Supreme Court of India
Raymond Synthetics Ltd. And Ors vs Union Of India And Ors on 4 February, 1992
Equivalent citations: 1992 AIR 847, 1992 SCR (1) 481
Author: T Thommen
Bench: Thommen, T.K. (J)

PETITIONER:
RAYMOND SYNTHETICS LTD. AND ORS.

Vs.

RESPONDENT:
UNION OF INDIA AND ORS.

DATE OF JUDGMENT04/02/1992

BENCH:
THOMMEN, T.K. (J)
BENCH:
THOMMEN, T.K. (J)
MOHAN, S. (J)

CITATION:
1992 AIR 847 1992 SCR (1) 481
1992 SCC (2) 255 JT 1992 (1) 463
1992 SCALE (1)264

ACT:
Companies Act, 1956-Section 73-Public Limited company-Listing shares on stock exchange-Procedure-When allotment of shares becomes void-When liability to repay application money and interest arises-Permission-When deemed to be refused or granted.
Securities Contracts (Regulation) Act, 1956-Section 22-Appeal-When lies-Pending appeal-Effect.
Companies Act , 1956-Section 73, (1A) (2), (2A), (2B), 2(31), 5-Interest-Payment of-Company's liabilities-Circumstances-Situation in pre and post Companies (Amendment) Act, 1974 - Liability of Directors-Scope of-"An Officer in default"-Construction.
Companies Act , 1956- Section 73(2)"Forthwith"-Construction of-Legislative intention.
Companies Act , 1956-Section 73(1) (2) (3)-Application money-Company's right or obligation to credit bank accounts-Effect-Purposes for usages of such money.
Companies Act , 1956-Section 73(2)-Interest-Assessment period-Calculation-Starting point-Construction-Legislation intention.
Companies Act , 1956-Section 73-Ambiguous section-Construction-Method.
Interpretation of Statut-Ambiguous section-Construction (Section73, Companies Act, 1956)

Companies Act , 1956-Section 73 (2A)-When applicable-"Due"-Construction-"Due" and "payable" not same- "Penal" not penalty-Administrative inconveniences cannot be pleaded.

HEADNOTE:

The appellant-company was registered under the Companies Act, 1956. It obtained the consent of the Government of India to

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issue 7,20,00,000 equity shares of Rs. 10 each at par and 33, 90, 000 fourteen per cent secured redeemable non-convertible debentures of Rs. 100 each at per.

One of the conditions attached to the consent order was "The company shall scrupulously adhere to the time limit of 10 weeks from the date of closure of the subscription list for allotment of all securities and despatch of allotment letters/certificates and refund orders."

On 12.7.1990 the company issued prospectus for the issue of the shares and debentures, stating therein that the company had sought the permission of the stock exchanges at Indore, Ahmedabad, Bombay, Calcutta and Delhi for dealing in equity shares and debentures in terms of the prospects; that interest at the rate of 15 % per annum on the excess application money would be paid to the applicants as per the guidelines issued by the Ministry of Finance on July 21, 1983 and September 27, 1985; that the public issue would open on August 20, 1990 and close on August 23, 1990; and that it would not be extended beyond August 31, 1990.

The issue opened on August 20, 1990. The company received 26,32,894 applications for equity shares together with an aggregate sum of Rs. 225,25,51,247 in respect of a public issue of Rs. 25 crores.

The shares issue was close on 23rd August 1990. On October 15,1990 the Board of Directors of the company approved the allotment of shares. Prior to 1.11.1990, it secured the requisite permissions of the stock exchanges at Indore, Ahmedabad, Bombay Calcutta and Delhi to deal in the shares offered in the prospects.

The company had to despatch 25,50,604 refund order, which were printed in Bombay and they were meant to be despatched from Delhi. The company despatched 8,55,226 refund orders from New Delhi at the rate of approx. 1,00,000 refund orders per day.

On 26th October, 1990 a consignment of 6,69,999 refund orders were despatched from Bombay to Delhi. As a result of a fire that broke out on the way, many refund orders were destroyed and about 50 % of the consignment was missing after the accident.

In consultation with the Madhya Pradesh Stock Exchange and the Company's Bank, instructions were issued by the Company to

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stop payment of all refund orders with a view to avoiding any possible fraud or misuse. As a result of the countermanding of all the refund orders and the printing of new refund orders, delay occurred in the despatch of newly printed orders.

For issuing the refund orders, at the request of the company, the Madhya Pradesh Stock Exchange granted extension of time till November 30,1990 and further extended till 19th December, 1990.

The Bombay Stock Exchange refusing the grant extension of time informed the company that it was bound to pay interest by reason of the delay in the despatch of refund orders.

The refund orders were not despatched until 12th November, 1990. The Government of India and the Securities and Exchanges Board of India-Respondents Nos. 1 and 2 respectively, insisted that the company should pay interest to the investors for the period of the delay in making the refund in accordance with the provisions of section 73 of the Companies Act from 1st November (the expiry date of the period of 10 weeks from the date of the closure of the subscription lists) till the date of posting of the refund orders.

The company filed a writ petition in the High Court apprehending that the Government might direct the stock exchanges to delist the shares of the company by reason of its failure to pay interest and also initiate actions against it.

In the High Court, the respondent No. 1 submitted that the liability to pay the excess amount arose on the expiry of 10 weeks from the date of closure of the subscription lists.

The respondent No. 2 contended that the liability arose on the date of allotment.

The company-the appellant contended that on the facts of the case, the liability arose on at the end of the period as extended by the Stock Exchanges at Indore in terms of the prospectus.

The High Court dismissed the writ petition, holding that the company was liable to pay interest at the prescribed rates for the period of delay and the liability for same arose on the expiry of 8 days from the date of allotment of the shares, and not from the date of expiry of 10 weeks, where allotment was made earlier to that date.

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This appeal was filed by the Company against the High Court's judgment by special leave, on the question, whether the High Court was right in discarding, for computation of interest, the time limit of 10 weeks running from the date of closure of the subscription lists, notwithstanding that the allotment had been made prior to the date of expiry of 10 weeks.

The appellant contended that the company was entitled to retain the excess amount for the period mentioned in the prospectus and consequently no liability to pay interest could arise until the expiry of that period; that as the Madhya Pradesh Stock Exchange had extended time for refund till 19th December, 1990, the liability of the company to repay the excess amount did not arise until then; that the interest became payable only after 8 days from the expiry of the period as extended by the Madhya Pradesh Stock Exchange; and that the interest was payable as a penalty and therefore a reasonable and rational construction of the statute to be made in regard to the commencement of the liability of the company to repay the excess amount by taking into account of the relevant circumstances which caused the delay.

The respondents submitted that the liability to repay the excess amount arose on the date of allotment of the shares, that the liability arose forthwith and any delay beyond the period of 8 days from the day on which the liability arose attracted interest that the expression `forwith' had to be understood as an immediate liability ascertainable with reference to the date of allotment, but subject to a period of grace of 8 days.

Allowing the appeal, this Court,

HELD : 1.01 As per Dr. Justice T.K. Thommen :-

A public limited company has no obligation to have its shares listed on a recognised stock exchange. But if the company intend to offer its shares or debentures to the public for subscription by the issue of a prospectus, it must, before issuing such prospectus, apply to one or more recognised stock exchanges for permission to have the shares or debentures intended to be so offered to the public to be dealt with in each such stock exchange in terms of section 73. [496 G]

1.02 Sub-section (1) of section 73, as amended by the

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Companies (Amendment) Act, 1988 has application only to a company intending to offer shares or debentures to the public for subscription by the issue of a prospectus. Until this sub-section was inserted, listing of public issues was not compulsory. [497 B-C]

1.03. Sub-section (1A) of Section 73 as amended by the Companies (Amendment) Act, 1988 makes it necessary for the company to state in its prospectus the name of each of the recognised stock exchanges whose permission for listing has been sought by the company. [497 G]

1.04. Any allotment of shares will become void if permission is not granted by the stock exchange or each such stock exchange, as the case may be, before the expiry of 10 weeks from the date of the closing of the subscription lists. The validity of the allotment is made dependent on securing the requisite permission of each stock exchanges whose permission has been sought. [497 G-498 A]

1.05. The liability to repay the application money

arises only upon refusal of the stock exchange to grant the permission sought by the company before the expiry of 10 weeks from the date of closing of the subscription lists. [498 A]

1.06 There is a deemed refusal if permission is not granted by the stock exchange before the expiry of 10 weeks from the date of closing of the subscription lists, and upon the expiry of that date, any allotment of shares made by the company becomes void. [498B]

1.07. Sub-section (1A) postulates that any allotment made becomes void at the end of 10 weeks from the date of the closing of the subscription lists if by that time the requisite permission of the stock exchange has not been obtained. But this consequence is postponed till the dismissal of any appeal preferred under section 22 of the Securities Contracts (Regulation) Act, 1956. Nevertheless, the permission, if not obtained with 10 weeks, is deemed not to have been granted. [504 F-G]

1.08. It is the legislative intent to delay the result postulated under sub-section (1A) i.e., rendering the allotment void, until the period of 10 weeks has expired or until the dismissal of the appeal.

1.09. The liability to repay the excess money in the present case arose on 1.11.1990 which was admittedly the date of expiry of 10 weeks from the date of the closing of the subscription lists, and consequently the liability to pay interest at the rate specified in sub-

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section (2A) arose on the expiry of 8 days from 1.11.1990. [498 C-D]

2.01. From the decision of the stock exchange refusing permission, an appeal will lie under section 22 of the Securities Contracts (Regulation)Act, 1956. [498 C]

2.02. Pending the decision in appeal, the allotment made would not be void, and the decision of the concerned stock exchange is made dependent on the result of the appeal. [498 C]

2.03. The fact that an appeal is pending does not postpone the result contemplated in sub-section (2) in regard to the liability to repay the amounts and the interest accruing thereon if the amounts are not repaid within 8 days after the liability arose. [505 A]

3.01 Sub-section (1A) of Section 73 postulates two circumstances in which interest becomes payable, namely, where the permission has not been applied for before issuing the prospects and the company has thus acted in violation of the law or where permission, though applied for, has not been granted. In the former case, apart from the other consequences which may flow from the company's disobedience of the law, the liability to pay interest arises as from the date of receipt of the amounts, for the company ought not to have received any such amount in response to the prospectus issued by the company in disobedience of the requirements of

subsection (1). In the latter case, the liability to pay interest does not arise until the expiry of 8 days after the company became liable to repay the amounts received by reason of its failure to obtain the necessary permission as referred to in sub-section (1A). [499 C-D]

3.02. Section 73, as it stood prior to 1975, contained no specific provision compelling the company or its directors to repay the amounts received in excess of the aggregate of the application money relating to the shares or debentures in respect of which allotments have been made. Sub-section (2A) was inserted by the Companies (Amendment)Act, 1974 inserted to cover cases where permission of the stock exchange has been obtained, but the shares or debentures have been over-subscribed and the company is consequently in possession of excess amounts. The amended sub-section made the company liable to repay the excess amounts forthwith, but did not made the company liable to pay interest on such excess amounts. But a liability was cast on the directors. If the excess amount was not repaid within 8 days from the day the company became liable to

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repay it, the directors were made jointly and severally liable to repay such amount with interest. The proviso to sub-section (2A), which like the proviso to sub-section (2), as they stood prior to 1988, provided that a director was not liable to repay the money with interest if he proved that the default in payment of the money was not on account of any misconduct or negligence on his part. [500 C-E]

