ALLAHABAD HIGH COURT

Jwala Prasad

Vs.

Official Liquidator jwala jjaiik Ltd

Special Appeals Nos.304 of 1957 and 4 and 71 of 1958

(A.P. Srivastava and M. Lal, JJ.)

08.08.1961

JUDGMENT

A.P. Srivastava, J.

1. These are three special appeals arising out of the same case and can, therefore, be conveniently disposed of together. They arise Out of an application made by the 'official Liquidator of the Jwala Bank Ltd., (in liquidation) under section 235 of the Companies Act of 1913. The application was filed against seven persons, three of them being the present appellants. The seven persons were Sri Jwala Prasad, Sri G.G. Buty, Sri W.C.G. Dunne, Sri W.B. Dawson, Sri Rama Shanker, Father Francis Xavier and Messrs. S.N. Gupta and Co. Sri W.C.G. Dunne died during the pendency of the petition and the case abated against him. Sri W.B. Dawson was not traceable and the Liquidator, therefore, intimated to the Court that he was withdrawing the case against Sri W.B. Dawson and did not want to proceed against Mm. The application proceeded against the remaining five persons. Father Francis Xayier having been exonerated from liability decrees were passed against the remaining four persons. Sri Jwala Prasad was held liable for Rs. 56,212/- plus Rs. 2,000/- as costs. Sri Rama Shanker was held liable for Rs. 5,000/- and for Rs. 500/- as costs. Sri S.N. Gupta of Messrs. S.N. Gupta and Co., was also held liable for the same amount. Sri G.G. Buty was held liable for Rs. 3,750/- without costs. Special Appeal No. 304 of 1957 has been filed by Sri Jwala Prasad. Special Appeal No.4 of 1958 has been filed by Sri G.G. Buty and Special Appeal no.71 of 1958 has been filed by Sri S.N. Gupta. At the time of hearing we were told that Sri Rama Shankar has submitted to the order passed against him and has not appealed.

2. Six of the persons against whom the application had been filed were the directors of the Bank in liquidation while Sri S.N. Gupta of Messrs. S.N. Gupta and Co., was the duly appointed auditor of the Bank.

3. The Jwala Bank was originally started as a private concern of which Sri Jwala Prasad,

appellant in appeal No.304 of 1957, was the sole proprietor. In. April, 1938, the Jwala Bank Ltd., was incorporated as a public limited liability company with an authorized capital of Rs. 25,00,000/- divided in 25,000/- ordinary shares of Rs. 100/- each. It had its registered office at Agra. The issued capital till the 30th of June, 1949, was Rs. 13,32,700/-. Sri Jwala Prasad held 4,375 fully paid up shares of the company in his own name and the names of his wife and children the management of the company was vested in a Board of Directors of which Sri Jwala Prasad was the Chairman. The company had 29 branches in different parts of India, one of its principal offices being located at Bombay. On the 10th April, 1947, the Central Government purporting to act under an ordinance which was in force on that date directed the Reserve Bank of India to cause an inspection to be made of the company.

As a result of the report of the inspection the Central Government passed an order dated the 6th of April, 1948, prohibiting the Bank from, receiving fresh deposit at any of its offices, branches or agencies with effect from 12-4-1948. At that time the liabilities of the Bank amounted to Rs. 1,09,00,000/-. Under a scheme that was formulated by the Bank a sum of Rs. 98,70,000/- was later paid to the creditors and depositors and in this way some of the liabilities were Satisfied. Others, however, remained outstanding. On the 1st of August, 1949, a creditor Sri Sitla Prasad Singh filed an application under section 163 of the Companies Act of 1913 praying for the winding up of the company. The application was allowed on the 17th of February, 1950, and on the same date the official Hquidator was appointed a liquidator of the company. As a result of the appeal which was filed against the order directing the winding up the functioning of the official Liquidator remained stayed first from the 24th of February, 1950. to the 20th of March, 1950, and again from the 28th of August, 1950 to the 24th of October, 1950. The appeal was, however, dismissed on the 24th of October 1950, and the stay order was discharged. The liquidator then took charge of the affairs of the company. He got the affairs of the company investigated by a firm of chartered accountants known as Messrs. G.P. Jaiswal and Co. As a result of the report of the investigators and a scrutiny of the account books of the company and the balance sheets of the years 1945-46 and 1946-47 the Official Liquidator discovered:-

(1) That Sri Jwala Prasad had unauthorisedly drawn a large amount of Rs. 45,942/- as daily allowance during the period 1-11-1947 to 31-4-1950.

(2) That in fact no profits had accrued to the Rank in 1946 yet a large amount had been distributed as dividend between the share-holders. The amount had really been distributed out of the capital in direct contravention of the terms of the articles and the memorandum of association of the company.

(3) That a large amount had been allowed to be assessed as income tax on the profits of the company for the year 1945-46 though in fact no profits had accrued to the company in that year.

(4) That in respect of the year 1946-47 also though no profits had actually accrued a large amount had been shown as profits. Though no income-tax had been asssessed on the profits deductions of income-tax at source had not been allowed to be refunded.

(5) It was alleged that the Chairman and the Directors who had been impleaded as

opposite parties in the application were directly responsible for the manipulation of the accounts and the resulting loss to the company. The method employed in the manipulation of accounts was alleged to be that the cost price of the shares held by the company in various other companies had been inflated and the inflated amount had been shown as profits in the accounts as well as the balance sheets. It was urged that the balance sheet prepared was inaccurate and misleading. So far as Sri S. N. Gupta whose firm had audited the accounts of the two years was concerned, it was alleged that he had performed his duties perfunctorily and had made no attempt to check and verify the figures incorporated in the balance sheets. The liquidator, therefore, sought to make the seven opposite parties impleaded in the application liable for a total amount of Rs. 4,50,331/ 15/- which was made up of the following four items:-

(a) Dividend for 1946 ... ... Rs. 78,254/10/-.

