

(1960) 05 P&H CK 0007
In the Punjab And Haryana At Chandigarh
Case No : First Appeal No. 221 of 1953

Karnal Distillery Co. Ltd.

APPELLANT

Vs

Ladli Parshad Jaiswal and Another

RESPONDENT

Date of Decision : 25-05-1960

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 10 , 35A
Companies Act, 1913 — Article 71, 235, 86, 86F, 91A
Companies Act, 1929 — Section 143
Limitation Act, 1963 — Article 120, 36

Citation : AIR 1960 P&H 655

Hon'ble Judges : I. D. Dua, J; Bishan Narain, J

Bench : Division Bench

Judgement

Dua, J.

(1) This appeal is an offshoot of an unfortunate dispute between two real brothers which could perhaps have been avoided had it not been for the too selfish attitude on behalf of both of them. It could be helpful to reproduce the pedigree-table of the parties, because that would give us a clear picture of the long drawn out litigation between the two contestants, which has been going on for quite a number of years now:

KISHORI LAL	_____	
Ladli Parshad Shanti Parshad Smt. Suraj = Durga Parshad Mukhi (widow)		
_____		Sajan Lal Madan Lal

Kishorilal had started the business of distillation of alcoholic beverage under the name and style of Kishori Lal and Sons. This appears to be initially a joint Hindu family business, the members of which were obviously Kishori Lal and his sons, etc., and was conducted under the name and style Karnal Distillery, Karnal. When Kishori Lal died somewhere in 1928, leaving behind a widow and three sons, Durga Parshad, being the eldest son, continued the joint family business with himself as the karta of the joint family. After the death of Durga Parshad, Ladli

Parshad, being the eldest male member of the family at that time, continued the business till 1940, when the joint family appears to have disrupted with the result that his business was converted into a contractual partnership.

It seems that soon thereafter the business was taken over by a private limited Company Ltd., incorporated sometime in 1941. These facts are clear from another litigation which culminated in a judgment by a Division Bench of this Court in Karnal Distillery Co. Ltd. and Others Vs. Ladli Parshad Jaiswal and Another, and are not controverted. This judgment is now the subject matter of an appeal to the Supreme Court. It was, however, agreed at the Bar that the decision in this judgment operates as *res judicata* and it is for this reason that I have reproduced this earlier history of the Karnal Distillery Co. Ltd., in the present case.

It may also, at this stage, be mentioned that, according to the respondents, the suit, out of which the appeal before us, has arisen, was instituted as a counterblast to Lali Parshad's suit in the earlier litigation. It is common ground that L. P. Jiswal was born somewhere in 1914 or 1915 and S. P. Jaiswal in 1921. It appears that according to the Articles of Association of 1941, Ladli Parshad Shanti Parshad and Smt. Suraj Mukhi (widow of Durga Parshad) were to be the first Directors and L. P. Jaiswal was appointed Managing Director and was to so continue for a period of ten years from the date of the registration of the Company unless he voluntarily resigned from his office; in fact he was to continue as Managing Director for a further term of ten years unless notice of discontinuance of his office was given within fifteen days of the expiry of the first eight years, by a two-thirds majority at a special general meeting convened for the purpose.

His appointment was not liable to be revoked or cancelled and he was expected to devote only so much of his time as he considered necessary or desirable in the interests of the Company; there was also no bar to his engaging himself in any other business or profession, subject, however, to the condition that such business or profession did not in any way compete with the business of the Company. It seems that, to start with, the three branches of Kishori Lal held almost equal number of shares in the Company, but we are informed by the respondents now, that L. P. Jaiswal soon thereafter became owner of a larger number of shares than the other member of the Company; as a result of his increased holding he obviously was in a position to dominate the affairs of the Company and could not be expelled under the provisions of Article 47 of the Company's Articles of Association.

It further appears that S. P. Jaiswal soon began to feel that his elder brother was not treating him in a befitting manner, and as a result of this feeling, sometime in 1942, disputes arose between the two brothers and L. P. Jaiswal was removed from the managing directorship. As usually happens in such circumstances, both sides tried to secure control of the concern, which was obviously yielding enviable profits; and indeed they even took their grievances to the civil Courts,

but on 16-10-1945 we find a kind of compromise effected between the two brothers, by which their differences seemed apparently to have been composed at least for the time being.

(2) According to this compromise L. P. Jaiswal was given a sort of a clearance certificate absolving him of all responsibilities of his dealings as Managing Director; for future L. P. Jaiswal ceased to be Managing Director but became instead a permanent Chairman, and S. P. Jaiswal became the Manager of the Company. This compromise, however, appears to have been short-lived and trouble again started in less than a year. On 28-3-1946 L. P. Jaiswal was removed from directorship of the company and some changes were effected in the Articles of Association. This is really the culminating point of the struggle between the two brothers to take control of the concern. L. P. Jaiswal thereupon instituted a suit challenging various proceedings including those of 28-3-1946. This suit is, as stated above, now the subject matter of an appeal to the Supreme Court from the decision of a Division Bench of this Court reported as Karnal Distillery Co. Ltd. and Others Vs. Ladli Parshad Jaiswal and Another,

(3) The present suit was instituted by the Karnal Distillery Co., Ltd., through S. P. Jaiswal as the Managing Director against L. P. Jaiswal and M/s. L. P. Jaiswal and Co., through L. P. Jaiswal its sole Proprietor, for the recovery of Rs. 44,070/- 13/- The basis of the suit is contained in paragraphs 2 to 5 of the plaint which are in the following terms:

"2. That the defendant No. 1 was acting as the Managing Director of the plaintiff-Company from April, 1941, to October, 1945.

