
(2013) 11 MAD CK 0248

In the Madras High Court

Case No : A.S. Nos.167, 206 and 207 of 2002 & CMP.Nos.13770 & 13771 of 2012

M/s. Adithyaa

APPELLANT

Vs

Food Corporation of India

RESPONDENT

Date of Decision : 27-11-2013

Acts Referred:

Citation : (2014) 1 MadWN(Civil) 113

Hon'ble Judges : Mr. R.S. Ramanathan, J.

Bench : Single Bench

Advocate : Mr. M.S. Sundarajan, Advocate, for the Appellant No. A.S. 167 of 2002; Mr. A.S. Thambuswamy, Advocate, for the Respondent A.S. No. 206 of 2002; Mr. M.S. Sundarajan, Advocate, for the Respondent No. 1 in A.S. No. 207 of 2002; Mr. A.S. Thambuswamy, Advocate, for the Respondent No. A.S. 167 of 2002; Mr. A.S. Thambuswamy, Advocate, for the Appellant A.S. No. 206 of 2002; Mr. A.S. Thambuswamy, Advocate, for the Appellant A.S. No. 207 of 2002; Mr. M. Kamalanathan, Advocate, for the Respondent No.2 in A.S. 207 of 2002

Final Decision : Disposed Off

Judgement

Mr. R.S. Ramanathan, J.—As these Appeals are arising out of the common judgment and decree, dated 29.04.2002, passed in O.S.Nos.1 & 8 of 2002, on the file of the Additional District Judge, Fast Track Court, Cuddalore, they were heard together, and disposed of, vide this common judgment.

2. The plaintiffs in O.S.No.1 of 2002, are the appellants in A.S.No.206 of 2002, the first defendant in O.S.No.8 of 2002, is the appellant in A.S.No.207 of 2002, and, the plaintiff in O.S.No.8 of 2002, is the appellant in A.S.No.167 of 2002.

3. The plaintiffs in O.S.No.1 of 2002, filed the suit for recovery of a sum of Rs.9,29,715.82 from the defendant. The suit was dismissed. Aggrieved by the same, A.S.No.206 of 2002 was filed. The first defendant in O.S.No.8 of 2002, filed A.S.No.207 of 2002 against the grant of decree for a sum of Rs.1,29,195.74. In O.S.No.1 of 2002, counter claim was made by the defendant for a sum of Rs.6,04,597/- with future interest at the rate of 12% p.a. and that

was allowed and the same was challenged in A.S.No.206 of 2002.

4. The plaintiffs allegation in O.S.No.1 of 2002, is as follows:-

i) For the year 1992-93, the plaintiff-Corporation decided to award stevedoring contract. For the said purpose, they floated tenders dated 17.08.1992, and the tender was called for submission of rates by interested persons for stevedoring, clearing, handling and transport of food grains arriving in bulk at Cuddalore Port. The tender was opened on 21.08.1992. The rate quoted by the defendant-Contractor was accepted by the plaintiffs, and an appointment order was given to the defendant and the defendant was asked to undertake the work at Cuddalore Port. The defendant furnished a bank guarantee, for a sum of Rs.5,00,000/-. The Tamil Nadu Mercantile Bank, Madras, guaranteed the said amount (i.e., Rs.5,00,000/-). The period of contract was for one year, i.e., from 30.09.1992 to 29.09.1993. As per clause xx Part-1 and xx Part-II (ii) of the tender agreement, the contractor is responsible for taking necessary steps to ensure prompt discharge of the goods from the Vessels and removal of the same from the sheds, without causing any damage. The contractor is also liable to make good the loss that may be caused to the plaintiffs, on account of lack of care in handling the Vessels on the part of the defendant.

ii) The defendant handled two Vessels, viz., i) M.V.Lok Pratima and ii) M.V.Jag Rahul, which arrived at Cuddalore Port on 1.10.1992 and 5.3.1993, respectively. The Vessel-M.V.Lok Pratima arrived at Cuddalore Port with the Bill of Lading, weighing 23,240.455 metric tonne of wheat from Canada at 09.06 hours on 1.10.1992 for lightening. The said Vessel commenced her discharge work at 11.15 hours on 7.10.1992, and completed her lightening at 14.30 hours on 2.11.1992. The rate of discharge to be maintained, as per the Charter Party agreement between the Shipping Corporation of India and Food Corporation of India, in respect of the Vessel-M.V.Lok Pratima, dated 22.7.1992, is 1,500 metric tonne, per weather working day (six hatches 5 hooks). The lay time allowed for discharging 6194 m.t. of goods, was four Days 03 Hours 06 Minutes ("D.H.M."4.03.06), as per the above said Charter Party agreement, whereas, the defendant has taken D.H.M.20-19, for lightening purpose. As a result, the plaintiffs had to pay the overall demurrage of 6 days 11 hours 07, as per clause xx Part-1(i) of the tender agreement.

iii) In the case of the Vessel-M.V.Lok Pratima, there has been ship demurrage, due to slow discharge operation by the defendant. Hence, the plaintiff incurred loss towards the cost of gunny bags, transit loss in road movement and payment of customs overtime, thread costs, totalling a sum of Rs.8,40,215.27, as demurrage, and the said amount has been paid by the plaintiffs to the steamer owners. As per the tender agreement, the defendant is liable to make good the loss caused to the plaintiffs.

iv) Insofar as the Vessel-M.V.Jag Rahul is concerned, the same arrived at Cuddalore Port, at 22.30 hours on 5.3.1993, with the Bill of Lading, weighing

36,385 m.t. of wheat from Australia, for lightening before final discharge at Madras Port. The Vessel commenced her lightening work at 10.30 hours on 10.3.1993, and completed the said work at 18.30 hours on 15.3.1993. The quantity lightened at Cuddalore Port, was 4631 m.t., as per the draft survey, and carried on the balance quantity to Madras Port. As per clause 38 of the Charter Party agreement, the lay time allowed to discharge the quantity of 1,500 m.t. per weather working day is, 03 days 2 hours and 13 minutes, whereas, the defendant has taken 06 days 11 hours and 55 minutes to discharge the above said quantity. As per xx Part-1 (i) and Part- II (i) of the tender agreement, the defendant is liable to make good the loss caused to the plaintiffs.

v) Though the Vessel-M.V.Jag Rahul earned overall despatch money, by saving the lay time at Madras Port, the money so earned at Madras Port has offset the demurrage caused at Cuddalore Port. The free time allowed at Cuddalore Port, was only 03 days 02 hours and 13 minutes, and time taken by the defendant, was 06 days 11 hours and 55 minutes and therefore, time loss at Cuddalore Port, was 03 days 09 hours and 42 minutes. Hence, the plaintiff-Corporation had lost more despatch money due to lay time loss at Cuddalore Port. Hence, the plaintiffs incurred demurrage, amounting to Rs.5,95,700/-

vi) The defendant has also caused damage to the plaintiffs' goods, to the tune of Rs.24,993.52, as 2069 gunny bags were found damaged/short. As per the tender agreement, the defendant has to transport 11,485 BT gunny bags from Cuddalore Port to FSD, Thiruvandarkoil on 3.6.1993 and 9.6.1993, but, at the time of unloading the goods, 1,890 gunny bags were found damaged, besides there being shortages and losses. Owing to the same, the plaintiffs incurred damage to the tune of Rs.24,993.52. As per clause 2, para 4 (A) of the tender agreement, the contractors should do all services, including the stitching of non-standardised wheat bags inside the Ship holds, and, the plaintiff will approve the quality of thread to be used by the contractors for stitching purpose. The operation of filling up of food-grains in the gunny bags and stitching of the wheat bags by thread in the Ship is an internal operations, to be carried out by the contractors.

