Form No. J(1)
OD-1

IN THE HIGH COURT AT CALCUTTA
Commercial Appellate Division
ORIGINAL SIDE

AD-COM 4 of 2024
With
AS 3 of 1996

TATA STEEL LIMITED

-Versus-

THE OWNERS AND PARTIES INTERESTED IN THE OCEAN VESSEL ESPERANZA - III.

OCO 2 of 2025

IA NO:GA-COM 1 of 2024

THE TINPLATE COMPANY OF INDIA LTD.

-Versus-

THE OWNERS AND PARTIES INTERESTED IN OCEAN VESSEL ESPERANZA III (SANDHEAD)

Present:
The Hon'ble Justice RAJASEKHAR MANTHA
The Hon'ble Justice AJAY KUMAR GUPTA

For the Appellant:	Mr. Ratnanko Banerjee, Sr. Adv. Mr. D.K. Sarkar, Adv. Mr. J. Ghorai, Adv. Mr. D. Ghorai, Adv. Mr. S. Sen, Adv.
For the Respondent:	Mr. V.K. Ramavardhan, Sr. Adv. Mr. K. Thakkar, Sr. Adv. Mr. S. Prasad, Adv. Mr. N. Banerjee, Adv.
Heard on:	07th April, 2025
Judgment On:	29th April, 2025

Rajasekhar Mantha, J.

1. The appeal and cross-objection have been filed against judgment and decree dated 07th May, 2024 passed by a Single Bench of this Court in AS 3 of 1996 [The Tinplate Company of India Limited -Vs- The Owners and Parties Interested In Ocean Vessel Esperanza-III (Sandhead)].

2. By the impugned judgment, the Single Bench of this Court allowed the counter-claim of the defendant/cross-objector in the suit and dismissed AS 3 of 1996. The Single Judge allowed the defendant to encash the bank guarantee furnished by the plaintiff/appellant in terms of the orders dated 28th February, 1996 and 29th February, 1996 passed at the inception of the suit. The Registrar, Original Side was directed to encash the bank guarantee and transfer the proceedings thereof to the defendant, 'Cargo Levant'. Interim interest and interest on judgment @ 6%on the sum of Rs.68 lakhs from 25th April, 1996 was also ordered by the Single Judge.

A. Facts of the Case

3. The brief facts relevant to the case are that one "Cargo Levant", entered into a time charter party of the sea-faring vessel "Esperanza-III", with its owners on 19th December, 1995. [Exhibit 6]

4. A Bill of Lading dated 28th December, 1995 [Exhibit 1] was issued by the carrier in favour of the appellant M/s. Tinplate Company of India Ltd. as a consignee to carry and deliver 263 Tin Mill Blackplates in coils, from the port of lading at Antwerp in Belgium to Calcutta, on agreed terms and conditions. Five other similar bills of lading were also issued by the carrier on the same terms

and conditions to different other consignees (some of whom are sister concerns of the plaintiff) in Calcutta.

5. The Ship M.V. Esperanza III arrived at the sand-heads on the 5th February, 1996 outside Kolkata Port but could not berth at the port due to a "river pilot strike".

6. By a facsimile communication dated 8th February 1996, [Exhibit 5] the agents of the carrier one M/s. Oceanic Shipping Agency Pvt. Ltd, to the appellant, recorded that the ship was unable to berth at Calcutta due to the aforesaid pilot strike and was stuck at the Sand-heads from 5th February, 1996. The appellant was asked to indicate whether the Cargo could be discharged at a port nearby. It was also stated that if a nearby port is not indicated by the plaintiff the consignment would be delivered at the destination, condition precedent upon payment of all detention charges by the appellant, in terms of Clauses 11 and 12 of the bill of lading in addition to freight already paid. The appellants did not reply to the same.

7. The vessel arrived at the Sandhead outside Kolkata port on 16thFebruary 1996.

8. By a further facsimile message communication from the M/s. Oceanic Shipping Agency Pvt. Ltd. dated 19thFebruary 1996 [Exhibit 4] the appellant was intimated that the vessel was expected to berth at Calcutta on 13thFebruary 1996 and that the latter must instruct their shipping agents to contact the carrier for delivery orders.

9. The defendant/cross-objector once again informed the appellant that delivery orders for Cargo would be issued to the appellants only against payment of detention charges in terms of Clauses 11 and 12 of the Bill of Lading. The

detention charges were raised in an invoice dated 27th February, 1996 [Exhibit 3/2] and forwarded the same to the learned Advocates of the plaintiff under cover of a letter dated 28th February, 1996 [Exhibit 3/1].

10. The defendant in a letter dated 28th February, 1996 denied liability for paying any detention charges since the vessel has been detained for no fault of theirs and beyond anybody's control. The demand for detention charges was stated to be illegal. The appellant threatened the defendant with legal action and arrest of vessel in the event delivery orders were not issued. The appellant was however silent on why they did not want the Cargo to be discharged at a nearby port.

11. Upon reaching the sand-heads, the respondent notified the customs authorities at Calcutta of the proposed delivery of Cargo. When the vessel finally berthed at Kolkata on 28th February, 1996 the said M/s. Oceanic Shipping Agency Pvt. Ltd., sent an invoice dated 27th February, 1996 to the appellant, for a sum of Rs. 68,42,844/- being detention charges of the vessel at the sand-heads from16th to 26th February 1996. Similar invoices towards detention charges, duly apportioned, were raised to 5 other consignees of other Cargo who duly paid the same and obtained delivery orders of their consignments [Exhibits 9/1 to 9/10].

