

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

ADMIRALTY SUIT NO. 36 OF 2007

Crown Maritime Co. (I) Ltd.,
a company incorporated under the
Laws of India and having its
registered office at B-3201, 32nd Floor,
Gokul Concorde, Thakur Village,
Kandivali (E), Mumbai – 400 101.
Represented by the Official Liquidator
attached to the Bombay High Court

...Plaintiff

Versus

1. Barge “Salina II”, Vessel flying the
Indian Flag together with her hull,
gear, tackles, machinery, apparel,
furniture, equipments, and all and
other paraphernalia, presently lying
in the Port and Harbour of Mumbai,
within the territorial waters of India
and within the Admiralty Jurisdiction
of this Hon’ble Court.

...Defendant No.1

2. Sadhana Technical Works Pvt. Ltd.
is a company incorporated under the
laws of India and having its registered
office at 401/2/3, 4th Floor, Rex Chambers,
Walchand Hirachand Marg, Fort,
Mumbai – 400 001.

...Defendant No.2

Ms. Shweta Sadanandan i/b Mr. Ashwin Shanker for Plaintiff (In
Liquidation).

Mr. Manoj Khatri for Defendants.

CORAM : K.R.SHRIRAM, J.

DATED : 18th FEBRUARY 2021.

ORAL JUDGMENT :

1. This is a suit filed by plaintiff claiming a sum of Rs.98,23,397/-

as per Particulars of Claim at Exhibit A, which reads as under :

Exhibit A

Particulars of Claim

1. *Rs.98,23,397.00 (Rupees Ninety Eight Lakhs Twenty Three Thousand Three Hundred And Ninety Seven Only), payable to the Plaintiff, by the Defendant's, under the said "TOWCON" Agreement, dated 31-07-2007, towards the following :*

*a. Demurrage, payable @ : Rs.96,00,000/-
Rs.3,00,000/- (Per Day),
from 03-08-2007, until filing
of the said Complaint, aggregating
to.*

b. Anchorage charges. : Rs.9,860/-

c. Light Dues. : Rs.352/-

d. Port Dues : Rs.36,685/-

*e. Accommodation for the : Rs.51,000/-
Defendant No.2's staff.*

*f. Food for the Defendant : Rs.25,500/-
No.2's staff*

*g. Damages caused by the : Rs.1,00,000/-
Defendant No.1, to the
Plaintiff's vessel.*

*GRAND TOTAL : Rs.98,23,397.00
(Rupees Ninety Eight Lakhs
Twenty Three Thousand
Three Hundred And Ninety
Seven Only)*

2. *Plus further interest @ 15% p.a. on the sum of Rs.98,23,397.00 (Rupees Ninety Eight Lakhs Twenty Three Thousand Three Hundred And Ninety Seven Only) from the date of filing of the suit till payment and/or realisation ;*

3. *PLUS COSTS.*

2. As regards items (b) to (g) there is no evidence. No submissions were also made. Plaintiff's counsel's arguments were restricted to item (a).

3. It is plaintiff's case that plaintiff had entered into a "TOWCON" Charter Party dated 31st July 2007 with defendant no.2 whereby plaintiff agreed to tow defendant no.1 Barge Salina II, a dumb barge, from Mumbai to the Port of Kakinanda for a lumpsum payment of Rs.79,00,000/-. Plaintiff was to use one of its tug M.V. Crown – 1 to tow defendant no.1. Plaintiff has relied upon the following clauses in support of its claim :

Clause 32 (Part I) : Lump sum towage price (also state when each installment due and payable) (cl.2)

Clause 27 (Part I) : Free Time at Place of Destination (Cl.2 (g) 24 hrs.)

Clause 39 (Part I) : Number of additional clauses, covering special provisions if agreed. (All Port dues, other statutory charges and demurrage @ Rs.3,00,000/- per day on Hirer's account)

Price and Conditions of Payment Clause – 2 (c), 2 (f) and 2 (g) (Part III)

2(c) The Lump Sum and all other sums payable to the Tugowner under this Agreement shall be payable without any discount, deduction set-off, lien, claim or counter-claim, each installment of the Lump-sum shall be fully and irrevocably earned at the moment it is due as set out in Box, 32. Tug and/or Tow lost or not lost and all other sums shall be fully and irrevocably earned on a daily basis.

2(f) Any delay payment due under this Agreement shall be paid to the Tugowner as and when earned on presentation of the Invoice.

