

**(2013) 07 BOM CK 0009**  
**In the Bombay High Court**  
**Case No : First Appeal No. 290 of 2005**

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|------------------------------------------|------------|
| M/s. United India Insurance Company Ltd. | APPELLANT  |
| Vs                                       |            |
| Kishor L. Tolani                         | RESPONDENT |

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**Date of Decision :** 05-07-2013

**Acts Referred:**

**Citation :** (2013) 5 ABR 517 : (2013) 6 ALLMR 612

**Hon'ble Judges :** U.V. Bakre, J

**Bench :** Single Bench

**Advocate :** Emerico Afonso, for the Appellant; Nitin Sardesai and A.D. Bhobe, for the Respondent

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## Judgement

U.V. Bakre, J.—The above appeal and cross-objection, both, are directed against the Judgment, Order and Decree dated 30/07/2005 passed by the learned Civil Judge, Senior Division, Vasco-da-Gama (Trial Court) in Special Civil Suit No. 45/94/A. Parties shall hereinafter be referred to in the manner in which their names appear in the cause title of the said Special Civil Suit of 45/94/A.

2. The plaintiff had filed the said suit for declaration that the Defendant No. 1 is liable to indemnify the plaintiff and consequently to pay Rs. 13,00,000/- towards the bill No. 7/B/MS/89 dated 26/12/1989 and further to pay to the plaintiff a sum of Rs. 26,30,174.88 along with interest @ 18% per annum from the date of filing of the suit till realisation.

3. The case of the plaintiff, in short, is as follows:

The plaintiff, who is the sole proprietor of M/s. Kilito Ore Carriers, had obtained a barge by name "M.V. Vinayak" under lease from M/s. Tolani Shipping Limited, Bombay and the same was plied for transportation and carriage of ores in Goa. The said barge was insured with Defendant No. 1, an Insurance Company, in the name of M/s. Kilito Ore Carriers, under policy No. 121600/22/01/11/01140/89 for all risks, which policy was valid for a period from 08/01/1989 to 07/01/1990. The vessel was insured for Rs. 17,00,000/-. Besides the same, as per Clause

9.1.2 of the Insurance Policy, the Indemnity/Insurance covered the removal, destruction and attempt at removal or destruction of the wreck or even failure to do so and under Clause 13.6, the expenses incurred by the plaintiff shall be recoverable in addition to the loss recoverable and up to the amount insured of Rs. 17,00,000/-. The said barge, with full load, sank into the water on 04/10/1989 about 6 Nautical miles west of the breakwater at Mormugao Port. There was total loss and no hope of salvaging the barge. By letter dated 05/10/1989, the plaintiff was notified by the Deputy Conservator of Mormugao Port to remove the wreck of the said barge as it was hampering safe navigation of the vessels in the Port. Again by letter dated 22/11/1989, the Deputy Conservator wrote that the navigation was being hampered and that if the plaintiff does not take immediate steps, then the Port Trust will do the work and recover from the plaintiff all the costs plus 20% of the total expenditure. After calling for quotations, the plaintiff entrusted the work of wreck removal to the Defendant No. 2, a partnership firm carrying on the business of undersea diving and salvage operations. For that an agreement dated 27/11/1989 was executed under which the Defendant No. 2 was to charge a sum of Rs. 13,00,000/-. The Defendant No. 1 was kept informed of the sinking of the said barge at all times. As per the requirements of Mormugao Port Trust (M.P.T.), the Defendant No. 2 cut away parts of the said wreck and sank it deeper to below the seabed level. The Deputy Conservator of Port, then, issued a certificate to the effect that the work has been done. The Defendant No. 2 thereafter sent a bill dated 26/12/1989 to the plaintiff for Rs. 13,00,000/- and all the documents were thereafter submitted by the plaintiff to the Defendant No. 1, along with the claim. The Defendant No. 1 however kept saying that it was looking into the matter. The Defendant No. 1 unilaterally appointed another firm of Divers namely M/s. Pentagon Salvage and Diving Company, Panaji, to submit a private report. The said firm had also tendered for the work of wreck removal of the barge but was not appointed for doing the said work. The Defendant No. 1 delayed the matter of payment due to which the plaintiff wrote a letter to the Defendant No. 1 to pay the amount with interest. The plaintiff received copy of another letter from the Deputy Conservator of Port stating that the original depth of water in the area was restored. The Defendant No. 1 also wrote a letter by which it was made clear that they accepted the fact of the barge being lost and forwarded a cheque for Rs. 17,00,000/- to the owners of the barge. The Defendant No. 1, however, further wrote that the claim of wreck removal charges was still being considered. In view of the long delay on the part of the Defendant No. 1, the plaintiff sent legal notice dated 09/07/1991 to the Defendant No. 1. The Defendant No. 1 sent a letter dated 1/7/1992 denying its liability. The plaintiff also sent letter to the M.P.T. seeking clarification, with copy to the Defendant No. 1. By letter dated 03/08/1992, the Defendant No. 1 wrote to the plaintiff that it was examining the claim for "sue and labour". Thereafter, the plaintiff gave final notice dated 20/02/1993 to the Defendant No. 1. By reply dated 4/5/1993, the Defendant No. 1 denied the liability.