B. <u>Proceedings before the Single Bench</u>

12. On 28th February, 1996 the appellant filed AS No. 3 of 1996, in the Admiralty Jurisdiction of this Court, praying for the following reliefs:

> "The plaintiff, therefore, prays for and claims;
> a) Arrest of the said Ocean Vessel Esperanza III her tackles, apparels and furniture:

b) Injunction restraining the defendants and/or the said Ocean vessel Esperanza II from leaving the Sandheads or the jurisdiction of this Hon'ble Court without discharging the cargo of the plaintiff covered by the said Bill of lading No.004;
c) Decree directing the defendants for delivery of the said 263 coils of the said prime quality tin mill black plates;
d) Alternatively, Decree for Rs. 7,36,519.84;
e) Interest from 17th February 1996 till filing of the suit, interim interest and interest on judgement at 20% per annum;
f) Receiver;
g) Injunction;
h) Costs;
i) Further and other reliefs."

13. At Para 11, 12, 13 and 15 in the plaint, the appellant contended that the demand of detention charges by the respondent is wrongful. The withholding of delivery of consignment under the Bill of Lading for non-payment of detention charges is illegal and that the respondent/cross objector is in breach of duty as a common carrier. The said paragraphs are set out herein-below:

"11. the defendants are wrongly contending that due to strike by the Calcutta Port Pilots the said Ocean Vessel Experanza III has been "detained" and the plaintiff will have to pay to the defendants "detention charges" yet to be ascertained.

12. The plaintiff states that neither in law nor in fact the said Ocean Vessel has been detained and as such the question of payment of any detention charges by the plaintiff does not arise. The purported plaint of the defendants by way of "detention charges" are wrongful, delivery of the said goods covered by the said Bill of Lady. Such withholding delivery of the plaintiff's good is in breach of the agreement and breach of duty as common carrier and/or public carrier and the defendants are liable to pay or losses and damages suffered and that might be suffered by the plaintiff as a result thereof.

13. The Plaintiff entitled to and claims delivery of the said goods forthwith and claims damages for the wrongful withholding of delivery of goods.

14. The defendants are threatening and intend to and will sail away from the Sandheads/Calcutta Port any time without discharging the plaintiff's goods covered by the said Bill of Lady unless the unreasonable and unlawful demands of the defendants are met."

15. By an order dated 28th February, 1996 a Single Bench of this Court passed an ad-interim order of injunction restraining the vessel M.V. Esperanza III from leaving the port of Calcutta without securing the claim of the petitioner for a sum of Rs.6,36,34,519.80/- (being the value of the cargo). The injunction was to continue until 4.00 PM the next day.

16. On the next day, i.e. 29th February 1996, when the defendants entered appearance, the single bench directed the appellants to secure the claim of the respondent towards detention charges for a sum of Rs. 68 lakhs by way of a bank guarantee or immovable property within or outside the jurisdiction of the Court within 2 weeks, against which the respondent would issue delivery orders of the consignment of the appellant.

17. Another consignee, M/s. Telco Limited, a sister concern of the appellant also undertook to furnish security for a sum of Rs. 8.68 lakhs, detention charges either by way of bank guarantee or by way of immovable property within or outside the jurisdiction of this Court against delivery orders of their consignment would also be issued.

18. The appellants furnished a bank guarantee to secure the said detention charges. Delivery orders were issued by the defendant. The appellant obtained and appropriated the consignment of 263 Tin Mills Blackplates in coils to their use and benefit. The vessel left Kolkata thereafter.

19. On 3rd January, 1997 the respondent filed a written statement in AS No. 3 of 1996n wherein it was as follows:

> "4. With regard to the allegations contained in paragraph 3 of the plaint the defendant craves reference to the Bill of Lading and its

terms and conditions to ascertain this true scope and effect. A Bill of lading No. 004 dated 28th December, 1996 was issued on behalf of the vessel by the master acknowledging 263 coils measuring gross weight 2.510.173 K.G. to carry the same from Antwerp being the port of loading and to discharge the same at the Calcutta, being the port of discharge on the terms and condition recorded therein. Clause 11 of the terms and conditions of the Bill of Lading inter alia provided that if the vessel waits at some convenient port or place or at the designated discharge port any waiting time shall be paid for by the merchant as detention at the rate set out in clause 12 of the said Bill of Lading. A pilot strike was prevailing at the Calcutta Port in February 1996. The said vessel dulygave notice to the plaintiff and other cargo owner that the defendant would not bring the vessel to Calcutta unless they were prepared to pay detention charges and thereafter brought the vessel to Calcutta on the terms that the detention charges would be paid by them. The vessel M.V. Esperanza-III arrived at Sandheads on 16th February, 1996. Notice of readiness was duly issued on behalf of the vessel but the said vessel was detained at Sandheadasdue to Pilot Strike at Calcutta Port which was called off on 26th February 1996 and the vessel was berthed on 28th February 1996 and discharged her cargo. As such the defendant is entitled to detention charges as specified in Clause 12 of contract of carriage for which notices have been issued upon the consignee of cargo requesting them to pay the detention charges. The plaintiff inspite of such notice and in violation of the terms and conditions of the contract of carriage failed and neglect to pay the detention charges of the vessel as a result of which the defendant did not issue the delivery order. Delivery orders were issued in terms of the orders passed by this Hon'ble Court in the instant proceeding and upon furnishing Bank Guarantee by the plaintiff. The defendant is entitled to the detention charges without any ambiguity and in accordance with the terms and conditions of the contract of carriage. The plaintiff is obliged to pay the detention charges in accordance with the contract of carriage. The plaintiff accepted the cargo at Calcutta on the basis that they will pay detention charges. Save such and same what are matters of record I deny each and every allegation contained in the said paragraph.

