

(2010) 07 DEL CK 0383

Delhi High Court

Case No: CS (OS) 48 of 1970

Jayanti Shipping Co. Ltd.

APPELLANT

Vs

Dr. Dharma Teja and Others

RESPONDENT

Date of Decision: July 19, 2010

Acts Referred:

- Companies Act, 1956 - Section 291
- Trusts Act, 1882 - Section 10

Hon'ble Judges: S. Ravindra Bhat, J

Bench: Single Bench

Advocate: N.K. Kantawala, for the Appellant; Nemo, for the Respondent

Judgement

S. Ravindra Bhat, J.

The plaintiff, by way this suit, claims recovery of Rs. 1,39,64,197.98 against the defendants. Since they were proceeded ex-parte by order dated 30.09.2004, the Court considers it appropriate to discuss the facts as established through the evidence by the plaintiff.

2. The facts of the case are that the plaintiff is a company incorporated under the Companies Act, 1956, involved in the shipping business. The first defendant was appointed as a Chairman of the Board of Directors of the plaintiff on 14.02.1961 and the second defendant was appointed as its director on 11.11.1961. Sometime in the same year, i.e. 1961 the two defendants negotiated a deal on behalf of the plaintiff for purchase of 7 liberty vessels and two sales contracts dated 15.11.1961 were entered into on behalf of the plaintiff. The plaintiff passed a resolution on 17.02.1961 resolving that the defendants shall fund the purchase of the said 7 vessels by their private foreign exchange assets, in lieu of which the plaintiff shall allot 1,12,500 and 35,200 shares to the first and second defendant, respectively. In February 1962, the Shipping Development Fund Committee of Government of India granted loans to the plaintiff to an extent of Rs. 20.25 crores for building several

new vessels in Japan at a low rate of 3% per annum. The said loan was granted on the condition that the plaintiff would not be entitled to receive any part of the advance unless it proved to the satisfaction of the Committee, by 29.11.1962, that it had a paid up equity capital of Rs. 1.5 crores contributed in cash or by unencumbered tangible assets owned by the plaintiff and approved by the Committee. In a Board of Directors meeting dated, 17.02.1962, it was resolved by Resolution No. 8 that the shares would be issued in lieu of cash payments to the promoters, i.e. the first and second defendants in the proportion of 75% and 25%, respectively. Further, the payment to the original sellers was resolved to be made by the defendants from their foreign exchange assets.

3. It is stated that the required permissions and clearances were duly obtained from the Ministry of Transport & Communication (Department of Transport), Central Government through its letter dated 23.03.1962 (Ex. PW-1/4) and the Director General of Shipping, with the pre condition that the defendants shall pay for the purchase of the vessels from their foreign exchange assets and that under no circumstances shall the Government of India provide any financial assistance for the same. The total price for the 7 liberty vessels was represented to be \$ 2.8 million. The Shipping Development Fund approved the transaction through its letter dated 11.04.1962 (Ex. PW-1/7) on the condition that the total market value of the vessels ascertained when the vessels arrive at India and in case the value is found to be less than \$ 2.8 million the plaintiff would increase its paid up equity capital to the extent of the shortfall before the plaintiff became entitled to receive any part of the loans from the said Committee.

4. The plaintiff sought permission from the Reserve Bank of India (Hereafter, "RBI"), through its letter dated 26.03.1962 (Ex. PW-1/5) for opening a bank account abroad to facilitate purchase of vessels and give credit to the defendants for money deposited by them in the said account towards the unpaid balance of shares. The plaintiff further sought permission of the RBI to open a dollar account in U.S.A. through its letter dated 02.04.1962 (Ex. PW-1/6). The RBI permitted the plaintiff to open a U.S. Dollar account for the purposes of the said transaction in the Irving Trust Company (Bank), New York through its letter dated 11.04.1962. By letter dated 16.04.1962, the Senior Deputy Director General of Shipping, Bombay conveyed the approval of the Indian Government for acquisition of the seven vessels. The plaintiff further sought permission from the RBI to open letters of credit in the said New York bank, guaranteeing payment on delivery of the ships to the various sellers in its letter dated 8.04.1962, which was granted through RBI's letter dated, 25.04.1962 (Ex. PW-1/11, which refers, in turn, to the conditions as set out in Ex. PW-1/9).

