Official Liquidator, Supreme Bank Ltd vs P. A. Tendolkar (Dead) By L. Rs. And Ors on 19 January, 1973

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Author: M. Hameedullah Beg

Bench: M. Hameedullah Beg, A.N. Grover

PETITIONER:
OFFICIAL LIQUIDATOR, SUPREME BANK LTD.

Vs.

RESPONDENT:
P. A. TENDOLKAR (DEAD) BY L. RS. AND ORS.

DATE OF JUDGMENT19/01/1973

BENCH:
BEG, M. HAMEEDULLAH
BENCH:
BEG, M. HAMEEDULLAH
GROVER, A.N.
MUKHERJEA, B.K.

CITATION:
1973 AIR 1104 1973 SCR (3) 364
1973 SCC (1) 602
CITATOR INFO :
E 1983 SC 188 (43)

ACT:
Companies Act (7 of 1913), s. 235 and Companies Act (1 of 1956), s. 543-Power of Court to make compulsive orders against heirs of deceased director in misfeasance proceedings-Actio personalis moritum cum persona-Scope of-Right of appeal by and against heir.
Banking Companies Act (10 of 1949), ss. 45(G) and 45(O)-Official liquidator, whether should apply for public examination of directors under s. 45(G) to s. 45 O(2) as amended by Act 33 of 1959-Scope of the fresh Period of limitation-S. 45(O)(2) prevails over s.235 Companies Act, 1913, in relation to Banking Companies.
Principles determining liability of managing director and Board of Directors in misfeasance proceedings.

HEADNOTE:

On an application for winding up of a bank a provisional liquidator was appointed on 15th March 1956. The appellant, who was thereafter appointed as liquidator filed an application on the 27th August, 1960, for misfeasance proceedings under s. 45H of the Banking Companies Act. 1949, and s. 235 of the Indian Companies Act, 1913. Under s. 45 0 (2) in respect of all other claims by the Banking Company against its directors, the period of limitation shall he 12 years from the date of the accrual of such claims'. By Amending Act 33 of 1959 the words 'or five years from the date of the first appointment of the liquidator whichever is longer', were added at the end of the ,sub-section. The official liquidator relied upon several reports made by the Reserve Bank and by others under orders of the High Court. The proceedings were taken against the directors, managing director and officers of the company. Two of the directors died while the proceedings were pending. The Company judge dismissed the proceedings against the employees as time-barred, and held that the heirs of the deceased ,directors could not be proceeded against; but, in respect of the managing director and those Directors who were alive when he gave his decision it was held that the proceedings were within time, being covered by the special provisions of s. 450 of the Banking Companies Act. The directors contended that the whole responsibility for the fraud and misappropriation lay with the managing director. who had wide powers under the Articles of Association, and in whose favour the directors had executed a power of attorneys The managing director however contended that he acted 'according to the policy and ill accordance with directions of the directors in whose hands he was a mere tool'. The Company Judge determined the loss to the Company and gave directions as to the liabilities of the managing director and other directors. In appeal, the Division Bench reduced the total liability of directors and the individual remaining liability of the managing director though it placed a larger share of the burden of contribution on the managing director. The appellant appealed against the order in relation of the liability of the managing director and two other directors.

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One of these two directors died pending the grant of his own application for a certificate under Art. 136 of the Constitution. His heirs got themselves impleaded and contended that the proceedings against them could not continue and also on the merits regarding the liability of that director.

HELD : (1) The contention that s. 235, Companies Act, 1913, could apply to these proceedings is erroneous because, the

proceedings are governed expressly by the, special law on the subject contained in s. 45-0 of the Banking Companies Act. [376F-G]

(2) The plea that 12 years from the 'accrual of claims' had expired before s. 45-0(2) was amended by the, Amending Act of 1959, and that, therefore, the enlarged period of limitation of 5 years from the date of the first appointment of the liquidator was not available to the Official Liquidator in the present case is also unacceptable. The facts necessary to determine whether any part of the claims accrued against any director have not been examined. Such a point involving an investigation into fresh facts showing when claims for any particular item of loss to the company accrued or when they accrued against the board of directors, cannot be taken up for the first time in this Court when the matter was not raised and gone into the High Court. [376A-F]

(3) In any case, the amendment of s. 45 (O) (2) conferred a new. right of counting the period of limitation from the first appointment of the liquidator. The exercise of that right by the liquidator, acting on behalf of the company, certainly took place after the commencement of the Amending Act of 1959. There was no question here of giving any retrospective Operation to any right whether procedural or substantive. [377A-C]

(4) The maxim actio personalis moritur cum persona would not be applicable to actions based on contract or where a tort feasor's estate had benefitted from a wrong done. There is no reason to extend the maxim to cases involving breaches of fiduciary duties where the personal conduct of the deceased director has been fully inquired into and the only question for determination, on an appeal, is the extent of the liability incurred by the deceased direction. Such liability must necessarily be confined to the assets or the estate left by the deceased director in the hands of his successors. In so far as a heir or legal representative has an interest in the assets of the deceased director and represents the estate, and the liquidator represents the interests of the company, the heirs as well as the liquidator should, in equity, be able to question a decision which affects the interests represented. [380D, E-A]

In re. East of England Bank-Feltem's Executors case, [1865] 1 Equiry Cases 219 in re. United English and Scottish Assurance Co.-ex parte Hawkins, [1867] 3 Ch. A.C. 787, in re. British Guardian Life Assurance Company, [1880] 14 Ch. D. 3 335, S.B. Billimoria Official Liquidator v. Cecilla Mary DeSouza and Ors., A.I.R. 1926 Lah. 624, Official Liquidators v. Jugal Kishore and Ors., A.I.R. 1939 All 1. Maniklal Brijal. v. Vendravandras, C. Jadav & Ors.. A.I.R. 1944 Born. 193, Pattiam Veittil Menokki Senkaram Nambiar v, Kottayam Bank by Official Liquidator, Tellichary & Ors., A.I.R. 1946 Mad. 304 and In re. The Peedan Juharmal Bank Ltd., A.I.R. 1958 Mad. 583, referred to.

(5) While s. 235 of the Companies Act 1913 corresponding to

s. 543 of the Companies Act, 1956, gives a power to the court to inquire into the conduct of any past or present director, the section,,

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confine the power of the Court to make orders for repayment or restoration of money or property or contribution to the assets of the company against the individuals occupying the capacities either in the past or present mentioned therein; and, the power does not, on the language of the provisions, extend to making compulsive orders against the heirs of the delinquent directors or officers. As the power to take the special proceedings is discretionary and does not exhaust other remedies, although the court may, as a matter of justice and equity, drop proceedings against the delinquent directors, managers or officers who ate no longer alive, leaving the complainant to his ordinary remedy by a civil suit against the assets of the deceased, yet, where no injustice may be caused by continuing these proceedings against the past director even though he be dead, the proceedings could continue, after giving the person who may be interested, an opportunity to be heard. But even such proceedings can only result in a declaration of the liability of a deceased director, because, the language of s. 235 of the 1913 Act does , not authorise passing of orders to compel heirs or legal representatives to do any thing. Such compulsive proceedings as may become necessary against those upon whom devolve the assets or estate of a deceased delinquent director, who may have become liable, could only lie outside the section. The power under the section would not extend beyond making a declaration against the deceased director provided he in his life time, or, his heirs, after his death, have bad due opportunity of putting forward the case on behalf of the allegedly delinquent director. if either a liquidator or the heirs of a delinquent director against whom a declaration of liability has been made, can question the determination of liability of the deceased delinquent, who was alive at the time of the judgment against him, it is obvious that the appellate court could give a declaration either reducing or increasing the liability even though it may not be able to enforce it by an order under the section. If the declaration can be questioned by an appeal the liability can be not only wiped off or reduced but also increased on an appeal heard after the death of a director held liable. [381F-H; 382A-B; 383A-D]

In the present case, the director whose representatives were impleaded had full opportunity of defending himself in the misfeasance proceedings, he exercised his right of appeal against the order of the Company Judge, and the DiVision Bench reduced his liability. His heirs were heard on merits in the appeal to this Court, and any order passed by this Court could only affect the assets or the estate of the deceased director. In these proceedings an order cannot be

passed against the heirs of the director so as compel them to do anything and the official liquidator or the co-directors may take any other proceeding which may be open to them under the law so as to obtain the contribution of that director. [383E-G]

Erlanger v. New Sombero Phosphate Co., [1878] 3 App. cas. 1218 Rams-kill v. Edwards, [1886] 31 Ch. D. 100, In re. Sharne, [1892] 1 Ch. 154, L.S. Ramaswamy Iyer v. Brahmayya & Co. Official Liquidators, Hanuman Dan Ltd., (1944) 36 Com Cas 270; New Fleming .Spinning & Weaving Co. Ltd. v. Kessonji Naik and Ors., I.L.R. 9 Dorn. 373, Gopal Ganesh Abhyankar v. Ramachandra Sadashiv Sahasrebudha, I.L.R. 26 Bom. 597, Sakvahani Ingle Rao Sahib v. Bhavani Bozi Sahib and Ors., I.L.R. 27 Mad. 588 and Padarath v. Raja Ram, (1882) 4 AU. 235, referred to.