2(g) The Free Time specified in Boxes 26 and 27 shall be allowed for the connecting and disconnecting of the Tow and all other purposes relating thereto. Free Time shall commence when the Tug arrives at the pilot station at the place of departure or anchors or arrives at the usual waiting area off such places. Should the Free Time be exceeded, Delay Payment(s) at the rate specified in Box 29 shall be payable until the Tug and Tow sail from the place of departure or the Tug is free to leave the place of destination.

Permits and Ceritification – Clause 11 (Part II)

(a) The Hirer shall arrange at his own cost and provide to the Tug owner all necessary licenses, authorizations and permits required by the Tug and Tow to undertake and complete the contractual voyage together with all necessary certification for the Tow to enter or leave all or any ports of call or refuge on the contemplated

voyage.

(b) Any loss or expenses incurred by the Tugowner by reason of the Hirer's failure to comply with this Clause shall be reimbursed by the Hirer to the Tugowner and during any delay caused thereby the Tugowner shall receive additional compensation from the Hirer at the Tug's Delay Payment rate specified in Box 29.

4. According to plaintiff, the tow line had been connected on 1st August 2007 when the 24 hours free time as per Clause No. 2(g) of the Charter Party commenced, the free time got over on 2nd August 2007 and therefore, Tug Crown I went on demurrage as per box 39 of the Charter Party at Rs.3,00,000/- per day commenced. According to plaintiff the delay was solely attributable to delay on the part of defendant no.2 in obtaining necessary permission. It is plaintiff's case that in terms of Clause No.11 of Part II of the Charter Party, defendant no.2 being hirer shall be required to arrange at its own cost and provide to plaintiff all necessary permissions required by the Tug and Tow to undertake and complete the contractual voyage. The permission was required to be obtained from Mercantile Marine Department, Mumbai for certifying the Tug and Tow as seaworthy and the sailing permission was to be obtained from the office of the Directorate General of Shipping (DGS). According to plaintiff, relying upon Clause No.11 as quoted above, the permission of Mercantile Marine Department (MMD) and later of DGS was to be applied and obtained by defendant no.2. Plaintiff state that they have validated all necessary certificates and approvals required to ply in the territorial waters of India. Ms. Sadanandan submitted since defendant failed to obtain the necessary permission, as DGS

was not giving permission in view of the prevailing weather conditions, the entire contract had to be abandoned. Plaintiff is claiming demurrage of Rs.3,00,000/- per day from 3rd August, 2007 until filing of the plaint. It is not clear when the two line was disconnected but plaintiff is claiming Rs.3,00,000/- per day upto the date of the suit. There is no explanation why it was payable upto the date of the suit.

5. Admittedly, in accordance with the contract defendant no.2 had given advance of Rs.40,00,000/- to plaintiff. Defendant had filed a counter suit which came to be dismissed for default. Mr. Khatri said as plaintiff had gone into liquidation, defendants decided not to apply for restoration of the counter suit.

6. By letter dated 22nd August, 2007, DGS rejected Mercantile Marine Department's recommendations to grant necessary towage permission and asked them to put forth the request upon the monsoon receding. Upon receiving the said letter, plaintiff by its letter dated 23rd August, 2007 (Exh.P-1/13) requested defendant no.2 to disconnect defendant no.1 vessel from the Tug and move first defendant vessel to safer anchorage until towing was permitted. None of the counsel were able to state the date when the Tow was disconnected from the Tug. There were communications exchanged between plaintiff and defendant no.2 making allegations and counter allegations. The suit came to be lodged thereafter on 3rd September 2007.

7. Plaintiff obtained on 3rd September 2007 an order of arrest of defendant no.1 vessel and security was furnished by defendant no.2 for release of defendant no.1. In the counter suit defendant no.2 had arrested plaintiff's vessel Crown I and plaintiff had furnished security for release of Crown I.

8. By Consent Terms which were filed on 5th May, 2009 the order of arrest dated 3rd September, 2007 was unconditionally vacated and set aside and the security furnished for release of defendant no.1 was ordered to be returned to advocate for defendants.

9. Defendant No.2 has filed written statement for itself and for defendant no.1, and broadly, the defence taken are ;

a. This court does not have jurisdiction. [Mr. Khatri stated he was not pressing this];

b. Plaintiff's Tow was unfit and unseaworthy for towage as MMD surveyor pointed out various deficiencies in plaintiff's tug;

c. Frustration of contract because the Directorate General of Shipping declined to grant permission.

