

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INTERIM APPLICATION NO.105 OF 2022
IN
COM. ADMIRALTY SUIT NO.82 OF 2021**

M.V.Lima V and Ors. ... Applicants
and
Coastal Marine Construction and Engineering Ltd. ... Plaintiff
versus
M.V.Lima V and Ors. ... Respondents

Mr. Prathamesh Kamat with Ms. Chairstabelle M.K. i/by Mr. Manoj Khatri for Applicants/Defendants.

Mr. Bimal Rajasekhar with Mr. Ram Narayan i/by Mr. Ashwin Shankar for Plaintiff.

CORAM : N. J. JAMADAR, J.

**RESERVED ON : 20 SEPTEMBER 2022
PRONOUNCED ON : 28 FEBRUARY 2023**

JUDGMENT :

1. Defendant Nos.1 to 3 have preferred this application to set aside an ex-parte order dated 27 July 2021 of arrest of M.V.Lima V – Defendant No.1 Vessel and release the Defendant No.1 Vessel. The Defendants also seek compensation of Rs.15 Lakhs from the Plaintiff towards loss and damages sustained by the Defendants on account of unjustified arrest of the Defendant No.1 Vessel and a direction to the Plaintiff to deposit a sum of Rs.52,72,630/- to secure the Defendants for loss and damages on account of unjustified arrest.

2. Coastal Marine Construction and Engineering Limited (Costal Marine) - Respondent/Plaintiff instituted a suit seeking an arrest of Defendant No.1 Vessel and a

decree in the sum of Rs.1,77,21,679.27 along with further interest @ 12% p.a. on the principal amount of Rs.1,46,88,269.

3. Coastal Marine claimed, Defendant No.1 Vessel appeared to have been registered under the Inland Vessel Act, 1917. It ordinarily plied on non-inland waters. Defendant No.1 Vessel was owned by Snexa Projects – Defendant No.2, a Partnership firm. The third Defendant is a partner of Snexa Projects.

4. Coastal Marine claimed to have entered into a contract to hire the Defendant No.1 Vessel for work at RSPL Dwarka, under a Purchase Order dated 19 November 2020. Under the terms thereof, the Defendant No.1 was to be delivered at Belapur Yard within 15 days of the advance payment of hire charges, to be made by the Plaintiff to Snexa Projects.

5. The Defendants committed default in delivery of the Defendant No.1 Vessel within the time stipulated under the purchase agreement. The Plaintiff paid the hire charges along with GST. Yet the Defendants committed default in delivery of the Defendant No.1 Vessel. The Defendant No.1 Vessel could be delivered by the Defendant Nos.2 and 3 only on 23 January 2021, after a delay of 37 days. Even post delivery, according to Coastal Marine, the Defendants continued to commit breach of the material terms of the Purchase Order. Defendant No.1 Vessel was not fully operational. In fact, it was unable to propel by itself. Coastal Marine was, thus, constrained to take assistance of the tugs to propel Defendant No.1 Vessel. During

the period of hire, Defendant No.1 Vessel broke down on multiple occasions. The Plaintiff was, thus, made to incur huge costs in inter alia hiring tugs for towing of the Defendant No.1 Vessel.

6. In accordance with the terms of the Contract, whilst Defendant No.1 Vessel was on downtime, hire charges were not payable. Yet Coastal Marine was made to part with an amount of Rs.28 Lakhs, Rs.5,04,000, Rs.20 Lakhs, Rs.9,37,600/- and Rs.7,60,366/- (total Rs.70,01,966/-) under the threat of termination of the engagement. As and by way of mitigating measure, Coastal Marine incurred expenses. Coastal Marine is, however, entitled to recover the hire charges and expenses incurred by Coastal Marine for employing the tugs on account of the breach of the obligation on the part of the Defendants. Hence the Suit for refund of the hire charges and recovery of the expenses incurred by Coastal Marine, interest thereon and costs.

7. Coastal Marine moved for an ex-parte order of the arrest of Defendant No.1 Vessel. By an order dated 27 July 2021, in Judge's Order No.122 of 2021, a learned Single Judge of this Court ordered the arrest of Defendant No.1 Vessel, opining that a prima facie case for arrest of Defendant No.1 Vessel for enforcement of a maritime claim, was made out. To have the Defendant No.1 Vessel released, it was directed, the Defendants shall deposit a sum of Rs.1,77,21,679.27 along with interest @ 12% p.a. on the principal amount of Rs.1,46,88,269/- by way of security.