3. That during the period between 31st March, 1944, to 3rd July, 1944, the defendant, while he was acting as such Managing Director as aforesaid, fraudulently with a view to derive personal benefit to himself at the cost and to the detriment of the plaintiff-Company, supplied 25,146.1 bulk gallons of the methylated spirit to defendant No. 2 firm (of which the defendant No.1 is the sole proprietor) at Rs. 1-1-0 while the current selling price of the said spirit during the period above-mentioned always remained Rs. 2-8-0 per bulk gallon.

4. That thus the defendant No. 1, in breach of trust and in the utter abuse of his fiduciary position in relation to the plaintiff-Company of which he was then the Managing Director, gained a personal benefit of Rs. 36,147-8-3 calculated at Rs. 1-7-0 per bulk gallon, causing a loss of the said amount to the plaintiff-Company. Defendant No. 2 is really another name under which defendant No. 1 carries on some of his business and has therefore been impleaded to avoid any technical objection.

5. That as the defendants have wrongly benefited by the amounts which should, in fact, have gone to the plaintiff-Company but for certain clever and dishonest manipulations effected with ulterior motives, they are liable to pay the said amount of the plaintiff together with interest at the rate of 6 per cent per annum on the above amount calculated from the respective dates of the sale of the said

spirit as per list "A" attached. The interest so calculated comes to Rs. 7,923-4-9.

(4) This suit was resisted on various grounds including eight preliminary objections. In one of them the suit was sought to be stayed under S. 10 of the C.P.C., pending the decision of the previously instituted suit by L. P. Jaiswal; this plea appears to have prevailed and the present suit was actually stayed, as desired by the defendants, and this accounts for the delay in the disposal of this suit. The only other preliminary objections worth mentioning, and with which we are also concerned in this appeal, relate to the plea as to limitation and the competency of S. P. Jaiswal to institute this suit on behalf of the Company.

On the merits it was contended that L. P. Jaiswal was a Managing Director of the Company up to 16th of October 1945 and continues to be the Chairman of the Company even thereafter. Para 3 of the plaint was denied and it was emphatically controverted that L. P. Jaiswal as Managing Director fraudulently did any act to derive personal benefit at the cost and to detriment of the Company. The selling price of methylated spirit during the period between the 31st of March and 3rd of July, 1944, at Rs. 2-8-0 per bulk gallon was also not admitted. It was of course denied that the plaintiff-Company supplied to the defendant during the above period 25,146 bulk gallons of methylated spirit. Allegations in para 4 of the plaint were similarly not admitted and existence of fiduciary position of the defendant as well as any alleged breach of trust were also disputed.

It was pleaded that no fiduciary position had been abused, nor had any gain or personal profit to the extent of Rs. 36,147-8-3 been made as a result of such abuse. Loss to the plaintiff-Company was also not admitted, though it was accepted that L. P. Jaiswal had been carrying on business in the name and style of L. P. Jaiswal and Company. It was, however, expressly asserted that the defendants never manufactured methylated spirit. This assertion, I believe, was designed to suggest that there was no competition by the defendants with the business of the plaintiff-Company. Para 5 of the plaint was also not admitted. In the additional pleas reliance was placed on resolution No. 10 of 30-4-1941 of the Board of Directors, resolution No. 3 of the extraordinary general meeting dated 1st August 1941 confirming resolution No. 10 of the 30th of April 1941, resolution No. 4 of the 2nd of December, 1943 of the ordinary general meeting, resolutions Nos. 2, 8, 9 and 14 of the 16th of October 1945 of the extraordinary general meeting and receipt for Rs. 2,30,600-3-7 dated 16th of October 1945 in support of the section that the plaintiff-Company had allowed L. P. Jaiswal to carry on such business of buying methylated spirit from the plaintiff-Company as his personal and private business without any objection.

It was further asserted that the Company had approved and confirmed the purchase of the spirit by the defendants. Reliance was also placed on the full and final receipt said to have been given by the plaintiff-Company to the defendants on 16th of October 1945 absolving them from all liability, if any, in respect of and including the transaction in dispute. It was also asserted that the rate of supply

of methylated spirit to the Defence Department was Re. 0-15-0 per bulk gallon as shown in resolution No. 8 of the 31st of January 1942 of the Directors' meeting, and indeed the written statement proceeds to state that the plaintiff-Company was paid by the defendants Re. 1-1-0 per bulk gallon of the spirit which rate was in excess of the amount which the defendants was obliged to pay; according to para 11 of the written statement by the plaintiff-Company was liable to refund to the defendants this amount paid in excess. The Company was also said to be estopped from bringing the present suit on account, of its acts, conduct, admissions, and the clear receipt of the 16th of October, 1945.

(5) In the replication by the plaintiff it was pleaded that S. P. Jaiswal being the principal officer of the Company and Managing Director was competent and authorised to institute the present suit. The allegations in para 10 of the written statement were denied in toto and it was reiterated that L. O. Jaiswal had taken undue advantage of his fiduciary position as the then Managing Director of the Company and had thus cleverly manipulated certain proceedings and resolutions with a view to benefit himself at the cost of the Company and to cover up his otherwise fraudulent dealings. Those resolutions and receipt, the correctness and validity of which was denied, were alleged to be fraudulent acts in breach of trust and in utter abuse of the fiduciary position held by L. P. Jaiswal in relation to the plaintiff-Company; the plea of estoppel was to course denied.

(6) On 31st of August 1948 one of the preliminary objections relating to the applicability of S. 10 of the C.P.C., was decided in favour of the defendants and the suit, as already noticed, was stayed till the decision of the other suit. "Mr. Ladli Parshad Jaiswal v. The Karnal Distillery Company Ltd."