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(6) It is a question of fact, to be determined upon the evidence in each case, whether a Director, alleged to be liable for misfeasance, had acted reasonably as well as honestly and with due diligence, so that he could not be held liable for conniving at fraud and misappropriation which takes place., A Director may be shown to be so placed and to have been so closely and so long associated personally with the management of the Company that he will be deemed to be not merely cognizant of but liable for fraud in the conduct of the business of a Company even though no specific act of dishonesty is proved against him personally. He cannot shut his eyes to what must be obvious to everyone who examines the affairs of the Company even superficially. If he does so he could be held liable for dereliction of duties undertaken by him and compelled to make good the losses incurred by the Company due to his neglect even if he is not shown to be guilty of participating in the commission of fraud. it is enough if his negligence is of such a character as to enable frauds to be committed and losses thereby incurred by the Company. [386E-H]

On the evidence on record, the promoter or founder Directors who were there since the inception of the Bank, were cognizant of the nature of the dealings by the Managing Director and the officers of the Bank. The evidence showed that they had been discussing matters relating to the management of the Company at the meetings of the Board where items of "policy", which benefited the Directors at the expense of the depositors, must have been discussed. They could not have been ignorant of the fact that the Account Books contained fictitious entries showing payments for shares by them when they bad not actually paid for them. Nor could they be so innocent as not to know of the window dressing and presentation of false balance-sheets so as to conceal the_ true state of affairs from the depositors for years. Any director conscious of his managerial responsibilities. who had cared to examine the affairs of the Bank, could not have failed to find out what was really

happening in the Bank. The fact that these practices were tolerated for such a long period without any check by the Board of Directors indicates that the promoter Directors must be participants in the benefits of widespread misappropriation even though they may have so operated as not to leave any traces of actual misappropriation by them in the records of the Bank, [398E-G; 399C-E]

Upon the facts examined by the trial judge it is therefore clear that although the Managing Director was conducting the day to day affairs of the company and must therefore be held responsible for greater share of the loss incurred due to the misappropriation and misuse of managerial power yet his co-directors could not possibly be ignorant of the nature of such dealings and the activities of the employees and the Managing Director, simply because they had executed a power of attorney in his favour. The Company Judge as well as the Division Rench had referred to the difficulties encountered in determining the actual total loss to the Company because of want of any reliable statement of account. This state of the records of the Bank was itself evidence of breach of their duties by the Managing Director and the Board of Directors to see that the business of the Bank was honestly and efficiently conducted. The proved conduct of the other directors was such that an inference of their complicity in concealing the true state of affairs from depositors, presumably because they were them-,elves benefitting from it, could not be avoided. [388B-D E-F; 390E-F]

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In re. City Equitable Life Insurance Co., 1925 Ch. 407, Dovey V. Cory, [1901] A.C. 477, In re Benham & Co., [1883] 25 Ch.D. 752 and Overand & Gurna Co. v. Gibb, (1944) 5 L.R. H.L. 480, referred to.

(7) The Division Bench erred in reducing the total liability of the directors and the individual liability of the managing director. On his own admission, the managing director was liable for a larger amount. [393C-E]

(8) The Division Bench also erred in holding that a good deal of evidence was not placed before the Court, which would have been available had the Official Liquidators asked for public examination of the Directors under s. 45G of the Banking Companies Act. The Official Liquidator could not possibly have done anything more in his application than to rely on reports available to him and to prove the correctness of their contents by producing, as witnesses, those persons who conducted the investigation and made reports. All that s. 45G requires is the submission of a report showing that loss has been caused to the Banking Company in the opinion of the Official Liquidator, and thereafter it is for the Court to decide whether the Directors should be publicly examined. In the present case, the Company Judge did order the public examination of the Directors, but they were unwilling to give evidence. [395B-C; 396D-N; 397E-H]

(9) The Division Bench further erred in holding that the allegations of improper conduct by the Directors in not exercising proper supervision, did not form the subject-matter of any separate issue framed by the Company Judge. The issues framed in the case were wide enough to cover the question. The Directors had not only an opportunity of meeting the allegations contained in the petition, but also had knowledge of the material brought on record later. The Directors were in no way handicapped by the alleged vagueness of charges or a failure to frame issue more fully. The Company Judge was therefore right in considering the evidence adduced in the case. [396E-G; 399D-E: 398E-G]
Nagubai Ammal and Ors. v. B.Sama Rao & Ors., [1956] S.C. R. 45 1, followed.
[Applying the above principles the liability of the managing director and the other directors. including that of the deceased directorwere fixed and the case was remitted to the trial Judge for passingorders against the managing directors and the director who was alivewhen Judgment in proceedings under s. 235 of the Companies Act,1913. was given. As regards the liabilities of other deceased directors it was open to the official liquidator and the director who is alive, to take any other proceedings which may be available under the law against his estate or assets in the hands of his heirs.]

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 195- 197, 234 and 300 of 1967.

Appeals by a certificate from the judgment and order dated January 7, 1966 of the Mysore High Court at Bangalore in Company Appeals Nos. 9 and 10 of 1967.

S.C. Sundraswamy, Rameshwar Nath and K. Suryanarayana It Rao, for the appellants (in C. As. Nos. 195-197 'and Respondent No. 1 (in C. As. Nos. 234 and 300).

C.K. Daphtary, S. K. Mehta, K. R. Nagaraja and Qamuruddin, for appellant (in C.A. No. 234) respondent No. 1 (in C.A. No. 195).

V.S. Desai and P. C. Bhartari, respondent No. 2 (in C.As. 196 and 197) and respondents Nos. 3-6 (in C.A. No. 300). R. B. Datar, for respondent No. 4.

The Judgment of the Court was delivered by BEG, J.-These are five appeals by grant of certificates under Article 133 (1) (a) of the Constitution by the Mysore High Court where the orders of the learned Company Judge, in misfeasance proceedings. under Section 45H of the Banking Companies Act, 1949, (hereinafter referred to as 'the Act'), read with Section 235 of the Indian Companies Act, 1913, (hereinafter referred to as 'the Act of 1913') had been modified by a Division Bench. These

proceedings were instituted by the Official Liquidator against seven Directors, including the Chairman of the Board of Directors and the Managing Director, and the Cashiers, the Accountant, too Branch Managers, another officer, and an auditor of the Supreme Bank of India Ltd., Balgaum, (hereinafter referred to as 'the .Bank') under liquidation. The Bank, incorporated on 27-5-1939, commenced business on 6th October, 1939. It suspended business on 27-11-1954 as a result of gross mismanagement which enabled large sums of money to be misappropriated and false and fictitious entries to be made in its account books.

Out of the seven Directors mentioned above, five, namely. S. G. Pant, the Chairman of the Board of Directors, S. K. Sawant, the Managing Director from July, 1946. P. A. Tendolkar, D. R. Angolkar, and L. S. Ajgaonkar, were promoter or founder Directors. The sixth Director, R. W. Forwal, joined the Board in 1961. The seventh Director, R. N. Kalghatgi, took charge of his office in July, 1953, on the death of his elder brother G. N. Kalghatgi. Before the Company Judge could give his decision, on 8-11-1963, S. G. Pant, the Chairman of the Board of Directors, had expired on 29-8-1961, and D. R. Angolkar, Director, had died on 10-10- 1962. During the pendency of the applications for certification, under Article 133 of the Constitution, for appeals to this Court, another founder Director, P. A. Tendolkar died, 10-8-1966, so that his legal representatives were substituted for subsequent proceedings. The Official Liquidator had alleged, in the application for misfeasance proceedings, dated 27-8-1960. that "the Directors and the employees of the Bank had misappropriated or 'become liable or accountable for a total sum of Rs. 26,000/-" due to the Com-

pany, and were guilty of "Misfeasance,, breach of trust, and fraudulant conduct in relation to the Company". The Official Liquidator had prayed that the Court may be pleased to take cognizance of the application against the Respondents and examine their conduct and "direct them all or such of them as may be hold liable, particularly or generally, severally or jointly, and, in such manner as it may deem just, fit, and proper, to repay and restore the money of the Bank, together with interest, or, to contribution such amounts to the assets of the Company by way of compensation in respect of misapplication, retainer, misfeasance or breach of trust" as the Court may deem just. Thus, the prayer for relief covered every type of order the learned Company Judge could consider fit and proper to meet the needs of the case.

We may now glance at the background of investigations and reports made which led up to the misfeasance proceedings, before we consider the issue raised and decision given on these by the learned Company Judge and then by the Division Bench.

On 7-3-195 1, after the coming into force of the Banking Companies Act 1949, on 16-3-1949, the Reserve Bank of India had given its short inspection report (A-1) on the affairs of the Bank under Section 22 of the Act. This report showed that even necessary formalities with regard to opening of deposit accounts were not complied with, over-drafts were allowed in 'savings' Bank accounts, unsecured advances were disproportionately large, rates offered on some fixed deposits were abnormally high, the Bank was constantly borrowing from other Banks by pledging its investments, 16% of the advances were irregular, records to indicate the correct value of goods pledged or hypothaticated were not maintained, effective steps against those who obtained proved irregular advances were not taken, sufficient information was not available about the means and standing of

the borrowers, neither periodical returns, particularly of advances by the Branches, were made, nor were the Branches inspected periodically, the usual practice of Balancing the ledger at frequent intervals was not observed, and account books and records of the Bank were not' duly maintained. The Reserve Bank, therefore, suspended its' decision about issue of a licence to the Bank to carry on banking business until the Bank had removed these shortcomings.

On 5-3-1953, a second report (A-2), under Section 22 of the Act, was given by the Reserve Bank, in which it was observed, inter-alia, that the Bank had not rectified the defects pointed out in the previous inspection report, that the Board, of Directors did not show sufficient interest in the working of the Bank, and that there was no proper supervision and control over the activities of the Managing Director. The question whether the Bank was eligible or not for a licence was still left undecided after listing irregularities found under fourteen heads. On 13-9-1954, a very detailed inspection report (A-3), under Section 35, sub.s(1) of the Act, carried out on 26-3-1954, was sent by the Reserve Bank to the Bank, with a covering letter, in which the following conclusion was recorded :-

> "On the basis of the above report, it appears that the banking company is conducting its affairs in a manner detrimental to the interests of its depositors. The Reserve Bank of India, therefore, proposes to give it a notice in writing in terms of the first proviso to subsection (2) of Section 22 of the Act that a licence to carry on banking business in India cannot be granted to it".

The Bank was given an opportunity to make a representation against the report.