8. The Applicants/Defendants have preferred this Application contending

that the order of arrest of Defendant No.1 Vessel was obtained on the strength of a completely baseless and untenable claim. Coastal Marine had failed to demonstrate that there were reasonable grounds to believe that the Plaintiff had maritime claim against the Defendants and was entitled to arrest the Defendant No.1 Vessel. The Defendants contend that the Plaintiff's claim that it is not entitled to pay hire charges as Defendant No.1 Vessel was not fully operational and was always on down time, is completely misconceived as Coastal Marine had sought extension of hire period. The delay in the delivery of the Defendant No.1 Vessel was primarily on account of the time which was consumed in the modification of Spud and Casing of the barge, as sought by Coastal Marine.

9. According to the Defendants, over emphasis on clause 8 of the Purchase Order, to bolster up a case that Coastal Marine was not obligated to pay the hire charges, professedly for down time, runs counter to the express terms of the contract. Under the terms of the contract, Coastal Marine had an option to terminate the contract. Coastal Marine never terminated the contract. Instead Coastal Marine voluntarily utilized the service of Defendant No.1 Vessel beyond two months period under an express promise to pay the hire charges for the same.

10. It is further contended that the services of the tugs were utilized by Coastal Marine despite a clear communication by the Defendants that they would not be liable to incur expenses on the said count. In any event, Coastal Marine having

utilized services of Defendant No.1 cannot seek refund of both the hire charges and the amount allegedly spent for hiring the tugs. On the contrary, according to the Defendants, wholly unlawful and unjustified arrest of Defendant No.1 Vessel entitles the Defendants to claim compensation for the loss caused thereby. Hence, this Application.

11. In further Affidavit in support of the Interim Application, the Defendants contended that the Defendant No.1 Vessel having been registered under Section 19F of the Inland Vessel Act, 1917 (Act, 1917), could not have been arrested by invoking the provisions contained in the Admiralty (Jurisdiction and Settlement of Marine Claims) Act, 2017. A Certificate of registration issued under Section 19F of Act, 1917 was pressed into service.

12. Coastal Marine resisted the Application by filing an Affidavit in Reply. Coastal Marine asserts, since it had made out a prima facie case for arrest of Defendant No.1 Vessel, the instant application for vacating the order of arrest is untenable. Even otherwise, according to Coastal Marine, no prima facie ground is made out to vacate the order of arrest. Coastal Marine asserts, delayed delivery of the Vessel, by as many as 37 days, is incontestable. In fact, there are clear and explicit admissions in the correspondence exchanged between the parties that the Defendants could not deliver Defendant No.1 Vessel in accordance with the time stipulated under the terms of the Contract.

13. The facts that, even post delivery, Defendant No.1 Vessel was not functioning properly and fully operational, are also borne out by the said correspondence. There was no denial on the part of the Defendants that Defendant No.1 was unable to propel by itself. In accordance with the terms of the Contract, especially clause 8, the entire period of hire was downtime as the Defendant No.1 Vessel never functioned properly. The payment of hire charges and continuance of the hire, beyond two months, according to Coastal Marine, were the measures in mitigation. Likewise, the hire of the tugs by Coastal Marine, to tow Defendant No.1 Vessel, was in the circumstances of the case, an absolutely mitigating measure. In the context of the contractual commitment of Coastal Marine, terminating the contract and hiring another Vessel, would have proved to be more expensive. Therefore, the Defendants cannot draw any mileage from the utilization of the services of Defendant No.1 Vessel.

14. In further Affidavit in Reply, Coastal Marine made an endeavour to demonstrate that Defendant No.1 Vessel ordinarily plied on inland waters. Thus, the challenge to the arrest on the ground that the Admiralty Act, 2017 does not govern the Defendant No.1 Vessel cannot be entertained.

15. In the light of the aforesaid facts and pleadings, I have heard Mr. Kamat, learned Counsel for the Applicants/Defendants and Mr. Bimal Rajasekhar, learned Counsel for Coastal Marine at some length.

16. To start with, few uncontroverted facts. Jural relationship between Defendant Nos.1 and 2 and 3 is not in contest. Nor the contractual relationship between the Plaintiff and Defendants is in dispute. The parties are not at issue over the point that the purchase order issued by Coastal Marine dated 19 November 2020 incorporates the terms of the contract.