(b) Income tax and Excess Profits Tax assessed for 1946 ... Rs. 2,29,127/1/-.

(c) Deductions of Income tax at source for 1947 disallowed ... Rs. 99,008/-.

(d) Daily allowance wrongly Charged ... ... Rs. 45,942/-.

4. The prayer made in the application was :-

"It is, therefore, respectfully prayed that this Hon'ble Court will be pleased to examine into the conduct of the directors opposite parties Nos.1 to 6 and that of the Opposite party No.7, Messrs. S.N. Gupta and Co., Auditors of the Bank, and compel them either jointly or severally to restore the money with interest at such rates as this Hon'ble Court may think just to the assets of the Jwala Bank Ltd., by way of compensation in respect Of misapplication retainer and misfeasance or breach of trust as this Hon'ble Court may think just and proper with costs of these proceedings".

5. Replies to the application were filed separately on behalf of the three appellants, Sri Rama Shanker and Father Xavier. As Father Xavier had been exonerated and there is no appeal before us on behalf of Sri Rama Shanker we are not concerned with the defenses which they put forward. So far as Sri Jwala Prasad was concerned, he denied that the accounts were manipulated or that profits were incorrectly shown. He said that the manner in which the accounts and the balance sheets had been prepared was perfectly justified and in accordance with recognized methods of accountancy and that the cost price of the shares had been properly shown. He denied shaving drawn any unauthorized daily allowance and pleaded that he had acted throughout in a bona fide and honest manner. He disputed the allegation that the dividends had been distributed out of the capital or that income-tax and super tax had been paid to Government on imaginary profits. He denied all liability. He pleaded limitation also.

6. Sri G.G. Buty also pleaded limitation and stated further in his reply that he had been appointed only an honorary director and had attended only one meeting with the result that he had ceased to

be a director long before the years in dispute. He said that the accounts of the company and the balance sheets which he had signed had been, audited by a duly chartered accountant and he signed the same as he had no reason to doubt the bona fides of the Chairman, the auditors or the other directors who had signed the same. He said that he had not been benefited in any way and had not caused any loss to the Bank by any act of his.

7. Sri S. N. Gupta of the firm of Messrs. S.N. Gupta and Co., chartered accountants, also contested his liability. He said that the balance sheets and the Profit and Loss Accounts of the years in question were prepared by the officers of the head office of the company at Agra on the basis of the returns submitted by the various branch offices and the head office accounts. The accounts so prepared had been passed by the Chairman. His own firm had audited the accounts and signed the balance sheets but had no reason to think that the figures submitted by the branch offices and the head office were incorrect. No occasion, therefore, arose for checking and verifying those figures. He denied that he had acted negligently or that he had performed his duties perfunctorily. He too pleaded limitation, and said that he had throughout acted honestly and in good faith.

8. The question of limitation raised by almost all the contesting opposite parties was decided as a preliminary issue by Mr. Justice Brij Mohan Lall on the 24th of August, 1954. He took the view that though prima facie the application was barred under section 235 of the Indian Companies Act, limitation had been saved On account of the coming into force during the pendency of the application of the Ranking Companies (Amendment) Act (Act No.XIII of 1953). He was of the view that with the help of section 45-O of the Banking Companies Act the application could be held to be within limitation.

9. Subsequently while the case was being dealt with by Mr. Justice Upadhya he framed no less than 32 issues in the case on the basic of the pleadings of the parties. It is, however, not necessary to reproduce those issues because when ultimately the case was tried by Mr. Justice Gurtu he did not refer to those issues or decide the case with reference to them. After recording the evidence which was led by both the parties and considering the same Mr. Justice Gurtu found as a fact that accounts had been manipulated and that though in fact there had been no profits in the years 1945-46 and 1946-47 by inflating the cost of shares owned by the Bank and adding certain adjusted amounts to actual costs fictitious profits had been shown in the profit and Loss Accounts as well as in the balance sheets. He was of opinion that the way in which the cost of the securities had been calculated or in which adjusted amounts had been included in those costs was not justified. He was also of opinion that the dividend paid in 1945-46 had really been paid out of the capital, there being no actual profits during that year. About the sum of Rs. 2,26,233/4/- which had been allowed to be assessed as income-tax on the profits of that year he held that the assessment had not become final and no liability for the amount could, therefore, be fixed on the opposite parties. In his view no profit were earned in the year 1946-47 also. The income tax and excess profits tax return for that year had, however, been filed by the liquidator himself and he

could, therefore, agitate the question of refund of tax deducted at source for two years before the proper authorities. The opposite parties could not, therefore, in the opinion of the learned Judge, be held liable for Rs. 99,008/-. He did not accept the claim for the refund of the amount drawn by Sri Jwala prasad on account of daily allowance as he was of opinion that no case had been made out for directing a refund of the amount so charged. He found, however, that Sri Jwala Prasad, Sri G.G. Buty and Sri Rama Shanker as Chairman and Directors were responsible for making good to the company the loss they had caused in 1945-46. So far as the auditor was concerned, he was of opinion that he could have called for suffident particulars or at least a detailed certificate giving the relevant data which would have enabled him prima facie to check whether the correct cost was mentioned in the balance sheets, that, according to him, would have put the auditor on further enquiry. The auditor, therefore, in his view, should have been more careful in accepting the certificate and the figures supplied to him by the Bombay Branch and could on that account be held liable. He, therefore, held these opposite parties liable for the amounts already mentioned though he did not state the principle on which the figures of those amounts had been arrived at.