After suspension of payments by the Bank on 26th November, 1954, the Bank had applied, on 1-12-1954, to the High Court of Bombay, under Section 37 of the Act, praying for the grant of a moratorium and for opportunity to tic given to reconstruct the Banking Company as a going concern. An interim order was passed by the Bombay High Court granting moratorium for a period of two months and staying all actions against the Company for this period. Shri V. R. Kothagi, an Advocate of Belgaum, was appointed as Special Officer of the Bank under Section 37(3) of the Act, with powers to file suits.

Under the directions of the Bombay High Court the Reserve Bank deputed Shri Amrit Lal Bhatia to inspect the records and the workingof the Bank and to submit a report under the proviso to sub.s(2)of Section 37 of the Act. This report, submitted on 13-1-1955 (A-4), disclosed a deplorable state of accounts which contained a number of false and fraudulent entries, want, of supervision by either the officials or the Directors, unauthenticated erasures and alterations in the accounts, and a shortage of cash to the extent of 2.01 lakhs. It showed that the total liability of the Bank, excluding its share capital, amounted to Rs. 14.83 lakhs.

On 20-12-1954, the Directors of the Bank, with the concur- rence of the Special Officer, had appointed Shri K. Y. Wagle as Officer to examine the records of the Company with a view to explore the possibilities of its reconstruction. This report, dated 16-2-1955 (A-21) said :

> "On going through the books of accounts, it is observed that the misappropriation penetrates into the books from 1948 and still earlier and the amounts misappropriated are through entries from (a) Cash, (b) Bank accounts with other Bankers, (c) Branch accounts".

A list of cash deficits and fictitious entries who also given here. The report mentions that the assets and liabilities of the Bank could not be verified as no regular audit had been carried out and that the records had been maintained in "a most deceptive manner" so that the amounts involved could not be ascertained correctly. The total. amount "involved in the fraud" was assessed roughly at Rs. 4.26 lakhs. It said : "So far an amount of Rs. 3.75 lakhs has been traced from various sources. The balance can be traced provided the accounts are reconciled". After this report, the Bombay High Court rejected the application for further moratorium and for a reconstruction of the Company. On 8-3-1956, a depositor of the Bank applied to the Bombay High Court for the winding up of the Banking Company. On 13-3-1956, a provisional liquidator was appointed, and, on 16-4-1956, the Bank was ordered to be wound up. As a result of reorganisation of States, 'the winding up proceedings were transferred to the High Court of Mysore, and, the Official Liquidator at the Mysore High Court was appointed as the Liquidator of the Bank.

On 22-7-1958, the Official Liquidator brought to the notice of the Company Judge an elaborate report (A-9), dated 10-5- 1957, made by M/s. D. D. Joshi & Co., Auditors, appointed by the Direction of the Bank themselves. Here, after a survey of the Bank's history and conduct of its affairs by its Directors and officers we find, among the conclusions, recorded :

"(1) The Directors, by accepting a responsibility which they never intended to accept, laid the foundation for the fraud. They have misled the share holders and the depositors by presenting false Balance Sheets and Profit 'and Loss Accounts, at least from 1946 onwards. knowing them to be false.

(2)The Managing Director Shri S. 'K. Samant. the Accountant Shri R. S. Deshpande and the three Cashiers. K. V. Saudi. V. K. Nadgouda, S. N. Ajrekar took full advantage of the weakness of the Directors, the negligence of the Auditors, and fraudulently misappropriated the monies individually and collectively".

The Chartered Accountants were unable to ascertain the exact amounts misappropriated. They gave the following reasons for coming to the conclusion that the "Balance Sheets and the Profit and Loss Accounts for the years from 31-3-1946 onwards are false and incorrect":

> (a) The staff and the Directors know that the Bank had not received the share amount for the majority of the shares allotted which was made up of the fictitious credits given against these share applications, and which did not represent the actual physical cash on hand on that day.
>
> (b) The amount of unclaimed dividends taken to interest account was illegal and against the provisions of the Articles of Association of the Bank.

(c) The Auditors, when they counted the cash on 24th March, 1954, could have known that the actual cash on hand verified by them was far short of the cash balance shown by the Day Book of that day bad they tallied the cash counted by them with the Day Book.

(d)The Bankers' Balances as shown in the Balance Sheets did not show the correct balances inasmuch as false debits were made to these Banks by misappropriating the amounts shown as sent to the Bank for credit-

(e) The remission of Rs. 1,000 shown in the Profit and Loss Account of 1947 is a misnomer and the wording seems to have been purposely used to mislead all concerned.

Moreover, there is no sanction also for this remission.

(f) Due to suppression of overdrafts in the Savings Bank Accounts, the figures of deposits and consequently of loans, as shown in the Balance Sheets were incorrect, etc. etc. In D. D. Joshi Co's report it is also stated "On the event of the commencement of our work, the Directors had resolved to repay a part (10%) of' the deposit amounts to the depositors. This was the best opportunity to bring forth passbooks and other records in the possession of the depositors for getting the deposits verified for our purposes. The matter was discussed with the Chairman and some of the Directors and we handed them a specific form for obtaining letters of confirmation of balances from-the depositors. The Chairman and the Directors assured us to give due publicity to the matter before disbursing the amount and upon insisting on the production of pass-books and other records available from the depositors at the time of making the payments. However, it was later on discovered that this proposal of ours had not been carried out and that the deposit amounts were being disbursed without insisting upon the production of the pass-books. When the matter was again referred to the Chairman we were surprised to learn that the Directors had not approved of our proposal on the ground that it would have caused unnecessary inconvenience and harassment to the depositors (Annexure No. 4). By this failure on the part of the Chairman and the Directors a vary good opportunity available to us and the management for verifying the accounts of the Bank from sources independent of records at the Bank was denied and lost to us. Thus, the Directors themselves who had appointed us and promised us all facilities and co-operation did not extend the same as and when it was essential. From the facts that came to our notice subsequently during the course of our investigation. it seems that this act of theirs might even have been deliberate". After giving the, Directors and Officers of the Bank due opportunity to reply to D. D. Joshi Co's report, the Official Liquidator had filedthe application of 27-8-1960, under Section 45H of the Act readwith Section 235 of the Indian Companies Act. on the strengthof all the above mentioned reports, copious extracts from which were annexed to a duly sworn affidavit supporting the application for misfeasance proceedings.

In reply to the application, the Directors complained of vagueness and lack of particulars of the alleged wrongful acts and omissions. They also relied strongly on Articles 109 and 1,12 of the 'Articles of Association' relating to the powers and duties of Managing Director in whose favour they

are said to have executed a power of attorney. They tried to put the whole responsibility for the alleged fraud and misappropriations and loss on the Managing Director. S. K. Samanth. appointed in 1946 and some officers of the Bank. denied that the Managing Director consulted them before taking any action in the day to day transactions of the Bank. On the other hand. the Managing Director, S. K. Samanth pleaded that the whole business of the Bank was conducted "according to the policy and in accordance with the instructions of the Board of Directors" in whose hands he was "a mere tool." All the opposite parties to the application pleaded that the proceedings were barred by limitation.

The learned Company Judge had dismissed the proceedings against employees of the Bank as time barred on the ground that their cases were governed by the limitation provided for in Section 235 of the Companies Act of 1913, the application of Section 543 of the Companies Act of 1956 having been expressly excluded by Section 647 sub. s (2) of that Act, in a case in which the winding up of the Company had begun, as it did in the instant cage, before the commencement of the 1956 Act on 1-4-1956. But, in respect of the Managing Director and those Directors who were alive when the learned Company Judge gave his decision on 8-11- 1963, it was held that the proceedings were covered by the special provisions of Section 45 (O) of the Banking Companies Act applicable to them. The first two clauses of Section 45(O) read as follows :

> "45(O). Special Period of limitation (1) Notwithstanding anything to the contrary contained in the Indian Limitation Act, 1908 (IX of 1908) or if any other law for the time being in before,, 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 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".

By the Act XXXIIII of 1959 the following words were added at the end of Section 45 (O) (ii) : "or five years from the date of first appointment of the liquidator whichever is longer".

The Company Judge had held that the nature of the claims in the misfeasance proceedings against the Directors in the instant case fell under the category of "all other claims", mentioned ill Section 45 (O) (ii), for which the period of limitation was either twelve years from the dates of "accrual of claims" or five year from the date of the first appointment of the Liquidator "whichever is longer". The learned Company Judge held that the first clause of Section 45(O) of the Banking Companies Act, 1913, did not apply to a case in which the period of limitation had not begun to run 'before the

filing of the winding up petition, and that the misfeasance proceedings against Directors, having started, on 27-8-1960, within five years of the first appointment of the liquidator on 13-3-1956, were clearly within time. Incidentally, the finding that limitation did not begin running before filing the misfeasance application implied that this was not a case in which I claim had "accrued" before the filling of- the application. The ,Objection that Section 45(O) of the Act would apply to claims made by the Company itself and not to those by a liquidator was rightly over-ruled on the ground that the Liquidator really repre- sented the Company and that a claim made by the liquidator was therefore, a claim "by the Banking Company", as was held in Jawala Prasad Vs. Official Liquidator,(1) within the meaning of this expression used in Section 45(O) of the Act. The Division Bench, in five appeals by the Directors, had concurred with the ,Company Judge's views on the issue of limitation.

