Amrut

IN THE HIGH COURT OF BOMBAY AT GOA

COMMERCIAL APPEAL NO.1 OF 2021
WITH
CROSS OBJECTIONS NO. 1166 OF 2021 (Filing No.)
IN
COMMERCIAL APPEAL NO.1 OF 2021

M/s. Bagadiya Brothers Pvt. Ltd.,
A Company incorporated under the Companies
Act 1956 having their office at Bagadia Mansion,
Ground Floor, Jawahar Nagar,
Raipur, Chattisgarh – 492001
(Through its Authorized Chief Executive Officer)
Mr. Sunil Patni S/o Pannalal Patni. … Appellant

Versus

1 Mormugao Port Authority
(Formerly known as Mormugao Port Trust),
a body constituted under the Major Port
Authorities Act, 2021 having its office at
Headland Sada, Goa.

2 M/s. MSPL Limited,
A Company incorporated under the Companies
Act, 1956 and having their office at B-S/5,
Campal Trade Centre, Campal,
Panaji Goa 403 001. …Respondents

Mr S. G. Desai, Senior Advocate with Mr Tejas Rane, Advocate for the Appellant.
Mr Yogesh Nadkarni and Ms D. Shirgam, Advocates for Respondent No.1.
Mr Nitin Sardessai, Senior Advocate with Mr Vivek Rodrigues, Advocate for Respondent No.2.

CORAM: M. S. SONAK &
BHARAT P. DESHPANDE,JJ

RESERVED ON: 23rd JANUARY 2023
PRONOUNCED ON: 25th JANUARY 2023

JUDGMENT : (Per M. S. Sonak, J)

1. Heard the learned counsel for the parties.

2. This commercial appeal and the cross objections therein concern the judgment and decree dated 22.11.2019 made by the learned Commercial Court in Special Civil Suit (COML.) No. 7/2017. By this judgment and decree, the learned Commercial Court has dismissed the suit and the counterclaims filed therein. Therefore, defendant No.2 has instituted Commercial Appeal No.1/2021, challenging the dismissal of its counterclaim.

3. In addition, the original plaintiff, formerly known as Mormugao Port Trust and now known as Mormugao Port Authority (MPA), has filed cross objections, questioning the dismissal of its suit. The original defendant No.1 had also filed a counterclaim in the suit, which was dismissed by the impugned judgment and decree. However, the original defendant No.1 has not challenged this dismissal either by filing an independent appeal or cross-objections in this appeal.

4. For convenience, the parties will be referred to by their description in the suit. This means that MPA will be referred to as the plaintiff, M/s MSPL Limited as defendant No.1, and M/s Bagadiya Brothers Pvt. Ltd., as defendant No.2, for this appeal and the cross-objections.

5. The plaintiff, constituted under the Major Port Trusts Act, 1963 (said Act), instituted Special Civil Suit (Commercial) No.7/2017 against the defendants seeking the following reliefs:-

> (a) Decree be passed declaring that an amount of ₹1,44,12,185.78 (Rupees one crore forty four lakh twelve thousand one hundred eighty five and paise seventy eight only) is jointly and severally payable by both the defendants;
>
> (b) Decree be passed declaring that the amount of ₹1,44,12,185.78 (Rupees one crore forty four lakh twelve thousand one hundred eighty five and paise seventy eight only) has been rightly, legitimately and justifiably recovered by the plaintiffs from the defendant No.2;
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> (c) In the event this Honourable Court holds that the amount of ₹ 1,44,12,185.78 (Rupees one crore forty four lakh twelve thousand one hundred eighty five and paise seventy eight only) is payable by defendant No.1 alone, then a decree be passed directing defendant No.1 to make payment of the said amount together with interest @18 (Eighteen only) per cent per annum from June 2014 when the said amount was paid by the Defendant No.2 to the plaintiffs, till effective payment with cost;

(d) Any other and/or further order and/or orders as this Honourable Court may deem fit and proper in the circumstances of the case may passed,

(e) Costs of this suit be granted.

6. Both the defendants filed counterclaims in the above suit. Defendant No.1 filed a counterclaim seeking a refund of ₹4,49,69,445/- with interest at 18% per annum from the plaintiff. Defendant No.2 filed a counterclaim seeking to recover an amount of ₹3,68,92,878/- with interest at 18% per annum from the plaintiff. Both defendants claimed that they were not liable to pay these amounts, but these amounts were unlawfully recovered from them by the plaintiff.

7. Based on the pleadings of the parties, the learned Commercial Court framed the following issues and an additional issue:-

ISSUES

1. Whether the plaintiff proves that the defendants are liable to pay to the plaintiff jointly and severally a sum of ₹1,44,12,185.78?

2. Whether the plaintiff proves that the plaintiff are rightly and justifiably recovered the said amount of ₹1,44,12,185.78 from the defendant No.2?

