

(1964) 10 MAD CK 0007

In the Madras High Court

Case No : O.P. No. 192 of 1947 and C.A. No. 217 of 1963

Brahmayya and Co. Official Liquidators, Hanuman Bank Ltd.
(In Liquidation)

APPELLANT

Vs

V.S. Ramaswami Aiyar and Another

RESPONDENT

Date of Decision : 21-10-1964

Acts Referred:

Banking Companies (Amendment) Act, 1950 — Section 11
Banking Companies Act, 1949 — Section 45, 5, 5(1)
Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8
Madras Estates Land Act, 1908 — Section 55

Citation : AIR 1966 Mad 247

Hon'ble Judges : Sadasivam, J

Bench : Single Bench

Judgement

(1) Application, by the Official Liquidators of the Hanuman Bank Ltd., Tanjore under Ss. 45-A and 45-B of the Banking Companies Act for

permission to sue under O.1, R. 8, C.P.C., on behalf of all the creditors of Dewan Bahadur N. Swaminatha Iyer and his estate for a declaration

that the release deed executed by Dewan Bahadur N. Swaminatha Iyer dated 27-7-1945 is void against the Hanuman Bank Ltd. (in liquidation)

and all other creditors and for directing the respondents, who are the sons of the late Dewan Bahadur N. Swaminatha Iyer, to compensate the

Hanuman Bank Ltd., (in liquidation) in respect of the losses caused by the acts of misfeasance and breach of trust committed by their father to the

extent of Rs. 14,08,647, and for costs.

(2) The Hanuman Bank Ltd., Tanjore was wound up on a creditor's petition dated 26-7-1947 by an order passed by this court on 5-11-1947.

Messrs. Brahmayya and Co., have been appointed Official Liquidators by an order

of this court dated 12-1-1948. The Official Liquidators filed Application No. 2826 of 1950 u/s 235 of the Companies Act of 1913, against the directors, auditor and officers of the company to make good or contribute the amounts claimed in that application in respect of acts of misfeasance, misapplication and breach of trust. This court held that the members of the managing committee were liable to pay compensation to the Bank for the losses sustained by it by the misappropriation and improper loans and advances and discounting of cheques and bills and by illegal declaration of dividends out of capital and the members of the managing committee were made liable for varying sums. But as Dewan Bahadur N. Swaminatha Iyer, the President of the Bank and one of the members of the Managing committee, died on 16-8-1959, while the arguments on the application were coming to an end, this court held on the strength of the decision in In Re: Peerdan Juharmal Bank (in liquidation) by Joint Official Liquidator, , that the proceedings cannot be continued after his death and his liability cannot be enforced against his legal representatives in the same proceedings. Hence the present Company Appn. No. 217 of 1963, has been filed against the respondents, who are the sons of Dewan Bahadur N. Swaminatha Iyer.

(3) The respondents have raised several objections to the maintainability of the present application in their counter. Some of the objections are in the nature of preliminary objections, while some others such as res judicata, limitation etc, could be legitimately decided as preliminary issues. If the preliminary objections and issues are not upheld, the application has to be disposed of on merits after taking evidence.

(4) The claims made in this application fall under the following three heads. The first claim is to recover Rs. 11, 12, 947, made up of several items of loans and advances, described in schedule 1 to the report of the Official Liquidators, made from the head office and branches of the Bank without obtaining any security and in total disregard of the rules and regulations of the Bank with the result that they have become irrecoverable and totally lost to the Bank. The second claim is in respect of misapplication of the funds of the Bank to the tune of Rs. 2,05,000, for the purchase of coffee estates in the name of Coorg Coffee Plantations Ltd. of which Dewan Bahadur N. Swaminatha Iyer was the President. The third and last

claim is in respect of a sum of Rs. 90,700 representing the losses sustained by the bank by reason of declaration of dividends out of capital by the Board of Directors.