6. The statements contained in paragraph 6, 7 and 8 of the plaint are denied save and except what are matters of record. Inspite of notice being served the plaintiff failed and neglected to pay the detention charges having committed breach of the terms and conditions of the contract of carriage and as such was not entitled to delivery order unless the detention charges are paid.

9. The allegations contained in paragraphs 12 to 16 of the plaint are denied save and except what are matter of record and the defendant repeats and reiterates the statements contained hereinabove. The claim of detention charges by the defendant is lawful, tenable and justified and the defendant was entitled in law to withhold the delivery order. It is denied that such withholding of delivery order is in breach of the agreement and in breach of duty as common carrier and/or

> public carrier as alleged or that the defendant is liable to pay the alleged losses and damages suffered or might be suffered by the plaintiff as alleged. It is further denied that the plaintiff suffered damages or is entitled to an enquiry. Save as such and save what are matters of record I deny each and every allegation contained in the said paragraphs.
>
> 14. In the facts and under the circumstances, stated above the plaintiff is not at all entitled to the relief claimed. The plaintiff obliged to pay the detention charges and such detention charges has been secured by way of Bank Guarantee interms of the orders passed in the instant proceedings. Considering the facts of this case this Hon'ble Court should be pleased to direct encashment or the Bank Guarantee and to direct the proceeds thereof be paid to the defendant."

20. The suit appeared in the Cause List of the Single Bench on 24th June, 2024for hearing. Counsel for the appellant submitted that he had no instructions from his client. The respondent submitted that the suit is unnecessary since the appellant has received delivery of the goods and demanded encashment of the bank guarantee.

21. The suit was decreed on the said day with a direction on the appellant to renew the bank guarantee within one month from date and permitted the respondent to encash the same. In the event the bank guarantee was not renewed the defendant/respondent was held entitled to a decree for Rs. 68 lakhs and the suit was decreed and disposed of.

22. On an application for recall of the Court's order dated 24th June, 2004,being G.A. 2683of 2004, by order dated27th July, 2004, the decree was recalled and the appellants were directed to furnish a fresh bank guarantee for Rs. 68 lakhs within 2 weeks from date. The bank guarantee was renewed from time to time.

23. Sometime in the year 2008 the respondent filed an application being GA No. 4111 of 2008 before the interlocutory court seeking leave to encash the bank guarantee. Affidavits were exchanged. The defendant relied upon two letters

dated 7th June, 2008 [Exhibit 7] from M/s. P & I Services Pvt. Ltd. and the reply dated 22nd June, 2008 [Exhibit 8] issued by the Kolkata Port Trust whereby it was confirmed that there was a river pilots strike in Kolkata Port between 16th to 28th February, 1996. In reply thereof, the appellants contended that since there was no counterclaim filed by the defendants, they are not entitled to any such relief.

24. The respondents thereafter filed GA No. 1486 of 2012 seeking amendment to the written statement. Only one paragraph being No. 15 which formally raised a counterclaim against the appellant was proposed to be added. The said paragraph is set out herein below:

> "15. Without prejudice to what is contained in Paragraph 14 hereof defendant claims and/or counter claims as follows:
>
> a) An order and/or Decree directing the Registrar Original Side, to encash the Bank Guarantee for Rs.68,00,000/- given by the plaintiff in favour of the said Registrar and to pay the same to the Defendant with all accrued interest.
>
> b) An Order and/or Decree directing the Registrar Original Side to encash the Bank Guarantee for Rs.68,000,000/- given by the plaintiff in favour of the Registrar and to pay to the Defendant such sums as seems fit and proper to this Hon'ble Court.
>
> c) Such further or other Order and/or Decree and/or Directions be passed by this Honourable Court as seems fit and proper and in the interest of justice."

25. The said two applications were taken up by a Single Bench of this Court on 3rd August, 2012.The Single Judge while holding that all ingredients of a counter-claim were already available in the original written statement filed by the respondents, permitted amendment of the plaint.

26. On an appeal being APO 140 of 2012 against the said order dated 3rd August, 2012 a Division Bench of this Court disposed of the same by order dated12th November 2012, holding that, all the observations of the Single Judge must be

deemed as prima facie. The amendment to the written statement was allowed subject to the appellant's contention that the counterclaim was barred by limitation.

27. The suit was taken up for final hearing and two issues were framed by the Court.

> a) Is the defendant entitled to a sum of Rs. 68 lakhs as claimed in paragraph 15(b) of the written statement?
> b) Is the claim of the defendant is barred by laws of limitation?

C. <u>The Evidence in the Suit</u>

28. The evidence in the suit was directed to be recorded before a Commissioner appointed by the Court. The Commissioner in its Minutes of the meeting dated 10th June 2017 recorded that the "plaintiff's advocate submitted that he does not wish to adduce any evidence and plaintiff does not wish to proceed in its claim".

29. On behalf of the defendants, however, two witnesses were examined. DW 1 was Gopal Krishna Bhattacharjee who was an employee of the agents of the carrier defendant M/s. Oceanic Shipping Agency Pvt. Ltd. DW 2 was Dilip Krishna Chatterjee an employee of P & I Services Pvt. Ltd. The defendants, inter alia proved the Charter-party, Bill of Lading, invoices issued towards detention charges for Rs. 68 lakhs, notices issued to the plaintiff/appellant dated 9th February, 1996 and a letter of the Kolkata Port Trust dated 7th June, 2008 confirming that there was a pilot's strike at the Kolkata Port between 5th February, 1996 and 25th February, 1996. Each of the aforesaid documents were marked as exhibits in the suit.

