(1996) 06 CAL CK 0032

Calcutta High Court

Case No: Commercial Suit No. 723 of 1989

Sancheti Food Products Ltd.		APPELLANT
	Vs	
Registrar of Ships and Others		RESPONDENT

Date of Decision: June 7, 1996

Acts Referred:

- Constitution of India, 1950 - Article 86
- Customs Act, 1962 - Section 155
- Essential Commodities Act, 1955 - Section 15(1), 15(2)
- Evidence Act, 1872 - Section 11(2), 123, 162, 65(g)
- General Clauses Act, 1897 - Section 22, 3, 3(22)
- Income Tax Act, 1961 - Section 67
- Merchant Shipping Act, 1958 - Section 22, 24, 27, 28, 31

Citation: 100 CWN 760

Hon'ble Judges: Ajoy Nath Ray, J

Bench: Single Bench

Advocate: P.P. Ginwalla, P.K. Das, B.K. Laha, Tapan Dey and A. Mukherjee, for the Appellant;S.C. Roy Choudhury, N.N. Debnath and R.P. Mookerjee, for the Respondent

Judgement

Ajoy Nath Ray, J.

The suit has been against thee Union of India and three other defendants designed by their office for recovery of damages. The plaint is prolix. But in substance, the complaint of the plaintiff is that they bought from the Union of India in its Andaman & Nicobar Islands Administration three ships in or about the month of January, 1987, but because of the wrongdoings of the defendants, they were unable to ply or resell the vessels or earn profits. Thereby they have suffered loss, and they claim compensation. Thee vessels were admittedly bought at an auction which was attended by the plaintiff and it is in evidence that the price of all three vessels together was a little above Rs. 13 lakh. It is also not in dispute that none of the three

vessels did in fact ply or earn any profit or was resold until the date of the filing of the suit.

2. The plaintiff has claimed loss of profits in two ways. For the first period which goes even beyond the end of the year 1988, the plaintiff''s case is that profits were not earned because the vessels, which were all wooden fishing trawlers, were not allowed to go out to fish. The plaintiff has claimed loss of profits at a certain rate, which is somewhat under Rs. 20,000/- per day.

3. The second head of loss of profits arises, according to the plaintiff, in this way. Not having been allowed to ply the vessels in Indian fishing waters, the plaintiff decided to sell off these vessels at a profit to a certain organization in Somalia, carrying the name of Botan. Even this venture of the plaintiff, according to them was abortive because of the wrongful actions of the defendants. Although the plaintiff had actually literally entered into a million dollar contract with the Somalian party, yet nonee of the vessels got sold because permission was again refused. The claim is therefore, for the loss of profits which the plaintiff would have earned had the vessels been sold at the agreed price, less of course, the expenses necessary for carrying out the plaintiff''s part of the contract of sale, i.e., delivering the ships in good order to Botan at Somalia.

4. Before I go to the facts allegedly giving rise to the plaintiff''s cause of action it is better to give a few facts about the trial of the case itself. The hearing has lasted over 55 days although it has not yet touched 60. The battle has been a hard fought one. The most experienced and learned Senior Counsel have themselves conducted, at least in part, the examination-in-chief and cross-examination and made arguments by delving into almost all possible Authorities on the issues which arose in the suit Such authorities almost equally range over the Indian and the English spectrum. It has been a great pleasure for me but the patience of the litigants must have been tried to the very end.

5. Six witnesses in all came to give evidence before me. The first witness for the plaintiff was Ashoke Sancheti, the Managing Director of the plaintiff company. Everyday when the suit was heard, mostly on Fridays only, he was present in Court For reasons which will become clear later on he has put a lot of stake on this suit although theoretically he is a different person juristically from his company.

6. After Sancheti three accountants came to give evidence for the plaintiff. They came to prove the quantity of loss of profits, so for as the fishing loss is concerned. Mr. Mallik was the foremost of these three Accountants, a renowned Chartered Accountant of India and formerly a Sheriff of our city. He was assisted in his task of computation of the figures by a team, amongst whom figured one Guha Roy who also came to give evidence before me. The third person who came to depose on these figures was one Ketela who was in the employment of the plaintiff company and who was himself conversant with the books of accounts. These four witnesses

closed the case of the plaintiff. On behalf of the defendants the first witness was N.D. Sarkar who has also attended Court on almost all the days the suit was heard but not as regularly as Sancheti. Sarkar is employed in the Mercantile Marine Department at Calcutta. He has special knowledge about the survey of ships. Apart from him the only other witness called by the defendants was Capt. Barve who, at the material time, was posted at Bombay and was the Nautical Adviser to the Government of India.

7. The complaint of the plaintiff has been that the ships were bought from the Andaman & Nicobar Administration at the islands themselves but because of the various failures of the Marine Department, especially at the Islands, these vessels could not ply. These vessels were all wooden trawlers of Thai origin and had been confiscated sometime early in the year 1986 by an Indian Patrol which found the vessels poaching in Indian waters. The vessels were caught and brought to the Andamans and there they remained under the custody of the Andaman Police Administration until the plaintiff bought those three ships. In 1967 the Marine Department of the Islands, which is a satellite of the Mercantile Marine Deptt. at Calcutta, had but one surveyor. His name is B.K. Bhowmik. Although he is not dead, because there is nothing to indicate that he is, he did not come to give evidence for the defendants. The plaintiff has put a large part of the blame for the plaintiffs inability to ply the vessels on B.K. Bhowmik. A few details of these allegations have to be related here because they are a very material portion of the facts and allegations relevant in this suit.

8. The correspondence on record shows that the plaintiff was very keen to ply the vessels as soon as those were bought in 1987. Sancheti has also said so. Again and again they have written to the Union of India and its officers that appropriate steps should be taken so that the vessels do not remain idle.

9. After confiscation the vessels had been lying idle for nearly one year and then those were sold to the plaintiff. A letter from the plaintiff''s own side written in March 1987 puts on record that the vessels were under water when those were purchased but the case of the plaintiff also is that two of the three vessels (and for those two vessels the plaintiff had paid larger sums apiece than for the third one) were made afloat immediately on purchase.

10. The plaintiff thereafter applied to the appropriate department at Jahaz Bhavan in Bombay for allotment of light and sound signals and allotment of the ships'' names and those came along without a problem. The ships were named Sea Scan I, Sea Scan II and Sea Scan III. Sea Scan III has been under water since purchase and the suit is much more concerned with the two other vessels than the third one.

11. It is the common case of the parties that before an Indian fishing vessel can play and catch fish it must possess either a registration granting it the use of an Indian Flag or it must possess a plying pass granted to it u/s 41 of the Merchant Shipping

Act. To be absolutely accurate, a fishing boat might also ply if it has a special dispensation given by the Central Government under Part XVA, Section 435X of the Merchant Shipping Act, 1958, but this dispensation is not ordinarily granted, if at all, as a plying pass is, which is mentioned in Section 41. That Section is reproduced below :

41 : Where it appears to the Central Government that by reason of special circumstances it is desirable that permission should be granted to any Indian Ship to pass without being previously registered from one port to any other port in India, the Central Government may authorise the registrar of the first mentioned port to grant a pass in such form as may be prescribed, and that pass shall for the time and within the limits therein mentioned have the same effect as a certificate of registry.

12. For the purpose of obtaining a registration it is indispensable that the tonnage of the ship be ascertained. It would be necessary for the plaintiff, for obtaining a registration of these fishing vessels, to get their tonnage measured and without this, registration was admittedly impossible.

13. For the purpose of measurement of tonnage, the officers of the Marine Department in general rely upon the documents and papers including the plans of the ship which are usually available with each ship. These plans are supplied by the ship builders. From these plans and from the calculations already made by the ship builders in their various papers on documents, the measurement of tonnage takes place in a smooth and easy, way.

14. In the instant case, however, none of the three vessels had any documents or papers or plans. Ship builder''s certificates or ship builders'' plans could not be forwarded by the plaintiff to the Union of India or any or its officers. However, it is nobody''s case that if the ships'' papers are not available, the ships tonnage cannot be measured or that a ship without builder''s papers is not remittable in India at all. The plaintiffs ships had as much a right to be registered in India as any other ship with the most complete and comprehensive set of drawings and papers.

15. A special job, however, would have to be performed, because of the absence of the drawings, for the ascertainment of the tonnage of each of the ships of the plaintiff. The plaintiff had in its employment several men in 1987. One of them was a certain Vijayan who, as admitted by Sarkar, was a qualified naval architect. The plaintiffs naval architect had prepared plans of two of the ships, and it is not in dispute that those plans, (whether those were absolutely accurate or not is another question), were submitted to Bhowmik at Andamans.

16. The plaintiff has stated that in or about March 1987 the plaintiff put up Sea Scan I in the slip way of the Andaman for repairs including repair of its hull. The vessel was at the slipway for nearly a month. Expenses were incurred for repairs. I have no reason to doubt this case of the plaintiff. The cash book for wooden trawlers expenses is exhibited and the plaintiff claims to have spent same Rs. 20 lakh and

more, but only one entry from the book was formally tendered and marked as an exhibit.

17. At the time this vessel was at the slipway a simple letter was sent to Bhowmik requesting him to take a survey of the ship including survey of the hull. Now a slipway permits the inspection of the bottom of the ship which one cannot have when the ship is in a floating condition. Such an inspection Is also possible in a dry dock but the Andamans do not have a dry dock at all. It is at the slipway that the ships have to be hauled up and their bottoms exposed if it is necessary to do repair work there. It is not in dispute that Bhowmik received the letter in March 87. It is not in dispute that Bhowmik did not visit the ship at the slipway for any purpose whatsoever whether for inspection of the hull or otherwise.

18. Like Sea Scan I, Sea Scan if war also put up at the slipway but for a shorter length of time some 2/3 months after Sea Scan I had been released from the slipway. There was no visit from Bhowmik to see the hull of Sea Scan I also but there is no similar letter of request in this case as in the other one.

19. The case of the plaintiff is that B.K. Bhowmik intentionally stayed away and acted all along with a motivated design to prevent the registration and plying of the plaintiffs vessels. The decision on this allegation of the plaintiff would be an important one in deciding the suit.

20. It appears from the letters that the plaintiff had a little difficulty in getting Bhowmik even to accept the plans prepared by Vijayan for computation of the ship''s tonnage. During the entirety of the year 1987 and even thereafter a lot of correspondence ensued between the plaintiff and the Mercantile Marine Deptt. at Calcutta as well as between the plaintiff and the Central Mercantile Marine Deptt., so to speak, at Bombay. It is from these letters written to places other than to the Surveyor''s office at the Andamans that it can be made out that the plaintiff experienced some difficulty even at the initial stage of the lodgment of the ship''s plans.

21. Be that as it may, the plans of Sea Scan I and Sea Scan II were delivered to Bhowmik and those plans had been drawn up in accordance with the Merchant Shipping (Tonnage Measurement of Ships) Rules, 1960.

22. In June, 1987 Bhowmik returned those drawings to the plaintiff stating that those drawings and calculations should be made not in accordance with the Tonnage Rules of 1960 but in accordance with the Draft Tonnage Rules of 1982.

23. It has been, the case of the defendants that there was an international treaty in 1969 to which India was a party by reason of which it was necessary to change the rules regarding measurement of a ship''s tonnage. However, the change of rules was not made immediately by publication of due notifications under the Merchant Shipping Act, 1958. Even the preparation of the Draft Rules took the rather longish

period of 13 years after the conclusion of the treaty. These Draft Rules of 1982 had no force of law. They had only an expectation of getting some force of law in future, just as an heir apparent waits to come into property and estate in good time. The Rules waited for five years. On the 11th of May, 1987 a due notification was issued making the Rules enforceable in India as part of the Indian Law. But, it appears that from 1982 onwards, the Mercantile Marine Departments all over the country including Jahaz Bhawan at Bombay consistently followed the 1982 Draft Rules as if those were Rules having the force of law. This is no less than the making, of, a law onto themselves for the different Mercantile Marine Departments, and as I go on unfolding the story of the suit, it will appear that they have a habit of doing so.

24. The plaintiff in 1987 was plying two other ships of its at the Vizag seas. These were respectively named Sanfood I and Sanfood II. The defendant''s case is that the 1982 draft rules had been followed even by the plaintiff in the computation of tonnage of these two ships.

25. After the return of the plans by Bhowmick those were resubmitted, admittedly so far as Sea-Scan I is concerned, to the same B.K. Bhowmick in June, 1987. I have come to the conclusion that the plans regarding Sea-Scan II were also re-submitted to Bhowmik in or about June 1987 although a letter of receipt indicating such a submission is not so clearly available on the records as in the case of Sea-Scan I. The reason for my concluding so is as follows. At least one plan 6f Sea-Scan II was given by Bhowmik to Sarkar along with the plans of" Sea-Scan I when Sarkar went to the Andamans later in February, 1988. More of this visit hereafter. Also, there is absolutely no reason why in June 1987 when the plaintiff had good hopes of plying both the ships the plaintiff should completely overlook the submission of the plans of one ship altogether. More importantly if no plans of Sea-Scan II had been submitted Bhowmik would not have taken the step of visiting this ship in November, 1987 which is the first time that he visited any of the two ships.

26. The plaintiffs complaints about Bhowmik''s inaction and even his motivated obstruction of the processing of the papers of the plaintiffs ship were made both to the Principal Officer at Calcutta, who was one Dutt, to Captain Barve at Bombay and to one Kalidas Rao who was then the Deputy Chief Surveyor of ships of the Government of India. In the voluminous Correspondence on record it can be seen that again and again directions came from Bombay to Bhowmik in two different manner. It was the constant advice of Captain Barve that since registration might take a long time (this is another aspect of the Mercantile Marine Department making a law into itself, and I shall give details later) the plaintiff should be issued a plying pass for the plaintiffs vessels provided those vessels satisfied the safety and manning rules. It is impossible to read in these instructions the mandate to Bhowmik to check the safety of the vessels from top to bottom including checking of hull, machinery and everything else.

27. In any event he never made any attempt to check anything, because he visited the ships only twice, in November 1987 and January 1988, and that too for checking tonnage. He did no work himself, apparently, except write letters.

28. There are rules regarding manning and the carrying of several safety equipment on board the ship and the plainly worded letters of Captain Barve referring to safety and manning cannot but mean a direction upon Bhowmik to see that the ships did not go unmanned end that the ship did have on board the equipment necessary for the due protection of the crew as mentioned in the rules.

29. Mr. Roychowdhury when arguing the case for the defendants himself brought to my attention several rules which included, the rules for carrying on board life saving appliance. He referred me to the Merchant Shipping (Fire Appliance) Rules, 1969, so the Merchant Shipping (Life Saving Appliances) Rules, 1982 and to the Merchant Shipping (Prevention of Collision at Sea) Regulations, 1975. Mr. Roychowdhury submitted that material portions of these sets of Rules were applicable to fishing trawlers at the material time and were also applicable to the plaintiff''s vessels.

30. If the direction of Capt. Barbhe is to be read as a, direction upon Bhowmik to see to it that the Life Saving Appliances Rules were duly complied with then B.K. Bhowmik simply disobeyed those instructions. There is absolutely no record to show that B.K. Bhowmik ever visited any of these two ships with a view to ascertaining whether the ships had adequate life saving, appliances on board or not. In regard to this it is best to mention at this stage that the plaintiff was favoured with a list of the necessary life saving equipments for its ships by way of a communication from one Biswas, who was deputing for Bhowmik sometime in 1980 when he was on leave. Sanchetti said that Bhowmik saw the life saving equipment on board when he went in November 1987. However the said list is a list of the requirements as given in the Rules themselves. The list is not a product of the officers visiting any of the two ships. Mr. Roy Chowdhury has alleged again and again that the plaintiff must come and show that he had all the necessary safety equipments on board. Sanchetti from the box has asserted that the safety equipment was there. There is no attempt from anybody on the part of the defendants to show by paying visit to the ship, or to the witness box, that this or that safety equipment was lacking and, therefore, the two ships or either of the two ships did not qualify for a plying, pass.

31. In 1987 the plaintiff had, as I conclude, sufficient resources to comply with Manning Rules. On the basis of the evidence on record, it would be thoroughly unjust to come to the conclusion that in June/July or August 1987 the plaintiff was not ready or willing or able to comply with the Manning Rules or any particular provision thereof. There was absolutely no attempt from Bhowmik to check the ships or the plaintiffs organisation with regard to compliance with Manning Rules.

32. Captain Barbhe himself admitted from the box that from the impression which he gathered at Bombay, the plaintiff was cooperative and ready and willing to

comply with all rules but that there was a lack of rapport between Sanchetti and Bhowmik. I have not seen in the correspondence of Sanchetti or from his evidence in the box any such statement or any such offensive language or behaviour which could cause a lack or rapport between him and Bhowmik. Since Bhowmik or any other competent person has not come to make a contrary case, I must conclude that the lack or report was entirely a fault of Bhowmik.

33. The plaintiff''s allegation is that Bhowmik and Dutt was corrupt. It has been alleged by Sanchetti that Bhowmik had openly declared that he will never let the plaintiffs vessels ply. Even when this serious allegation was made against Bhowmik and Dutt neither of them came to say anything in their own favour or to justify their actions and letters taken and written in the most material years of 1987 and 1988.

34. Mr. Dutt, the principal officer of the Mercantilo Marine Department, Calcutta, was involved with the three ships and their registration and also the matter of grant of plying pass to them from the very beginning. The involvement of at least three persons at Calcutta and the Andamans has been proved in the suit. Those three persons are Dutt, Sarkar who came to give evidence, and Bhowmik who was the sole surveyor on the island.

35. As early as in the month of July, 1987 Dutt had written to Bombay mentioning about the necessity of testing the stability of the three vessels. Why Dutt became apprehensive of the inadequacy of the stability of these three vessels cannot be explained. It is not in evidence that Dutt had ever aid a visit to the Andamans or had himself seen any of the three vessels. Under these circumstances expressing doubt about the stability of the vessels leads me to consider this as a factor indicating the possibility that Dutt was minded to put a spoke in the wheel of the plaintiff, in their efforts to get registration of the vessels and ply those for fishing.

36. Although the plaintiffs were clamouring from at least as early as March, 1987 that Bhowmik do cooperate with them and pay all the necessary visits to the vessels, yet the first visit of Bhowmik came only in November, 1987, Sarkar from the box said at least once that Bhowmik should have visited the vessels. The case of Sarkar, at least in part, was that the work-load at the Andamans was too much for one surveyor. This might have been so but there is no adequate proof that the work-load of Bhowmik was so much that he could not even once pay a visit either to Sea-scan I or Sea-scan II for eight long months for any purpose whatsoever.

37. During this period mandates had come again and again from Bombay to allow the plying pass to the two vessels provided these satisfied the safety and the manning rules. In one letter the Deputy Chief, Surveyor Kalidas Rao went so far no specifically to direct Bhowmik that for the purpose of issuing a plying pass the tonnage computation given by the plaintiffs could be accepted as such as the provisional tonnage. The reading of Rao''s letter dated 9.9.87 (Vol. II, P. 54) and of Barve''s letters, one dated 16.10.87 (Vol. II, pages 56, 58) and Bhowmik''s letter of

30.10.87 (Vol. II, P. 57) show that Bombay wanted Bhowmik to do the job, but he refused.

38. Yet when later on, Bhowmik visited sea-scan II in November, 1987, he went with the avowed purpose of checking the tonnage calculation and not for any other purpose. His visit was the most cursory. Letters written during these periods show that Bhowmick did not come to the ship armed with plans which had been submitted to him. On the other hand it appears that he had in his possession only one calculation sheet. After his visit he came back and complained in writing that the measurements of the owners were. 10% or so wrong. The owners denied it by their subsequent letter.

39. Then Bhowmik slumbered for another two or three months. Thereafter another visit was paid to the plaintiffs ship in or about January, 1988. In spite of every direction from Bombay to expedite the tonnage calculation and also the grant of paving pass after making the appropriate checking, Bhowmik succeeded in completing neither job for any of the two ships.

40. If there were on record specific complaints regarding any of the two ships, alter visits had been paid by Bhowmik to the ships, putting on record that for this or that reason plying pass could not be granted, then the matter would stand on a different footing. But everything is intentionally kept at a totally vague level and at a jumbled condition. It necessarily had to be left vague, because no surveyor can make a complaint about a ship unless he actually sees the ship and scrutinizes ft honestly and diligently for a specific purpose.