vii) As far as the plaintiffs' case is concerned, the contractor has to give foodgrains imported at Cuddalore Port in bags stitched by machine, for which the composite rate of Rs.129/- is given. Therefore, the amount of Rs.49,345.60 paid to the contractor, for reimbursement of thread cost at 20 paise, per bag, have to be refunded to the plaintiffs by the defendant. As per the tender agreement Part-V, the defendant was asked to transport 909 bags of Canadian wheat, weighing 86.161.000 m.t. from Cuddalore Port to Tiruvandarikiol depot, at the rate of Rs.40/- per m.t. Due to negligence on the part of the defendant in handling the bags during transportation, it was found that 220 kgs of wheat was found short delivered. The loss suffered by the plaintiffs, under this head, has to be compensated by the defendant, and, three times cost of foodgrains, works out to Rs.3,647.17, as per the tender agreement. As per clause 20, Part-II (ix) of the

tender agreement, the payment of customs OTA, is also to be borne by the contractor, since the composite rate of Rs.129/- per m.t., is inclusive of payment of customs OTA too. Hence, the customs OTA charge of Rs.45,010.00 paid by the plaintiffs, has to be refunded by the defendant.

viii) The total loss sustained by the plaintiffs, due to negligence on the part of the defendant, is Rs.15,58,911.56. As the said amount was for more than the amount covered by the bank guarantee given by the defendant, and, since the bank guarantee was due to expire on 27.3.1996, the plaintiffs had no other option, except, to invoke the bank guarantee. The invocation of the bank guarantee was due to the default committed by the defendant. After deducting a sum of Rs.6,29,195.74, which was available with the plaintiffs, which included encashment of bank guarantee for a sum of Rs.5,00,000/- the balance payable by the defendant, is Rs.9,29,715.82.

ix) Hence, the plaintiff caused a demand on the defendant to remit Rs.9,29,715.82, to which, the defendant caused a reply, containing false allegations. The defendant also made a counter claim, before the City Civil Court, Madras, against the plaintiffs for the relief of permanent injunction, restraining them from invoking the bank guarantee. By this conduct, the defendant has shown his unwillingness to pay the amount, due to the plaintiffs. After issuing a final notice to the defendant on 3.9.1996, the plaintiffs filed O.S.No.1 of 2002, for recovery of a sum of Rs.9,29,715.82 with future interest at the rate of 18% p.a and for costs.

5. The defendant filed a written statement along with the counter claim, and the averments contained therein are as follows:-

i) It is true that the defendant was given a contract for clearing, handling and transport of food grains arriving in bulk, at Cuddalore Port. The period of contract was for one year, (from 30.09.1992 to 29.09.1993). The defendant deposited not only a sum of Rs.50,000/- as earnest money, but also, furnished a bank guarantee for a sum of Rs.5,00,000/-. The defendant handled two Vessels, viz., M.V.Lok Pratima and M.V.Jag Rahul, and did the work of stevedoring and clearing. From time to time, the defendant submitted the bills to the plaintiffs. As per the contract, the defendant should submit the bills within two months from the expiry of the contract, and, the provisional payment of 90% of the bills has to be paid by the plaintiffs. The bills were submitted on the following dates, a) 6.3.1993, b) 13.3.1993, c) 17.4.1993 and d) 20.4.1993, and, a reminder was sent on 2.9.1994. A total sum of Rs.1,76,807.98, was due from the plaintiffs. The plaintiffs sent a show cause notice on 24.1.1995, assessing the liabilities at Rs.10,38,283.94. The defendant sent a reply on 23.2.1995. Even after the receipt of the same, the plaintiffs remained indifferent, without paying the defendant's bills and without adjudicating the matter. Thereafter, the plaintiff by letter, dated 30.08.1995, sought for an extension of the bank guarantee for another one year, as it is expiring on 28.9.1995. The defendant by reply, dated 17.9.1995, pointed out the final adjudication and payment of their bills. The

plaintiffs, thereafter, attempted to invoke the bank guarantee, without a final adjudication or demand. Aggrieved by the same, the defendant filed O.S.No.3426 of 1996, on the file of the City Civil Court, Madras, for the relief an injunction, restraining the plaintiffs from invoking the bank guarantee and for recovery of Rs.1,76,807/- due from the plaintiffs. Long afterwards, the plaintiffs filed the suit (viz., O.S.No.1 of 2002) for an alleged claim of Rs.9,29,715.82. This suit has been filed only as a counterblast.

ii) The defendant has further stated that the allegation that in the case of M.V.Lok Pritima, there has been ship demurrage, due to slow discharge operation by the defendant is false, as the discharge work has been carried out as expeditiously as possible. The plaintiff has wrongly calculated the lay time for discharge. In Cuddalore Port, there is no dock facility, and it is a minor port, where the Ships used to be anchored 2 kilometers away from the wharf. The bags have to be loaded in boats and should be transported to the wharf, enroute, there is a curve, which is called the nose point. For all these reasons, the Government has restricted the plying of boats only from 6.00 a.m to 6.00 p.m. As per Rule 16 of annexure IV of the Tamil Nadu Minor Ports Harbour Rules, no craft can take place between 6.00 p.m. to 6.00 a.m. If calculated on the basis of 12 hours working time operations, the lay time at Cuddalore Port for 6389-469 m.t. is, 8 days 12 hours and 26 minutes. The discharge has been done in four days four hours and 52 minutes. From the total lay time, time taken for trimming M.V.Lok Pratima, is 1 day 3 hours and 4 minutes and time taken from trimming does not come under the discharge operations, and, on proper calculations, there has been saving of time of 3 days 57 hours and 34 minutes. The plaintiff-Corporation is aware of the Cuddalore Port rules, as they have been importing the cargoes at the said port from the year, 1960 onwards. At no point of time, has the plaintiffs stated on what basis the demurrage claimed, has been arrived at. They also did not take into consideration the rain, surf stoppage, which has been duly signed by the competent authority. The statement of facts, which has been signed by the steamer agent, Master of Vessel have also been sent to the plaintiffs by the defendant and the same were also accepted by the plaintiffs, without any demur. The foodgrains discharged would not be moved immediately from the wharf in order to create space in the wharf. The defendant, was therefore, allowed to use only 1/3 portion on the northern side of the wharf for discharge and stacking of standardized bags before loading them into wagons. The claim for demurrage for M.V.Lok Pratima is, therefore, arbitrary, baseless and untenable.

iii) Demurrage incurred with regard to M.V.Jag Rahul is also false, as the discharge work has been finished on time and there has been no slow down, or, slackness in the discharge operations. The discharge for M.V.Jag Rs.6,04,597.00 and hence, preferred a counter claim for a sum of Rs.6,04,597.00 and for costs. years from the contract period, made no claim regarding demurrage with respect to M.V.Jag Rahul. If really, any loss has incurred with regard to M.V.Jag Rahul, the plaintiffs, would have made the claim in the notice dated, 24.1.1995 itself,

but, only, in the subsequent notice, dated 22.05.1996, the demurrage with regard to M.V.Jag Rahul was made. By that time, the defendant has filed a suit against the plaintiff-Food Corporation of India, Madras, and Tamil Nadu Mercantile Bank, in O.S.No.3426 of 1996, on the file of the City Civil Court, Madras, for recovery of amount, and, also for an injunction, restraining the Food Corporation of India, Madras, from invoking the bank guarantee. This claim for demurrage was made only after the defendant's suit was filed. Hence, it is an after thought and made only as a counter blast to the suit filed by the defendant.