3. Whether the defendant No.1 proves that the plaintiffs are liable to refund to the defendant No.1 a sum of ₹4,49,69,445/-

or any other amount together with the interest @18% p.a. or at any other rate?

4. Whether the defendant No.1 proves that the claim of the plaintiff has been fully satisfied and as such, there is no cause of action for the plaintiff to file the present suit?

5. Whether the suit is barred by limitation?

6. Whether the defendant No.1 proves that the suit is liable to be rejected as against defendant No.1 under Order 7 Rule 2A of CPC?

7. Whether the defendant No.2 is entitled to recover from the plaintiff a sum of ₹3,68,92,878/- with interest @18% from the date of filing of the counter claim till its realization?

8. What relief? What order?

ADDITIONAL ISSUE

1. Whether the defendants prove that they have issued statutory notice to the plaintiffs under Section 120 of Major Port Trusts Act, 1963 before filing counter claim and that the counter claims are maintainable ?

8. The plaintiff examined its constituted attorney, Rajan Naik (PW1) and Mahadev Joshi (PW2). As a result, Mohit Ratolikar, authorized signatory of defendant No.1, deposed on behalf of defendant No.1 and Sunil Kumar Patni, Chief Executive Officer of defendant No.2, deposed on behalf of defendant No.2.

9. On evaluating the oral and documentary evidence on record, the learned Commercial Court dismissed the plaintiff's suit and the two counterclaims of the defendants. Hence, this appeal by defendant No.2 and the cross objections by the plaintiff. As noted earlier, defendant No.1 has neither filed any appeal nor cross objections questioning the dismissal of its counterclaim or any of the findings recorded against defendant No.1 in the impugned judgment and decree.

10. Mr Desai learned Senior Advocate for the Appellant (defendant No.2) submitted that Section 120 of the Major Port Trusts Act, 1963 (the said Act) did not apply to the present case because, according to him, the plaintiff, in recovering the amount of ₹3,68,92,878/- had acted neither under the provisions of the said Act nor purported to act under the provisions of the said Act. He submitted that the plaintiff's actions were high-handed and not related to any of the provisions of the said Act or the rules and regulations made therein. He, therefore, submitted that under such circumstances, defendant No.2's counterclaim could not have been rejected by invoking the bar of limitation prescribed under Section 120 of the said Act or for alleged want of notice under Section 120 of the said Act.

11. Mr Desai submitted that defendant No.2 had caused to issue a legal notice dated 26.08.2014 upon the plaintiff demanding an amount of ₹14,58,556/- and ₹1,64,14,858/- with an interest of 18%

per annum towards the storage charges which the plaintiff forced the defendant No.2 to pay. He submitted that the response dated 22.09.2014 issued by the plaintiff did not firmly deny the illegality of such forcible recovery. The plaintiff only claimed the matter was pending before the Hon'ble Supreme Court. If it were ultimately held that defendant No.1 was responsible for the payment of this amount, then this amount would be refunded to defendant No.2. Mr Desai submits that the firm rejection was after the plaintiff instituted the suit and the summons was served on defendant No.2 on 19.03.2015. He submitted that defendant No.2 filed its written statement and counterclaim on 29.06.2015, i.e. within six months of receipt of the summons. Mr Desai submitted that the cause of action accrued to defendant No.2 on receipt of summons in the suit on 19.03.2015. Therefore, the counterclaim filed within six months from this date was within the limitation period under Section 120 of the said Act.

12. Mr Desai submitted that the plaintiff forced defendant No.2 to pay an amount of ₹1,39,95,488/- towards the unloading charges. He submitted that such a levy was neither under the provisions of the said Act nor could be regarded as some action purported to have been taken under the said Act. He submitted that no notice under Section 120 of the said Act was necessary to recover this amount. He submits that the learned Commercial Court does not even discuss this aspect of the recovery, much less adjudicate upon it. He proposes, therefore, that the impugned decree warrants interference.

13. Mr Desai submits that the impugned decree records a finding that defendant No.2 was not liable to pay any storage charges to the plaintiff. Mr Desai offers that after recording such finding; the learned Commercial Court was obliged to decree defendant No.2's counterclaim or, in any case, the alternate relief prayed for by the plaintiff in prayer clause (c) of the plaint.

14. Mr Desai finally submitted that the amounts recovered by the plaintiff from defendant No.2 were mainly because of defendant No.1. He offered that recoveries were high-handed and without the authority of law. He submitted that the recoveries were contrary to the decision of the Hon'ble Supreme Court in terms of which defendant No.2 purchased the ore stacked with the plaintiff at a public auction. He submitted that the amounts were recovered by the plaintiff taking undue advantage of the fact that vessels for export of this ore were berthed at the port and any delay in loading the ore would involve defendant No.2 into the breach of international export commitments and payment of enormous demurrage charges. Mr Desai submits that the learned Commercial Court did not adequately consider all these aspects. He, therefore, proposes that the appeal be allowed by decreeing defendant No.2's counterclaim. In any case, Mr Desai submits that the learned Commercial Court should have at least considered and granted the plaintiff relief in terms of prayer clause (c) of the plaint based upon the finding recorded by it in the impugned judgment and decree.