41. Correspondence is also on record to the effect that even the Mercantile Marine Department entertained doubts about the experience and expertise of Bhowmik in the matter of tonnage calculation. The ships had no papers and therefore experience and expertise where both needed if the Union of India and its officers were paying any serious attention to the matter of tonnage calculation.

42. How serious the officers were and how quickly they performed the task of tonnage calculation is mentioned below.

43. With the- beginning of the year 1988 the superior officers had given up hope of having tonnage computed ever with the efforts of Bhowmik. Therefore, it was deckled that Sarkar would visit the island from Calcutta and do the work of tonnage calculation.

44. Sarkar arrived on or about the 19th of February, 1988 and his work on the island occupied him for some two days or so. On the very evening of his visit, it is evidence that he and Bhowmik sat down and composed a letter making enquiries from the police department of the Andamans about the various points which could be raised against the ship. One of the points was whether the ships were all -in a sunken condition when those were purchased in January, 1987. New, admittedly those were

not afloat when bought but were immediately made afloat after their purchase. The point here is, why somebody from the MMD Calcutta who goes for the purpose of measuring tonnage of the two ships should sit down with the surveyor of the Andamans and make enquiries about the possible points which can be raised against the ships.

45. In the said letter of 19th February, it was stated that it had been learnt that the vessels when purchased were in sunken condition. Sarkar was specifically asked where he had learnt of such a thing when he was nowhere on the scene at the Andamans in January, 1987 and there was no chance of the learning on the basis of his personal knowledge that the ships or any of the three ships were in a sunken condition when those were bought.

46. The surprising reply which came from Sarkar was that he had learnt of it from the police department at Calcutta. I utterly disbelieve that there was any communication between Sarkar and the Calcutta Police Department regarding the sunken condition of the three ships.

47. For the purpose of measuring the tonnage of the ships, with the utmost accuracy possible, the plaintiffs had been directed, at least with the approval of Sarkar if not his own positive direction, that both the ships be put on a beach so that the bottom measurements could also be taken. Both the ships were therefore, beached. Sarkar took measurements. He was provided at this stage with the plans of the two ships by Bhowmik which plans had been submitted to Bhowmik by plaintiffs. It is in evidence that at least one plan of Sea-scan II was available to Sarkar. This shows that the plans of Sea-scan II were also submitted to Bhowmik by the plaintiffs for otherwise the plans or plan could not have been made available to Sarkar.

48. Various questions were asked about the adequacy of the plans which were given to Sarkar. According to him, if the defect of the absence of an offset table is discounted then from amongst the plans given to him the general lines plan of Sea-scan I was acceptable. Other plans, according to Sarkar, needed modification before computation of tonnage could be made.

49. After coming back to Calcutta, on the basis of measurements, taken by Sarkar, he computed the tonnage of the two ships and sent those for approval to Bombay. The computations of Sarkar were promptly sent back from Bombay to Calcutta and it was pointed out by the Deputy Chief Surveyor that Sarkar had made no fewer than eight mistakes. A recomputation was called for.

50. Recomputation was made. Recomputed figures were again sent back to Bombay. Those were accepted only thereafter and the tonnage computation of the ships along with the tonnage booklets was given to the plaintiffs only in September, 1988, that is, some 20 months after they had purchased the ships.

51. The plans submitted by the plaintiffs to the department of the defendants have not been produced by them. This I consider to be a serious lapse on the part of the defendants. When examined on the issue of non-production of relevant documents by the defendants, Sarkar substantially said that he was not aware why those were not being produced. When he was cross-examined whether there had been a theft of the plans or other relevant documents from the government department or whether the police had been informed of such theft, he again did not know. It is on record that Bhowmik had preserved also one fire fighting arrangement plan, the other copies of which were returned, unapproved. This also was not produced. Nor the harbour master''s file from the Andamans, which would be very likely to be material on the aspect of repairs done to the ships.

52. Some plans, as we were available to the plaintiffs, have been tendered in evidence. One of the plans contains the signature of Vijayan, the plaintiffs'' Naval Architect and also a wrong date being 29-2-87; but from those plans submitted to Bhowmik were adequate or whether the tonnage calculations given on the basis of those plans would be materially different from those which were made by the long and delayed efforts of the defendants after the aforesaid lapse of some 20 months.

53. While efforts were being made for getting the tonnage computed, the question of grant of plying pass to the vessels was avoided mainly by Bhowmik by raising issues of his own, thus preventing the plying of the ships in the immediate future. The question of stability was raised again after Sarkar went back to Calcutta in February, 1988 and it is in evidence that he suggested the raising of the issue. From the box he tried to justify his conduct by saying amongst other things, that there were certain structures proposed to be made for accommodation of cabin crew and those amongst other things would render it necessary to test the stability of the vessels. Now Sarkar had admittedly gone to the Andamans only because Bhowmick had shown his utter inefficiency in the matter of tonnage computation. Sarkar had not gone to check the stability of the vessels for, if he had gone to check the'' stability he could not have come back without putting the vessels in the water at all. He left those in the same beached condition in which he had found those vessels.

54. Sarkar also gave evidence about the engine condition of the vessels. In February. 1988 he had not gone to check the engines. He had never asked the plaintiffs to put the vessels in water or to run the engines or to show him whether the vessels were in a running and fit condition although their tonnage had not been computed. Yet he has given evidence that in February, 1988, according to him, the engines of the vessels were not adequate. I discount his evidence in this regard because no fair or proper test was made by Sarkar in regard to the engines of the two vessels in February, 1988, nor had he gone to test the engines of the vessels at that time.

55. Of the other points raised by Bhowmick, one was a speed trial of the vessels. The plaintiffs also alleged that Bhowmick had asked them to load the vessels full for tonnage computation. The complaints were to Bombay, and to save his own skin,

Bhowmic denied in a letter that he had asked for a full load. I believe that Bhowmic had asked to full load, as Sanchetti asserted from the box. None came to assert the truth of Bhowmic''s denials, and I do not believe the truth of Bhowmic''s statements in letter, even if those are good evidence, which is seriously doubtful. The plaintiffs reaction to a speed trial requirement was that if a plying pass is granted and the vessels are allowed to fish then speed trials and stability experiments can be continued at will by the Officers of the Union for as long as they pleased, but full loading the vessels even at the stage where tonnage computation had not practically been started at all, and the grant of a plying pass was nowhere in sight, would compel the plaintiffs to buy fish from the market and load the vessel in full. That is the condition in which the trawlers would be, when they complete their fishing and return in full load to port. Bhowmic also asked, as the letters reveal, whether any classification society was involved in the matter of the survey or-construction of the ships. It is well-known to everybody that there is no classification society at the Andamans at all. Even forms and rules made by the Central Government at the Andamans and those are sent from Calcutta so that the work can be carried on. As Bhowmic (for example) had misquoted from that 1987 tonnage rules in his letter of 23-12-87 (vol. I p. 333), the tonnage rules had to be sent to the Andamans on 10-2-88 from the MMD Calcutta (Vol. III, p. 35).

56. It was specifically asked for by Bhowmik that a stability booklet be furnished. Now Section 343(b) of the Merchant Shipping Act specifically exempts a fishing boat from the necessity of carrying a stability booklet. Bhowmik also asked for scantling table data. If dictionaries or technical-works are consulted on the meaning of this word (and those can always be consulted and judicial notice taken of such scientific matters), it will be seen that scantling tables are tables and data providing the sections of the Ship''s structure at various points. Now, a section cannot be obtained without cutting and opening up the ship. This scantling table data can be available if and only if these are furnished at the time of construction and building of the ship. If those are attempted to be prepared after the ship is constructed one would have to take the ship apart and thereafter one might have a very good computation of tonnage but it would be like curing the disease but killing the patient.

57. Even after the computation of tonnage was over, and tonnage booklet were sent in 1988, the plaintiffs were again asked that their ships be put to survey. The letter in this regard, after some questions were put in cross-examination to Mr. Sarkar, had to be admitted.

58. In giving the details above I have purposely refrained from giving too many exact dates and exact quotations from specific letters. The purpose of my doing so is this. If the plaintiffs are to succeed in their case of proving breach of statutory duties, such proof must come in a manner which is both broad and unimpeachable. It is not possible for a Court even to consider grant of damages on too nice a weighment on the facts and circumstances, and thus to tilt the scales. The lapses of

the Officers of the Union must be so stark as to be shocking and then and only then can be Court consider the question of entering a, finding that there has been a breach of statutory duty.

59. In the instant matter, I have no doubt in my mind that Bhowmik purposely stayed away from the plaintiffs ships so that processing of the ships'' papers are delayed and the ships do not sail at all. I accept the plaintiffs case that they tried their best and paid 40 to 50 visits to the Surveyor''s office without producing any fruitful result. I am also of the opinion that Bhowmik was wanting in the necessary skill which was required for checking the tonnage of the ships on the basis of the drawings as forwarded by the plaintiffs naval architect. In forming these opinions I have not taken into account the following materials which were also proved. One of those is a letter of the then M.P. of the Islands, Sir M.R. Bhakta, making a complaint about the integrity of Bhowmic. I have not taken into account the letter because very strictly speaking it is hearsay evidence and I do not want to enter a finding against the Union and its officer on any evidence which might even remotely be hearsay. The other material which I have discounted is the record of a disciplinary proceeding against one officer, a certain Subhash, who in such proceeding gave evidence that Bhowmik had asked him to destroy papers, which would include Sanehetti''s. This was, if it were admissible, evidence of Bhowmik trying to hide his guilt. But I have not taken this into account in forming the adverse opinion against Bhowmik because Mr. Roy Chowdhury rightly submitted this is also hearsay evidence and perhaps so twice removed.

60. I have, however, put due weight on the non-production of Bhowmik. I am not at all satisfied that the Union of India made appropriate enquiries and put in appropriate efforts for producing Bhowmik before the Court. Once, when Mr. Roychowdhury was replying, he answered to my question if Bhowmik were dead, that oh no, he was hot dead. Bhowmik was clearly the most important witness from the side of the Union If he were available. It was once suggested in evidence that he had gone to England. There is no reason to believe so. There are no particulars of his departure from India available anywhere. It is in evidence that there was an enquiry against him. I cannot take note of any suggestion from the Bar that Bhowmik is now at Taratala. But I do come to this conclusion that appropriate efforts in this regard were not put in by the defendants and therefore they are guilty of holding back a most important witness. Dutta also, being then the principal Officer of MMD, and being the author of several letters which are material to the issue should have come to the box. He also stayed away. The two persons who deputed for Bhowmik for short periods in 1987 and 1988, being Goutam Sengupta and Biswas, were also lost sight of by the Union.

61. From the evidence on record I come to this conclusion that Dutta, Sarkar and Bhowmik each in their appropriate times as and when they came in contact with the plaintiff and the plaintiffs business, acted in a most uncooperative way with a view

to preventing the plying of the ships if they so could, all the time preserving their own skins. When Sarkar came to Court and questions were put to him about the ships'' drawings, his first reaction was to suggest that the room temperature which is the temperature of the drawing sheets should also be mentioned. If the temperature is riot mentioned then the expansion or shrinking of the drawing sheet is unascertainable and therefore the calculation on the said drawings will become unacceptable. I treat this as an attempt to throw dust into the eyes of the Court. On taking judicial notice of elementary scientific facts, I come to the conclusion that the linear coefficient of expansion of any ordinary drawing sheet-is so negligible as not to affect the measurements shown on the paper whether the measurements are taken from the drawing sheet in the hottest conditions at the Andamans or the coolest room, may be properly air-conditioned, which is available at the Mercantile Marine Department in Calcutta.

62. I also conclude that at least these three officers in their concerted effort delayed the plying of the two ships of the plaintiff, Sea-Scan I and II, and such delay was prolonged in such a manner as completely to prevent the use of the ships and to make these a liability to the plaintiff, than an asset.

63. I next come the factual aspect of the failure of the plaintiff to sell off all the ships to the foreign Somalian party. It is necessary to dispose of a few facts regarding this before I touch the legal aspects of this case. The written contract with the'' Somalian organization has been admitted in evidence. It is dated, 24.9.88 the value of the three ships, if delivered taken as one million dollars which was the contracted into and I believe the plaintiff that the Indian Embassy at Somalia was involved in the processing and finalization of this contract, and that in this regard Sanchetti had met the Indian ambassador at Somalia. I accept that the necessary approval of the Somalian Government was also obtained. I accept that the plaintiff actually met the person who was controlling the organization by the name of Botan Fishing Co., and that when he described that person as a tail, lanky man with curly hair, he was not talking from his imagination but was describing the man he had actually met. Ashok Sanchetti, who gave evidence, has travelled in more countries than one in his effort to get these vessels on water. He went to Somalia and to Abu Dhabi, and he has also been to Thailand where he met one Shilpachei in his attempts to find out any drawings of the boats if those were available.

64. I accept that in or about December, 1988 the plaintiff contacted one Arnab Sen of Ballygunge Circular Road, Calcutta who quoted a per ship price of about Rs. 2,00,000/- plus necessary expenses for the purpose of conveying the ships from the waters of India to those of Somalia. I have no reason to doubt that the plaintiff was genuinely trying to sell all these ships at the maximum profit available to it. The plaintiff has frankly admitted that at the end of 1988 when the salt was attempted to be finalized, the only ship which was in a good condition was Sea-Scan Ii. It was seen by she purchaser from Somalia. After the two ships had been beached in February

1988 for the purpose of exposing then bottoms for accurate tonnage computation, one of the two ships namely Sea-Scan-1 had fallen on one of its sides and the engines had been spoilt due to water ingress. Therefore, the idea of the plaintiff was that if permissions were available Sea Scan II would be made ready and sent over to Somalia and if even a third part of the million dollars were received, it would be quite sufficient in a phased manner to put Sea Scan I and Sea scan III respectively in order and send those over to Somalia also one by one. Everything remained in the stage of preparation and planning because permission to export was refused. Captain Barve has admitted that if the ships had been registered, the contracts would have worked out.

65. The reason for such governmental refusal is stunning. It was ordered that the ships should not be exported because India was in need of fishing tonnage. This means that it Was necessary for the Indian economy to do fishing with the employment of Indian vessels and therefore, no good cause being shown, permission was refused to export the vessels, capable of fishing in Indian waters. One particular Director of a Section of the Ministry also requested the plaintiff in May, 1989 for a discussion and this was more than a month after the service of the Section 80 notice.

66. On the one hand therefore, the marine Officers of the Union of India were raising objections without number against the plaintiff''s ships being registered or allowed to ply, and on the other hand when the plaintiff wanted the ships to be exported at a very good price in foreign exchange being paid for those ships, the same Union of India through other Officers in one of its ministries was refusing permission to export, again I have specifically refrained from giving exact dates, or the names of specific Officers. I have done so with a purpose. When the refusal to export on the one hand is so starkly contradictory to the refusal to let the ships ply in Indian waters, the giving of many such details only dilutes the issue. The matter is so absurd that its absurdity is the most apparent when described in general terms and such facts as these do not need any details for their clarification or emphasis.

67. A request for permission to sell was made as early as in August, 1988. The request was to Capt. Barve himself. After the Shipping Directorate and the Ministry of Commerce had duly communicated with each other, and were, as we now know, at cross purposes, the rejection of permission was made as late as on 21.09.89.

68. The matters were made even worse by the evidence which came out when Captain Serve was in box. His evidence was that his department at Bombay was under the impression that the Ministry of Commerce would be the appropriate Ministry to consider the question of export of the vessels and not the Mercantile marine Department or the Nautical adviser''s office. Therefore, when the MMD was consulted, they did not give any positive support to the case of export and the request for permission made by the plaintiff. If it is the case that the MMD thought that the question of export would be determined by the Ministry, and the Ministry

thought that the question of registration prior to export and the grant of the Indian flag would be determined, not by the Ministry, but by the Mercantile Marine Department, then there is a clear case of a culpable misunderstanding between the two wings of the Union of India. From the evidence given by Barve, I cannot but conclude that there was such a culpable misunderstanding. I say so also because there has been no evidence coming from anybody from the Ministry of Commerce, in the result the plaintiff was kept saddled with his three boats which, instead of becoming a profit earning export commodity became slowly deteriorating articles, ultimately reaching a stage of no value whatsoever.

69. Sarkar has seen the ships at least three times. Of these three occasions I have already mentioned the February, 1968 one which was the first time he saw the two ships, Sea Scan I & II. There are reports of his seeing the ships on two other occasions and U is the case that the ships, at least after the filing of the salt, have now become totally valueless and junk. Mr. Ginwalla submits that if the ships, even according to the defendant''s are valueless now, there is no question of deducting any present value of the ships from the profits payable and the entire amount of the million dollars should be payable to the plaintiff less expense for delivery at Somalia.

70. After the filing of the suit a writ application was made filed by the plaintiff for registration of the ships under Chapter XVA of the 1958 act but such registration has been refused. The papers in this regard are not fully to evidence before me nor need those be in evidence, because so far as this suit is concerned time comes to a stop with the filing of the plaint.

73. It is now an appropriate stage to pass over to certain legal aspects of the matter. The claim in loss of profits is of the order of several crores or rupees. The purchased of the ships was made at Rs. 13 lakh and odd, when the price of all three are taken together. The first question which comes to the mind, and in deciding legal issues it is most inadvisable to leave common sense out, is how anybody can claim crores of rupees for something which he could have discarded immediately upon his purchase, without being a loser for more than Rs. 14 lakh at the most? I put the question to Mr. Mullick that if the plaintiff succeeds in this suit and gets a decree for several crores of rupees, then one would invest all the money one has in the fishing trade. Mr. Mullick answered that it would be tempting. I also asked him how he considered the profits and the percentage of the returns to be when those were in the region of crores on the basis of a capital investment of the order of Rs. 10/15 Lakhs. Mr. Mullick''s answer was that those were in the nature of very good super profits, but not unrealistic.

72. The above is the common sense point of view. In law, the point is that unless there are circumstances to show that the price of the sips at the auction of January, 1987 represented the fair market price of those ships at that date, then in the absence of proof of those circumstances, the purchase price by itself, and all alone, is no indication of the market price of those ships. In other words, unless there is

proof and there is evidence before the court, the court does not know whether the ships which were bought for Rs. 13 lakh and odd were worth Rs. 13 lakh or were worth Rs. 130 lakh. Mr. Ginwalla submitted from the Bar that the plaintiff succeeded in getting the ships very cheap and the officers of the M.M.D. wanted a share in the good fortune of the plaintiff. I cannot rely at all on a submission on a fact which was made from the bar only, but even then the submission has an indirect value. The value is the indication of this possibility that the ships might have been worth in an open market much more than Rs. 13 or 14 lakh and unless there if proof to this effect the court should discard the mental discomfort which might be felt in passing a decree for several crores of rupees for something bought for under Rs. 15 lakh. Such a discomfort is loyally irrelevant to the determination of this suit Sarkar said that trawlers of the type of sea-scan I, II or III would be worth in a good condition in the region of Rs. 50 lakh to 1 crore. The value of Sanchetti''s two other trawlers fishing at the Vizag seas, which were bought in 1981 was given by Sarkar as a little under Rs. 90 Lac the Andaman trawlers were old the value might have been less if those were old, A discussion of this nature only shows how hypothetical and unproductive these questions and these answers tend to become. Unless one sticks to the evidence which has been actually adduced before the court and one also sticks to those issues only which arise legally on the disputes raised by the parties in this suits. one is likely to go quite astray.

73. The next common sense point, which however, became a thoroughly well argued legal point also is this. Mr. Roy Chaudhury submitted that if the ships were good, there was no difficulty in making this demonstration and solving the problem of whether the ship were moving like injured birds or were flying like arrows. It is a beautiful phrase and obviously, flying means plying here. Legally translated the issue coverts into this. Even if Bhowmick. Dutta. Sarkar and all the rest had prevented the registration, and had prevented the grant of plying pass, even then, if the ships were bad and unseaworthy those could not have been plied by the plaintiff in any event and those could not have earned any profits at all. Specifically in regard to fishing boats, under Chapter XVA, an inspection certificate of seaworthiness is needed u/s 435K before a fishing boat is allowed to ply the seas. If the boats were bad and if the boats were never worthy of grant of a seaworthiness certificate u/s 435K, then the exercise of determining the errors, if any, of the officers of M.M.D. becomes a completely fruitless one. No ship which is unable to ply the seas can form the subject matter of a claim for loss of profits, or a resale which could not be completed.