iv) The defendant has further stated that though the Vessel-M.V.Jag Rahul arrived at Cuddalore Port on 4.3.1993, the notice of readiness was accepted as per the directions of the Food Corporation of India, only on 15.03.1993. When the Vessel berthed at Cuddalore Port, it was 35.5 feet draft. As per the Charter Party agreement, the discharge of the cargo for Rs.5,00,000/- obtained by the plaintiff illegally. The loss claimed by the plaintiffs totalling to a sum Rs.15,58,911.56 is without any legal basis, or, owner of the Vessel. Eventhough, the discharge work commenced on 14.3.1993, it was completed on 15.3.1993. It is, therefore, quite clear that the discharge had been completed within the time allowed. The plaintiff has not given any details how a claim of Rs.5,95,700/- is arrived at by them. There was no possibility of the plaintiff-Corporation earning any despatch money, as the discharge work itself commenced only on 14.3.1993. The tender agreement does say that despatch money should be earned, but, it depends upon so many factors, like weather, proper functioning of handling equipments and availability of space in the wharf, and availability of boats etc. The discharge work carried out at Madras Port by another contractor, and the earning of despatch money at Madras Port, cannot be equated with discharge work done at Cuddalore Port, as the conditions stipulated at Cuddalore Port are entirely different. With regard to the cost of gunny bags damages, as alleged, the defendant is not at all liable. The number of gunny bags and its conditions, has not been verified in the presence of the defendant. The defendant was not asked to transport 11,485 BT gunny bags from Cuddalore Port to Tiruvandar Koil.

v) The claim for refund of money, paid for thread cost is also unsustainable. As per clause XIV (i) of the tender agreement, the Plaintiff Corporation has to arrange for the supply of empty gunny bags and also jute twine to the contractor from time to time. The plaintiff-Corporation has paid the amount towards the thread cost, knowing fullywell that it is an allowable claim, as per the tender agreement. No objection was made by the plaintiff- Corporation, when the claim was made by the defendant and they cannot plead ignorance of their own tender conditions.

vi) Similarly, the claim made towards the customs OTA is also a baseless claim. As per Part-II, Clause iv of the tender agreement, the customs OTA has to be directly paid by the plaintiff-Corporation. The claim made towards the transit loss is also un-sustainable. The bags, in which, the foodgrains were transported, were

covered and sealed by the Food Corporation of India and no impairing has been reported by the plaintiff-Corporation. The plaintiffs' suit is barred by limitation. The adjustment of a sum of Rs.6,29,195.71, by enforcing the bank guarantee offered by the defendant, is not in accordance with law, as the defendant has filed the suit, restraining the plaintiff from invoking the bank guarantee, and the same is pending before the City Civil Court, Madras, and hence, the amount obtained by the plaintiff, by invoking the bank guarantee, is not sustainable in law, and therefore, the defendant is entitled to the return of Rs.5,00,000/- obtained by the plaintiff illegally. The loss claimed by the plaintiffs totalling to a sum Rs.15,58,911.56 is without any legal basis, or, proof and, it is highly exaggerated.

vii). As per the terms of the tender agreement, the defendant has to furnish security deposit to the tune of Rs.5,00,000/- The defendant arranged a bank guarantee payable by the Tamil Nadu Mercantile Bank, Madras, for the said sum. The plaintiffs invoked the bank guarantee, even before they raised a demand for payment of money due and payable by the defendant. The sum of Rs.5,00,000/- was remitted by the Tamil Nadu Mercantile Bank to the plaintiff, in spite of the notice of injunction order obtained in O.S.No.3426 of 1996 on the file of the IV Assistant Judge, City Civil Court, Chennai, having been served on plaintiff. The adjustment of the sum of Rs.5,00,000/- paid by the Tamil Nadu Mercantiles Bank, on the invocation and encashment of the bank guarantee on 18.3.1996, against the alleged claim, is wrong and improper. With regard to the balance sum adjusted by the plaintiffs, the defendant claimed the same in O.S.No.3426 of 1996. Therefore, the defendant is entitled to the return of Rs.5,00,000/- appropriated by the plaintiff, by invoking the bank guarantee and the defendant is also entitled to the bank interest at the rate of 17% from 18.3.1996 to 11.6.1997 upto the date of this counter claim, amounting to Rs.6,04,597.00 and hence, preferred a counter claim for a sum of Rs.6,04,597.00 and for costs.

6. The averments made by the plaintiff-Corporation in the reply to the counter claim made by the defendant in O.S.No.1 of 2002, are briefly as follows:-

i) The defendant handled two Vessels, M.V.Lok Pratima and M.V.Jag Rahul. The bills submitted towards the handling charges were cleared in time and payments were effected to the defendant. With regard to four bills dated 06.3.1993, 13.3.1993, 17.4.1993 and 20.04.1003, full payment was not effected and only 50% of the bill amount was paid in respect of two bills, dated 13.3.1993, and 17.4.1993, which related to the trimming operations of the two Vessels, as there is no specific rate available in the tender. That apart, to minimise the other mounting liabilities of the defendant, entire bill amount was not paid. Similarly, in respect of the bill dated 20.4.1993, 10% balance of Rs.61,062.95 has to be adjusted towards the liabilities. So far as the bill, dated 6.3.1993 is concerned, it has been mentioned that shortages of goods were noticed at the receipt end, when goods were transported by roadways. The Plaintiff-Corporation also stated that a sum of Rs.1,29,195.75 has been adjusted from and out of the balance

payable to the defendant towards the trimming charges and those amounts were held under two bills.

ii) The plaintiff-Corporation further averred that, it is incorrect to say that Rs.1,76,807.98 was adjusted, as mentioned in para iii of the counter claim. It is also incorrect to say that the plaintiff-Corporation attempted to invoke the bank guarantee, without any adjudication or demand. The bank guarantee was invoked by the first plaintiff as early as on 1.3.1996, even before the filing of the suit and the application by the defendant before the City Civil Court, was brought to the knowledge of the first plaintiff. Before invoking the bank guarantee, the defendant was put on notice on 24.1.1995 and 27.1.1995, to remit the cost of damages suffered by the plaintiff due to the delay caused by the defendant in handling the goods. But, the defendant did not come forwards to pay the amount, and hence, the plaintiff was compelled to invoke the bank guarantee. It is also not correct to say that the time worked out by the plaintiff for the discharge of goods is incorrect, as the lay time is worked out as per the terms and conditions mentioned in the Charter Party agreement. The defendant, after fully acquainting themselves about the position of the Cuddalore Port tendered their contract and agreed to perform the services at Cuddalore Port, as per the terms and conditions contained in the tender agreement. Hence, the claim for demurrage with respect to M.V.Lok Pratima, is therefore, just and proper. The Tamil Nadu Minor Ports Harbour Rules, cannot be taken into account as the defendant is bound by the Charter Party's terms and conditions and the defendant has to discharge 1500 m.t. of wheat per weather working day.

iii) In respect of the Vessel-M.V.Jag Rahul, the lay time allowed for discharge of the cargo is, 3 days 2 hours and 13 minutes, whereas, the defendant took 6 days 11 hours and 55 minutes for discharge. Hence, there was an excess of 3 days, 9 hours and 42 minutes, for which, a sum of Rs.5,95,700/- has been claimed as demurrage at the rate of Rs.1,75,000/- per day. The gunny bags received at Thiruvandarkiol Depot from the Cuddalore Port, by the Local Depot Office were found damaged, and the defendant, who has been in custody of the same, is responsible for the same. The amount towards the thread cost paid to the defendant is also recoverable, as per the tender agreement. As per the tender agreement, the defendant has to do all the services, including the payment of overtime allowance at the composite rate and hence, the payment made for the customs OTA is also recoverable from the defendant. The transit loss recoverable from the defendant is also correct, as there has been short delivery of wheat at the receiving end. The plaintiff's claim is in time. The plaintiff invoked the bank guarantee, as the validity of the bank guarantee expires in March, 1996. The bank guarantee has been invoked before the first plaintiff received the suit notice in O.S.No.3426 of 1996. To adjust and to minimise the liability, the plaintiff was compelled to invoke the bank guarantee. The defendant ought to have claimed the amount in the suit filed by him against the plaintiff in O.S.No.3426 of 1996 on the file of the City Civil Court, Madras, and having failed to do so, the defendant is precluded from doing it now in O.S.No.1 of 2002. Hence, the

counter claim made by the defendant may be rejected or dismissed.