15. At the outset, Mr Nadkarni, learned counsel for the plaintiff, submitted that the evidence on record was sufficient to decree the suit and hold that both the defendants were jointly and severally liable to pay the amount of ₹1,44,12,875.78 to the plaintiff. In the alternative, he submitted that after the learned Commercial Court recorded finding that defendant No.1 and not defendant No.2 was liable to pay this amount, a decree in terms of the prayer clause (c) of the plaint should have followed. He, therefore, submitted that the cross objections filed by the plaintiff in this appeal should be allowed.

16. Mr Nadkarni submitted that the plaintiff's suit was only in respect of the amount of ₹1,44,12,875.78, which were storage charges up to 4.10.2012. He pointed out that by order dated 5.10.2012, the Hon'ble Supreme Court banned mining in the State of Goa. He submitted that the suit was filed because some ambiguity was sought to be raised by the defendants on the liability issue to pay the storage charges up to this period. The ore was stored by defendant No.1, but defendant No.2 had purchased the same in the auction "as is where is basis". He submitted that in terms of the said Act, the plaintiff had a lien on the ore. Therefore, the party which sought to lift the ore was legitimately required to pay the storage charges. Mr Nadkarni submitted that after 21.04.2014, defendant No.2 was clearly liable for payment of storage charges to the extent of ₹34,88,228.22. Accordingly, he submitted that the amount of ₹34,88,228.22 was correctly recovered from defendant No.2.

17. Mr Nadkarni submitted that defendant No.2's counterclaim was clearly barred by the special law of limitation prescribed under Section 120 of the said Act. He offered that if Mr Desai's contention about the accrual of the cause of action after the receipt of summons in the suit on 19.03.2015 is to be accepted, then the counterclaim will have to be dismissed for want of notice under Section 120 of the said Act after the accrual of the cause of action. He submitted that defendant No.2 had pleaded in para 8 of the counterclaim that the cause of action for recovery of ₹1,64,14,858/- arose on 17.05.2014 and the cause of action for recovery of ₹1,39,95,488/- arose on 07.04.2014, 21.05.2014 and 18.06.2014. He submitted that once any alleged cause of action accrues, the limitation period must be reckoned from the said date. Therefore, he proposed that the counterclaim was barred by limitation based on the averments in para 8 of the counterclaim or otherwise.

18. Mr Nadkarni submitted that in so far as the counterclaim of ₹1,39,95,488/- towards unloading charges was concerned, the same was barred under Section 120 of the said Act because there was no notice as contemplated by Section 120 of the said Act was ever given by defendant No.2. Mr Nadkarni referred to the provisions of Sections 42, 48 and 59 of the said Act to submit that unloading charges, were charges levied under the provisions of the said Act.

19. Mr Nadkarni finally submitted that defendant No.2's appeal be dismissed for all the above reasons and the plaintiff's cross-objections allowed. He urged accordingly.

20. Mr Nitin Sardessai, learned Senior Advocate appearing for defendant No.1, submitted that the plaintiff in para 7 of the plaint had pleaded that the amounts allegedly payable to the plaintiff on account of transaction with defendants Nos.1 and 2 was ₹5,93,81,630.78. He further pointed out that in para 8 of the plaint, the plaintiff had pleaded about recovering a sum of ₹4,49,69,445/- from defendant No.1 towards the above amount. He pointed out that the plaintiff, in para 9 of the plaint, admitted to the recovery of the balance amount of ₹1,44,12,185.78 from defendant No.2. He submitted that thus the plaintiff admitted recovery of the entire amount of ₹5,93,81,630.78 from defendant Nos.1 and 2. Mr Sardessai submitted that since the plaintiff recovered the whole amount, there was no cause of action to institute the suit. On this ground alone, the suit was required to be dismissed and was correctly dismissed by the learned Commercial Court. He, therefore, urged the dismissal of the plaintiff's counterclaim.

21. Mr Sardessai further pointed out that defendant No.2 had at no stage sought any decree against defendant No.1. He, therefore, submits that no case is made out for the grant of any relief, much less alternate relief to the plaintiff because the grant of such relief would enable defendant No.2 to recover some amount from defendant No.1, even though defendant No.2 had raised no claim against defendant No.1. He submitted that this would be incongruous. On these grounds, Mr Sardessai urged that defendant No.2's counterclaim was correctly dismissed and no relief should be granted to defendant No.2 in the appeal instituted by it.