74. It is necessary at this stage and especially in regard to answering this question to set-out the issues upon which the parties went to trial :-

ISSUES

1. Did the plaintiff comply with the obligations and formalities as required of it for the purposes of Registration and Survey of the Fishing Vessels "MFV SEA-SCAN I",

"MFV SEA-SCAN II" and MFV "SEA-SCAN III"?

2. Did the defendants wrongfully and illegally not grant the Certificate of Registration or the plying-pass or the permission to export in respect of the said vessels or any of them?

3. Did the defendants act in an arbitrary (way), mala fide and in abuse on their powers and/or in wrongful usurpation of powers as alleged in paragraphs 52 and 61 of the plaint? If not is the suit at all maintainable?

4. Have the defendants wrongfully and illegally failed and neglected to discharge their statutory obligation, if any, in regard to the plaintiffs said three vessels or any of them?

5. (a) Has the plaintiff suffered any loss or damage?

(b) To what extent is it attributable to the defendants of any of them?

6. To what reliefs, if any, is the plaintiff entitled?

75. It will be seen that the issues were not framed with this object in view that the defendants would argue that the suit should fail because the ships were unseaworthy even if the plaintiff succeeded in proving the breach of their statutory duty in the matter of grant of registration or plying pass.

76. There is no adequate paragraph in the written statement which raises this contention that even if registration was not allowed and plying pass was intentionally withheld the plaintiffs suit should fail on the factual score of the ships being unseaworthy.

77. The written statement was drafted clearly on the basis of the correspondence on record. Dutt had erroneously given the impression to Jahaz Bhawan at Bombay that the ships were old and were only confiscated in the early 1980''s and the error was repeated in paragraph 23 of the written statement where it was wrongly alleged that the ships had been confiscated years before when those were actually caught Even in a written statement drafted in this manner there was no allegation that the ships were unseaworthy even from the very beginning. I am of the opinion that Dutt''s error was deliberate, intended to injure the plaintiff and bring down their chances in the estimate of Bombay. This conclusion is inevitable, because no satisfactory explanation of this double error is forthcoming from the side of the defendants.

78. Another point of the utmost importance in this regard is that in the voluminous correspondence exhibited before me, the briefs of documents running to some seven volumes, it was not the stand taken either by the Marine Department at Calcutta or by the Surveyor''s office of the Andamans that the requests for registration and plying pass made by the plaintiff were requests without basis or purpose because the plaintiff was the owner of mere junk which did not, deserve

the name of a ship and therefore, the formalities of registration or tonnage computation or grant of plying pass were totally empty exercises which could not bear any fruit in future. This was not the attitude at all. On the other hand, the most extreme details regarding the ship, its line curves called Bonjean curves, its tonnage, its plying power and all the rest were made the subject of enquiry, although in a haphazard and jumbled up way.

79. Would the Court be permitted in this state of the pleadings and in this state of the correspondence, on the basis of which issues were raised, to defeat the suit because there, has not been an adequate proof of the seaworthiness of Sea-Scan I and Sea-Scan II, and an adequate proof that if given good time and money, Sea-scan III also could be made adequately seaworthy? In my opinion, it would be absolutely against the relevant rules of law, and absolutely contrary to justice, to examine the plaintiffs case in these circumstances with a view to finding out if the plaintiff has proved adequately the seaworthiness or the possible seaworthiness of his three ships.

80. The plaintiff went to trial on the written statement, the correspondence and issues and the plaintiff closed the plaintiff''s case knowing fully well what those were. It would be wrong, after the conclusion of the case, to defeat the plaintiff on an issue of which he did not have adequate notice. I am of the opinion that the defendants should not be permitted to urge the issue of seaworthiness of the ships of the plaintiff as a residuary issue on which they might succeed even if they fail on all the other issues in this suit.

81. I also accept the evidence given before me where the plaintiff again and again asserted that sea-scan I and If had been made seaworthy, after causing them to be put in the slip way and repaired. Sanchetti is not a technical man. If seaworthiness'' were at issue in a manner which it is net, it might have been necessary for the plaintiff to give detailed evidence though technical experts about how seaworthy his vessels were. But as things stand it would be quite sufficient for the plaintiff reasonably and under credible circumstances to assert that his ships were seaworthy, and since there is no proper denial of it, he need other no better proof.

82. The plaintiff also asserted that some Rs. 20 to 30 lac was spent is the ships repairs, a book being the cash book for fishing trawlers account containing the details of expenditure Was produced by the plaintiff but only one entry from it was formally exhibited. On the basis of cases, later to be discussed, Mr. Ginwalla submitted that if the Union refrains from calling upon the plaintiff to produce the relevant books or the other entries in the book before the Court, the Union cannot challenge that those expenses were incurred. Mr. Roy Chowdhury duly joined issue on this count also. Be that as it may, even one entry in a cash book is evidence that the ships were put up for repairs. Add to this the non-production of the harbour master''s file from the Andamans, the existence of which was not denied by Sarkar, and which might well have thrown light on the slipway expenses. I have no

hesitation in accepting the plaintiff''s case that they did attempt to repair two of their three ships in a serious manner, and when they were asking for registration and plying pass they were not merely playing a game of hide and seek with the officers, if they at all deserve that appellation.

83. Mr. Ginwalla also submitted in this regard that for ships in general there is a presumption of seaworthiness. He relied upon the old English case reported in 1878(3) Q.B.D. 594 (Pick up vs. Thames Insurance). That was a case against an insurer. One of the two pleas raised by the insurer was that the vessel was not seaworthy at the time of the commencement of her voyage. The ship in question had completed a voyage from point de Galle and had touched at Rangoon. She was admittedly seaworthy then. After staying at the Port from 25.4.1874 to 4.6.1874 the proceeded again to a port in U.K. but between 9th and 15th June. She met with heavy seas, but managed to return to the Port of Rangoon on the 20th. There she was thereafter pronounced to be unseaworthy and it was found on a survey held in July that the ship, which was wooden, had been eaten badly into by works. The Trial Judge had given a direction to the fury that if the time which elapsed between setting sail and putting back to Port was sufficiently short; then, the onus of proof would shift from the underwriters to the owners of the ship and in that event it would be incumbent on the assured to prove that the unseaworthiness of the ship arose from clauses occurring on the seas and it was not that the ship was unseaworthy from the very beginning.

84. The Court of Appeal came to the conclusion, with the concurrence of the Judge himself who had directed the jury, that the period of time for return to Port is not by itself, such an important factor as to shift the onus, and also, that the onus never shifts in that manner at all. It would be for the under writer to prove unseaworthiness in any event.

85. From this case Mr. Ginwalla would have me conclude that he the instant case also the owner of the ship being the plaintiff would have in his favour a presumption of seaworthiness and that, the defendants cannot succeed unless they raise unseaworthiness as an issue and prove such unseaworthiness themselves.

86. It was pointed out that the above case of pickup was relied upon by the Privy council in the case of AIR 1949 278 (Privy Council) The reliance was placed ay the Privy Council regarding the aspect of the shift of burden.

87. I do not read the Pickup case as an authority for this in sweeping general proposition that wherever seaworthiness of a ship is concerned the owner of the ship relieved from the task of proving it and that the onus is always on the other side, be it an insurer or be it any other party defendant. However, I do read the Pickup case as an instance, where the seaworthiness of a ship is legally presumed, and a pointer to this, that there might well be situations in different cases where as a matter of law, although seaworthiness is an important aspect of the matter. The

plaintiff is relieved of the task of proving it at all. The plaintiff might enjoy this position of relief for various reasons. It might be, as in the Pickup case, the claim is against an insurer and the law does not allow the insurer to raise a plea of unseaworthiness and not prove it themselves. Or it might be a case like the present, where the seaworthiness of the ships which have allegedly lost profits, is an important lay question, but is not in issue because the parties have not thought it material to go to trial on that aspect of the matter. Accordingly, it is not important to see whether the plaintiff has been able to show to the court that his ships Sea-Scan I, and Sea-Scan II were capable of flying like arrows in April and July, 1987 respectively and that Sea-Scan III was capable of being made good and resold.

88. Our case has to be decided on the basis that if registration or plying pass were granted the ships would have gone out to sea and caught fish and made profits to the extent proved by the plaintiff.

89. I shall come to quantification of damages much later. The second important aspect of the matter is that even assuming that the Officer of the defendants have failed in the performance of their statutory duty of granting registration where registration is due, would the defendants even in that event be liable to pay damages? If they are so liable, of what category is this tort and is this tort recognized in law?

90. Again before going into the details of the law and the different decisions cited by both the sides it is best to start with the Merchant Shipping Act itself and to see if the Act gives hints of how this question is to be determined.

91. u/s 336 of the said Act the Central Govt., in cases where a ship is considered to be defective might detain it for the purpose of avoiding serious danger to human life.

92. u/s 337 of the Act, it is provided that if such detention is made without reasonable and probable cause the Central Government is liable to pay to the owner of the ship the costs and incidentals, to the detention and also compensation for any loss or damage sustained.

93. It is pertinent to note that there is no other section permitting detention of the ship in any other place of this lengthy Act. At least none was placed before me. The way of detaining a fishing vessel like the plaintiff''s would be, not a direct order of detention for preventing danger to human life, but a refusal to grant a seaworthiness certificate u/s 435K, which is contained in Part XVA of the Act, a part specially introduced in May, 1983, for separately treating fishing vessels. The simple question to ask oneself at this stage is, that if section 337 permits the recovery of damages and compensation for one type of detention, why should the Court not grant damages and compensation if the plaintiffs ships are detained, not by the passing of a direct and straight-out order of the Central Government, but by the indirect and at least partly dishonest method of seeing to it that there is delay never

ending, both in the matter of registration of the plaintiffs ships and in the matter of the grant of a plying pass to the plaintiff for plying its ships.

94. In my opinion, and I shall seek to substantiate it also on the basis of the authorities cited by both sides, Section 337 by itself would be a very good indication that the Court is entitled to, and is bound in duty to, compensate a plaintiff who has suffered loss profits at the hands of the officers of the Union of India by reason of indirect detention of its ships caused by holding up of registration and plying pass.

95. The first and principal way in which Mr. Roy Chowdhury wanted to get over this difficulty is by invoking the principle in Cutler''s case. The case is reported in 1949(1) All. E.R. 544 a particular English betting statute had provided that in dog racing tracks space would be provided, to persons with totalizators. The owner of a totalizator, commonly calling a bookmaker or a bookie, in that case made a complaint that due space was not provided to him as directed in the Beting and Lotteries Act, 1934. It was held by the House of Lords that even if there was a breach of that statutory duty, the plaintiff, being a bookmaker, would not be entitled to make a claim for compensation for such breach unless it could be shown that the Act had been enacted for the benefit of a class to which the plaintiff belonged. Put in a very simple manner the decision in that case was that the beting Act had been made in England for the benefit of the general public who were being given the facility of betting on dog facing tracks, and that the enactment had not been made for the purpose of enriching the bookmakers. The Act, therefore, was passed for the furtherance of the enjoyment of restrained gambling, but not for the purpose of allowing commercial profit of those people who take advantage of the prevalence of a spirit of gambling amongst the general public in England, as, to be fair, exists everywhere else in the world also.

96. Mr. Roy Chowdhury submitted on this basis, that the Merchant Shipping Act was not passed for the benefit of shipowners but was passed for protection, restraint and due control of Merchant ships, and their crew and cargo. Therefore even if there is a breach of statutory duty, the plaintiff would not be entitled to recover, Mr. Roy Chowdhury pointed out that Cutler''s case and the principle of Cutler''s case has been accepted even by the Supreme Court in the case of Shri K. Ramadas Shenoy Vs. The Chief Officers, Town Municipal Council, Udipi and Others, Cutler''s case is referred to by the Supreme Court at paragraph 24 and the creation of the statutory duty for the benefit of a particular class is also noticed there. The principle, therefore, is a principle accepted in Indian law also, but the point is whether the principle can be correctly applied to the facts and circumstances of this case and to the provisions of Merchant Shipping Act, 1958.

97. It is proper at this stage to refer to the very last case which was cited by Mr. Roy Chowdhury when he was about to conclude his reply. The case is of X (Minors) vs Bedfordshire Council reported in (1995) 2 A.C. 633. It is a decision of the House of Lords in an English Appeal. In that case the House made an important distinction in

regard to the breach of statutory duty so far as private rights are concerned, in distinction from public rights The House was of the opinion that a breach of statutory duty would not by itself permit a plaintiff to sue and recover damages, even if the duty existed for the benefit of a class to which the plaintiff belonged, but that it would have to be shown also by the plaintiff that the Parliament had intended by enactment of the statute to confer a private right for the breach of which an action for damages would lie. Mr. Roy Chowdhury read certain portions of the speeches of the Law Lords and he particularly referred me to the speech of Lord Browne-Wilkinson starting at page 730. His Lordship gave (see pages 730 and 731) a classification of four different categories, where private law claims for damages would lie. The fourth category mentioned by his Lordship was misfeasance in public office i.e. the failure to exercise statutory powers either with the intention to injure the plaintiff or in the knowledge that the conduct particularly was unlawful". An action in purported exercise of statutory duty but tainted with the above infirmities would also be in the same class.

98. The case before the House concerned child abuse. There were claims made for negligence as well as for breach of statutory duty. The Cutler principle, i.e. that the plaintiff must show that he belongs to a class for the benefit of which the legislation in question was intended by the Parliament, has undergone a further refinement in favour of the defendant and against the plaintiff in the above child abuse case. Whether such refinement is to be accepted in India, will have to be decided in an appropriate case which squarely raises the question as a substantial and important issue in that case.

99. In my opinion, in our case neither the Cutler principle, nor the refinement in the child abuse case is squarely in issue. The principal reason for my thinking so is this. The question whether Parliament intended to give benefit to a class to which the plaintiff belongs can arise only in the case of such legislation where some benefit is at all given to some class. The Merchant Shipping Act is not a benefit giving or a welfare legislation. It is an Act for restrictions and for control. It might be that such restriction and such control will benefit others, being the members of the crew or other members of the public, by preventing harm from coming to them. It is not this type of negative benefit that the Cutler principle is concerned with. In any opinion, that principle is applicable only to positive benefits given by legislation and not to restrictive legislation which might have been passed for the benefit, by way of protection to other citizens than shipowners.

100. The Udipi case, although relied upon by Mr. Roy Chowdhury, for showing that the Cutler principle has been accepted in India, was really cited by Mr. Ginwalla and he drew my particular attention to paragraph 25 of that case where some indications are to be found about what should be proved for success if the plaintiff alleges the tort of breach of a statutory duty. A reading of paragraph 25 will reveal that the Supreme court reiterated that Cutler principle. However, since the

pronouncement is of the Supreme Court it is binding on all Indian courts, which even the most sophisticated house of Lords decision is not, and because of the binding nature it is clearly the Indian law that an action for damages for breach of statutory duty will lie in India. Whether in our case such damages can be granted will have to be decided on further discussion, because even if the cutler principle does not negative the case for damages, we have to find out a principle which allows the grant of such damages for breach of duty imposed by restrictive legislation before the plaintiff can be allowed to succeed in this suit.

101. Mr. Ginwalla showed, even from cases decided in England, that instances are to be found even there where a welfare legislation granting benefit to the class to which the plaintiff belongs has ultimately resulted in a decision that the plaintiff will succeed, or should succeed, in case of breach of performance of such welfare statutory duties. Mr. Ginwalla particularly showed me the case of Thornton vs. Kirklees Metropolitan Borough Council reported in : (1979) 2 All. E.R. 349. The case followed the oftused English pattern of the defendant seeking to strike out the plaintiffs claim on the ground that even if the allegations in the plaint are taken to be true those do not disclose a cause of action. The Court of Appeal in the Thornton case decided that a certain English Act of 1977, which was passed for providing accommodation to homeless persons, imposed a duty on the concerned housing for providing such accommodation and that the plaintiff, who was homeless and whose need had the requisite priority, could, therefore, sue for non-allotment of accommodation or the non-giving of assistance in regard to obtaining accommodation and if he succeded in proving the factual allegations he could also recover damages.

102. But again, the Merchant Shipping Act not being a beneficial legislation in the welfare sense the above case cited by Mr. Ginwalla cannot be applied to the facts and circumstances of this case.

103. Mr. Ginwalla, however, also relied upon several authorities where there had been breach of statutory duty and damages were recovered, and those statutes were not necessarily of the welfare or benefit granting type. One of those cases was the case of Sm. Jeet Kumari Poddar and Others Vs. Chittagong Engineering and Elecric Supply Co. Ltd. and Another, where an action was brought under the Fatal Accident Act for the unfortunate demise of a young man who had started to help in his father''s draping business. He had been electrocuted because of, improper insulation of a current carrying conductor. The Electric Supply Company of Chitagunge was sued for recovery of damages. It was decided by the Division Bench that the electricity authority, which was a public authority, had a duty in the facts and circumstances of that case not to be negligent in relation to the insulation of current carrying conductors and because of their negligence and breach of duty the deceased had been kilted. The Court pointed out that, whether the breach of statutory duty caused by negligence in performance will or will not given rise to an

action for damages, has to be decided separately in different particular cases. Unless by express words of the statute, or by necessary implication, the public authority is exempted from the consequences of neglect of performance of such duty, damages would be payable. This case, in my opinion, has a much greater bearing on the facts of our case than the line of Cutler Cases. If Bhowmick and the other concern officers negligently or deliberately failed in the performance of their statutory duty, then, unless expressly or by implication the liability for damages can be ruled out they and their employer being the Union of India would have to pay damages if the plaintiff proves the breach of statutory duty.

104. Mr. Ginwalla multiplied the number of cases where breach of statutory duty was proved by the successful plaintiff. He relied on the case of Dawson & Co. vs. Bingley Urban District Council reported in (1911-13) All. E.R. Reprints page 596. There had been negligence of the local authority in putting a fire plug correctly in position. The particular facts which led the court to conclude that the public authority was negligent are not important in this context. What is important is to note that a breach of statutory duty of this nature was held by the Court of Appeal to be a tortious act of misfeasance, damages were recoverable under such circumstances.

105. The next case in this line was the case of Provender Millers reported in 1939(3) All E.R. page 882. The decision of Farewell J. is given here The decision in appeal is reported at 1939(4) All E.R. page 157, the case was instituted by the owner of a riparian mill-owner. The plaintiff had been injured because of the works undertaken by the public authorities, being the Southampton County Council, for repair of a bridge. The public authorities were acting under statutory powers. The Court of Appeal went so far as to hold that even in exercise of such powers the authorities would have to compensate the plaintiff if they injured the plaintiffs property and were unable to show that the exercise of such statutory powers could not have been made in any other way than by injuring the plaintiff. In my opinion it is a relevant case showing that if injury is proved by the plaintiff the public authorities cannot escape liability merely by showing that they were acting in exercise of statutory powers, they must further show that such exercise was made in the manner it was made injuring the plaintiff because there was no other way to discharge the statutory duty. If Sanchetti succeeds in proving injury and if it appears that the, actions of the officers of the Union of India resulted in such injury then it would not be enough for them merely to say that the Merchant Shipping Act permits them to carry out the statutory duty of tonnage verification or ship testing, but they must also show that they performed such duties in the manner possible, and such way of performance had to injure the plaintiff whether they wished it or not. I adopt the principle of the English case here, which binds me not by the doctrine of precedent, but by the power of persuasive reason and wisdom.

106. I have also come to the conclusion on the facts mentioned above, that the officers here not only did not act in the only manner possible, which had to injure the plaintiff, but that they deliberately injured the plaintiff in delaying the processing of the ship''s papers and in not giving the plaintiffs ships the due attention which those vessels deserved.