10. The principal point urged on behalf of the three appellants in support of the appeals now before us relates to limitation. It is urged that the application under section 235 of the Indian Companies Act having been filed more than three years after the first appointment of the liquidator and also more than three years after the dates of the alleged misfeasance, misapplication or misappropriation the application was clearly time barred. The view of Mr. Justice Brij Mohan Lall that section 45-O of the Banking Companies Act saved this application from limitation is challenged and the learned counsel for Sri Jwala Prasad contended that the Banking Companies Act or in any case the Banking Companies Amending Act 1953 was not applicable at all. The learned counsel for Sr. G.G. Buty and Sr. S.N. Gupta urged that even if section 45-0 of the Banking Companies Act applied to the case so far as their clients were concerned, the essential requirements of that section not being present the Official Liquidator could not claim an extension of limitation as against them on the basis of section 45-O.

11. In order to correctly appreciate the various contentions which have been put forward in connection with the question of limitation a bit of history will have to be delved into.

12. Section 235 of the Companies Act of 1913, as originally enacted contained three subsections. In sub-section (1), which conferred the power on the Court to take action at the instance of the liquidator or any creditor or contributory of the company in cases of misfeasance, misapplication, retainer or breach of trust no period of limitation was mentioned during which the application under the sub-section could be made. The sub-section only empowered the Court to take action in the circumstances mentioned in it on an application being made. Sub-section (3) provided that an application filed under sub-section (1) was to be treated as a suit for the purpose of limitation. A difference arose between the various High Courts as to what was the period of limitation applicable to an application filed under sub-section (1) of section 235 which was to be treated as

a suit. The articles of the Limitation Act which were referred to in that connection were Articles 36, 90, 115, 116 and 120. Different Courts held one or the other of these articles to be applicable. In Order to remove this conflict of opinion section 235 was amended by the Companies (Amendment) Act 1936. By that amendment the third sub-Section of section 235 was deleted and the words "made within three years from the date of the first appointment of a liquidator in the winding up or of the misapplication, retainer, misfeasance, or breach of trust, as the case may be, whichever is longer" were inserted in sub-section (1). The effect was that relief under sub-section (1) could be claimed by an application made by the Liquidator or any creditor or contributory provided the application was made within three years either from the date of the first appointment of the liquidator in the winding up or from the date of the misapplication, retainer, misfeasance or breach of trust as the case may be. According to the amendment the "longer" of these two periods could be availed of. It is, however, difficult to see how a period of three years calculated from one date can be longer than a period of three years calculated from another date. Two periods of three years will always be equal irrespective of the dates from which they are counted and one cannot be longer than the other. The intention of the amendment is, however, clear and there can be no two opinions about it. The intention was to fix the period during which the Court could be approached by an application for taking action against the persons mentioned in the section for acts of misapplication, misfeasance or breach of trust. Such an application could always be filed within three years of those acts. In a case a winding up had been ordered and a liquidator had been appointed the application could be filed either within three years of the date of the first appointment of the liquidator or within three years from the date of the act complained of. The liquidator in, the case of a company ordered to be wound up was thus given a specific period during which he could make enquiries and take action. He could not at his sweet will exhume dead cases or rake up buried bones long after his own appointment. If he had to take action he had to apply within three years of his own first appointment. If he did that he could bring to the notice of the Court any act of retainer, misfeasance or breach of trust, however, old it may be. But if he did not take advantage of this period and did not make the application within three years of his first appointment the action which he could take could relate only to the acts of retainer, misfeasance or breach of trust which had been committed within three years of the elate of the application. In fact, therefore, the expression "whichever is longer" was really intended to mean "whichever expires later".

13. The Companies Act of 1913 as it was originally enacted applied to all kinds of companies, including banking companies. Till the year 1936 there was no legislation applicable especially to banking companies. In that year, following some of the recommendations of the Central Banking Enquiry Committee, a new part called part XA, was added to the Indian Companies Act of 1913. This Part applied to banking companies. The rest of the Act also remained applicable to such companies. The provisions of part XA were amplified and amended in 1942 and 1944. In 1946 the Banking Companies (Inspection) Ordinance came into force. In the same year was passed the Banking Companies (Restriction of Branches) Act, 1946. It was followed by the Reserve Bank of India (Temporary Amendment) Ordinance, 1947. The Banking Companies Act (Act X of

1949) was enacted in 1949. It replaced Part XA of the Companies Act of 1913 and came into force on the 18th of March, 1949. This Act, viz., the Banking Companies Act, 1949 (Act X of 1949), applied to banking companies as defined in the Act. The word "banking" has been defined in clause (b) of section 5 as meaning

> "the accepting, for the purpose of lending or investment, of deposits of money from the public, repayable on demand or otherwise, and withdrawable by cheque, draft, order or otherwise".

14. "Banking company" according to clause (c) of the same section means "any company which transacts the business of banking in India". There is an explanation to that clause which provides:-

> "Any company which is engaged in the manufacture of goods or carries on any trade and which accepts deposits of money from the public merely for the purpose of financing its business as such manufacturer or trader shall not be deemed to transact the business of banking within the meaning of this clause".

In the Act, as it was originally enacted, Part IIIA providing for special provisions for speedy disposal of winding up petitions was not there. Part IIIA consisting of sections 45-A to 45-H was first inserted in the Act by the Amendment Ordinance of 1949, which was replaced by the Banking Companies (Amendment) Act 1950. The Amendment Ordinance, of 1949 and the Bubsequent Amendment Act of 1950 put in a clause in section 45-F of Part IIIA which provided:

> "Notwithstanding anything to the contrary contained in the Indian Limitation Act, 1908 (IX of 1908), or any other law for the time being in force, in computing the period of limitation prescribed for any suit or application by a banking company, the period of one year immediately preceding the date of order for the winding up of the banking company shall be excluded".