It has, however, been urged before us, on behalf of the Directors, that, the period of three years, provided by Section 235 of the Companies Act of 1913, as well as 12 years from " accruel of claims", prescribed by Section 45 (O) (ii) of the Act. having expired before the Act XXXIII of 1959, by which Section 45 (O) (ii) was amended on 1-10-1959, time barred claims could not be revived whether the case was governed by the limitation laid down in Section 235 of the Act of 1913, or that in Section 45 (O) of the Act. The contention that Section 235 of the 1913 Act could apply to these proceedings, governed expressly by the special law on the subject contained in Section 45 (O) of the Act, is plainly erroneous. The plea that twelve years from the "accrual of claims" had ,expired before Section 45(O)(ii) was amended on 1-10-1959 is also unacceptable. It does not seem to have been specifically advanced in the High Court so that the facts may be examined there to determine when any part of the claims "accrued" against any Director. Such a point, it is obvious, involving an investigation into fresh facts, showing when claims for any particular terms of loss to the Company accrued, or when they accrued against its' Board of Directors itself cannot be taken up for the first time in this Court. It was not taken, and, therefore, not gone into in the High Court. In any case, the amendment of Section 45 (O) (ii) of the Act had conferred a new right of counting the period of limitation from the first appointment of the liquidator. The exercise of that. right by the liquidator, acting on behalf of the Company, certainly took place after the commencement of Act XXXIII of 1959. There was no question here of giving any retrospective operation to any right whether procedural or substantive. We, therefore think that the claims against the Directors, which were prima facie made within time, were not shown to have been barred by limitation.

We will now consider another question of preliminary nature with regard to the liabilities of legal representatives of the deceased respondents. The Company Judge had held that misfeasance proceedings were of a special nature involving an enquiry into the, alleged wrongful conduct of Directors personally. The liability of a Director for such wrong doing was held to be of personal character which vanished with the death of a Director. Reliance had been placed, by the Company Judge, on : In Re, East of England Bank-Feltom's Executors Case,(1) which had been followed in Re: United English and Scottish Assurance Company ex-parte Hawkins,(2) and in Re: British Guardian Life Assurance Company.(3) The learned Judge observed that the principle laid down in these English cases had been followed by Indian High Courts in the cases mentioned by him which were : (1) S. B. Billimnpria, Official Liquidator Vs. Cenilla Mary Devsouiza & Ors., (4) (2) Official Liquidators Vs. Jugal Kishore & Ors., (5) (3) Manilal Brij lal Vs. Venadravandas C. Jadev & Ors.,(6) (4) Pattiain Veettil Menokki Senkaram Nambiar Vs. Kottayam Bank by Official Liquidator,

Tellichery & Ors., (7) (5) In Re :

> The Peerdan Juhaymal Bank Ltd. (8). The learned Judge, therefore, held that proceedings could not continue against the heirs of either the Chairman of the Board, S. G. Pant, or the Director Angolkar, who had died before the Company Judge gave his decision on 8-11-1963. The correctness of the decision of the Company Judge to exempt heirs and legal representatives of the Chairman Pant and the Director Angolkar was not questioned by any party in the five appeals before the Division Bench. Their possible liabilities, as persons upon whom the assets and properties of Pant and Angolkar may (1) 1865 (1) Equity Cases 219.(2) 1867 (3) ch. Appeal Cases 787 @ 791.
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> (3) 1880 (14) ch. Division 335.(4) A.I.R 1926 Lahore 624. (5) A.I.R. 1939 All. I.(6) A.I.R. 1944 Bom. 193. (7) A.I.R. 1946 Mad. 304.(8) A.I.R. 1958 Mad. 583.

have devolved, do not, therefore, call for a decision from us. But the general question of liability of heirs and legal representatives of delinquent Directors has arisen before us in respect of the liability, if any, of the heirs and legal representatives of Director Tendolkar who died on 10-8-1966 pending the grant of his application for certification of fitness of the case under Article 133 of the Constitution for an appeal to this Court. Tendolkar's heirs got themselves impleaded so as to prosecute the application for certification of fitness of the case for appeal, and, after obtaining it, they filed their appeal in this Court against the order of the Division Bench holding Tendolkar liable. Learned Counsel representing them was heard in support of objection that the proceedings against them could not continue and also on merits of the order determining the liability of Tendolkar. Learned Counsel for the Official Liquidator, on the other hand, pressed his appeal against the order of the Division Bench reducing the liability of Tendolkar.

In Re : East of England Bank-Feltoms Executors Case (Supra), the question was left undecided whether the remedy against the estate of a delinquent Director was by way of a suit. or in winding up proceedings. It was certainly not held there that there was no remedy. In Re : British Guardian Life Assurance Company (Supra), it was observed that the Directors were liable for breaches of trust for moneys not rightly invested, although, it was held that, on the language of Section 165 of the English Companies Act, which was very similar to Section 235 of the Act of 1913, these summary proceedings were not available against the heirs of a delinquent Director. English Courts have, however, held that equitable relief against the deceased Directors estate, which may have benefitted from breach of trust. was not barred. (See: Erlanger Vs. New Sombrero Phosphate Co.;(1) Ramskill Vs. Edwards;(2) Re : Sharne (3) In W. S. Ramaswamy Iyer & Anr. Vs. Brahmavya & Co., Official Liquidators. Hanuman Bank Ltd., (4) , a Division Bench of the Madras High Court held that, as the position of a Director of a Company was analogous to that of a trustee with regard to powers over the funds of the Company, and, as his office was of a fiduciary character, he would be liable for breaches of trust if he misused his powers. It was held that the liability incurred by Directors by such misuse of power was neither exhausted by proceedings against them in the course of a Company's liquidation nor did it vanish with the death of a Director.

(1) (1878) 3 App. Cas. 1218.(2) (1886) 31 Ch. Dvn. 100. (3) (1892) 1 Ch. 154. (4) Company Cases Vol. 36, p. 270.

In the New Flemirg Spinning & Weaving Co. Ltd. Vs. Kessorji Nalik & Ors.,(1) it was held that misfeasance by a Director was a breach of trust and not merely a personal default so that the estate of the deceased Director would be liable to make good the loss caused to a Company by the misfeasance of the deceased. But, this was a case in which a regular suit had been filed.

In Official liquidators Vs. Jugal Kishore & Ors., (Supra), it was pointed out that Section 235 of the Companies Act 1913 contemplates proceedings against Directors and not against their heirs or legal representatives, and that, although, Section 306 of the Indian Succession Act gives a right to continue even special proceedings against executors or administrators of the estate of the deceased, yet, it did not extend to mere heirs and legal representatives. it was also observed here that the provisions of Section 235 of the Companies Act of 1913 do not bar suits by the Official Liquidator, in suitable cases, against the heirs of the deceased. Similar views were adopted in: S. B. Billimoria. Official Liquidator Vs. Cecilla Mary De'Souza & Ors. (Supra); Manilal Brijlal Vs. Vendravandas C. Jadev & Ors. (Supra); and in Re : The Peerdan Juharmal Bank Ltd. (Supra). Two cases, Gopal Ganesh Abhyankar Vs. Ramchandra Sadashiv Sahasrabudhe (2) and, Sakyahani Ingle Rao Sahib Vs. Bhavani Bozi Sahib & Ors.,(3) were cited on the application of the maxim "actio personalis moritur cum personal". In Abhyankar's case (Supra) the Defendant against whom a suit for damages for defamation had been decreed had died during the pendency of the appeal against the decree passed. At the hearing of the appeal, the plaintiff had objected that the appeal had abated. The Bombay High Court held that the Defendant's legal representatives had a right to continue the proceedings and to question the decree. The High Court referred to several cases, including a Full Bench decision of the Allahabad High Court in Padarath Vs. Raja Ram,(4) where Edge, C.J. had said :

> "I have always understood the law to be that, in those case in which an action would abate upon the death of the plaintiff before judgment, the action would not abate if final judgment had been obtained before the death of the plaintiff".

Then the Court held "The result of these authorities would clearly seem 'to be that, where the claim has been perfected by a judgment, the nature of the relief claimed on appeal (1) I.L.R. IX Bom. 373. (2) I.L.R. 26 Bombay 597. (3) I.L.R. 27, Mad. 588. (4) (1882) 4 All. 235. 9-L798Sup.C.I./73 stands on a different tooting and there will be no abate- ment".

We think, that the ratio decidendi of this case helps the Official Liquidator appellant. In S. I. Rao Sahib's case (Supra) it wag held that a reversioner's right was "personal" which vanished with the death of the plaintiff. Hence, the appeal of the plaintiff, in which the heirs had been substituted, was held to have abated. We fail to see how this case helps the heirs of Tendolkar. The decisions of our High Courts, while keeping in view the consideration that a misfeasance proceeding, contemplated by Section 235 of the Act of 1913, involving an inquiry into the personal conduct of persons acting in capacities mentioned therein, may attract the application of the maxim "actio personalis moriture cumpersona", have proceeded, very rightly, more on an interpretation-of the provisions of Section

235 than on the application of that maxim. The maxim Actio personalis moritur cum persona, as pointed in Winfield's "Law of Tort (Eighth Edn. p. 603-605), was an invention of English Common Lawyers. It seemed to have resulted from the strong quasi-criminal character of the action for trespass. Just like a prosecution for a criminal offence, the action for trespass, which was "the parent of much of our modern law of tort", was held, by applying this maxim, to be incapable of surviving the death of the wrongdoer, and, in some cases, even of the party injured. The maxim, with its extensions, was criticised by Winfield and found to be "pregnant with a good deal more mischief than was ever born of it". Whatever view one may take of the justice of the principle, it was clear that it would not be applicable to actions based on contract or where a tort feasor's estate had benefitted from a 'wrong done. Its application was generally confined to actions for damages for defamation, seduction, inducing a spouse to remain apart from the other, and adultery.

We see no reason to extend the maxim, as a general principle, even to cases involving breaches of fiduciary duties or where the personal conduct of the deceased Director has been fully enquired into, and the only question for determination, on an appeal, is the extent of the liability incurred by the deceased Director. Such liability must necessarily be confined to the assets or estate left by the deceased in the hands of the successors. In so far as an heir or legal representative has an interest in the assets of 'the deceased and represents the estate, and the liquidator represents the interests of the Company, the heirs as well as the liquidator should, in equity, be able to question a the interests represented.