10. Issues were framed on 11th August, 2017 as under :

1) Whether this Court has jurisdiction to entertain and try the present suit in view of the exclusive jurisdiction clause in the Towage Contract Agreement entered into by both the parties?

2) Whether plaintiff proves that the vessel Crown I was

fit and seaworthy to undertake the towage of the defendant Barge Salina II between 1st August, 2007 and 9th August, 2007 as per the Towage Agreement?

3) Whether defendants prove that plaintiff had undertaken to obtain necessary permissions and approvals?

4) Whether defendants prove that the Towage Agreement was frustrated on account of lack of necessary permission/ approval from the Statutory Authorities and therefore the contract between the parties stands void?

5) Whether plaintiff proves that they are entitled to claim for demurrage from defendant?

6) If the answer to issue no.5 is in the affirmative, whether plaintiff is entitled to a decree against defendants jointly and/or severally for the sum of Rs.98,23,397/- together with interest thereon at 15% p.a. from the date of the suit until payment/realisation?

7) What decree? What order?

11. In view of Mr. Khatri's statement that he is not challenging the jurisdiction, Issue No.1 has to be answered in the affirmative.

12. Plaintiff and defendants filed their respective affidavit of documents and compilations. Plaintiff filed evidence of two witnesses, one Samuel Bobby and Sujathan Kottapuram, but relied only on evidence of Sujathan Kottapuram who was also the only witness made available to be cross-examined. Defendants led evidence of one Kishore Gambani who was cross-examined by plaintiff.

13. I have heard the counsels and also considered the pleadings, evidence and documents in the matter. Ms. Sadanandan in fairness admitted

that obligation to apply for permission to Mercantile Marine Department, Mumbai was on plaintiff by simply filing the requisite applications. Ms. Sadanandan hastened to add to ensure that the authorities are mollified and permission was granted was on defendant no.2. Defendant stated that plaintiff took it upon themselves to apply and obtain necessary permissions and if plaintiff failed to obtain these permissions, defendant cannot be held liable. On this issue questions were also asked in cross-examination by plaintiff's counsel to defendant's witness Mr. Kishore Gambhani. Question No.7, 8, 9, 10, 11, 13, 14, 15, 18, 19, 20, 21, 22 and 23 and the answers thereto are pertinent and read as under :-

Q.7. According to you were there any mutually agreed amendments made to the subject Charter Party ?

Ans. We have not made any written amendments to this Charter Party but, we have verbally agreed that Plaintiff will take the necessary towage permission from the respective authorities for this particular towage.

Q.8. Is there any clause provided under the subject Charter Party for written/verbal amendment? If yes, can you identify ?

Ans. As mentioned earlier, the clauses can be amended mutually and same can be attached to this contract as additional clauses. This is as per Box No.39 of the Charter Party Agreement.

Q.9. I put it to you that there is no clause provided under the subject Charter Party for written/verbal amendment?

Ans. I disagree. As earlier mentioned even verbally we can agree to amend the clauses.

Q.10. Would it be correct to say that the subject Charter Party is used widely in the towage industry?

Ans. Yes.

Q.11. *Would it be correct to say that generally the Tug hirer obtains the necessary authorisations from the MMD from undertaking a Tow voyage?*

Ans. It depends on the agreed terms. The general practice is that the Tug Owner who is going to tow the Barge takes the necessary approvals from MMD/DG Shipping.

Q.13. *Was an MMD surveyor appointed to inspect Tug and Tow for issuance of towing certificates?*

Ans. Yes, it was arranged by Tug owner.

Q.14. *Would it be correct to say that under the prevailing MMD rules the formal application is required to be made by the Tug Owner?*

Ans. Yes.

Q.15. *Can you point out from the proceedings, that a MMD surveyor was required to be arranged by the Tug Owner in the present case?*

Ans. There is nothing on record to show. But, it was verbally agreed and that is how the tug Owner had made applications to MMD for approval of towage.

Q.18. *What documents relied upon by the Plaintiff made it evident that it was the Plaintiff who had applied for the permission of the towage?*

Ans. In document marked as Exhibit P-1/13, it states that Plaintiff has approached MMD for towing permission. Also the documents at Exhibit P-1/3 and P-1/12 also shows the same.

Q.19. *What is the basis of your belief that the Plaintiff was to obtain the necessary licenses, authorisations and permits required by the Tug and Tow to undertake the voyage?*

Ans. The application of towage to the MMD was made by Plaintiff that is the basis of my belief.