5. The suit alleges that in order to obtain pecuniary advantage to themselves, the defendants passed a resolution in the Board of Director's meeting dated 31.07.1962 (a copy of the minutes of meeting has been marked as Ex. PW-1/12) opened an account in plaintiffs name in the Bank of Nova Scotia, New York, USA (hereafter,

"foreign bank"). The defendants deposited an amount of US \$ 2.8 million (\$ 2.1 million by the first defendant and US \$ 7,00,000 by the second defendant) on 01.07.1962 in the said account. Further, seven Letters of Credit (each worth \$ 4,00,000, total worth of \$ 2.8 million) were opened in favour of Soiedad Transoceanic Canopus S.A., Panama City, Panama (the common agent representing the four companies from whom the ships were to be purchased, hereafter "Canopus") providing for payment on 30.11.1962. In the aforesaid Board of Director's meeting, it was further resolved that each letter of credit would provide that it might be availed of by Canopus by drafts at 12 days sight payable 30.11.1962 and accompanied by a statement addressed to the plaintiff that the Bill of Sale and other documents conferring title to the vessels would be delivered on or before 30.11.1962. It is submitted further, that the plaintiffs account in the Bank of Nova Scotia was pledged as security against the letters of credit and that the necessary permission of RBI be obtained in view substitution of Bank of Nova Scotia in place of Irving Trust Company. It is stated that only the two defendants were present in the said Board of Directors meeting. These seven letters of credit were contrary to the clear direction of RBI pertaining to this transaction, as they did not contain the condition that payment would be made only upon the receiving the bill of sale with full warranty and the plaintiff company sending a telegram confirming delivery of the vessels in India. The letters of credit were presented by Canopus to the Bank by December, 1962. Thereafter, these seven vessels were registered in India with the Registrar of Indian Ships at Bombay (now Mumbai) and the bill of sale disclosed the price of the seven vessels as under:

Previous Name of the Vessel	Changed Name of the Vessel	Declared Price
EMMA	NANAK JAYANTI	US \$ 10 and other valuable consideration
HERMIONI	ARYA JAYANTI	US \$ 10 and other valuable consideration
MOUNT SHASTRA	SHANKARA JAYANTI	US \$ 10 and other valuable consideration
HILTON	GOVIND JAYANTI	US \$ 10 and other valuable consideration
DELIS	BUDHA JAYANTI	US \$ 10 and other valuable consideration

6. On 10.06.1966 the President of India promulgated the Jayanti Shipping Company (Taking Over of Management) Ordinance, 1966 for taking over the management of the plaintiff for a limited period in order to secure the proper management of the same. In exercise of powers u/s 3 of the said ordinance, the Government by a notification dated 10.06.1966 certain persons were appointed to take over the management of the plaintiff and to be the Board of Control. The Shipping Corporation of India Ltd., Bombay was constituted as Managing Agent of the plaintiff. The defendants vacated their respective offices in the plaintiff company on 10.06.1966, i.e. the date of the notified order u/s 3 of the Ordinance. Upon inquiries it was ascertained from the records that on 16.03.1962 shares of the plaintiff were allotted to the defendants in the following pattern: 1,07,490 shares of face value of Rs. 100/- each (total value 1,07,49,000) to the first defendant for a part payment of Rs. 12,36,000/- and 35,200 shares of face value Rs. 100/- each (total value 35,20,000) for a part payment of Rs. 1,82,000/-. Thus, an amount of Rs. 1,28,51,000/- (Rs. 95,13,000/- and Rs. 33,38,000/- from the first and the second defendant, respectively) remained unpaid by the defendants. Further it is stated that Canopus was used merely as an intermediary by the defendants for obtaining a temporary bank loan from the foreign bank but in fact the seven vessels were not purchased from the funds connected with the said bank loan.