17. Defendant No.1 was described in the Purchase Order as a 'self propelled barge'. It was hired for RSPL Dwarka site. It was agreed to be hired for two months @ Rs.28 Lakhs per month. Defendant No.1 Vessel was agreed to be delivered at Belapur Yard within 15 days from the date of receipt of the Purchase Order and release of advance payment for the first month. Though reasons for the delay in delivery of the Defendant No.1 Vessel are in controversy, yet the fact that the Defendant No.1 Vessel was actually delivered on 23 January 2021 is incontestable. The second arena of controversy is the condition of Defendant No.1 Vessel since the time of the delivery and during period of hire.

18. Coastal Marine's claim comprises return of hire charges of Rs.70,01,966/- on the premise that the Defendant No.1 Vessel was on down time during the entire period of hire. The second component of Coastal Marine's claim is formed by the costs incurred by Coastal Marine to the tune of Rs.76,50,303/- towards hiring tugs etc., to make Defendant No.1 operate.

19. The Defendants seek to vacate the order of arrest on the ground that the

arrest was unlawful since the Defendant No.1 Vessel is an inland Vessel and, thus, beyond the purview of the Admiralty Act, 2017. Secondly, Coastal Marine's claim for refund of hire, after having utilized the services of the Defendant No.1 Vessel, not only for two months contract period but also for 10 days beyond, is wholly untenable. Thirdly, the Plaintiff cannot seek to recover the expenses incurred for hiring tugs as the Plaintiff had utilized the tugs for its own operations and had entered into a contract for hiring tugs even before the hiring Defendant's Vessel. Lastly, in any event, Coastal Marine having already deducted hire charges towards liquidated damages, cannot now seek to recover the hire charges paid for utilizing the services of Defendant No.1. Alternatively, Coastal Marine having claimed to have operationalized Defendant No.1 Vessel by using the tugs, cannot claim refund of hire in addition to the costs incurred for hiring of the tugs.

20. Point No.1 : Whether the Act, 2017 applies to the Defendant No.1 Vessel ?

Mr. Kamat strenuously submitted that the Defendant No.1 Vessel being "inland Vessel" could not have been arrested by invoking the provisions contained in Section 5 of the Act, 2017. It was urged that the proviso to sub-section (2) of Section 1 of the Act, 2017, takes an inland vessel out of the purview of the said Act. Adverting to the principle of interpretation of a proviso, Mr. Kamat would urge that if full play is given to the proviso to sub-section (2) of Section 1, the inland vessel is clearly beyond the ambit of the provisions of the Act, 2017.

21. Mr. Kamat placed reliance on the judgment of the Division Bench of the Calcutta High Court in the case of Jindal ITF Ltd. And Anr. V/s. I-Marine Infratech (India) Pvt. Ltd.¹ and the judgment of the learned Single Judge in I-Marine Infratech (India) Pvt. Ltd., Mumbai V/s. The Owners and parties interested in the Vessel M.V.Maheshwari and Anr., dated 21 December 2020, which was carried in appeal before the Division Bench in the former case.

22. Per contra Mr. Rajasekhar submitted that the entire edifice of the Defendants claim that the Defendant No.1 is an inland vessel, is based on mere registration of the Defendant No.1 under Chapter IIA of the Act, 1917. However, mere registration by itself is of no consequence. Taking the Court through the definition of an inland vessel under Section 2(1)(a) of the Act, 1917. Mr. Rajasekhar would urge that the *sine qua non* for designating a Vessel as an inland vessel is that it ordinarily plies on inland water.

23. In the case at hand, according to Mr. Rajasekhar, Defendant Nos.1 to 3 have not specifically pleaded, much less substantiated, that the Defendant No.1 Vessel ordinarily plies on inland water. The said fact which was within the special knowledge of the Defendants ought to have been adequately pleaded and established. Laying emphasis on the role of the proviso and the necessity of its literal construction, Mr. Rajasekhar would urge that a wide and liberal construction to unduly restrict the

1 2021 SCC Online Cal 142

applicability of the provisions of the Act, 2017, would defeat its very object.

24. It was submitted that reliance placed by Mr Kamat on the judgments in the cases of **I-Marine (supra)** is of no assistance to the Applicants. On the contrary, the learned Single Judge in the case of **I-Marine (supra)** has in terms observed that the registration of a vessel under the Act, 1917 is of little significance.