We may now consider the meaning and effect of Section 235 of the Act of 1913 which reads as follows :

> "235. Power of Court to assess damages against delinquent directors, etc.(1) Where, in the course of winding up a company, it appears that any person who has taken part in the formation or promotion of the company, or any past or present Director, Manager or liquidator, or any officer of the company has misapplied or retained or become liable or accountable for any money or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of the liquidator, or of any creditor or contr ibutory 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, examine into the conduct of the promoter, director, manager, liquidator or officer, and compel him to repay or restore the money or property or any part thereof respectively with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the Company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust as the Court thinks just. (2) This section shall apply notwithstanding that the offence is one for which the offender may be criminally responsible."

It will be seen that, while Section 235 of the Act of 1913, like Section 543 of the Companies Act of 1956, to which it corresponds, gives the power to the Court to enquire into the conduct of "any past or present Director", yet, both Section 235 of the Act of 1913 and Section 543 of the Companies Act

of 1956 confine the power of the Court to make orders for repayment or restoration of money or property or contribution to the assets of the Company against the individuals occupying the capacities, either in the past or present, mentioned therein. This power does not, on the language of these provisions, extend to making compulsive orders against heirs of delinquents. As the power to take these special proceedings is discretionary and does not exhaust other remedies, although, the Court may, as a matter of justice and equity, drop proceedings against delinquent Directors, Managers, or Officers who are no longer alive, leaving the complainant to his ordinary remedy by a civil suit against the assets of the deceased, yet, where no injustice may be caused by continuing these proceedings against a past Director, even though he be dead, the proceedings could continue after giving persons who may be interested opportunities to be heard. But, even such proceedings can only result in a declaration of the liability, of a deceased director, because the language of Section 235 of the Act of 1913, as already noticed, does not authorise passing of orders to compel heirs or legal representatives to do anything. Such compulsive proceedings as may become necessary against those upon whom devolve the assets or the estate of a deceased delinquent Director, who may have become liable, could only lie outside Section 235 of the Act of 1913.

There was nothing in the Act of 1913 which corresponded to Section 542 of the Companies Act of 1956, the relevant part of which lays down:

> "542. Liability for fraudulent conduct of business (1) If in the course of the winding up of a company, it appears that any business of the company has been carried on, with intent to defraud creditors of the Company, or any other persons, or for any fraudulent purpose, the Court, on the application of the Official Liquidator, or the liquidator or any creditor or contributory of the Company, may, if it thinks it proper so to do, declare that any persons who were knowingly parties to the carrying on of the business in the manner aforesaid shall be personally responsible, without any limitation of liability, for all or any of the debats or other liabilities of the company as the Court may direct.

On the hearing of an application under this subsection the Official Liquidator or the liquidator, as the case may be, may himself give evidence or call witnesses.

(2) (a) Where the Court makes any such declaration, it may give such further directions as it thinks proper for the purpose of giving effect to that declaration.

(b) ****** ********

(c) The Court may, from time to time, make such further order as may be necessary for the purpose of enforcing any charged imposed under this sub-section,

(d) *** ***** (3) **** **** **** It may be possible (though we need express no final opinion on the matter) where a proceeding under Section 543 is covered also by the terms of Section 542 of the Companies Act of 1956, to give directions to persons other than those whose conduct is enquired into, including directions to heirs and legal representatives, for the purpose of enforcing a

declaration. But, we think that the power under Section 235 of the Act of 1935, which corresponds to Section 543 of the Act of 1956, would not extend beyond making a declaration against a deceased Director provided he, in his life time, or his heirs, after his death, have had due opportunity of putting forward the case on behalf of the allegedly delinquent Director. If either a Liquidator or the heirs of a delinquent Director, against whom a declaration of liability has been made, can question the determination of liability of the deceased delinquent, who was alive at the time of the Judgment against him, it is obvious that the Appellate Court could give a declaration either reducing or increasing the liability even though it may not be able to enforce it by an order under Section 235 of the Act. If the declaration can be questioned by an appeal, as we think that it can, the liability can be not only wiped off or reduced but also increased on an appeal heard after the death of a Director held liable. Applying the principles laid down above to the case before us, we find that Tendolkar had a full opportunity of defending himself against the misfeasance proceedings taken by the liquidator. He also exercised his right of appeal against the order of the Company Judge. The Division Bench, as already observed, reduced his liability. His heirs were, heard on merits in the appeal before us. Any order passed by us could only affect the assets or the estate of the deceased Tendolkar. But, as already indicated by us, we cannot, in these proceedings, pass an order against the ,heirs of Tendolkar so as to compel them to do anything. The Official Liquidator or the co-Directors may, however, take, any other proceeding which may be open to them under the law so ,as to obtain the contribution of Tendolkar. Before we consider the manner in which the liabilities of the Directors were determined, on the evidence on record, by the Company Judge and then by the Division Bench, we will refer to the principal authorities, cited before the High Court and also before us, with regard to the principles on which liabilities of Managing Directors and other Directors may be determined in such cases.

In Re : City Equitable Life Insurance Co.,(1) which is regard as the locus classicus on the subject, was relied upon by (1) [1925] Ch. 407 at 427.

both sides. Here, Romer, J., after considering earlier authorities, said :

> "In order, therefore, to ascertain the duties that a person appointed to the board of an established company undertakes to perform, it is necessary to consider not only the nature of the company's business, but also the manner in which the work of the company is in fact distributed between the Directors and the other officials of the Company, provided always that this distribution is a reasonable one in the circumstances, and is not inconsistent with any express provisions of the articles of association. In discharging the duties of his position thus ascertained a Director must, of course, act honestly, but he must also exercise some degree of both skill and diligence. To the question of what is the particular degree of skill and diligence required of him, the authorities do not, I think, give any very clear answer. It has been laid down that so long as a Director acts honestly he cannot be made responsible in damages unless guilty of gross or culpable negligence in a business sense. But, as pointed out by Neville J. in Re. Brazilian Rubber Plantations and Estates Ltd., (1911)1 Ch. 425), one cannot say whether a man has been guilty of 'negligence, gross or otherwise, unless one can determine what is the extent of the

> duty which he is alleged to have neglected. For myself, I confess to feeling some difficulty in understanding the difference between negligence and gross negligence, except in so far as the expressions are used for the purpose of draw- ing a distinction between the duty that is owed in one case and the duty is owed in another ....
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> "There are, in addition, one or two other general propositions that seem to be warranted by the reported cases : (1) A director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience. A director of a Life Insurance Company for instance, does not guarantee that he has the skill of an actuary or of a physician. In the words of Lindley M.R.; 'If Directors act within their powers, if they act with such care as is reasonably to be expected from them, having regard to their knowledge and experience, and if they act honestly for the benefit of the Company they represent, they discharge both their equitable as well as their legal duty to the Company' (Lagunas Nitrate Co. Vs. Lagunas Syndicate(1899)2 Ch. 392, 435). It is perhaps only another way of stating the same proposition to say that Directors are not liable for more errors of judgment. (2) A Director is not bound to give continuous attention to the affairs of his Company. His duties are of an intermittent nature to be performed at periodical board meetings; and at meetings of any committee of the board upon which he happens to be placed. He is not, however, bound to attend all such meetings, though he ought to attend whenever, in the circumstances, he is reasonably able to do so. (3) In respect of all duties that, having regard to the exigencies of business, and the articles of association, may properly be left to some other official, a director is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly".

It must, however, be remembered that these remarks were made in the context of a case in which the honestly of the conduct of the Directors had not been questioned at all. In Dovey Vs. Cory,(1) which was, also cited, the question considered by the, House of Lords was whether a Director, though, in fact innocent of any complicity in fraud, was liable to the Company for negligence in not having discovered the fraud perpetrated by others. In that context, Lord Halsbury L.C. bad observed as follows:

> "It is obvious if there is such a duty of detecting frauds it must render anything like an intelligent devolution' of labour impossible.. . . . I cannot think it can be expected of a Director that he should be watching either the inferior officers of the bank or verifying the calculations of the auditor himself. The business of life could not go on if people could not trust those who are put into a position of trust for the express purpose of attending to details of management".

In this very case, Lord Davey said :

> "I think the respondent (Cory) was bound to give h is attention to and exercise, his judgment as a man of business on the matters which were brought before the board

at the meetings which he attended, and it is not proved that he did not do so. But I think he was entitled to rely upon the judgment, information, and advice of the Chairman and general manager, as to whose integrity, skill, and competence he had no reason for suspicion".

(1) [1901] A.C. 477.

In Re : Danham & Co.,(1) a Director was held not liable for the fraud of his Co-Directors in issuing false and fraudulent reports and balance sheets. But, even in this case, it was found that the books of accounts of the Company had been properly kept and duly audited so that the Director concerned had no reason for suspecting fraud and was misled "by reason of the extraordinary powers conferred by the Articles upon the Chairman".

In Palmer's "Company Law" (21st Edn. 1968 p. 575), after a citation of the three cases mentioned above, we find the comment "It is doubtful whether, if similar facts arose today, the court would decide in the same manner, because now a days the courts take a stricter view of the duties of a director than they took some twenty-five years ago".

It is certainly a question of fact, to be determined upon the evidence in each case, whether a Director, alleged to be liable for misfeasance, had acted reasonably as well as honestly and with due diligence, so that he could not be held liable for conniving at fraud and misappropriation which takes place. A Director may be shown to be so placed and to have been so closely and so long associated personally with the management of the Company that he will be deemed to be not merely cognizant of but liable for fraud in the conduct of the business of a Company even though no specific act of dishonesty is proved against him personally. He cannot shut his eyes to what must be obvious to everyone whoexamines the affairs of the Company even superficially. If he does so he could be held liable for dereliction of duties undertaken by him and compelled to make good the losses incurred by the Company due to his neglect even if he is not shown to be guilty of participating in the commission of fraud. It is enough if his negligence is of such a character as to enable frauds to be committed and losses thereby incurred by the Company.

In the case before us, strong reliance has been placed, on behalf of the Directors, on articles 109 and 118 of the Articles of Association which read as follows :

"Duties of the Managing Director.