3.03. Owing to the absence of a specific provision imposing liability on the company to pay interest on the over-subscribed amounts, and also owing to the absence of any provision to exempt directors who were not directly in charge of the administration of the company and the need to make listing of public issues compulsory, further amendments to the section became necessary. Accordingly the Amendment Act of 1988 introduced several amendments to section 73, one of them being the substitution of a part of sub-section (2A) making the company and every director of the company who is `an officer in default' jointly and severally liable to repay the excess money with interest. [500 F-H]

3.04. A `director of a company who is an officer in default' appearing in sub-section (2A) must be understood with reference to the definition of `an officer who is in default' contained in section 2 (31) read with section 5. This definition includes the managing director or the whole time director of a company. [500 H-501 A]

3.05. The liability imposed under sub-section (2A) on a director of the company falls only upon a director who is `an officer in default', as defined under section 2 (31) read with section 5(a) (b), and not upon any other director. The nominees of the Government of financial institutions on the board of directors of the company, but not directly in

charge of its administration as full time directors, are exempted from personal liability. [501 A-B]

3.06. Sub-section (2A) provides for the accrual of interest and the rates thereof. Unlike sub-section (2B) providing for punishment by imposition of fine or imprisonment, sub-section (2A) speaks only of interest which is in contra-distinction to punishment and is not penal in character. It merely provides a mode of calculation of the amounts payable. Any consideration with reference to a penal provision is of no relevance to the liability of the company of its directors to pay interest in terms of sub-section (2A). [503 E]

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3.07. Sub-section (2B) concerns solely with default of compliance with the requirement of sub-section (2A) namely, repayment of excess money. Failure to repay the excess money as required by sub-section (2A) visits the company and every officer of the company who is in default (as defined under section 5) with the stipulated punishment. This is, of course, in addition to the payment of interest prescribed under sub-section (2A). [503 H-504 A]

3.08. The interest provided under sub-section (2) is payable to the applicants in terms of that sub-section unless the money is returned to them within the specified time, notwithstanding the pendency of an appeal mentioned in the proviso to sub-section (1A). Subsection (3) has to be so understood to be in harmony with the other provisions of section 73. [506 C]

3.09. If the permission for listing sought under sub-section (1) is not granted, the interest payable under sub-section (2) is attracted. Sub-section (2) says that the liability to repay the money received from applicants arises forthwith either where the permission has not been sought or, having been sought, it has not been granted. [504 H-505 A]

3.10. The accrual of interest under sub-section (2) is not dependent or consequent on the nullity postulated insub-section (1A). [505B]

4.01. The expression `forthwith' does not necessarily and always mean instantaneous. The expression has to be understood in the context of the statue. Where, however, the statute prescribes the payment of money and the accrual of interest thereon at certain points of time, the expression `forthwith' must necessarily be understood to be immediate or instantaneous, so as to avoid any ambiguity or uncertainty. The right accrues or liability arises exactly as prescribed by the statute. [502 H-503 A]

4.02. When `forthwith' is used for determining the time and mode of payment of the principal and interest, a liberal or reasonable construction not to be adopted. The legislature intended the expression `forthwith' to refer to a particular day on which the liability to repay the principal amount arose and that is the day from which the

period of 8 days has to be computed, and on the expiry of that period, interest begins to accrue. [503 B-C]

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Keshav Nilkanth Joglekar v. The Commissioner of Police, Greater Bombay, [1956] SCR 653 and Salim v. State of West Bengal, [1975] 3 SCR 394, distinguished.

5.01. The right or obligation of the company to keep the money in the bank is only for the period preceding the decision of the stock exchange on the company's request for permission to list. Once the permission is expressly or impliedly refused, the money has to be returned to the applicants, notwithstanding the pendency of the company's appeal. The earlier part of the sub-section about depositing the money in the bank is controlled by the latter provision in the sub-section for return of the money as required by sub-section (2). This is particularly so by reason of the penalty specially provided in sub-section (3) in the event of default of compliance with the requirement of that sub-section. [505 H-506 B]

5.02. The money credited to the separate bank account can be utilised for only two purposes: (1) for adjustment against allotment of shares where listing is permitted; or (2) for repayment where listing is not permitted or the company is otherwise unable to allot shares. The company has no right to deal with the money in any other manner or keep it longer than permitted by the section. [506 G-H]

Palmer's Company Law, 24th ed. para 24.31; 1955(1) WLR 1080, referred to.

6.01. Interest does not begin to run under sub-section (2) until 8 days have elapsed from the date of expiry of the period of 10 weeks commencing on the date of closure of the subscription lists. The fact that the legislature has so provided in cases where permission has been refused expressly or by reason of the deeming provision is sufficient indication of the legislative intent to give the company reasonable time to repay the money. [507 B-C]

6.02. Companies generally make allotments as soon as practicable after the necessary application has been made to the recognised stock exchange for permission for listing. Upon the issue of the prospectus after making such application, amounts are received from the public in consideration of which allotments are made in anticipation of the requisite permission. Greater the reputation of the company, larger are the amounts likely to be received. If permission is not granted, the entire amounts received from the public

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have to be forthwith repaid. On the other hand, if permission is obtained, but the amounts received from the public are in excess of the aggregate of the application money relating to the allotted shares or debentures. Such excess amounts are forthwith repayable. Whether or not permission will be obtained cannot be ascertained until the

period prescribed for the purpose has expired, namely, 10 weeks from the date of closing of the subscription lists. Until the expiry of those 10 weeks, neither the subscribing public nor the company will be in a position to decide whether or not the allotments made are valid. This is a period of uncertainty and it is for that reason that the legislature has, been is a case of refusal to grant permission, provided that the liability to repay the application money arises upon the expiry of 10 weeks. [507 D-G]

6.03. The possibility of an appeal being allowed is, not a ground to delay repayment. It should make no difference whether it is as a result of the permission having been refused, or permission having been granted and excess amounts are received by reason of over subscription, that repayment of money has to be made by the company. It either event, the liability to repay the amounts arises forth-with on the expiry of 10 weeks from the date of closure of the subscription lists, and the interest will begin to accrue thereon on the expiry of 8 days therefrom. This construction is, just and reasonable from the point of view of both the investor and the company, and has the advantage of certainty, uniformity and easy application. [507 G-508 A]

7. The section 73 is not free from ambiguities and doubts. Having been amended in several respects, it has not finally emerged with the clarity that admits of easy construction. But the contemporaneous construction placed upon an ambiguous section by the administrators entrusted with the task of executing the statute is extremely significant. This construction is, perfectly consistent with the language and the object of the statute. It is a practical and reasonable construction, particularly because it affords the company reasonably sufficient time to complete the formalities for despatch of the refund orders. And the investor who has responded to the invitation contained in the prospectus is not unduly kept waiting for the return of the excess amounts due to him. [508 E-G]

Desh Bandu Gupta & Co. & ors. v. Delhi Stock Exchange Association Ltd., [1979] 4 SCC 565 and K.P. Varghese v. Income Tax Officer, Ernakulam & Anr., [1981] 4 SCC 173, referred to.

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Crawford's Interpretation of Laws, 1989 Ed. -referred to.

As per Mr. Justics S. Mohan (Concurring)

1.01. Sub-section (2A) of Section 73 of the Companies Act comes into operation only where permission has been granted by the recognised stock exchange or exchanges. The words, "where permission has been granted" are of great significance. Therefore, the contention that on the date of allotment the liability to pay interest arises may not be correct. Nor again, it would be correct to contend that the

mechanics of refund liability to pay arises on the date of allotment since there is a failure of consideration in respect of shares not allotted. [519 B-C]

1.02. The liability of the company to repay the excess amount under Section 73 (2A) will arise only on the expiry of 10 weeks from the date of the closure of subscription lists. The interest begins to accrue thereupon at the end of 8 days. [526 A]

2.01. The word "due" in the section 73 has been substituted for the word "payable" in order to make it clear that a mortgagor cannot redeem within the term of the mortgage. The right of redemption arises when the principal money secured by the mortgage has become due and may be exercised at any time thereafter, subject of course to the law of limitation. [520 C-D]

2.02. "Due", means payable immediately or a debt contracted but payable at a future time. "A debt is said to be `due'the instant that it has existence as a debt; it may be payable at a future time" it cannot be contended on the strength of Section 530 `due' and `payable' is one and the same even under S. 732 (a). [522 E-F]

Black's Legal Dictionary, (5th Edition 488), Venkataramiah's Law Lexicon and Legal Maxims Vol. I, 713-714; Wharton's Law Lexicon, 14th Edition; Buckley on the Companies Acts, 14th Edition, Volume I, referred to.

Bhaktawar Begum v. Husaini Khanam, (1914)36 All. 195; 41 I.A. 84; 23 I.C. 355; Bir Mohammad V. Nagoor, [1914] 27 Mad. L.J. 483; 25 I.C. 576 (which over-ruled Rose Ammal v. Rajarathnam, (1900) 23 Mad. 23); Baroda Board & Paper Mills Ltd. v. Income Tax Officer, Circle I, Ward E, Ahmedabad and others, 1976 (46) company cases

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25; Union of India v. Air Foam Industries (P) Ltd., AIR 1974 S.C. 1265 & 1271 (Para 7) referred to.

3. "Forthwith' is not susceptible of a fixed time definition, and the surrounding facts and circumstances must be taken into consideration in determining the question, and forthwith may be minutes, hours, days or even weeks. It cannot be said that "forthwith" means E.O. instanti. [526 E-F]

Dickerman v. Trust Co., 176 U.S. 193, 20 Sup., Ct. 311, 44 L.Ed. 423, 4 Tyrwh. 837; Edwards v. Ins. Co., 75 Pa 378; Seammon v. Ins. Co., 101, III 621; 11 H.L. Cas. 337; Bennect v. Ins 67 N.Y. 274; Pennsylvanis R.Co. v. Reichert, 58 Md. 261; Meriden Silver Plate Co. v. Flory 44 Ohio St. 437, 7 N.E. 753. 7 Dowl. 789" 193, Soutern Reporter, 339 and 16 Soutern Reporter 33 @ 35 Col. I., Laws 1035, Ex Secs C. 10, referred to.

Bouvier's Law Dictionary-Referred to.

4. It cannot but be held that the payment of interest is only compensatory and not penal. Merely because clause 10 uses the word "penal" it cannot be amount to penalty. [526 F]

Mahalaxmi Sugar Mills Co. Ltd v. Commissioner of Income Tax, Delhi, New Delhi, [1980] 3 SCR 421, referred to.

5. In view of the clear terms of the statute the administrative inconvenience cannot be pleaded. [528 B-C]

Sanjeev Coke Manufacturing Co v. Bharat Cooking Coal Ltd. & Another, [1983] 1 SCR 1000 1029, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 3498 of 1991.

From the Judgment dated 17/18.7.1991 of the Bombay High Court in writ petition No. 2038 of 1991.

G. Ramaswamy, Attorney General, V.R. Reddy, Addl. Solicitor General, Anil B. Divan, K.S. Cooper and T.R. Andyaranjina, R.F. Nariman, S.A. Divan, B.R. Agrawala, Vinod B. Agarwala, P.N. Kapadia, Pramod B. Agarwala, S. Krishnachandani, Dr. Sumat Bhardwaj, Ms. Sandhaya Mehta for M/s Gagret & Co., Ms. Sushma Suri, A.M. Khanwilkar, M.P. Bharucha, R. Karanjawala, Mrs. M. Karanjawala, Mrs. V.S. Rekha, A.R. Amin, K.J. John, Dr. A.M. Singhvi and Ajit Pudussery for the appearing parities.