(5) The present application has been filed under Ss. 45-A and 45-B of the Banking Companies Act. I entertained some doubt whether the

Banking Companies Act which came into force on 18-3-1949, could apply to the Hanuman Bank Ltd. in liquidation in respect of which the

winding up petition had been filed even of 26-7-1947. In *Jwala Prasad Vs. Official Liquidator Jwala Bank Ltd.*, , it was pointed out that under the

definition of the word "banking" given in S. 5, Clause (b) of the Banking Companies Act, 1949, acceptance of deposits of money from the public

for the purpose of lending and investment was one of the essential features of a banking company and as this feature was absent in the banking

company in question by reason of its having ceased to accept deposits from 12-4-1948 under the directions issued by the Central Government it

was held that it was not a banking company on the date on which the Banking Companies Act came into force and hence the said Act, or the

subsequent amendments in the Act would not affect the banking company and the liquidator could not get any advantage from the provisions of the

said Act. But in *Vasan Bros. v. Official Liquidator, Bombay*, AIR 1952 Trav Co 170 it was held that in order that a company may be a banking

company under S. 5(1)(c) of the Banking Companies Act, it is not necessary that at a particular point of time it should be in a position to transact

its business and that the definition contained in S. 5(1)(c) of the Banking Companies Act can only mean that transacting the business of banking

should be its business and not the business should have been transacted at any particular point of time. It is rightly pointed out in that decision that

while the construction of the definition of a term in a statute should be such as not to be repugnant to the context, it must equally be such as would

aid the achievement of the purpose that it sought to be served by that Act. This decision has not been referred to in the above Allahabad decision

and there is also not much of a discussion in the Allahabad decision.

The petition for winding up of the bank in question in the decision in AIR 1952 Trav Co 170 was prior to the Banking Companies Act coming into

force. It was held in that decision that having regard to S. 11 of the Banking

Companies (Amendment) Act 20 of 1950 which provided for the transfer of pending proceedings in the winding up of any bank to the court exercising jurisdiction under the Act, Section 45-A was made retroactive so as to apply to all pending proceedings in other courts which are statutorily transferred to the High Court by providing that "it shall stand transferred". It was held in *Jadunath Roy and Others Vs. Bank of Calcutta Ltd.*, that by virtue of S. 11 of the Banking Companies (Amendment) Act of 1950, the records of pending proceedings in respect of any suit by or against a banking company relating to or arising out of the winding up of a banking company in any court must be sent to the High Court having jurisdiction under the Act, that the transfer is automatic and that no order of court is necessary. In *Thangia v. Hanuman Bank Ltd.* AIR 1958 Mad 403 it was held by this Court in a batch of second appeals against the very same bank which is the applicant herein that it does not matter whether the claims in question be by or against a particular branch of the banking company so long as the branch is situated in India and the claim or question has arisen or arises before or after the date of the order for the winding up of the banking company or before or after the commencement of the Amendment Act of 1953. It was held in that case that a suit under S. 55 of the Madras Estates Land Act for issue of pattas against a banking company against which liquidation proceedings are in progress in the High Court is not triable by the Deputy Collector by virtue of Ss. 45-A, 45-B and 45-C of the Banking Companies Act as amended, read with S. 11 of the Banking Companies (Amendment) Act 1950. The winding up of the Hanuman Bank Ltd., in liquidation is not yet over and hence the provisions of the Banking Companies Act could be invoked.

(6) The respondents have pleaded in the counter that the appropriate proceedings to obtain the reliefs sought in this application can only be by way of a suit and not by way of an application. The learned advocate for the respondents contended that S. 45-B of the Banking Companies Act merely provides for the jurisdiction of the court and does not dispense with the necessity of filing a suit. I am unable to accept this contention. In *Dhirendra Chandra Pal Vs. Associated Bank of Tripura Ltd. (In Liquidation)*, it has been pointed out by the Supreme Court that obviously the normal proceeding that S. 45-B of the Banking Companies Act contemplated

must be taken to be a summary proceeding by way of an application, Rule 5 of the Banking Companies Rules of 1954, provides that apart from particular kinds of applications which should be made by originating petition all other applications to the court under the Act shall be by Judges summons and that the Official Liquidator should file a report, instead of an affidavit in support of or in answer to a Judge's summons. In fact, the practice in this Court and in other High Courts, as disclosed from the decided cases, is to file only applications under S. 45-B of the Banking Companies Act and not to file suits. If the contention of the learned advocate for the respondents were accepted, the Banking Companies would have to pay heavy court fees for filing such suits and their position would be worse than other companies under the Companies Act. It is clear from what I have stated that the present application under S. 45-B of the Banking Companies Act is maintainable.