4. The Defendant No. 1, in its written statement, alleged as follows:

The plaintiff is not the owner of the barge. Under the Marine Hull Policy No. 121600/22/01/11/01140/89., the hull and machinery of the vessel "M.V. Vinayak" valued at Rs. 17,00,000/- was insured in favour of M/s. Kilito Ore Carriers, for the period from 08/01/1989 to 07/01/1990. The loss of the said vessel "M.V. Vinayak" is not disputed but it is false that there was no hope of salvaging the same or that the barge was hampering safe navigation of vessels in the port. Though the quotations were called for to remove the wreck for minimizing the loss, however, no contract for wreck removal was awarded as the said wreck got embedded of its own in sea bed and the required water depth was available at the site. It was therefore not necessary to remove the same. The purported agreement dated 27/11/1989 for removal of wreck was sham agreement and the Defendant No. 1 has nothing to do with the same as the same is between the plaintiff and the Defendant No. 2. The purported certificate dated 23/12/1989 of Deputy Conservator of Port was obtained by Defendant No. 2 by falsely representing that wreck was removed. The Defendant No. 1 on investigation found that the wreck of the vessel was lying intact, partly embedded in the sea bed at the depth of over 22 metres. No amount was spent by the plaintiff in saving the vessel or minimizing the loss. The Defendant No. 1 appointed Trans Ocean Marine and General Surveyors to investigate the alleged loss. The said investigators appointed a firm of underwater divers namely M/s. Pentagon Salvage and Company Ltd., for inspection of the wreck, which submitted a report that the wreck was lying intact in one piece partly embedded in seabed at a water depth of over 22 metres. The Defendant No. 2 did not carry out any work of wreck removal or dismantling or disintegration of wreck. For the above reasons, the Defendant No. 1 settled the claim for loss of vessel but rejected the claim of wreck removal. The Defendant No. 1 is also not liable for any sue and labour as no expenses were incurred on saving the vessel or minimizing the loss.

5. The Defendant No. 2 filed written statement contending that it has satisfactorily carried out the work entrusted to it under the Wreck Removal Agreement dated 27/11/1989 and that an amount of Rs. 13,00,000/- is due and payable to it and that the bill was submitted to the plaintiff. The Defendant No. 2 further stated that on completion of the said work a certificate was issued by the Deputy Conservator of Port. According to the Defendant No. 2, the plaintiff had confirmed that they would settle all the bills but had prayed for time to settle the amount due and payable to Defendant No. 2 on the ground that the Defendant No. 1 has illegally denied their liability to indemnify the plaintiff under the insurance policy issued by Defendant No. 1. The Defendant No. 2 alleged that plaintiff is liable to pay to it the principal sum of Rs. 14,55,000/- with interest at the rate of 18% per annum. The Defendant No. 2 filed a counter-claim with regard to the said claim.

6. The plaintiff filed written statement to the counter-claim of Defendant No. 2

alleging that the payment of the bill for Rs. 13,00,000/- was subject to indemnity granted by the underwriters i.e. Defendant No. 1 under the Insurance Policy for wreck removal and this was known to the Defendant No. 2 and therefore, the Defendant No. 2 was aware that the work carried out had to be approved by the Defendant No. 1 before releasing any money pursuant to indemnity granted. The plaintiff further stated that it has submitted all the documents to the Defendant No. 1 to settle the bill of the Defendant No. 2 and is pursuing the claim of the Defendant No. 2 with the Defendant No. 1. According to the plaintiff the liability to settle the counter-claim raised by the Defendant No. 2 lies on the Defendant No. 1.

7. Issues came to be framed by the trial Court as per the rival contentions of the parties. The plaintiff examined himself as PW 1 and two witnesses namely: (i) Mr. N.S. Vishwas, a qualified Marine Engineer and surveyor, as PW 2 and (ii) Captain V.S. Gopinath, the Deputy Conservator of Mormugao Port, as PW 3. The Defendant No. 1 examined its Senior Divisional Manager, namely Mathew Sequeira, as DW 1, Mr. Ashok Gowarikar, a Marine surveyor, as DW 2 and Mr. Bernard D'Souza, a partner of Pentagon Salvage & Diving Co., as DW 3. The Defendant No. 2 did not examine any witness.