7. On or about 01.08.1962 two demand drafts were received from Canopus upon the foreign bank, for US \$ 2.1 million and US \$7,00,000/- in favour of the two defendants, respectively. Thereafter, the defendants endorsed the two demand drafts in the plaintiffs favour. On 01.08.1962 the defendants opened another account, in the said foreign bank in the name of the plaintiff in which the amount of the two demand drafts was credited and the account of the foreign bank was debited with the Rupee equivalent of US \$2.8 million dollars, i.e. Rs. 1,33,00,000/- in the books of account of the plaintiff. Further, upon receiving instructions from the defendants, the said bank also issued 7 letters of credit on 01.08.1962 each worth \$ 4,00,000 favouring Canopus, signed by the first defendant on behalf of the plaintiff (Ex. PW-1/13 to PW-1/19). The said letters of credit were for 120 days, to expire on 30.11.1962. Two of them were presented before 30.1.1962 and the remaining five were renewed for 30 days, and also later presented by Canopus. Thereupon, the account of the foreign bank, in the books of the plaintiff was credited with Rs. 1,33,00,000/-. The defendants deposited drafts aggregating to US \$ 2.8 million as collateral security for the letters of credit. The plaintiff alleges that the credit of US \$ 2.8 million in the said bank and the 7 letters of credit totaling US \$ 2.8 million in

effect cancelled each other. The foreign bank informed the plaintiff of the entire transaction by letter dated 25.11.1966 (Ex. PW-1/20). On 05.04.1967 the foreign bank addressed a letter to the plaintiff informing that no commission or charges were paid to the bank for opening the letters of credit (Ex. PW-1/21).

8. It is alleged that the terms of the seven letters of credit were materially different from those stipulated by the RBI in connection with the purchase of these seven liberty vessels. The terms provided for the payment to be made by the foreign bank under the letters of credit on the same being presented accompanied by a written statement of Canopus in duplicate addressed to the plaintiff containing an undertaking from Canopus that it would deliver to the plaintiff on or before 30.11.1962, the bills of sale and other documents conveying title to the vessels. The defendants had also forged entries in the books of the plaintiff on or about 02.08.1962 favouring the defendants for a sum of Rs. 1,28,51,000/- and further account entries showing false payment by the of the unpaid balance of Rs. 1,33,00,000/- towards the shares allotted to them. Ex. PW-1/22 and Ex. PW-1/23 are the journal vouchers dated 02.08.1962 and Ex. PW-1/25 and Ex. PW-1/26 are the two certificates issued by the bank of Nova Scotia dated 01.08.1962 pertaining to the alleged deposits of US \$ 2.1 million and \$ 700,000 by the two defendants, respectively, in the plaintiffs collateral account. It is alleged that the said certificates were fraudulently and in collusion caused to be forwarded to the plaintiffs by the defendants. Ex. PW-1/27 (which has been marked again as Ex. PW-1/51) is a letter dated 01.08.1962 addressed to the plaintiff to transfer Rs. 13,000/- to the second defendant to "make up the money paid in short" by the second defendant and thus make his 35,200 shares fully paid up.

9. The plaintiff alleges that the seven liberty vessels were far less in value than the quoted US \$ 2.8 million and the defendants" actions were solely motivated to generate undue monetary benefits to their own self with mala fide intentions in illegal manner. The account in the Bank of Nova Scotia was opened much prior to the issue of RBI's letter dated 20.08.1962, whereby the earlier sanction requiring the account to be opened in the Irving Trust Company (Bank) had been modified only to the extent that the account could be opened with the Bank of Nova Scotia. The terms of the letters of credit were contrary to those prescribed by the RBI. The payment for the seven vessels was not made through the said letters of credit. The defendants, in collusion, fraudulently obtained a credit in their respective personal accounts of Rs. 99,75,000/- (equivalent of US \$ 2.1 million) and Rs. 33,25,000/- (equivalent of \$ 70,000), totaling Rs. 1,33,00,000/-. It is alleged that out of this amount, credits to the extent of Rs. 96,32,695.77 were in violation of the plaintiffs Board resolution dated 17.02.1962.