22. Based on the rival contentions, the following points arise for determination in this appeal.

> (a) Whether the plaintiff had no cause of action to institute the suit after the plaintiff had admittedly recovered the entire amount of ₹5,93,81,630.78, which it claimed was jointly and severally due from the defendants towards the storage charges?
>
> (b) Whether the plaintiff was entitled to recover the storage charges for the period up to 04.10.2012 jointly and severally from the defendants or whether defendant No.1 was alone liable for such payment?
>
> (c) Was defendant No.2's counterclaim for recovery of storage charges and unloading charges totalling ₹3,68,92,878/- barred under Section 120 of the said Act?
>
> (d) Are the plaintiff and/or defendant No.2 entitled to any relief in the appeal and cross-objections? If so, what should be the nature of the relief?

23. Though all the parties led both oral and documentary evidence, considering the issues involved, the documentary evidence needs to focused on this matter. There are no significant factual disputes. The main issues concern legal liability and the interpretation of the provisions of the said Act, including mainly Section 120 of the said Act.

24. The plaintiff was formerly a Major Port Trust constituted under the said Act. After the amendment of the said Act, the plaintiff is now a Major Port Authority concerned with the administration, control, and management of the Mormugao Port at Goa. The functioning of the plaintiff is governed by the said Act and the rules and regulations made thereunder, about which there was no serious dispute amongst the parties.

25. The evidence shows that in 2010 the plaintiff allotted defendant No.1 a plot at its berth nine for storing ore. On 05.10.2012, the Hon'ble Supreme Court banned mining operations, including exporting ore extracted from mines in Goa. The record shows that this order was varied to some extent on 21.04.2014. In terms of varied order, the interim directions were issued permitting the e-auction of ore stacked at various locations in the State of Goa, including the Mormugao Port. Towards the storage charges of such ore between 01.10.2011 to 04.10.2012, the plaintiff had determined liability at ₹5,93,81,630.78.

26. There is evidence that the above liability was determined by the plaintiff based upon the scale of rates determined by the Tariff Authority for Major Ports (TAMP) constituted under Section 47A of the said Act. No dispute was raised about the rates though there was a dispute about the liability to pay. Even this dispute was mainly about whether this amount should be paid by defendant No.1 or defendant No.2.

27. The evidence on record also shows that out of the above amount of ₹5,93,81,630.78, the plaintiff recovered an amount of ₹4,49,69,445/- from defendant No.1. In the suit, no declaration was sought or, for that matter, no relief was sought in respect of this amount by the plaintiff. However, defendant No.1, from whom this amount was recovered, raised a counterclaim seeking a refund from the plaintiff. The learned Commercial Court dismissed this counterclaim. This dismissal was never challenged by defendant No.1 either by instituting any substantive appeal or filing cross-objections assuming such cross-objections could be filed in the appeal instituted by defendant No.2. Even before this Court, Mr Sardessai, learned Senior Advocate for defendant No.1 raised no contentions concerning this amount of ₹4,49,69,445/-.

28. In the meantime, defendant No.2 purchased the ore stored on the plot allotted by the plaintiff to defendant No.1 through e-auction. This purchase was on "As is where is basis". Both oral and documentary evidence establish this fact. No serious dispute was raised about this fact, though the dispute was about the scope and extent of the expression "As is where is basis".

29. Since defendant No.2, based on the auction purchase, wished to export the ore stored on the plot allotted by the plaintiff to defendant No.1, the plaintiff required and defendant No.2, under protest, paid *inter alia* the balance amount of ₹1,44,12,185.78 to the plaintiff. Mr Nadkarni emphasized that this amount was a balance for storage charges up to 04.10.2012 and not beyond. For storage charges beyond 04.10.2012, the plaintiff levied, and defendant No.2 paid under protest an amount of ₹34,88,228.22. This amount was not the subject matter of the plaintiff's suit. However, defendant No.2, in its counterclaim, claimed a refund of this amount along with the amount of ₹1,44,12,185.78 for storage charges before 04.10.2012. The plaintiff also recovered from defendant No.2 an amount of ₹1,39,95,488/- for unloading charges. Again even this amount was not the subject matter of the plaintiff's suit. However, defendant No.2, in its counterclaim, sought recovery of this amount which was paid under protest.

30. Thus, the pleadings and the evidence show that the plaintiff's suit was concerned only with the amount of ₹1,44,12,185.78, which the plaintiff recovered from defendant No.2 towards the storage charges of the ore for the period before 04.10.2012, i.e. before the ban of mining and export of ore from the Goa. The plaintiff's case was that the defendants jointly and severally owed this amount to the plaintiff. Therefore, the same was legitimately recovered from defendant No.2. The plaintiff, however, pleaded that should the Commercial Court conclude that this amount was exclusively payable by defendant No.1, then a decree be made directing defendant No.1 to refund/pay this amount to defendant No.2 based on the premise that defendant No.2 had paid this amount to the plaintiff on defendant No.1's account.