The Judgment of the court was delivered by THOMMEN, J. The question which aries in this appeal from the judgment of the Bombay High Court in writ petition No. 2038 of 1991 is, when does a company become liable to pay interest under section 73 (2A) of the Companies Act, 1956 (the "Act"). The answer to it depends on the answer to the more fundamental and far more difficult question, i.e. when does a company become liable to repay the money received from applicants for shares or debentures in excess of the aggregate of the application money relating to the allotted shares or debentures. If such excess application money is not repaid within eight days from the days on which the company and every director `who is an officer in default' is liable to pay insterest at the specified rates. The period of eight days has to be reckoned in accordance with section 74. But it is not clear when exactly does the liability to repay the excess money arise. Does it arise on the date of the allotment, as found by the High Court, or on the expiry of 10 weeks from the date of closing of the subscription lists, referred to in sub-section (1A) of section 73, or, as contended by the company, on the expiry of the period mentioned in the prospectus? Whichever is the correct date, interest becomes payable by the company and its directors `in default', if the excess money is not repaid within the period of grace of eight days from the date on which the company becomes liable to pay it. When does that liability arise is the crucial question.

We shall presently examine the relevant provisions of the section, but before we do so, it may be of interest to refer briefly to the circumstances in which the alleged liability of the appellant company has arisen.

The appellant is a company registered under the provisions of the Companies Act, 1956. The company obtained the consent of the Government of India vide its Order dated May 31, 1990 to issue 7,20,00,000 equity shares of Rs. 10 each at par and 33, 90,000 fourteen per cent secured

redeemable non-convertible debentures of Rs. 100 each at par. This Order was, made by the Government in exercise of its power under the Capital Issues (Control) Act, 1947. One of the conditions attached to the order reads: "The company shall scrupulously adhere to the time limit of 10 weeks from the date of closure of the subscription list for allotment of all securities and despatch of allotment letters/certificates and refund orders."

A prospectus was issued by the company on 12th July, 1990 for the issue of the aforesaid shares and debentures. The prospectus stated, amongst other things, that the company had sought the permission of the stock exchanges at Indore, Ahmedabad, Bombay, Calcutta and Delhi for dealing in equity shares and debentures in terms of the prospectus; that interest at the rate of 15 % per annum on the excess application money will be paid to the applicants as per the guidelines issued by the Ministry of Finance on July 21, 1983 and September 27, 1985; that the public issue will open on August 20, 1990 and close on August 23, 1990; and that it would not be extended beyond August 31, 1990. When the issue thus opened on August 20, 1990, it received overwhelming response as a result of which it was about 40 times over-subscribed. The company received 26,32,894 applications for equity shares together with an aggregate sum of Rs. 225,25,51,247 in respect of a public issue of Rs. 25 crores. In view of this public response, the share issue was close on 23rd August, 1990. On October 15, 1990 the board of directors of the company approved the allotment of shares. Shortly thereafter, it secured the requisite permissions of the stock exchanges at Indore, Ahmedabad, Bombay, Calcutta and Delhi to deal in the shares offered in the prospectus. These permissions were obtained prior to November 1, 1990. The company had to despatch 25,50,604 refund orders of an aggregate value of well over Rs. 200 crores. These orders which were printed in Bombay were meant to be despatched from Delhi. The company despatched 8,55,226 refund orders from the Sarojini Nagar Post Office , New Delhi at the rate of approx. 1,00,000 refund orders per day. On 26th October, 1990 a consignment of 6,69,999 refund orders had been despatched from Bombay to Delhi in a brake van of the Paschim Express. A fire broke out on the way in the brake van as a result of which many refund orders were destroyed. Almost 50 % of the consignment was missing after the accident. In consultation with the Madhya Pradesh Stock Exchange and the Company's Bank,instructions were issued by the Company to stop payment of all refund orders with a view to avoiding any possible fraud or misuse. As a result of the countermanding of all the multi-colored refund orders and the printing of new refund orders with distinctive colours etc., delay occurred in the despatch of newly printed orders. At the request of the company, the Madhya Pradesh Stock Exchange granted it extension of time till November 30,1990 for issuing the refund orders. Time for this purpose was further extended by that stock exchange till 19th December, 1990. The Bombay Stock Exchange, however, refused to grant extension of time. It further informed the company that it was bound to pay interest by reason of the delay in the despatch of refund orders. The Securities and Exchange Board of India, the second respondent, called upon the company by its letter dated March 13,1991 to pay interest to the investors at varying rates for the period from 1st November (which is when the period of 10 weeks from the date of the closure of the subscription lists expired) till the date of posting of the refund orders. The refund orders were not despatched until 12th November, 1990. The Government of India and the Securities and Exchange Board of India insisted that the company should pay interest to the investors for the period of the delay in making the refund in accordance with the provisions of section 73. Apprehending that the Government might direct the stock exchanges to delist the shares of the company by reason of its failure to pay interest,

and also initiate actions against it, the company filed a petition in the High Court under Article 226 of the Constitution, but it was dismissed by the impugned judgment.

The Bombay Stock Exchange seems to have understood that the liability of the company arose on the expiry of 10 weeks after the date of closure of the subscription lists. Paragraph 23.2 of its publication of March 1991 quotes the condition mentioned in the Order of the Government of India dated 31.5.1990(which we have extracted above)to the effect that the liability of the company for despatch for refund orders arose only at the end of 10 weeks from the date of closure of the subscription lists.

In the High Court, the Union of India and the Securities and Exchange Board of India appeared to have taken a divergent stand on the question. While the Government of India submitted (as disclosed in its affidavit, and as referred to by the High Court in the impugned judgment) that the liability to pay the excess amounts arose on the expiry of 10 weeks from the date of closure of the subscription lists, the Securities and Exchange Board of India contended that the liability arose on the date of allotment. In the present appeal, however, the Union of India support the stand of the Securities and Exchange Board of India. On the other hand, the company contended that, on the facts of this case, the liability arose only at the end of the period as extended by the Stock Exchange at Indore in terms of the prospects. The High Court held:-

"...In our judgment, there is no difficulty in fixing the date from which the liability of the company to make repayment arises. In a case where the allotment is completed before expiry of the 10 weeks, then from the date of allotment and in case where the allotment is not completed till the expiry of ten weeks from the date of closure of the subscription list, then from the date of expiry of ten weeks..."

The reason stated by the High Court for coming to this conclusion is that the company knew that the excess amount was on the date of allotment and there was no reason why the company should delay payment till the end of 10 weeks in case the allotment was made earlier. The High Court says-

"...In cases where the allotment is completed before expiry of ten weeks, then the Company very well knows the excess amount, which is to be repaid and consequently the liability accrues forthwith to repay the said amount. In case the Company fails to repay the amount within the grace period of eight days, then the Company would be liable to pay interest to the investor inspite of the fact that period of ten weeks from the date of closure of the subscription list is not over..."

The High Court thus held that the company was liable to pay interest at the prescribed rates for the period of delay and the liability for the same arose on the expiry of 8 days from the date of allotment of the shares, and not from the date of expiry of 10 weeks, where allotment was made earlier to that date. The High Court did not accept the contention of the company that the time having been extended by the Madhya Pradesh Stock Exchange till 19th December, 1990 in accordance with the relevant provisions of the prospectus, the company had no liability to pay interest.

The question for consideration, therefore, is whether the High Court was right in discarding, for computation of interest, the time limit of 10 weeks running from the date of closure of the subscription lists, notwithstanding that the allotment had been made, as in the present case, prior to the date of expiry of 10 weeks.

`Listing means the admission of the securities of a company to trading privileges on a Stock Exchange. The principal objectives of listing are to provide ready marketability and impart liquidity and free negotiability to stocks and shares; ensure proper supervision and control of dealings therein; and protect the interests of shareholders and of the general investing public. (See para 1.1. of the `Stock Exchange Listing', publication of Bombay Stock Exchange of March, 1991).

A public limited company has no obligation to have its shares listed on a recognised stock exchange. But if the company intends to offer its shares or debentures to the public for subscription by the issue of a prospectus, it must, before issuing such prospectus, apply to one or more recognised stock exchanges for permission to have the shares or debentures intended to be so offered to the public to be dealt with in each such stock exchange in terms of section

73. We shall now read the provisions of section 73 insofar as they are material:-

Sub-section (1) of section 73 read:

"S. 73 (1). Every company intending to offer shares or debentures to the public for subscription by the issue of a prospectus shall, before such issue, make an application to one or more recognised stock exchanges for permission for the shares or debentures intending to be so offered to be dealt with in the stock exchange or each such stock exchange."

This sub-section was inserted by the Companies (Amendment) Act, 1988 with effect from 15.6.1988. It has application only to a company intending to offer shares or debentures to the public for subscription by the issue of a prospectus. Until this sub-section was inserted, listing of public issues was not compulsory.

This original sub-section (1) was substituted by the Companies (Amendment) Act, 1974 with effect from 1.2.1975, and substituted again and renumbered as the present sub- section (1A) with effect from 15.6.1988 by the Companies (Amendment) Act, 1988. Sub-section (1A) reads: "73(1A). Where a prospectus, whether issued generally or not, states that an application under sub-section (1) has been made for permission for the shares or debentures offered thereby to be dealt in one or more recognised stock exchanges, such prospectus shall state the name of the stock exchange or, as the case may be, each such stock exchange, and any allotment made on an application in pursuance of such prospectus shall, whenever made, be void if the permission has not been granted by the stock exchange or each such stock exchange, as the case may be, before the expiry of ten weeks from the date of the closing of the subscription lists:

Provided that where an appeal against the decision of any recognised stock exchange refusing permission for the shares or debentures to be dealt in on that stock exchange has been preferred

under section 22 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956), such allotment shall not be void until the dismissal of the appeal." This provision makes it necessary for the company to state in its prospectus the name of each of the recognised stock exchanges whose permission for listing has been sought by the company. Any allotment of shares will become void if permission is not granted by the stock exchange or each such stock exchange, as the case may be, before the expiry of 10 weeks from the date of the closing of the subscription lists. The validity of the allotment is thus made dependent on securing the requisite permission of each stock exchange whose permission has been sought. The liability to repay the application money arises only upon refusal of the stock exchange to grant the permission sought by the company before the expiry of 10 weeks from the date of closing of the subscription lists. This is clear from sub-section (1A) read with sub-section (5). There is a deemed refusal if permission is not granted by the stock exchange before the expiry of 10 weeks from the date of closing of the subscription lists, and upon the expiry of that date, any allotment of shares made by the company becomes void.

However , from the decision of the stock exchange refusing permission, an appeal will lie under section 22 of the Securities Contracts (Regulation) Act, 1956. Pending the decision in appeal, the allotment made would not be void, and the decision of the concerned stock exchange is made dependent on the result of the appeal. What is significant is that it is the legislative intent to delay the result postulated under sub-section (IA), i.e., rendering the allotment void, until the said period of 10 weeks has expired or until the dismissal of the appeal.