Q.20. *Would it be correct to say that there is no clause in the Charter Party Contract to suggest that parties can vary the terms by their conduct?*

Ans. No, it is incorrect. There is a box 39 in the Charter Party where we can put additional clauses. In this particular Charter

Party we have not put any additional clauses but verbally we had agreed that the towage approval from respective authorities will be obtained by the tug owner.

Q.21. Who was the person orally communicating this information from the Defendant No.2's side and who was communicated to?

Ans. I was communicating with Capt. Suresh Kumar of the Plaintiff.

Q.22. When was this information communicated?

Ans. I do not remember the exact date, but it was during the final negotiations of Charter Party.

Q.23. Have you made a reference to this "oral agreement" in your Written Statement?

Ans. Yes. It is at Page No.37 of the Written Statement, para 3, under the title "Frustration of Contract" particularly sub-para (a). The reference is extracted below :

"The Performance of the said TOWCON Agreement was dependent upon necessary permission/approvals from the Statutory Authority. It is the Plaintiff who undertook the responsibility of getting necessary permission/approval and in furtherance applied to MMD for towing permission."

14. In my view, reading the questions asked and the answers thereto and the statement made by Ms. Sadanandan as recorded earlier, even though printed clause no.11 provided for the hirer (defendant) to arrange for necessary licenses, authorisation and permits required by the Tug and Tow to undertake and complete contractual voyage, plaintiff, the Tug owner, had assumed based on the understanding between the parties, the responsibility to apply for and obtain all necessary licenses, authorisation and permits. To a specific question by plaintiff in the cross-examination, D.W. 1 states that it was verbally agreed with Captain Suresh

Kumar of plaintiff. Plaintiff could have got Captain Suresh Kumar to give rebuttal evidence to the answers given by D.W. 1, but plaintiff chose not to do so. Therefore, considering the questions and answers as noted above, parties had orally agreed that it will be plaintiff who shall apply for and obtain all necessary licenses, authorisation and permits required by the Tug and Tow to undertake and complete the contractual voyage. The obligation was on plaintiff to obtain the necessary licenses, authorisation and permits. Defendant cannot be blamed for DGS not accepting the recommendation of MMD to grant the licenses or authorisation or permits for the voyage.

15. In any event, these licenses and authorisation were given by Mercantile Marine Department on 16th August, 2007 (Exh.B-1/13) but Directorate General of Shipping refused permission for the tug and tow to take the voyage in view of the foul season.

16. Now let us consider, whether, if the permits or authorisations were available, the Tug and Tow could have made the contractual voyage ?

Clause No.13 of Part II of the Charter Party provides for seaworthiness of the Tug and it reads as under :

Clause 13 Seaworthiness of the Tug

The Tugowner will exercise due diligence to tender the Tug at the place of departure in a seaworthy condition and in all respects ready to perform the towage, but the Tugowner gives no other warranties, express or implied.

Plaintiff has relied upon Exh.P-1/9 and P-1/12 which of course have also been relied upon by defendants at Exh. D-8 and Exh. D-11. P-1/9 is a hand written document.

Ms. Sadanandan and Mr. Khatri state that Exh.P-1/9 has been hand written and issued by the Mercantile Marine Department surveyor. It will be useful to reproduce the said letter which reads as under :

U/signed boarded m.v. Crown-I at on 9/8/2007 for towage permission for from Mumbai to Kakinada. Following deficiencies observed. Same need to be rectified before towage permission can be recommended to DGS.

1. Steering Gear System of Crown-I is not functioning properly. On hand steering when held to any side is given to say Port or stbd 10 degrees suddenly shows hard (25 deg) Port or stbd.

2. Navigational charts for the intended voyage to Kakinada are not corrected up to date.

3. Passage Planning for the voyage is not ready.

4. Mr. V. Victor Chief Officer of the V/L is of more than 65 years of age (DOB 20.04.1942). No age dispensation has been sought for him.

5. In FSI Report dated 6/6/07 four numbers of deficiencies were given code 17 are still not closed/rectified.

6. 7 Nos. of officers/crew Articles of agreement have not been opened.

7. Boarding facility is not provided on the side of the tow.

8. Tow does not have 0.8% of the length trim by stern.

9. V/L (Tow) Stability Booklet and General Arrangement Plan has only one crane fitted where as tow is fitted with additional 3 Nos. containers on deck as cargo/equipment. Strength of the fastenings of crane not calculated.