31. After considering the oral and documentary evidence on record, the learned Commercial Court has recorded categorical findings in paras 41, 42, and 43 that defendant No.2 was not liable to pay the amount of ₹1,44,12,185.78 to the plaintiff. This amount, being a part of the total amount of ₹5,93,81,630.78, was exclusively payable by defendant No.1 to the plaintiff. Thus, the learned Commercial Court concluded that the plaintiff might not have been justified in recovering the amount of ₹1,44,12,185.78 from defendant No.2 since this amount was payable exclusively by defendant No.1.

32. The above findings of the learned Commercial Court are based upon a correct evaluation of the oral and documentary evidence on record. Admittedly, the plaintiff had allotted a plot for ore storage to defendant No.1. The ore in question was stored by defendant No.1 on such allotted plot. Therefore, in terms of the said Act and the determination of the scale of rates by the TAMP, the plaintiff had necessary statutory powers to recover the storage charges of ₹5,93,81,630.78 from defendant No.1.

33. Since these charges were for the period up to 04.10.2012, i.e. before the onset of the mining ban, there was no question of placing this liability on defendant No.2, who came into the picture only after the Hon'ble Supreme Court varied its order on 21.04.2014 and permitted e-auction and exports of extracted ore stacked at various locations in the State of Goa including the plot allotted by the plaintiff to defendant No.1. Thus, at least up to 04.10.2012, the liability for payment of storage charges of ₹5,93,81,630.78 was exclusively that of defendant No.1 and not defendant No.2.

34. Consistent with the above position, the plaintiff demanded and even recovered an amount of ₹4,49,69,445/- from defendant No.1. Even the balance amount of ₹1,44,12,185.78 should have been recovered by the plaintiff from defendant No.1. Instead, this amount was recovered from defendant No.2, which was not legally liable to pay such amount. Therefore, the learned Commercial Court was justified in concluding that defendant No.2 was not liable to pay the amount of ₹1,44,12,185.78 to the plaintiff, and the plaintiff was not justified in recovering this amount from defendant No.2. The learned Commercial Court was also justified in recording a clear and cogent finding that this amount of ₹1,44,12,185.78 was exclusively payable by defendant No.1 to the plaintiff.

35. After recording the above clear and categorical findings, there is no adequate explanation for denying the plaintiff alternate relief in terms of the plaint's prayer clause (c). In this prayer clause, all the plaintiff had sought was a decree to direct defendant No.1 to pay to defendant No.2 the amount of ₹1,44,12,185.78 should the learned Commercial Court conclude that this amount was payable to the plaintiff by defendant No.1 alone. This relief was incorrectly denied by the learned Commercial Court to the plaintiff on the specious plea that since the plaintiff had recovered the entire dues towards the storage charges amounting to ₹5,93,81,630.78, the plaintiff had no cause of action for instituting the suit. In short, the learned Commercial Court accepted the contention now raised by Mr Sardessai on behalf of defendant No.1.

36. Though the pleadings and the evidence show that the plaintiff had recovered the amount of ₹5,93,81,630.78 towards the storage charges up to 04.10.2012, from out of this amount, an amount of ₹4,49,69,445/- was recovered from defendant No.1. The balance amount of ₹1,44,12,185.78 was recovered from defendant No.2. Defendant No.2 had paid this balance amount under protest and without prejudice to its rights to recover. Furthermore, defendant No.2 also addressed a legal notice to the plaintiff claiming that it was forced to pay this amount and, consequently, was entitled to recovery. Thus, there was a cloud on the recovery status of this amount of ₹1,44,12,185.78 from defendant No.2.

37. In the above context, the plaintiff was justified in instituting the suit, seeking a declaration that both the defendants were jointly and severally liable to pay this amount. However, in alternate and by way of abundant caution, the plaintiff pleaded that should the learned Commercial Court conclude that this amount was exclusively payable by defendant No.1, then instead of requiring the plaintiff to refund this amount to defendant No.2, it is the defendant No.1 who should be directed to pay this amount with interest to defendant No.2.

38. This alternate relief was based on the premise that even the amount of ₹1,44,12,185.78 was due and payable to the plaintiff. Still, only the dispute was whether the same was payable by defendant No.1 or defendant No.2. Therefore, if defendant No.2 had paid this amount on account of defendant No.1, then it was only appropriate that defendant No.1 and not the plaintiff repays this amount to defendant No.2. In the context of the cloud raised on this amount, a suit for declaration was competent. The plaintiff does not seem to doubt its entitlement to recover this amount. The only doubt was whether this amount had to be recovered from the defendants jointly and severally or from defendant no. 1 exclusively. Therefore, the suit for declaration on this limited aspect. Such a suit was, in our judgment, competent and not bereft of a cause of action.