Sub-section (2), as amended in 1988, reads: "S. 73(2). Where the permission has not been applied under sub-section (I) or, such permission having been applied for, has not been granted as aforesaid, the company shall forthwith repay without interest all moneys received from applicants in pursuance of the prospectus, and, if any such money is not repaid within eight days after the company becomes liable to repay it, the company and every director of the company who is an officer in default shall, on and from the expiry of the eighth day, be jointly and severally liable to repay that money with interest at such rate, not less than four per cent and not more than fifteen per cent, as may be prescribed, having regard to the length of the period of delay in making the repayment of such money."

This sub-section requires the company to repay `forthwith' all money received from applicants in response to the company's prospectus either where the company has not applied for permission of the recognised stock exchange for listing or where permission has been applied for but not granted. If the company has issued a prospectus without seeking permission for listing, it has clearly acted in violation of the mandatory provisions of the Act, and the company has no right to receive or retain any amount by way of subscription in pursuance of its prospectus. On the other hand, where permission has been sought, but has not been obtained within 10 weeks from the date of closing of the subscription lists, thereby rendering void any allotment made, the company is bound to repay all such money forthwith, but without interest. In the event of such money not being repaid within 8 days after the liability to repay arose, the company and every director of the company who is `an officer in default' are made jointly and severally liable to pay the principal amount as well as interest thereon from the date of expiry of the said 8 days. The interest is payable at the prescribed rates varying from 4% to 15%, dependent on the length of the period of delay in making such repayment.

This sub-section thus postulates two circumstances in which interest becomes payable, namely, where the permission has not been applied for before issuing the prospectus and the company had thus acted in violation of the law or where permission, though applied for, has not been granted. In the former case, apart from the other consequences which may flow from the company's disobedience of the law, the liability to pay interest arises as from the date of receipt of the amounts, for the company ought not to have received any such amount in response to the prospectus issued by the company in disobedience of the requirements of sub-section (I). In the latter case, the liability to pay interest does not arise until the expiry of 8 days after the company became liable to repay the amounts received by reason of its failure to obtain the necessary permission as referred to in sub-section (IA).

It may be mentioned in this connection that, prior to the amendment of 1988, sub-section (2) did not make the company liable to pay interest on the amounts repayable by it in terms thereof, but only the directors were liable for payment of such interest, apart from the principal amounts. The proviso to the sub-section as it stood prior to 1988 exempted a director from such liability if the default was not caused by his misconduct or negligence. As a result of substitution of a proviso of the sub-section by the Amendment Act of 1988, the company and every director of the company `who is an officer in default' are made jointly and severally liable for payment of the principal amount as well as interest.

We shall now read the crucial provision which is sub- section (2A):-

"S.73 (2A). Where permission has been granted by the recognised stock exchange or stock exchanges for dealing in any shares or debentures in such stock exchange or each such stock exchange and the moneys received from applicants for shares or debentures are in excess of the aggregate of the application moneys relating to the shares or debentures in respect of which allotments have been made, the company shall repay the moneys to the extent of such excess forthwith without interest, and if such money is not repaid within eight days, from the date the company becomes liable to pay it, the company and every director of the company who is an officer in default shall, on and from the expiry of the eighth day, be jointly and severally liable to repay that money with interest at such rate, not less than four per cent and not more than fifteen per cent, as may be prescribed having regard to the length of the period of delay in making the repayment of such money".

Sub-section (2A) was inserted by the Companies (Amendment) Act, 1974 which came into force w.e.f. 1.2.1975. Section 73, as it stood prior to 1975, contained no specific provision compelling the company or its directors to repay the amounts received in excess of the aggregate of the application money relating to the shares or debentures in respect of which allotments have been made. Sub-section(2A) was inserted to cover cases where permission of the stock exchange has been obtained, but the shares or debentures have been over-subscribed and the company is consequently in possession of excess amounts. The sub- section, as inserted in 1975, made the company liable to repay the excess amounts forthwith, but did not make the company liable to pay interest on such excess amounts. But a liability was cast on the directors. If the excess amount was not repaid within 8 days from the day the company became liable to repay it, the directors were made jointly and

severally liable to repay such amount with interest. The proviso to sub-section (2A), which like the proviso to sub- section (2), as they stood prior to 1988, provided that a director was not liable to repay the money with interest if he proved that the default in payment of the money was not on account of any misconduct or negligence on his part.

Owing to the absence of a specific provision imposing liability on the company to pay interest on the over- subscribed amounts, and also owing to the absence of any provision to exempt directors who were not directly in charge of the administration of the company and the need to make listing of public issues compulsory, further amendments to the section became necessary.

Accordingly the Amendment Act of 1988 introduced several amendments to section 73, one of them being the substitution of a part of sub-section (2A) making the company and every director of the company who is `an officer in default' jointly and severally liable to repay the excess money with interest. A `director of a company who is an officer in default' appearing in sub-section (2A) must be understood with reference to the definition of `an officer who is in default' contained in section 2(31) read with section 5. This definition includes the managing director or the wholetime director of a company. So understood, the liability imposed under sub- section (2A) on a director of the company falls only upon a director who is `an officer in default', as defined under section 2(31) read with section 5(a) (b), and not upon any other director. The nominees of the Government or financial institutions on the board of directors of the company, but not directly in charge of its administration as full time directors, are exempted from personal liability. The rate of interest payable under sub-section (2A) is, an seen above, not less than 4 per cent and not more than 15 per cent.

The sub-section requires the company to repay the over subscribed amounts. These amounts are paid by persons who have responded to the prospectus which was issued by the company after making an application for permission in accordance with sub-section (1). But when the subscription lists are closed, the excess money is ascertained with reference to the actual allotments made and so it becomes repayable as the company has no right to retain it. The question is, for the purpose of computing interest, did it become repayable upon the date of allotment, as found by the High Court and as contended by the respondents, or on some other day.

The Additional Solicitor General, appearing for the Union of India, Mr. K.S. Cooper, for the Securities & Exchange Board of India, Mr. T.R. Andhyarujina, for the Bombay Stock Exchange and Dr. A.M. Singhvi, for one of the interveners, submit that the liability to repay the excess amount arises on the date of allotment of the shares, for the statute says that the liability arises forthwith and any delay beyond the period of 8 days from the day on which the liability arose attracts interest. The expression `forthwith' has to be understood as an immediate liability ascertainable with reference to the date of allotment, but subject to a period of grace of 8 days.

Mr. Anil B. Dewan, appearing for the company, on the other hand, contends that the company is entitled to retain the excess amount for the period mentioned in the prospectus and consequently no liability to pay interest can arise until the expiry of that period. Prospectus is an instrument registered under section 60 of the Act and all statements contained in it are matters permitted to be inserted by the statue. The terms of the prospectus are binding not only upon the company but also

upon persons who deal with the company in pursuance of the prospectus. One of those terms concerns the repayment of excess money. It reads:-

"...In case an application is rejected in full, the whole of the application money received will be refunded and where an application is rejected in part, the balance, if any, after adjusting money due in the manner provided earlier in this Prospectus on Equity Shares/Debentures allotted will be refunded to the applicants within ten weeks of the date of closing of the Subscription List or in the event of unforeseen circumstances within such further time as may be allowed by the Stock Exchange at Indore"

(emphasis supplied) In the present case, counsel points out, time for refund had been extended by the Madhya Pradesh Stock Exchange till 19th December, 1990. Accordingly the liability of the company to repay the excess amount did not arise until then. In the circumstances, interest became payable only after 8 days from the expiry of the period as extended by the Madhya Pradesh Stock Exchange.

If Mr. Dewan's argument were to be accepted, the company would have incurred no liability to pay interest, for time had been extended by the Madhya Pradesh Stock Exchange. But this argument is clearly contrary to the provisions contained in sub-section (4) of section 73 of the Act which reads:_ "S. 73(4). Any condition purporting to require or bind any applicant for shares or debentures to waive compliance with any of the requirements of this section shall be void".

In the teeth of that sub-section, Mr. Dewan's argument on the point is totally without merit. Even if sub-section (4) had not been inserted in section 73, Mr. Dewan's argument in this respect would have been equally unsustainable, for no agreement can defeat or circumvent a mandatory requirement of the statute. This is all the more so in view of section 9 which specifically provides that the provisions of the Act override the memorandum or articles of association of the company or any agreement executed or resolution passed by it. The statute requires the company to pay interest in terms of sub-section (2A). That provision says that the company should pay excess money forthwith, failing which interest becomes payable at the end of 8 days therefrom. Any inconsistent provision in the prospectus is unenforceable and it can be of no avail to the company.

It is true that the expression `forthwith' does not necessarily and always mean instantaneous. The expression has to be understood in the context of the statute. Where, however, the statute prescribes the payment of money and the accrual of interest thereon at certain points of time, the expression `forthwith' must necessarily be understood to be immediate or instantaneous, so as to avoid any ambiguity or uncertainty. The right accrues or liability arises exactly as prescribed by the statute. Decisions such as Keshave Nilkanth Joglekar v. The Commissioner of Police, Greater Bombay, [1975] SCR 653, and Salim v. State of West Bengal, [1975] 3 SCR 394, deal with the expression `forthwith' in the context of preventive detention demanding a liberal or reasonable construction. But that is not the construction which has to be adopted when `forthwith' is used for determining the time and mode of payment of the principal and interest. The legislature intended the expression `forthwith' to refer to a particular day on which the liability to repay the principal amount arose, and that is the day from which the period of 8 days has to be computed, and on the expiry of that

period, interest begins to accrue.

It is further contended on behalf of the company that in any view interest is payable as a penalty and, therefore, a reasonable and rational construction has to be placed upon the statute in regard to the commencement of the liability of the company to repay the excess amount. Relevant circumstances which caused the delay must be taken into account in this regard. There is no substance in this contention. As stated earlier, sub-section (2A) provides for the accrual of interest and the rates thereof. Unlike sub-section (2B) provides for punishment by imposition of fine or imprisonment, sub-section (2A) speaks only of interest which is in contradiction to punishment and is not penal in character. It merely provides a mode of calculation of the amounts payable. Any consideration with reference to a penal provision is of no relevance to the liability of the company or its directors to pay interest in terms of sub-section (2A).

Sub-section (2B) on the other hand provides for punishment. It reads:-

"S.73(2B). If default is made in complying with the provisions of sub-section (2A), the company and every officer of the company who is in default shall be punishable with fine which may extend to five thousand rupees, and where repayment is not made within six months from the expiry of the eighth day, also with imprisonment for a term which may extend to one year".

This sub-section concerns solely with default of compliance with the requirement of sub-section (2A) namely, repayment of excess money. Failure to repay the excess money as required by sub-section (2A) visits the company and every officer of the company who is in default (as defined under section 5) with the stipulated punishment. This is, of course, in addition to the payment of interest prescribed under sub-section (2A).

Sub-section (5), as it stood prior to 1.2.1975, read: "S. 73(5). For the purpose of this section permission shall not be deemed to be refused if it is intimated that the application for permission though not at present granted, will be given further consideration".

This sub-section was substituted by the Companies (Amendment) Act, 1974 with effect from 1.2.1975 reading as follows:-

"S.73(5). For the purposes of this section, it shall be deemed that permission has not been granted if the application for permission, where made, has not been disposed of within the time specified in sub-section (1)."

Sub-section (1) referred to in sub-section (5), as substituted on 1.2.1975, is in fact the present sub-section (1A), for, as stated earlier, the original sub-section (1) was amended and renumbered as sub-section (1A) when the present sub-section (1) was inserted by the Companies (Amendment) Act, 1988 w.e.f. 15.6.1988. Consequently, the words `the time specified in sub-section (1)' appearing in sub-section (5), as inserted w.e.f. 1.2.1975, denote the period of 10 weeks mentioned in the present sub-section (1A). This means that the permission for listing is deemed not to have been granted, i.e., impliedly refused, if the application for permission filed by the company has not been disposed of

before the expiry of 10 weeks from the date of the closing of the subscription lists, as mentioned under sub-section (1A).