107. The next case of Mr. Ginwalla was another bridge case, where the bridge in question hit the top of a sailing ship and damaged it. It is the case of AIR 1931 59 (Privy Council) and the advice of the judicial committee was given through Lord Atkin. The defendant bridge company had so constructed the bridge that the space below it lost a lot of the necessary clearance and height and navigation was confined only to times when there was low water and low tide, it was held that the construction had interfered with the navigation of the river. It was a case of nuisance, and so incidentally was also the case of the riparian mill owner, in this context reference might be made to the judgment of the single Judge, 1939(3) AIR 887C where his Lordship said to the effect that in certain circumstances negligence is not a happy legal concept. Indeed where a permanent danger is created, as in the case of the "Eurana" the appropriate concept is one of nuisance. Be that as it may, the performance of statutory duty must be made in such a manner as not to injure the plaintiff and if it is not so made and the plaintiff gets injured there are cases without number to show that recovery of damages can be made. It is not so relevant to categorize the breach of duty and to see whether it fits better with the concept of nuisance or whether it fits better with the concept of negligence but it is much more important to pay attention to the three following factors :
1) Whether the plaintiff has been injured and such injury is attributable to the actions or ommissions of the public defendants;

2) Whether the action of the dependence was taken or not in the manner those were, because there was no other alternative and the plaintiff had to be injured;

and

3) Whether in the Statute there are express words or whether from other circumstances it has to be implied that even if the two above questions are answered for the plaintiff the law does not allow the plaintiff to recover damages.

108. In my opinion if these three questions are adverted to the answers to all these come in favour of the plaintiff here. It these answers are favourable to the plaintiff he goes a long way towards succeeding in his case, but the quantification of damages still remains an outstanding issue.

109. We pass on next to a particular aspect of tonnage computation which has occupied much time during the arguments both of Mr. Ginwalla and of Mr. Roy Chowdhury. It will be remembered that the original computations were forwarded by the owners to Bhowmick in accordance with the Tonnage Rules or 1960. Those

drawings were immediately sent back. The request of Bhowmick was that those should be prepared in accordance with the Draft Rules of 1982 which had not been notified, and which had not become Indian law the 82 draft rules were notified on or about the 11th of May 1987. But there is nothing on the papers to suggest that Bhowmick was aware of such notification or that he mentioned that the drawings should be redone in accordance with the 1987 rules. He was always mentioning the 82 draft rules, the answer given on 19.04.1989 to the statutory notice also repeated this stand.

110. Now, whether the 87 tonnage rules had become law when Bhowmick returned the drawings or not. Mr. Ginwalla''s submission was that such new tonnage rules could, in any event, not be applied to the plaintiffs ships because the rules themselves showed the inapplicability of these rules either to Sea Scan I or to Sea Scan II. The notification of 11th May, 1987 bearing No. GSR(F) was handed up to Court, sub-rule 3 of the Rule 1 provide that the rules will apply to the following four cases :

a) a new ship.

b) an existing ship which undergoes alterations which" the Chief Surveyor thinks to be a substantial variation affecting its tonnage.

c) existing ships if the owner requests for an application of the ''87 rules and

d) to all other existing ships, but with effect from 18th July, 1994.

111. A new ship is defined in sub-rule (q) of rule 2 as a ship, the keel of which is laid or after the commencement of the 87 rules.

112. It is nobody''s case that the keel of Sea-Scan I or the keel of sea-scan II was laid after 11.5.87. It could not be so because the ships with their keels had been caught sailing in the seas in 1986. It is also nobody''s case that there was any certificate by the Chief Surveyor that there had been any tonnage variation due to ship modification. The owner never requested tonnage computation according to the 1987 Rules. Their sending of computation according to the 1987 Rules. Their sending of computation according to the Rules of 1960 points just the other way. Also, clause (d) above was clearly not applicable because the date of 11.7.94 was 7 years away from the time we are talking about.

113. There was absolutely no way the tonnage Rules or 11.5.87 could be made applicable in accordance with law to any of the plaintiffs ships. Yet those where applied. It was insisted upon by the Mercantile Marine Department that those be applied, and the plaintiff towed their line.

114. When I say that the Mercantile Marine Department in India has habit of making laws unto themselves, I have this point in my mind also.

115. Mr. Roy Chowdhury submitted that contemporaneously, that is, in or about June, 1987 the plaintiff did not insist that the 1960 Rules be applied. In fact the plaintiff resubmitted drawings, as required by Bhowmick, in accordance with the later Rules. Thus according to Mr. Roy Chowdhury, it will lies in the mouth of the plaintiff to raise this question now.

116. The reason why I have discussed these two sets of Rules viz. of 1960 and of 1987 at some length is two fold. The first reason is that a bare look at the two sets of Rules will show that these are totally different. It is absolutely wrong to suggest that these two are very much the same. Secondly, if the defendants insisted on applying rules which had no application to the plaintiffs ships, then they were insisting upon doing something which they had no legal authority to do. Nobody knows to-day what would have happened if the originally submitted drawings of the plaintiff had been, duly considered by Bhowmick and the other officers of the mercantile Marine Department in accordance with the Tonnage Rules of 1960, and they had not insisted wrongly upon the application of the 82 draft Rules. The defendants, therefore, are guilty of an act, or better, a course of action, which is not supported by law and is, therefore, entirely void. The Notification number of the 1960 Rules published on 17.12.60 is G.S.R. 1550. If the respondents were under a duty to apply those Rules, and these Rules only, and if they had no authority to apply any other Rules, and if those other Rules on their very terms had no application to the two ships of the plaintiff, it becomes material to ask oneself the question, as to what in Indian law is the effect of an act which is void in law and which injures the plaintiff.

117. It is doubtless true that the return of the drawings injured the plaintiff and it is doubtless the law that against the application of wrong Rules there is no estoppel, and the plaintiff cannot be estopped from urging in the suit that he has been injured by the use of a void course of action by the Mercantile Marine Department, which was the purported insistence of theirs on the application of the draft rules of 1982 or the Tonnage Rules of 1987.

118. The point of applying the wrong law and the wrong Rules to the plaintiff''s ships will arise in other contexts also. But before I discuss those other factual aspects, this is a good place here to see what the law in India relating to void action and resulting damage is. Mr. Ginwalla relied in this regard upon the case of Bishambar Nath and Others Vs. The Agra Nagar Mahapalika, Agra and Another, The actions of the respondents being the Agra Municipality in that case were also invalid as are the actions of the respondents here, inter alia, in their application of the wrong set of Tonnage Rules to the plaintiffs ships. The facts in the case were that there was a bad order passed stopping sale of certain foodstuff which happened to be "ATTA". The seller in that case had displayed a signboard therein it had been prominently noted that the foodstuff was unfit for human consumption. But the order stopping sale, which was invalid, had nonetheless been passed. The sellers had instituted a suit against the public defendants for recovery of damages the amount of which is also

mentioned in the Supreme Court judgment as Rs. 34,000/-. The suit was decreed. But the High Court on appeal dismissed the suit, the Supreme Court on appeal, however, passed an order of remand. The judgment is important in two respects. It shows that in case of injury resulting from an invalid action of the defendants the plaintiff can not only file a writ asking for the quashing of an invalid order, but can also maintain a suit for recovery of damages. Thus, if the application of the wrong Tonnage Rules was made, the remedy of the plaintiff is not restricted to filing a writ in 1987 and obtaining a compulsive order for applying the right of set of rules. I have grave doubts whether the time factor involved in such a process would have at all helped the plaintiff in any event.

119. The second important point is mentioned in the short, but crucial paragraph which is paragraph 12 of the said judgment. Their Lordships opined in that paragraph that it was immaterial that the respondents had acted bona fide and in the interests of preservation of public health. Their Lordships said:

Their motive might be good but their orders are illegal. They would accordingly be liable for any loss caused to the appellants by their action.

120. Even if I assume that the Mercantile Marine Department was acting in good faith, and for the preservation of what they thought to be public interest in the application of the wrong set of rules, yet if damage has resulted to the plaintiff they must compensate the plaintiff for their void course of action irrespective of their motive.

121. I am unable to hold that the Mercantile Marine department of the entire country is like a babe in arms and does not know the law. I am compelled to take the only possible view that the Marcantile Marine Department should be taken as aided by competent lawyers in a competent legal department which can at least advise them as to which set of Rules is applicable in which set of circumstances when such circumstances and the terms of such Rules have no difficulty in their application and present no problems of interpretation or clarification in regard to the question as to which of the two sets of Rules is to be applied. I am of the opinion that in applying the 1987 Rules the Mercantile Marine Department chose a void course of action and that it chose so deliberately. It is impossible to ascribe to an important department of the country ignorance or non-understanding of a simple law and the Country''s enactments and the country''s rules.

122. In these circumstances, it would be for the defendants to show that even if they had accepted the 1960 drawings and applied the 1960s Rules yet the plaintiff would have to be refused sanction to the drawings and their tonnagge computations. They are absolutely unable to discharge this burden which lies on them; because, if they are to escape liability for their invalid action they must show that no damage has resulted to the plaintiff therefrom. The plaintiff is unable to produce the drawings made according to the 1960 Rules which were submitted to Bhowmick and returned

by him. Equally, the respondents must take responsibility for the irresponsible officer Bhowmick who returned computations made in accordance with the applicable rules without apparently keeping any records, and insisting upon the plaintiffs going on a wrong course of action.

123. This, then, is the law with regard to the injurious void actions of public defendants so far as bur country is concerned. This is the appropriate place to deal with Mr. Ginwalla''s case of Dr. Dunlop reported in (1981) 1 All. E.R. 1202. This case concerned two suits, the second of which had been filed for recovery of damages. Dr. Dunlop had got into disputes with the Woolvahra Municipal Council which refused to sanction plans for development of the property bought by him. In the first suit the validity of the refusals of the Municipal Council was in issue. The plaintiff succeeded in having it declared that the refusals were invalid and one of the principal grounds for such decision was that Dr. Dunlop had not been heard prior to such refusals. In the second suit when damages were claimed it was found at trial that the Municipal Council had consulted their solicitors in the taking of their decisions and that they had not acted maliciously. When the matter was argued before the Judicial Committee of the Privy Council substantial reliance was placed, on what is now called the Beardesert claim, based on the judgment of the High Court of Australia delivered in the case of Beaudesertshire Council vs. B. Smith 1966 (120) CLR 145. The Dunlop case shows that the Beaudesert principle has been applied in many cases and in many countries. The important quotation from the judgment of the Australian High Court which was extracted by Lord Diplock runs as follows :-
It appears that the authorities cited do justify a proposition that, independently of trespass, negligence or nuisance but by an action for damages upon the case, the person who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another, is entitled to recover damages from that other.

124. Lord Diplock called this Beaudesert principle an in nominate tort. His Lordship placed special emphasis on the word ''unlawful'' which occurs in the above passage. His Lordship held that the word ''unlawful'' and the words forbidden by law'' are not necessarily interchangeable. His Lordship also held, not following Lord Halsbury (see page 1209) that although the word ''unlawful'' had sometimes been used to describe acts that were void, such an use is inaccurate. The substance of the decision in this regard was that void decisions regarding non-granting of permission by the Woolvahra Council might have been void but those were not unlawful within the meaning of the Beaudesert principle.

125. In view of the decision of the Supreme court in the food sale stoppage case, I an unable to follow this distinction of Lord Diplock. In India, the law is that damages resulting from wrong courses of action by public defendants, whether those were void or voidable, or illegal, Will alike give zxrise to a case for damages. The Dunlop

case was cited by Mr. Ginwalla inter alia for the -purpose that If the circumstances are right and if injury results in accordance with the Beadesert principle from unlawful actions of public-defendants in discharge of public duties then even in England damages are recoverable. The Indian law in this regard appears to favour the plaintiff even more than the English law.

126. TO substance the proposition that the 1982 draft Rule made on the basis of the Treaty of 1969 had no force of law in India until a notification in accordance therewith was published Mr. Ginwalla relied upon several cases. He relied on the case of Tractoro export reported in AIR 1971 S.C. page 1 and submitted that in our country, as in England, a treaty does mot become effective or operative by itself unlike in some European continental countries. We need specific domestic legislation to introduce the subject matter of the Treaty into the body of enforceable Indian law. I accept this proposition as good law as indeed I must.

127. Mr. Ginwalla also placed reliance in this regard art the case of Jolly George Varghese and Another Vs. The Bank of Cochin, and drew my attention specially to page 473, the bottom of the left column and the top of the right column. The proposition here also is the same, that is, until the Municipal law is changed by Municipal Legislative Bodies, an international convention cannot affect that change by Itself. The third case in this regard was the one of C.R.V. Committee reported in AIR 1983 Karnataka, page 85 which concerned two black listed cricketers. It was held In that case that the making of a treaty into Indian law is the province of the Parliament and the Court cannot pass a compulsive order in that respect.

128. These cases, the principles enunciated in which should be known to any lawyer in India, and certainty to lawyers who advise the important Department of the Indian government being the Merchantile Marine Department, show that until a due notification is published an international treaty cannot be applied as a part of the Indian law by the Marine Department and the Department cannot discard the old Rules, in this case the 1960 Tonnage Rules which have net until then been repealed or amended by the Competent Authority having power in that regard.

129. In regard to tonnage measurement, the application of the wrong section of the Mercantile Shipping Act is also as important as the application of the wrong tonnage rules u/s 22 of the Act of 1958 every Indian ship is compulsorily registerable under the Act. However, by way of an amendment made by parliament as early as in 1983 an explanation was added to this section providing that for the purpose of this Section a ship would not include a fishing vessel. The admitted case of the parties is that the plaintiffs two trawlers were fishing vessels. It is impossible, in my opinion, in any view of the law or in any view of the construction of the Act, or of this particular section, to come to the conclusion that the notwithstanding the explanation inserted by Parliament with immediate effect in 1983, fishing vessels continued even thereafter to be compulsorily registrable u/s 22.

130. It is equally impossible to hold that from and after 1983 Indian fishing vessels were not registrable at all Thus the only possible view in law is that Indian fishing vessels became registrable after 1983, not under the provisions of Section 22 of the Act but because of the provisions specially introduced, also in 1983, as a special part in the Act, being Part XV-A meant only for the fishing boats.

131. S. 435C in the said part provides that every Indian boat shall be registered under that part.

132. The above distinction has an important practical effect. The manner of tonnage computation and verification is different for Part V ships than for Part XV-A fishing vessels.

133. The particulars which are to be furnished for registration of a ship are also different for Part V ships and Part VX-A fishing vessels. Those were particularly more different in the year 1987 because special rules regarding fishing vessels under Part XV-A were not published in 1983 when the amendments in the Act were made, nor published in 1987 when the plaintiff was clamouring for registration, but were published as late as in November, 1988 when the suit had almost become ripe. To show the efficiency of the Mercantile Marine Department, it might be mentioned that the Rules published in November, 1988 were received by the Merchantile Marine Department at Calcutta, some six months later in May 1989. If this happens to the principal Marine Department of this region, then it might well be imagined as to what will happen to the satellite department at the Andamans where copy tonnage rules had to be sent to Bhowmick because Bhowmick had misquoted a particular provision of even the wrongly applied rules for tonnage measurement, being those of 11.5.1987.

134. The tonnage measurement for Part V ships is controlled by Section 27 which is set out below:

27 (1) The owner of every Indian ship in respect of which an application for registry is made shall cause such ship to be surveyed by a surveyor and the tonnage of the ship ascertained in the prescribed manner.

(2) The surveyor shall grant a certificate specifying the ships tonnage and build and such other particulars descriptive of the identity of the ship as may be prescribed and the certificate of the surveyor shall be delivered to the registrar before registry

135. Compare however the difference in procedure of tonnage measurement for fishing vessels which is given in Section 435G.

The entirety of the said Section is set out below :

435G. (1) The owner of every Indian fishing boat required to be registered under this Part shall make an application in the prescribed form to the registrar for the grant to him of a certificate or registry in respect- of the fishing boat.

(2) The owner of every Indian fishing boat in respect of which an application under. Sub-section (1) is made, shall cause the tonnage of the fishing boat to be ascertained in the prescribed manner.

(3) The registrar may make such inquiry as he thinks fit with respect to the particulars contained in such application and shall enter in a register to be kept for the purpose (hereinafter referred to as fishing boats register) the following particulars in respect of the Indian fishing boat, namely :

(a) the name of the fishing boat, the place where she was built and the port to which she belongs :

(b) the rig, type and tonnage of the tonnage boat :

(c) the number assigned to the fishing boat:

(d) the name, occupation and residence of the owner of the fishing boat :

(e) the mortgages, if any, effected by the owner in respect of the fishing boat : and

(f) such other particulars as may be prescribed.

(4) After the particulars in respect of the Indian fishing boat when have been entered in the fishing boats register under'' Sub-section (3), the registrar shall grant to the applicant a certificate of registry in the prescribed form.

(5) The owner of every Indian fishing boat shall pay for each certificate of registry a fee accordance to such scale as may be prescribed by the Central Government having regard to the tonnage of the fishing boat, but in no case exceeding one rupee per ton of its gross tonnage.

(6) An Indian fishing boat required to be registered under this Part but not so registered may be detained by a proper officer until the owner, skipper, tindal or other person in charge of the fishing boat produced a certificate of registry in respect of the fishing boat.

136. As the tonnage of Sea Scan I and II ultimately came out as 128 and 105 M.T.''s, the fees therefore could not exceed Rs. 233/-. I hold that the plaintiff was always willing to pay this sum, and far more.

137. One main difference between Section 27 and Section 435G lies in this that a survey by a surveyor is a necessity by the express words of Section 27, but for fishing vessels, the ascertainment of tonnage by the owner is not mentioned in 435G(2) as being required to be made by a surveyor, with any special qualification.

138. Under Sub-Section 3 of Section 435G., the registrar is permitted to "make enquiries regarding the owner''s computation at the registrar''s discretion.

139. The Mercantile Marine Department and its officers did not apply part XV A to the plaintiffs ships at all, Mr. Roy Chowdhury submitted in this context that the

plaintiff''s two other vessels, Sanfood I and Sanfood II which were plying at the Vizag seas were also plying on the basis of Part V of the Act being applied to those vessels. Also, according to Mr. Roy Chowdhury the facts in this case reveal that the insistence from the plaintiff to apply Part V to his ships did not come at all in the year 1987 but that such insistence was made from and after the month of July 1988.

140. What: I have said previously with regard to tonnage rules applied with even greater force with regard to Sections inserted by Parliament. If Parliament enacts that from a certain year certain provisions will not be applicable to certain ships and passes an appropriate statute in that regard; then it is not open to the Mercantile Marine Department to make a law unto themselves and to say, that Parliament might do as it pleases, but the Mercantile Marine Department will continue to apply the law which it chooses to apply until it sees fit to apply the other newly made by Parliament.

141. Before I elucidate further on the difference of Sections 27 and 435G and the effect of such difference on the facts of this case, I must dispose of the point of law which arises in this regard, which is that until Rules are made under the different Sections of Part XV A those Sections cannot practically be applied to any fishing vessel and, therefore, the Mercantile Marine Department was compelled to apply Part V to the two ships of the plaintiff.

142. Mr. Roy Chowdhury had submitted that even the plaintiff did not raise the point of the applicability of Part XVA instead of Part V to the plaintiff''s ships before July, 1988. Apart from that he said that Part VXA contains several Sub-sections which indicate that until rules were made and until notifications fixed authorities as the prescribed ones to discharge their duties under those sections, it would be impossible for the Union and the Officers of the Union to apply the provisions of Part XVA. To elucidate his argument Mr. Roy Chowdhury submitted that u/s 435D it was for the Central Government by notification to declare which places or ports would be the places or ports of registry under Part Mr. Roy Chouwdhury submitted if there is no port of registry prescribed it would not be possible to register a fishing vessel at any port.

143. Again it was Mr. Roy Chowdhury''s submission that the Registrar who would discharge the function of registering Indian fishing boats under Part XVA would also have to be notified and appointed by the Central Government u/s 435E. Thus it was argued if there is no Registrar notified or appointed the plaintiff''s vessels could not be registered under Part XVA.

144. In support of his arguments Mr. Roy Chowdhury first referred me to Section 24 of the General Clauses Act. He submitted that under that Section it has been enacted that in certain circumstances orders, notifications and rules will have to be continued in their application until new rules and orders are made to replace the old ones. Mr. Roy Chowdhury argued that even if the legislature had introduced Part

XVA in 1983 yet rules under Part XVA had not been made until as late as in November, 1988. Thus all the rules and all the prescribed forms which were applicable to ships under Part V would also have to be applied to fishing boats. The plaintiff, therefore, would have no satisfy the requirements of his prescribed, rules and notifications and would also have to abide by the forms which had been prescribed under Part V until new rules and new forms were notified and prescribed under Part XVA. The first case in this regard which was relied upon by Mr. Roy Chowdhury is the case of the Chief Inspector of Mines vs. Re. Karam Chand Tahapar reported in AIR SC 838. The Mines Act, which was considered in that case had first been passed in 1923 and the replacing Act was passed in 1952. Under the old Act regulations had been made in 1925. In 1955, which was a material year in the case before the Supreme Court, it was held that no new rules being framed the old regulations would still continue to apply.