25. To start with the governing provisions. Sub-section (2) of Section 1 of the Act, 2017 reads as under :

“(2) It shall apply to every vessel, irrespective of the place of residence or domicile of the owner :

Provided that this Act shall not apply to an inland vessel defined in clause (a) of sub-Section (1) of Section 2 of the Inland Vessels Act, 1917 (I of 1917), or a vessel under construction that has not been launched unless it is notified by the Central Government to be a vessel for the purposes of this Act :

Provided further that this Act shall not apply to a warship, naval auxiliary or other vessel owned or operated by the Central or a State Government and used for any non-commercial purpose, and, shall also not apply to a foreign vessel which is used for any non-commercial purpose as may be notified by the Central Government.”

26. On a plain reading, the first proviso takes out an inland vessel defined in clause (a) of sub-section (2) of Section 1 of the Inland Vessels Act, 1917 and a vessel under construction, from the purview of the Admiralty Act, 2017. The Parliament has used the word ‘defined’ with a definite purpose. What has to be considered is whether the Vessel meets the ingredients of an inland vessel as defined in the Act,

2017. The choice of the word ‘defined’ instead of the word ‘registered’ is required to be given the meaning it deserves. The two terms ‘defined’ and ‘registered’ cannot be used interchangeably. Thus, the definition of an inland water under the Act of 1917, assumes critical salience.

Under Section 2(1)(a) of the Act, 1917, an inland vessel is defined as under :

“(a) “inland vessel” or “inland mechanically propelled vessel” means a mechanically propelled vessel, which ordinarily plies on inland water, but does not include fishing vessel and a ship registered under the Merchant Shipping Act, 1958 (44 of 1958);”

27. An inland vessel or inland mechanically propelled vessel means the mechanically propelled vessel which ordinarily plies on inland water, but does not include a fishing vessel and the ship registered under the Merchant Shipping Act, 1958. Again a plain reading of the aforesaid definition would indicate that the defining element of an inland vessel is whether it ordinarily plies on inland water, as defined in clause (b) of Sub-section (1) of Section 2 of the Act, 1917, which reads as under :

“(b) “inland water” means -

- (i) any canal, river, lake or other navigable water within a State :
- (ii) any area of any tidal water deemed to be the inland to be smooth and partially by the Central Government under Section 70,
- (iii) Waters declared by the Central Government to be smooth and partially smooth waters under clause (4) of Section 3 of the Merchant Shipping Act, 1958;”

28. Secondly, the definition of an inland vessel excludes a fishing vessel and a

ship registered under the Merchant Shipping Act, 1958. Thirdly, conspicuous by its absence is the reference to registration of a vessel as an inland vessel under Chapter IIA of the Act, 1917.

29. Undoubtedly, Defendant No.1 Vessel is registered under the Act, 1917. A certificate of registration issued under Section 19F of the Act, 1917 is annexed to the plaint. In this context, in paragraph 1 of the plaint, the Plaintiff asserts that the Defendant No.1 Vessel appeared to be registered under the Inland Vessels Act, 1917, but on the Defendants representation that it ordinarily plies on non-inland water, the Plaintiff had hired Defendant No.1 Vessel for work on its project area, which fell under non-inland water.

30. In the light of the clear and explicit provisions contained in sub-Section (2) of Section 1 of the Act, 2017, and Section 2(1)(a) and (b) of the Inland Vessels Act, 1917, a detailed reference to the judgments relied upon by Mr. Kamat and Mr. Rajasekhar on the principle of interpretation in support of the proviso is not at all warranted. It is trite appropriate function of a proviso is that it qualifies the generality of the main enactment by providing exception and taking out from the main enactment a portion which, but for the proviso, would fall within the ambit of the main enactment.

31. In my view a conjoint reading of the provisions contained in sub-section (2) of Section 1 of the Act, 2017 and Section 2(1) (a) of the Act, 1917, indicate that even

when a vessel is registered under the Inland Vessels Act, 1917, the applicability of the Admiralty Act, 2017 cannot be questioned unless it can be shown that the Vessel ordinarily plied on inland water. The registration of a vessel under Inland Vessels Act, is not the sole barometer of determining the character of a vessel. An essential feature of an inland vessel is it voyages ordinarily within the inland waters. Secondly, the inland vessel which is registered under the Merchant Shipping Act, 1958, loses the character of an inland vessel, even if it ordinarily plies on inland water and registered under the Inland Vessels Act, 1917. In either case, the registration of a vessel under Chapter IIA of the Act, 1917, is not determinative.