Sub-section (1A) postulates that any allotment made becomes void at the end of 10 weeks from the date of the closing of the subscription lists if by that time the requisite permission of the stock exchange has not been obtained. But this consequence is postponed till the dismissal of any appeal preferred under section 22 of the Securities Contracts (Regulation) Act, 1956 (see the proviso to sub-section (1A) of section 73 of the Act). Nevertheless, the permission, if not obtained within 10 weeks, is deemed not to have been granted.

If the permission for listing sought under sub-section (1) is not granted, the interest payable under sub-section (2) is attracted. Sub-section (2) says that the liability to repay the money received from applicants arises forthwith either where the permission has not been sought or, having been sought, it has not been granted. The fact that an appeal is pending does not postpone the result contemplated in sub- section (2) in regard to the liability to repay the amounts and the interest accruing thereon if the amounts are not repaid within 8 days after the liability arose. The accrual of interest under sub-section (2) is not dependent or consequent on the nullity postulated in sub-section (1A).

In this connection, reference may be made to sub- section (3) which reads:-

"S.73(3). All moneys received as aforesaid shall be kept in a separate bank account maintained with a Scheduled bank until the permission has been granted, or where an appeal has been preferred against the refusal to grant such permission, until the disposal of the appeal, and the money standing in such separate account shall, where the permission has not been applied for as aforesaid or has not been granted, be repaid within the time and in the manner specified in sub-section (2), and if default is made in complying with this sub-section, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five thousand rupees."

(emphasis supplied) This sub-section refers to the obligation of the company to keep all amounts received from the subscribers in a separate bank account maintained with a Scheduled bank. Such money must so remain in the bank until the permission has been granted by the stock exchange or until the disposal of an appeal preferred against refusal to grant permission. Where the permission has not been sought, the company has, as seen above, acted in disobedience of the law, and the amounts received from the investors must be credited to the separate bank account and immediately returned to them together with the interest which accrued for the period. But where permission has been sought, but not granted, the amounts so kept in the bank have to be repaid within the time specified in sub-section (2). Default of compliance with this requirement will make the company and every officer in default (as defined under section 5) liable to be punished with fine. This will, of course, be in addition to the liability for payment of interest in terms of sub- section (2).

The right or obligation of the company to keep the money in the bank is only for the period preceding the decision of the stock exchange on the company's request for permission to list. Once the permission is expressly or impliedly refused, the money has to be returned to the applicants,

notwithstanding the pendency of the company's appeal. The earlier part of the sub-section about depositing the money in the bank is controlled by the latter provision in the sub-section for returns of the money as required by sub-section (2). This is particularly so by reason of the penalty specially provided in sub-section (3) in the event of default of compliance with the requirement of that sub-section.

Sub-section (3) may at the first blush appear to be contradictory, but it is really not so, considering the legislative intent to protect the legitimate claim of the applicants for interest on the money paid by them. The interest provided under sub-section (2) is payable to the applicants in terms of that sub-section, unless the money is returned to them within the specified time, not withstanding the pendency of an appeal mentioned in the proviso to sub- section (1A). Sub-section (3) has to be so understood to be in harmony with the other provisions of section 73. This is all the more explicit from sub-section (3A).

Sub-section (3A) says that the company shall not utilise the amounts held in the separate bank account for any purpose other than what is permitted by sub-section (3A).

Sub-section (3A) provides:-

"S.73(3A). Moneys standing to the credit of the separate bank account referred to in sub-section (3) shall not be utilised for any purpose other than the following purposes, namely:-

(a) adjustment against allotment of shares, where the shares have been permitted to be dealt in on the stock exchange or each stock exchange specified in the prospectus; or

(b) repayment of moneys received from applicants in pursuance of the prospectus, where shares have not been permitted to the dealt in on the stock exchange or each stock exchange specified in the prospectus, as the case may be, or, where the company is for any other reason unable to make the allotment of share".

The money credited to the separate bank account can be utilised for only two purposes: (1) for adjustment against allotment of shares where listing is permitted; or (2) for repayment where listing is not permitted or the company is otherwise unable to allot shares. The company has no right to deal with the money in any other manner or keep it longer than permitted by the section.

The money so kept in the separate bank account is held by the company for and on behalf of the subscribers in a fiduciary capacity. Such amount do not form part of the general assets of the company. The relationship between the applicants and the company in respect of the application money so held in accordance with sub-section (3) is that of `bailers and bailee and not of creditors and debtor'. See Palmer's Company Law, 24th ed. para 24.31; 1955 (1) WLR, 1080,1085.

Interest does not begin to run under sub-section (2) until 8 days have elapsed from the date of expiry of the period of 10 weeks commencing on the date of closure of the subscription lists. The fact that the legislature has so provided in cases where permission has been refused expressly or by

reason of the deeming provision is sufficient indication of the legislative intent to give the company reasonable time to repay the money.

Companies generally make allotments as soon as practicable after the necessary application has been made to the recognised stock exchange for permission for listing. Upon the issue of the prospectus after making such application, amounts are received from the public in consideration of which allotments are made in anticipation of the requisite permission. Greater the reputation of the company, larger are the amounts likely to be received. If permission is not granted, the entire amounts received from the public have to be forthwith repaid. On the other hand, if permission is obtained, but the amounts received from the public are in excess of the aggregate of the application money relating to the allotted shares or debentures, such excess amounts are forthwith repayable. Whether or not permission will be obtained cannot be ascertained until the period prescribed for the purpose has expired namely, 10 weeks from the date of closing of the subscription lists. Until the expiry of those 10 weeks, neither the subscribing public nor the company will be in a position to decide whether or not the allotments made are valid. This is a period of uncertainty and it is for that reason that the legislature has, in a case of refusal to grant permission, provided that the liability to repay the application money arises upon the expiry of 10 weeks. The possibility of an appeal being allowed is, as stated above, not a ground to delay repayment. It should make no difference whether it is as a result of the permission having been refused, or permission having been granted and excess amounts are received by reason of over-subscription, that repayment of money has to be made by the company. In either event, the liability to repay the amounts arises forthwith on the expiry of 10 weeks from the date of closure of the subscription lists, and the interest will begin to accrue thereon on the expiry of 8 days therefrom. This construction is, in our view, just and reasonable from the point of view of both the investor and the company, and has the advantage of certainty, uniformity and easy application.

The condition attached to the Order of the Government of India dated 31st May, 1990, which we have extracted above, indicates that the time limit of 10 weeks from the date of closure of the subscription lists applied to refund orders as well as to allotment of all securities and despatch of allotment letters/certificates. The Government of India thus understood that the liability of the company to repay the amounts in terms of section 73 arose only at the end of 10 weeks from the date of closure of the subscription lists. This condition presumably applies to repayment under sub-section (2) as well as under sub-section (2A) of section 73. This is fully borne out by the averments contained in the affidavit filed in the High Court on behalf of the Union of India as well as by the oral submissions on its behalf before the High Court on the point. Similar appears to be the stand of the Bombay Stock Exchange, as seen from its publication of March 1991 (para 23.2). The letter dated March 13, 1991 sent by the Securities and Exchange Board of India, the 2nd respondent, to the appellant company stating that interest was payable from 1st November, 1990, which is the date of expiry of the period of 10 weeks from the date of closure of the subscription lists, roughly indicates how the 2nd respondent construed the provision shortly before the proceedings commenced in the High Court.

The section is not free from ambiguities and doubts. Having been amended in several respect, it has not finally emerged with the clarity that admits of easy construction. But the contemporaneous

construction placed upon an ambiguous section by the administrators entrusted with the task of executing the statute is extremely significant. This construction is, in our view, perfectly consistent with the language and the object of the statute. It is a practical and reasonable construction, particularly because it affords the company reasonably sufficient time to complete the formalities for despatch of the refund orders. And the investor who has responded to the invitation contained in the prospectus is not unduly kept waiting for the return of the excess amounts due to him. See Desh Bandhu Gupta & Co. & Ors. v. Delhi Stock Exchange Association Ltd., [1979] 4 SCC 565 and K.P. Varghese v. Income Tax Officer, Ernakulam & Anr., [1981] 4 SCC 173. See also Crawford's Interpretation of Laws, 1989 Ed.

Neither the date of allotment, as found by the High Court, nor the date specified in the prospectus, as contended by the company, is relevant to the commencement of liability for payment of interest on the excess money.

The liability of a company to repay the excess money under section 73(2A) of the Act arises on the expiry of 10 weeks from the date of the closing of the subscription lists, and the interest begins to accrue thereon at the end of 8 days therefrom.

Accordingly the liability to repay the excess money in the present case arose on 1.11.1990 which was admittedly the date of expiry of 10 weeks from the date of the closing of the subscription lists, and consequently the liability to pay interest at the rate specified in sub-section (2A) arose on the expiry of 8 days from 1.11.1990.

MOHAN, J. I had the advantage of perusing the draft judgment of my learned brother. I concur with him. However, some important points require to be amplified. The points that arises for determination are:

(i) the scope of liability under Section 73 (2A) of the Companies Act.

(ii) Meaning of the word "forthwith"

(iii) Whether the payment of interest is penal in nature?

(iv) Whether administrative inconvenience could be pleaded to avoid the statutory liability? Section 73 occurs under Para III of the Companies Act 1956 (Central Act of 1/1956 hereinafter referred to as the Act). This section deals with the allotment of shares and debenturs. It has undergone important amendments in 1975 and 1988. Prior to amendment in 1975, Section 73 read as under :_ "Allotment of shares and debentures to be dealt in on stock exchanges. (1) Where a prospectus, whether issued generally or not states that application has been or will be made for permission for the shares or debentures offered thereby to be dealt in on a recognised stock exchange, any allotment made on an application in pursuance of the prospectus shall, whenever made, be void, if the permission has not been applied for before the tenth day after the first issue of the prospectus or, if the permission has not been granted before the expiry of (four weeks) be notified to the applicant for permission by or on behalf of the stock exchange.

(2) Where the permission has not been applied for as aforesaid, or has not been granted as aforesaid, the company shall forthwith repay without interest all moneys received from ap-

plicants in pursuance of the prospectus, and, if any such money is not repaid within eight days after the company becomes liable to repay it, the directors of the company shall be jointly and severally liable to repay that money with interest at the rate of five per cent per annum from the expiry of the eighth day:

Provided that a director shall not be liable if he proves that the default in the repayment of the money was not due to any misconduct or negligence on his part.

(3) All moneys received as aforesaid shall be kept in a separate bank account maintained with a Scheduled Bank so long as the company may become liable to repay it under sub-section (2) ; and if default is made in complying with this sub-section, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five thousand rupees.

(4) Any condition purporting to require or bind any applicant for shares or debentures to waive compliance with any of the requirements of this section shall be void.

(5) For the purpose of this section (it shall not be deemed that permission has not been granted) if it is intimated that the application for permission though not at present granted, will be given further consideration.