30. The suit was listed for final hearing on 32 dates between 3rd February, 2022 and 15th June, 2024. On the said dates, the plaintiff's advocates either remained absent and/or sought adjournment on one pretext or the other. When the hearing finally commenced the plaintiff contended that the defendant's counterclaim was barred by limitation since the amendments to include the counterclaim, in the year 2012, was beyond the period of limitation. The defendant is not entitled to detention charges since they did not offer to deliver the goods at a nearby port nor made any attempt to mitigate the losses. It was also argued that the written statement has been filed not by the defendant but on somebody masquerading as the defendant. It was further argued that the witness on behalf of the defendant was not authorised to depose on behalf of the owners of the vessel.

31. The defendant argued that the plaintiff not agreeing to proceed with the claim has failed to discharge its burden to prove and has abandoned the suit after enjoying interim orders. The suit is liable to be dismissed on this ground alone and the defendant must be permitted to encash the bank guarantee of Rs. 68 lakhs, interest on Rs. 68 lakhs is also prayed for. It is specifically argued that the formal counterclaim included in the written statement by way of amendment was without prejudice to the rights of the defendants and that there was no need to file a counterclaim. The Single Judge proceeded to decide the matter on the basis of Section 101, 102, and 103 of the Evidence Act.

D. <u>The Findings of the Single Bench</u>

32. It was held by the single bench that the plaintiff failed to discharge its burden of proof that the claim of the defendant for detention of charges was wrongful.

The plaintiff could not be permitted to obtain delivery of goods by way of interim orders and enjoy the benefit thereof and abandon the claim for main reliefs subsequently. The plaintiff was found unjustly enriching itself.

33. The Court found that the defendant was able to prove its claim towards detention charges and the suit was not barred by limitation. The suit was dismissed and all pending interim applications were also dismissed. The Court found that an act of court i.e. the interim order of arrest and subsequent release of the ship against the plaintiff furnishing bank guarantee gave undue advantage and enrichment to the plaintiff.

34. The Court found that the parties ought to be placed in the position that they would have been if the interim order had not existed and applied Section 144 of the CPC. The bank guarantee was directed to be encashed by the Registrar, Original Side, and paid to the defendant/respondent/cross-objector. A 6% interest per annum was awarded from 24th April, 1996 till the date of payment.

E. Findings of this Court

35. This Court has heard lengthy arguments by learned Senior Counsel for the Parties Mr. Banerjee and Mr. Ramavardhan. The first question to be decided in the opinion of this Court is as to whether the defendant was required to file a formal counterclaim in a suit of this nature i.e. an Admiralty Claim.

i) The Need For a Counterclaim and the issue of Limitation

36. Section 11 and 12 of the Admiralty (Jurisdiction and Settlement of Maritime Claims), Act, 2017, of the Act prescribe as follows:

> "11. Protection of owner, demise charterer, manager or operator or crew of vessel arrested.—(1) The High Court may, as a condition of arrest of a vessel, or for permitting an arrest already effected to be

> maintained, impose upon the claimant who seeks to arrest or who has procured the arrest of the vessel, an obligation to provide an unconditional undertaking to pay such sums of money as damages or such security of a kind for an amount and upon such terms as may be determined by the High Court, for any loss or damage which may be incurred by the defendant as a result of the arrest, and for which the claimant may be found liable, including but not restricted to the following, namely:— (a) the arrest having been wrongful or unjustified; or (b) excessive security having been demanded and provided. (2) Where pursuant to sub-section (1), the person providing the security may at any time, apply to the High Court to have the security reduced, modified or cancelled for sufficient reasons as may be stated in the application. (3) If the owner or demise charterer abandons the vessel after its arrest, the High Court shall cause the vessel to be auctioned and the proceeds appropriated and dealt with in such manner as the court may deem fit within a period of forty-five days from the date of arrest or abandonment: Provided that the High Court shall, for reasons to be recorded in writing, extend the period of auction of the vessel for a further period of thirty days.
>
> 12. Application of Code of Civil Procedure.—The provisions of the Code of Civil Procedure, 1908 (5 of 1908) shall apply in all the proceedings before the High Court in so far as they are not inconsistent with or contrary to the provisions of this Act or the rules made thereunder."

37. A combined reading of Section 11 and Section 4(1)(g) of the Act of 2017 would clearly establish that a counterclaim under an agreement relating to the carriage of goods is inherent to and embedded in a maritime claim and is hence required to be decided by a Court under Section 11 of the Act of 2017.The said provisions have also been deemed to be part of common law principles applied in India before the advent of the Act of 2017. Reference in this regard is placed in the cases of ***Chrisomar Corporation v. MJR Steels Pvt Ltd*** reported in ***(2017) 10 SCC 774*** and ***M.V. Elizabeth v. Harwan Investment and Trading Corporation Ltd*** reported in ***(1993) Supp (2) SCC 433.***

38. The expression "and for which the claimant may be found liable" used in Section 11 above clearly implies that a counterclaim of a defendant in an admiralty action is embedded within Section 11 itself. The defendant is merely

required to raise it in his defence. If after the trial the defendant succeeds the sum payable to him reserved in the form of security for release of the vessel must be decreed in its favour. It is irrelevant as to who is required to furnish security i.e. the claimants or the owner of the vessel.

39. It also therefore follows from the above and Section 12 of the Act of 2017 that raising of a counterclaim by use of the expression "counterclaim" may not be mandatory as prescribed under Order VIII Rule 6B of the CPC in a given case as available in the instant case. It is only if the defendant in a suit made a claim outside the scope of the claim of the plaintiff that he would be required to formally plead a counterclaim in terms of Order VIII Rule 6B.