39. However, at the same time, the plaintiff was conscious that a simple declaration would never suffice. Therefore, even the alternate relief was correctly claimed because the plaintiff could not anticipate what the Court might ultimately declare. Therefore consequential reliefs were correctly claimed. Thus construed, the finding about the plaintiff having no cause of action is vulnerable and based on the same, the learned Commercial Court was not justified in declining the relief in terms of prayer clause (c) of the plaint.

40. Significantly, defendant No.1 has not bothered to challenge the findings recorded by the learned Commercial Court about its liability or the finding that defendant No.2 was not liable to pay this amount of ₹1,44,12,185.78 to the plaintiff. Therefore, the learned Commercial Court was not correct in accepting the contention about the plaintiff having no cause of action to institute the suit. The learned Commercial Court has held that the plaintiff might have had a cause of action if it had refunded the amount of ₹1,44,12,185.78 to defendant No.2. Respectfully, We disagree with this line of reasoning. Even without refunding such an amount, the plaintiff undoubtedly had a cause of action to institute the suit because there was some cloud being raised on the recovery of this amount from defendant No.2, and perhaps the plaintiff suspected some merit in the objection urged by defendant No. 2.

41. However, the plaintiff entertained no doubt about its entitlement *per se* to recover this amount. The only doubt was whether this amount could be recovered jointly and severally from the defendants or from defendant no. 1 exclusively. Mr Nadkarni, learned counsel for the plaintiff, was justified in submitting that the suit was in the nature of an inter-pleader suit. The plaintiff did not doubt its entitlement to the amount of ₹5,93,81,630.78. The only doubt was whether the defendants were jointly and severally liable to pay this amount or only defendant No.1 was liable to pay this amount.

42. In the above circumstances, the plaintiff certainly had a cause of action to maintain the suit and to seek the reliefs sought in the plaint. Therefore, after concluding that defendant No.1 was exclusively liable to pay, the learned Commercial Court could not have rejected the alternate relief prayed for in prayer clause (c) of the plaint on the plea that no cause of action was spelt out to institute the suit in the first place. Thus, the appeal is liable to be allowed, and the relief in terms of the plaint's prayer clause (c) is liable to be granted in this matter.

43. Accordingly, the first and second points for determination can be answered by holding that the plaintiff had a cause of action for instituting the suit. Further, the plaintiff was entitled to recover the storage charges for the period up to 04.10.2012 from defendant No.1 exclusively and not from defendant No.2.

44. The learned Commercial Court, in the context of defendant No.2's claim for an amount of ₹3,68,92,878/- which includes the above amount of ₹1,44,12,185.78 has held that such counterclaim was barred by the special law of limitation provided under Section 120 of the said Act. Therefore, the issue raised was whether this finding is correct and whether defendant No.2 could nevertheless benefit from the plaintiff securing the relief in terms of prayer clause (c) of the plaint.

45. In our opinion, there is nothing incongruous about such a situation. The special limitation period of six months applies to a suit or other proceedings commenced *against* the plaintiff or its members or employees for anything done or purporting to have been done in pursuance of the said Act. Therefore, these six months limitation period does not apply when the plaintiff sues. Besides, it is well settled that usually, the limitation does not extinguish a right but only affects the remedy. Therefore, there is nothing inconsistent about granting the plaintiff relief in terms of prayer clause (c) of the plaint even though the learned Commercial Court has held that defendant No.2's counterclaim concerning this amount of ₹1,44,12,185.78 was barred by a special law of limitation prescribed under Section 120 of the said Act.

46. Besides, in so far as the amount of ₹1,44,12,185.78 is concerned, the position of this particular counterclaim being barred by a special law of limitation is, at best arguable. The record bears out that the defendants addressed a legal notice dated 26.08.2014 to the plaintiff regards an amount of ₹1,64,14,858 and ₹14,58,556/-. This amount includes the amount of ₹1,44,12,185.78, which is presently the subject matter of discussion. Accordingly, this notice complied with the mandate of Section 120 of the said Act qua this limited amount.

47. The plaintiff responded to the above legal notice dated 26.08.2014 on 22.09.2014. If the response, which is a part of the evidence on record, is perused, it is apparent that the plaintiff did not categorically dispute the claims to the extent of ₹1,44,12,185.78; instead, the plaintiff responded that the legality of the cargo stocked by defendant No.1 at MPT and its legal ownership is yet to be established as per the Hon'ble Supreme Court order. Therefore, in case the port receives storage charges from the legal owners of this cargo before the auction, which was shipped by defendant No.2 after the decision of the Hon'ble Supreme Court. The same would be refunded to defendant No.2. The response ended by saying that the claim for this particular amount cannot be considered at this stage.