(6) This section shall have effect :

(a) in relation to any shares or debentures agreed to be taken by a person underwriting an offer thereof by a prospectus, as if he had applied, therefor in pursuance of the prospectus; and

(b) in relation to a prospectus offering shares for sale, with the following modifications namely -

(i) reference to sale shall be substituted reference to allotment;

(ii) the persons by whom the offer is made, and not the company, shall be liable under sub-section (2) to repay money received from applicants, and reference to the company's liability under that sub-section shall be construed accordingly; and

(iii) for the reference in sub-section (3) to the company and every officer of the company who is in default, there shall be substituted a reference to any person by or through whom the offer is made and who is knowingly guilty of, or wilfully authorises or permits, the default.

(7) No prospectus shall state that application has been made for permission that the shares or debentures offered thereby to be dealt in on any stock exchange, unless it is a recognised stock exchange".

After amendment in 1975, Section 73 read as follows:- "Allotment of shares and debentures to be dealt in on stock exchanges. (1) Where a prospectus whether issued generally or not states that an application has been, or will be, made for permission for the shares or debentures offered thereby to be dealt in on one or more recognised stock exchanges, such prospectus shall state the name or the stock exchange or, as the case may be, each such stock exchange, and any allotment made on an application in pursuance of such prospectus shall, whenever made, be void if the permission has not been applied for before the 10th day after the first issue of the prospectus, or, whether such permission has been applied for before that day, if the permission has not been granted by the stock exchange or each such stock exchange, as the case may be, before the expiry of 10 weeks from the date of the closing of the subscription lists : Provided that where an appeal against the decision of any recognised stock exchange refusing permission for the share or debentures to be dealt in on that stock exchange has been preferred under section 22 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956), such allotment shall not be void until the dismissal of the appeal.

(2) Where the permission has not been applied for as aforesaid, substituted for "or has not been granted as aforesaid" by the Companies (Amendment) Act, 1974, w.e.f. 1.2.1975 substituted for "five per cent" ibid.

(2A) Where permission has been granted by the recognised stock exchange or stock exchanges for dealing in any shares or debentures in such stock exchange or each such stock exchange and the moneys received from applicants for shares or debentures are in excess of the aggregate of the applicant moneys relating to the shares or debentures in respect of which allotment has been made, the company shall repay the moneys to the extent of such excess forthwith without interest, and if such money is not repaid within eight days, from the day the company becomes liable to pay it, the Directors of the Company shall be jointly and severally liable to repay the money with interest at the rate of twelve per cent per annum from the expiry of the said eighth day :

Provided that a Director shall not be liable if he proves the the default in the payment of the money was not due to any misconduct or negligence on his part.

(2B) If default is made in complying with the provisions of sub-section (2A), the company and every officer of the company who is in default he shall be punishable with fine which may extend to five thousand rupees, and where repayment is not made within six months from th expiry of the eighth day, also with imprisonment for a term which may extend to one year.

(3) All moneys received as aforesaid shall be kept in a separate bank account maintained with a Scheduled Bank (until the permission has been granted, or where an appeal has been preferred against the refusal to grant such permission, until the disposal of the appeal, and the money standing in such separate account shall, where the permission has not been applied for as aforesaid or has not been granted, be repaid within the time and in the manner specified in sub-section (2); and default is made in complying with this sub-section, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five thousand rupees.

(3A) Moneys standing to the credit of the separate bank account referred to in sub-section (3) shall not be utilised for any purpose other than the following purposes, namely:-

(a) Adjustment against allotment of shares, where the shares have been permitted to be dealt in on the stock exchange or each stock exchange specified in the prospectus; or

(b) Repayment of moneys received from applicants in pursuance of the prospectus, where shares have not been permitted to be dealt in on the stock exchange or each stock exchange specified in the prospectus, as the case may be, or, where the company is for any other reason unable to make the allotment of share.

(4) Any condition purporting to require or bind applicant for shares or debentures, to waive compliance with any of the requirement of the section shall be void.

(5) For the purpose of this section it shall be deemed that permission has not been granted if the application for permission, where made, has not been imposed of within the time specified in sub-section (1).

(6) This section shall have effect -

(a) In relation to any shares or debentures agreed to be taken by a person underwriting an offer thereof by a prospectus, as if he had applied therefor in pursuance of the prospectus; and

(b) In relation to a prospectus offering shares for sale, with the following modifications namely-

(i) References to sale shall be substituted for references to allotment;

(ii) The persons by whom the offer is made, and not the company, shall be liable under sub-section (2) to repay money received from applicants, and references to the company's liability under that sub-section shall be construed accordingly; and

(iii) For the reference in sub-section (3) to the company and every officer of the company who is in default, there shall be substituted a reference to any person by or through whom the offer is made and who is knowingly guilty of or wilfully authorises or permits, the default.

(7) No prospectus shall state that application has been made for permission for the shares or debentures offered thereby to be dealt in on any stock exchange, unless it is a recognised stock exchange."

After amendment in 1988, Section 73 reads as under:- "Allotment of shares and debenture to be dealt in on stock exchange. (1). Every company, intending to offer shares or debentures to the public for subscription by the issue of a prospectus shall before such issue, make an application to one or more recognised stock exchanges for permission for the shares or debentures intending to the so

offered to be dealt with in the stock exchange or each such stock exchange.

(1A) Where a prospectus, whether is issued generally or not, states that an application under sub-section (1) has been made for permission for the shares or debentures offered thereby to be dealt in one or more recognised stock exchange, such prospectus shall state the name of the stock exchange and any allotment made on an application in pursuance of such prospectus shall, whenever made, be void if the permission has not been granted by the stock exchange or each such stock exchange, as the case may be, before the expiry of ten weeks from the date of the closing of the subscription lists :

Provided that where an appeal against the decision of any recognised stock exchange refusing permission for the shares or debentures to be dealt in on that stock exchange has been preferred under section 22 of the Securities Contracts (Regulations) Act, 1956 (42 of 1956), such allotment shall not be void until the dismissal of the appeal.

(2) Where the permission has not been applied for under sub-section (1) or, such permission having been applied for, has not been granted as aforesaid, the company shall forthwith repay without interest all moneys received from applicants in pursuance of the prospectus, and, if any such money is not repaid within eight days after the company become liable to repay it, the company and every director of the company who is an officer in default shall, on and from the expiry of the eighth day, be jointly and severally liable to repay that money with interest at such rate, not less than four per cent and not more than fifteen pr cent, as may be prescribed, having regard to the length of the period of delay in making the repayment of such money.

(2A) Where permission has been granted by the recognised stock exchange or stock exchanges for dealing in any shares or debentures in such stock exchange or each such stock exchange and the moneys received from applicants for shares or debentures are in excess of the aggregate of the application moneys relating to the shares or debentures in respect of which allotments have been made, the company shall repay the moneys to the extent of such excess forthwith without interest, and if such money is not repaid within eight days, from the day the company becomes liable to pay it, the company and every director of the company who is an officer in default shall, on and from the expiry of the eighth day, be jointly and severally liable to repay that money with interest at such rate, not less than four per cent and not more than fifteen per cent, as may be prescribed, having regard to the length of the period of delay in making the repayment of such money.

(2B) If default is made in complying with the provisions of sub-section 2(A), the company and every officer of the company who is in default shall be punishable with fine which may extend to five thousand rupees, and where repayments is not made within six months from the expiry of the eighth day, also with imprisonment for a term which may extend to one year.

(3) All moneys received as aforesaid shall be kept in a separate bank account maintained with a Scheduled Bank until the permission has been granted, or where an appeal has been preferred against the refusal to grant such permission, until the disposal of the appeal, and the money standing in such separate account shall, where the permission has not been applied for as aforesaid

or has not been granted, be repaid within the time and in the manner specified in sub-section (2) and if default is made in complying with this sub-section, the company and every officer of the company who is in default, shall be punishable with fine which may extend to five thousand rupees.

(3A) Moneys standing to the credit of the separate bank account referred to in sub-section (3) shall not be utilised for any purpose other than the following purposes, namely :-

(a) adjustment against allotment of shares, where the shares have been permitted to be dealt in on the stock exchange or each stock exchange specified in the prospectus ; or

(b) repayment of moneys received from applicants in pursuance of the prospectus where shares have not been permitted to be dealt in on the stock exchange or each stock exchange specified in the prospectus, as the case may be, or, where the company is for any other reason unable to make the allotment of share.

(4) Any condition purporting to require or bind any applicant for shares or debentures to waive compliance with any of the requirement of this section shall be void.

(5) For the purposes of this section, it shall be deemed that permission has not been granted if the application for permission, where made, has not been disposed of within the time specified in sub-section (1).

(6) This section shall have effect -

(a) in relation to any shares or debentures agreed to be taken by a person under writing an offer thereof by a prospectus, as if he had applied therefore in pursuance of the prospectus; and

(b) in relation to a prospectus offering shares for sale, with the following modifications, namely -

(i) reference to sale shall be substituted for references to allotment;

(ii) the persons by whom the offer is made, and not the company, shall be liable under sub-section (2) to repay money received from applicants, and references to the company's liability under that sub-section shall be construed accordingly; and

(iii) for the reference in sub-section (3) to the company and every officer of the company who is in default, there shall be substituted a reference to any person by or through whom the offer is made and who is knowingly guilty of, or wilfully authorises or permits, the default.

(7) No prospectus shall state that application has been made for permission for the shares or debentures offered thereby to be dealt in on any stock exchange, unless it is a recognised stock exchange".

As the section reads now, every company is required while it offers for public subscription issues of shares or debentures by means of a prospectus, to make an application for listing the security in one or more recognised stock exchanges. Should the stock exchange not grant the permission for listing, before the expiry of 10 weeks from the date of closing the subscription lists, no allotment could be made. In other words, the stock exchange has a say in the matter of listing. It also requires to be stated that the company, besides the Director, is made liable for failure to repay the application money or the excess application money along with interest.

Notes on clauses read as under :-

"Clause 10 provides for compulsory listing of all public issues with recognised stock exchanges. Presently, listing of public issues is not compulsory. Further , as per the existing provisions only the directors are liable for failure to repay the application money or the excess application money within the specified time, if the company fails to pay". "It is proposed to make the company in addition to the directors who commit the default liable to repay the application money or excess application money alongwith interest at a rate between 4% to 15% depending upon the period of delay with a view to ensuring that ordinary directors like nominee of govt. financial institutions do not attract penal provisions, it is further proposed that only the directors who is an officer in default should be liable for prosecution".

As per provision to sub-section (1), an appeal may be preferred under section 22 of the Stock Securities Contracts (Regulations) Act, 1956. Such an appeal may be -

(i) against the decision of stock exchange refusing permission ; and

(ii) if the stock exchange fails to dispose of the application for permission within 10 weeks from the date of closing of the subscription lists. This 10 weeks become important because of the deemed rejection under sub-section (5).

Sub-section (1A) mentions the date of closing of the subscription lists. Thus, it is a crucial date for determining the expiry of 10 weeks for the grant of permission by stock exchange. Equally that becomes the crucial date for calculating the time for preferring an appeal under section 22 of the Securities Contract (Regulations) Act, 1956, as aforesaid against the refusal of permission. No doubt, neither in this section nor elsewhere it is stated as to when the company is required to close subscription lists. Of course, that will depend upon the facts of each case. Section 69 of the Act states that unless minimum subscription is received, no allotment shall be made of any share capital of the company offered to the public for subscription. In fact, sub-section 5 of the said section states categorically as follows :- "If the conditions aforesaid have not been complied with on the expiry of one hundred and twenty days after the first issue of the prospectus, all moneys received from applicants for shares shall be forthwith repaid to them without interest; and if any such money is not so repaid within one hundred and thirty days after the issue of the prospectus, the directors of the company shall be jointly and severally liable to repay that money with interest at the rate of six per cent per annum from the expiry of the one hundred and thirtieth day : Provided that a director shall not be so liable if he proves that the default in the repayment of the money was not due to any

misconduct or negligence on his part".