(1) [1883] 25 Ch. Divn. 752.

109 (a) The Managing Director, shall out of the money received by the Company make all necessary and proper disbursements, in carrying on the business of the Company, and shall cause proper accounts to be kept of all transactions of the Company and shall once in every year, settle and adjust such accounts with the Board and Auditors and shall make out the Balance Sheet and Profit and loss account and all the returns, and statements required by the Acts. to be audited and signed.

Appointment of Managing Director.

(b) The Directors may from time to time appoint any one from their body to the Managing Director of the Company, either for a fixed period, or without any limitation as to the period for which he is to hold such office, on such terms, provisions, and conditions as to remuneration, management of the Company's business and affairs and removal. which may be mutually agreed upon between the Directors. and the Managing Director."

> "Power to appoint Committee and to delegate.
>
> 118. The Directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit. Any committee so formed shall, in the exercise of the powers so delegated, conform to any regulations that may from time to time, be imposed upon it by the Directors".

But, despite these articles and the, power of attorney executed in favour of the Managing Director, article 125 gave the Directors atleast supervisory powers of management. The Managing Director S. K. Semant, who had tried to prove that it was the Board of Directors which really and actually conducted the affairs of the Company and that he was merely a tool, had relied on this article which reads as follows :

> "Powers of Directors.
>
> 124. The Management of the business of the Company shall be vested in the Directors, who in addition to the powers and authorities by these presents or otherwise expressly conferred upon them, may exercise all such powers and do all such acts, and, things as may be exercised or done by the Company and are not here-
>
> by or by statute expressly directed or required to be exercised or done by the Company in general meeting, but subject nevertheless to the provisions of the statutes, and of the presents, and to such regulations being not inconsistent with the aforesaid provisions as may from time to time be made by the Company in General Meeting; Provided that no regulation so made shall invalidate any prior act of the Directors which would have been valid if such regulation had not been made".

Upon the facts examined by the learned Company Judge very fully and less fully by the Division Bench and the findings recorded thereon, it is clear to us :that, although the Managing Director was conducting the day to day affairs of the Company and must, therefore, be held responsible for a greater share of losses incurred due to misappropriations, dishonesty, and misuse of managerial powers, yet, his Co- Directors could not possibly be ignorant of the nature of such dealings and activities of the employees and the Managing Director simply because they had executed a power of attorney in favour of the Managing Director. The Company Judge, relying upon observations in Overend & Gurney Co. v. Gibb(1) had held that :

> "The Directors were cognizant of circumstances of such a character, so plain and so manifest, that no men with any ordinary degree of prudence, acting on their own behalf, would have conducted themselves in the manner the Directors of this Company have done".

The proved conduct of the founder Directors was such that an inference of their complicity in concealing the true state of affairs from depositors, presumably because they were themselves benefitting from it, could not be avoided. The learned Company Judge had rejected the plea of the Directors that they had acted both honestly and reasonably in the performance of their duties.

The learned Company Judge had observed:

> "It has been argued on behalf of the Liquidator, and suggestions have also been made to the Directors when they were in the witness box, that they did not take immediate steps to remove dishonest members of the staff from service and to set right things because they were afraid of their own dishonest conduct being exposed by the staff members if they persisted in taking action against them. Two circumstances relied upon in support of this argument are that in spite of promises (1) L.R. 5 H..L. 480.

made to the Reserve Bank, no reconciliation statements were got prepared for fear that any such reconciliation would bring to light false entries in account books. Secondly, it appears that one R. P. Joshi was appointed as Manager or Chief Officer but unceremoniously removed from service shortly after his appointment because with a view to set right matters he started taking steps which might have brought to light several irregularities in the loan accounts of the Directors themselves.

So far as reconciliation is concerned. the position appears to have been that the discrepancy in bank accounts could not possibly be, explained by cheques, bills or other instruments instransit. The discrepancy, as it turned out, was a result of making false entries and making unauthorised advances out of the cash. The subsequent taking of loan documents was the only type of reconciliation that was possible.

That R. P. Joshi was removed from service shortly after his appointment is admitted. The reason given is that his behaviour towards the customers was found to be not quite good. But it has been established by evidence that the supervision of his conduct during the initial period of probation was entrusted to a committee of Directors of whom Tendolkar was one. Tendolkar denied that he was a member of that committee. But Kalghatgi in his evidence stated that Tendolkar was one of them but declined to admit that he also was a member thereof. It has been possible for these Directors to give these answers because the record in the rough minutes books relating to the appointment of this Committee is not signed by any of the Directors. But I am satisfied on the evidence that there was such a committee. The disinclination on the part of these Directors to admit that they were members of the said committee leads to the conclusion that they do not wish directly to be associated with the decision to terminate R. P. Joshi's service, which lands some support to the suggestion on behalf of the Liquidator that the principal or operative reason for the said decision was that he started looking into loan account of the Directors and pointing out irregularities in them".

He went on to observe "As I have already stated, the making of loans and' advances to the Directors may not in itself be irregular or dishonest, provided that no difference is made in the matter of procedure and scrutiny between the loans to Directors and loans to other persons. If (certain preferences or concessions are made in favour of the Directors including the omission to adopt proper procedure and scrutiny, it is a legitimate criticism to make that the Directors have taken undue advantage of their position as Directors which undoubtedly is a departure from the standard of care and rectitude expected of them. As I have already observed, if men at the top are guilty of departure from proper conduct, they place themselves in a position which makes it difficult, if not impossible, for them to correct their subordinates. There is, therefore, force in the argument that this particular situation in which, the Directors found themselves might be one of the reasons for not taking stern action against dishonest members of the staff. This circumstance is enough, in my opinion, to disentitle the Directors from saying that their only fault was honest error of judgment or that they have acted reasonably in ;the circumstances of this case.

I hold therefore that the Directors, other than the Managing Director, are also liable for the loss because they must be held to have failed in their duty of providing for good and efficient management of affairs of the Company and because they cannot in the circumstances claim that they were entitled to rely upon either The Managing Director or any members of the supervisor staff".

The learned Company judge as well as the Division Bench had referred to the difficulties encountered in determining the actual total, loss to the Company because of want of any reliable statement of account. This state of the records of the Bank was itself evidence of breach of their duties by the Managing Director and the Board of Directors to see that the business of the Bank was honestly and efficiently conducted.

The learned Company Judge, after considering all the items of proved loss to the Company and making appropriate deductions for assets which could be considered even of doubtful value, had found that at least a loss of Rs. 2,50,000 was caused by the mismanagement of the Managing Director and the Co-Directors. The learned Company Judge had ordered the Managing Director as well as the Directors Tendolkar and Ajgaonkar and Porwal and Kalghatgi to contribute jointly and severally a sum of Rs. 2,50,000 with interest at 6 per cent per annum from the date of his order ,on 8-11-1963 until payment, to the assets of the Company, but .the learned Judge limited the liabilities of Porwal and Kalghatgi to Rs. 15,000 each, provided they paid this sum within three months of his order.

The Division Bench found the estimate of the Company Judge about the total loss due to mismanagement to be not only reasonable, but record findings showing that loss incurred under the two heads of loss for the whole period was more. Speaking about the loss shown by proved shortage of cash and manipulation of balances with the other banks and the extent of the liability of the Managing Director for these it said :

> "Though the total loss to the Bank under the aforesaid two heads (shortage of cash and manipulation of' balances with other Banks) may be estimated at Rs. 2,65,000,

> he is liable for only that portion of the said loss which occurred after he became the Managing Director in July, 1946. Unfortunately, neither the, Official Liquidator nor the witnesses focussed the inattention to apportionment of the loss between the period, prior to July 1946 and the period subsequent to July 1946".

It rejected the plea of the Managing Director that he had executed' promissory notes in favour of the Bank for Rs' 5 3,000 and Rs. 58,500, on 19-11-1954, and 3-12-1954 respectively, under some pressure, threat, or coercion. It relied upon a statement in writing of the Managing Director (A. 25) addressed to the Special Officer on 8-12-1954 in which the amounts of the two pronotes totalling upto Rs. 1,11,500 to the Bank constituted an admission and undertaking to repay atleast this amount to the Bank. It observed that even on 8-12-1954 the Managing Director did not deny his liability to pay this amount. It then held.:

> " Hence, this can safely be taken as his liability for his negligence and breach of duty. Rs. 14,000 has been realised from him by the sale of his car and truck and another sum of Rs. 24,000 has been realised by the sale-deed executed by him in favour of the Bank conveying his house. Deducting these two sums, he is still liable for a sum of Rs. 73,500. Thus, his liability to contribute to the assets of the Company can safely be fixed at Rs. 73,500 though it is likely that the extent of loss resulting from his negligence and breach of duty as Managing Director, is much larger. He is also liable to pay interest on this sum of Rs. 73,500 at 6 per cent per annum from the order of the learned Company Judge till payment".

The Division Bench, after holding that the Managing Director S. K. Samant was liable to contribute atleast Rs. 73,500 more with interest, actually reduced the liability of S. K. Samant individually to Rs. 58,500 and of Directors Tendolkar and Ajgaonker jointly and severally to Rs. 50,000 only. After that, it added that, out of the sum of Rs. 5 8' 500 payable initially 'by S. K. Samant, the liabilities of the Co-Directors Tendolkar and Ajgaonkar would be, joint and several with the Managing Director S. K. Samant to the extent of Rs. 50,000 only. This meant that the joint and several liabilities of Ajgaonkar with the Managing Director S. K. Samant would only come into play if S. K. Samant failed to discharge his, own liability to the extent of Rs. 58,500. The result of the orders ,of the Division Bench was that the amount to be repaid to the Bank by the Managing Director and the four Directors totalled up to Rs. 1,23,500. This total liability was determined after deducting Rs. 24,000 already realised from the sale of the house and Rs. 14,000 from the sale of a car and truck of S. K. Samant.