40. A Counterclaim would be required only if the defendant has further and other claims not pleaded by a claimant in an admiralty action. This must be understood as the object and purpose of Section 12 of the Act of 2017. The Act of 2017 is nothing other than a codified version of the Maritime law as it stood and was applied by Indian Courts based on the national laws on the carriage of goods by sea and other laws and international conventions applied in Common law.

41. The right of a carrier, both in common law and in terms of a Bill of lading, to a lien on the goods for demurrage and/or detention charges is recognized by the Supreme Court at Para 7 of the decision of the Supreme Court cited by learned Counsel for the respondent being ***Shipping Corporation of India Ltd. v. C.L. Jain Woollen Mills & Ors.*** reported in ***(2001) 5 SCC 345***.

> **"7.** Before examining the correctness of the rival submissions, one thing is crystal clear that the relationship between the importer and the carrier of goods in whose favour the Bill of Lading has been consigned and who

has stored the goods in his custody, is governed by the contract between the parties. Section 170 of the Indian Contract Act engrafts the principle of bailee's lien, namely, if somebody has received the articles on being delivered to him and is required to store the same until cleared for which he might have borne the expenses, he has a right to detain them until his dues are paid. But it is not necessary in the case in hand to examine the common law principle and the bailee's lien inasmuch as the very terms of the contract and the provisions of the Bill of Lading, unequivocally conferred power on the appellant to retain the goods, until the dues are paid. Such rights accruing in favour of the appellant cannot be nullified by issuance of a certificate of detention by the Customs Authorities unless for such issuance of detention certificate any provisions of the Customs Act authorise. We had not been shown any provisions of the Customs Act which would enable the Customs Authorities to compel the carrier not to charge demurrage charges, the moment a detention certificate is issued. It may be undoubtedly true that the Customs Authorities might have bona fide initiated the proceedings for confiscation of the goods which however, ultimately turned out to be unsuccessful and the Court held the same to be illegal. But that by itself, would not clothe the Customs Authorities with the power to direct the carrier who continues to retain a lien over the imported goods, so long as his dues are not paid, not to charge any demurrage charges nor the so-called issuance of detention certificate would also prohibit the carrier from raising any demand towards demurrage charges, for the occupation of the imported goods of the space, which the proprietor of the space is entitled to charge from the importer. The importer also will not be entitled to remove his goods from the premises unless customs clearance is given. But that would not mean that demurrage charges could not be levied on the importer for the space his goods have occupied, since the contract between the importer and the proprietor of the space is in no way altered because of the orders issued by the Customs Authorities. The learned Additional Solicitor General vehemently argued and pressed sub-section (2)(*b*) of Section 45 in support of his contention that the imported goods have to be dealt with in accordance with the permission in writing of the proper officer of the Customs Department and in exercise of such power when the Customs Authorities initiate adjudication proceeding and ultimately confiscate and levy penalty, when such order is struck down and a detention certificate is issued, the said issuance of detention certificate would come within the expression “otherwise dealt with” used in Section 45(2)(*b*), and therefore, the proprietor of the space would be bound not to charge any demurrage charges. We are unable to accept this contention inasmuch as the expression “otherwise dealt with” used in Section 45(2)(*b*), in the context in which it has been used, cannot be construed to mean, it authorises the Customs Officer to issue a detention certificate in respect of the imported goods, which would absolve the importer from paying the demurrage charges and which would prevent the proprietor of the space from levying any demurrage charges. Having scrutinized the provisions of the Customs Act, we are unable to find out any provision which can be remotely construed to have conferred power on the Customs Authorities to prevent the proprietor of the space from levying the demurrage charges and, thereby absolving the importer of the

> goods from payment of the same. In fact the majority decision in *Grand Slam International case* [*International Airports Authority of India* v. *Grand Slam International*, (1995) 3 SCC 151] clearly comes to the aforesaid conclusion with which we respectfully agree."

42. The lis before the Single Judge was whether the defendant was entitled to the detention charges for the period between 16th and 26th of February 1996 when the vessel was detained at the sand-heads at Kolkata. The entitlement and claim of the defendant which was a maritime claim is clear and explicit from the plaint itself. The defendant therefore did not have to make or plead any formal counterclaim as prescribed under Order VIII Rule 6B of the Code of Civil Procedure 1908.

43. In the instant case since the defendant had only joined issue with the plaintiff on the question of payment of detention charges disputed by the plaintiff in the plaint Para 14 of the original written statement set out herein above would suffice without any formal counter-claim being raised in terms of Order VIII Rule 6B of the Code. The defendant has pleaded his entitlement to detention charges as the cause of the non-delivery of goods to the plaintiff.

44. Since the defendant had already raised its maritime claim/ counterclaim in the unamended written statement the claim of the defendant is clearly within limitation. In view of the discussions made hereinabove, the defendant, as a matter of abundant caution and without prejudice to the statement made in Para 14 of the written statement, has raised a formal counterclaim in terms of Order VIII Rule 6B of the Code in 2012. The genesis of such a counterclaim is already contained in its original written statement that was filed within the period of limitation.