8. Upon appraisal of the entire evidence on record, the learned trial Court held that the contention of the Defendant No. 1 that the wreck was not removed or that the same was beyond the port area and hence not required to be removed is not acceptable. It has been further held that in view of the letter dated 5/10/1989 which is part of Exhibit PW 1/F colly, it is clear that the said barge was sunk within port area and that there was navigational hazard. The trial Court held that the letter dated 27/7/1992 at Exhibit PW 1/I issued by the Defendant No. 2 shows that the agreement did not require the Defendant No. 2 to refloat or physically lift out the wreck and that they were only required to provide the M.P.T. with water depth of over 21 metres at the wreck site. The trial Court found that the letter dated 23/12/1989, at Exhibit PW 1/K, clearly shows that salvager had carried out work of removal of navigational obstruction to the satisfaction of PW 3 and that necessary depth was obtained. The trial Court further held that the report submitted by private investigator engaged by Defendant No. 1 is not admissible and is not binding on the plaintiff. The trial Court held that the plaintiff has proved that the Defendant No. 1 is liable to indemnify the plaintiff of the sum of Rs. 13,00,000/- with interest in terms of the contract. The trial Court also held that the Defendant No. 2 is liable to receive the said amount of Rs. 13,00,000/- as agreed upon between the plaintiff and Defendant No. 2. The trial Court, however, held that it is not proved that the Defendant No. 2 is also further entitled to receive Rs. 1,30,000/- and Rs. 25,000/- as claimed, by way of the counter-claim. Hence, the suit was partly decreed by declaring that the Defendant No. 1 is liable to indemnify the plaintiff for a sum of Rs. 13,00,000/- and that the said amount shall be paid with interest @ 6% per annum from the date of the suit till its recovery. The counter-claim of the Defendant No. 2 has been disposed of by directing that in the event, the amount is recovered by the

plaintiff, the same shall be paid to the Defendant No. 2.

9. Aggrieved by the Judgment and Decree, the Defendant No. 1 has filed the First Appeal whereas the Defendant No. 2 has filed Cross-objection. The Defendant No. 1 has also filed the M.C.A. No. 626/2009 for amendment of its written statement. The Defendant No. 1 wants to add in paragraph 4 of the written statement that the wreck of the vessel was lying outside the port limits and the Conservator of Mormugao Port has no jurisdiction over the wreck. This application is supported by the affidavit of the Senior Divisional Manager of the Defendant No. 1. The plaintiff has not filed any reply to the said amendment application. However, the Defendant No. 2 has filed a reply resisting the application on the ground of delay and that the amendment is neither relevant nor necessary for the adjudication of the subject-matter.

10. Heard Mr. Afonso, learned Counsel appearing on behalf of the Defendant No. 1, Mr. Sardesai, learned Counsel appearing on behalf of the plaintiff and Mr. Bhobe, learned Counsel appearing on behalf of the Defendant No. 2.

11. Mr. Afonso, learned Counsel appearing on behalf of the Defendant No. 1, in the first instance, submitted that the amendment to the written statement, as prayed for by the Defendant No. 1 is necessary for determination of real controversy between the parties and that since evidence has already come on record with regard to the same, no prejudice would be caused to the plaintiff or Defendant No. 2 by allowing the same. He therefore urged that the same be allowed.

12. The learned Counsel for the Defendant No. 1 submitted that the plaintiff is not the owner of the barge and that the owner is M/s. Tolani Shipping Limited, Bombay, which firm has been paid the amount of Rs. 17,00,000/- towards constructive total loss of the barge. He therefore canvassed that the plaintiff has no liability for wreck removal. He submitted that as per the policy there was liability for wreck removal but in the present case the wreck could have been left at the place where the barge sank. He read out the evidence on record and submitted that there is no material produced by the plaintiff to prove that the barge wreck was lying within the port area and that there was navigational hazard. It is submitted that Chapter III of the Indian Ports Act, 1908 (the Act, for short) deals with the appointment of the Conservator and his powers. He submitted that in terms of Section 10 of the said Act the Conservator can cause obstruction to be removed within the limits of port and in terms of Section 11 can recover expenditure of removal. He thus argued that the Conservator of Port has no jurisdiction beyond the port area. He further submitted that in terms of the underwater inspection report submitted by M/s. Pentagon Salvage and Diving Co., Panaji, the barge still lies under the water which proves that the wreck was not at all removed or disintegrated. He read out the provisions of Part XIII on "wreck and salvage" contained in the Merchant Shipping Act, 1958, in support of his contention that there is no need to remove the wreck which lies outside the port area. He pointed out that the Defendant No. 1 is not a party to the wreck