32. Reverting to the facts of the case, the judgment in the case of **I-Marine (supra)** does not govern the facts of the case at hand as, in the said case, the vessel in question was registered under the Merchant Shipping Act, 1958.

33. Mr. Kamat would urge that it is for the Plaintiff who seeks to invoke the Admiralty Act, 2017, to establish a prima facie case that the Act of 2017 applies. Registration of the Defendant No.1 Vessel under Section 19F of the Act, 1917 raises a presumption of the Defendant No.1 Vessel being an inland vessel. In the absence of material to the contrary, the Defendant No.1 Vessel could not have been arrested by invoking the Admiralty Act, 2017.

34. At this stage, the issue needs to be determined on the basis of the pleadings and material pressed into service. The Plaintiff claimed that the Defendants had

represented that the Defendant No.1 Vessel ordinarily plied on non-inland waters. In contrast, there is an equally general assertion that the Defendant No.1 Vessel plied ordinarily on inland waters. In my view, the issue cannot be decided on the basis of abstract doctrine of onus of proof. Indisputably, the work in question was to be carried out and was, in fact, carried out on non-inland waters. The details of the previous voyages undertaken by Defendant No.1 Vessel and the logbook would have thrown light on the ordinary area of operation of the Defendant No.1 Vessel.

35. In the very nature of the things, such material would be within the special knowledge of the Defendants. When the Defendants approached the Court with a case that the arrest is unlawful as the Vessel does not fall within the ambit of the Admiralty Act, 2017, the Defendants were enjoined to place material which would show with an element of certainty that the Defendant No.1 Vessel ordinarily plied on inland waters. It is also imperative to note that it is not the case of the Defendants the Defendant No.1 Vessel would never transgress on non-inland waters.

36. In this view of the matter, at best, the question as to whether the Defendant No.1 Vessel ordinarily plied on inland waters would be a triable issue. Thus, I am not impelled to vacate the order of arrest on the ground that the Defendant No.1 Vessel could not have been arrested as it falls beyond the purview of the Admiralty Act, 2017.

37. **Point No.2 : Whether the arrest for refund of hire charges and/or for**

expenses incurred for hire of tugs was unjustified ?

38. Mr. Kamat urged with a degree of vehemence that the Plaintiff's claim for refund of hire is untenable bordering on being outlandish. To claim refund of hire charges after having utilized the Defendant No.1's services not only for the contract period but also 10 days beyond, without any demur, is wholly iniquitous. In any event, according to Mr. Kamat, clause 8 of the Purchase order providing for refund of the hire charges never became operational. To wriggle out of the apparent incongruity in the stand of the Plaintiff, according to Mr. Kamat, the Plaintiff has made an endeavour to improve its case from one of Defendant No.1 Vessel being a dumb barge to Defendant No.1 Vessel not being fully operational. The utilization of the services of Defendant No.1 Vessel for two and half months belies the Plaintiff's claim on both the counts, urged Mr. Kamat.

39. At any rate, the Plaintiff cannot seek refund of the hire charges simultaneously seeking the damages for the expenses allegedly incurred in hiring tugs to operationalize the Defendant No.1 Vessel. In fact, the Plaintiff having sought extension of the charter party beyond the contract period without any demur or demand, impairs the claim for damages on the principle of waiver by estoppel, submitted Mr. Kamat.

40. In opposition to this, Mr. Rajasekhar submitted with tenacity that the commercial nature of the bargain cannot be lost sight of. The parties had entered into

the contract being fully cognizant of the nature of the bargain. Thus, it was specifically provided that during the period of downtime of Defendant No.1 Vessel, no hire charges would be payable. The parties further agreed that if any expenses were required to be made by the Plaintiff to make Defendant No.1 functional to perform in accordance with the terms of the contract, those expenses would be borne by the Defendants. Therefore, there is no incongruity in the claim of the Plaintiff in seeking refund of the hire charges simultaneously claiming expenses incurred for making the Defendant No.1 functional.