(7) The present suit was revived sometime in 1950 and in the statement before issues S. P. Jaiswal asserted that the defendant L. P. Jaiswal as a Managing Director of the plaintiff-Company had sold to himself as sole proprietor of M/s. L. P. Jaiswal and Co., 25,146.1 bulk gallons of methylated spirit at Rs. 1/1/- per gallon against the then prevalent market price of Rs. 2-8-0 per gallon and that the business of the defendant-Company was in clear competition with that of the plaintiff-Company. The resolution of the 16th of October, 1945, absolving the defendants of their liability, was stated to have been passed under compulsion and without going into accounts. Confirmation by the plaintiff-Company of the sale of the methylated spirit in suit was denied.

(8) The statement of the counsel for the defendants before issues admitted L. P. Jaiswal to be a shareholder and Managing Director of the plaintiff-Company between 31st of March 1944 and 3rd of July, 1944. It was also admitted that L. P. Jaiswal was the sole proprietor of the defendant-Company M/s. L. P. Jaiswal and Company. It was denied that the business carried on by the defendant-Company was a rival competitive business so far as the plaintiff-Company is concerned. It was, however, asserted that the defendant-Company had been permitted by the resolutions of the plaintiff-Company to carry on the business. Existence of fiduciary relationship between L. P. Jaiswal and the plaintiff-Company, in so far as

the transactions in dispute are concerned, was also denied. The purchased quantity of methylated spirit, as asserted by the plaintiff, was not admitted, and it was reiterated that the defendant had purchased the said spirit at the rate of Rs 1/1/- per gallon, although he was entitled to purchase it at the rate of Re. 0-15-0 per gallon. The market-rate at the relevant time was also asserted to be the same.

(9) On the pleadings of the parties the following issues were settled:

1. Whether Mr. S. P. Jaiswal was the Managing Director of the Company at the time of the institution of the suit and had a right to institute the suit on behalf of the Company?
2. Whether even if it is not proved that Mr. S. P. Jaiswal was the Managing Director of the plaintiff-Company, he was a Director and Manager of the Company has a right to file the suit?
3. Whether the suit has been filed with the sanction of the plaintiff-Company? If not, what is its effect?
4. Whether between 31st March, 1944, and 3rd July, 1944, Mr. L. P. Jaiswal while acting as the Managing Director of the plaintiff-Company fraudulently with a view to derive personal benefit to himself at the cost and of the detriment of the plaintiff-Company supplied 25.146.1 bulk gallons of the methylated spirit to defendant No. 2 of which he was the sole proprietor?
5. Whether at the time of the purchase the selling price of the spirit was Rs. 2-8-0 per bulk gallon?
6. Whether defendant No. 1 in entering into this purchase transaction committed a breach of trust of the fiduciary position existing between him and the plaintiff-Company? If so, what is its effect?
7. Whether the plaintiff is estopped from bringing this suit by his acts, conduct and admission?
8. Whether defendant No. 1 was by the resolutions or Articles of the Association barred from carrying on a separate business? If so, what is its effect?
9. Whether by resolutions mentioned in para No. 10 of the written statement defendant No. 1 was permitted by the plaintiff-Company to carry on separate business to buy the spirit in suit from the plaintiff-Company as his personal and private business without any objection?
10. Whether the plaintiff-Company approved and confirmed the purchase of spirit in suit by defendant No. 1 from the plaintiff? If so, what is its effect?
- 10A. Whether on 16th October, 1945, the plaintiff-Company passed full and final receipt in favour of the defendants, absolving them from all liabilities, if any, in respect of the transaction in suit? If so, what is its effect?

11. Whether the resolutions and receipt dated 16th October, 1945, of the plaintiff-Company absolving the defendant from all liabilities in respect of, and including, the transaction in dispute were passed under compulsion and are not binding on the plaintiff-Company and do not absolve the defendant from all liabilities?

12. Whether the suit is within time?

13. Whether the plaintiff is entitled to recover the difference between the contract rate and the market rate of spirit at the time of sales? If so, to what amount is the plaintiff entitled?

14. Whether the plaintiff is entitled to interest? If so, at what rate?

15. Whether the defendant is entitled to any refund? If so, to what amount?

16. Whether the defendant is entitled to compensatory cross under S. 35A of the C.P.C.?

17. Relief.

(10) Issue No. 10A, it may be stated was added at the instance of the defendant at a later stage, sometime in July 1952.

(11) The trial Court decided issue No. 1 against the plaintiff holding the proceedings of the meeting of 28th of March 1946 to be null and void and of no effect. Strictly speaking, the learned Subordinate Judge held that Mr. S. P. Jaiswal could not be considered to have been validly appointed as Managing Director of the plaintiff-Company on the ground that the decision in the other suit (suit No. 374 of 1946: Lali Parshad Jaiswal v. Karnal Distillery Co., Ltd.,) on this point operated as res judicata.

I may here state that the fate of issues Nos. 2, 10A and 11 has also, according to the trial Court to depend on the decision of the other suit because of the rule of res judicata. By virtue of decision on issues Nos. 1 and 2 the decision on issue No. 3 has also gone against the plaintiff. Under issue No. 4 it has been decided that the plaintiff-Company agreed to supply the spirit at Re. 0-15-0 per gallon to the Government of India in 1942 and the supply to defendant No. 2 was made under the order of the Government of India and according to the rate prescribed by them. In this view the allegation of fraud on the part of the defendant No. 1 was negated and the decision given against the plaintiff. Under issue No. 5 the trial Court did not feel satisfied on the evidence produced in the case that the selling price of the spirit at the time of purchase by the defendant was Rs. 2-8-0 per gallon.