145. Mr. Roy Chowdhury then relied on the case of Mohan Lal Goenka and Another Vs. The State of West Bengal, . This was also a case under the Mines Act and the decision in regard to the point which we are discussing now was to the same effect in this case also. The next case was that of Neel alias Niranjan Majumdar Vs. The State of West Bengal, This case concerns the Arms Act and the Old Act had been passed in 1878. The New Act was passed in 1959. The notification under the old Act had been made in 1923. It was held by the Supreme Court that notwithstanding the repeal of the Old Act the notification and the effect thereof as made in 1923 would continue along with the New Act of 1959. The last case in this regard as cited by Mr. Roy Chowdhury was the Five Judge decision of the Supreme Court in the case from T. Cajee Vs. U. Jormanik Siem and Another, Mr. Roy Chowdhury specifically placed the latter portions of paragraph 10. The case is a long one and it concerned, inter alia, the question of the power of removal of officers like the SIEM or Chief. The Supreme Court opined that until regulations were made or laws were passed it was not that there would be an absolute void and it could not be argued that there could be no appointment or dismissal of the personnel of the administration. The principle of continuance of previously prescribed rules and methods was affirmed by the Supreme Court In this case also.

146. Mr. Ginwalla in answer to Mr. Roy Chowdhury relied in Section 22 of the General Clauses Act. He submitted that a Central Act might or might not come into force immediately as envisaged in that section and it was for the Parliament to decide whether the enactment made by them would come into operation immediately upon the passing of the Act or whether there should be a time gap prior thereto in this case Mr. Ginwalla argued the amending Act of 1983 had come into force immediately on its passing and Parliament had not left a time gap for the Central government to make piles in the interregnum. This argument of Mr. Ginwalla is irrefutable.

147. If one is to hold that a fishing vessel in India was registrable under some section or the other at all material periods of time before or after 1983, one cannot think of holding otherwise. Registration either has to be made as required u/s 22 in Part V or it has to be made as required under 435G (1) in Part XVA. The Explanation to Section 22 rules out its applicability to fishing vessels. The specific wording of 435G(1) makes a fishing vessel compulsorily registrable thereunder. Thus, when the Mercantile Marine Department continued to apply Part V to the vessel of the plaintiff in 1987 and 1988 they embarked on a void course of action. They were seeking to apply the wrong law. They were as much in error in this regard as they were in applying the wrong Tonnage Rules to the plaintiffs ships.

148. Mr. Ginwalla''s argument was that a statutory power must be exercised and it cannot be left unexercised simply because rules had not been made as envisaged under some section of the Act of the other. He cited several cases to substantiate this proposition. The best case to start with in a one decided by a Full Bench of this court in 1961 which concerned Income tax search and seizure. The power to search and seize had been given by the Act in that year but no prescribed rules had been made thereunder when the search and seizure in the case before the court had been conducted. The case is of Surajmull Nagarmull and Others Vs. The Commissioner of Income Tax,

149. The principle which emerges from this case and the others cited by Mr. Ginwalla in this regard is that the Court must ask itself the question whether the statutory power had been made exercisable on a condition precedent and whether such condition was the framing of rules or the publication of a prescribed notification. If the Court comes to the conclusion that the statutory power was unexerciseable without the fulfillment of the previous condition, being the making of the Rules, then the statutory power would have to be left unexercised until rules were made. The Division Bench of the Calcutta High Court came to the conclusion that the income tax search and seizure was not a provision of that nature. The search and seizure were pronounced to be valid and that the absence of rules did not invalidate the exercise of power which had been (sic) by the Act itself.

150. The first case cited in this regard by Mr. Ginwalla however was the case of the Dargah Committee, Ajmer, reported in AIR 1962 SC page 574 Mr., Ginwalla placed passages especially from page 5/8. The absence of rules was in issue in that case also. The Supreme Court did opine to the effect that even if there had been no rules framed, it would not necessarily mean that the statutory power would be in abeyance for that reason.

151. The next case concerned the absence on regulations for regulating service conditions. It is the case of the Mysore Road Transport which was a five Judge decision of the Supreme Court. The case is reported at Mysore State Road Transport Corporation Vs. Gopinath Gundachar Char, In Paragraph 2 of the Judgment the Supreme Court referred to a certain High Court decision which had held that until

regulations had been framed under a certain Section of the Act setting up the corporation, being Section 45(2)(c), and those regulations had been made with the previous sanction of the State Government, the Government could not appoint officers and servants or lay down their conditions of service. Thereafter the Supreme Court simply said that decision of the High court was wrong and erroneous. In my opinion the case is relevant to the issue whether rules and prescribed notifications were essential under Part XVA and whether the powers under Part XVA could not be exercised without such notification and prescriptions.

152. The next case was that of the U.P. State Electricity Board Lucknow Vs. City Board, Mussoorie and Others, The Electricity Supply Act provides that the grid tariff would be fixed in accordance with the regulations to be made in that regard. The Supreme Court however held that even if there were no regulations it did not mean that grid tariff could not be fixed at all. This goes to show that unless the statute expressly prohibits or by necessary implication prohibits the use of statutory power without the framing of prior regulations and rules the courts would definitely lean in favour of immediate exercise of statutory power which has been conferred by Parliament

153. The next case of Surinder Singh Vs. Central Government and Others, states in a succint way that rule making under an Act is not necessarily a condition precedent to the exercise of statutory power. If the rules are framed, no doubt the statutory power would have to be exercised in accordance with those rules but if no rules'' are framed then the authority is not precluded from exercising the power conferred by the statute.

154. The next was the case of Shamkant Narayan Deshpande Vs. Maharashtra Industrial Development Corporation and another, Mr. Ginwalla placed, inter alia, passages from page 1175 and he submitted that if no rules are prescribed then service conditions can still be prescribed by means of issuance of executive instructions.

155. In my opinion, on the basis of the above cases, Mr. Ginwalla submitted rightly that even if there is no port or place prescribed under Part XVA and even if no registrar had been appointed under Part XVA it was possible for a union officer to set as registrar, and it was possible for the union to treat places and ports for registrar of fishing vessels merely by departmental instructions issued by the appropriate officers of the Mercantile Marine Department. Indeed, not only was this possible, but it was incumbent on the Marine Department to issue such executive directions either by open publication or at least by way of issuance of departmental circulars. If they were compelled to registrar fishing boats under Part XVA, they were compelled to have officers who would perform the function of the registrar, and they would also have to have places and, ports where the registration would in fact be effected.

156. If the Mercantile Marine Department did not issue executive directions for appointing registrars and ports of registration of fishing vessels immediately, after 1983, and if they waited for the Central government to make rules, then it merely shows either an inexcusable lackadaisical approach on their part or alternatively yet another instance of their making a law unto themselves and continuing to apply part V requirements, notwithstanding the mandate of the law to the contrary. It is not that the Supreme Court had opined for the first time in 1993 that the exercise of statutory power is not lightly to be kept in abeyance. It has been the continuing trend for many decades. Yet nothing was done to bring the provisions of Part XVA immediately into operation. It is no doubt the tort of the breach of the statutory duty of applying the right law to the citizens of India, and Indian corporations and their property.

157. Lastly Mr. Ginwalla submitted that rules under Part V cannot be followed if those rules in any manner conflict with the provisions of Part XVA. The submission is eminently justified. The case relied on in this regard is K. Rama Rao, reported at AIR 1960 Mysore 313. It is a decision of an Hon''ble Single Judge and his Lordship said that the government should do nothing which might directly or indirectly have the effect of subverting the provision of the Act.

158. Also Mr. Ginwalla relied on the case of the Chief Inspector of Mines which had been relied on by Mr. Roy Chowdhury. He showed from paragraph 9 which is at page 842 of AIR 1961 SC that the court allowed the old Mines Regulation to subsist as there is no provision express or otherwise in the later Act to the contrary and the regulations are not inconsistent with the re-enacted provisions.

159. The Mercantile Marine Department was, therefore, compelled to apply all the provisions of Part VX-A to the plaintiffs ships and they were also permitted to use the rules and prescription made under Part-V provided those did not conflict with any portion of Part XV-A. They never approached the problem from this true and only angle.

160. Let us now see how this principle of law takes shape in relation to the specific provisions of Part XV-A. Under Sub-Section (3) of Section 435G, the particulars necessary for registration of an Indian fishing boat are given. Those are almost, in the nature of paper information like - the name, the place of built, the rig, the type, the number of the boat, the name and occupation of the owner and the mortgages, if any, on the ship. The only non-paper information, if I might be permitted to use this term, is the ship''s tonnage. Under Sub-section (I) of the Sub-section (3), other particulars as prescribed could also be called for, for registration of an Indian fishing vessel. But, at the material time, nothing else had been prescribed. Therefore, the officers of the Mercantile Marine Department were under a compulsion and a duty to allow registration to the plaintiffs vessels on compliance with the requirements of Sub-section (3). The only requirement outstanding was the tonnage requirement. Everything else was known, as best as those could be known. The ships had been

bought from the Union. The plaintiff was not asking for an immediate registration of Sea Scan-III which was under water. The plaintiff had calculated the tonnage of Sea Scan-I and Sea Scan II in accordance with the applicable rules. Those drawings and computations were returned. Not only was the plaintiff not given registration of the above two ships, but the detailed computation of tonnage with the intervention of surveyors, which is a Part-V requirement, occupied the long period up to September, 1988. The officers of the Mercantile Marine Department were, therefore, guilty of the tort of applying the wrong law, and of asking the plaintiff to fulfill various requirements which were not required prior to registration and thereby the officers in effect held up the plaintiffs ships and practically detained those ships from going out to sea for fishing.

161. Three of the notable requirements, which were asked for by the officers of MMD and which were not required in law to be complied with by the plaintiff prior to registration'', were those of having a draft carving and marking note, of having a stability lest and a consequent stability information booklet and of undergoing a speed trial. The draft carving and marking note, although insisted upon by the MMD u/s 28 of Part V of the Act, is not even required now for a fishing vessel. The insistence on fulfillment of post registrational requirement prior to grant of registration to the two ships of the plaintiff which, according to it, were ready, was one of the principal torts of breach of statutory duty. These requirements were intentionally insisted upon by Bhowmick and others, although they were duty-bound in law to grant registration to the plaintiffs ships on fulfillment of only the requirements as set out in Sub-section (3) of Section 435G.

162. I indicate below, in brief, the way in which the application of Part-XV-A instead of the application of Part-V would have made a material difference in the matter of grant of registration to the plaintiffs ships :

i) The way of ascertainment of tonnage under Part XV-A is different and without the necessary intervention of surveyor;

ii) There is a complete inapplicability of the necessity of having a draft carving and marking note for a fishing vessel.

iii) The requirement for grant of registration under Part XV-A; especially in the material years of 1987 and 1988 until rules under Part XV-A were made in November. 1988 were substantially different from those required under Part V:

iv) There were no specific forms and no specific rule which had to be complied with prior to registration under Part XV-A and thus the informal but honest request for registration made by the plaintiff were quite sufficient.

v) At the material time, there were no rules prescribed for testing the stability of fishing vessels and therefore, insistence upon of a stability booklet were wrong.

163. Even in the plaintiffs vessels had been granted registration on due compliance by the plaintiff of Part XV-A requirement, even then u/s 435K the sea-worthiness certificate of the fishing boat would be needed. No officer of the Mercantile Department need have been under any fear and apprehension that if the plaintiffs fishing boat is registered, they will immediately thereafter go on to ply the seas and thus endanger the lives of the crew. I have already said that there is no plea in the written statement to the effect that even if the plaintiff had been granted registration or the plying pass for its ships those could not have gone out to sea because the ships were junk and were useless. This issue does not arise in the suit. It is important to note in addition thereto that if the officers of the MMD were serious about testing the plying ability of the vessels of the plaintiff, they would have ample time to test it even after granting registration and they had a power and duty to make such test u/s 435K: but this was not the course adopted by the officers of MMD. The ships of the plaintiff were never visited at the material time by any officer of the MMD. excepting for the purpose of tonnage computation., The ships were never visited to test the engine power. The ships were never visited to test the presence of life saving equipment. The ships were never visited to test whether the safety of manning rules had been complied with for grant of plying pass to those ships. Sea Scan-i went for repairs on the slip-way in March, 1987. Only in September, 1988, the tonnage booklets came. None of the officers of MMD had visited the plaintiff''s ships with the bona-fide intention of testing those for allowing those to ply the seas and for asking the plaintiff to make any rectification or supply any deficiency even if those were present on the ships. This confirms my view that the officers of the MMD deliberately withheld the processing of the plaintiffs ships papers and thereby caused loss to the plaintiff.

164. The plaintiff wrote to the principal officer of the MMD, Calcutta asking for all forms and papers and all requirements needed to be met by the ships. The letter was not replied to with copy forms annexed. It ill lies in the mouth of the defendant to argue in spite of this that survey forms were not filed by the plaintiff until 1988. It would, in this case, be travesty of justice to rule that the defendant is excused by the non-filing of a form by the plaintiff, or non-payment of a small tonnage fee, or for not having a notarial indorsement along with the plaintiffs declaration of ownership.

165. The second main legal defence raised by Mr. Roy Chowdhury, apart from raising the obstacle of the Cutler principle, was the point that for a tort of the nature involved in this suit, recovery of a mere economic loss cannot be made. Mr. Roy Chowdhury submitted that loss of profits for inability to catch and sell fish or loss of profits for inability to complete a re-sale of the ships to the Somalian organisation were both in the nature of loss or profits and, therefore, in the nature of a mere economic loss. The case relied on by Mr. Roy Chowdhury was Murphy''s case reported in 1990 Vol. 11 All England Reports p. 908. This was a case where the plans approved by the District Council and sanctioned by them appeared to have been wrongly made and cracks had been visible in the property and the house which had

been bought by the plaintiff. The Judge, who tried the suit, had found that the plaintiff Had been exposed to an imminent risk of health and safety. The decision of the House of Lords is reported at the place mentioned above. It is important to note that in that case, the building had not actually come down and neither any property nor the person of the plaintiff had been actually damaged. The view in those circumstances which had been earlier expressed by Lord Denning was, that if alter a negligent sanction of a plan cracks develop in the building and the building actually fells down and causes damage to the person or property of the plaintiff and damages are recoverable in those circumstances, then why should the Court not hold that damages are also recoverable at the stage where the cracks are visible, but the building has not actually collapsed. The House of Lords disapproved of this line of easoning.

166. The House specifically kept a part the question of economic loss which arises out of professional relationships, The main case in this regard is the case of Hedley Byrne, which concerned a negligent misrepresentation of a banker. The case had been cited before the House. The opinion of the House was that in the case of the local authority, the facts did not disclose that they were subject to a tortious liability in regard to the performance of their duty of a plan sanction. The House was troubled by an idea that if an incorrectly sanctioned plan can give rise to a tortious liability, then it would become indefinitely transmissible because the owner of the house might sell it to another and he to yet another and so on.

167. On a reading the case, which was placed at length, it is impossible not to form the opinion that the House, as a matter of social policy, was extremely reluctant to foist a tortious liability on the local authority which was a public body funded with public money. That a social policy might persuade the court to hold in certain cases that recovery of damages cannot be made is recognised in 12 Halsbury 1133, where it is said that the plaintiff may recover, or fail to recover, damages in a novel situation by reason of the view of public or social policy taken by the courts.

168. We are, however, nor concerned here with this principle which was important in Murphy''s case. We are concerned with the problem of recovery of economic loss. The principle of not allowing mere economic loss in cases of tort has long been evolved. The general rule is that unless the person, property or good name of the plaintiff has been injured damages cannot be recovered for a tortious act. If the plaintiffs person is wronged, it is the tort of trespass to the person or of false imprisonment If the plaintiffs property is tortiously dealt with it might be trespass, or detinue or conversion, and if the plaintiffs good name is damaged it might the tort of libel or slander.

169. An exception is the tort of professional misrepresentation which I have mentioned above and which'' I need not further mention in this case.

170. A good and relatively old English case to understand this principle is the case of Weller & Co. vs. Foot & Mouth which was cited in Murphy''s case and the therefore, I do not give its reference separately.

171. The case concerned the foot and mouth disease of cattle. It was alleged that because of the negligence of the defendant the plaintiff had been unable to use the cattle market and thus had suffered loss of profit. It was there said to the effect that for actions on tort, this type of loss of profits, pure and simple, which might also in modem terminology be called economic loss, is not recoverable. The plaintiff''s cows had not been injured because of the negligence of the defendants. If the plaintiffs cows had been injured recovery could certainly be made. But the loss of profits was claimed not through the chain of damage or injury to the plaintiffs person, property or good name. Therefore, mere economic loss was not recoverable. Murphy''s case is an extension of this principle in another novel situation where social policy has also affected the decision in a substantial manner.

172. In our case the plaintiff is not claiming loss of profits pure and simple, without showing that it has been occasioned through injury to his property. The plaintiffs case is that the plaintiffs property being the ships were in effect detained and not allowed to go to sea. Such a detention works in practice as nothing better than actually withholding the plaintiffs ships by physical force. If the plaintiff-is not allowed by the authorities, who are the only authorities which can permit the plaintiffs ships to sail, then the plaintiffs ships are in effect detained by those authorities to the coast. If there is such a detention and neither the coastal waters can be exploited for fishing nor the vessels sold out to foreign parties, and the plaintiff suffers damages thereby, then the plaintiff claims those damages not as mere economic loss, but as loss which has been occasioned through tortious acts or tortious omissions of which the direct subject matter is the plaintiff''s property being the two ships for fishing and three ships for resale.

173. Neither the Weller principle nor the Murphy principle has any application in facts of this nature. On the other hand the case of a simple truck detention cited by Mr. Ginwalla has much more bearing on the facts of our case. It is the case of Dhian Singh Sobha Singh and Another Vs. The Union of India (UOI), Mr. Ginwalla cited it primarily for the proposition that in India the law is, that for tortious acts the plaintiff is entitled to recover all direct losses suffered by the plaintiff because of the tortious act. But the facts in the case also show that if the plaintiff''s chattels are unlawfully detained and the plaintiff suffers loss, such loss can be recovered by an action by the plaintiff. Trucks of the plaintiff which had been hired out to the defendants, who were the respondents before the Supreme Court were not returned in time. Thus, the bailee, after the period of bailment was over, unlawfully detained the plaintiff''s goods. The Supreme Court discussed at length whether in such circumstances the plaintiff should sue for wrongful conversion of the trucks or should sue for damages in detinue because of wrongful detention of the trucks, in

the latter case asserting still the plaintiff''s title to those vehicles. The details of those discussions are Hot material here. But it is to be noted that the Supreme Court opined, (see paragraph 24) that the plaintiff cannot be compelled to choose a remedy which is less beneficial to him.

174. If a plaintiff can be permitted to choose the remedy of suing for wrongful detention of trucks of his, which are taken on hire and not returned, 1 do not see why the plaintiff cannot institute a suit for two ships of his which are bought by him from the Union of India but which the Union will not let him ply without good law or good reason for such withholding. Nor do I see why he cannot sue for damages when the three ships were held back to India and therefore could not be resold. I have already given the facts regarding the abortive attempts of sale of the ships to Botan, and this remark I make, that the permission was refused merely because the Shipping directorate and the ministry were at cross purposes. The one thought that export was for the ministry to sanction and the other presumably thought that a vessel would be registered and thus cleared for export by the Directorate. If this matter were a (sic) and we were in late 1988 I might have directed a reconsideration of the plaintiff''s request for permission to export, this time by proper application of the minds of the Nautical Advisers as well as the secretaries of the Ministry of Commerce. But this is not a writ and it is not 1988. So for the wrong suffered by the plaintiff he must be paid a monetary compensation and thus put back in, the position as if it had got permission to export and as if it had then exported the three vessels.

175. Apart from dealing, with Murphy''s case Mr. Ginwalla also gave a number of instances from decisions even in England where even public authorities had been held to be liable to private persons for breach of statutory and public duties.

