. Fernandes disagrees and states that defendant no.4 only secured plaintiff's claim but did not make the payment. I would clarify that if defendant no.4 has paid this amount, it may seek rebate for the amount paid from the decretal amount.

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, the 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.
Gaekwad

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signed by
Gauri A.
Gaekwad
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