It was contended before us that the Division Bench had erred in reducing the total liability of the Board of Directors from Rs. 2,50,000 to Rs. 1,61,500 (i.e. Rs. 1,23,500 plus Rs. 38,000) ,on a rather arbitrary view that this is all that could be definitely proved to be the total loss to the Company due to the misfeasance ,of the Board, as, a whole, after all the Directors had clear and definite notice of the irregularities committed in the management of the Bank from the Reserve Bank's first report, although the Division Bench had itself held that the total loss covered 'by the ,two heads of 'shortage of cash and 'manipulation of balances with other banks' over the whole period of management by the Board was Rs. 2,6-5,000. The, Division Bench confined the liabilities of the whole Board of

Directors, apart from those of the Managing Director individually, to only Rs. 65,000 "proved to have taken place subsequent to March 195 1, when they became aware of Ex. A1 the first report of the Reserve Bank"'.

The learned Company Judge had separately considered the cases of Porwal, who joined as Director in 1951 after the first Inspection Report by the Reserve Bank had already been given, and of R. N. Kalghatgi, who became a Director only in July 1953, on the death of his elder brother G. N. Kalghatgi. They had pleaded that they were ignorant of the malpractices and misappropriations which had taken place before they joined the, Board ,of Directors. The Company Judge had noted that no suggestion of dishonest conduct had been made against them and that they had not borrowed any money from the Company. Nevertheless, as they were fixed with the knowledge of the contents of the several reports of the Reserve Bank, mentioned above, they were held liable to contribute Rs. 15,000 each, as mentioned above, for their negligence and breach of duty to provide and ensure honest and efficient management of the affairs of the Bank. The Division' Bench had, in view of the short period for which they had functioned on the delinquent Board of Directors, reduced the contributions to be made by R. W. Porwal and H. N. Kalghatgi to Rs. 10,000 and Rs. 5,000 respectively with interest at 6 per cent per annum from 8-11-1963, the date of the order of the Company Judge, until the date of payment. Having regard to the mitigating circumstances, and, particularly, the shortness of the period for which these two Directors served on the delinquent Board of Directors, with the nature of activities of which they could not possibly have been ignorant after the reports of the Reserve, Bank, we consider the orders of the Division Bench reducing the liabilities of these two Directors to be just and reasonable. It may also be mentioned here that Porwal and Kalghatgi appear to have accepted the justice of assessment of their liabilities as they had not appealed against the order of the Division Bench so that no question of any further reduction of their liabilities arise before us.

While we think that the Division Bench was justified in placing a larger share of the burden of contribution on the Managing Director, upon the facts and circumstances of this case, it had manifestly erred in passing an order which not only reduced the total liability of the Directors, but had, without giving any good reason for it, reduced the individual remaining liability of S. K. Samant to Rs. 5 8,5 00 only. It had itself held, that, even according to the admission of the Managing Director, he was liable to the extent of Rs. 1, 1 1, 5 00 and that, as this was a fair measure of the extent of the loss caused by the Managing Director, the amount still payable by him was Rs. 73,500 (i.e. after deducting Rs. 38,000 for the amounts already realised from Samant).

We may here indicate the nature of the evidence, discussed at length by the learned Company Judge, on which findings relating to mismanagement by the Board of Directors were based. Shri A. L. Bhatia (P.W. 1), Banking Officer of the Reserve Bank of India, had duly proved facts disclosed in the reports, dated 7-3-1951(Al), dated 5-3-1953 (A2), dated 13-9-1954 (A3), and dated 13-1-1955 (A4), which were made after carrying out inspections of the records disclosing the manner in which the business of the Bank was conducted. He had been fully cross-examined on the contents of the reports. Shri B. D. Joshi, Chartered Accountant (PW. 2), who stated that he had been appointed to examine and audit the accounts of the Company by the Board of Directors, at the instance of the CID, for the period from 1948 onwards, had proved the contents of his report (A9) dated 10-5-1957.

He was also thoroughly cross-examined on behalf of the Directors. Shri K. Y. Wagle (PW. 3), Auditor, was examined by the Official Liquidator to prove and support the contents of his report (A. 21) dated 16-2-1955. Shri V. R. Kotbagi. Advocate (PW. 4) who, as indicated above, had been appointed as the Special Officer, under Section 37 of the Act, and who func-

tioned from 7-12-1954 to 4-4-1955 in that capacity, had duly proved and was fully cross-examined about the admissions made in writing (Ex. A. 25) by S. K. Samant. No objection had been taken on behalf of the Directors to the admissibility of any of the reports or other documents, exhibited on behalf of the Official Liquidator. In addition to the considerable evidence given by the witnesses mentioned above, the learned Company Judge, in order to give the fullest possible opportunity to the Directors to meet the prima-facia case of misfeasance, by misconducting the affairs of the Bank in a manner which could not be honest and which caused heavy losses to the Bank, had ordered the Directors, who had produced no witness in defence, to appear and give evidence in court, particularly 'because the defence of the Directors seemed to the learned Judge to be proceeding on the wrong assumption that the whole burden of proof rested upon the liquidator. The learned Judge, in this connection, referred to the provisions of Section 45H of the Act which laid down:

> "45H. Special provisions for assessing damages against delinquent directors, etc.-
>
> (1). Where an application is made to the High Court under Section 235 of the Indian Companies Act, 1913 (7 of 1913), against any promoter, director, manager, liquidator or officer of a banking company for repayment or restoration of any money or property and the applicant makes out a prima facie case against such person to repay and restore the money or property unless he proves that he is not liable to, make the repayment or restoration either wholly or in part :
>
> Provided that where such an order is made jointly against two or more such persons, they shall be jointly and severally liable to make the repayment or restoration of the money or property.
>
> (2) Where an application is made to the High Court under Section 235 of the Indian Companies Act, 1913 (7 of 1913), and the High Court has reason to believe that a property belongs ;to any promotor, Director, Manager, liquidator or officer of the banking Company, person as an ostensible owner, then the High Court may, at any time, whether the property stands in the name of such person, or any other whether before or after making an order under sub-section (1) direct the attachment of such property, or such portion thereof, as it thinks fit and the property so attached shall remain subject to attachment unless the ostensible owner can prove to the satisfaction of the High Court that he is the real owner and the provisions of the Code of Civil Procedure, 1908 (Act 5 of 1908), relating to attachment of property shall, as far as may be, apply to such attachment".

The Directors, apparently unwilling to appear in evidence, had questioned the power of the learned Company Judge to order them to appear and give evidence in open Court. Their appeal against the

order for the examination of the Directors had been dismissed. There was no further appeal against that order which became binding on the parties. The Division Bench, however, to support its view that the Directors other than the Managing Director could not be made liable before the Reserve Bank report came to their knowledge in March 195 1, observed that a good deal of evidence, which may have been available if the official Liquidator had asked for the public examination of the Directors under Section 45G of the Act, could not be placed before the Court. The Division Bench had also held that the allegations of improper conduct by the Directors, in not- exercising proper supervision, did not form the subject matter of any separate issue or point formulated by the Company Judge. Furthermore, the Division Bench held that allegations of improper conduct on the part of Directors, in obtaining excessive loans for themselves', which the Directors were not called upon to meet, should be ignored in determining the liability of the Directors for making good loss due to shortage of cash and manipulation of 'bank balances. It had, nevertheless, held the Directors liable inasmuch as they could not "totally abdicate their powers and functions and divest themselves of responsibility for proper management of the Company". The Division Bench had also commented upon the vagueness of allegations against the Directors individually.

We find, as the judgment of the learned Company Judge also shows, that each allegation in the misfeasance application was supported by sufficient particulars and evidence. In paragraph 12 of the application, it was stated that, although the books of the Bank showed a cash balance of Rs. 1,50,471-15-7, yet, the actual cash found on 26-11-1954 when the Bank closed business was Rs. 645.04. In addition, there was a cash deficit of Rs. 8773-15-8 revealed in the earlier report, so that the total deficit of cash was Rs. 1,58,600- 14-1 1. In paragraph 13, the unexplained difference between the accounts at the Branches, with particulars given, was shown to be Rs. 1,44,500. In paragraph 14, 'details of unreconciled differences in accounts with other Banks, referred to in the Reserve Bank report of 13-9-1954, were given. Paragraph 15 gave the details of allotment of new shares to the Directors and their friends without payment of any cash whatsoever for these shares, in 1946, although fictitious entries were made to show payments

-L796Sup. C.I./73 by the Chairman by G. N. Kalghatgi, and by L. S. Ajgaonkar. It was stated here that the Directors were fully aware of the fictitious nature of these entries. To explain them away, debits were made to a suspense account for the purpose of preparing the balance sheet ending on 31-12-1947. It was not only alleged but shown that the Directors were debarred by Article 147 of the Articles of Association from transferring unclaimed dividends to any funds or other accounts before the expiry of a year and that this had been done to cover up the fictitious entries. It was asserted there that the Auditor's report had also concealed the true, facts and that this was a deliberately fraudulent conduct. Paragraph 17 of the application gave a list of amounts shown to have been withdrawn by the Directors and their friends within a week before the closing of its business by the Bank. In earlier paragraphs of the petition, details of reports of Shri K. Y. Wagle, dated 16-2-1955, and of B. D. Joshi, given on 10-5-1957, and the explanations given by the Directors, were mentioned. The reports of the Reserve Bank of India were also mentioned in the application. The Official Liquidator could not possibly have done anything more in his application than to rely on reports available to him and to prove the correctness of their contents by producing, as witnesses, those individuals who had conducted the investigations and made the reports. He was not personally aware of the affairs of the Bank before he was appointed to wind up the Company. We think that, in

the circumstances of the case, sufficient particulars had been furnished in the misfeasance application. The Directors not only had an opportunity of meeting the allegations contained in the petition, but they also had knowledge of the material brought on record afterwards. It is true that there was no separate issue on the extent of the liability of the Managing Director and the Directors due to neglect in exercising proper control and supervision over officers of the Bank. But, we think that the gravemen of the charges against the Directors was more serious than that. The learned Company Judge had framed three issues apart from two on the preliminary questions disposed of by us already. These three issues were framed as follows:

> "1 Whether the Official Liquidator proves that on the date the Company closed its business, viz., on 27-11-1954 there was shortage in cash and if so, in what sum? 2, Whether the Liquidator proves that loss was occasioned to the Company by misapplication of cash or funds shown to have been credited to the accounts of the Company with the other Banks but not so actually credited?
>
> 3. Whether and if so, which of the respondents is or are liable to make good the shortage in cash and loss occasioned to. the Company; if found liable, are the respondents so liable jointly and severally and if severally, to what extent in the case of each of them ?".