7. The averments contained in the plaint in O.S.No.8 of 2002 are briefly as follows:-

i) The plaintiff carries on business of stevedoring, handling and transporting of goods under the name and style of "Adithyaa". In the course of its business, it submitted a tender, dated 17.8.1992, called for, by the first defendant for stevedoring, clearance, handling and transporting of foodgrains arriving in bulk, landing at Cuddalore Port to the first defendant's godown. The tender was opened on 21.8.1992 and the plaintiff's tender was accepted by the first defendant. The plaintiff made earnest deposit of Rs.50,000/- along with the tender quotation. The tender agreement contained various terms and conditions and the period of the contract was for one year from the date of appointment. The terms stipulated among other conditions, is the furnishing of security deposit of Rs.5,00,000/- which gave an option to deposit 50% of the prescribed security at the time of acceptance of the tender and the balance 50% has to be paid by the plaintiff by deductions at the rate of 5 % from the admitted bills of the contractors. The plaintiff submitted the security deposit initially, by exercising the above option, but, on the arbitrary demand made on the plaintiff by the first defendant in the course of the operation of the contract, the plaintiff complied with the terms of the contract, by furnishing a bank guarantee for Rs.5,00,000/- given by the second defendant-Tamil Nadu Mercantile Bank Ltd., The bank guarantee was in force from 28th January, 1993 upto 28 September, 1995. The guarantee was to be in force during the period taken and will be enforced only on failure on the part of the contractor to perform the contract, and for a claim by way of loss or damage caused to the first defendant by breach of conditions contained in the said agreement.

ii) The plaintiff performed the contract from 30.09.1992, to 29.09.1993, by stevedoring, clearance, handling and transporting the foodgrains, which arrived at the Cuddalore Port and submitted the bills for payment from time to time. By letter dated 2.9.1995, the plaintiff reminded the first defendant that their Bill No. S.015, dated 6.3.1993, Bill No.018, dated 13.3.1993, Bill No.024, dated 7.4.1993, and Bill No.029, dated 22.4.1993, totalling a sum Rs.1,38,824.38 were kept pending, without payment. Apart from the above said amount, payable to the plaintiff, the first defendant has to pay a sum of Rs.24,456/- towards the stitching of Padutha for the Vessel-M.V.Lok Pratima and a sum of Rs.7,527.60 towards stitching of Padutha and Rs.6,000/- for levelling of 4 hatches in respect of the Vessel-M.V.Jag Rahul. Therefore, the first defendant has to pay a total sum of Rs.1,76,807.98, as aforesaid with respect to the bills submitted and the demand contained in the letter dated 2.9.1994 for the trimming and other expenses, which formed the work entrusted under the contract. The contract stipulated that bills should be submitted to the extent of 90% of such bills. In spite of submission of the bills for the work completed, as aforesaid, the first defendant has not paid any amount till date, nor, has any reason been given for

non-payment as per the contract. The plaintiff states that in spite of its letter dated 2.9.1994, 23.2.1995 and 17.9.1995, the first defendant has not paid any amount towards the sum of Rs.1,76,807.98, and hence, the plaintiff has sought the relief in the suit proceedings for recovery of the said amount.

iii) The first defendant sent a show cause notice, dated 24.1.1995, stating that, as per the provisional assessment, an approximate liability of Rs.10,38,283.94 under various heads, including demurrage charges etc., had been fixed on the plaintiff, "and that, if no explanation was received, the first defendant will proceed further. The plaintiff immediately replied to the show cause notice, by explanation letter, dated 23.2.1995, and thereby, repudiated the liability. However, the first defendant, by letter dated 30.8.1995, without applying its mind to the explanation given by the plaintiff, sought for an extension of the bank guarantee for another one year, stating that, it is expiring on 28.9.1995. The plaintiff intimated the first defendant that without prejudice to their stand that no liability for damages or expenses could be fixed on them, they had given instructions to the second defendant to extend the bank guarantee for six months from 29.9.1995. The plaintiff understands that the second defendant intimated the extension of the bank guarantee to the first defendant. The first defendant seems to take recourse to the bank guarantee, without considering the plaintiff's explanation letter, dated 23.2.1995. The first defendant cannot have any recourse to the bank guarantee, once the contract has been performed, and there has been no breach of contract by the plaintiff, complained during the period of the contract from 30.09.1992 to 29.9.1993. It is under these circumstances, the plaintiff filed the suit for a permanent injunction, restraining the first defendant from enforcing the bank guarantee dated 28.1.1993, extended upto 28.3.1996 and the second defendant from making any payment to the first defendant under the said guarantee and a decree for a sum of Rs.1,76,807.98 against the first defendant and for costs.

8. The averments contained in the written statement filed in O.S.No.8 of 2002 of the first defendant are briefly as follows:-

i) The bank guarantee was invoked by the first defendant, as early as on 1.3.1996, even before suit notice was issued to the first defendant. Further, pursuant to the invoking of the bank guarantee, the second defendant issued a fixed deposit receipt, dated 18.3.1996, for a sum of Rs.5,00,000/- in favour of the first defendant, which deposit is for a period of one year, i.e upto 18.3.1997. As such, the suit filed by the plaintiff has become infructuous. During the year 1992-1993, the first defendant decided to award stevedoring contract to the plaintiff, which was done so under letter, dated 28.9.1992. As per the terms of the tender agreement, the contractor has to furnish a bank guarantee for a sum of Rs.5,00,000/-. Accordingly, the plaintiff furnished a bank guarantee for a sum of Rs.5,00,000/-, which was guaranteed by the second defendant and the bank guarantee was valid upto 29.9.1995 and subsequently, it was extended for a period of six months, i.e., upto 27.3.1996.

ii) The plaintiff commenced contract work at Cuddalore Port on 30.09.1992. In the course of the contract from 30.09.1992 to 29.09.1993, the plaintiff handled two Vessels, i) M.V.Lok Pratima and ii) M.V.Jag Rahul, which arrived at the Cuddalore Port. As per the Charter Party agreement, the plaintiff has to discharge certain goods, as indicated in the tender agreement, which was accepted by the plaintiff. However, the plaintiff failed to discharge the goods according to the accepted rates, which were indicated in the Charter Party. Since the plaintiff failed to comply with the terms and conditions of the tender agreement, the first defendant sustained immense loss to the extent of about Rs.8,49,215.29, on account of lay time charges, ship demurrage charges, gunny bags losses etc. The first defendant assessed the provisional loss to be around Rs.10,38,283.94 and called upon the plaintiff to pay the same. However, the plaintiff did not pay the amount, claimed by the first defendant, but, raised various objections and claims. Since the losses incurred by the first defendant, which was provisionally fixed, was more than the value of the bank guarantee furnished by the plaintiff, the first defendant invoked the bank guarantee, which was accordingly paid to the first defendant by the second defendant by way of a fixed deposit in their favour.