41. Taking the Court through the correspondence exchanged between the parties, Mr. Rajasekhar would urge that there are clear and explicit admissions of defaults, and even an apology, on the part of the Defendants for not delivering the Defendant No.1 Vessel on time. Mr. Rajasekhar would further submit that the correspondence also indicates that, the fact that the Defendant No.1 was unable to propel by itself has not been contested. In the circumstances, the utilization of the tugs by the Plaintiff to make the Defendant No.1 functional was essentially a measure in mitigation of damages. The Plaintiff, thus, cannot be precluded from seeking the refund of hire charges plus the expenses incurred.

42. At this juncture, it may not be appropriate to delve deep into the allegations and counter allegations. Instead, it may be apposite to keep in view the test which is to be applied in the matter of ordering the arrest of a vessel in exercise of admiralty

jurisdiction and also vacating the order of arrest and/or return of security, when the defendant seeks such relief. The Division Bench judgment of this Court in the case of *M/s. Kimberly – Clark Lever Pvt. Ltd. V/s. M.V. Eagle Excellence*² (supra) has elaborately considered the test which should govern the exercise of jurisdiction.

43. After advertent to the pronouncements of the Supreme Court including the judgments in the cases of *Videsh Sanchar Nigam Ltd. vs. M. V. Kapitan Kud and others*³ and *M.V. Elisabeth and another vs. M/s. Harwan Investment & Trading Co. and another*⁴, and comparing and contrasting the norms of, “reasonably arguable best case” and “a *prima facie* case”, the Division Bench enunciated that to make out a reasonably arguable best case, as held by the Supreme Court, the plaintiff must establish a *prima facie* case and the distinction between two tests, namely, “the reasonably arguable best case” and “the *prima facie* case” has almost been obliterated and both the expressions substantially convey the same meaning.

44. On the aforesaid touchstone, readvertent to the facts of the case, there is material on record to, *prima facie*, indicate that the delay in delivery of the Vessel was primarily attributable to the Defendants. It is true that the Plaintiff had sought modification of the *spud*. However, that did not appear to be the principal reason for the delay in the delivery of the Defendant No.1 Vessel. A communication dated 11 January 2022 addressed on behalf of Snexa Projects – Defendant No.2, whereby the

² Appeal No.240 of 2007 in NMS 2346 of 2006 in ADMS 12 of 2006

³ (1996) 7 SCC 127.

⁴ AIR 1993 SC 1014.

defendants apologised for not handing over the Defendant No.1 Vessel on time, at this stage, prima facie, indicates the party to whom the delay was substantially attributable.

45. The correspondence addressed on behalf of the Plaintiff on 29 January 2021 indicates the position in which Defendant No.1 Vessel was found. There was a categorical assertion that the Defendant No.1 Vessel was unable to sail at her own and was not able to reach destination. Defendant No.1 Vessel was covering negative distance. That constrained the Plaintiff to hire the tugs and tow the Defendant No.1 Vessel at her destination to start the actual work.

46. In response, Snexa Projects – Defendant No.2 declined to pay any money to mobilize Defendant No.1 Vessel and refused to bear the expenses of towing tugs. Instead it was proposed that the Defendant No.1 would put down the anchor and, after weather calms, start to mobilize again within 2-4 days. At that stage, there was no clear and categorical denial that the Defendant No.1 was unable to propel by itself. The aforesaid correspondence assumes significance as it had an element of spontaneity.

47. In the backdrop of the aforesaid nature of correspondence exchanged between the parties, the stipulations in the contract are required to be noted. Clauses 8, 9, 10, 13, 14(e), bear upon the determination of the controversy. They read as under :

“8. Breakdown clauses :

Because of the following reasons, if the Vessel is not functioning properly as per Hirer, then it will consider as down time

- a. Manpower – in case, shortage of crews/unqualified/inexperienced personnel, which may affect the operation, then barge will be considered as break down until deployment of required personnel's.
- b. If any break down of Vessel then barge will be considered until it is made operational.
- c. Equipment's & Rigging Gears : Because of non-availability of sufficient spares/rigging materials, if barge is not operating properly, it will be on down time until it is replaced or repaired.
- d. Hull and Machinery : During operation, if hull or machinery get damaged/defective, it will be Considered as break down until it is repaired & fully operational condition. Either the resources available at site or by outside work shop, all the expenses such as, repair cost, agent charge, port & custom expenses, barge or boat hiring cost (if it is shifted to other place) etc., will be in Barge Owners Scope.
- e. Any damages or repairs due to excavators or crane shall be in COMACOE Scope.
- f. Weather & Environment condition : The weather and environmental conditions will be in line those expected at the time of the operating period and the location. Your crew is deemed to be aware of the same and operate the vessel accordingly to fulfill the task and objective of the hire. Any standby due to the bad weather conditions will be accountable/chargeable to COMACOE.
- f. Repair and Maintenance : Damages to the barge during offshore operations to be looked after by Vessel Owner & claimed from insurance.
- g. Scheduled maintenance allowed for 48 hours per month in four shifts of 12 hrs. of each.
- h. Any breakdown more than scheduled maintenance shall be deducted on pro rat basis on pro-rata basis.
- i. If breakdown is more than 15 days then the replacement of barge shall be under owners scope.