The Court came to this conclusion on the ground that evidence with respect to private sale, given by some of the plaintiff's witnesses could not afford a safe criterion for the price fixed for the contractors of the Government of India and that the best evidence on this point had not been brought on the record. Decision on issue No. 6, following the discussion on issue No. 4, similarly went against the plaintiff. On issue No. 7 the plaintiff having been held to have given a

complete discharge on 16th of October 1945, was found to be estopped from bringing the present suit. As a result of the decision on issues Nos. 4 and 7 the conclusions on issues Nos. 8 to 10 also went against the plaintiff, the finding being that the plaintiff had actually approved the transaction in dispute to be fully justified.

Under issues Nos. 10A and 11 also, as a result of the decision in the earlier suit negating the allegations of undue influence and coercion, the plaintiff-Company before us, having given complete discharge to the defendants, was held incompetent to challenge the compromise evidenced by the receipt (Ex. D-8), dated 16th of October 1945. Issue No. 12 was, however, decided in favour of the plaintiff and the suit held to be within limitation under Art. 120 of the Indian Limitation Act. The contention that on the analogy of S. 235 of the Indian Companies Act the present suit should also be held to be governed by three years" period was, of course, repelled.

The plaintiff was held disentitled to recover the difference between the contract rate and market rate of methylated spirit at the time of the sale and with this observation issue No. 13 was also decided against the plaintiff. On these findings obviously no question of the plaintiff claiming any interest could arise and issue No. 14 was, in consequence, determined against the plaintiff. The defendants having not paid any court-fee on the claim of refund, issue No. 15 was held not to arise and was, therefore, negatived. Similarly the defendants having not made out any case for special costs, none were awarded to them under issue No. 16. On these findings, as already observed, the plaintiff's suit was dismissed with costs.

(12) On appeal Mr. S. N. Bali has addressed very lengthy arguments in criticism of the judgment of the Court below and Mr. B. R. Tuli has similarly addressed extensively in support of the judgment (except on the plea of limitation which portion he has assailed) and the decree appealed against. Before dealing with the respective contentions advanced on behalf of the contesting parties, it may be stated that both counsel agreed before us that the decision in the earlier suit does operate as *res judicata*, and indeed both sides based their arguments in the light of the findings contained in the judgment in the first case.

It is, therefore, necessary at this stage to see as to what precisely are the findings and conclusions in the earlier decision, which has since been reported as *Karnal Distillery Co. Ltd. and Others Vs. Ladli Parshad Jaiswal and Another*, This is a judgment of a Division Bench of the Court consisting of Bhandari C. J., and Tek Chand, J., by which the suit of Ladli Parshad Jaiswal (plaintiff-respondent in that case and defendant-respondent before us) was dismissed. According to the judgment of the Division Bench, the finding of the learned District Judge, on appeal, as to the existence of undue influence said to have been exercised by Ladli Parshad Jaiswal over his younger brother S. P. Jaiswal and nephews, was a finding of fact and, therefore, not open to question on further appeal in the High Court. This finding was held not to be vitiated in any manner so as to justify

interference by this Court on second appeal.

As a result the conclusion of the District Judge to the effect that the resolutions mentioned in para 6 of the plaint in the earlier suit and passed at the extraordinary general meeting, dated 16th of October 1945, were ineffective as having been passed under undue influence was upheld. The allegation of coercion by L. P. Jaiswal, however, did not find favour with the Division Bench. What has been stated above clearly establishes that the compromise, which was given effect to in the form of several resolutions passed at the extraordinary general meeting of the plaintiff-Company held on 16th of October 1945, was held to be bad and ineffective on account of undue influence exercised by L. P. Jaiswal. The following items inter alia were thus held to be tainted with undue influence and, therefore, of no binding effect:

(i) The resolution accepting and ratifying all acts done by L. P. Jaiswal and the contracts entered into by him or on behalf of the Karnal Distillery Company during his period of managing directorship;

(ii) The resolution by which accounts and assets of the Company were deemed to have been accounted for by L. P. Jaiswal and the accounts relating to the Karnal Distillery Company were treated as correct and L. P. Jaiswal released and for ever discharged from all liabilities relating to the management of the Company during his period of office;

(iii) The clear receipt in respect of all property, books assets, etc., given to L. P. Jaiswal;

(iv) The resolution, according to which L. P. Jaiswal was to be a permanent Director of the Company and not liable to retirement by rotation;

(v) The resolution electing and appointing L. P. Jaiswal as permanent Chairman of the Company and;

(vi) The provisional confirmation and ratification of the contracts executed, business done and benefits derived by L. P. Jaiswal under facilities granted to him by the resolution of 30th of April 1941.

(13) We are not concerned with the other resolutions for our present purposes; the resolutions mentioned above, however, have a direct bearing on the fate of the present litigation and that is why they have been expressly specified.

(14) Mr. Bali has contended that in view of the final judgment of the Division Bench in the earlier case, which, it is agreed at the Bar, operates as *res judicata*, the decision of the trial Court is directly hit on all those issues which were decided against the plaintiff-appellant on the basis of the earlier decision of the same date by the same learned Senior Subordinate Judge, and indeed Mr. Tuli, whose argument also proceeded on the clear assumption that the decision of the Division Bench of this Court in the earlier case operates as *res judicata*, did not make any serious attempt to controvert this point.

The question, however, arises as to how far the plaintiff is entitled to claim relief in the present suit, even on the finding that the resolutions passed on 16th of October 1945, on which the trial Court has mainly relied, are not helpful to L. P. Jaiswal in view of the decision of the Letters Patent Bench in the earlier case. The preliminary question, which is the subject matter of issues Nos. 1 to 3, also calls for decision.

