|cITEM NO.101 COURT NO.6 SECTION IX

S U P R E M E C O U R T O F I N D I A

RECORD OF PROCEEDINGS

CIVIL APPEAL NO(s). 3308 OF 1999

K.P. SOMAN Appellant (s)

VERSUS

BD.OF TRUSTEES OF PORT OF MORMUGAO & ANR Respondent(s)

(With office report)

Date: 20/04/2006 This Appeal was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE B.P. SINGH

HON'BLE MR. JUSTICE ALTAMAS KABIR

For Appellant(s) Mr. B.V. Deepak, Adv.

Ms. Malini Poduval,Adv.

For Respondent(s) Mr. U.A. Rana, Adv.

Mr. Arvind Kumar, adv.

Mr. P.K. Thakur, Adv.

for M/S Gagrat & Co.,Advs.

UPON hearing counsel the Court made the following

O R D E R

The appeal is dismissed with no order as to the co
sts in terms of the signed order.

(Ajay Kr. Jain)
(Vijay Dhawan)

Court Master
Court Master

(Signed order is placed on the fil
e)

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3308 OF 1999

K.P. Soman .... Appellant

Versus

Board of Trustees of Port of Mormugao & Anr. .... Respondents

O R D E R

The appellant herein impugns the judgment and order of the High Court of Bombay at Goa dated 29.7.1998 in First Appeal No. 93 of 1993. The High Court by its impugned judgment and order has non-suited the appellant on two grounds, firstly, on the ground of the bar of Order II Rule 2(3) of the Code of Civil Procedure, 1908 and secondly, on the ground of limitation holding that the suit was barred by limitation prescribed by Section 120 of the Major Port Trusts Act, 1963. The facts of the case are not in dispute. They may be succinctly stated thus,

The appellant herein entered into an agreement with the respondent-Trust which involved removal of wreck at Vasco Bay and dumping the same at Berth No. 10 at the tendered amount of Rs.14,97,000/- subject to "no cure no pay" clause. The work was to b

e completed within a period of 35

weather working days and the appellant was required to furnish a bank guarantee in the sum of Rs.65,000/- as

security deposit and Rs.10,000/- as earnest money. As against the advanc e of Rs.7,00,000/- made to the

appellant he was required to give a bank guarantee, which he furnished. It appears that the w ork could not be

completed within the period stipulated in the agreement and the period had, therefore, to be e xtended. The

appellant claims to have done some work inasmuch as he had removed 5,000 Metric Tonnes of th e wreckage

and in the process had spent about Rs.17,10,000/-. However, no payment was made to the appell ant. On April

12, 1988, the respondent No. 2 sent a letter to the appellant herein complaining that he was n ot doing work of

removal of the wreckage and that if no reply was received by 18th Apr il, 1988, the bank guarantee of

Rs.7,00,000/- furnished by the appellant would be encashed and the contract would be treate d as cancelled.

On 9.5.1988, the appellant received a communication from respondent No. 2 date d 5.5.1988 conveying the

decision of the respondents to encash the bank guarantee and to treat the contract as cancelle d.

On the following day, i.e., on 10.5.1988 the appellant filed a Regular Civil Suit No. 62/1988

against the Port Trust for a declaration that they were not entitled to encash the bank gua rantee and for an

order of injunction restraining the defendants from encashing the bank guarantee. While t he said suit was

pending, the appellant by his notice of 3.1.1989 called upon the respond ents to pay him a sum of

Rs.17,10,000/- within four weeks. Since the demand of the appellant was not fulfilled, he fil ed an application,

being Miscellaneous Application No. 229/1989 in the High Court on 15.6.198 9 under Section 402 of the

Merchant Shipping Act, 1958. That proceeding was ultimately dismissed by the High Court on June 05, 1990 holding that Section 402 of the Merchant Shipping Act did not apply to a case where there was an express agreement between the owner and salvor. Thereafter, on July 05, 1990 the instant suit being Special Civil Suit No. 93/1990 was filed by the appellant to recover the sum of Rs.21,60,000/- together with interest thereon towards salvage services rendered by him as also the other amounts deposited by way of security deposit and earnest money.

We may at this stage observe that in the injunction matter, though temporary injunction was granted, in the appeal preferred therefrom a direction was made by the Appellate Court to deposit the amount of Rs.7,00,000/- in Court, and in that view of the matter the appellant withdrew the said suit.