iii) The contract was awarded to the plaintiff for a period of one year, for stevedoring, clearing, handling and transporting of foodgrains at Cuddalore Port. Part-I (i) of the tender agreement, in question, clearly envisages that the plaintiff was ensured the discharge of cargo handled by it at the rate not less than what was provided for, in the Charter Party agreement of the concerned Vessel, and, if there has been any short fall in discharge of the goods on the stipulated rate and consequential demurrage charges, the plaintiff will be responsible for the same and will make good the losses and expenses incurred by the first defendant. As per the tender agreement, the plaintiff has to discharge 1500 m.t. of goods per day. As far as the transaction is concerned, the Vessel M.V.Lok Pratima incurred ship demurrage due to slow discharge operations by the plaintiff. In addition to that, the first defendant had incurred loss for a sum of Rs.1,33,550.57, towards the cost of gunny bags, jute twine, transit loss and customs OTA. As such, the allegations that the first defendant had to pay the plaintiff, an expenditure of Rs.24,456/- incurred by the plaintiff towards the stitching of Padutha for the Vessel-M.V.Lok Pratima and a sum of Rs.7,527.60 towards the stitching of Padutha and Rs.6,000/- for levelling four hatches in respect of the Vessel-M.V.Jag Rahul are false. Therefore, the first defendant has to pay a total sum of Rs.1,76,807.93 as aforesaid, with respect to the bills submitted and the demand contained in the letter dated 2.9.1994 for the trimming and other expenses, which formed the work entrusted under the contract are false, frivolous and vexatious. The first defendant has not fixed the provisional liability as Rs.8,52,921.37. The first defendant received a reply from the plaintiff on 23.2.1995, which is still under examination by the first defendant for fixation of final liability. However, since the bank guarantee was to expire on 27.3.1996, the first defendant had no other alternative, but, to invoke the bank guarantee.

iv) The averment that the first defendant cannot under law, fix damages arbitrarily, and claim any amount as damages and the terms of the contract with respect to this are erroneous and lopsided, are false, vexatious and baseless. The stevedoring contract was awarded to the plaintiff only on the application made by the plaintiff. The same was accepted by the plaintiff and the work was carried on at Cuddalore Port. At this juncture, the plaintiff is not entitled to question the validity of the terms and conditions of the contract. The damages were fixed, after taking into consideration the losses suffered by the first defendant due to the plaintiff. The first defendant has not even replied to the demand of payment of Rs.1,76,807.98 towards the bills for the work done, is denied as false and baseless. The letter, dated 23.2.1995 is being considered for fixation of final liability. It is false to state that the first defendant cannot have any recourse to the bank guarantee once the contract has been performed and there has been no breach of contract by the plaintiff.

v) As stated earlier, the first defendant has sustained heavy loss due to the failure on the part of the plaintiff in discharging the contractual obligations. Hence, the loss incurred by the first defendant should be compensated by the plaintiff. Further, the plaintiff cannot have any claim from the first defendant. However, as a provisional assessment of liability, the first defendant had indicated that the plaintiff is liable to pay the first defendant a sum of Rs.8,52,921.37. Since this amount was far more than the amount covered by the bank guarantee, and as the bank guarantee was due to expire on 27.3.1996, the first defendant had no other alternative, but, to invoke the bank guarantee. It is absolutely clear that the plaintiff has committed default and breach of contract and the amount owed to the first defendant is more than the amount given by the plaintiff in the form of bank guarantee. The plaintiff's claim for the sum of Rs.1,76,807.98 against the first defendant, is totally baseless and is not maintainable, either in law, or, on facts. Under these circumstances, it is prayed for the dismissal of the suit with costs.

9. The averments contained in the written statement filed by the second defendant in O.S.No.8 of 2002, are briefly as follows:-

i) The second defendant has given a bank guarantee in favour of the plaintiff for a sum of Rs.5,00,000/- and it is admitted. It is also true that the bank guarantee is in force from 28.1.1993 upto 28.9.1995. Thereafter, the guarantee was extended for a period of six months, i.e., from 28.9.1995 to 28.3.1996. As per the bank guarantee given by the second defendant in favour of the first defendant, the second defendant has to make payment without any demur and on a demand from the first defendant. Therefore, the second defendant is bound to pay to the first defendant when the money is demanded, notwithstanding any dispute/objection raised by the contractors/suppliers in any of the suit proceedings, pending before any Court, or, Tribunal related to therein. In fact, the second defendant, by its letter, dated 6.3.1996, informed the plaintiff to remit the sum of Rs.5,00,000/-, so as to make payment to the first defendant.

There was no reply from the plaintiff. In the circumstances, the second defendant was left with no other option, except, to encash the bank guarantee in favour of the first defendant. In fact, it has been clearly mentioned in the bank guarantee that the second defendant has to make payment, without any demur, or, protest, as and when the demand is made by the first defendant, notwithstanding, any dispute between the plaintiff and the first defendant. The second defendant has nothing to do with the dispute arose between the plaintiff and the first defendant. Moreover, there was no fraud alleged by the plaintiff against the first defendant. The first defendant, by letter, dated 1.3.1996, informed the second defendant that the plaintiff has not performed the contractual obligations satisfactorily, and hence, the first defendant wanted to encash the bank guarantee amount in their favour. Accordingly, on 18.3.1996, the second defendant paid the amount by Muthu Coovial deposit, bearing receipt No.62198/586, dated 18.3.1996, for the sum of Rs.5,00,000/- to the first defendant. Later, the first defendant withdrew the amount. The second defendant has acted, as per the bank guarantee deed, and hence, the suit is liable to be dismissed against the second defendant.

10. In O.S. No.1 of 2002, the following Issues were framed by the Trial Court :-

- i) Whether the defendant has not completed the discharge work from M.V.Lok Pratima and M.V.Jag Rahul within the stipulated time for discharge, resulting in loss to the plaintiffs by way of demurrage?
- ii) Whether the defendant is liable to pay any damages to the plaintiffs towards the loss and damage caused to the gunny bags?
- iii) Whether the defendant is liable to pay any damages to the plaintiffs on account of thread costs, customs OTA and transit loss?
- iv) Whether the plaintiffs are liable to pay Rs.6,04,597/- to the defendant representing the bank guarantee amount and interest realized by the plaintiffs by invoking the bank guarantee, as claimed in the counter claim?
- v) Whether the plaintiffs are entitled to the amount claimed ?
- vi) To what other reliefs, the plaintiffs are entitled to?
- vii) To what other reliefs, the defendant is entitled to? and
- viii) Whether the suit is in time?

11. In O.S. No.8 of 2002, the following Issues were framed:-

- i) Whether the first defendant is entitled to invoke the bank guarantee, dated 28.1.1993, given by the plaintiff ?
- ii) Whether the plaintiff is entitled to recover the sum of Rs.1,76,807.98 against the first defendant towards the bills submitted for expenses incurred by the plaintiff in the course of performance of the contract between the parties?

iii) Whether there was any breach of contract by the plaintiff, as alleged by the first defendant and are they entitled to enforce the bank guarantee for paying themselves arbitrarily for the alleged damages? and

iv) To what relief ?.

12. The issues framed in O.S.No.8 of 2002 are modified as follows:-

i) Whether the plaintiff is entitled to the relief of permanent injunction, as prayed for ?

ii) Whether the plaintiff is entitled to claim a sum of Rs.1,76,807.98 from the first defendant? and

iii). To what relief, the plaintiff is entitled to?

13. On the side of the Food Corporation of India, the witness, R.Malathi, the Assistant Manager of FCI, Cuddalore, was examined as P.W.1 and Exs.A.1 to A.21 were marked. On the side of M/s. Adithyaa, one Suresh Kumar was examined as D.W.1 and Exs.B.1 to B.47 were marked and on behalf of the Tamil Nadu Mercantile Bank, the witness, Kalirajan was examined as D.W.2 and Exs.B.48 to B.50 were marked.