removal agreement. He submitted that there is collusion between the plaintiff, Defendant No. 2 and the Deputy Conservator of Port to swindle the Defendant No. 1 without doing any work of wreck removal and that the wreck removal agreement is a sham agreement. He showed from the said agreement that the plaintiff had to furnish Bank Guarantee. He submitted that no such Bank Guarantee has been furnished. He pointed out that the Defendant No. 2 has been joined as party without seeking any relief against it and therefore the Defendant No. 2 had no cause of action to file any counter-claim. He further submitted that the claim of Rs. 13,00,000/- is barred by law of limitation since the alleged agreement was performed in 1989 and the bill for Rs. 13,00,000/- was raised on 26/12/1989 whereas the suit was filed in April, 1994. Mr. Afonso, learned Counsel, pointed out that the plaintiff has not paid any amount as yet to the Defendant No. 2 towards the alleged cost of wreck removal. He contended that in terms of Section 125 of the Indian Contract Act, the Defendant No. 1 is not liable to indemnify the plaintiff. He further submitted that in terms of Section 64UM of the Insurance Act, 1938 any licensed surveyor can assess the loss but his report is not binding on the Insurance Company. He therefore contended that the report or recommendations of PW 2 are not binding on the Defendant No. 1. Learned Counsel, therefore, urged that the appeal be allowed and the impugned judgment and decree be set aside.

13. Mr. Sardesai, the learned Counsel appearing on behalf of the plaintiff, submitted that the contract of insurance is a contract of indemnity and there is no clause in the policy for not indemnifying the plaintiff in respect of removal of wreck which is not in the port area. He further submitted that there is ample evidence on record to prove that the said vessel had sunk within the port area. According to him the port limit is 20 km. and that 1 nautical mile is equivalent to 1.8 km. and since the barge had sunk within 6 nautical miles it is less than 12 kms. and therefore within the port area. He submitted that there is not even a whisper in the written statement of the Defendant No. 1 that the wreck is not within the Port area. He submitted that the authority to decide the need to remove any obstruction within the port area is the Conservator of Port and in the present case the Deputy Conservator of Mormugao Port has issued letters dated 05/10/1989 and 22/11/1989 directing the plaintiff to remove the wreck. He further submitted that the authority of the Deputy Conservator is within the port area. He pointed out that the said Deputy Conservator of Port namely Captain Gopinath has been examined by the plaintiff as PW 3 and he has duly proved that the wreck was within port area and was causing navigational hazard and further that the work of restoring the depth was successfully done. He questioned as to why no suggestion was put to Captain Gopinath to the effect that the wreck was out side the port area. He submitted that the date of the report of Gowarikar (DW 2) and Bernard D'Souza (DW 3) was prior to the date of examination of Captain Gopinath in the Trial Court and therefore the Defendant No. 1 could have easily asked him the question regarding their case that the wreck was not within the port area. According to him, the said question

was not asked to PW 3 because that would have inconvenienced the insurance company. He read out the relevant portions of the evidence on record and submitted that the plaintiff has duly proved that the Defendant No. 1 is liable to pay to them the said charges of Rs. 13,00,000/- towards the cost of wreck removal. With regard to the contention of the learned Counsel for the Defendant No. 1 that the plaintiff has not yet paid the said amount of Rs. 13,00,000/- to the Defendant No. 2 and therefore in terms of the policy the Defendant No. 1 is not liable to indemnify the plaintiff, Mr. Sardesai submitted that once the liability has become absolute, the plaintiff has every right to call upon the Defendant No. 1 to make the payment. He submitted that since the Defendant No. 1 has not yet indemnified the plaintiff, the plaintiff in turn could not pay the said amount to the Defendant No. 2. He pointed out that there cannot be any fear that the plaintiff may not pay the said amount to the Defendant No. 2 since appropriate direction has been given by the trial Court to pay the said amount to the Defendant No. 2 and the plaintiff has not challenged the impugned judgment and order. He further submitted that though the barge "M.V. Vinayak" belonged to M/s. Tolani Shipping Limited. Bombay, however, the same was leased to M/s. Kilito Ore Carriers of which the plaintiff is the sole proprietor and that the insured is M/s. Kilito Ore Carriers and therefore it is the plaintiff who is entitled to receive the said amount and, in turn, liable pay it to the Defendant No. 2. He therefore urged that there is no substance in the appeal filed by the Defendant No. 1 and the same is liable to be dismissed. He also canvassed that there is no evidence on record sufficient to prove the claim of the Defendant No. 2 made in the counterclaim, with regard to Rs. 25,000/- and Rs. 1,30,000/- and therefore the cross-objection is also liable to be dismissed.