10. The Shipping Development Fund Committee got the seven vessels valued by Rugg & Co. London (report annexed as Ex. PW-1/30), where the total value of all the seven vessels was found not the exceed ♦ 3,70,000 at the time of purchase,

whereas the defendants dishonestly valued each vessel at \$ 4,00,000. The Declaration of Ownership for the respective vessels is annexed as Ex. PW-1/31, 33, 35, 37, 39, 41, 43 and the Bill of Sale of Registered vessel as Ex. PW-1/32, 34, 36, 38, 40, 42, 44. The inquiries further revealed that the defendants had received and amount of ♠ 55,000/- from one M/s. H. Clarkson & Co. to facilitate the purchase of the vessel "Historian" and later directed it to reimburse itself from other funds of the plaintiff to the extent of ♠ 49952.2.11/- and for the purchase of vessel "Planter", funds of the plaintiff to the extent of ♠ 45,000/- were diverted by the defendants through the said M/s. H. Clarkson & Co. These funds, totaling to ♠ 94,952.2.11/- were wrongfully recovered from the plaintiff.

11. The plaintiff further places reliance on the following: Ex. PW-1/45, i.e. the Instrument of Sale in relation to S.S. Gargi Jayanti (Planter) and Ex. PW-1/58, i.e. letter dated 06.03.1962 of the Shipping Development Fund Committee reminding the plaintiff of its obligation to:

- (a) Put in an initial paid up equity capital of Rs. 1.5 crores;
- (b) Add Rs. 25 lakhs of paid up equity capital for every Rs. 100 lakhs of loan advanced;
- (c) Build up a final paid-up equity capital of Rs. 5 crores.

And further, that no credit will be given to the capital structure of the plaintiff relating to the above three aspects to the extent of Rs. 86 lakhs (♠ 6,45,000/-), which is the exact difference between the contract price of the seven liberty ships and their valuation by the Rugg & Co. London.

12. The plaintiff finally argues that both the defendants taken together paid at the most ♠ 2,75,047.17.1/-, i.e. ♠ 3,70,000/- (ascertained valuation of the vessels) minus ♠ 94,952.2.11/- (total amount diverted to M/s. H. Clarkson & Co.) as against US \$ 2.8 million as claimed by them. ♠ 2,75,047.17.1/- converted in Indian rupees at the then prevalent exchange rate of Rs. 13.333/- per Pound sum up to Rs. 36,67,304.23/-. The defendants jointly purported to own fully paid up shares to the extent of Rs. 1,33,00,000/- out of which, an amount of Rs. 1,28,51,000/- remained unpaid, as is shown in account entries dated 02.08.1962. Thus, an amount of Rs. 91,83,695.77/-, i.e. Rs. 1,28,51,000/- (balance due towards shares held as fully paid up) minus Rs. 36,67,304.23/- (amount paid by the defendants towards purchase of vessels) remains outstanding on the defendants towards the payment on shares held as fully paid up. Further, the plaintiff claims an amount of Rs. 4,49,000/-, i.e. Rs. 96,32,695.77/- (credit in violation of the Board resolution dated 17.02.1962) minus Rs. 91,83,695.77/- (amount due on shares held as fully paid up) by reason of fraud practiced by the defendants in obtaining credits wrongfully in their personal accounts. Thus, the principal amount due sums up to Rs. 96,32,695.77/-, i.e. Rs. 91,83,695.77/- plus Rs. 4,49,000/-. The plaintiff claims the said amount alongwith interest from 02.08.1962 till date of payment, as such, the total amount due till the

date of filing of the suit sums upto Rs. 1,39,64,197.98/- . The plaintiff alleges that the defendants are guilty of fraud and/or breach of trust and/or breach of duty and/or misfeasance by fraudulently obtaining credit in their personal accounts.