14. The Trial Court answered Issue No.i against the plaintiffs in O.S.No.1 of 2002, holding that no loss was caused to the plaintiffs by the act of the defendant by way of demurrage in respect of two Vessels, viz., M.V.Lok Pratima and M.V.Jag Rahul. Issue No.ii was answered against the plaintiffs in O.S.No.1 of 2002, holding that no acceptable evidence was produced by the plaintiffs to prove the damages and shortages in respect of the gunny bags, and, Exs.A.16 and A.17 cannot be considered for awarding damages, as claimed by the plaintiffs. Issue No.iii was answered against the plaintiffs in O.S.No.1 of 2002, holding that, as per the contract, the plaintiff- Corporation has to supply the jute twine to the defendant, and, as per Ex.B.22, the plaintiffs reimbursed Rs.49,345/- towards the cost of jute twine to the defendant. Therefore, the plaintiffs are not entitled to claim that amount. The Trial Court also held that the sum of Rs.45,010/-, claimed by the plaintiffs towards the customs OTA also, cannot be considered, as the plaintiffs directed the defendant, under Ex.B.21 to get refund of the customs OTA paid by the plaintiffs to the customs authority, and, as per Ex.A.1, Part-II, clause ix of the tender agreement, the plaintiffs have to pay the customs OTA and negatived that claim also. Issue No.iv was also answered against the plaintiffs, holding that the plaintiffs cannot invoke the bank guarantee for a sum of Rs.5,00,000/- given by the defendant, and therefore, the plaintiffs are liable to repay the bank guarantee with interest as claimed by the defendant in the counter claim and directed the plaintiffs to pay Rs.6,04,597/- as claimed by the defendant in the counter claim and decreed the counter claim in favour of the defendant. Issue No.xiii was also answered against the plaintiffs, holding that the suit was not barred by limitation. In the result, the suit filed by the plaintiffs in O.S.No.1 of 2002 was dismissed and the counter claim filed by

the defendant was decreed.

15. In the suit, viz., O.S.No.8 of 2002, Issue No.ii was partly allowed and the Trial Court granted the decree for a sum of Rs.1,29,195.74, as the same was admitted by the first defendant in O.S.No.8 of 2002, in their suit in O.S.No.1 of 2002 and Issue No.i in O.S.No.8 of 2002 was answered against the plaintiff, holding that the relief has become infructuous, as the bank guarantee was already invoked by the first defendant. Aggrieved by the above said judgment passed by the Trial Court, these three Appeals are filed.

16. Mr. A.S.Thambuswamy, the learned counsel appearing for the Food Corporation of India, (FCI), viz., appellants in A.S.Nos.206 and 207 of 2002 submitted that the Trial Court, without properly appreciating the various exhibits, especially, Exs.A.1 to A.4, erred in holding that the defendant in O.S.No.1 of 2002 did not cause any loss to the plaintiffs in the matter of discharge of cargo from the Ships beyond the time stipulated, and therefore, defendant was not liable to pay the demurrage on that ground. The learned counsel also submitted that in O.S.No.1 of 2002, the claim was made for a sum of Rs.15,58,911.56 on the following heads:-

a)

Demurrage in respect of M.V.Lok Pratima:

Rs.8,40,215.27

b)

Demurrage in respect of M.V.Jag Rahul:

Rs.5,95,700.00

c)

The value of gunny bags damaged/short:

Rs. 24,993.52

d)

Cost of thread:

Rs. 49,345.60

e)

Road Transit Loss:

Rs. 3,647.17

f)

Customs OTA:

Rs. 45.010.00

TOTAL:

Rs.15,58,911.56

17. The learned counsel appearing for the Food Corporation of India, further submitted that the plaintiff-Corporation adjusted the amount by encashment of bank guarantee for a sum of Rs.5,00,000/- and also the amount payable by the plaintiff-Corporation to the defendant- M/s. Adithyaa towards the spinning charges, which was arrived at Rs.6,29,195.74 and claimed the balance of Rs.9,29,715.82. The learned counsel further submitted that, admittedly, the defendant-M/s. Adithyaa took more time to discharge the cargo. As per Ex.A1, clause 42 of the tender agreement, if the Contractor has taken longer time than the time allowed for loading and discharging, the demurrage shall be paid at the rate of Rs.1,75,000/- per running day, or pro rata and the demurrage was calculated on that basis for extra days taken by the contractor in discharging the cargo. Therefore, as per Ex.A.1, the defendant-M/S. Adithyaa Traders is liable to make good the loss caused to the plaintiff-Corporation.

18. The learned counsel for the Food Corporation of India also submitted that, as per Ex.A.1, the discharge time limit is, as stated in the Charter Party agreement-E.A4. As per clause 14 of Ex.A.4, the discharge time rate for 1,500 m.t. of goods is, per weather working day and the Vessel-M.V.Lok Pratima arrived at Cuddalore Port on 01.10.1992, and, as per Ex.B.25, time taken by the defendant-M/s. Adithyaa for lightening the goods is 9 days, 12 hours and 48 minutes. As per Ex.A.4, the defendant ought to have discharged the cargo within four days, three hours and six minutes, and therefore, the demurrage was claimed by the plaintiff- Corporation. The learned counsel also submitted that the contention of the defendant-M/s. Adithyaa that Cuddalore Port is a minor port and the goods can be transported from the Ship to the Wharf only between 6.00 p.m to 6.00 a.m., and therefore, it cannot be stated that the defendant had taken longer time than the stipulated time, cannot be accepted, as the defendant- M/s. Adithyaa himself has admitted that their agents were discharging the cargo even after 6.00 p.m., as per Ex.B.25. Therefore, the learned counsel contended that the defendant-M/s. Adithyaa was permitted to discharge the cargo throughout the day, and they have taken longer time, than what is prescribed under Ex. A.4. The plaintiff-Corporation was forced to pay the demurrage, as per clause 42 of Ex.A.1, to the Port Trust Authorities and that was claimed from the defendant-M/s. Adithyaa and these aspects were not properly appreciated by the Trial Court.

19. The learned counsel for the Food Corporation of India, also contended that the Trial Court erred in rejecting other claims made by the plaintiff-Corporation with regard to the damages for the gunny bags, cost of thread and jute twine and transport charges and customs OTA, and all these claims were made by the plaintiff-Corporation in its various letters and those claims were not repudiated by the defendant-M/s. Adithyaa, and therefore, the Trial Court ought to have

decreed the suit filed by the plaintiff-Corporation in O.S.No.1 of 2002. The learned counsel submitted that the Trial Court erred in allowing the counter claim filed by the defendant-M/s. Adithyaa, and the bank guarantee was invoked rightly by the plaintiff-Corporation, as the defendant failed to act according to the terms of Exs.A.1 and A.4, and, as per the terms of the bank guarantee, the plaintiff- Corporation is entitled to invoke the bank guarantee in the event of any failure on the part of the defendant-M/s. Adithyaa. Therefore, the Trial Court erred in allowing the counter claim.

20. The learned counsel for the Food Corporation of India also submitted that the Trial Court erred in passing a decree in O.S.No.8 of 2002 for a sum of Rs.1,29,195.74, holding that the plaintiff-Corporation admitted in O.S.No.1 of 2002 that it is liable to pay Rs.1,29,195.74 and adjusted the same along with bank guarantee for the amount payable by the defendant- M/s. Adithyaa and the defendant-M/s. Adithyaa was not liable to pay any amount and only the plaintiff-Corporation is liable to pay the said amount. The learned counsel submitted that, eventhough in O.S.No.1 of 2002, the plaintiff-Corporation adjusted the amount by encashment of the bank guarantee for a sum of Rs.5,00,000/- and Rs.1,29,195.74 for trimming charges payable by the defendant-M/s. Adithyaa, while making the counter claim in O.S.No.1 of 2002, the defendant-M/s. Adithyaa claimed only Rs.5,00,000/- being the bank guarantee amount with interest thereon and the defendant-M/s. Adithyaa did not make any counter claim in respect of Rs.1,29,195.74 towards the trimming charges and though the plaintiff-Corporation agreed to reimburse the trimming charges incurred by the defendant-M/s. Adithyaa, in the absence of making any counter claim regarding the trimming charges, the defendant-M/s. Adithyaa cannot claim the same in O.S.No.8 of 2002 and the Trial Court also cannot grant that amount on the basis that the plaintiff-Corporation itself admitted its liability in respect of Rs.1,29,195.74.