45. Even assuming for the sake of argument that the defendant was required to formally plead and raise a counterclaim in terms of Order VIII Rule 6B, paragraph 11 of the decision of the Supreme Court in the case of ***Laxmidas Dayabhai Kabrawala v. Nanabhai Chunilal Kabrawala & Ors.*** reported in ***1963 SCC Online SC 128*** is of relevance:

> **"11.** The question has therefore to be considered on principle as to whether there is anything in law — statutory or otherwise — which precludes a court from treating a counter-claim as a plaint in a cross-suit. We are unable to see any. No doubt, the Civil Procedure Code prescribes the contents of a plaint and it might very well be that a counter-claim which is to be treated as a cross-suit might not conform to all these requirements but this by itself is not sufficient to deny to the Court the power and the jurisdiction to read and construe the pleadings in a reasonable manner. If, for instance, what is really a plaint in a cross-suit is made part of a written statement either by being made an annexure to it or as part and parcel thereof, though described as a counter-claim, there could be no legal objection to the Court treating the same as a plaint and granting such relief to the defendant as would have been open if the pleading had taken the form of a plaint. Mr Desai had to concede that in such a case the Court was not prevented from separating the written statement proper from what was described as a counter-claim and treating the latter as a cross-suit. If so much is conceded it would then become merely a matter of degree as to whether the counter-claim contains all the necessary requisites sufficient to be treated as a plaint making a claim for the relief sought and if it did it would seem proper to hold that it would be open to a court to convert or treat the counter-claim as a plaint in a cross-suit. To hold otherwise would be to erect what in substance is a mere defect in the form of pleading into an instrument for denying what justice manifestly demands. We need only add that it was not suggested that there was anything in Order 8, Rule 6 or in any other provision of the Code which laid an embargo on a court adopting such a course."

46. Applying the aforesaid to the case at hand it is clear that paragraph 14 of the original written statement and other paragraphs clearly raise a claim counter to the plaint case and join issue with it. This Court is therefore inclined to hold that the defendant has clearly raised a counterclaim against the plaintiff, both in the original written statement and the amended written statement, within the period of limitation prescribed therefor.

47. The decision cited by Mr. Ratnanko Banerjee, learned Counsel for the appellant namely in the case of ***Rajini Rani and Anr. v. Khairati Lal & Ors.*** reported in ***(2015) 2 SCC 682*** and ***Ashok Kumar Kalra v. Wing Commander Surendra Agnihotri & Ors.*** reported in ***(2020) 2 SCC 394*** do not have any manner of application in the facts of the case.

ii) The issue of entitlement of the defendant to detention charges

48. The following Clauses about the entitlement of the respondent/carrier to detention charges in the bill of lading have been omitted by the plaintiff in the paper books/pleadings filed in this Appeal. They have been included in a Supplementary Paper Book filed by the respondent.

> "Clause 11. If the vessel waits at some convenient port or place as aforesaid as waiting time shall be paid for by the merchant as detention at the rate set out Clause 12"
>
> "If and when the goods are so discharged from the vessel at the loading port, intermediate port or wheresoever the Merchant shall bear and pay all charges and expenses incurred in connection with such discharge. Full bill of lading freight and charges shall be freed fom all responsibilities in respect of such goods, the goods being at the sole risk and expenses of the merchant. The Carrier shall not be liable for any loss of or damage to the goods whatsoever howsoever caused and such discharge shall constitute complete and true delivery and performance hereunder.
> If and when the goods are carried to and discharged at any intermediate port, by the Carrie44r or substitute vessel whereby the route selected by the carrier, in his absolute discretion as aforesaid, is longer than that which the vessel would have otherwise taken the merchant to pay the carrier detention as set out in clause (12) for the period the voyage takes longer.
> If the vessel walls at some convenient port or lace as aforesaid or at the designated discharge port any waiting time shall be paid for by the merchant as detention as the rate set out in clause (12).
> d) All expenses referred to in these provisions to be borne by the merchant shall be deemed to be freight and shall be paid in addition to the agree freight, even if already paid, notwithstanding the fact that the contract of carriage is on liner terms.
> e) In no case the carrier shall be required to change the geographical rotation of the vessel planned in order to reduce or minimize or otherwise eliminate delay.
> Clause 12. Detention

> Detention is agreed to amount in call case to Dm 2,000 per vessel's gross deadweight on pre day/rata. The total amount of detention payable to the carrier shall be distributed on all merchants having ca-go on board in proportion to their quantity of fright/tons on board. No Merchant shall be liable for detention charges shall be deemed earned and the Carrier shall be freed from all responsibilities in respect of such gods, the goods being at the sole risk and expanse of the Merchant. The Carrier shall not be liable for any loss of or damage to the goods whatsoever howsoever cause and such discharge shall constitute complete and true delivery and performance hereunder.
> If and when the goods are carried to and discharged at any intermediate port, by the Carrier or substitute Vessel whereby the route selected by the Carrier in his absolute discretion as aforesaid, is longer than that which the vessel would have otherwise taken the merchant to pay the Carrier detention as set out in clause (12) for the period the voyage takes longer."

49. Clause 13 of the bill of lading the following sub-clause (i) is set out herein below:

> "i)The Carrier shall have 1 lien for any amount due under this contract and cost of recovering same and shall be entitled to sell the goods privately or by auction to cover any claim. The Merchant is under all circumstances responsible for the payment of freight payable by him under this contract. This is also applicable for freights which are payable at the port of discharge or at final destination (if on-carriage)."

50. Applying the principles laid down in the ***Shipping Corporation of India decision (Supra)***, the appellant is bound by the aforesaid clauses in the bill of lading, to pay detention charges to the defendant, in situations specified thereunder.

51. The defendant with a view to mitigate the liability of the defendant towards detention charges by way of a facsimile letter dated 8th February, 1996 [Exhibit 5] called upon the appellant to indicate if the Cargo could be discharged at a nearby port. This detention of the vessel at the sand heads outside the Calcutta port could have been avoided. The plaintiff/appellant did not and or refused to respond to the same. The defendant, therefore, had no option than to wait at

the Sandhead until the pilot strike was over and berth at Kolkata to discharge the Cargo.

52. By a facsimile message dated 19th February, 1996 [Exhibit 4] the plaintiffs were informed of the arrival of the vessel at the Sandhead and were asked to instruct their clearing agents to contact the defendant for issuance of delivery orders.