176. I have already mentioned the case of Thornton which is the case of non-allotment of house or non-rendering of appropriate assistance to homeless persons with priority and that case is reported in (1979) 2 All E.R. 349. The next case cited by Mr. Ginwalla was the case of Garden Cottage Foods reported in (1983) 2 All. E.R. 770. The plaintiff in that case was buying milk from the Milk Marketing Board and making sales of large quantities to a single Dutch consumer. Presumably the resales were being made at much profit On the Milk Marketing Board refusing to continue sales to the plaintiff the plaintiff instituted the action. The EEC Treaty and Article 86 of it was considered by the House of Lords in that ease. But we are not concerned with that. We are, however, concerned with the view of the House that an abuse of a dominant position which was enjoyed by the Milk Marketing Board, could give rise to a remedy in damages. The question arose in an indirect manner as an argument had been made that if damages are an adequate remedy then an injunction compelling continuance of the sales of milk should not be granted. In coming to the conclusion that an injunction should not be granted the House had to opine that damages would be recoverable if the plaintiff made out the plaintiffs case

on facts. It is with this aspect of the decision that we are concerned.

177. Although the House of Lord''s decision is not binding on me, yet I have no hesitation in accepting this principle of law that if a plaintiff is injured by an abuse of a dominant position enjoyed by a statutory authority in India and the plaintiff suffers damage thereby the plaintiff can successfully maintain a suit for recovery of damages.

178. I am of the opinion that such an abuse, which must be willful and illegal (or unlawful or not permitted by law) is an instance of the Beaudesert principle which I have mentioned above and which, in my opinion, should be held as applicable in India, and I hold so.

179. The next case was that of Dr. Premananda Roy, reported in [1992] 1 All E.R. 705. This case also reached the House of Lords. The case is again an instance of the usual English practice of the defendants seeking to strike out the plaintiffs claim as not disclosing a cause of action. The doctor plaintiff in that case, who was a National Health Practitioner, had not been given the payments and reimbursements to which he alleged that he was entitled. The House refused to strike out the action and the House was of the opinion that the action was plainly not an abuse of the process of the Courts. The importance of this case is that the House was of the opinion that a judicial review was not the only possible remedy available to the plaintiff in the facts of the case before the House. I have already said in relation to the food sales stoppage case, that in India the plaintiffs remedy against a void administrative order is not limited to filing a writ. The case of Dr. Premananda Roy is a further confirmation of this view.

180. Mr. Ginwalla also cited the flat allotment case concerning the Lucknow Development Authority Vs. M.K. Gupta, The complainant M.K. Gupta in that case had not been allotted the flat although he had made full payments.

181. The Supreme Court was of the opinion that a compensation of Rs. 10,000/- awarded by the Commission should not be interfered with and the Supreme Court even made observations about the grant of aggravated damages for punitive purposes. The Supreme Court also allowed costs of Rs. 5,000/- to the respondent M.K. Gupta.

182. Lastly Mr. Ginwalla relied on the factory inundation case, which is the case of Jay Laxmi Salt Works (P) Ltd. Vs. State of Gujarat, Mr. Ginwalla cited it for the purpose that the Supreme Court in this case has used the word "negligence" in several places in a special way, which seems to indicate that the court is minded to include within its ambit even eases of deliberate and malicious injury. According to this view the tort of negligence in India would not only include acts and omissions which are in the nature of slips causing damage to the plaintiff, but would also include deliberate malicious acts which also injure the plaintiff. In this particular case, the salt factory of the plaintiff company had been inundated due to a bundh

construction and opening up of the gate during the time of downpour. The events had occurred in 1955/1956. The Supreme Court considered the factor whether a loss to the common man Should or should not go uncompensated. The case is yet another instance of a public authority being the State of Gujrat being held liable to a private plaintiff for tort. We are not concerned with the provisions of the Limitation Act which figured in an important position in that case before the Supreme Court. But in view of this case and others I am compelled to come to the conclusion that there is nothing in Indian Law in general and is nothing in the Merchant Shipping Act in particular which prevents the recovery of loss of profits by the plaintiff from the Union of India, in case the loss is established to have been caused by the acts and omissions of the officers of the Mercantile Marine Department, which has been established.

183. To fortify my above view it is necessary to deal with section 460 of the Merchant Shipping Act, 1958 which was relied upon by Mr. Roy Chowdhury as affording protection against liability. The said section reads as follows:-

S. 460. No suit or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done under this Act.

184. Mr. Roy Chowdhury relied upon sub-section 22 of section 3 of the General Clauses Act for emphasizing that an act still remains an act in good faith if it is done honestly even if the act is a negligent one. Thus he argued that even if Bhowmick and others were guilty of negligence they would still have protection for their actions if those were honest.

185. On the factual aspect of the case I have already reached the conclusion that Bhowmick''s actions and omissions were not honest. They were directed intentionally towards delaying the registration of the plaintiffs ships. I have also come to conclusion that the principal officer of the Mercantile Marine Department at Calcutta, viz. Dutt, also impeded by correspondence from his office the registration of the plaintiffs ships as much as he could. My conclusion is that Sircar displayed gross incompetence in being unable to compute the tonnage of the two ships at his first attempt even after having those beached so that he could take measurements where he wished and as he wished. Actions which are deliberately malicious, although perhaps not actions which are products of gross incompetence, are in a category worse than mere negligence and therefore, the above sub-section can grant no additional help to Bhowmick apart from the help, if any, which is afforded to him by the words of Section 460.

186. This would be a sufficient answer to section 460, since Bhowmick ruled the scene in 1987 and in 1988 at the Andamans, but much law was discussed in this regard and it would be inadvisable completely to leave the cases out of consideration.

187. It is also important to mention at this point that the suit is filed against the Union of India and three other persons named by their designation. The designation of the first defendant would be applicable to Dutt at the material time, as that of the second defendant would be applicable to Bhowmick at the material time. The third defendant is the Director General of Shipping. No question arises in this suit of passing personal decrees against Dutt or Bhowmick or any other officer of the Union of India because these persons are not sued personally. In a writ matter it is possible to strike out the unlawful or unconstitutional action of an officer and it is quite sufficient if the officer is impleaded by mention of the designation only. Indeed in writ petitions it is the usual course because officers keep coming and going to and from one particular government post to another. But in a suit for negligence, if a particular person is to be made liable himself for satisfaction of the decree to be passed in the suit then he has got to be impleaded personally. The decree to be passed in this suit, shall therefore be as against the fourth defendant which is the Union of India and the fourth defendant only.

188. Mr. Roy Chowdhury relied upon the case of the The Municipality of Bhiwandi and Nizampur Vs. Kailash Sizing Works, . He said on the basis of this case that an action so as not to be done in good faith has to be something worse than a mere negligent act. The case was cited for substantiating the same argument which was advanced on the basis of section 3(22) of the General Clauses Act To meet this argument of Mr. Roy Chowdhury Mr. Ginwall first relied upon the case of RAJA BAHADUR KAMAKHYA NARAIN SINGH Vs. UNION OF INDIA AND OTHERS., He submitted that the words "intended to be done" In section 67 of the income tax Act were held in that case to refer to future acts. This case does not help Mr. Ginwalla because section 460 contains the word "done" as much as it contains the words "intended to be done". Next Mr. Ginwalla referred to the case of Edwards vs. Vestry of St Mary which is a decision of the Court of Appeal reported at 58 L.J. Q.B. 165. A portion from the judgment of Lord Justice Bowen was placed and any judgment of his Lordship is always a pleasure to read amongst other things for the extreme felicity of his Lordship''s language. The question was whether supply of a water cart in a detective condition was a thing done or intended to be done under a particular English Act. Bowen L.J. said that such a point is no doubt a fine one as the point would involve deciding whether at the time of acting the persons were acting within the scope of their employment.

189. Mr. Ginwalla said on this basis that if the actions of the Union''s officers were outside the scope and authority of the Merchant Shipping Act and the relevant rules then they could not in any event be protected. Something intended to be done or done which was neither under the Act nor under the appropriate rules framed under the Act could not claim the protection of section 460. In my opinion. Mr. Ginwalla was right in this submission in regard to the misapplication of Part V and the new tonnage rules. I repeat here my view that no officer of the M.M.D. can be relieved from responsibility for not knowing what the legal duty under the

appropriate section of the Act or the rules was.

190. Thirdly Mr. Ginwalla submitted that the protection of section 460 is given only to persons and the Union of India is not a person. To substantiate this proposition Mr. Ginwalla relied on the case of M/s. Jaswant Sugar Mills reported at AIR 1966 Punj. 229 . It was held there that the word "person" would not include the government. The next case relied upon by Mr. Ginwalla is referred to in the Punjab case and that is the case of Ramrichpal Agarwalla and Others Vs. The State of West Bengal, It was indeed held there that the State is not a person. The case permits government officers to be described as persons in certain facts and circumstances but such a permission cannot be granted if the government or the State itself is to be described.

191. I agree with Mr. Ginwalla that the protection of Section 460 does not extend to the Union of India. I agree with him for the reason given above and also for this reason that where Parliament intended that protection should be given to the Government itself as much as to the Government officers, Parliament made specific provision in that regard. Mr. Ginwalla showed me such specific protection of the Government, given to it along with its officers separately. These are in Sections 15(1) and 15(2) of the Essential Commodities Act, 1955, in Section 40, sub-sections (1) AND (2) of the Central Excise & Salt Act, 1944 and in Sec. 155 of the Customs Act. 1962, which mentions both the Government and the Government officers separately.

192. I agree with Mr. Ginwalla in this regard also.

193. To hold the Union liable however I would first have to conclude that the Union''s officers are liable. Then the principle of vicarious liability will have to be applied. Even if the protection of Sec. 460 is extended to the officers, yet if the officers were otherwise liable to an action, the vicarious liability of the Union of India could not be got over. If an officer acting in the course of his employment does something for which the plaintiff can institute a suit for damages or compensation then, if the facts are appropriate and the wording of the protective Section is also appropriate, the action against the officer himself might be barred but such a bar would not automatically extend to the officer''s employers. A Section like Section 460 bars the remedy but does not wipe out the liability. Therefore if the officer of the Union is liable, then whether Section 460 operates or not, so as to protect the said officer or not, the liability of the Union of India must remain untouched.

194. Although the question of vicarious liability was not much argued by Mr. Roy Chowdhury yet I should refer to the case of Race vs. Home office, shown by Mr. Ginwalla which is reported at 1994(1) All E.R. 97. This was again a strike out action procedure adopted by the Home Office and the case again reached the House of Lords, a certain prisoner had allegedly been ill treated in prison. His clothes had been taken away. He had been asked to sleep on the floor and food had been thrown on the floor for him to eat from there. The question arose whether these

actions of the prison officers, could even if proved, make the Home Office liable.

195. The problem was the problem mentioned by Bowen LJ. i.e. whether the prison officers were acting in their course of employment or not. Surely if a prison officer when going back home from duty assaults a person on his own, the Home Office cannot be vicariously held responsible. Where, therefore, was the line to be drawn? The argument made by Mr. Harris O.C. as noted in the Judgment of the House is a brilliant combination of words. He had argued that the question posed above would be a question of fact and degree whether the prison officers were engaged in a misguided and un-authorised method of performing their authorised duties, or whether they were engaged in what was tantamount to an unlawful frolic of their own (at 102f) This argument was accepted by the House. I respectfully accept this way of judging whether the employer and especially a State employer, is to be held liable for untoward and wrongful actions of the State officers.

196. The question to be asked on the basis of this case would be whether Bhowmick, Dutt, Sircar and the high officers at Bombay, who were only writing letters and none of whom ever came down to Calcutta, were purportedly performing their authorized duties in an unauthorized way, or had they gone on a frolic of their own with the plaintiffs ships? The answer can but be one. They were acting in a misguided and wrongful way and in some cases in a deliberate and malicious way. But they were all along acting in their official capacities. They were all along using their official power. There was no going on a frolic of their own. They would not get joined, except by their holding of office. Thus the Union of India is liable, as the Home Office would have been liable in the Racz case, had the action of Racz proceeded further and had Racz been able to prove the allegations in the plaint. But the English public defendants, by use of that English genius for good administration and adoption of good public policy, will settle a suit that is likely to go against public officers openly after the point of law has gone against them. We have not reached that degree of expertise in Indian administration yet

197. Mr. Roy Chowdhury had often asked himself, while arguing, what is the tort his clients have committed. They might have made mistakes. But they were all along asking the plaintiff to perform only what the plaintiff was under a duty, to perform. The officers might not have been extremely friendly or extremely co-operative but a lapse of such a nature is not a tort.

198. I have given above various instances of the tort of the Union officers and I again summaries here a few of those lapses which do amount to tort. The first tort was the tort of applying a stricter and inapplicable law. This is especially true in regard to the registration requirements of part V in distinction from, those of part XVA. u/s 31 of Part V the particulars for registration necessarily involve the tendering of a surveyor''s certificate: No such certificate is required under Sec. 4350 also the tonnage rules that there were applied were wrong and inapplicable rules. Even when rules under Part XVA had been framed and the Merchant Shipping

(Registration of Indian Fishing Boats) Rules, 1988, were published in November that year and those rules made 11.5.87 tonnage rules applicable to fishing boats, even then those rules had no application to the plaintiff''s ships because the plaintiffs ships would not fit in any of the descriptions given in the 11.5.87 rules.

199. The next tort is the tort of intentional delay. Bhowmick did it shamelessly and he simply stayed away. 1 am not so much of the opinion that Sarkar deliberately miscalculated the tonnage. I am inclined to reach the other conclusion which would be that Sarkar was thoroughly incompetent and did not know what to do and therefore made numerous errors. A government servant who displays a sad want of necessary competence in a responsible and key position and thus injures the plaintiff exposes his employer to an action for tort

200. Bhowmick was far more incompetent than Sarkar. Bhowmick could not do a single thing about tonnage calculation, he did not want to do it and even if he had wanted his skill would not permit him to complete the task. As a handiwork of Bhowmick, a calculation made in regard to another ship named M.V. Tata Jay is exhibited While evidence was being taken the sheet of Bhowmick was sought to be taken out from the file of M.V. Tata Jay, presumably for Sarkar to took at it better and give instructions to Learned Counsel for the defendants. But the sheet was reinserted. It contains, as Mr. Lala emphatically pointed out, no fewer than 50 to 100 corrections.

201. The next tort was the deliberate jumbling of post registration requirements with pre-registration ones. The two notable matters in this regard are concerned with speed trials and stability of fishing vessels. Bhowmick also insisted upon full loading the vessels although he denied it when the plaintiffs complained to Bombay. I disbelieve Bhowmick''s denials. In case the officers had granted plying pass to the plaintiffs ships and the plaintiff had been able to ply the vessels no suit for damages for loss of profits for not catching fish would lie. But here also the officers were guilty of deliberately not applying their minds as to whether plying pass should or should not be granted to the plaintiffs vessels. Bhowmick never made a genuine attempt to visit the ships and to check whether Safety and Manning Rules had been complied with and to intimate the plaintiffs as to which insufficiency, if any, are to be supplied in this regard.

202. Bhowmick mentioned about the hull condition of the vessels bat he had never utilized any of the opportunities which had been given to him to inspect the ships hulls when those had been exposed for inspection. This is yet another instance of his deliberate inaction intended to injure the plaintiff.

203. I shall mention about the plying pass section and why I think that in regard thereto also the Mercantile Marine Department has tried to make a law upto itself but before doing so a few other topics have to be concluded. The first of these residuary topics concerns the evidentiary value of letters, the writers of which have

not come before the Court. It is a matter of quite some importance to the Union of India. This is because at the material time being the years 1987-88 Sarkar had seen the vessels for tonnage computation for some three days only in February 88 and apart from that no one has come from the side of the Union to give evidence in regard to the ships or the processing of the ships papers.

204. To my mind this practically makes the case of the Union ex parte. Did Bhowmik turn a deaf-ear to the 50 or 60 visits of the plaintiff to bring him to the plaintiffs ships? Did Bhowmick actually check any measurements in November 1987 when he went on Sea Scan 11? Did he find the measurements to be wrong? What papers was he carrying with him at that time? What was his attitude with regard to the grant of plying pass? What was his attitude with regard to the examination of the ships hull condition? No satisfactory answers to these and numerous other questions can be given from the side of the defendant at all through the oral evidence of any witness. Captain Barve was stationed all along at Bombay and never saw the ships at the material time. He did not know what Bhowmick or anybody else was doing at the Andamans as a part of his personal knowledge. In this view of the matter what is the Court to do regarding the allegations in Bhowmick''s letters and what value Is the Court to attach to these documents, the formal proof of which has been dispensed with, but no admission with regard to the contents of which has been made by the plaintiff? Mr. Roy Chowdhury was well aware of these difficulties. He cited cases for showing the evidentiary value of documents taken by themselves even if there is no oral evidence in regard thereto.

205. The first case in this regard was the case of P.C. Purushothama Reddiar Vs. S. Perumal, Mr. Roy Chowdhury placed reliance, inter alia, on head note (e) and paragraph 19. He said on this basis that once a document is properly admitted the contents of the documents are admitted in evidence also though the contents might not be conclusive evidence. This was an election case.

206. The next case was that of Lionel Edwards, a Division Bench decision of this Court reported at Lionel Edwards Ltd. Vs. State of West Bengal, Mr. Roy Chowdhury placed reliance, inter alia, on head note (C). The Division Bench there opined that if the documents are marked on admission without any reservation, the contents of the documents are also to be taken as admitted. In our case, however, there was reservation wade by the plaintiff as to the truth of the contents at each and every stage. The Division Bench referred in this case to the view of Bhagawati, J., (Senior) in the case of Lionel Edwards Ltd. Vs. State of West Bengal, There his Lordship had taken the classical view that the issue before the Judge was not whether the document had been written by (here, say Bhowmick) and that if that had been the only issue the proof of the signatures or the handwriting could have been enough. What was in issue before the Judge was apart from having signed or written the documents whether the contents of the documents were correct This could not be proved by a witness who had no personal knowledge whatever about the contents.

Our Division Bench expressly said that this view is not conflict with the view said that this view is not in conflict with the view taken by the, Division Bench.

207. The view of Bhawati, J., (Senior) is respectfully adopted by me and it is a perfectly standard view. Statements are of two types. Some statements are themselves facts in issue and can be proved by proof of the statement A promise to pay written in a letter is itself a fact and the letter can be proved to prove the promise. Libel made in a letter is itself a fact and the letter is the best evidence in a defamation suit. However, when a statement is made like, I went on board the ship to check the tonnage measurements, the statement itself is not a relevant fact in the suit. The relevant fact is whether the person actually went on board the ship to take the measurements. To prove this a person having personal knowledge of the going on board must come before the Court The best person would be Bhowmick himself whose absence has been most unsatisfactorily left unexplained. Some other person might also have been there but nobody has come on behalf of the Union of India.

208. The next case was that of Harnath Malhotra and Another Vs. Dhanoo Devi Agarwala, Mr. Roy Chowdhury placed passages from page 102. He. showed that some Balance Sheet copies were admitted in evidence without any objection. In such cases the contents of the document even if not conclusively proved would be admissible evidence.

209. The last case was that of Bishwanath Rai Vs. Sachhidanand Singh, Mr. Roy Chowdhury, inter alia, placed paragraph 7 from page 1953. The letter of a Swamiji was in issue and the Court said in that paragraph that in the absence of examination of the Swamiji the correctness of the statements in the letters cannot be held to be proved. The Court, however also held that the letter was admissible to show the fact that the Swamiji had in fact written such a letter with the contents which had a bearing on the issues involved in the case. To that extent the letter was held as admissible. This in my respectful reading of the judgment of the Supreme Court accords perfectly with the view of Bhagawati, J. (Senior) mentioned above. Nobody can dispute that Bhowmick wrote that he had gone on board the ship and that he had found errors in tonnage calculation but whether Bhowmick wrote these things or not is not material. What is material is whether he did find errors in tonnage calculations or whether he did go on board the ship and such other matters.