14. Mr. Bhobe, the learned Counsel appearing on behalf of the Defendant No. 2, at the out set, under the instructions from the Defendant No. 2, submitted that the Defendant No. 2 is not pressing for the cross-objection and consequently the relief claimed in the counter-claim, insofar as the same is not granted by the trial Court. He submitted that as far as the plaintiff is concerned there can be no dispute that the work has been satisfactorily done and the Defendant No. 2 is therefore entitled to receive the said amount of Rs. 13,00,000/-. He submitted that the plea taken by the Defendant No. 1 during the course of trial that the vessel sank beyond the limits of M.P.T. and that the Deputy Conservator of Mormugao Port has no jurisdiction is as and by way of an afterthought. He invited my attention to the agreement of the wreck removal which is at Exhibit PW 1/B and more particularly to Clause No. 5 thereof which is security clause, which requires the owners (plaintiff) to execute a Bank Guarantee/Insurance Guarantee in favour of the contractor (Defendant No. 2) for the wreck removal remuneration of Rs. 13,00,000/-. He submitted though no bank guarantee was furnished by the plaintiff, however, by letter dated 4th January, 1990 (Exhibit D-2/A), the plaintiff has given this Insurance Guarantee, to settle the bills in case they are paid by the underwriters. He submitted that quotations were invited for the work of wreck removal and the Defendant No. 2 was engaged for the said

work. He submitted that the evidence on record sufficiently proves that the Defendant No. 1 had knowledge of all the facts from the beginning and had not taken any objection. He therefore urged that the impugned judgment and order is not assailable and no interference with the same is called for.

15. I have gone through the original record and proceedings and I have considered the submissions made by the learned Counsel for the parties.

16. It is seen that in the evidence it has come on record that according to the Defendant No. 1 the wreck of the vessel was lying out side the Port limits and that the Conservator of Mormugao Port had no jurisdiction over the wreck. However, the above facts have not been pleaded in the written statement of the Defendant No. 1. I am of the view that the amendment to the written statement therefore is necessary for the purpose of determination of the real controversy between the parties and for the ends of justice. I am also satisfied that no prejudice will be caused to the plaintiff or the Defendant No. 2 since the plaintiff has not objected to the amendment application and witnesses have been cross-examined on the said case of the Defendant No. 1. Therefore, the M.C.A. 626/2009 is allowed. The Defendant No. 1 shall carry out the amendment to its written statement within a period of one week from today.

17. Let us first see as to what is the extent of liability of the Defendant No. 1 towards the wreck removal and whether there is any substance in the contention of the Defendant No. 1 that since the plaintiff is not the owner of the vessel, he is not entitled to claim the wreck removal charges. The said barge "M.V. Vinayak" belonged to M/s. Tolani Shipping Limited, Bombay. The plaintiff is the sole proprietor of M/s. Kilito Ore Carriers, to whom the said barge was leased. The above facts as stated by PW 1 have not been denied by the Defendant No. 1. Hence, the non-production of the lease agreement does not weaken the case of the plaintiff. The said barge was insured in the name of M/s. Kilito Ore Carriers, with the Defendant No. 1, under policy No. 121600/22/01/11/01140/89 for all risks and was valid for a period from 08/01/1989 to 07/01/1990. Admittedly, as per the request of the plaintiff, on behalf of M/s. Kilito Ore Carriers, the cheque in settlement of the CTL claim of the barge "Vinayak" was issued by the Defendant No. 1 in favour of M/s. Tolani Shipping Co. Ltd., Bombay. In terms of Clauses 9.1.2 and 13.6 of the Insurance Policy which is at Exhibit PW 1/A, the Defendant No. 1 is obliged to indemnify the plaintiff towards the expenses for the work of wreck removal or destruction or any attempt towards wreck removal or destruction of the same and even if the attempt fails. DW 1. Mathew Sequeria, the Senior Divisional Manager of the Defendant No. 1 has stated that as per Clause 9 of the said policy the underwriters (Defendant No. 1) had agreed to indemnify the assured for any sum or sums paid by the assured to any other person by reason of the assured becoming legally liable as owner of the vessel for removal or destruction of any fixed or movable object including the wreck of the vessel. In his cross-examination, DW 1 has admitted that Defendant No. 1 was liable to indemnify the plaintiff for the cost of wreck removal provided the

claim fits into the conditions laid down in the policy. Admittedly, if payable, such a claim could go to the extent of and up to an amount equal to the sum assured i.e. Rs. 17,00,000/-. It is seen from the policy that the insurance is not only for total removal of the wreck or bringing the wreck to the surface but it also includes breaking the wreck wholly or partly and or pushing it under the seabed below the required depth to restore the safe navigation. The plaintiff, as sole proprietor of M/s. Kilito Ore Carriers, is entitled to the wreck removal charges from the Defendant No. 1 since in terms of the Insurance Policy, said M/s. Kilito Ore Carriers is the assured. Hence, there is no force in the contention of the Defendant No. 1 that the plaintiff is not entitled to be indemnified for the charges towards wreck removal.