9. Rates : Hire charges will be as follows :

- a. Hire charges for “MV Lima V Rs.28,00,000/- per month.
- b. Daily Charter rate : INR 92,054 + GST per day or pro rata for part thereof
- c. Hire charges will not be applicable in the cases of breakdown clauses mentioned above.

10. Termination : - This contract of hire will terminate in the following circumstances :

- a. Poor performance of the vessel for any reason
- b. insufficient crew to perform the duties as defined.
- c. frequent breakdown affecting the Hire's operation
- d. loss of vessel.

13. Terms of payment : As agreed upon the following payment terms will apply.

- a. One month advance shall be paid against the security cheque at the time of issuance of PO.
- b. The balance one month advance shall be paid against when barge reaches RSPL Dwarka and ready for operation.
- c. Need two copies of invoices to be addressed to accounts office along with delivery challans duly signed and stamp by receive, copy of accepted P.O.
- d. It is expressly understood and agreed that the advance paid will always remain as a refundable advance which will become returnable to Buyer in case of failure to supply the equipment or termination of Purchase Order as per your Termination point Number 10 only. No any other reason will be accepted.

NOTE : The security cheque will be returned back to the Barge Owner after completion of one month project work.

14. Other Terms and Conditions :

- e. Barge should always be in a condition to capable of performing the work as defined in this order.”

48. Mr. Kamat would urge that the claim of the Plaintiff that it is entitled to the refund of the hire charges based on sub-clause (d) of clause 8, is ex-facie misplaced. Neither the hull nor the machinery was damaged or defective. Thus, the Defendant No.1 Vessel can never be said to have been on downtime. Mr. Kamat further submitted that had Defendant No.1 Vessel been not able to execute the task for which it was hired, or frequently broke down, as alleged, the Plaintiff had an option of terminating the contract under clause 10. Not only the Plaintiff did not invoke the termination clause, but sought an extension of the contract for 10 more days beyond the contract period vide email dated 19 March 2021. It is incomprehensible that the Plaintiff would have sought extension of the term of the contract of hire, had the Defendant No.1 Vessel been not performing upto the mark. This factor singularly demolishes the entire case of the Plaintiff, urged Mr. Kamat.

49. Mr. Rajasekhar joined the issue by canvassing a submission that the extension of term of contract cannot be construed out of context. The Plaintiff had repeatedly asserted that it was suffering losses on account of the delay and non-performance on the part of the Defendant No.1 Vessel. Within couple of days of the delivery of the Vessel, the Plaintiff had apprised the Defendants about the precarious condition in which the Defendant No.1 was operating. In the exigency of the situation, the Plaintiff was well advised to mitigate its losses by making the Defendant No.1 operational rather than terminating the contract and incurring more losses.

50. Mr. Rajasekhar laid emphasis on sub clause (c) of clause 9, which stipulated that hire charges will not be applicable in case of breakdown of Defendant No.1 Vessel. Reliance was also placed on sub-clause (e) of clause 14, under which the parties expressly agreed that the Defendant No.1 should always be in the condition capable of performing work defined in Purchase Order.

51. The situation which thus obtains is that the Plaintiff claimed to have incurred expenses in hiring tugs to make the Defendant No.1 Vessel operational. This claim of the Plaintiff, prima facie, finds support in the documents in the nature of the invoices raised by the tugs providers. In addition, there is material to indicate that within a couple of days of the delivery of the Vessel, the Plaintiff had apprised the Defendants about the necessity of the tugs to tow the Defendant No.1 vessel to the work site and to carry out the contractual obligations. There is also material to show that at the initial stage itself, Snexa Projects – Defendant No.2 had contested the liability to pay the charges for tugs.