53. By a facsimile message dated 19th February, 1996 [Exhibit 4] the defendant notified the plaintiff/appellant for the second time and reiterated their claim for detention charges in terms of Clauses 11 and 12 of the Bill of Lading. It was further stated that the Cargo would be released only after full collection of detention charges to be worked out after the pilot strike is called off and the vessel berths at the port of Kolkata.

54. By a similar communication addressed to other consignees [Exhibits 9/1 to 9/10] dated 16th February, 1996 the defendant notified that the Cargo would be discharged only after the vessel berthed at Kolkata port after the conclusion of the pilot strike. It was further notified to the said other consignees that delivery orders for the consignment would be issued only against payment of detention charges in terms of Clauses 11 and 12 of the Bill of Lading.

55. In a reply to a letter dated 7th June, 2008 [Exhibit 7] the Kolkata Port Trust addressed a communication dated 22nd June, 2008 [Exhibit 8] to M/s. P & I Services Pvt. Ltd. confirming that there was a river pilot strike at Kolkata port between 16th and 28th February, 1996.

56. The appellant for the first time on 20th February, 1996 denied any liability for payment of detention charges and threatened the defendant with illegal action and arrest if the vessel left the jurisdiction of Indian Courts without

discharging the Cargo at Kolkata. The appellant was completely silent as regards the discharge of the Cargo at any alternative port as requested by the defendant in its letter dated 8th February, 1996 [Exhibit 5].

57. The appellant therefore failed to mitigate its liability towards payment of detention charges. The defendant therefore became entitled to the said detention charges in terms of Clauses 11 and 12 of the Bill of Lading. The appellant has never questioned the illegality of Clauses 11 and 12 of the Bill of Lading and could not do so in law. The defendant has proved by oral and documentary evidence its entitlement to the detention charges and its formal counterclaim. The defendant is therefore entitled to a decree for such detention charges.

iii) The Burden of Proof

58. Paragraphs 11,12 and 13 of the plaint have been set out hereinabove clearly demonstrate that it is the plaintiff who has asserted that the claim for detention charges by the defendant/respondent was illegal. Prayer B to the plaint was to seek an injunction against the vessel from leaving Kolkata without discharging the consignment under the Bill of Lading. The plaintiff therefore took upon itself the burden of proof under Section 101 of the Evidence Act that the defendant was not entitled to claim detention charges.

59. The plaintiff obtained a decree in terms of the Prayer C to the plaint at an interim stage in the suit sometime in the year 1996 itself. It had obtained the delivery of the consignment by putting in a bank guarantee in favour of the Registrar, Original Side of this Court for Rs.68 lakhs representing the delivery charges.

60. If one ignores the formal counterclaim raised in the amended plaint in terms of paragraphs 11,12,13 and 15 of the plaint read with Paragraphs 4,6,9 and 14 of the original written statement, the burden of proof of proving the disentitlement of the defendant towards detention charges therefore squarely rested with the plaintiff.

61. Paragraphs 8,9 and 10 of the decision cited by the respondent in the case of ***Anil Rishi v. Gurbaksh Singh*** reported in ***(2006) 5 SCC 558*** would clearly apply in the facts of the case.

> **"8.** The initial burden of proof would be on the plaintiff in view of Section 101 of the Evidence Act, which reads as under:
> "101. *Burden of proof.*—Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.
> When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."
>
> **9.** In terms of the said provision, the burden of proving the fact rests on the party who substantially asserts the affirmative issues and not the party who denies it. The said rule may not be universal in its application and there may be an exception thereto. The learned trial court and the High Court proceeded on the basis that the defendant was in a dominating position and there had been a fiduciary relationship between the parties. The appellant in his written statement denied and disputed the said averments made in the plaint.
>
> **10.** Pleading is not evidence, far less proof. Issues are raised on the basis of the pleadings. The defendant-appellant having not admitted or acknowledged the fiduciary relationship between the parties, indisputably, the relationship between the parties itself would be an issue. The suit will fail if both the parties do not adduce any evidence, in view of Section 102 of the Evidence Act. Thus, ordinarily, the burden of proof would be on the party who asserts the affirmative of the issue and it rests, after evidence is gone into, upon the party against whom, at the time the question arises, judgment would be given, if no further evidence were to be adduced by either side."

62. The plaintiff appellant having failed to lead any evidence in this regard must be deemed to have admitted its liability towards the defendant towards detention

charges under Clauses 11 and 12 of the Bill of Lading read with Exhibits 3 series, Exhibit 4 and Exhibit 5.

63. Several other consignees whose Cargo was being carried along with that of the appellant on whom invoices towards detention charges were raised [Exhibits 9 series] have paid the said detention charges of the vessel duly apportioned to them. The appellant therefore even otherwise has not been treated differently as compared to the other consignees by the defendant, the appellant is therefore equally liable towards the detention charges of the vessel between 16th and 28th February, 1996.

iv) <u>The application of Section 144</u>

64. The plaintiff obtained a decree for delivery of consignment at the ad-interim stage in the suit. The Plaintiff thereafter chose not to lead evidence either in support of his challenge to the detention charges or even to the counterclaim of the defendant to the same. The plaintiff therefore abandoned the suit after obtaining the delivery of the consignment. The finding of the single judge as regards the unjust enrichment by the plaintiff in obtaining the interim order of arrest, is wholly justified.

65. By reason of refusing to press its claim or lead evidence to dispute the detention charges the plaintiff must be deemed to have conceded to the claim of the defendant.