13. On 18.04.1977 this Court framed the following issues:

1. Whether Shri Shashi Ranjan Prashad is duly authorized to institute the suit and to verify the plaint of the suit? OPP
2. Whether the suit of the plaintiff is within time? OPP
3. Whether the Court has no jurisdiction to try the suit? OPD
4. Whether the defendants made available to the plaintiff foreign-exchange of U.S. \$ 2.8 m @ \$ 4,00,000/- for each of the seven liberty ships. If so, whether the price of the seven ships was paid out of that account under the Letters of Credit for each ship? OPD
5. Whether the defendants adopted the scheme described in para 7 of the plaint and obtained pecuniary advantage by practising fraud/conspiracy? If so, to what effect? OPP
6. Whether the total market value of the seven liberty ships at the time of purchase did not exceed $\text{₹} 3,70,000/-$? If so, whether the defendants fraudulently with a view to obtain pecuniary gains got fully paid up shares to the extent of 1,07,490 by defendant No. 1 and 35,200 shares by defendant No. 2. OPP
7. In case the market value of the said seven ships happened to be less than \$ 4,00,000/- each, whether the plaintiff-company was to increase its paid-up equity capital beyond One crore Fifty Lakhs by the amount by which the total market value of the liberty ships was less than the market price and to what effect? OPD
8. Whether the plaintiff is stopped from challenging the contracts for the purchase of liberty ships? OPD
9. Whether the plaintiff is stopped from challenging the value of the seven liberty ships? OPD
10. Whether any wrongful credits were obtained in the personal accounts of the defendants by reason of fraud practiced by the defendants? OPP
11. Whether the plaintiff was deprived of a sum of Rs. 96,32,695.77/- or any other amount by reason of fraud or conspiracy on part of the defendants? OPP
12. Whether the defendants are jointly and severally liable for the amount claimed in the suit? OPP
13. At what rate and to what amount is the plaintiff entitled towards interest? OPP
14. Relief.

14. In view that the defendants were proceeded ex-parte in this case, only the averments made by the plaintiff in its pleadings and at the time of arguments and the documents produced to substantiate such averments shall be considered by the Court to dispose of the present suit.

Issue No. 1

15. This issue was cast, with the onus of proving, on the plaintiff. In support of the suit having been filed by a duly authorized and competent person, the plaintiff has filed Ex. PW-1/1, a certificate stating about a Board Resolution authorizing the filing of the present suit. The resolution was exhibited, during course of evidence. The Court is therefore, satisfied that the suit was filed with proper authority. The issue is answered in favour of the plaintiff, and against the defendant.

Issue No. 2

16. The plaintiff relies upon its pleadings in para 17 of the plaint and para 27 of the evidence by way of affidavit, which was later tendered in Court. It is stated that the suit is within time as the right to sue accrued to the plaintiff only when it first gained knowledge of the fraudulent acts of the defendants, during and after March, 1967 after its management was taken over by the board of control. The plaintiff further asserts that the defendants have been continuously absent from India since July, 1966 and that in any event the time during which the defendants were absent from India has to be excluded, as such the suit is within time.

17. The facts discussed, and materials placed on the record would reveal that the transaction in question here took place in 1962-63. It is a matter of record [letter dated 25.11.1966 (Ex. PW-1/20) and Ex. PW1/21 (05.04.1967)] that the actions of the defendants could be unraveled much later, after all the circumstances came to light, including correspondence with the bank, inquiry into the affairs and account books of the company, etc. Further, the worth of the ships purchased was also ascertained through the report of Rugg & Co. (Ex. PW-1/30) after the management of the company could be taken over.

18. The present action is based on allegations of breach of trust, and violation of fiduciary capacity of the defendants, who were the plaintiffs directors. Such fiduciary capacity has been upheld by the decisions of the Supreme Court reported as [Nanalal Zaver and Another Vs. Bombay Life Assurance Co. Ltd. and Others](#), and [Needle Industries \(India\) Ltd. and Others Vs. Needle Industries Newey \(India\) Holding Ltd. and Others](#). In such cases, Section 10 of the Indian Trusts Act, 1882 operates, for purposes of the Limitation Act. The said provision reads as follows:

10. Suits against trustees and their representatives - Notwithstanding anything contained in the foregoing provisions of this Act, no suit against a person in whom property has become vested if trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the

purpose of following in his or their hands such property, or the proceeds thereof or for an account of such property or proceeds, shall be barred by any length of time.

Explanation - For the purposes of this section any property comprised in a Hindu, Muslim or Buddhist religious or charitable endowment shall be deemed to be property vested in trust for a specific purpose and the manager of the property shall be deemed to be the trustee thereof.

A similar provision exists under the English Limitation Act, 1980 Section 21(1)(b). The same was applied and the Court held, in Paragon Finance plc. v. D.B. Thakerar & Co. 1999 (1) All. ER. 400 that a director, who was asked to account for profits he had received as a result of the agreements with the company in which he was interested, could not claim the bar of limitation. In India, the basis of locating a fiduciary duty on the Director of a company is Section 291 of the Companies Act. Having regard to these facts and circumstances, it is held that the suit has been filed within the period of limitation. The issue is therefore, answered in favour of the plaintiff.