48. Mr Desai submitted that it was only after defendant No.2 received a summons in the suit that defendant No.2 realized that the plaintiff specifically rejected its claim for this amount and others. The counterclaim was filed soon after that and well within the period of limitation prescribed in Section 120 of the said Act. Therefore, this line of argument could have been pursued and developed. But unfortunately, defendant No 2's pleadings in the counterclaim dent this line of arguments to a significant extent.

49. The pleadings in defendant No.2's counterclaim on the aspect of accrual of the cause of action and, consequently, the limitation, is a cause of concern for defendant No.2. Para 8 of defendant No.2's counterclaim reads as follows:-

> *"8. The cause of action for recovery of Rs.1,64,14,858/- arose on 17/05/2014, when the said amount was recovered illegally by the plaintiffs. Cause of action for recovery of Rs.14,85,556/- arose on 05/06/2014, when the said amount was illegally recovered by the plaintiffs. Cause of action for recovery of Rs.5,79,870/- arose on 25.03.2014, when the bank guarantee in the amount of Rs.16 crores was extracted by the plaintiffs from this defendant. Cause of action for recovery of Rs.1,69,73,117/- illegally recovered by the plaintiffs towards unloading charges arose on 07/04/2014, 21/05/2014 and 18/06/2014 and cause of action for the same continues. The cause of action next arose on 22/09/2014 and the lastly the cause of action arose on the date of institution of the above suit. The cause of action is of continuing and recurring nature."*

50. It is well settled that once the limitation period begins to run, the same does not ordinarily stop unless the statute so permits. Therefore, if the pleadings in para 8 of the counterclaim referred to above are to be accepted, then the cause of action in respect of the amount of ₹1,64,14,858/- which includes the amount of ₹1,44,12,185.78 commenced on 17.05.2014. Accordingly, the counterclaim filed on 29.06.2015 was beyond the special limitation period prescribed under Section 120 of the said Act.

51. At one stage, Mr Desai tried to urge that the requirement of notice under Section 120 of the said Act and the institution of the suit are independent and disjunctive. He urged that the two requirements need not be insisted conjunctively but could be complied alternatingly. For this, he emphasized the expression "*or after six months after the accrual of the cause of action*". In our judgment, a bare construction of the provision coupled with the object for its enactment militates against the interpretation proposed.

52. The above contention, or in any case, a very similar argument, was considered and rejected by the Hon'ble Supreme Court in ***V. M. Salgaocar and Bros. Vs Board of Trustees of Port of Mormugao and another***[1]**.** In this case, the Hon'ble Supreme Court upheld the constitutional validity of Section 120 of the said Act. Even the contention about the requirement to issue notice and to file a suit

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within six months from accrual of the cause of action was held to be conjunctive and not alternate.

53. The above position is evident from the discussion in para 27 of *V. M. Salgaocar* (supra), which reads as follows:-

> *"27. The Major Port Trusts 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 Shipping Corporation of India Ltd. Vs. Union of India and another [AIR (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."***

54. In ***Naik Brothers Dryfish Private Limited & others. Vs Union of India and others***[2], the learned Single Judge of this Court has held that the suit instituted without the issue of mandatory pre-suit notice and a suit instituted beyond the special period of limitation prescribed under Section 120 of the said Act is barred and must be dismissed. The learned Single Judge held that bare perusal of the provisions under Section 120 of the said Act would show that it provides twin interdict for the institution of the 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 must be instituted within six months from the accrual of the cause of action. The learned Single Judge followed the decision of the Hon'ble Supreme Court in *V. M. Salgaocar* (supra).

55. The Hon'ble Supreme Court in *V. M. Salgaocar* (supra) and the learned Single Judge in *Naik Brothers* (supra) have explained the purpose for providing a special period of limitation for suits against the Port Authorities and its officers is to ensure that they are not flooded with belated litigations and actions. Instead, the provision is designed to enable the Port Authorities and its officers to effectively defend the proceedings or actions promptly initiated when the evidence is readily available. Once it is conceded that this special period of limitation prescribed under Section 120 of the said Act would apply given the provisions of Section 29(2) of the Limitation

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Act, 1963, the Courts are bound to dismiss the suits instituted after the prescribed period of limitation. This is consistent with the provisions of Section 3 of the Limitation Act 1963 because no amount of equitable considerations can typically assist a belated suitor.

56. However, having regard to the finding that the plaintiff is entitled to relief in terms of prayer clause (c) of the plaint, the circumstance that the counterclaim was barred by the special limitation period prescribed under Section 120 of the said Act will not preclude defendant No.2 from benefiting from the relief in terms of prayer clause (c) of the plaint. As noted earlier, the bar of limitation usually does not destroy the right or entitlement, but only the remedy is impaired. Besides, different limitation periods could apply to different parties even in the same suit or proceedings. But, in so far as defendant No.2's claim for ₹1,39,95,488/- with interest at 18% per annum towards the unloading charges is concerned, the same will be affected by the provisions of Section 120 of the said Act for at least two reasons discussed hereafter.