52. The aforesaid material, if considered cumulatively, and, in conjunction with the delay in the delivery of the Defendant No.1 Vessel, purportedly for making the Defendant No.1 Vessel seaworthy, in my view, justifies an inference, prima facie, that the Defendant No.1 Vessel was not in a position to perform as self-propelled barge and discharge its contractual obligations to the fullest.

53. It is trite the contract between the parties is required to be considered in the

light of the intent of the parties in entering into the contract and the attendant circumstances. So construed, I am afraid to accede to the submission of Mr. Kamat that sub-clause (d) of clause 8 authorising the Plaintiff to incur the expenses for making the Defendant No.1 Vessel operational and recover the expenses thereof, did not kick in. To construe the said clause in the fashion as urged by Mr. Kamat, would be to completely lose the commercial sense of the bargain.

54. The issue which, however, merits consideration is the claim for return of hire charges simultaneously with the claim for expenses incurred for making the Defendant No.1 operational. Firstly, it is not the case of the Plaintiff that the services of the Defendant No.1 Vessel could not at all be utilized for the work for which it was hired. Secondly, there is material to show that the Plaintiff deducted a portion of the hire charges on account of liquidated damages as well. Thirdly, it is professed case of the Plaintiff that the hiring of the tugs was a measure in mitigation of the damages. In the aforesaid view of the matter, the question which comes to the fore is whether the Plaintiff's claim for both return of the hire charges and the expenses allegedly incurred to make the Defendant No.1 Vessel operational, is justifiable ?

55. Mr. Rajasekhar endeavoured his best to persuade the Court to hold that there is no prohibition in law to lay such a claim especially in the backdrop of the commercial nature of the contract. I am afraid to accede to this submission. Once the Plaintiff accepted performance of the contract, albeit by employing measures in

mitigating the damages, the remedy of the Plaintiff would be restricted to the damages suffered. The measure of damages would then be to put the Plaintiff in the same position as far as possible in which the Plaintiff would have been if the contract had been performed by the Defendant No.1 strictly in accordance with the terms of the Purchase Order. Normal measure of damages for breach of contract was thus stated in the case of **Ghaziabad Development Authority v/s. Union of India and Anr.**⁵ as under :

“5..... In case of breach of contract, damages may be claimed by one party from the other who has broken its contractual obligation in some way or the other. The damages may be liquidated or unliquidated. Liquidated damages are such damages as have been agreed upon and fixed by the parties in anticipation of the breach. Unliquidated damages are such damages as are required to be assessed. Broadly, the principle underlying assessment of damages is to put the aggrieved party monetarily in the same position as far as possible in which it would have been if the contract would have been performed.”

56. From this standpoint, in my considered view, the Plaintiff would not be justified in claiming return of the hire charges, simultaneously with expenses which it claimed to have incurred for making the Defendant No.1 Vessel operational. Had it been the case of the Plaintiff that the work for which Defendant No.1 Vessel was hired, could not be performed despite hiring tugs to make the Defendant No.1 operational, different consideration would have come into play. In this context, the act of the

5 (2000) 6 SCC 113

Plaintiff in seeking an extension of the contract for 10 days by a communication dated 19 April, 2021 underscores that the Defendant No.1 could be utilized for the work it was hired for and tilts the scale in favour of the Defendants.

57. The conspectus of aforesaid consideration is that the claim of the Plaintiff for return of the hire charges, prima facie, does not appear to be sustainable. Thus, the security demanded from the Defendants for the release of the Defendant No.1 Vessel needs to be scaled down. The Plaintiff claimed to have incurred expenses to the tune of Rs.76,56,303/- to make the Defendant No.1 Vessel operational to perform the work for which it was hired. In my view, it would, therefore, be appropriate to call upon the Defendants to furnish security for the said amount along with interest thereon @ 9% p.a. from the date of the institution of the Suit.

58. Hence, the following order :

ORDER

- (i) The Application stands partly allowed.
- (ii) The quantum of the security to be furnished by the Defendants for the release of the Vessel M.V.Lima V, stands scaled down.
- (iii) The Defendants shall furnish security in the sum of Rs.76,50,303/- along with interest @ 9% p.a from the date of the institution of the Suit for the release of the Defendant No.1 Vessel.
- (iv) The order of arrest dated 27 July 2021 and the Judge's Order No.132 of

2021 of even date stand accordingly modified.

(v) No costs.

(N.J.JAMADAR, J.)