21. The learned counsel for the Food Corporation of India further submitted that the plaintiff-M/s. Adithyaa in O.S.No.8 of 2002 also did not prove the claim made by it in O.S.No.8 of 2002 by producing any documentary evidence and the Trial Court also held that no documentary evidence was filed by the plaintiff in O.S.No.8 of 2002 to prove his entitlement to claim that amount from the Food Corporation of India, and therefore, in the absence of any proof adduced by the plaintiff in O.S.No.8 of 2002, the same cannot be decreed. The learned counsel, therefore, submitted that the Trial Court ought to have decreed the suit filed by the appellants in O.S.No.1 of 2002, as prayed for, and dismissed the suit in O.S.No.8 of 2002 filed by the plaintiff-M/s. Adithyaa.

22. Mr. M.S.Sundarajan, the learned counsel appearing for M/s. Adithyaa, viz., the appellant in A.S.No.167 of 2002 and respondent 42 A.S.No.206 of 2002 submitted that the plaintiff-Corporation cannot rely upon Ex.A.4/Charter Party agreement, as the same was not given to the defendant-M/s. Adithyaa, and admittedly, Cuddalore is a minor port, wherein, discharge work cannot be done

between 6.00 p.m. to 6.00 a.m. and one weather working day is 24 hours and that is also stated so in Ex.A.1 in clause 14, and, having permitted the defendant-M/s. Adithyaa to unload the cargo for only 12 hours, the time taken by the defendant-M/s. Adithyaa to discharge the cargo was within the time stipulated even as per the Charter Party agreement-Ex.A.4, and therefore, it cannot be stated that by reason of the act of the defendant-M/s. Adithyaa, loss was caused to the plaintiff- Corporation by way of demurrage. The learned counsel also submitted that, though demurrage was in respect of two Vessels, no proof was adduced by plaintiff-Corporation for having paid demurrage to the Port Trust Authorities, and therefore, even assuming that the defendant-M/s. Adithyaa was liable to pay the demurrage for the delayed discharge of goods, in the absence of any proof for payment of demurrage, the same cannot be claimed by the plaintiff- Corporation.

23. The learned counsel for the defendant in O.S.No.1 of 2002, viz., M/s. Adithyaa also submitted that there was no delay on the part of the defendant-M/s. Adithyaa, and the delay was due to the non availability of lighters and also due to the lethargic movement of the goods in the Wharf, as the defendant-M/s. Adithyaa was allowed to use only 1/3 portion on the northern side of the wharf for discharge purpose and these facts were also admitted by the plaintiff-Corporation, and therefore, there was no delay caused by the defendant-M/s. Adithyaa in discharging the cargo and all these aspects were taken into consideration by the Trial Court, while answering Issue no. in O.S.No.1 of 2002. The learned counsel also submitted that in respect of the customs OTA, claimed by the plaintiff-Corporation for a sum of Rs.45,010/- there was no liability on the part of the defendant- M/s. Adithyaa to pay the Customs OTA. As per Exs.A.10 and A.14, the customs OTA was claimed from the FCI by the customs officials and that was for the entire month, and, as per Ex.B.21, the plaintiff-Corporation requested the defendant-M/s. Adithyaa to arrange for the refund of Customs OTA from the customs officials and that would also prove that the said amount was not payable by M/s. Adithyaa. The learned counsel also submitted that, as per clause 14 (i) of Ex.A.1, the plaintiff-Corporation was duty bound to supply the jute twine to the defendant-M/s. Adithyaa, and, as per Ex.B.22, the plaintiff-Corporation paid a sum of Rs.49,345/- against the claim of M/s. Adithyaa made by their Bill No.31, dated 19.04.1993, for a sum of Rs.61,200/- and therefore, the same cannot be claimed by the plaintiff-Corporation. The learned counsel also submitted that no proof was adduced by the plaintiff-Corporation for the loss of gunny bags and that was also rightly rejected by the Trial Court.

24. Mr. M.S.Sundarajan, the learned counsel for M/s. Adithyaa further submitted that, as per the terms of the bank guarantee, the same can be encashed by the plaintiff-Corporation only in the case of any breach of contract on the part of the defendant-M/s. Adithyaa, and, without determining the liability payable by M/s. Adithyaa, or, without proof that the M/s. Adithyaa caused loss to the plaintiff-Corporation by reason of the delay in discharging the cargo, as a result, the plaintiff-Corporation was forced to pay the demurrage charges, the bank

guarantee should not have been invoked by the plaintiff-Corporation, and therefore, the counter claim was filed by the defendant-M/s. Adithyaa in O.S.No.1 of 2002 for repaying the bank guarantee of Rs.5,00,000/- with interest from the date of encashment of the said amount and that was rightly considered by the Trial Court and decreed the counter claim.

25. The learned counsel appearing for M/s. Adithyaa, viz., appellant in A.S.No.167 of 2002 submitted that in O.S.No.8 of 2002, the plaintiff M/s. Adithyaa claimed Rs.1,76,807.93 and the details of that amount was given by M/s. Adithyaa, as per Ex.B.14, the letter addressed to the plaintiff- Corporation, and they are as follows:-

Bill Nos.

Date

Rs.

1

15

03/06/93

Transport of wheat bags to T.V.Kovil Depot

3446.44

2

18

13.3.1993

Trimming of Vessel "lok prathima" balance 50% payment

52227.43

3

24

04/07/93

Trimming of Vessel "Jag Rahul" balance 50% payment

22087.56

4

29

22.4.1993

10% security deposit of Vessel "Jag Rahul"

61062.95

26. The learned counsel for the appellant in A.S.No.167 of 2002 submitted that the plaintiffs in O.S.No.1 of 2002 admitted that they are liable to pay the trimming charges for both the Vessels incurred by the appellant in A.S.No.167 of 2002, and a sum of Rs.61,062.95 was the amount retained by the plaintiff-Corporation, being the security deposit amount, whenever payment was made to the appellant in A.S.No.167 of 2002. In addition to that, transport of wheat bags was claimed for a sum of Rs.3446.44, and thus, a total sum of Rs.1,38,824.38 was claimed on those accounts. In addition to that, the plaintiff in O.S.No.8 of 2002 also incurred expenses of Rs.24,456/- towards the stitching of Padutha for the Vessel M.V.Lok Pratima and a sum of Rs.7,527.60 towards the stitching of Padutha and Rs.6,000/- for levelling of 4 hatches in respect of the Vessel-M.V.Jag Rahul and all those claims were claimed from the first defendant-Food Corporation of India and the Food Corporation of India is liable to pay the same. Therefore, the Trial Court ought to have decreed the entire claim made by the plaintiff in O.S.No.8 of 2002 and ought not to have rejected the claim for Rs.45,010/-.

27. On the basis of the above submissions, the following points arise for consideration in these Appeals:-

I) Whether the appellants in A.S.Nos.206 and 207 of 2002 proved that they paid demurrage charges by reason of the loss caused by the respondent-M/s. Adithyaa in discharging the cargo beyond the stipulated time?

II) Whether the appellants in A.S.Nos.206 and 207 of 2002 are entitled to the claim made by them in respect of the damages for the gunny bags, worth Rs.49,345.60 paid towards the jute twine to the respondent/M/s. Adithyaa and Rs.45,010/- paid towards the Customs OTA, from the respondent/M/s. Adithyaa and also Rs.3,647.17 towards the transit loss?

III) Whether the appellants in A.S.Nos.206 and 207 of 2002 are entitled to invoke the bank guarantee?

IV) Whether the counter claim made by the defendant in O.S.No.1 of 2002, claiming reimbursement of the amount representing the bank guarantee with interest is sustainable ?

V) Whether the appellant in A.S.No.167 of 2002 is entitled to claim the amount, as claimed in O.S.No.8 of 2002? and

VI) Whether the appellant in A.S.No.207 of 2002 is liable to pay Rs.1,29,195.74, as decreed in O.S.No.8 of 2002?