This clause in section 45-F of Part IIIA of the Banking Companies Act was introduced first by the amending Ordinance which came into force on the 19th of September, 1949. It was followed by the Amendment Act of 1950 which commenced on the 18th of March, 1950. Then came the Banking Companies Ordinance XXIV of 1953, by which part IIIA was thoroughly Overhauled and recast. The former sections were deleted and new sections 45-A to 45-X were inserted. The Ordinance of 1953 came into force on the 24th of October, 1953 and was followed by the Banking Companies (Amendment) Act, 1953 which commenced on tine 30th of December, 1953. By the Ordinance of 1953 subsequently replaced by the Act of that year the clause about limitation added to the old section 45-F was deleted and section 45-O was enacted which has three clauses which read as follows:-

> "45-O. (1) Notwithstanding anything to the contrary contained in the Indian Limitation

Act, 1908 (IX of 1908), or in any other law for the time being in fores, in computing the period of limitation prescribed for a suit or application by a Banking company which is being wound up, the period commencing from the date of the presentation of the petition for the winding up of the banking company shall be excluded.

(2) Notwithstanding anything to the contrary contained in the Indian Limitation Act. 1908 (IX of 1908), or section 235 of the Indian Companies Act, 1913 (VII of 1913), or in any other law for the time being in force, there shall be no period of limitation for the recovery of arrears of calls from any director of a banking company which is being wound up or for the enforcement by the banking company against any of its directors of any claim based on a contract, express or implied; and in respect of all other claims by the banking company against its directors, the period of limitation shall be twelve years from the date of the accrual of such claims.

(3) The provisions of this section, in so far as they relate to banking companies being wound up, shall also apply to a banking company in respect of which a petition for the winding up has been presented before the, commencement of the Banking Companies (Amendment) Act, 1953."

15. With this history of the provisions relating to limitation it is necessary that a few dates must also be kept in mind. The financial year of the Jwala Bank Ltd., commenced on the 1st of July, of each calendar year and ended on the 30th of June. The year 1945-46 thus lasted from the 1st of July, 1945 to the 30th of June, 1946 and the year 1946-47 lasted from the 1st of July 1946 to the 30th of June 1947. On the 6th of April, 1948, the Central Government prohibited the Bank from receiving fresh deposits with effect from the 12th of April, 1948. The order of the winding up of the company was passed on the 17th of February 1950 and the first order of appointment Of the Official Liquidator was passed on the same date. The application under section 235 was filed on the 30th of September, 1953. Two other dates may be mentioned though they are no longer very material. The period during which Sri Jwala Prasad was alleged to have drawn unauthorised daily allowance amounting to Rs. 45,942/- commenced on the 1st of November, 1947 and ended on the 30th of April, 1950.

The dates have become immaterial because it has been held that the amount is not refundable and the Official Liquidator has submitted to the decision. The operation of the order appointing the Official Liquidator remained stayed from the 24th of February, 1950, to the 20th of March 1950 and again from the 28th of August 1950 to the 24th of October 1950. These dates are also immaterial because it is conceded that nothing turns on them and the period of stay does not affect the question of limitation in any manner.

16. The contention urged on behalf of the appellants is that the acts on account of which the appellants have been held liable were all committed according to the allegation of the Liquidator himself before the 30th of June 1947. The first appointment of the Liquidator was made on the nth of February 1950. For the application under Section 235 limitation provided in the section itself was three years. It could be counted on an alternative basis either from the date of the first

appointment of the liquidator or from the date of the acts complained of. If calculated in the former manner the limitation expired on the 17th of February 1953. If calculated in the latter manner it expired in any case on the 30th of June 1950. The present application having been filed on the 30th of September 1953 was clearly barred by time. It is further contended that the liquidator could not get any benefit of Section 45-0 of the Banking Companies Act because:

(1) The Banking Companies Act 1949 or its subsequent amendments were not applicable to the case at all. The Act applied only to companies carrying on banking business within the meaning of the term as defined in the. Act. For such a business the acceptance, of deposits for lending or investment was necessary. The company in question had stopped accepting deposits under a direction issued by the Central Government in 1948. The Banking Companies Act came into force in 1949. It could not, therefore, apply to the company at all.

(2) Sub-section (1) of Section 45-O of the Banking Companies Act applies only to a suit or application by a banking company. An application filed under Section 235 of the Companies Act by a liquidator cannot by any means be considered to be an application by a banking company. The liquidator, it is urged, may for certain purposes represent the company of which he is appointed liquidator but he cannot be equated with the company for all purposes and does not himself become the company.

(3) Sub-section (2) of Section 45-O provides that there shall be no period of limitation among other things for the enforcement by the Banking Companies against any of its directors of any claim based on a contract, express or implied. It further provides that the limitation shall be twelve years in respect of all other claims by the banking company against its directors and shall start from the date of the accrual of such claims. It is urged, in the first place, that an application made by the liquidator under Section 235 of the Companies Act cannot be considered to be a "claim" at all. By such an application the liquidator only brings certain facts to the notice of the Court and requests the Court for taking appropriate action. There is no question in such an application for enforcing any claim against any one secondly it is said that even if the application is treated as relating to a claim the claim is certainly not based on a contract, express or implied, and no advantage can, therefore, be taken of the clause according to which there is no period of limitation for the enforcement of such a claim. Nor, it is contended, can the liquidator take advantage of the other clause of the sub-section because the "claim" cannot in any sense be held to be a claim by a banking company.

(4) On behalf of the appellant Sri G.G. Buty it is said that he had ceased to be a director of the company long before by omitting to attend three consecutive meetings. He was, therefore, not a director on the date on which the application was filed and could not on that account be affected by Section 45-O. The learned counsel on behalf of Sri S.N. Gupta urges that his client had never been a director and subsection (2) of Section 45-O is confined in its application to claims against directors. It does not relate to the cases of auditors at all. It is urged that against Sri. S.N. Gupta, therefore, no question of saving the

application from limitation on the basis of Section 45-O can arise.