Issues No. 3 & 4.

19. These issues were framed at the behest of the defendants, who neither supported these with any documentary evidence, or oral evidence, nor pursued their defence. In the circumstances, the issues are answered against them, and in favour of the plaintiff.

Issue No. 5, 10 & 11.

20. In para 7 the plaintiff describes an elaborate scheme, allegedly adopted by the defendants to dupe the plaintiff in order to make undue financial gains in their favour. Para 7(a) states about a Board of Directors meeting, dated 31.07.1962, where certain board resolutions were passed, as discussed in para 5 of this judgment. A copy of the minutes of the Board meeting dated 31.07.1962 is placed on record as Ex. PW-1/12, which confirms the averment. The plaintiff describes about the defendants' device whereby the sellers' agent, Canopus issued two demand drafts aggregating U.S. \$ 2.8 million in their favour, which were endorsed to the plaintiff. On 01.08.1962, the defendants caused an account to be opened in the plaintiff's name in the foreign bank, where the said two demand drafts were deposited. The books of the plaintiff company were debited with the Rupee equivalent of US \$ 2.8 million, i.e. Rs. 1.33 crores. Pursuant to the defendants' instructions, the foreign bank issued 7 letters of credit each worth US \$ 4,00,000/-. The said letters of credit were signed on the plaintiff's behalf by the first defendant and were valid for 120 days. Only two of them were presented within the time limit and the others expired, which were later renewed and presented within the extended time. The defendants, upon presentation of the said letters of credit made the plaintiff to credit the amounts in the bank in the books of the plaintiff company. The foreign bank had insisted the letters of credit ought to be prepaid, resulting in the defendants depositing the drafts (for US \$ 2.8 million) as collateral to secure the

letters of credit. Thus, the credit of US \$ 2.8 million in the plaintiff company's bank account, in effect, cancelled out each other.

21. The plaintiff, in support of the above allegations, relies upon Ex. PW-1/22 - PW-1/27 and the seven letters of credit issued in favour of Canopus, Ex. PW-1/13 - PW-1/19. It is further submitted that the first defendant's letter dated 01.08.1962 (Ex. PW-1/51) reveals that he had instructed the plaintiff to debit US \$ 2736.84 from his account to make up for the deficient share money of the second defendant, in respect of 35,200 shares. The plaintiff also relies upon Ex. PW-1/55, account entries of the plaintiff company reflecting that the defendants had paid the unpaid share capital of Rs. 1,28,51,000/- On 3rd August, 1962 (by Ex. PW-1/63) the Bank of Nova Scotia issued a letter stating that the sum of US \$ 2.8 million had been received from the defendants and credited to the plaintiff's account, and pledged as security for the letter of credit. The plaintiff also relies on Ex. PW-1/62 and Ex. PW-1/61 by the defendants, informing plaintiff about payment of US \$ 2.8 million. On 18.09.1962, and 26.10.1962 the RBI issued letters, exhibited as Ex. PW-1/49 and Ex. PW-1/45 seeing details in regard to permission to open letters of credit, covering the cost of ships, to be purchased by the company. This information was supplied by the plaintiff company on 9.11.1962, stating that the letters of credit covering the cost of the ships had been issued in favour of Canopus SA, the common agent in respect of all vessels and that the Bank of Nova Scotia was selected for that purpose (Ex. PW-1/48). The same day, the first defendant directed the plaintiff to allot 1,12,500 shares in lieu of payment of Rs. 12,46,875/-, representing 10% of part payment (Ex. PW-1/59).

22. Reliance is placed on various documents (Ex. PW-1/33 and PW-1/34; Ex. PW-1/41 and PW-1/43; Ex. PW-1/31 and PW-1/32; Ex. PW-1/35 and PW-1/36; Ex. PW-1/44 and PW-1/45; and Ex. PW-1/37 and PW-1/38) to say that declaration of ownership and bill of sale in respect of various vessels were registered. The bills of sale mentioned that the transaction, in respect of the vessels was carried out for US\$ 10. The plaintiff's affidavit evidence states that on 10.06.1966, the defendants resigned or vacated the office of Chairman and Director, of the company, respectively. The plaintiff also relies on Ex. PW-1/52, a letter by M/s H. Clarkson & Co., a ship broker, informing the original plaintiff that for purchasing one vessel "Historian" the defendants had issued directions to it (Clarkson & Co.) directing them to advance ♣ 55,000 to their account, and later reimburse themselves from the plaintiff's other funds to the extent of ♣ 49,952.11. The letter also informed that the defendants had borrowed ♣ 45,000 for purchase of the vessel "Planter" and issued directions to recover it from the plaintiff. Clarkson & Co. had recovered ♣ 94,952.21 from the plaintiff (Ex. PW-1/51).