210. But the requests made by Bhowmick by his letters, in so far as those requests are themselves relevant facts, are proved by proof of the letters themselves. For example when Bhowmick requests for the stability booklet in a letter of 16.2.88, and the letter is proved, Bhowmick''s wrongful request is proved. This is because his asking for the thing not required is itself a material and relevant fact in this suit When Bhowmick writes to his Superior saying that the tonnage computation is complete and only the value of "d" is outstanding, such a communication by Bhowmick is proved by the proof of the letter. The plaintiff is entitled to make a comment on this that Bhowmick was displaying his incompetence by even writing

the letter because the value of "d" is given in the rules themselves and Mr. Lala showed in this regard Rules 4(1)(c) and 4(2)(i)(iii) from the 1987 tonnage rules. Thus Bhowmick was not only seeking to apply the wrong rules, he did not even know the rules which he was supposed to apply himself. To supply Bhowmick''s deficiency, the MMD, Calcutta sent a copy of the rules to Bhowmick on 10-2-88. To show this lapse of Bhowmick the plaintiff can rely upon the above communication made by Bhowmick although only the letter of Bhowmick is to evidence.

211. As against the lack of proper witnesses from the side of the Union the plaintiff put in its Managing Director Ashok Sancheti who was comparatively speaking, very much in the know of the affairs with which we are concerned in this suit. He had seen the ships before the auction and he had visited the Andamans again and again Be was the moving force from the side of the plaintiff in regard to the correspondence. He was trying to activate Calcutta and the Andamans by moving Bombay. It was he who had approached Somalia and Botan. Thus, so far as the plaintiff''s side is concerned the plaintiff had an all important witness to corroborate the statements made in the letters written from the side of the plaintiff. But the defendant Union of India is unable to return this compliment.

212. Mr. Ginwalla relied upon the case of Kamal Krishna Deb reported in 72 CWN 79 where an Hon''ble Single Judge of this court relying inter alia, upon the case of Subramaniam, reported at (1956) 1 WLR 965 made remarks to the effect that when the factum of a statement is proved such method of proof is nor hearsay; however, when the truth of the statement is sought to be proved this is hearsay. "It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by evidence, not the truth of the statement but the fact that it was made."

213. Mr. Ginwalla also relied on the case of AIR 1940 153 (Privy Council) The case concerns, inter alia, the statements made as to an adoption made to officials in the locality, not merely by the plaintiff himself in the presence of others but also by other persons and the dismissed Sardar himself. In these circumstances, the judicial committee was not minded to dismiss the statements as mere self assertions. Mr. Ginwalla placed a passage from the right column of page 155 where a statement made by the plaintiff had been taken down and where the plaintiff had signed the words that he was the adopted son of Horukrushno Naiko. Then again at the right column of page 157 the will of the Sardar was referred to and there the Sardar had said addressing his wife that after his death she would at her discretion adopt a son from among the sons of the Sardar''s younger brother.

214. In circumstances such as these, the Court might be unable to brush aside the contents of statements, even when those are tendered in proof of their truth i.e., when the maker of the statement is absent or when the statement is made against a person''s own interest. However, in our case although Mr. Roy Chowdhury faced the

problem of having practically no material witnesses for the relevant period of time. Mr. Ginwalla faced that problem to a far lesser extent, because he had one important material witness on facts. Still, he relied on certain cases to show that even in areas where Sancheti did not himself have personal knowledge, letters from the plaintiff could be relied upon on certain legal principles. This was mainly the reason why he cited the above decisions. He also cited the case of J.D. Jain reported at AIR 1982 SC 763. This was an industrial case and Mr. Ginwalla showed that the Supreme Court had held that where a complaint has been made, the evidence of the making of such complaint can be given by the witnesses in whose presence such complaint was made. This did not violate the rule against hearsay. In my opinion, this case is but another instance of the principle that where the statement itself is a relevant fact, the statement can be proved whether the statement is made orally or in writing.

215. The next case of Sanchindra Nath Chatterjee reported at AIR 1970 Cal 33 shows that the correspondence in the matrimonial matter which ensued between the two unfortunate parties was treated by the Division Bench as lot only relevant, but also revealing. Mr. Ginwalla placed paragraph 125 in this regard. He said that the looking into of the correspondence between the plaintiff and the different officers of the Union of India is permissible on this basis. Such letters contained, inter alia, complaints and requests. These complaints and requests being themselves relevant facts can be looked into and the plaintiff can rely on this without violating the hearsay-rule.

216. Mr. Ginwalla cited also the case of Babulal Choukhani Vs. Western India Theatres Ltd. and Another, and placed para 21 where the learned counsel''s reliance on S. 11(2) of the Evidence Act was noted. That section allows these facts also to be proved which make the existence of relevant facts highly probable, or highly improbable. In my opinion this case can at least be shown to use the Setters of complaint, showing that the writing of those render highly probable the grievance that Bhowmick had asked for full loading of the ships:

217. Mr. Ginwalla said that the letters can be looked into on the principle of res gestae also if the letters satisfy the test that those are part of the same transaction as the facts themselves and are immediately corrected with those facts. I must admit that the point of res gestae was rather raised by me first than by Mr. Ginwalla. To show when the doctrine of res gestae can be invoked Mr. Ginwalla relied upon the case of R.V. Andrews reported at (1987) 1 All E.R. 513 where statements of a stabbed person were held as admissible on these principles because those were spontaneous and contemporaneous and therefore, there was no possibility of concoction or fabrication.

218. In the case of Chhotka Vs. The State, which was next relied upon by Mr. Ginwalla, the necessity of immediacy of the transaction in regard to invocation of the doctrine of res gestae was pointed out. The spontaneity and immediacy of the

declaration in question were the important factors. These res gestae cases mainly concern criminal matters and the civil courts are not usually so much concerned with these doctrines as the writers of the letters usually come to the box when their letters are proved and those letters are used for the purpose of corroboration or for challenging the witnesses. It rarely happens as in this case that one side, namely the defendant, has left untouched the facts, without calling practically any witnesses for exculpating themselves on that score.

219. In this important matter therefore, I am of the opinion that where the truth of the facts alleged in the correspondence is involved and a proof this way or the other on these matters is likely to make the defendant liable, the defendant must fail in each and every case because there is nobody who is authorised in law to support such case on facts for the defendant, who has also come to the box actually to render that support. The cases cited by Mr. Roy Chowdhury do not go so far as to establish that if Bhowmick wrote something and the writing itself was not the material fact even then the letter is to be taken as some support of the defendant''s case. If I were to adopt that view I would go against the most salutary principle that where there are no recognized legal exceptions evidence should not be admitted or weighed in favour of a party which has not permitted such evidence to be challenged by cross-examination of the witnesses of that party by the adversary. If I were to let in the favourable statements made by Bhowmick and Dutt and all the rest I would be allowing those statements in, without getting those tested by cross-examination and this is contrary to long established rules and practice.

220. Another aspect of the Evidence Act arose in this manner that certain books of account of the plaintiff, being the cash books for wooden trawlers account were not proved to the full extent. Only one entry was proved from a cash-book. Mr. Roy Chowdhury raised the objection that if one entry only has been proved then the Court can look at that entry and none other. If the plaintiff had opportunity of disclosing and proving the entirety of the book and did not avail itself of that opportunity then the Court should draw an adverse inference in that regard. By such adverse inference the Court should enter the adverse finding that the plaintiff did not spend any money as the plaintiff claims to have spent for repairing the two ships excepting for what amount is proved by the single entry. The claim in this regard was that a sum of Rs. 22 lac had been spent for repairs.

221. Mr. Ginwalla answered this by saying that no case for adverse inference had been made out by the defendants. If the defendants wished to call for the entirety of any books it was for them to ask for production of those books or those entries of those books. If they did not do so and kept completely silent in the matter than they cannot ask the Court to draw an adverse inference. The first case cited in this regard was that of Mst. Ramrati Kuer Vs. Dwarika Prasad Singh and Others, Head note ''C'' of the case was placed and from the judgment amongst other paragraphs, paragraph 9. In that case it was argued that the accounts, if produced would

show-that certain amounts were received by widows as maintenance allowance. If produced, those would not show the payment to be half share of income. In these circumstances the court said the appellant had not asked in the court below that the documents be produced. Since they had not asked for production of the documents they were not entitled to ask the court to draw an adverse inference. The Court said that even if the withholding of the accounts meant withholding of the best evidence yet no adverse inference could be drawn from such non production. As I respectfully read this case, the Court here gave an instance of when not to draw an adverse inference. The Court''s power to draw an adverse inference in these matters is discretionary and is not compulsory. The facts and circumstances of non production have to be weighted in each different case before an adverse inference can be drawn. It is important to distinguish what is good and sufficient evident and what is insufficient, from non production of that evidence which gives a negative weight against the plaintiff''s case. The issue here v, whether the plaintiff has given adequate evidence for proving expenditure for repair of the plaintiffs ships by disclosing the cash book and the proving of one entry. The issue also is whether by not tendering all the other entries the plaintiff has rendered itself liable to the drawing of an adverse inference.

222. In my opinion it would be most unfair to draw an adverse inference in this case in regard to the cost of repairs. It would be unreasonable to hold that because the plaintiff has not formally tendered all entries in the cash book, the court should infer that had the plaintiff tendered all the entries those would not show additional and substantial cost to have been incurred.

223. In my opinion it was adequate for the purpose of this suit to prove even one entry. It was adequate because the cost of repairs need not be exactly ascertained in the suit but it is important for the plaintiff to prove that cost had been incurred for making the ships floating and seaworthy. For this purpose the disclosure of the cash book and the providing of even one entry was quite sufficient.

224. The second case relied upon by Mr. Ginwalla in this regard is the case of Indira Kaur and Ors Vs. Sheo Lal Kapoor, Mr. Ginwalla relied, inter alia, on paragraphs 8 and 9 of this judgment and drew my attention to the finding of the Court that, in the facts and circumstances before it, it was wrong for the lower Courts to have drawn an adverse inference of the plaintiffs impecuniosity from the non-production of the plaintiffs bank pass book. It was an appeal in a suit for specific performance. The Supreme Court upset the findings of no fewer than three lower courts. The case was that of a poor man whose son was ill and who had sold his house with a stipulation to buy it back later on. The lower Courts had held that the poor man did not have money enough to effect the repurchase and they had drawn the above adverse inference. The Supreme Court opined that the High Court had committed an error in drawing an adverse inference against the plaintiff for not producing the pass book in disregard of the fact that neither had the defendant called upon him to produce it

nor had the Court ordered him to produce it on his own.

225. This finding stares one in the face. Mr. Roy Chowdhury tried to point out distinguishing factors like the emphasis placed by the Supreme Court on the fact that the plaintiff was present at the Club Registrar''s office on deadline date, which was 16.8.77 but the defendant was not so present. Thus how could it be said that the defendant was ready to take the money from the plaintiff, ever; if he had it at the material time and place?

226. If I do not give weight to the opinion of the Supreme court expressed, inter alia, in paragraph 9, regarding the error of drawing the adverse inference as pointed out by it I shall be going against the doctrine of precedent. It is thus the law that in inappropriate circumstances it is wrong to draw an adverse inference merely because of non-production, when the other side has not called for the document and when the court has also not ordered its production. An adverse inference is to be drawn when a party wishes to hide something from the eyes of the Court. It is not a mechanical rule, but it is a rule of Justice. In a situation like the present, when the plaintiff has brought before the court the entire wooden trawlers account cash book it would be unjust and erroneous to draw an adverse inference against the plaintiff merely because it has not formally tendered more than one entry in the cash book.

227. The question of non-production occurs in this suit from another angle also. This time, it is non-production from the side of the defendant The drawings submitted by the plaintiff were not produced nor at least one fire plan which was retained by Bhowmick even when he had rejected the others. The suit was filed to September, 1989, almost in the thick of events, and it is in that very month that the refusal to export to Somalia had been made by the Ministry. In these circumstances the defendants had due notice that the documents might well be relevant in a suit where the plaintiff alleges wrongful withholding of registration. Thus, non-production of these documents by the defendants requires an explanation. It was for the defendant''s own benefit to produce those documents. Once the plaintiff has shown that drawings prepared with the help of a duly qualified Naval Architect were supplied to the defendant, it would then be for the defendant to show that those drawings, even if prepared by a qualified Naval Architect were so hopelessly insufficient that the defendants had to re-do the task themselves on their own. We have only the word of mouth of Sircar that the drawings were inadequate excepting for the liners plan of Sea-Scan I which did not have the offset table only. This has come from a witness who tried to emphasize the shrinkage of the drawing paper and the consequent error in drawing calculations before it became clear to him that the court was sufficiently aware of elementary scientific principles so as not to be misled by such red herrings.

228. Mr. Ginwalla said in this regard that there are cases in show (sic) even in suits for negligence an adverse inference might be drawn for (sic) production of relevant

files. He showed me the case of the State of Punjab Vs. Modern Cultivators, Ladwa, He placed, inter alia, paragraph 4 from the judgment. There also the Supreme Court observed that in view of the pendency of the suit the relevant documents must have been preserved. The Court opined that it was clear that the documents had deliberately not been produced. In this state of the finding the Court also drew an inference of an adverse nature that the defendant was negligent in the management of the Canal. The documents which were not produced, inter alia, were the files of the Canal Officer and various reports of the Executive Engineer which were material to the question of the breach of duty.

229. I need not go so far against the defendant in the matter of non-production of the drawings as to draw an adverse inference. It might be said that the copy drawings were equally with the plaintiff who had filed the suit in September, 1989 and the plaintiff might have produced those drawings also. But the conclusion that has to be reached against the defendant in this regard is that they have not been able to show the Court that the drawings of the plaintiff were insufficient It has not been the case of the defendant that the drawings were like the scribblings of a child on a piece of paper which had no value at all. If such were the case non-production by the defendant might have been understandable. But here the balance had to be weighed. It had to be seen whether the Naval Architect''s drawings were wrong or right. There was an assessment to be made and a decision to be reached on a rational application of the court''s mind to the facts and figures apparent from the defendant''s drawings. Since these drawings are not there the Court is unable to reach the conclusion that those were insufficient. And if those were not insufficient the entire exercise of beaching the vessels, of doing a recalculation, and then sending it over to Bombay, (even if those contained some eight glaring errors) was an exercise in futility which only helped to stop timely operation of the plaintiffs vessels.

230. Mr. Ginwalla had made a complaint that the defendants were obstructive in the matter of giving of inspection of documents of which the plaintiff had asked for inspection. They had asked for inspection at several different places being Calcutta, the Andamana, Delhi and Bombay. All these places were involved. Delhi was involved, inter alia, because of the refusal of permission to export. Mr. Ginwalla pointed out that Court orders bad to be obtained for getting inspection and even after the first order was obtained the dates fixed for inspection at these different places were unrealistic. On the basis of those dates one would have to travel at such pace and within such a short time from Bombay to the Andamans that the flight services available in India would not allow it. It is also on record that to make the dates realistic those had to be altered by obtaining yet another order from Court.

231. Mr. Roy Chowdhury submitted that on these altered dates what inspection was taken and what was not taken, cannot be made the subject-matter of mere argument from the bar. Mr. Roy Chowdhury is absolutely right in this regard. 1 am

not in a position to opine that documents were withheld from the plaintiff at the Andamans altogether, which was a submission of Mr. Ginwalla from the bar without having any evidence from the box in this regard.

232. Mr. Ginwalla, however pointed out that inspection or no, this was a case where the plaintiff could not and did not claim privilege. The court is entitled to draw all inference, adverse or otherwise from any non-production of any relevant document by the defendant and these documents are all in the same category as ordinary private ones. To show the strict rule which has to be observed for claiming privilege Mr. Ginwalla referred me to the five Judge decision in the case of The State of Punjab Vs. Sodhi Sukhdev Singh, There the Court considered the controlling section being section 123 of the Evidence Act. Mr. Ginwalla placed before me amongst others paragraphs 12 and 13 and also passages from the right column of page 513.

233. He also showed me paragraph 20 of the judgment and section 162 of the Evidence Act which was considered there. It was Mr. Ginwalla''s submission that it is for the court to decide the admissibility of a document in respect of which privilege is claimed. Priviledge cannot be claimed so as to hide the document even from the eyes of the Court, or to masquerade any and even reason of suppression as a public interest. I accept Mr. Ginwalla''s submission in this regard. If there were a due claim for privilege I would have to consider whether the sections above referred to applied and in that event I would also have to decide whether to inspect the documents claimed to be privileged myself in court or not.

234. The question, however, does not arise because there is no appropriate claim for privilege in this suit in regard to any document whatsoever. The manner it has to be claimed by an appropriate Secretary or a Minister is explained by the Supreme Court, inter alia, at the right column of page 504. No such claim was made by any appropriate authority in regard to any document involved in this suit.

235. At the very end of his arguments. Mr. Roychowdhury merely hinted at the point of sovereign immunity. He did not rely on any case in this regard but, in his thoroughness, Mr. Ginwalla referred to a case even in this respect. That is the case of N. Nagendra Rao reported at AIR 1994 Supreme Court 2663. This was a case where goods had been seized under the Essential Commodities Act and released later. Damage was claimed to have been suffered and damages were sought to he recovered. The Supreme Court discussed at length those acts of State which are immune from scrutiny and Mr. Ginwalla referred, inter alia, to paragraphs 23 and 24 in this regard. A passage from Laski is also quoted in the judgement where it is pointed out that the State, because it is a sovereign, is distinguished in these matters from all other associations. I do not understand how in our case sovereign immunity can be claimed when the entire transaction is of an essentially commercial nature. No act of State was involved in this Suit or in any of the actions of any of the officers of the Mercantile Marine Department. I do not think any further discussion in this respect is called for.

236. Although the witness Sancheti had imputed corruption to Dutt and Bhowmick, he did not impute it so much to Sarkar. Yet when Sarkar went to the box, Mr. Ginwalla suggested that at his instance the plaintiff was asked to get the drawings prepared by one Bijit Sarkar. The identity in the surnames is coincidental. The imputation and suggestion in cross-examination was that if Bijit Sarkar prepared the drawings then the witness Sarkar would get a share of his fees underhand. I am a little puzzled to understand why, when Sarkar had undertaken the computation himself there should even then be somebody else to help him but be that as it may. I must also record that after some preliminary hesitation, which was more apparent from Sarkar''s manner than from what he said from the box, he denied having suggested the name of Bijit Sarkar.

237. Mr. Roychowdhury in no uncertain terms said that it was unfair on the part of Mr. Ginwalla to make a suggestion of this nature without laying She foundations for it in the examination-in-chief.

238. Mr. Ginwalla said that there was no unfairness or improperietry involved. He said that the principle in Carapiet, reported at AIR 1961 Calcutta 359 has no application in these circumstances. He said that the Carapiet principle applies when the party calling witnesses second tries to produce a surprise witness without suggesting the case to be made through that witness to the witnesses of the party calling evidence first. In my opinion Mr. Ginwalla is right in this regard but a further explanation is necessary.

239. In the Carapiet situation if a surprise witness is called by the party calling his witnesses later, then the Court cannot, according to usual general principles, altogether discount the evidence given by that surprise witness. But if the Court cannot discount that evidence, the party calling its evidence first will be prejudiced. It will be prejudiced because it has been tricked and surprised by a case suddenly sprung upon it.

240. If, however, a party calling witnesses first has not made out a case and suggests that case to the witness of the party calling witnesses second, than either such suggestion is accepted or rejected. If it is accepted then there is no harm because it is quite a fair way of conducting a cross-examination. Cross-examination is neither restricted to relevant topics nor need it be completely freed from surprise value. If, however, the suggestion in cross-examination is not accepted, then that part of the case fails because it is well known (that no amount of suggestions can become evidence. Thus, the party which has not given evidence in regard to the surprise suggestions in the beginning, ends the trial without having any evidence in its support. It is quite different from the Carapiet situation where the Court actually has to discount a portion of the otherwise admissible evidence because of unfairness, in our situation I simply accept Sarkar''s case that he had not suggested the name of Bijit Sarkar and I do not see how Mr. Ginwalla is to be blamed for unfairness in cross-examination in this matter.

241. This brings me to the last of those aspects in which the Mercantile Marine Department has sought to make a law unto itself. This is the matter of grant of plying pass u/s 41 of the Merchant Shipping Act. Mr. Ginwalla has not made arguments so much on this section because it is in Part-V. Captain Barve who was on the nautical side of the Marine Department at Bombay said from the box that registration of ships takes a long time. Thus his advice was that a plying pass should be issued so as nor to keep the plaintiff''s ships idle. Under what section should a plying pass be issued? Of course, the answer must be, section 41.