(5) It is urged lastly on behalf of all the three appellants that Sections 45F and 45-O of the Banking Companies Act were never intended to revive dead claims and were not retrospective in that sense. If the limitation provided in Section 235 Of the Companies Act had expired and the liquidator had lost his right of approaching the Court under that section the subsequent enactments of these provisions (Secs.45-F or 45-O) could not have the effect of reviving that right. Limitation could be extended under these provisions only if it had not already expired.

17. It has not been disputed on behalf of the respondents that the present application under Section 235 made by the Official Liquidator was beyond time if limitation is to be counted as laid down in the section itself. If the period of three years mentioned in the section is counted from the date of the first appointment of the liquidator the limitation expired on the 17th of February 1953. 'If the period was calculated from the 30th of June 1947 it expired on the 30th of June 1950. The present application was filed only on the 30th of September 1953. The liquidator claimed the benefit of the Banking Companies Act and particularly of Section 45F which was introduced in it by the Amending Ordinance of 1949 subsequently substituted by the Amending Act, 1950 and of Section 45-O put in in the Act by the Amending Act 1953. The appellants, however, contend that the Banking Companies Act or its subsequent amendments were not applicable to the case because before the Banking Companies Act of 1949 came into force on the. 16th of March 1949 the Jwala Bank Ltd. had ceased to be a banking company. It is not denied that the company was originally a banking company, as it received deposits of money from the public for the purposes of lending or investment. It is, however, urged that before the Banking Companies Act came into force this company had ceased to be a banking company because under on order of the Central Government it had ceased to accept deposits.

18. From the definition of the word "banking" given in clause (b) of Section 5 of the Banking Companies Act it appears to be clear beyond doubt that acceptance of deposits of money from the public for the purposes of lending and investment is one of the essential features of a banking company and if that feature is absent a company will not be considered to be a banking company to which the provisions of the Banking Companies Act would be attracted. We do not have before us the order issued by the Central Government stopping the Jwala Bank Ltd. from accepting deposits but in his application under Section 235 the Official Liquidator himself stated in paras. 6, 7 and 8:

"6. That by an order dated 10th April 1947, the Central Government purporting to act under an ordinance directed the Reserve Bank of India to cause an inspection to be made of the Jwala Bank Ltd. Agra and the inspection was accordingly made.

7. That thereafter the Central Government passed an order on the 6th of April 1948, prohibiting the Bank from receiving fresh deposits at any of its offices, branches and agencies with effect from 12th April 1948.

8. That on the publication of the aforesaid order there was a run on the Bank and fresh business was stopped, and the Bank tried to meet the claims of the depositors by the sale of its assets and also by realization of the outstanding dues."

It, therefore becomes indisputable that under the order of the Central Government issued on the 6th of April 1948 with effect from the 12th of April 1948 the company was not to accept fresh deposits at any of its offices, branches or agencies. There was actually a run on the bank on that account which ultimately led the bank being ordered to be wound up. After the 12th of April 1948 the company may have been carrying on other business but if from that date it had ceased to accept deposits from the general public and had been prohibited from doing so there appears to be great force in the contention of the appellants that it had ceased to be a banking company. It was, therefore, not a banking company on the date on which the Banking Companies Act came into force. That Act or the subsequent amendments in that Act could not consequently affect the company and the liquidator could not get any advantage from their provisions.

19. Let us, however, assume for the sake of argument that the Banking Companies Act and the amendments made in it applied to the present company. The question is what advantage could the liquidator get from that fact?.

20. It is urged on behalf of the respondent in this connection that under Section 235 itself the liquidator could file the application upto the 17th of February 1953. Under Section 45F the period of one year ending with the filing of the application for winding up was to be excluded. The period of limitation for the application, therefore, got extended up to the 17th of February 1954. Before this period expired Section 45-O was enacted and the period got further extended. The application made on the 30th September 1953 was, therefore, well within time.

21. The argument contains certain assumptions whose correctness is challenged. We may, however, leave aside that question for the present. It is obvious that the argument suffers from fallacies. In the first place, Section 45F did not provide that the period of limitation was to be extended by one year. It only provided that in computing the period of limitation the period of one year immediately preceding the date of the order of the winding up of the banking company shall be excluded. Advantage of this provision could, therefore, be taken only if the period of limitation started more than a year earlier than the date of the order of winding up. If limitation was to be counted from the date of the order of winding up itself, there could be no question of excluding any earlier period while computing the period of limitation. Advantage of Section 45F could, therefore, be taken only if out of the two alternative methods of calculating limitation mentioned in Section 235 the liquidator had chosen to count limitation from the date of the misfeasance, misapplication, etc. In that case the three year's period having started from the 30th of June 1947 and the order of winding up having been passed on the 17th of February 1950 the period of one year from the, 17th of February 1949 to the 17th of February 1950 could have been excluded. But even after excluding this period the limitation would have expired on the 30th of

June 1951. There could be mo question of excluding the period of one year immediately preceding the date of the order of winding up when limitation was to be counted from the date of the order itself. The liquidator could in the circumstances get no advantage on account of the enactment of Section 45F and even if that section applied the period during which he could apply under Section 235 could not be extended beyond the 30th of June 1951.