66. The argument of Mr. Banerjee, learned Counsel for the appellant that the defendant had also benefited from the interim orders, in obtaining freedom from arrest, to leave Kolkata Port after the interim order, is hubristic and fallacious. It is at the instance of the plaintiff that the original order of

injunction was passed by the Single Judge on 28th February, 1996. Upon modification of the order on the next date, i.e. 29th February, 1996, the plaintiff at the ad-interim stage was able to obtain a decree in terms of Prayer C to the plaint, not leading any evidence in support of the claim of alleged disentitlement of the defendant to detention charges would demonstrate that the plaintiff may have admitted to the entitlement of such charges from the date of institution of the suit itself.

67. The defendant was and is entitled to be restored to the position as if the plaintiff paid the said detention charges on 28th February, 1996. The defendant was also entitled to invoke the Bank guarantee, even without leading any evidence once the plaintiff chose not to lead any evidence in the matter. The Single Judge therefore was right in applying Section 144 of the CPC in the facts of the case.

68. Reference in this regard is made in the decision of ***South Eastern Coalfields Ltd. v. State of M.P. & Ors.*** reported in ***(2003) 8 SCC 648*** at paragraph 26cited by learned Counsel for the respondent cross-objector would clearly apply to the facts of the case, it was held as follows:

> **"26.** In our opinion, the principle of restitution takes care of this submission. The word "restitution" in its etymological sense means restoring to a party on the modification, variation or reversal of a decree or order, what has been lost to him in execution of decree or order of the court or in direct consequence of a decree or order (see *Zafar Khan* v. *Board of Revenue, U.P.* [1984 Supp SCC 505 : AIR 1985 SC 39]) In law, the term "restitution" is used in three senses: (*i*) return or restoration of some specific thing to its rightful owner or status; (*ii*) compensation for benefits derived from a wrong done to another; and (*iii*) compensation or reparation for the loss caused to another. (See *Black's Law Dictionary*, 7th Edn., p. 1315). *The Law of Contracts* by John D. Calamari & Joseph M. Perillo has been quoted by Black to say that "restitution" is an ambiguous term, sometimes referring to the disgorging

> of something which has been taken and at times referring to compensation for injury done:
> "Often, the result under either meaning of the term would be the same. … Unjust impoverishment as well as unjust enrichment is a ground for restitution. If the defendant is guilty of a non-tortious misrepresentation, the measure of recovery is not rigid but, as in other cases of restitution, such factors as relative fault, the agreed-upon risks, and the fairness of alternative risk allocations not agreed upon and not attributable to the fault of either party need to be weighed."
> The principle of restitution has been statutorily recognized in Section 144 of the Code of Civil Procedure, 1908. Section 144 CPC speaks not only of a decree being varied, reversed, set aside or modified but also includes an order on a par with a decree. The scope of the provision is wide enough so as to include therein almost all the kinds of variation, reversal, setting aside or modification of a decree or order. The interim order passed by the court merges into a final decision. The validity of an interim order, passed in favour of a party, stands reversed in the event of a final decision going against the party successful at the interim stage. Unless otherwise ordered by the court, the successful party at the end would be justified with all expediency in demanding compensation and being placed in the same situation in which it would have been if the interim order would not have been passed against it. The successful party can demand (*a*) the delivery of benefit earned by the opposite party under the interim order of the court, or (*b*) to make restitution for what it has lost; and it is the duty of the court to do so unless it feels that in the facts and on the circumstances of the case, the restitution far from meeting the ends of justice, would rather defeat the same. Undoing the effect of an interim order by resorting to principles of restitution is an obligation of the party, who has gained by the interim order of the court, so as to wipe out the effect of the interim order passed which, in view of the reasoning adopted by the court at the stage of final decision, the court earlier would not or ought not to have passed. There is nothing wrong in an effort being made to restore the parties to the same position in which they would have been if the interim order would not have existed."

F. Conclusion

69. In view of the discussions above, it is held that the claim of the defendant against the plaintiff is not barred by limitation. Issue B is answered in favour of the defendant/Cross-objector. The defendant cross objector is also entitled to its claim for detention charges. Issue A is also answered in favour of the defendant/cross-objector.

70. The defendant is therefore entitled to a decree on its counterclaim for detention charges for a sum of Rs.68,42,844/-. The plaintiff's suit is liable to be dismissed.

71. On the question of interest, however, raised in the cross-objection filed by the plaintiff this Court notices that the transaction between the parties is purely commercial in nature. The detention charges were a lawful entitlement of the defendant carrier in terms of Clauses 11 and 12 of the Bill of Lading. The defendant cross objector has been wrongfully deprived of the user of Rs. 68 lakhs for 24 years.

72. The plaintiff may have secured the defendant by way of a bank guarantee but has had the user of the said Rs. 68 lakhs for a period of 23 years. The conduct of the plaintiff in delaying the hearing of the suit by more than 23 years has caused loss and damage to the defendant.

73. In those circumstances, the defendant is entitled to interest at more than 6% per annum, awarded by the Single Bench. The defendant shall, therefore, be entitled to interest @ 11% per annum on and from the date of filing of the suit till the date of actual payment. Such rate is close to the lending rates in the financial markets. The plaintiff itself has claimed 20% interest against the defendant in the suit.

74. The Registrar Original Side is directed to invoke the Bank Guarantee for Rs.68 lakhs and make payment to the Defendant/Cross-Objector. The Defendant/Cross-objector shall be entitled to execute this decree towards the balance sums as ordered hereinabove.

75. Consequently, AD-COM-4 of 2024 is dismissed. OCO 2 of 2025 is allowed.

76. With the aforesaid observations, the appeal is dismissed and cross-objection is allowed and disposed of.

77. There shall be no order as to costs.

(RAJASEKHAR MANTHA, J.)

I agree.

(AJAY KUMAR GUPTA, J.)