242. I have set out section 41 practically at the beginning of this judgement. I need not set it out once again. A bare reading of that section will show that it is intended for grant of a pass to an unregistered ship when she wants to go from one Port to any other Port in India. Plying pass must be granted from the first mentioned Port. The plying pass must specify the time and the limits for such certificate.

243. It is impossible to read into the section an alternative to registration which was inserted by the Legislature to give the Registering Department a sleeping time. Yet it appears that, that is the exact use to which this section has been put. Practically all vessels have a plying pass time before the officers wake up from their slumber and are able to grant a registration certificate. During that period of enjoyment of a plying pass the ships not merely pass from one Port to another but they go out from one Port and come back to the same Port and catch fish in between.

244. Captain Barve did not explain why registration should take a long time and therefore plying pass should be issued. A survey even under Para-V at the principal ports of Calcutta, Bombay and Madras is supposed to take about 72 hours. In these circumstances registration should not be so delayed as to compel the Mercantile Marine Department to pervert section 41 and to put it to a use for which it was never intended.

245. A paradox of this discussion is that if the Mercantile Marine Department in this case had used their ''own law'', which is not the law of the land, and had granted plying pass to the plaintiff''s vessels either u/s 41 or in the shape of a special exemption u/s 435X which is contained in Part XVA and on that basis the plaintiff had been able to ply the vessels, the plaintiff would not be able to claim, loss of profits. Thus the plaintiff would have benefited from a wrong application of the law, but this was not what happened in fact and thus the discussion has only theoretical and no practical value.

246. The time has come now to travel on to the last of the topics in this suit which is damages. Mr. Ginwalla''s submission was that in India the law is that a person who suffers the consequences of a tortious action can claim that loss suffered, due to the direct and immediate consequences of such wrongful action. In England the law has taken a slight turn and the damages which can be claimed are to be foreseeable and not merely direct. The point arose in this way that to one case a person had dropped

a plank into a ship''s hold, as a result of which the oil vapour in there caught fire and the entire ship exploded Now, a consequence of this nature is no doubt a direct one, because it is an immediate consequence of the dropping of the plank. But it is a neat issue whether the person dropping the plank in the circumstances then prevailing, could ordinarily be expected as a reasonable man, to have within his contemplation the reasonable possibility that merely because of the lapse of the drop of a plank, the entire ship will be destroyed in flames.

247. This point of law is interesting, but the point does not squarely arise in our case. Because, when Bhowmick, Dutt and Sarkar and the inactive superiors of theirs at Bombay, were, by their actions and omissions holding up the plying of the plaintiff''s vessels, and when the officers of the Ministry and of the Shipping Directorate were at cross purposes and thereby refusing permission to the plaintiff to sell its ships it would be within their contemplation as a foreseeable consequence, and it would also be a direct consequence, that the plaintiff would suffer damage for their breach. Thus it is not necessary to enter into the discussion whether the damage was suffered more as a direct consequence or more as a foreseeable consequence. Since it is both, damages must be awarded.

248. I note, however, the cases cited by Mr. Ginwalla to show that damage which is the direct consequence of tortious action, must be made good according to Indian law, whether the consequence was foreseeable or not. The first is the truck detention case mentioned by me above which is reported at Dhian Singh Sobha Singh and Another Vs. The Union of India (UOI), He then referred to a judgement of Sir Ashutosh in the case of India General Navigation and Railway Co. Ltd. Vs. The Eastern Assam Company Ltd., It is said at page 317 on the right hand column that when negligence has been established liability follows for all the consequences which are in fact the direct and natural outcome of it, whether the injury is a consequence that was foreseen or not This law is binding on me and the decision in this case was that of a Division Bench of this Court. Next, reference was made to the case of Poddar which is the electrocution case I have referred to above, Gambhirmull Mahabirprasad Vs. The Indian Bank Ltd. and Another,

249. In the judgement a basic principle regarding grant of damages as set out by Lord Blackburn in (1880) 5 Appeal Cases 25 at page 39 is approved. It is said that by damages a money compensation should, as nearly as possible, put the party who has been injured in the same position as he would have been in if he had not sustained the wrong. Applying this principle I must put back the plaintiff in the same position it would have been in if it had been able to ply the ships and sell the catch for profit and also thereafter sell off the three ships one by one to the Somalian organization named above.

250. The question of quantification of damages arises now. The most important remark that has to be made at the outset is that Mr. Roy Chowdhury in his arguments left the aspect of quantification of damages completely untouched. He

addressed me on liability but he did not address me on the facts regarding quantification of damages at all. He did not refer to the evidence of Mallik or Guha Roy or Katela or to the report on the question of quantum of damages which is marked Exbt. AAA.

251. Note the stark contrast this makes with the long and elaborate factual arguments made on several other topics, e.g. stability test Mr. Roychowdhury took a long time to place before me, how, in the beginning before even the first bitternesses had ensued, the plaintiff had itself asked for stability tests to be performed; how, it has been shown, that when preparations are complete, the test itself is merely a matter of a few hours; how the plaintiff, to push off stability experiments, had asked for a year''s time for a job requiring only a few hours. 1 have concluded on facts, nonetheless, that the insistence on stability tests and a stability booklet was made on a wrong view of the law and this course was maliciously pursued at the wrong time, i.e., even before tonnage computation and registration. So as to obstruct the plaintiff and saddle it with extra and fruitless expenditure. But, see the difference in the defendant''s approach on a factual topic like this, and the topic of quantification of damages, which is also very much a factual topic.

252. On the application of the theory of adversary procedure this would simply mean that according to the assessment of the defendants they had nothing to say on the quantification of damages if the court came to the finding that they were liable. On this basis I would simply have to decree the suit as claimed i.e., grant loss of profits at the rate of Rs. 20,000/- per day per ship from April, 1987 to March, 1989 for Sea Scan I and from August 1987 to March, 1989 for Sea Scan II and also allow damages for a million dollars less the expenses necessary for sending out the ships to Somalia, in my opinion the plaintiff is entitled to all these decrees on the simple application of the principle mentioned above.

253. But, having looked at the facts closely during some 60 days of trial 1 am unable to grant the entirety of these damages, because the periods as claimed and the sum as claimed have to be cut down a little. My reasons for this are set out below.

254. First, let me take the figure of the damages per day per ship which the plaintiff is entitled to get. The figure set out in the plaint is Rs. 20,000/-. But the figure proved by the plaintiff is Rs. 18,000/-. Therefore the per day estimate for each of the two ships Sea Scan 1 and Sea Scan II should be Rs. 18.000/-.

255. I have also to explain, (although it is strictly not necessary in law, if the adversary principle is applied) how the figure of Rs. 18,000/- has been arrived at. When Sancheti was giving evidence he said that the profit earning ratio between his ships which were plying at Vizag, being Sanfood 1 and Sanfood II and the ships which he had bought at the Andamans would be in the proportion of 1:2.5 (one is to two point five). This figure was used by Mr. Mallik in the making of the report. Mr.

Ginwalla had shown the figure to Sancheti although the report had not until then been proved and this course had to be adopted because two witnesses could not be called at the same time. It is usual to show the first witness documents intended to be proved by later witness on Counsel''s undertaking to prove these later and this is the course which was adopted in this suit.

256. It is a matter of paramount importance to note that on this figure of 2.5 Sancheti was not cross-examined at all.

257. Sancheti had undertaken to keep all the files and vouchers in regard to the Sanfood ships in court during the entirely of the trial. That undertaking has been obeyed and the heap of those documents were lying at the corner of court Room No. 14 when I started dictating the judgment there and I see those lying at the comer of Court Room No. 13 where I am dictating judgment today.

258. All those documents had been disclosed and offered for inspection. Those documents had been examined by Mallik, Guha Roy and their team and it was on that basis that they had projected the profit figures for Sanfood 1 and Sanfood II and computed by application of the multiplying factor of 2.5 the projected loss of profits for Sea Scan I and Sea Scan II.

259. Guha Roy told in cross-examination that if the figure of 2.5 supplied to them by the owners was wrong their project estimate and report would be correspondingly wrong. But the figure cannot be held to be wrong because it was left untouched in cross-examination and therefore accepted by the defendants.

260. Mr. Roy Chowdhury submitted that it was unknown to him that a procedure can be followed where the books are themselves not exhibited and yet the result of the books is used in the computation of damages This is often a permissible procedure where the documents are voluminous Usually the Court in such matters passes a decree with an appointment of a commissioner to take accounts and then the figure for the decree is ultimately arrived at. But here an even better procedure has been adopted It is the procedure where the party uses Section 65(g) of the Evidence Act. That Section permits the use of the report of an expert examiner who has examined the accounts himself and gives to the Court the result which is what the Court is primarily concerned with.

261. In my opinion Section 65(g) has been appropriately used in this cast: The books were disclosed and were not only before the Court but also thrown open to inspection to the defendants although they had not thought it necessary to undertake that task in any very great detail, it at all. Mallick and Guha Roy themselves did not actually see each and every figure and each and every relevant entry of the numerous books and voucher files which were identified by Katela. Section 65(g) in its terms does not require this. It requires that the voluminous documents and records be examined by an expert examiner. Examination of these audited books and vouchers by an expert accountant is not done in the same

manner today as it was done in 1872 or before that time. It is quite permissible for an expert and a top accountant like Mr. Mallick to engage a team and make random checks, and thus bring to bear upon those documents the entirely of his accountancy expertise. When he does that and when he signs a report it cannot but he said that he has examined the documents and being satisfied he has put his signature to the report.

262. In cross-examining Mr. Mallik, Brother Sinha who was then at the Bar had put a question that if Sea Scan I and Sea Scan II were not refrigerated vessels would not the report go? The answer was largely in the affirmative. The question however was not followed up. There are no details available or evidence on record as to whether refrigeration by use of an electrical cum mechanical plant or the refrigeration by use of ice was in issue. It is impossible to reject the claim for damages made by the plaintiff because of an answer given by an accountant in the matter of the refrigeration of a vessel upon which he had not come to speak.

263. The accountant had come to speak on facts and figures and refrigeration did not enter into it. Mr. Ginwalla has handed up to court host of materials in the shape of scientific books on ships and their refrigeration and he has even gone so far as to say that in certain circumstances vessels which are not mechanically refrigerated can catch more fish and earn more profits by use of ice than otherwise. It is not necessary to enter into these details. It is sufficient to point out that it is not the defendant''s case than a vessel which is not mechanically refrigerated is unable to catch fish or make any profit therefrom. Thus I cannot erase the effect of the entire report on the basis of a single answer given by Mr. Mallik.

264. The value of Rs. 18,000/- per day being ascertained we now have to see for which period it is applicable to Sea Scan I and Sea Scan II. In this and other regards in respect of quantification it is important to bear in mind the case of Gambhirmull Mahabirprasad, reported at AIR 1963 Cal. 163. It was a case where the plaintiff had claimed damages and it was alleged that as a result of the Bank''s negligence, the plaintiffs goods were never reshipped from Burma to Calcutta. Mr. Amiya Kumar Bose, who had taught me the little that I know of the law, was appearing for the plaintiff in that case. Amongst the many legal arrows in his quiver, there was a collection of legal authorities which, although little known, were of the highest binding effect, and also having great relevance on a lawyer''s everyday questions. Two such authorities accepted by the court here can be found at paragraphs 66 and 68. The ratio is this, that where the plaintiff has established his right to get damages, the Court cannot fold its hands and grant no damages because those are not mathematically accurately ascertainable. In compelling circumstances the Court might even have to make a pure guess. My opinion, with respect, in this matter is, that when the plaintiff has done all that it could reasonably be expected to do in the matter of bringing before the Court the facts and figures for computation of damages, the Court must make an assessment and reach a figure. It cannot

non-suit the plaintiff on a matter of pure arithmetic. This principle has to be borne in mind in the computation that I make below.

265. According to the plaintiff Sea Scan I had become sea-worthy and able to ply and catch fish in April, 1987 after it had come out of the slip way accept this evidence. In my opinion the beginning of the period of computation for Sea Scan 1 should be April, 1987.

266. But I cannot compute the period upto March, 1989 because after April, 1988 Sea-Scan I was not in a fit condition to ply. In a letter of 20.4.88 the plaintiff wrote that Sea-scan I has badly listed on the beach and the engines are spoilt due to water ingress. It is thereafter on record even from the correspondence on the side of the plaintiff that only Sea-scan II was in an operating condition. The plying period of Sea-scan I which was thus rendered useless because of the defendants'' misdeeds is from April, 1987 to April, 1988.

267. Sea-scan II according to the plaintiff was ready in August/September, 1987. I start the period of loss from September, 1987. The claim here also goes upto March, 1989.

268. But during that period the plaintiff had run into a serious financial crunch. One of the plaintiff''s two Vizag vessels San-Food had caught fire on the 8th of June, 1988. The plaintiff was put under surveillance and investigation by the CBI. Nothing came out of it excepting harassment and loss. The second vessel San-Food was grounded at Roychawk and permission for plying in respect of this vessel also was refused. Sancheti reminded me that I had myself in the Admiralty Jurisdiction passed an order for sale of this vessel also was refused. Sancheti reminded me that I had myself in the Admiralty Jurisdiction passed an order for sale of this vessel.

269. Because of these factors, and perhaps also others, the plaintiff admittedly had disbanded the plaintiffs crew in the Andamans in autumn 1988. If the crew is disbanded and there is a serious financial crunch I cannot go to the extent of holding that even after autumn 1980 the plaintiff could have run Sea-scan II as before and earned profits. Mr. Roy Chowdhury had difficulty in understanding the expression "autumn" but I have no difficulty in that regard. Autumn starts, in my opinion, from September, and thus the loss period for Sea-scan II is fixed from September, 1987 to September, 1988.

270. In case of each of the two ships there is thus a 12 month period of loss. I have to knock off a period from even this so as to allow a reasonable time to the defendants for processing papers. It should not be more than 7 or 15 days in the case of a country where, even according to the defendants, fishing tonnage is badly needed and fishing export is likely to bring in foreign exchange. But to give the defendants the maximum leeway, knock off one month from the 12 month period in case of both the ships.

271. Thus we get a 22 month loss period being 11 months each for the two ships. Multiplying 22 with 30, which is the number or days per month, and multiplying this product with 18,000 rupees per day which is the loss of profits per ship per day the Union of India being the fourth defendant is liable to pay the plaintiff on this count a sum of Rs. 1,18,80,000/- i.e. rupees one crore eighteen lakh eighty thousand.

272. I do not allow any loss of fishing profits for Sea-scan III.

273. The next count is for loss for inability to sell. In my opinion, the claim of a million dollars as the contract price has been soundly made. After knocking off expenses necessary for reaching the repaired ships to Somalia this is the amount to which the plaintiff would be entitled. I should not however, allow the decree to be obtained in terms of US dollars although I have jurisdiction to pass such a decree in such a manner. I would rather convert this into rupees.

274. The point here arises as to what should be the date of conversion and the exchange rate at that date. The rate in 1987-88 was far lower than the rate which is prevalent to-day. In this regard. Mr. Ginwalla cited two cases. The first one is reported at Forasol Vs. Oil and Natural Gas Commission, where the Court considered five different competing dates for obtaining the rate of conversion. In the second case which is the Renusagar case reported at AIR 1994 SC 863, the Supreme Court again entered into these questions. On the basis of the above two cases it is now the Indian law that the rate of conversion on the date of judgment should be applied. In this respect could have taken 30 rupees per US dollar to be a rate below which the conversion rate has not fallen in the near past and is not likely to fall in the near future either, but Mr. Lal points out, from the Economic Times of to-day that the rate of conversion is 34.83 rupees per US dollar as on date.

275. Applying this figure a million dollars convert into Rs. 3.48,30,000/- i.e. Rupees three crore forty eight lakh thirty thousand.

276. Now, I have to apply the principle of Gambhirmull and knock off amounts which would be necessary for repair and transport of these vessels to Somalia

277. It is (sic) that Arnab Sen, the person contacted for transport had asked for Rs. 1.98 lakh per vessel. Thus on his account for the three vessels I have to knock off a little under Rs. 6 lakh and I take the figure at Rs. 6 lakh.

278. In the period of end 1988-89 Sea-Scan II would require the least of repairs and it would go first. Even the report of Sircar dated March, 1989 mentions some leaks in the hull of Sea-scan II and I am not surprised if there were some leaks after the entire crew was disbanded in autumn, 1988. Sea-scan I would also have to be repaired and much more heavily than Sea-scan II because it had fallen on its side of the beach where Sircar had the pleasure and privilege of taking its measurements.

279. Sea-scan III would have to be brought out of water and repaired and this would perhaps require the heaviest cost.

280. The cost incurred for repair of Sea scan I and Sea scan II in 1987 was Rs. 22 lac. The value of the two Sanfood vessels as given by Sarkar was Rs. 87.66 lack in 1981. The value of the three vessels Sea scan I, II and III as declared by the plaintiff to the bank, who had seen the vessels was Rs. 1.69 crores. On this basis and on my estimation in the entirely of the facts and circumstances of this case I would knock off somewhat less than one third the contract price, today converting to the sum of Rs. 1 crore, for repair of all the three vessels and putting them successfully in a fit condition for transport to Somalia. Thus, deducting these amounts from the contract price the plaintiff is entitled on this account to a decree for Rs. 3,48,30,000/- less Rs. 1,06,00,000/- i.e. Rs. 2,42,30,000/- rupees two crore forty two lack thirty thousand.

281. Mr. Ginwalla has also claimed exemplary damages. He has invoked the principle definitely recognized by the English Courts that exemplary damages can and should be granted in appropriate circumstances. It is the accepted principle there that where necessary the Court must teach the defendants a lesson. The lesson should be that tort does not pay. The case relied on in this regard is the case of the Italian landlord evicting his tenants in a most summary and illegal manner. After eviction they had to stay outside with a friend and even their belonging had been thrown out. The case is that of Drane vs. Evangelow, reported at 1978 (2) All E.R. 437. Our Supreme Court also in the Consumer Forum Flat Allotment case, reported at 1994(1) SC 243 mentioned about the grant of punitive damages.

282. This case is an appropriate one for grant of some exemplary damages although in my opinion the plaintiff is not entitled to as high a figure as 25% of the total damages as was claimed by Mr. Ginwalla. It is indeed necessary to teach thee Mercantile Marine Department a lesson so as not to ill treat an Indian company and an Indian Company''s ships in the manner they have done in this case. In my opinion, however, the grant of exemplary damages should be limited to no more than Rs. 5 lac.

283. The last is the question of costs. The suit was heard for 56 days. The dictation of the judgment has today entered the 7th day. If I add to it the 56 days of trial the total number goes above 60. Taking the figure at even less than Rs. 10,000/- per day and only for the days the suit was heard in my opinion the 4th defendants should pay the plaintiff the costs of this suit assessed at Rs. 5 lac.

284. Although the issues have already been answered in the above discussions, out of pure deference to form, issue No. 1 is answered as "Yes, for Sea scan I and II," issue No. 2 is answered as "they wrongfully and illegally did not grant, registration and export permission", issue No. 3 is answered as "yes, and the Union and it''s concerned officers did abuse their power and usurp powers, and acted arbitrarily and malafide with intent to injure the plaintiff and the suit is maintainable", issue No. 4 is answered that "The defendants did wrongfully and illegally fail and neglect to discharge their statutory obligations in regard to Sea scan I and II for sailing and

for all three for reselling." issue No. 5(a) is answered as "Yes", issue No. 5(b) is answered that "The loss is wholly attributable to the defendants and the office bearers mentioned above" and regarding issue No. 6 I have mentioned the exact figures above after taking as much care as I could.

285. The plaintiff shall therefore be entitled as against the Union of India, the defendant No. 4, to the four respective sums of Rs. 1,18,80,000/-, Rs. 2,42,30,000/-, (as damages for loss of profits for not plying and for not being able to sell off), Rs. 5 lac (exemplary damages) and Rs. 5 lac (assessed costs), and there shall be decree accordingly, for Rs. 3,71,10,000/-, in favour of the plaintiff against the Union of India, the fourth defendant in the suit.

286. There shall be interest on judgment at the rate of 11% per annum on the first three of the four sums mentioned above. Stay of operation of this decree is prayed for by Mr. R.P. Mookherjee but it is refused.