One thing that is striking as far as the sub-section is concerned is, the repayment without interest before the expiry of 150 days after the first issue of the prospectus and the repayment with interest within 130 days after the issue of the prospectus or specific in their terms unlike Section 73. It cannot be gain said that the prospectus of the company is an important document provided for under the statute.

Section 2(36) defines "prospectus" as follows :- "prospectus" means any document described or issued as a prospectus and includes any notice, circular, advertisement or other document inviting deposits from the public or inviting offers from the public for the subscription or purchases of any shares in, or debentures of, a body corporate".

SEction 60 deals with registration of prospectus. Under sub-section (3) it is provided that the Registrar shall not register a prospectus unless the requirements of sections 55, 56, 57 and 58 and sub-sections (1) and (2) have been complied with. Section 62 deals with civil liability for misstatements in prospectus, while section 63 deals with criminal liability for misstatement in prospectus. In the background of the legal provisions section 73 will have to be analysed with regard to the liability to pay interest.

The date of allotment, according to Mr. Andhyarujina and Mr. Cooper is the relevant date. Therefore, according to the learned counsel, the crucial issue is the allotment. It is also submitted that when permission is granted, it is only a categorisation. It has already been seen that under section 69(5), specific dates have been mentioned as 120 and 130 respectively. Sub-section 2(A) of Section 73 does not mention any specific day. It also requires to be noticed under sub-section 1(A) of this very section "10 weeks from the date of closing of the subscription lists" is mentioned. Both under sub-section (2) and 2(A), no such time has been prescribed. Prior to 1988, sub-section (1) contemplated two situations - (i) application to stock exchange being made after issue within 10 days of issue or (ii) application made before the issue and 10 weeks for stock exchange to grant the application. Of course, if the application is not granted within 10 weeks, there will be deemed rejection under sub-section (5). But, unfortunately, after the amendment of sub-section (1) and 1(A), sub-section (2) has not been amended with reference to these amended provisions. As the law stands at present, the question of issue of prospectus without an application to stock exchange cannot arise at all.

As careful reading of sub-section 2(A) will clearly disclose that the said section comes into operation only where permission has been granted by the recognised stock exchange or exchanges. These words "where permission has been granted" are of great significance. Therefore, the contention that on the date of allotment the liability to pay interest arises may not be correct. Nor again, it would be correct to contend that the mechanics of refund liability to pay arises on the date of allotment since there is a failure of consideration in respect of shares not allotted.

On allotment, the money may become due. Thereafter the money is held in a fiduciary capacity. But the more important question is does it become payable? We will, now, refer to Black's Legal

Dictionary as to the meaning of the word "due" and "payable" (5th Ed. 448) are as under :- "Due" - Just; proper; regular; lawful; sufficient; reasonable, as in the phrases "due care", "due process of owing; payable; justly owed. That which one contracts to pay or perform to another; that which law or justice requires to be paid or done. Owed, or owing, as distinguished from payable. A debt is often said to be due from a person where he is the party owing it, or primarily bound to pay, whether the time for payment has or has not primarily bound to pay, whether the time for payment has or has not arrived. The same thing is true of the phrase "due and owing". Payable. A bill or note is commonly said to be due when the time for payment of it has arrived. The word "due" always imports a fixed and settled obligation or liability, but with reference to the time for its payment there is considerable ambiguity in the use of the term, the precise signification being determined in each case from the context. It may mean that the debt or claim in question is now (presently or immediately) matured and enforceable, or that it matured at some time in the past and yet remains unsatisfied, or that it is fixed and certain but the day appointed for its payment has not yet arrived. But commonly, and in the absence of any qualifying expressions, the word "due" is re-

stricted to the first of these meanings, the second being expressed by the term "overdue" and the third by the word "payable".

"Payable" -Capable of being paid; suitable to be paid; admitting or demanding payment; justly due legally enforceable. A sum of money is said to be payable when a person is under an obligation to pay it. Payable may therefore signify an obligation to pay at a future time, but, when used without qualification, term normally means that the debt is payable at once, as opposed to "owing".

As a matter of fact, these words assumed great significance under section 60 of Transfer of Property Act. The section was amended by Act 20 of 1929. The word "due" in the section has been substituted for the word "payable" in order to make it clear that a mortgagor cannot redeem within the term of the mortgage". "When the right of redemption arises- the right of redemption arises when the principal money secured by the mortgage that has become due and may be exercised at any time thereafter, subject of course to the law of limitation. In English law, the mortgagor cannot redeem before the time fixed for payment. Nevertheless there were a considerable number of Indian cases in which it was held that the time fixed in the deed was fixed for the convenience of the mortgagor and that he could redeem before that time unless there was an express stipulation to the contrary. These cases are bad law, for th view taken in other case that the mortgagor cannot redeem before the time fixed for payment is confirmed by the decision of Judicial Committee in Bhaktawar Begam v. Husaini Khanam, [1914] 36 All. 195. 41 I.A. 84, 23 I.C. 355 followed in Bir Mohammad v. Nagoor, [1914] 27 Mad. L.J. 483, 25 I.C. 576 which treats Rose Ammal v. Rajarathnam, [1900] 23 Mad. 23 as overruled".

In 1976 (46) Company Cases 25 in Baroda Board & Paper Mills Ltd. v. Income-Tax Officer. Circle I, Warde-E, Ahmedabad and others, it is held as under :- "Mr. A.L. Shah who appears for the liquidator in O.J. Appeal No. 2 of 1975 has urged before us that the legislature has used in the context of the priority of debts two distinct sets of words "debt due" and "due and payable" and proper meaning should be given to these sets of words, namely, "debt due" and "due and payable" and distinction must be made when the legislature has used two different terminologies, namely,

"due" in the beginning of the clause and "due and payable" at the end of the clause. He also wants us to dissect the phrase "due and payable" and he wants to emphasize that the debt must have become due in the narrower sense of the word of having come into existence and having been payable with reference to enforceability of payment and, in this sense, relying upon the decision of D.A. Desai J., he has urged before us that the debt must be existing at the relevant date and the event which brought the debt into existence must have occurred within the twelve months preceding the relevant date and it must also have become payable, meaning thereby that its payment could have been enforced against the company, within the twelve months before the relevant date. In view of the decisions that we have already referred to, particularly the passage from People v. Arguello as approved by the Supreme Court in Kesoram Industries' case and in Raman Iron Foundry's case, it is not possible for us to accept this contention of Mr. Shah. In our opinion, the only meaning that could be attached to the word "due" occurring in section 530 is that it must be presently due and the words "due and payable" mean the same thing, namely , that it must be presently payable. Therefore, so far as section 530(1) (a) is concerned, the revenue, taxess or rate, due from the company to the Central or State Government or to a local authority must be presently payable, that is, that the liability could be enforced as at the relevant date and, secondly, it must have so become presently payable within the twelve months immediately preceding the relevant date". In this connection we may refer to the case in Union of India v. Air Foam Industries (P) Ltd., A.I.R. 1974 S.C. 1265 & 1271 (para 7), which reads as follows :- "The first thing that strikes one on looking at Clause 18 is its heading which reads; "Recovery of Sums Due". It is true that a heading cannot control the interpretation of a clause if its meaning is otherwise plain and unambiguous, but it can certainly be referred to as indicating the general drift of the clause and affording a key to a better understanding of its meaning. The heading of Clause 18 clearly suggests that this clause is intended to deal with the subject of recovery of sums due. Now a sum would be due to the purchaser when there is an existing obligation to pay it in present. It would be profitable in this connection to refer to the concept of a `debt' for a sum due is to be found in Webb v. Stenton, [1883] 11 QBD 518 where Lindley. L. J., "...a debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation". There must be debitum in presenti; solvendum may be in presenti or in future - that is immaterial. There must be an existing obligation to pay a sum of money now or in future. The following passage from the judgment of the Supreme Court of California in People v. Arguello, [1869] 37 Calif 524, which was apporoved by this Court in Kesoram Industies v. Commr. of Wealth Tax, [1966] 2 SCR 688 (AIR 1966 SC 1370), clearly brings out the essential characteristics of a debt.

"Standing alone, the word `debt' is as applicable to a sum of money which has been promised at a future day as to a sum now due and payable. If we wish to distinguish between the two, we say of the former that it is a debt owing, and of the latter that it is a debt due".

This passage indicates that when there is an obligation to pay a sum of money at a future date, it is a debt owing but when the obligation is to pay a sum of money in praesenti it is a debt due. A sum due would, therefore, mean a sum for which there is an existing obligation to pay in presenti, or in other words, which is presently payable. Recovery of such sums is the subject- matter of Clause 18 according to the heading, That is the dominant idea running through the entire Clause 18".

We will now refer to Venkataramiya's Law Lexicon and Legal Maxims Vol, I, 713, 714. "Due" - means payable immediately or a debt contracted but payable at a future time. In Wharton's Law Lexicon, 14th Edn., it s meaning is stated to be "anything owing. That which one contracts to pay or perform to another; that which law or justice requires to be paid or done. It should be observed that a debt is said to be `due' the instant that it has existence as a debt; it may be payable at a future time". Therefore, it cannot be contended on the strength of Section 530 `due' and `payable' is one and the same even under S.732 (A). However, as contended, if the liability to pay interest arises from the date of allotment and the grace period after eight days, what is to happen in cases where permission is refused by the stock exchange? For the grant of such permission 10 weeks are available. Therefore, a company making allotment prior to the grant of permission cannot be mulcted with the liability when the section itself comes into play upon the grant of permission. Therefore, some definite date is required. It cannot be lost sight of that where permission is refused in the first instance there is also the right of appeal under Section 22 of the Securities Contracts (Regulations) Act, 1956. This too, has got an important bearing. It cannot be held that after allotment the mechanics of refund would come into play and again after rejection of permission, the money on all applications should be refunded once over again.

Equally, the contention of Mr. Anil Divan that the stock exchange will have power to extend the time cannot be accepted. It may be a practice to do so. But it does not mean the stock exchange can act contrary to clear wording to this section. More so, when Sub-section (4) is clear in its terms. Merely because the intending applicants agree to abide by the prospectus that cannot be binding in the teeth of this Sub-section.

For the sake of competition, reference may be made to the corresponding provision of English Law. Buckley on the Companies Acts, 14th Ed. Vol.I, while dealing with Section 51 which is the corresponding provision state as follows :- "The Act does not require the prospectus to fix any time for closing the subscription lists and, unless and until an issue is fully subscribed, there is nothing in law to require the company to close the lists. It is the common practice, however, at any rate in the case of prospectuses issued generally, to state in the prospectus that the lists will be closed on or before a particular date. In any case to which this section applies the company will, by reason of sub-s(3), be unable to employ any money received from shareholders until either permission to be listed has been obtained, or the lists have been closed and the period indicated in sub-section (1) has expired without the permission having been refused. Note that the sub-section does not say, 'if the permission has not been granted before the expiration of three weeks etc.' Presumable in practice the stock exchange, when it has an application for permission to be listed under consideration and has not either granted or refused permission within the three weeks period indicated above, will notify the applicant under sub-section (1) of an extension of the period.