(15) In the earlier case the Letters Patent Bench has expressly found that neither of the meetings held on 3rd of March 1946 and 28th of March 1946 were valid or binding on L. P. Jaiswal. That this decision does operate as res judicata was conceded by Mr. Bali, and indeed he tried to build his case on the assumption that these meetings are of no avail to him. The appellant has contended that S. P. Jaiswal is competent to file the present suit by virtue of Art. 132 of the Articles of Association of the Company. Mr. Tuli has, on the other hand, argued that the resolution by which this Article was passed, has been held to be invalid, or, at least, it must be considered to be invalid on the merits.

Mr. Bali has submitted in the alternative that even if S. P. Jaiswal be not considered to be the Managing Director, he is in any case competent to file the present suit as the Managing Director or principal officer of the Company. He has also contended, in addition, that if the resolution of 16th of October 1945 is cancelled, then this would result in revival of the resolution of 20th February, 1945, according to which S. P. Jaiswal had been appointed a Managing Director. This resolution, according to Mr. Bali, also gives to the Managing Director specific power to file suits, and, according to the statement of the counsel, L. P. Jaiswal had also admitted the appointment of S. P. Jaiswal as Managing Director in place of the former on 20th of February, 1945.

(16) At this stage it would be helpful to reproduce Article 132(5) of the Articles of Association of the plaintiff-Company (Ext. D-23) on which reliance has been placed:

"132. Managing Director--The Managing Director is Mr. L. P. Jaiswal and he shall continue to be Managing Director of the Company, unless he voluntarily resigns his office, for a period of ten years from the date of the registration of the Company, but if his term of office for a further period of ten years at the end of the first ten years is not to continue on the same terms and conditions, notice to that effect shall be given to him within fifteen days of the expiry of the first eight years by a two-third majority at a special general meeting convened for the purpose.

* * * * *

* * * * *

*** The said Managing Director, subject to the supervision and control of the Directors and without prejudice to his general powers conferred by these presents shall have the following powers, that is to say, power-

* * * * *

(5) To institute, conduct, defend, compound or abandon any legal proceedings by or against the Company or its officers or otherwise concerning the affairs of the Company and also to compound and allow time for payment or satisfaction of any debts due and of any claims or demands by or against the Company.

* * * * *

This provision; as is obvious, gives power to L. P. Jaiswal specifically and not to whatsoever may happen to be the Managing Director. The contention raised on behalf of Mr. Bali that the framers of the Article could not have intended to confer this power on L. P. Jaiswal alone and that they must have intended to confer this power on every incumbent of the office of the Managing Director is, in my opinion, not tenable and must be repelled. The language is very clear and explicit and no question of resorting to any guess about the implied intention arise. The counsel that contended that at least as a Director it is open to S. P. Jaiswal to file a suit on behalf of the Company, and it is argued that filing of suits is an integral part of the functions of managing a limited liability Company by the Directors. In this connection our attention has also been drawn to Art. 71 in Table "A" of the Indian Companies Act (Act VII of 1913) which defines the powers and duties of Directors. This Article undoubtedly lays down inter alia that:

"The business of the company shall be managed by the directors, who may pay all expenses incurred in getting up and registering the company, and may exercise all such powers of the company as are not, by the Indian Companies Act, 1913, or any statutory modification thereof for the time being in force, or by these Articles, required to be exercised by the company in general meeting."

The counsel has in this connection also relied on H.M. Ebrahim Sait Vs. The South India Industrials Limited, for the proposition that managing the business of the company includes the institution of suits on its behalf, when it becomes necessary in the course of management to recover moneys due to the company. In the alternative, reliance has been placed on Ex. P-3, which is a resolution passed on 2nd of March 1947 authorising S. P. Jaiswal to file a suit against L. P. Jaiswal. Mr. Tuli has, in reply, contended that this resolution of the 2nd of March 1947 is invalid because there was no valid Board of Directors constituted on that date.

Shrimati Suraj Mukhi, so argues the counsel, had been illegally appointed Director in place of L. P. Jaiswal and, therefore, there being no valid Board of Directors the resolution giving power to S. P. Jaiswal to file the present suit was invalid. He has in support of this submission plead reliance on Art. 71 of Table "A" which, according to him, vests the Board of Directors, and not the manager, with the power to manage the affairs of the company; by virtue of this Article the residuary power also rests with the Board. He has further drawn our attention to S. 83-A of the Indian Companies Act which lays down that every company shall have at least three Directors. This last contention, however, need not detain us,

because the plaintiff-Company is a private company and when the counsel's attention was drawn to sub-section (2) of this section, he conceded that this provision is inapplicable to a private company. Article 102 of the Articles of Association of the Company clearly lays down that the minimum number of Directors should be two. In this connection it is helpful to advert to S. 86 of the Indian Companies Act (VII of 1913) which lays down that:

"The acts of a director shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification:

Provided that nothing in this section shall be deemed to give validity to acts done by a director after the appointment of such director has been shown to be invalid"

The appellant has placed reliance on this section in support of the validity of the resolution dated 2-3-1947, whereas Mr. Tuli has contended that the earlier suit having been filed on 13th of December, 1946, when the invalidity of the constitution of the Board of Directors was expressly assailed in the Court of law, the provisions of S. 86 cannot be invoked in support of the validity of the acts of the Directors of the plaintiff-Company. He has also referred to the statement of L. P. Jaiswal that the meeting of the Board of Directors used to be held on first Sunday of every month and that the meetings held after 28th March 1946 were not so held and were, therefore bad and thus not binding on him. The counsel has relied on *Kanssen v. Rialto (West End) Ltd.* (1944) 1 All ER 751 and *Punjab Zamindars Bank Ltd. Lyallpur v. Madan Mohan Singh* AIR 1936 Lah 321, in support of his contention that no notice having been sent to *Ladli Parshad*, the Board meetings must be considered to be invalid. In addition he has emphasised that *Shrimati Suraj Mukhi* having been illegally appointed a Director in place of L. P. Jaiswal, the Board was invalidly constituted, and on this ground also the meeting of 2nd of March 1947 is invalid.