23. The above materials establish that the defendants had been appointed as Chairman and Director of the original plaintiff company; they, on 17.02.1962 had passed a resolution resolving to acquire 7 vessels, which were to be funded from the

foreign private assets of the said defendants, for which they were to be allotted 1,37,700 shares. The required permission was to be obtained from the Ministry of Shipping with the condition that the ships were to be funded with foreign assets of the defendants. The Shipping Development fund approved the proposal, on condition that the vessels would be valued after their delivery in India. The necessary approvals were sought from RBI for opening an account abroad, to facilitate the transaction. The account was therefore opened with the foreign bank, where the defendants deposited US \$ 2.8 million; later, their directions led to issuance of seven letters of credit for a total sum of US \$ 2.8 million, in favour of Canopus, the common agent representing all four companies who were to supply the vessels, i.e. the Japanese sellers. The RBI had stipulated that letters of credit were to contain conditions enabling payment only after the vessels" valuation and receipt of the Bill of sale with full warranty, and the original plaintiff company sending a telegram confirming delivery of vessels in India. However, none of the seven letters of credit issued to Canopus contained such conditions. The vessels were later registered in India, with the Registrar of Ships. The Bill of sale issued actually reflected the value of each vessel at US \$ 10, and not US \$ 400,000/-.

24. The materials on record in the form of various exhibits show that after 1966, in terms of the notification taking over management of the company, enquiries were conducted, after which it was revealed that a book entry (as opposed to actual payment) of Rs. 1,28,51,000/- had been made in respect of the unpaid share money. The company had, in the meanwhile, credited Rs. 99,75,000/- (equivalent of US \$ 2.1 million) in the account of the first defendant, and Rs. 33,25,000/- (equivalent of US \$ 700,000/-) in the second defendant"s account, violating the company"s resolution of 17.02.1962. The plaintiff has also proved that the defendants issued directions to Clarksons & Co. directing them to advance ♣ 55,000/- to them, and later reimburse themselves to the extent of ♣ 49,952.11. Clarksons informed that the defendants had borrowed ♣ 45,000/- for purchase of a vessel, and required recovery of the amount from the plaintiff company. Thus, Clarksons claimed ♣ 94,952.11/-.

25. The plaintiff relies on account entries of 02.08.1962, which reveal that the defendants had seemingly paid Rs. 1,28,51,000/- towards balance share price, but could get a credit in their accounts only to the extent of Rs. 36,67,304.23/-. The plaintiff claims the deficit to the extent of Rs. 91,83,695.77/-. The plaintiff is also claiming Rs. 4,49,000/- in addition.

26. The above discussion would show that the defendants, acting throughout as directors of the plaintiff company, used it to obtain credits, flouted RBI permission norms with impunity, and passed off 7 vessels, which were supposed to be worth US \$ 400,000/- each, but were shown in the Bill of sale as valued at US \$ 10 each. They also made book adjustments, in the share account of the plaintiff company, for fully paid shares, which were never really paid for. In addition, the materials also establish that RBI conditions for payment towards letters of credit, were

contravened, despite mandatory foreign exchange regulation. These were possible, as the defendants were in control of the affairs of the original plaintiff company. They left the company at a time of their choosing. All these could be achieved, as the said defendants abused the fiduciary duties imposed upon them, to transact business and conduct the company's affairs in its best interest. This has in turn resulted in loss to the company, to the extent of Rs. 96,32,685.77/- (Rupees Ninety six lakh, thirty two thousand, six hundred and eighty five and paise seventy seven only). This Court is of the opinion, therefore, that Issue Nos. 5, 10 and 11 are to be answered, accordingly, in the plaintiff's favour, and against the defendants. The said issues are so found.