22. The other fallacy lies in thinking that Section 45-O which came into effect on the 24th of October 1953 could be attracted to a case in which the right to apply under Section 235 had already Income time-barred. We find nothing in that section to show that it was intended to be retrospective in effect in the sense that it revived remedies which had already come to an end. In *Suburban Bank Ltd. v. Nistaran Chakrabarti*[1] the ordinary period of limitation for a suit tiled by a banking company as extended by Section 45F of the Banking Companies Act, 1949 had expired. During the pendency of the suit Section 45-O was enacted and the plaintiff bank claimed its benefit for bringing the suit within limitation. The claim was rejected and it was observed:-

> "I am unable to hold that the sub-section applies to those pending suits where its application would revive the right of action barred by the law in force at the time of the institution and that it does not apply to other pending suits where

[1] AIR 1955 Cal 172

> its application would bar the existing right of action. The language of the sub-section is not capable of such construction. The general words "a suit or application" can be given full effect by limiting them to suits and applications commenced after the sub-section came into force. The effect of the non-obstante clause at the beginning of the sub-section is to abrogate the existing laws clearly inconsistent with the sub-section. I find nothing in the sub-section inconsistent with the rule that a statute which is not a matter of mere procedure does not affect a pending proceeding in the absence of a clear intention to the contrary shown either by express words or by necessary implication in my judgment subsection (1) of Section 45-O does not apply to a suit or application pending on the date when it came into force."

23. The same view was taken in the *Punjab Commerce Bank Ltd. v. Brij Lal*[2], It was held that Section 45-O did not apply to pending suits and that (we are quoting from the headnote):

> "When once a right to sue has become barred under any earlier Act prescribing limitation for enforcing the right, no change of the law can revive that right after it had become barred by time, unless the later Act is retrospective in its effect. The amending Act of 1953 having no retrospective effect, it cannot be made applicable to a suit which has already been barred by the provisions of the Limitation Act."

24. The same opinion was expressed more recently in *Kesarichand Jaisukhlal v. Shillong Banking Corporation Ltd*[3]., and *Sarkar Dutt Roy and Co. v. Shree Bank Ltd*[4].

25. Learned counsel for the respondent however, urged that:

> (1) If instead of filing an application under Section 235 the Official Liquidator had filed a suit against the appellants the period of limitation for the suit would have been six years under Article 120 of the Limitation Act. If one year's period was to be excluded in view of Section 45-F the period became seven years. If, therefore, the cause of action arose on the 30th of June 1947 the claim would have been within time up to the 30th of June 1954. As Section 45-O cams into force in 1953 it had the effect of extending the period of limitation. He referred to the certain observations of Braund J. in *Benares Bank Ltd. v. Prakasb. Bhagwan Das*[5]*,*
>
> (2) There is really no question of reviving a dead claim. Limitation only extinguishes the remedy. It does not extinguish the right. The right of the liquidator to claim certain amounts from the appellants being intact there could be no question of any dead claim being revived with the help of Section 45-O. He placed reliance in support of this submission on *Baleswar prasad v. Latafat Karim*[6]*,* and *pitambar Mohapatra v. Lakshmidhar Mohapatra*[7]*,*

26. It may have been open to the liquidator to file a suit against the appellants. We express no opinion on the point. Had a suit been filed by him he may have taken

[2] AIR 1955 Pun 45 [4] AIR 1960 Cal 243 [6]AIR 1945 Pat 368
[3] AIR 1959 Ass162 [5] AIR 1946 All 269 [7] AIR 1949 Ori 64

advantage of a larger period of limitation. But he did not choose that remedy. The remedy he chose was the one mentioned in Section 235 of the Companies Act. There was a special limitation prescribed in the section for the enforcement of that remedy. If that period had expired the right of the liquidator to pursue that remedy came to an end. So far as that remedy was concerned, the fact that his right to pursue another remedy was still within limitation was immaterial. In Benares Bank Ltd., AIR 1946 Allahabad 269 (supra) the winding up petition was filed on the 3rd of August 1939. The Official Liquidator was appointed on the 1st of March 1940 and the misfeasance application under Section 235 was filed on the 12th of February 1943. The liquidator claimed that his application was within time as it had been filed within three years of the date of his appointment. He wanted to take advantage of the amendment introduced in, the section by the Indian Companies (Amendment) Act, 1936. It was, however, pleaded on behalf of the directors who were being sought to be made liable that the amending Act not having retrospective effect was not applicable and that the liquidator was bound to show that if his claim was treated as a suit it was within time under the provisions of the Limitation Act. This contention was rejected and it was held that the amending Act was retrospective' and advantage of it could be taken by the liquidator. The decision instead of supporting the contention of the learned counsel for the respondent really goes against him. The view taken in that case was that the original sub-section (3) of Section 235 having been deleted there was no question of applying to the application filed under sub-section (1) of the section the usual period of limitation applicable to suits. Learned counsel for the respondent is, therefore, not correct when he says that

because a suit by a liquida. tor would have been governed by the six years' rule of limitation his application under the, amended Section 235 would also be governed by the same rule. With the deletion, of sub-section (3) of Section 235 the provisions of the Limitation Act ceased to be applicable and the only rule of limitation that remained applicable to applications under sub-section (1) of the section was the sub-rule laid down in that sub-section.

27. It is true that limitation only bars the remedy and does not extinguish the right. In the present case, however, we are not concerned with the survival of the respondent's right. It may or may not be alive. What we have to see is whether his remedy to enforce that right by taking action under Section 235 of the Companies Act was still open to him or whether it had not been barred by limitation. This particular remedy may be tarred. Other remedies may be open. We are not concerned with the latter. It this particular remedy is barred the present application was bound to fail on the ground of limitation unless Section 45-O had the effect of reviving the dead application.