(17) After giving my best consideration to the points raised, in my view S. 86 of the Indian Companies Act (VII of 1913) would clearly cover this case, and it is difficult for me to hold that the power given to L. P. Jaiswal to file the present suit was so clearly and patently invalid as to justify its dismissal. It is precisely to save cases of the present nature that the Legislature has, in its wisdom, enacted S. 86. Merely because the earlier suit had been filed by L. P. Jaiswal making all sorts of sweeping allegations, which may or may not ultimately be found or shown to be correct or even justified, does not bring the case within the purview of the proviso to section 86, according to which the appointment must be "shown to be invalid"; bare allegation, like the one on which reliance has been placed, is, in my opinion, not enough to attract the proviso. It may have raised a doubt, but it can by no means be said that the appointment of the Directors was shown in December, 1946 to be invalid.

In this connection it is noteworthy that in the earlier case the Letters Patent Bench considered L. P. Jaiswal's prayer with respect to the alleged invalidity of all resolutions passed at all meetings held after 28th of March 1946 to be too

vague. Section 86, inspired as it is by a desire on the part of the Legislature to see that the day-to-day business of trading companies does not suffer on account of technical defects in the appointment of Directors, in my view, must be given a liberal interpretation so as to advance and promote the object of the provision, and not to unnecessarily curtail its scope so as to defeat the very purpose of its enactment. To non-suit the present plaintiff on this ground and to refuse to adjudicate upon the merits of the controversy would, in my opinion, cut down the beneficial operation of this section, and amount to defeating the very object for which it was enacted.

(18) (1944) 1 All ER 751, on which Mr. Tuli has placed reliance, dealt with facts materially different from those before us. In that case the Court was called upon to construe S. 143 of the English Companies Act of 1929, and on that record clearly there was no actual appointment in fact of "S" as a Director of the Company concerned. The plaintiff and "C" were the first Directors, each holding one share and "C" and "S" alleged that in February, 1940 S had been appointed a Director, although in fact no such appointment had been made. In 1941 no annual general meeting was held as required by the Articles of Association, but on 30th of March, 1943, "C" and "S" purporting to Act as Directors appointed "M" a Director of the company and received an application from "C" for a certain number of shares which at his request were allotted to "M", "S" and "C". "M" was found to be aware that the plaintiff was contending that "S" was not a Director, but relying on an assurance from "C", M did not make any enquiries.

In an action having been brought by the plaintiff for a declaration that the and "C" were the only Directors, it was held by the Court of Appeal that "M" having been put on enquiry, he should have inquired into the question whether or not "S" was in fact a Director and that having failed to do so, he could not rely on S. 143 of the Companies Act of 1929. Support is sought from this decision for the proposition that if a person is put on enquiry--as S. P. Jaiswal and other de facto Directors are said to have been put on inquiry by L. P. Jaiswal--then he cannot rely on S. 86.

(19) This section, as its language shows, refers to "discovery of defects" and not discovery of facts. It is the subsequent discovery of defect in the appointment or qualification of a Director which this section seeks to cure for certain purposes, and not the subsequent discovery of complete absence of factual appointment of Director. The case in hand is not a case of no appointment of Directors as was the position in Karsen's case 1944 1 All ER 751, but is only a case of a defect in the appointment of a Director, and this is so even according to the defendant contention.

It is, however, argued on behalf of the defendant-respondents that the observations of the Court of Appeal are of a general nature and would cover the present case. I am not impressed by this argument. In the Court of Appeal case there was in fact no appointment at all, and, therefore, the question of the applicability of S. 143 and could not at all arise; and indeed this aspect was

prominently brought out by the House of Lords on further appeal: *Morris v. Kanssen* 1946 AC 459. I would, in the circumstances, be disinclined, with respect, to treat the obiter of the Court of Appeal to be of any persuasive value in deciding the point before us.

(20) Mr. Tuli's contention is that the appointment of Shrimati Surajmukhi as a Director in place of L. P. Jaiswal was defective and, therefore, there was no valid Board of Directors with the result that the resolution empowering S. P. Jaiswal to institute the present suit is bad. It may be remembered that in the written statement as well as in his statement as a witness L. P. Jaiswal admitted that he was the Managing Director of the Company only up to 16th of October 1945 when he became the Chairman. L. P. Jaiswal has also admitted that the Board meeting held on 4th of November 1945 was attended by him, S. P. Jaiswal Madan Lal Jaiswal and Sajjan Lal Jaiswal at Karnal at 4.30 p.m., which is obviously suggestive of the fact that the Board so constituted was a de facto Board managing the affairs of the Company. The name of Sajjan Lal Jaiswal is perhaps a mistake, there being no such Director. On the facts and circumstances of this case, therefore I do not think the ratio of *Kanssen's* case 1944 1 All ER 751, can possibly be attracted. Section 86, Indian Companies Act, 1913, thus fully applies to the present case and the suit must be held to have been instituted by an authorised person. If section 86 applies, then clearly AIR 1936 Lah 321 is wholly unavailing.