28. The appellants in A.S. No.206 of 2002 claimed Rs.15,58,911.56, as per the details stated above, and out of the said amount, the appellant- Corporation claimed Rs.8,40,215.27 and Rs.5,95,700.00 towards the demurrage charges paid for the delayed discharge of cargo by the respondent-M/s. Adithyaa. Without

going into the contentions regarding the number of days taken by the respondent-M/s. Adithyaa in discharging the cargo and whether the respondent-M/s. Adithyaa has discharged the cargo within the time stipulated, and whether any loss was caused to the appellant-Corporation by reason of the delayed discharge of goods by the respondent-M/s. Adithyaa, in my opinion, the claim for damages can be made only on proof of payment of such amount to the Port Trust Authorities by the appellants in A.S.No.206 of 2002. Eventhough, as per clause 42 of Ex.A.1, demurrage charge has to be paid for the delayed discharge of goods, even assuming, as contended by the learned counsel for the appellant-Corporation that there was delay in discharging the cargo by the respondent- M/s. Adithyaa, in the absence of any proof of payment of demurrage charges by the appellant-Corporation, the same cannot be claimed by them.

29. It is admitted by the learned counsel for the appellant- Corporation that no evidence was produced for the payment of demurrage by the appellant-Corporation to the Port Trust Authorities. The appellant- Corporation can claim that amount, only, if it had paid the amount to the Port Trust Authorities, and, when there was no proof for such payment, the appellant-Corporation cannot claim that amount. Therefore, I hold that the appellant-Corporation failed to prove the payment of demurrage charges to the Port Trust Authorities and in the absence of such proof, the appellant- Corporation is not entitled to that amount from the respondent- M/s. Adithyaa. Hence, Point No.1 is answered against the appellants in A.S.No.206 of 2002.

30. As regards the claim made towards the Customs OTA is concerned, the appellant-Corporation has not produced any document to show that the customs OTA has to be paid only by the respondent- M/s. Adithyaa and that amount was paid by the appellant-Corporation, and therefore, the respondent-M/s. Adithyaa is liable to reimburse the same. As per Exs.A.10 and A.11, the Customs OTA is payable only by the appellant- Corporation and the appellant-Corporation also requested the respondent- M/s. Adithyaa to get refund of Customs OTA paid by them by using the respondent's good relationship with the Port Trust Authorities. Therefore, in the absence of any contract between the parties, that Customs OTA was to be borne by the respondent-M/s. Adithyaa, the same cannot be claimed by the appellant-Corporation from the respondent-M/s. Adithyaa and that was rightly appreciated by the Trial Court.

31. Similarly, the claim for refund of Rs.49.345.60 paid for thread cost by the appellant-Corporation is also un-sustainable. As evidenced by Ex.B.22, the respondent-M/s. Adithyaa claimed Rs.61,200/- being the charges for purchasing the jute twine used for stitching the bags by their Bill No.31, dated 19.04.1993, and that was accepted for a sum of Rs.49.345.60 by the appellant-Corporation, and, it has been stated in Ex.B.22 that the bill was passed for Rs.49.345.60, as sanctioned by the Regional Officer, Food Corporation Authorities, Madras, as the jute twine was not provided for stitching bags. Therefore, a sum of Rs.49.345.60 was only reimbursed by the appellants in A.S.Nos.206 and 207 of 2002 towards

the expenditure incurred by the respondent-M/s. Adithyaa in stitching the wheat bags. As per clause 14 (i) of Ex.A.1 also, the appellant-Corporation was bound to supply the jute twine to the respondent-M/s. Adithyaa, and therefore, the Trial Court rightly rejected the claim made towards the cost of jute twine and thread costs. The claim made by the appellant-Corporation towards the damages of the gunny bags was also rightly rejected by the Trial Court, as no acceptable evidence was produced by the appellant- Corporation to prove the damages sustained by it. Though claim was made under Exs.A.16 and A.17, the respondent-M/s. Adithyaa sent a letter dated Ex.B.23 repudiating their liability, and in the absence of any proof regarding the damage caused to the gunny bags, merely on the basis of the claim made under Exs.A.16 and A.17, the appellant-Corporation cannot claim that amount and that was rightly appreciated by the Trial Court.

32. Similarly, the claim for a sum of Rs.3,647.17 was also rightly rejected by the Trial Court, as no proof was produced by the appellant- Corporation. In my opinion, the Trial Court has rightly rejected the various claims made by the appellant-Corporation and there is no infirmity in the findings of the Trial Court in that regard and hence, Point No.II is also answered against the appellants in A.S.No.206 of 2002.

33. Admittedly, bank guarantee can be invoked only for the loss sustained by the appellant-Corporation and even according to the appellant- Corporation, the bank guarantee was invoked as per the calculation that the respondent-M/s. Adithyaa was liable to pay Rs.15,58,911.56. As per the terms of the bank guarantee, the same can be invoked only when there was any liability determined by the appellant-Corporation against the respondent-M/s. Adithyaa. Admittedly, no liability was determined, and only a show cause notice was issued. Further, while answering Points I and II, I held that the appellant-Corporation was not entitled to claim charges regarding the demurrages and other charges claimed in the plaint. Therefore, when the appellant-Corporation was not entitled to claim any amount from the respondent-M/s. Adithyaa, the appellant-Corporation was not entitled to invoke the bank guarantee, and therefore, the appellant- Corporation was liable to refund the bank guarantee with interest and that was rightly appreciated by the Trial Court and the counter claim filed by the defendant in O.S.No.1 of 2002 was allowed. Hence, Point No.III is also answered against the appellant-Corporation.

34. The appellant in A.S.No.167 of 2002 claimed a sum of Rs.1,76,807.98 and that amount comprises of expenses incurred towards the trimming charges, 10% of the security deposit retained by the appellant- Corporation and also the expenses incurred for stitching the Padutha for the Vessels. Though, no proof was adduced by the appellant in A.S.No.167 of 2002, regarding the trimming charges and 10% of the security deposit retained by the appellant-Corporation, the appellant-Corporation, in its plaint, in O.S.No.1 of 2002, admitted that they are liable to pay Rs.1,29,195.74 to the defendant in that suit, who is the

respondent in A.S.No.206 of 2002, towards the trimming and other charges. Therefore, the claim made by the appellant in A.S.No.167 of 2002 regarding the trimming charges and refund of 10% of the security deposit retained by the appellant- Corporation was accepted, and therefore, the Trial Court granted the decree for a sum of Rs.1,29,195.74.

35. Though the appellant in A.S.No.167 of 2002 claimed expenses incurred for stitching Padutha, no proof was filed, and, it was only claimed in its letter and that was not admitted by the first defendant in O.S.No.8 of 2002. Therefore, without proving the expenses incurred by the appellant in A.S.No.167 of 2002, the said amount cannot be claimed and that was rightly appreciated by the Trial Court. Therefore, the Trial Court was right in rejecting the claim for a sum of Rs.1,76,807.98, claimed by the plaintiff in O.S.No.8 of 2002.

36. The contention of the learned counsel for the appellant- Corporation that the plaintiff in O.S.No.8 of 2002, while making counter claim in O.S.No.1 of 2002, did not make any claim in respect of the trimming charges, withholding of 10% of security deposit, and Padutha charges, and was satisfied with the reimbursement of the bank guarantee amount with interest, and therefore, the claim made in O.S.No.8 of 2002 cannot be sustained, is not acceptable. It is not necessary that the respondent-M/s. Adithyaa should make his claim by way of counter claim and the respondent-M/s. Adithyaa is also entitled to file separate suit in respect of other claims by restricting his counter claim in respect of certain amounts. For all the above said reasons, Point Nos. IV, V and VI are answered accordingly.

37. In the result, the common judgment and decrees of the Trial Court rendered in O.S.Nos.1 and 8 of 2002 are confirmed and the Appeals are dismissed. There shall be no order as to costs. Consequently, connected CMPs are closed.