10. V/L to rectify deficiencies before departure

Sd/-

Item 1 to 6 above admittedly pertain to the defects on the tug Crown I which was owned by plaintiff. In fact, plaintiff in its letter dated

13th August, 2007 addressed to Mercantile Marine Department (Exh.P-1/12) has admitted the deficiencies of the Tug as noted in Exh.P-1/9 and state that these deficiencies have been rectified. Therefore, (a) plaintiff was in breach of Clause 13, Part II, of the Charter Party and (b) the deficiencies on the Tug were rectified and Mercantile Marine Department was informed only on 13th August, 2007.

17. Of course, there were some deficiencies on the Tow also as noted at Sr. No.7, 8 and 9 of Exh.P-1/9. But by 13th August, 2007 as per plaintiff's case in Exh.P-1/12 even these deficiencies in the tow have been rectified. Therefore, plaintiff cannot blame defendant alone for non performance. Mercantile Marine Department recommended by its letter dated 16th August 2007 (Exh.P-1/13) to DGS for grant of towing permission which admittedly was not granted in view of foul season. At the same time what has to be noted is it was not rejected but MMD was advised to apply again after monsoon receded (Exh. P-1/17).

In the circumstances, plaintiff cannot place the blame at the doors of defendant no.2.

18. Mr. Khatri for defendants submitted that in view of the admitted position that the Directorate General of Shipping refused to grant permission for the voyage (Exh. P-1/7), the contract became void. Mr. Khatri relied on Section 56 of the Indian Contract Act, 1872 which read as under ;

56. Agreement to do impossible act.—An agreement to do an act

impossible in itself is void.

Contract to do act afterwards becoming impossible or unlawful. A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful.—Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

19. Mr. Khatri states that in view of the refusal of the permission by DGS the act to be performed under the contract, after the contract was made, became impossible by reason of the permission being refused by DGS. Therefore, the contract had become void. As illustration Mr. Khatri submits that A contracts to take in cargo for B at a foreign port. A's Government afterwards declares war against the country in which the port is situated. The contract becomes void if war is declared.

20. Mr. Khatri submits, assuming without admitting, that it was defendant's responsibility to arrange and provide necessary licenses, authorisation and permits required by the tug and tow to undertake and complete the contractual voyage, DGS even on a recommendation made by the Mercantile Marine Department refused the permission in view of the foul season. Therefore, it became impossible to obtain permission required by the tug and tow for the voyage and hence contract had become void.

21. Ms. Sadanandan submitted in response to this argument by Mr. Khatri that the agreement was terminated by plaintiff under Clause

No.16 of the Charter Party which gave option to plaintiff to withdraw from the agreement if there was a delay on the day of departure exceeding 21 running days.

22. Even for a moment if I agree with the submissions of Ms. Sadanandan that plaintiff was entitled to rely on Clause 16 to withdraw the vessel, document Exh.P-1/17, which is a communication from DGS to Mercantile Marine Department, would indicate that the contract was not impossible of performance. Exh.P-1/17 shows that the permission required has been denied keeping in view of the monsoon conditions prevailing and MMD was advised to place the matter for consideration in case required, once the monsoon receded. Therefore, in my opinion, the contract had not become frustrated or void as submitted by Mr. Khatri.

23. One thing is certain that plaintiff is equally to be blamed for the delay as the plaintiff, as noted earlier, did not make the tug available in a seaworthy condition.

24. Ms. Sadanandan submits that plaintiff's obligation was only to exercise due diligence to tender the tug in a seaworthy condition. But the admitted fact is the tug was not so tendered and plaintiff had not exercised due diligence as could be seen from Exh.P-1/9 read with Exh.P-1/12 which was plaintiff's communication to Mercantile Marine Department.

I need to add Ms. Sadanandan wanted to rely on Exh.P-1/19 but later said she was not relying on the document as it was illegible and plaintiff did not have a readable copy.

25. In the circumstances, plaintiff is not entitled to any damages as claimed. Therefore, Issue Nos.2, 3, 4, 5 and 6 are answered as under :

Issue No.2 : Negative

Issue No.3 : Affirmative

Issue No.4 : Negative

Issue No.5 : Negative

Issue No.6 : Negative

Issue No.7 : Suit dismissed. No order as to costs.

(K.R. SHRIRAM, J.)