(21) The resolution dated 20th of February 1945, on which Mr. Bali had also tried to base his case, having not been placed on the present record, it cannot avail the plaintiff, and S. P. Jaiswal cannot, on the basis of any such resolution, be held to be empowered to institute the present suit.

(22) But section 86 apart, I am also doubtful if it is at all open to L. P. Jaiswal to raise this objection for the purpose of avoiding his liability to the Company, the institution of the suit being obviously for the benefit and in the interest of the plaintiff-Company. I am, however, not expressing any considered opinion on this point.

(23) The next point canvassed before us is with respect to the fiduciary capacity of L. P. Jaiswal. Mr. Bali has referred us to Art. 110 of the Articles of Association in which the Directors including the Managing Director are held not to be disqualified by their office from contracting with the Company, provided the nature of the interest of the Director concerned is disclosed by him at the meeting of the Directors at which the contract or agreement is determined and that the consent of the Directors is previously obtained in case of any contract or arrangement for the sale or purchase or supply of goods and materials with the Company by a Director, etc.; it is further provided in this Articles that no director or Managing Director shall vote in respect of any contract or arrangement in which he is so interested and, if he does so, his vote shall be counted. Section 86-F of the Indian Companies Act of 1913, to which also the counsel has referred, makes a similar provision, and so far as is relevant for our purposes lays down

that:

"86-F. Except with the consent of the directors, a director of the company, or the firm of which he is a partner or any partner of such firm, or the private company of which he is a member or director, shall not enter into any contracts for the sale, purchase or supply of goods and materials with the company,....."

It is urged that L. P. Jaiswal did not obtain any consent of the Directors for entering into the contract in question. Our attention has been drawn to *India Sugars and Refineries Ltd. v. Estate of the late V. Ramalingam* 1953 1 Mad LJ 577: (AIR 1953 Mad 694), where a contractor was held liable to the company for having utilised the office staff for his own business. The counsel has further sought to derive assistance from *Boston Deep Sea Fishing and Ice Co. v. Ansell* (1888) 39 Ch D 339 and reference has particularly been made to the judgment of Fry, L. J., at p. 368 where it is observed as follows:

"In my judgment, the conduct of Ansell in so dealing was a fraud--a fraud on his principals--a fraud, not according to any artificial or technical rules, but according to the simple dictates, of conscience, and according to the broad principles of morality and law, and I think it is the duty of the Courts to uphold those broad principles in all cases of this description."

(24) The facts of that case were that Mr. Ansell had been appointed Managing Director of Earle's Shipbuilding Company by an agreement entered into before the company had been registered, which was adopted by the Company after its registration; at the first meeting of the Directors he received instructions to arrange the terms of the building of four or five trawlers, which might be required, with M/s. Earle. Thus authorised, both as Managing Director and by the special resolution, Ansell goes to M/s. Earle and accepts an agreement from them to pay him commission of 1 per cent on the price to be paid by the company, of which he was Managing Director, to M/s. Earle. A further contract was subsequently entered into which Mr. Ansell was said to have exerted himself to beat down the prices of M/s. Earle, but he higgled and insisted on a payment being then made to him, and after debate succeeded in obtaining ? 50/- from them. It was on these facts that the observations quoted above were made by Fry, L. J.

(25) *Albion Steel and Wire Co. v. Martin* (1875) 1 Ch D 580, is the next decision on which Mr. Bali placed reliance in support of his contention fixing liability on L. P. Jaiswal. The counsel also read out certain passages from *Palmer's Company Law* (Twentieth Edn.) at pp. 554 and 564. At p.554 it is stated that, unless the Articles confer on a Director express powers of contracting with the company, a Director's powers of so contracting are extremely limited.

The company is entitled to the collective wisdom of its Directors, and if any Director is interested in a contract, his interest may conflict with his duty, and the law always strives to prevent such a conflict from arising; not even if it can be shown that the contract in question is a fair one is the Director allowed to

enter into it, for the Courts will not, in such cases, look into the merits, but adhere strictly to the rule that the possible conflict of interest and duty must not be allowed to arise. The following words of Lord Cairns L. C. from the decision *Parker v. McKenna* (1874) 10 Ch App 96, are then quoted:

"No man can in this Court, acting as an agent, be allowed to put himself in a position in which his interest and duty will be in conflict."

From p. 564 again the following passage is quoted:

"Directors are at all times acting on behalf of the company and they must accordingly at all times consider primarily the interests of the company;"

A little lower down it is further stated:

"Any fraud or underhand dealing by the director will render him liable to the company for any loss suffered by the company as a result, or for any profit which he may have made even if the company itself has not suffered and could not itself have made the profit."

As a matter of fact this passage is based on the decision of (1888) 39 Ch D 339 quoted above.

(26) In my view it cannot be disputed that L. P. Jaiswal, who acted as a Managing Director at the relevant period, held a fiduciary capacity vis-a-vis the Company, and indeed nothing substantial was urged on behalf of the respondents against the existence of the fiduciary capacity of L. P. Jaiswal.

(27-30) (After going through evidence, his Lordship continued and dealt with the contention of the defendant's counsel based upon S. 91-A of the Companies Act, 1913).

(31) Counsel also relied on S. 91-A of the Companies Act of 1913 in support of the contention that general disclosure of interest by Mr. L. P. Jaiswal, as contained in Ex. D-13, amounts to a sufficient compliance with the provisions of law. I equally regret my inability to accede to this contention. Considering the object and purpose of enacting S. 86-F, it is clear to my mind that the Legislature intended a full disclosure of the facts of particular contracts to the Directors so that they may apply their mind to the effect of such contracts on the company and then give or withhold their consent. No principle or precedent has been cited by the respondents showing that this is not the legal position. On the present record I am not satisfied that L. P. Jaiswal had complied with S. 86-F of Act VII of 1913.