The third issue involved determination of liabilities under the various heads on which evidence was led by both sides. The observations of the learned Company Judge about the failure of the Board of Directors to exercise proper control over the activities of the employees and the effect of setting bad examples before the employees were made as an answer to the attempts made by the Directors themselves to shift responsibility for the losses incurred, due to dishonest dealings which were not questioned, upon the shoulders of the employees of the Bank. The want of proper supervision was not, as is clear from the issues, a separate or easily separable head of liability. No separate liability for it was determined. The two heads of liability, covered by the first two issues, were wide enough to cover the. various causes of shortage and misapplication of funds and modes of falsification of accounts and other documents to conceal the true state of affairs left for elucidation by evidence. The remainder was, apparently, meant to be covered by the third issue.

We may point out that the report-cum-application made by the Official Liquidator for proceedings' against the delinquent Directors did record the Liquidator's opinion that loss had been caused to the Company, since its formation, by the acts and omission of the Directors, so that the High Court could order the production of the Directors for such examination as the High Court considered fit and proper. The High Court did make an order for their examination in Court. The Directors had not only had an opportunity of showing cause why they should not be so examined but had questioned the order for their examination by an appeal which failed. It is immaterial that the particular examination of the Directors was not described in the orders made as "public examination" within the meaning of Section 45 G of the Act. We think that the Division Bench had erred inasmuch as it proceeded on the assumption that the Liquidator has to make "a specific or separate application for public examination of Directors. All that Section 45G of the Act requires is the. submission of a report showing that loss has been caused to the Banking Company in the

opinion of the Official Liquidator. After that, it is the opinion of the Court, on the question whether the Director concerned should be publicly examined, that matters. In the case before us, the Company Judge was certainly of opinion that the interests of justice required the examination of the Directors which had been ordered. We think that the Division, Bench had erred in holding that the Directors had not had due opportunity of meeting allegations made against them.

It is true that the issues were rather broadly framed and could have been fuller. But, after considering the nature of charges and their particulars, the cases set up by the Directors in defence, the evidence led, and the very full and fair opportunities given by the learned Company Judges to the Directors to defend themselves, we are unable to agree with the Division Bench that the Directors were in any way handicapped by alleged vagueness of charges or a failure to frame issues more only or that a good deal of evidence led could be ignored for these reasons. It was pointed out by this Court, in Negubai Ammal & Ors. v. B. Shama Rao & Ors.,(1) with regard to the rule that evidence should not be looked into at' all on matters neither pleaded nor put in issue :

> "The true scope of this rule is that evidence let in on issues on which the parties actually went to trial should not be made the foundation for decision of another and different issue, which was not present to the minds of the parties and on which they had no opportunity of adducing evidence; But, that rule has no application to a case where parties go to trial with knowledge that a particular question is in issue, though no specific issue has been framed thereon and adduce evidence relating thereto."

We think that the learned Company Judge was right in coming to the conclusion, on the evidence on record, that the pro- moter or founder Directors who were there since the inception of the Bank, were cognizant of the nature of the dealings by the Managing Director and the officers of the Bank. The evidence showed that they had been discussing matters relating to the management of the Company at the meetings of the Board where items of "policy", which benefited the Directors at the expense of the depositors, must have been discussed. They could not have been ignorant of the fact that the Account Books contained fictitious entries showing payments for shares by them when they' had not actually paid for them. Nor could they be so innocent as' ,not to know of the window dressing and presentation of false balance sheets so as to conceal the true state of affairs from the depositors for years.

Considerable importance was 'attached, on behalf of the Directors, to the following statement in the Inspection report (Ex. A3) dated 27-8-1954 under Section 35(1) of the Act ;'The cash in hand at the Head office was verified on 17th May 1954, and it was found that it was short to the extent of Rs. 53-15-9". Apparently, this statement was made on the strength of entries (1) [1956] S.C.R. 451 at 461.

in the account which were not really reliable. If the statement could be correct, it would only mean that practically whole of the total deficit in cash at the bank shown as Rs. 1,73,000 in the report of Shri Wagle (Ex. A.21) dated 26-11-1954 represented misappropriation which took place between May and November, 1954. The report of Shri Wagle (Ex. A.21) also showed that when the Auditor's clerk counted the cash on 24-3-1954, it was Rs. 15,712-13-2 whereas the Day Book written thereafter

showed a closing 'balance of Rs. 3,07,555-2-10. It appears that cooking up of accounts and presentation of false balance sheets were the usual practice of the Bank.

Any Director conscious of his managerial responsibilities, who had cared to examine the affairs of the Bank, could not have failed to find out what was really happening in the Bank. The fact that these practices were tolerated for such a long period without any check by the Board of Directors indicates that the promoter Directors must be participants in the, benefits of widespread misappropriation even though they may have so operated as not to leave any traces of actual misappropriation by them in the records of the Bank. The circumstantial evidence against them is too damaging, considerable, and unanswered.

The result is that we think that the learned Company Judge was correct in assessing' the total liability of those members of the Board of Directors who were founder or promoter Directors. We also think that the Division Bench correctly came to the conclusion that it was _just and proper to place a greater share of liability upon the Managing Director. We, however, think that the Division Bench erred in reducing the liability of the Managing Director and the Directors as a whole. We think that the remaining liability of the Managing Director to pay Rs. 73,500 with interest at six per cent per annum from the date of the order of the Company Judge until payment is a correct measure of the initial separate liability of the Managing Director S. K. Samant as held by the Division Bench. But in case this amount cannot be realised from. S. K. Samant in the first instance, the remainder should become the joint and several liability of the remaining two Directors before the Company Judge, namely, P. A. Tendolkar and L. S. Ajgaonkar.

As we concur with the assessment of the total liability of the delinquent Board of Directors at Rs. 2,50,000 by the learned Company Judge, with which the Division Bench had not differed. we think that this should be the total amount which the Directors, who were alive when the Company Judge passed his order, are liable to contribute to the assets of the Company.

The result is that we 'allow the three appeals of the Liquidator bearing Civil Appeal Nos. 195-197 of 1967 and set aside the orders of the Division Bench determining the liabilities of S. K. Samant and P.A. Tendolkar and L. S. Ajgaonkar. We substitute the following determination of their respective liabilities and directions :

> (1) The total remaining liabilities of the Managing Director S. K. Samant and Directors P. A. Tendolkar and L. S. Ajgaonkar, R. K. Porwal and R. N. Kalghatgi are held to be Rs.

2,50,000 minus Rs. 38,000 which has already been realised by the sale of a house and a truck and car of S. K. Samant that is to say Rs. 2,12,000.

(2) We hold that as, out of this remaining sum of Rs. 2,12,000 the liabilities of Porwal and Kalghatgi have been correctly determined and restricted to Rs. 10,000 and Rs. 5,000 respectively, and discharged, these amounts will be deducted from the amount to be contributed by the remaining three Directors S. K. Samant, P. A. Tendolkar, and Ajgaonkar, and no further contribution will be

demanded from Porwal and Kalkhatgi who have already paid these amounts. Thus, the remaining further liability of S. K. Samant and P. A. Tendolkar and Ajgaonkar is reduced to Rs. 1,97,000.

(3) Out of this remaining liability of Rs. 1,97,000 the initially separate liability of Managing Director S. K. Samant is Rs. 73,500 together with interest at six per cent per annum from the date of the order of the learned Company Judge until payment.

(4) The still remaining liability ;to the extent of Rs. 1,23,500 with interest at six per cent per annum from the date of the order of the Company Judge, up to the date of payment will be the joint and several liability of the Managing Director S. K. Samant and the Directors Tendolkar and Ajgaonkar.

(5) The Directors Tendolkar and Ajgaonkar are held jointly and severally liable in case the amount, if any, which, out of the initially separate liability of the Managing Director S. K. Samant, that is to say Rs.

73,500, cannot be recovered from S. K. Samant only.

(6) The case is remanded to the learned Company Judge for passing such orders against the Managing Director Samant and Director Ajgaonkar, under Section 235 of the Act of 1913, as may be needed for discharging the liabilities determined above, but no, such orders will be passed against the heirs and legal represen- tatives of deceased Director P. A. Tendolkar under Section 235 of the Act of 1913, although their liabilities are declared. The Official Liquidator and L. S. Ajgaonkar are, however, left free to seek such other remedies, if necessary, by appropriate proceedings under the law, against the estate or assets of P. A. Tendolkar, as may be open to them.

The separate appeal (Civil Appeal) No. 300 of 1967 by L. S. Ajgaonkar is hereby dismissed.

The separate appeal (Civil Appeal) No. 234 of 1967 of P. A. Tendolkar, now represented by his heirs, is allowed only. to the extent that the order passed under Section 235 of the Act of 1913 for compelling P. A. Tendolkar to contribute his share is withdrawn 'as it has become infructuous and it is dismissed as regards the rest of the claim. Costs of the appeals in this Court shall be payable by all the Respondents with the exception of the legal representatives of P. A. Tendolkar. There will be no order as to costs in civil Appeal No. 234 of 1967. One set of hearing fee.

V.P.S.