18. Next question is whether the said vessel had sunk within the Port area and whether its removal was necessary for safe navigation of other vessels in the Port. There is no dispute that the said barge "M.V. Vinayak" sank on 04/10/1989 with full load. It was anchored alongside the transhipper "Priyamvada" anchored at Mormugao Port to load the foreign-going vessel. There is also no dispute that the said barge was a total loss and there was no hope of saving or salvaging the same. Admittedly, the amount insured towards value of the hull and machinery, i.e. Rs. 17,00,000/- has been already paid by Defendant No. 1 to M/s. Tolani Shipping Limited, Bombay.

19. It is pertinent to note that in the written statement filed by the Defendant No. 1 though it is denied that the said barge was hampering safe navigation of vessels in the port, however it is nowhere specifically pleaded that the said barge had not sunk in the port area. It was not the case of the Defendant No. 1 that they were not liable to indemnify for the expenses incurred towards wreck removal as the wreck was outside the Port area. There is no clause in the Insurance Policy saying that indemnity for wreck removal would not arise if the wreck lies outside the Port area. The notification specifying the limits of the Port area has not been produced on record by any of the parties. There is no dispute that the competent authority to decide whether the vessel is causing obstruction to navigation within the limits of Port or not is the Deputy Conservator of Mormugao Port. There is also no doubt that the Deputy Conservator of Port has no jurisdiction beyond the Port area. u/s 10(1) of the Indian Ports Act, 1908, the Conservator can remove or cause to be removed such obstruction. Sub-section (2) of Section 10 requires the owner to pay the expenses of the removal thereof and it also provides for punishment for causing such obstruction without any lawful excuse. Section 11, of the Ports Act provides for recovery of the expenses of removal from the owner. Thus, it can be safely presumed that the Deputy Conservator of Port would require any person to remove obstruction only if the said obstruction is within the limits of Port. By letter dated 05/10/1989, which is part of Exhibit PW 1/F Colly., the Deputy Conservator of Mormugao Port has specifically written to the plaintiff's proprietorship concern namely M/s. Kilito Ore Carriers that the said barge "Vinayak" is posing danger to vessels approaching the fairway buoys. The said authority, as a receiver of wreck, has directed the

plaintiff to take immediate action to remove the entire wreck from the said position. A warning has been given that failure of the plaintiff to do the said work will result into the Port Administration taking action by deploying a suitable salvage firm to execute the work entirely at the risk and cost of the plaintiff as per the Indian Ports Act and Port Regulations and if that happens, then the said costs plus 20% of the total expenditure will be recovered from the owner of the barge. The plaintiff has been further directed to intimate the Deputy Conservator of Mormugao Port the name of the Insurer with whom the subject barge is insured so that the Deputy Conservator can inform the said insurer of the action likely to be taken by the Port Administration. It is pertinent to note that again by letter dated 22/11/1989 which is also part of Exhibit PW 1/F Colly, the Deputy Conservator has warned the plaintiff that if immediate action is not taken, the Port will be compelled to deploy a suitable salvage firm to execute the work entirely at the risk and cost of the plaintiff and all costs plus 20% of the total expenditure will be recovered from the plaintiff. Hence, when the Deputy Conservator of Mormugao Port has directed the plaintiff to remove wreck saying that it is causing navigational hazard, it only means that the said wreck was lying within his jurisdiction i.e. within the port area and that the same was causing navigational hazard and it was necessary to remove the same. PW 3, Captain V.S. Gopinath is the said Deputy Conservator of Mormugao Port who has issued the said letters which are at Exhibit PW 1/F Colly. His evidence reveals that there was navigational hazard and necessity of removal of the barge. PW 2, Mr. Vishwas has stated that he had recommended the plaintiff to remove the wreck of the said vessel as it was causing obstruction to the navigation of other vessels, as notified by the Deputy Conservator of Mormugao Port and that he had submitted report to the Defendant No. 1. According to DW 1, the Seascan Services had mentioned in their report about the geographical and navigational location of the said barge and had submitted two reports one interim and the other final. DW 1 has not produced the said reports. DW 1 has admitted that the wreck removal was ordered by the Deputy Conservator of Port and that Seascan Services had recommended the removal of the wreck. He has however stated that they rejected the recommendation of Seascan as they thought that removal of wreck was not necessary at that time. Admittedly, the Defendant No. 1 did not write to the plaintiff that it was not necessary to remove the said wreck and that the wreck should not be removed. DW 1 does not say in his deposition that the wreck was lying beyond the port limits.

20. The Defendant No. 1 knew about all the events from the beginning. PW 1 had intimated the Defendant No. 1 about the said letters received from the Deputy Conservator of Mormugao Port and also about the steps to be taken for removal of the wreck. DW 1 has admitted that the plaintiff had sent the letter dated 05/10/1989 addressed to him by the Deputy Conservator of Mormugao Port informing about the removal of the wreck of the barge to the Defendant No. 1 and that in the said letter it was mentioned that the wreck of the said barge was causing hindrance for free navigation of vessels in the port area. DW 1

initially admitted that at this stage, the Defendant No. 1 appointed a Surveyor by name Seascan Services, but thereafter he corrected himself by saying that the plaintiff had appointed the said surveyor and the same was informed to the Defendant No. 1. DW 1 has stated that the said Surveyor was appointed in consultation with Defendant No. 1. DW 1 has admitted that wreck removal operation was supposed to be done by the plaintiff.