28. Under Section 20 of the Limitation Act as it was originally enacted, payment of interest could extend limitation only if the interest had been paid "as such." The section was, however, amended in 1942 and the words "as such" were deleted. A difference of opinion then arose as to whether the amended provision was applicable to cases which stood barred under the original rule. The view of this Court as taken, by Malik, J. (as he then was) in *Peary Lal v. Solu Gir*[8]*,* was that the rights barred prior to the amendment could not be revived and that the amended law could be taken

[8] AIR 1946 All 58

advantage of only if the right was not already barred. In support of his view Malik, J. placed reliance on several decisions of the Judicial Committee including those of *Appasami Odayar v. Subramanya Odayar*[9]*,* and *Sachindra Nath Roy v. Maharaj Bahadur Singh*[10]*,* A different view was, however, taken, by the patna High Court in AIR 1945 Patna 368 (supra) and by the Orissa High Court in AIR 1949 Orissa 64 (Supra):

> "The fundamental principle that the law of limitation applicable to a suit is the law prevailing at the time of its institution is subject to this exception that its applicability will not operate as to revive a right that has been extinguished on account of the pre-existing law of limitation."

This principle was recognised also by the Patna High Court in *jagdish Prasad Singh v. Saligram Lal*[11]*,* With great respect we agree with the view taken by Malik, J. in AIR 1946 AH 58 (Supra). That appears distinctly to be the preferable view. The limitation for the liquidator's application in the present case could not, therefore, be extended with the help of Section 45-O which came into force in October 1953 if the application had already become barred in 1951.

29. Learned counsel for the respondent referred to sub-section (3) of Section 45-0 to show that

the section was intended to have retrospective effect. The purpose with which sub-section (3) was enacted was however, different. Had the sub-section not been there it would have been argued that Section 45-O could be applied only to those winding up proceedings which commenced after the enactment of the section. In order that this contention may not be put forward, sub-section (S) was enacted and it was provided in it that the provisions of the section would apply even to those cases in respect of which the petition for winding up had already been presented. The only effect of the sub-section, therefore, was that Section 45-O was to apply not only to companies ordered to be wound up after the section had been enacted but also to companies which had been ordered to be would up earlier. There is nothing in sub-section (3) on the basis of which it can be argued that the provisions of sub-sections (1) and (2) of the section were to have the effect of reviving dead claims or of extending limitation for suits and applications which had already become time-barred. Advantage of those sub-sections could, therefore be taken only if the cause of action either arose after the enactment of the section or the claim in respect of it, if it had arisen earlier, was still within time.

30. Another argument on which the applicability of Section 45-O is questioned on behalf of the appellants is that the application made by the liquidator under Section 235 cannot be considered to be a suit or application by a banking company or to be in respect of a claim of a banking company. Sub-section (1) of Section 45-O applies to a suit or application by a banking company. Sub-section (2) of the section applies to claims by a banking company. The contention is that even if the Jwala Bank Ltd. was a banking company the application by the liquidator under Section 235 was not by the banking company and in any case it did not relate to a claim of the company. Reference was made in this connection to the case of *Official Liquidator v. Liaqat*

[9] ILR 12 Mad 26 (PC)
[10] AIR 1922 PC 187
[11] AIR 1946 Pat 60

Husain[12]*,* where it was held that a
proceeding started under Section 235 of the Companies Act was not a suit or other legal proceeding within the meaning of Section 260 of the Companies Act. While considering the nature of proceedings under Section 235 Young, J. observed in that case:

> "A misfeasance proceeding is merely an examination by the court into the conduct of an officer of the company, and as a result of that examination the court may order the officer to restore the money or the property of the company, as the court may think just."

31. Under the Companies Act a liquidator has several capacities and performs various functions. For certain purposes he represents the company. He is also a custodian of the rights of the creditors of the company and has to safeguard the rights of the share-holders and contributories also. He is an officer of the Court and acts under its directions. When he approaches the Court under Section 235 with a complaint against the officers of the company or its directors and requests the Court to take action against them and to make them refund to the company sums

which they had misappropriated and to make good to the company the loss which they had caused, the liquidator, in our opinion, acts for the company in the interest of all the persons concerned including the creditors and the contributories. He does not act for his own benefit. The words "by a company", in our opinion, include "for or on behalf of a company". The application made by the liquidator under Section 235 may not be a suit but it is certainly an application on behalf of the company and, therefore, by the company.

32. The word "claim" has not been defined either in the Companies Act or in the Banking Companies Act. According to the Concise Oxford Dictionary the word means "demand for something as due". The meaning of the word is clearly wide enough to cover a case in which the liquidator after drawing the attention of the Court to the relevant facts requests it to compel the officers or the directors of the company to make good the losses which they had wrongfully caused and to pay back the amounts which they had wrongfully withheld. It cannot, therefore, be said that in such an application "a claim" is not made on behalf of or by the company.

33. Sub-section (2) of Section 45-O applies only to claims against directors. For the enforcement of claims based on contracts it declares that there will be no period of limitation. In respect of other claims it provides that the period of limitation shall be 12 years; but the claims must be claims against directors before the sub-section can be applicable. The appellant Sri S.N. Gupta of Messrs. S.N. Gupta and Co. was admittedly not a director of the company. Sub-section (2) will, therefore, not apply to his case. Nor can any advantage be taken of subsection (1) because it came into force only in October 1953, and the limitation for taking action against this appellant was already barred on that date. The case against this appellant, therefore, could not be brought within limitation with the help of Section 45-O.

[12]1933 All LIR 199: AIR 1933 All 205

34. In the application filed by the liquidator the appellant Sri G.G. Buty was impleaded as a director. He had admittedly signed the balance-sheets of the two years in dispute. It is admitted that after he was appointed an honorary director Sri G.G. Buty attended only one meeting of the directors and then did not attend any other meeting though several were held. Having omitted to attend meetings for three months Sri Buty ceased to be a director under Section 86-I (1)(f). The fact that he had signed the balance-sheets of the years in question as a director could not take away the effect of that clause of Section 86-1 and make him a director on the dates when he signed the balance-sheets. But for the purposes of Section 235 it is not necessary that the person to be proceeded against must be a director on the date on which the application is made. If he has been a director at any time earlier he can be held liable for his acts and omissions during the period of his directorship.