57. In the first place, no notice was issued by defendant No.2 claiming this amount from the plaintiff. Secondly, the suit was never instituted within six months from accrual of the cause of action. Now that the requirement of issuing notice and instituting the suit within six months from the date of accrual of the cause of action are to be read and construed conjunctively, defendant No.2's claim for

₹1,39,95,488/- is clearly barred under Section 120 of the said Act. The decisions mentioned above speak of the mandatory nature of the twin interdicts provided in section 120 of the said Act. Though Mr Desai was justified in contending that the learned Commercial Court missed out on considering the claim for the amount of ₹1,39,95,488/- with interest at the rate of 18% per annum, even if the learned Commercial Court were to have considered this claim, it would not be in a position to decree this amount favouring defendant No.2 given the bar under Section 120 of the said Act.

58. Mr Desai, however, contended that levy towards unloading charges was neither a levy under the said Act nor could it be styled as anything purporting to have been done in pursuance of the said Act. Accordingly, Mr Desai submitted that there is no provision for the unloading charges levy; in any case, such unloading charges could never have been levied upon defendant No.2. Again, this was never the argument before the learned Commercial Court. Even otherwise, we are not persuaded to accept this argument. The argument overlooks the expression '*anything purporting to have been done..*' in section 120 of the said Act.

59. Section 42 of the said Act provides that the Board shall have the power to undertake services of landing, shipping or transhipping passengers and goods between vessels in the port and the wharves, piers, quays or docks belonging to or in the possession of the Board;

receiving, removing, shifting, transporting, storing or delivering goods brought within the Board's premises; amongst others.

60. From the aforesaid, it is apparent that the plaintiff had the powers to undertake services like landing goods, shipping, removing, shifting, transporting, storing or delivering goods brought within the Board's premises. Section 48 of the said Act requires TAMP to determine the scale of rates for services performed by the plaintiff or other persons. In addition, several provisions empower the plaintiff to levy and recover charges for the services rendered by the plaintiff at rates determined by TAMP.

61. Section 59 of the said Act provides that for the amount of all rates leviable under the said Act in respect of any goods, the plaintiff shall have a lien on such goods and may seize and detain the same until such rates are fully paid. Such lien shall have priority over all other liens and claims, except for general average and for the ship-owner's lien upon the said goods for freight and other charges where such lien exists and has been preserved in the manner provided in Section 60(1), and for money payable to the Central Government under any law for the time being in force relating to customs, other than by way of penalty or fine.

62. Therefore, though we are not presently deciding on the legality of the levy or determining the parties' liable to pay towards such levy, considering the above provisions, it is impossible to accept that the action of the plaintiff was not even some action purporting to have been done in pursuance of the said Act. The question at this stage is not whether such action was lawful. The question is whether the action was purporting to have been done in pursuance of the said Act. Since action was purporting to have been done in pursuance of the said Act, notice under Section 120 was an essential pre-requisite to the institution of the counterclaim.

63. As noted earlier, for recovery of the amount of ₹1,39,95,488/- with interest at the rate of 18% per annum, there was no notice under Section 120 of the said Act. The suit was also not instituted within six months from accrual of the cause of action. Section 120 of the said Act requires that both these conditions be conjunctively complied with. There was no compliance either conjunctively or even alternatively. Therefore, the Commercial Court was correct in dismissing the counterclaim of ₹1,39,95,488/- with interest at 18% per annum. Accordingly, the third point for determination is answered by holding that the counterclaim was barred under Section 120 of the said Act.

64. For all the above reasons, though defendant No.2's appeal is liable to be dismissed, the plaintiff's cross-objections will have to be allowed partly. As a result, the impugned judgment and decree are modified, and the suit is decreed in terms of prayer clause (c) of the plaint, which reads as follows:-

> "(c) In the event this Honourable Court holds that the amount of ₹1,44,12,185.78 (Rupees one crore forty four lakh twelve thousand one hundred eighty five and paise seventy eight only) is payable by defendant No.1 alone, then a decree be passed directing defendant No.1 to make payment of the said amount together with interest @18 (Eighteen only) per cent per annum from June 2014 when the said amount was paid by the Defendant No.2 to the plaintiffs, till effective payment with cost."

65. The fourth point for determination is answered accordingly.

66. The appeal and the cross objections are disposed of in the above terms without any order for costs.

BHARAT P. DESHPANDE, J **M. S. SONAK, J**

TARI AMRUT NAGESH Digitally signed by TARI AMRUT NAGESH Date: 2023.01.25 17:47:33 +05'30'