(32) It has next been contended that in any case the price paid by Mr. L. P. Jaiswal was more than what the plaintiff-Company could have got from the Defence Department, with the result that no loss has been occasioned by the Company. (His Lordship examined this contention and proceeded): In my view this contention seems to be well founded, and on the present record the plaintiff-Company has clearly failed to prove any loss on account of the transactions in

dispute.* * *

(33) The evidence of Banarasi Das, P.W. 1, Murari Lal P.W. 2 and Tara Chand P.W. 4 on the question of rate of methylated spirit is not only vague and general in character, but it also suffers from the infirmity of being inconclusive and uninspiring. I am wholly unable to place reliance on their testimony, which is also unhelpful because obviously the commodity in question could not be sold by the plaintiff in the open market.

(34) But then the appellant has contended that L. P. Jaiswal is liable to reimburse the plaintiff-Company and pay the entire profits made by him by supplying the solidified spirit to the Government; it is urged that L. P. Jaiswal having failed to produce his accounts relating to this deal with the Government, a presumption should be raised against him. This contention is, in my opinion, wholly misconceived. In the plaint as laid, the plaintiff has not claimed the profits made by L. P. Jaiswal on account of the supply of solidified spirit to the Government.

The only question arising out of the pleadings in the plaint centres round the extent of advantage obtained from or through the contract of purchase of methylated spirit by L. P. Jaiswal from the plaintiff-Company, and on this point there is no reliable and trustworthy evidence of the market rate, showing the loss incurred by the plaintiff-Company; material showing if the Company could freely sell methylated spirit to the public is also wanting on the present record. I, therefore, unhesitatingly repel Mr. Bali's contention.

(35) In this connection I may also, in passing, note another point canvassed at the Bar. Mr. Tuli contended that the plaintiff-Company did not manufacture solidified spirit, with the result that L. P. Jaiswal was not doing anything wrong by manufacturing solidified spirit from the methylated spirit which he obtained from the plaintiff-Company and then supplying it to the Government. Mr. Bali on the other hand, contended that the plaintiff-Company used to manufacture solidified spirit and that this business was included in the objects of the Company. In my opinion the evidence led on behalf of the plaintiff-Company is so utterly useless that it is not possible for me to hold that it used to manufacture solidified spirit.

(36) This brings me to the plea of limitation which went against the defendants in the trial Court but which Mr. Tuli has reagitated here. He has submitted that the case is governed by Art. 36 of the Indian Limitation Act and, therefore, having been filed beyond the period of two years the suit merits dismissal on this ground alone. The trial Court, according to him, is wrong in law in holding the suit to be within limitation.

(37) Article 36 deals with suits for compensation for any malfeasance, misfeasance or non-feasance independent of contract and no specifically provided for elsewhere in the Limitation Act. The terminus a quo for a suit under this contract is the date of malfeasance, misfeasance or non-feasance. According to the counsel whenever the various commodities were supplied to Mr. L. P. Jaiswal, the cause to action would arise on those dates, and, according to the

counsel, admittedly the suit has been filed more than two years thereafter.

Reference has been made to Bank of Multan Ltd. v. Hukam Chand AIR 1923 Lah 58(2), where it is laid down that applications under S. 235, Indian Companies Act, are in the same position as suits, for the purposes of the law of limitation and, therefore, applications filed under S. 235 more than two years after the day of misfeasance were held to be barred by time. I do not see how this position helps the learned counsel. Article 36 expressly excludes the liability on the basis of a contract, and in the present case, the controversy has really been fought out on the ground that the contract said to have been entered into by Mr. L. P. Jaiswal with the plaintiff-Company was brought about as a result of undue pressure and abuse of fiduciary position.

(38) The defendants have raised, in defence, all sorts of pleas--consistent and inconsistent--including even the plea that they had disclosed their interest in the contracts and had secured the consent of the Company through the Directors. The suit in these circumstances seems to me to be covered by the residuary Article 120. The Madras authority cited above would thus seem to be more to the point and, as held therein, the period of limitation for the present suit would be six years; nothing convincing has been urged to the contrary by the respondents.

(39) It has often been observed that the provision of the Limitation Act, which take away the right to sue, have to be strictly construed. If the language is clear, express, precise and unambiguous, it must be enforced, but where two interpretations are found to be equally possible, the Court may reasonably impute to the Legislature an intention to prescribe a larger period of limitation. In the present case it is only by refusing to place a literal construction on Art. 36, which excludes liability on the basis of a contract, and by extending the scope of this Article by a process of implication that it is being sought to be applied to the present suit. This, as at present advised, I do not find easy to maintain.

(40) For the reasons given above, this appeal fails and is hereby dismissed, but in the peculiar circumstances of the case and especially the fact that the dispute is between two real brothers, the parties are left to bear their own costs throughout.

Bishan Narain, J.

(41) I am in complete agreement with my learned brother but the plaintiff-Company in the present case has failed to prove that it used to manufacture solidified spirit at the relevant time and further it has failed to prove that L. P. Jaiswal (respondent) purchased methylated spirit from the plaintiff-Company at a price lower than the market price and thereby caused loss to the plaintiff-Company. The present suit, therefore, as laid fails and must be dismissed. I express no opinion on the other points discussed by my learned brother in the judgment.

(42) In view of the above findings, I agree that the appeal fails and must be

dismissed leaving the parties to bear their own costs throughout.

BY THE COURT

Accordingly, this appeal is dismissed and the parties are left to bear their own costs throughout.

Appeal dismissed.