35. The second sub-section of Section 45-O being applicable to claims against directors, that section was applicable at all, it could be utilized against Sri Buty also. If, on the other hand, no advantage of the section could be taken by the liquidator he could not claim extension of

limitation against Sri .Buty with its help.

36. We are, therefore, of opinion that the plea of limitation pressed on behalf of the appellants was well founded and should have been allowed to prevail. We are unable to agree with Mr. Justice Brij Mohan Lal that Section 45-O of the Banking Companies (Amendment) Act saved limitation in the present case. On the ground of limitation the petition of the respondent was bound to fail against all the appellants.

37. In this view of the case it is not necessary to consider in detail the claim of the liquidator on merit. It may, however, be mentioned that each of the three appellants question their liability on merits also and made a grievance of the fact that the amounts for which they had been made liable have been fixed arbitrarily and have not been calculated on any principle.

38. It was urged on behalf of Sri Jwala Prasad that the method of accounting to which exception was taken on behalf of the liquidator was quite justified and the adjusted amounts only represented the rise in the market value of the shares held by the company. The shares, it was pointed out, had actually been sold subsequently at about those prices. On behalf of Sri. S.N. Gupta it was urged that he should not have been found guilty of negligence and that he acted in good faith and had no reason to doubt the correctness of the figures that were supplied to him from the various branches of the company. On behalf of Sri Buty it had been argued that he could be held liable only for his acts and omissions as a director. As he had ceased to be a director long before the year 1945 he could not be responsible in his capacity as a director for anything done during the years 1945-46 and 1946-47. It was also pointed out by his learned counsel that he had been directed to refund not the amount which he had received as a director but an amount which had been paid to him as dividend on his shares in his capacity as a shareholder.

39. The contention on behalf of Sri Buty appears to be well founded. Under Section 235 he could be held liable only for his acts and omissions as a director and not for what he had received as a dividend on his shares in his capacity as a share-holder. The dividend may have been wrongly distributed out of capital but a share-holder could not be made to refund the dividend so received by an application under Section 235. In the two years in dispute Sri Buty was not legally a director of the company. His signing the balance-sheets of the two years could not make him a director if in law he had ceased to be a director long before. He could not, therefore, be made liable for the amount which had been decreed against him in these proceedings under Section 235.

40. In the circumstances of the present case we have no doubt that Sri S.N. Gupta of Messrs. S.N. Gupta and Co. did not act with that care and caution which was expected of him. As a chartered accountant he had great responsibility in the matter. Everyone concerned was bound to attach great weight to the certificates fee attached to the balance-sheets. The very fact that the

accounts had been audited by a chartered accountant and the balance-sheet contained his certificate was bound to lead everyone to think that everything was quite alright and above board. A great responsibility, therefore, rested on Sri S.N. Gupta and before he certified the accounts it was necessary for him to satisfy himself that the figures supplied to him were correct. There was nothing to prevant him from having the figures verified. He had a right to have access to all the account books and could check the figures if he wanted. The account books must have shown him that the shares not having been actually sold the adjusted amounts added to their costs did not represent actual profits. It could also not be difficult for him to see that the amounts entered as costs of the shares included something which ought not to have been included in them. The learned Judge was, therefore, in our opinion, justified in his view that Sri S.N. Gupta was guilty of negligence and want of care.

41. The responsibility of Sri Twala Prasad for the System according to which fictitious values were put on shares and unauthorized amounts were included in the costs of purchase appears to be indisputable. The cost price of shares entered in the account books was, as was admitted by him, not the actual cost. He included in it several things which could not ordinarily be included. The interpretation which he sought to put on the word "cost" appears to have been wholly unjustified. The practice, which he had introduced, of inflating the amount of the value of shares and including the inflated amounts which he called adjusted amounts in the profits of the company was also a wholly unjustified practice which made the Profit and Loss Accounts as well as the balance-sheets entirely misleading. It showed profits where none had actually been earned and enabled the directors to distribute dividends out of capital for which there was no justification in the articles and memorandum of association of the company. The shares held by the company may have appreciated in market value but till the shares were actually sold and a price higher than the amount actually spent in their purchase was realised the company could not be held to have earned any profits on account of the shares. The learned judge was, therefore, quite justified in taking the view that "Sri Jwala Prasad in fixing an arbitrary value on the shares held at the end of the year deliberately tried to mislead the share-holders and he adopted this system in order to show profits when there was, in fact, no profit."
He was, therefore, directly responsible for payment of dividend out of the capital.

42. The learned single Judge has not held the appellants responsible for three out of the four items claimed by the liquidator. In fact, he found them liable only for the sum of Rs. 76,254/14/- which was distributed as dividend in the year 1945-46 out of the capital. For some reason not mentioned by him, however, it appears that he passed decrees against the opposite parties not for the sum of Rs. 76,254/14/- the amount paid as dividend out of the capital in the year 1945-46 but only for Rs. 69,962/-. To this sum he added Rs. 3000/- on account of costs. It is correct that the principle on which the liability of the various appellants was calculated was not mentioned. It is, however, not necessary to go into the question because we are of opinion that the application made by the liquidator was barred by limitation and no liability could, therefore, be fixed on any of the appelants in purusance of that application.

43. The appeals, therefore, succeed. They are allowed and the application of the liquidator so far as the appellants are concerned stands dismissed. The appellants will have their costs from the respondent in respect of these proceedings both before the trial judge and in this court.
Appeals allowed.