21. The evidence of DW 2 and DW 3 is not sufficient to prove that the structure they located was of the barge which is the subject-matter of the present case. The services of Pentagon Salvage, of which DW 3 was one of the partners, were allegedly engaged by the Defendant in April, 1991, which is almost after one and half year from the date of sinking of the vessel. Incidentally, this firm namely Pentagon Salvage had tendered for the work of wreck removal but was not given the work. From the evidence of DW 3 and photographs which are annexed to the report of M/s. Pentagon Salvage and Diving Company, Panaji, it can be understood that the transhipper "Priyamvada" was not there whereas the inspection was carried out on the basis of the position of a transhipper by name "Swati Rani". Admittedly, the barge which was located was not identified by way of its name or registration number or by any other mark of identification. Therefore, the evidence and reports of DW 2 and DW 3 cannot be held to be pertaining to the barge in question. I am therefore not inclined to rely upon the evidence of DW 2, Ashok Gowarikar and DW 3, Bernald D'Souza where they say that the wreck was lying outside the port limits of Mormugao Port and was not required to be removed. In my view, evidence of DW 2 and DW 3 has been procured by way of afterthought only to defeat the claim of the plaintiff.

22. Therefore, it is sufficiently proved that the vessel had sunk within the Port limits and further that it was necessary to be removed as it was causing navigational hazard.

23. Next question is whether the work of removal of wreck which was hampering the safe navigation of vessels in the Port was caused to be done by the plaintiff and was actually done by the Defendant No. 2. There is on record the evidence of PW 1 with regard to the execution of the wreck removal agreement which is at Exhibit PW 1/B. Since the competent authority to see that there is no obstruction in any part of the Port which impedes the free navigation thereof is the Deputy Conservator of Mormugao Port and further since the Deputy conservator had directed the plaintiff to remove the obstruction created by the vessel "Vinayak", it goes without saying that the best authority to certify that the work has been satisfactorily carried out is none else than the same Deputy Conservator. The wreck removal agreement (Exhibit PW 1/B), accordingly, stipulates that the wreck removal shall be deemed to have been completed successfully on the submission of a certificate from the Deputy Conservator of Mormugao Port stating that the wreck has been removed to its satisfaction. PW 1 has deposed that as per the said agreement, the Defendant No. 2 cut the upper part of the barge which was causing navigational hazard and sank the wreck below the sea

bed level. PW 1 has further deposed that in satisfaction of the said work, the Deputy Conservator of Mormugao Port issued certificate dated 23/12/1989, the original of which was submitted to the Defendant No. 1 at the time of lodging the claim, along with the bill dated 26/12/1989 for Rs. 13 lakhs. The copy of the certificate dated 23/12/1989 is at Exhibit PW 1/K, by which the Deputy Conservator has certified that the Defendant No. 2 have carried out the removal of navigational obstruction of "Vinayak" and have achieved the original depth of water in the area. PW 1 has deposed that after he claimed the amount, the Defendant No. 1 by letter dated 5/11/1990 accepted the claim in respect of constructive total loss of Rs. 17 lakhs but as regards the other claim for wreck removal, he was informed that the same was under consideration. The letter dated 5/11/1990 is at Exhibit PW 1/C. By letter dated 3/8/1990, which is at Exhibit PW 1/D colly, the plaintiff again requested the Defendant No. 1 to settle the claim in respect of wreck removal. Then by legal notice dated 9/7/1991 (Exhibit PW 1/E colly), the plaintiff called upon the Defendant No. 1 to pay the amount of Rs. 17,93,354/- with interest at the rate of 24% p.a. The Defendant No. 1 wrote the letter (Exhibit PW 1/E colly) dated 1/7/92 to the plaintiff wherein it has been mentioned that the Deputy Conservator of Mormugao Port, by letter dated 31/10/1990, has informed that M/s. Madgavkar Salvage have disintegrated the wreck of sunken barge on 20/7/1991 in the place where it was sunk. It is further stated in this letter that the Defendant No. 1 is liable to indemnify the plaintiff only in the event of removal of the wreck and that in the absence of proof that the sunken barge was causing the navigational hazards and that the salvors had dislodged and removed the barge from the place where it is sunk, they are unable to meet the demand towards wreck removal. Thereafter, the plaintiff by letter (Exhibit PW 1/G) dated 15/7/1992, wrote to the Deputy Conservator asking to confirm if the salvage work was satisfactorily carried out by the Defendant No. 2. The Deputy conservator then sent the clarification vide letter (Exhibit PW 1/H) dated 23/7/1992 wherein it has been mentioned that when the barge sank, the soundings were taken by Marine Department and it was noticed that the sounding above the wreck was 17 to 18 metres whereas the original depth of water was 22 metres. It has been further mentioned that after the receipt of letter dated 20/12/1989 from M/s. Madgavkar Salvage stating that the work of removal of the barge has been successfully carried out, a survey was carried out of the area and it was observed that the original depth of water in the area was restored. All the above facts as stated by PW 1 and supported by documents, have been confirmed by PW 3, Captain Gopinath, who is the said Deputy Conservator of Mormugao Port. As already stated earlier, the indemnity is not only for actual removal or destruction of the vessel but also for attempted removal or destruction. Though it is contended by Mr. Afonso, learned Counsel on behalf of the Defendant No. 1, that the plaintiff, Defendant No. 2 and the Deputy Conservator of Mormugao Port are hands in glove or have colluded for swindling the Defendant No. 1 of the insurance amount, however no such plea of collusion is there in the written statement of the Defendant No. 1 and equally no such suggestion has been put to the Deputy Conservator i.e. PW 3. There being ample