The instant suit was resisted by the respondents on the ground that the suit was barred by the provisions of Order II Rule 2(3) of the Code of Civil Procedure, 1908, since the appellant-plaintiff herein had earlier filed Regular Suit No. 63/1998 which was subsequently withdrawn without obtaining the liberty of the Court to file a subsequent suit. The respondents-defendants also resisted the claim of the appellant on the ground that the claim was barred by limitation prescribed by Section 120 of the Major Port Trusts Act, 1963 which prescribed that such a suit should have been filed within a period of six months.

The learned Civil Judge who tried the suit upheld the contentions urged on behalf of the respondents, and in appeal the High Court has affirmed the findings of the Trial Court.

We are of the view that since the suit must fail on the question of limitati

on, it is not necessary for us to consider the other submissions urged before us which relates to the bar pleaded on the basis of Order II Rule 2(3) of the Code of Civil Procedure. At the threshold we may observe that counsel for the appellant has not contended before us that the limitation prescribed by Section 120 of the Major Port Trusts Act will not apply to the suit in question. We are, therefore, not called upon to consider whether the limitation prescribed by the aforesaid Section of the Major Port Trusts Act does not apply to the suit in question. We proceed on the basis that the limitation prescribed by Section 120 of the Port Trusts Act applies to the suit in question since that position is not disputed by the appellant, nor was it disputed by the appellant even before the High Court. The question then is whether the suit was filed within the period of limitation prescribed by Section 120 of the Major Port Trusts Act. The Courts below have proceeded on the basis that by letter dated 5.5.1988, received by the appellant on 9.5.1988, the respondents communicated their decision to encash the bank guarantee and unequivocally declared that they had cancelled the agreement. The cause of action for the suit, therefore, arose on 9.5.1988. On that basis it was held that the suit filed on July 5, 1990 was clearly barred by limitation.

Counsel for the appellant sought to contend before us that in view of the provisions of Section 29 (2) of the Limitation Act, the provisions contained in Sections 4 to 24 of the Limitation Act applied to the suit in question and, therefore, the period during which the appellant was pursuing bona-fide a legal remedy before another forum should be excluded. He submitted that the application under Section 402 of the Merchant Shipping Act was filed on 15.6.1989 and the same was dismissed on 5.6.1990. He, therefore,

submitted that the said period ought to be excluded in computing the period of limitation. It is not possible to accept the contention, because if the period of limitation prescribed under Section 120 of the Major Port Trusts Act applied, the cause of action having arisen on 9.5.1988, the suit ought to have been filed on or before the 8.11.1988. Since the suit was not filed within the period of limitation as prescribed by Section 120 of the Major Port Trusts Act, the suit was barred by limitation on the date it was filed. It was only subsequently, almost 7 months later, that an application under Section 402 of the Merchant Shipping Act was filed by the appellant. Since the suit stood barred by limitation much before the filing of the said application under Section 402 of the Merchant Shipping Act, the time taken in disposal of the said proceeding cannot be taken into account for computing the period of limitation and, therefore, no question arose of excluding the said period while computing the period of limitation prescribed under the Act.

The learned counsel then submitted that the cause of action in the instant case arose not on 9.5.1988 but on a subsequent date. According to him he had submitted a final bill claiming Rs.17,10,000/- on 27.5.1988. Since no payment was made, he issued notice by registered post calling upon the respondents to settle the final bill. This notice was issued on January 03, 1989. According to him, the cause of action arose when the respondents refused to make payment in terms of the notice issued on January 03, 1989. This submission must also be rejected because the respondents having cancelled the agreement and given notice thereof to the appellant which was received by him on 9.5.1988, the amount, if any, claimed by the appellant

under the said agreement became payable to him and he could have filed a suit for recovery of the said amount. The cause of action was not dependent upon the appellant giving notice to the respondents and claiming the amount due under the agreement, nor was it dependent upon the refusal of the respondents to pay the amount claimed or their failure to respond to the claim made. In the facts and circumstances of the case, we have no doubt that the cause of action accrued to the appellant on 9.5.1988 when the respondents cancelled the agreement and proceeded to encash the bank guarantee.

So viewed, we can find no error in the impugned judgment and order of the High Court. Accordingly, we dismiss the appeal but with no order as to costs.

..........................J.

(B.P. SINGH)

..........................J.

(ALTAMAS KABIR)

New Delhi

April 20, 2006