Issue No. 6

27. This issue is whether the total market value of the seven liberty ships at the time of purchase did not exceed ₦ 3,70,000/- and if so, whether the defendants fraudulently with a view to obtain pecuniary gains got fully paid up shares to the extent of 1,07,490 shares by defendant No. 1 and 35,200 shares by defendant No. 2.

28. The main evidence in this regard is the report of the ship valuers, M/s Rugg & Co., dated 17.02.1962. That report has been produced, and exhibited in the present suit, as PW-1/30. This is a series of reports, showing that the valuation of SS MOUNT SHASTA was UK ₦ 50,000 as also SS HILTON, SS HERMONIE, SS HISTORIAN, SS PLANTER and SS EMMA. SS DELIS was valued at UK ₦ 60,000. This valuation was on "as is where is" basis. The alternative valuation of these vessels after special survey, and conversion to accommodate Indian crew, was shown at UK ₦ 80,000 each. The plaintiff's witness has testified to the document, and the Court sees no reason to disbelieve it. The issue pertaining to valuation is accordingly answered in favour of the plaintiff, and against the defendants.

29. As far as the second part of the issue is concerned, the Court has already concluded, in the earlier part of this judgment, that the defendants never complied with the condition of ensuring that the share money was paid up; instead the documentary evidence reveals that they only made book entries as if the entire share money were paid up by each of them. This resulted in the plaintiff company being deprived of those amounts.

30. In view of the above findings, Issue No. 6 is answered in favour of the plaintiff. Issue Nos. 7 to 9.

31. The onus of proving these issues was cast on the defendants, who had insisted that they be framed. However, they are set down ex-parte; they have not led any evidence in support of the allegations. The issues are therefore, held against them.

Issue Nos. 12, 13 and 14.

32. The decision on these issues is to be rendered in the light of the previous findings, and common evidence. It has now been established that the first two

directors were the only responsible officers, and Chairman and Director, respectively, of the original plaintiff company. It was on account of their duplicity, that the company could be deprived to the extent of Rs. 96,32,685.77. A director's fiduciary duty may be spelt out in the following terms:

- (a) to act in the best interests of the company;
- (b) not to put himself/herself in position of conflict with the company (i.e. the no self-dealing rule); and
- (c) to act for proper purposes.

In the judgment reported as Dale and Carrington Int. (Pvt.) Ltd. v. P.K. Prathapan 2005 (12) SCC 212, the rule was stated as follows:

15 ...The fiduciary capacity within which the Directors have to act enjoins upon them a duty to act on behalf of a company with utmost good faith, utmost care and skill and due diligence and in the interest of the company they represent. They have a duty to make full and honest disclosure to the shareholders regarding all important matters relating to the company.... This requirement flows from their duty to act in good faith and make full disclosure to the shareholders regarding affairs of a company. The acts of directors in a private limited company are required to be tested on a much finer scale in order to rule out any misuse of power for personal gains or ulterior motives.

33. The acts indulged in by the defendants flout every norm of good practice, and point to stealth and deceit, with the objective of depriving the company of its rightful dues, towards the share money, which it was entitled to. They were also responsible for compliance with various terms of the RBI approval, which they violated, with impunity. Additionally, despite the awareness that the vessels were of a far lesser value, they claimed an inflated price, in respect of each of them. The role of each defendant is the same; they are therefore, jointly and severally liable for acts of misfeasance; furthermore, each of them could not have functioned without the knowledge, complicity and approval or connivance of the other. In these circumstances, they are jointly and severally liable.

34. As regards interest, the plaintiff has calculated the interest component and added it to the principal amount of Rs. 96,32,685.77/- (Rupees Ninety six lakh, thirty two thousand, six hundred and eighty five and paise seventy seven only), to arrive at the figure of Rs. 1,39,64,197.98. In addition, the plaintiff claims 6% p.a. on the said amount from 29.01.1970 till payment. The Court is of the opinion that the same is justified.

35. In view of the above findings, Issue Nos. 12-14 have to be answered in the plaintiffs favour. The suit is therefore, decreed for Rs. 1,39,64,197.98 with pendent lite and future interest (till payment) at 6% p. a. (as claimed) with costs. The plaintiff shall also be entitled to counsel's fee, quantified at Rs. 75,000/-.