An allotment within this section is void, not voidable as in an allotment in breach of Section 47" sub-section (3) in Re Nanwa Gold Mines, Ballantyne v. Nanwa Gold Mines Ltd. applications to subscribe for shares were invited on the footing that, if a resolution for reduction of capital was not passed or not confirmed by the court, the application moneys would be refunded and meanwhile would be retained in a separate account. The moneys were in fact put in a separate account in the names of the company and its registrars. The conditions were not fulfilled and shortly afterwards a

receiver was appointed in a debenture-holders' action. Harman J. held that the moneys in the separate account were repayable to the subscribers in full, basing his decision on the terms of the invitation and not on the provisions of this sub- section; but he expressed the view that the payment into a separate account in compliance with the sub- section would probably have the same effect". Palmer's Company Law, 1982, Vol I, 264 states as follows:-

"Refusal of Application to Deal - Where a prospectus states that application has been or will be made for the shares or debentures to be dealt with on the stock exchange, any allotment made on an application under the prospectus shall be void. (1) if permission has not been applied for before the third day after the first issue of the prospectus; or (2) if permission is refused before the expiration of three weeks (subject to the extension by the stock exchange to six weeks from the date of the closing of the subscription lists (Sec. 51 (1). It should be noted that under case (2) above, the allotment is not void if the stock exchange merely defers the decision on permission to deal, or does not arrive at a decision within the stated time.

During the periods stated in cases (1) and (2) above, the application money received by the company from shareholders who applied for shares has to be kept on separate account (Sec. 51 (3) ; "that appears", as Harman J. observed in Re Nanwa Gold Mines Ltd, "to be an attempt to erect, so to speak, by statute a kind of trust for applicant", consequently, the application money thus kept on separate account does not form part of the general assets of the company which are charged by a debenture secured by a floating charge. The relationship between the applicants and the company which holds the application moneys on separate account is that if bailers and bailee, and not of creditors and debtor".

Now, we will refer to the case in Nanwa Gold Mines Ltd. Ballantyne v. Nanwa Gold Mines Ltd., [1955] I W.L.R. 1080 @ 1085.

"Sub-section (3) provides that where money is sent in on a provisional application: "All money received as "aforesaid shall be kept in a separate bank account so long as the company may become liable to repay it under the last foregoing sub-section; and, if default is made in complying with this sub-section, the company and every officer of the company who is in default shall be liable to a fine not exceeding five hundred pounds". That appears to be an attempt to erect so to speak, by statute a kind of trust for applicants in a case of this sort. It is irrelevant here, because in this case the directors promised to do this very thing; No doubt that was only a compliance with the statute; but they did promise to do so and I think that their promise is of contractual effect, so I need not consider whether, if there was no promise but only the statutory obligation, the position would be the same. I incline to think it would be so, and that the object of section 51(3) was to provide protection for persons who pay money on the faith of promises of this kind".

As to the present position with regard to the liability to refund under Sec. 73 2(A) it is important to bear in mind that two notifications have come to be issued in exercise of powers conferred under Section 642.

Notification No. GSR 614 (E) dated 3rd October, 1991, called the Companies (Central Government's) General Rules and Forms (Second Amendment), 1991, which came into force on 1st November, 1991. In the above notification it is stated as under:-

"If the company does not receive application money for at least 90% of the issued amount, the entire subscription will be refunded to the applicants within ninety days from the date of closure of the issue. If there is delay in the refund of application money by more than 8 days after the company becomes liable to pay the excess amount, the company will pay interest for the delayed period, at prescribed rates in sub-section (2) and (2A) of Section 73. No statement made in this Form shall contravene any of the provisions of the Companies Act, 1956, and the rules made thereunder".

"Signature of Directors"

Again, notification No. S.O. 666(E) dated October 3, 1991 issued under sub-section (1) of Section 641 with amendments in Schedule II to the said Act, under Part I General Information, stated as under:- "(f) Declaration about the issue of allotment letters/refunds within a period of 10 weeks and interest in case of any delay in refund at the prescribed rate under Section 73(2)/2A"

Thus, the liability of the company to repay the excess amount under section 73(2A) will arise only on the expiry of 10 weeks from the date of the closure of subscription lists. The interest begins to accrue thereupon at the end of 8 days.

As the meaning of the word "forthwith", we will now refer to Bouvier's Law Dictionary for the meaning of the word "forthwith". "FORTHWITH. As soon as by reasonable exertion, confined to the object, it may be accomplished. (Approved in Dickerman v. Trust Co., 176 U.S. 193, 20 Sup, Ct. 311, 44 L.Ed. 423). This is the import of the term; it varies, of course, with every particular cases; 4 Tyrwh. 837; Edwards v. Ins Co., 75 Pa. 378. See Seammon v. Ins. Co., 101, III 621; 11 H.L. Cas. 337. Bannect v. Ins 67 N.Y. 274; Pennsylvanis R. Co. v. Reichert, 58 Md. 261; Meriden Silver Plate Co. v. Flory 44 Ohio St. 437, 7 N.E. 753. It is not as promptly as immediately; in some cases it might mean within a reasonable time; 7 Dowl. 789". We will also refer to 193 Soutern Reporter, 339 and 16 Soutern Reporter 33 @ 35 Col I. "As regards compliance with statute requiring petition for judicial review of an executive committee's denial of primary election contest to be filled "forthwith" the term "forthwith" is a relative one and means within such time as to permit that which is to be done, to be done lawfully and according to the practical and ordinary course of things to be performed or accomplished, and it is not to be used by way of a penalty when accidental interventions of which party is not to be charged with foresight have upset what otherwise would have been reasonable calculations regarding available time. Laws 1035, Ex. Secs c. 10". "Forthwith" is not susceptible of a fixed time definition, and the surrounding facts and circumstances must be taken into consideration in determining the question, and forthwith may be minutes, hours, days or even weeks". Therefore it cannot be said that "forthwith" means E.O. instanti.

It cannot but be held that the payment of interest is only compensatory and not penal. Merely because clause 10 to which a reference has already been made uses the word "penal" it cannot be amount to penalty. As useful reference can be made in Mahalaxmi Sugar Mills Co. Ltd. v.

Commissioner of Income Tax, Delhi, New Delhi, [1980] 3 SCR

421. "4. Penalties - if any person defaults in payment of excess imposed under sub-section (1) of Sec. 3, or , contravenes any provision of any rule made under this Act, he shall without prejudice to his liability therefore under sub-section (5) of Sec. 3 be liable to imprisonment upto six months or to a fine not exceeding rupees five thousand or both and in the case of continuing contravention in to a further fine not exceeding rupees five thousand or both and in the case of continuing contraventio in to a further fine not exceeding rupees one thousand for each day during which the contravention continues". It is apparent that section 3(2) requires the payment of cess on the date prescribed under the rules. Rule 4 of the U.P. Sugarcane Cess Rules, 1956 provides that the cess due on the sugarcane entering into the premises during the first fortnight to each calendar year must be deposited in the government treasury by the twenty second day of that month and the cess due for the remainder of the month must be deposited before the seventh day of the next following month. If the cess is not paid by the specified date, then by virtue of s. 3(3) the arrear of cess will carry interest at the rate of six per cent per annum from the specified date to the date of payment. Section 3(5) is a very different provision. It does not deal with the interest paid on the arrears of cess but provides for an additional sum recoverable by way of penalty from a person who default in making payment of cess. It is a thing apart from an arrear of cess and the interest due thereon.

Now, the interest payable on an arrear of cess under s. 3(3) is in reality part and parcel of the liability to pay cess. It is an accretion to the cess. The arrear of cess "carries" interest; if the cess is not paid within the prescribed period a larger sum will become payable as cess. The enlargement of the cess liability is automatic under section 3(3). No specific order is necessary in order that the obligation to pay interest is as certain as the liability to pay cess. As soon as the prescribed date is crossed without payment of the cess, interest begins to accrue. It is not a penalty for which provisions has been separately made by s. 3(5). Nor is it a penalty within the meaning of s. 4, which provides for a criminal liability and a criminal prosecution. The penalty payable under s. 3(5) lies in the discretion of the collecting officer or authority. In the case of the penalty under s. 4, no prosecution can be instituted unless, under s. 5(1), a complaint is made by or under the authority of the Cane Commissioner of the District Magistrate. There is another consideration distinguishing the interest payable under s. 3(3) from the penalty imposed under s. 3(5). Section 3(6) provides that the officer or authority empowered to collect the cess may forward to the Collector a certificate under his signature specifying the amount of arrears including interest due from any person, and on receipt of such certificate the Collector is required to proceed to recover the amount specified from such person as if it were an arrear of land revenue. The words used in s. 3(6) are "specifying the amount of arrears including interest", that is to say that the interest is part of the arrear of cess. In the case of a penalty imposed under s. 3(5), a separate provision for recovery has been made under s. 3(7). Although the manner of recovery of a penalty provided by s. 3(7) is the same as the manner of recovery provided by s. 3(6) of the arrears of cess, the Legislature dealt with it as something distinct from the recovery of the arrears of cess including interest. In truth, the interest provided for under s.3(3) is in the nature of compensation paid to the Government for delay in the payment of cess. It is not by way of penalty. The provision for penalty as a civil liability has been made under s. 3(5) and for penalty as a criminal offence under s.4. The Delhi High Court proceeded entirely on the basis that the interest bore the character of a penalty. It was according to the learned Judges "penal

interest". The learned Judge failed to notice s. 3(5) and s.4 and the other provisions of the Cess Act".

The last question will be that in view of the clear terms of the statute whether the administrative inconvenience could be pleaded. This could be decided with reference to the case in Sanjeev Coke Manufacturing Co. v. Bharat Coking Coal Ltd. & Another, [1983] 1 SCR 1000 @ 1029, as follows:-

"...But in the ultimate analysis, we are not really to concern ourselves with the hollowness or the self-condemnatory nature of the statements made in the affidavits filed by the respondents to justify and sustain the legislation. The deponents of the affidavits filed into Court may speak for the parties on whose behalf they swear to the statement. They do not speak for the Parliament. No one may speak for the Parliament and Parliament has said what it intends to say, only the Court may say what it the Parliament meant to say. None else. Once a statute leaves Parliament House, the Court's is the only authentic voice which may echo (interpret) the Parliament. This the court will do with reference to the language of the statute and other permissible aids. The executive Government may place before the court their understanding or misunderstanding of what Parliament has said or intended to say or what they think was Parliament's object and all the facts and circumstances which in their view led to the legislation. When they do so, they do not speak for Parliament. No Act of Parliament may be struck down because of the understanding of Parliamentary intention by the executive government or because their (the Government's) spokesmen do not bring out relevant circumstances but indulge in empty and self- defeating affidavits. They do not and they cannot bind Parliament. Validity of legislation is not to be judged merely by affidavits filed on behalf of the State, but by all the relevant circumstances which the court may ultimately find and more especially by what may be gathered from what the legislature has itself said..."

Therefore, it has to be held that administrative inconvenience can hardly be any ground.

Viewing the statutory provisions form the above perspective, I agree with my learned brother that the liability to repay the excess amount arose on November 1, 1990 and the liability to pay interest arose on the expiry of eight days from November 1, 1990.

ORDER For the reasons stated by us in our separate but concurring judgments dated 4.2.1992, we allow the appeal to the limited extent indicated by us and the judgment of the High Court shall stand altered accordingly. In the circumstances of this case, we make no order as to costs.

V.P.R. Appeal allowed.