evidence on record to support the claim of the plaintiff and the Defendant No. 2 to the extent of Rs. 13,00,000/-, the non-examination of any representative of the Defendant No. 2 is not material. It is therefore duly proved that the Defendant No. 2, under agreement with the plaintiff, carried out the work of removal of navigational obstruction of the barge "Vinayak" and achieved the original depth of water in the said area.

24. The contention of the learned Counsel for the Defendant No. 1 that since the plaintiff has not yet paid the amount to the Defendant No. 2, the Defendant No. 1 is not liable to make the payment, bears no substance. It is true that the Defendant No. 1 has agreed to indemnify the plaintiff's firm in terms of the conditions mentioned in the insurance policy which is at Exhibit PW 1/A and Clause No. 9.1 says that the Underwriters agree to indemnify the Assured for any sum or sums paid by the Assured to any other person or persons etc. etc. In the present case, the work of wreck removal has been actually carried out by the Defendant No. 2 and the Defendant No. 2 has submitted the bill towards the cost of the said work to the plaintiff, and the plaintiff, in turn, has submitted that bill to the Defendant No. 1 along with the claim. The absolute liability has been incurred by the plaintiff, and he being the policyholder, is entitled to receive the said amount from the Defendant No. 1 for paying it back to the Defendant No. 2. The plaintiff has promised the Defendant No. 2 to actually pay the said amount as soon as the Defendant No. 1 pays the same to the plaintiff. Therefore, the plaintiff has right to sue for specific performance of the Insurance Policy which is the contract of indemnity. There can be no fear that the plaintiff, after receiving the amount would pocket the same. In terms of the impugned Decree, in the event the amount is recovered by the plaintiff, the same shall be paid to the Defendant No. 2. The plaintiff has not challenged the decree, with regard to the counter-claim of the Defendant No. 2.

25. It is true that the Defendant No. 2 had done the work and submitted the bills sometime in the year 1989. However, the cause of action for the plaintiff to file the suit arose only when the Defendant No. 1 rejected the claim made by the plaintiff towards the wreck removal and this rejection was vide letter dated 01/07/1993. The plaintiff filed the suit on 29/04/1994. Therefore, the suit cannot be said to be barred by law of limitation. Insofar as the counter-claim of the Defendant No. 2 is concerned, by letter dated 4th January, 1990(Exhibit D2/A), the plaintiff had written to the Defendant No. 2 thereby confirming to settle all the bills of the Defendant No. 2 in case the same are directly paid by the Defendant No. 1. In paragraph 9 of the written statement, the Defendant No. 2 has averred that vide letter dated 4/8/1994, addressed to the Defendant No. 2, the plaintiff informed that the amount due to them under the wreck removal agreement dated 27/11/1989, was payable by the Defendant No. 1 and that they have filed the suit against the Defendant No. 1. The plaintiff, in the written statement to the counterclaim, have not denied the contents of paragraph 9 of the written statement. The liability was, thus, lastly admitted by the plaintiff vide letter dated 4/8/1994. The counter-claim is not against the Defendant No. 1 but

is against the plaintiff and therefore when the plaintiff have admitted their liability, the claim of the Defendant No. 2 also cannot be held to be barred by law of limitation.

26. In the circumstances above, the impugned judgment and order is in accordance with the settled principles of law based on correct appreciation of the evidence on record and no interference is called for. The Defendant No. 2 is not pressing for the cross-objection. In the result, the appeal and the cross-objection are dismissed. No order as to costs in the facts and circumstances of the case.