(7) The learned advocate for the respondents however argued that permission to sue under O. 1, Rule 8, C.P.C. for a declaration that the release deed executed by Dewan Bahadur N. Swaminatha Iyer dated 27-7-1945 is void against Hanuman Bank Ltd., in liquidation is not a claim which could be entertained under S. 45-B of the Banking Companies Act. In the Law Lexicon of British India by P. Ramanatha Iyer, it is stated that claim is a word of very extensive signification, embracing every species of legal demand and it is one of the largest words of law and includes demand"" and ""debt"". Demand for setting aside a transfer is certainly a ""claim"". But I shall proceed to consider whether there is anything in S. 53 of the Transfer of Property Act which would militate against the said view. Under S. 53 of the Transfer of Property Act, a suit instituted by a creditor to avoid a transfer on the ground that it has been made with the intent to defeat or delay the creditors of the transferor shall be instituted on behalf of or for the benefit of all the creditors. It is on account of this provision that the applicants seek permission to file the suit under O. 1, R. 8, C.P.C. on behalf of all the creditors. I have grave doubts whether the above provision that a suit by a creditor to set aside a fraudulent transfer should be a representative suit on behalf of all the creditors would apply to an application filed under S. 45-B of the Banking Companies Act. The Banking Companies Act provides a special machinery for the enforcement of claims by or

against a banking company which is being wound up in respect of any question relating to or arising in the course of the winding up of the banking company. According to S. 45-A of the Banking Companies Act, the provisions contained in Ss. 45-A to 45-X of Part III-A and the rules made there-under are to have effect notwithstanding anything inconsistent therewith in the Civil Procedure Code. It has been held in *In re, Varthakavardini Bank Ltd.*, 1964-34 Com Cas 225 (Mys), that the provisions as to abatement of suits etc., under the CPC do not apply to proceedings for winding up of a banking company. If the release deed executed by Dewan Bahadur N. Swaminatha Iyer is a sham document, it need not be set aside. In the case of an ostensible sale in favour of a third person this Court could enquire into and determine whether a delinquent director against whom proceedings are taken under S. 543 of the present Companies Act is the real owner by virtue of the provisions contained in S. 45-H(2) of the Banking Companies Act. It is true there is no such specific provision for avoiding fraudulent transfers. But the claim to avoid the transfer has been made under S. 45-B of the Banking Companies Act.

(8) The learned advocate for the respondents argued that an application for a declaration that the release deed executed by Dewan Bahadur N.

Swaminatha Iyer is fraudulent and therefore void against his creditors, is not a claim within the meaning of S. 45-B of the Banking Companies Act.

Under S. 45-B of the Banking Companies Act, it is the High Court, and no other court, which has got jurisdiction to decide any matter which

relates to or arises out of the winding up of banking company, when the registered officer is within the jurisdiction of the High Court, and the High

Court alone has to decide any question of priority and all other questions whatsoever, whether of law or fact, which may relate to or arise in the

course of the winding up of a banking company within the cognisance of the court. In *Dhirendra Chandra Pal Vs. Associated Bank of Tripura Ltd.*

(In Liquidation), , it was held that S. 45-B of the Banking Companies Act is not confined of claims for recovery of money or recovery of property,

moveable or immovable, but comprehends all sorts of claims which relate to or arise in the course of the winding up. In *Shri Ram Narain Vs. The*

Simla Banking and Industrial Co. Limited, it was held that having regard to the

wide and comprehensive language of S. 45-A and S. 45-B of the Banking Companies Act, it is clear that a proceeding to execute the decree obtained by a displaced creditor from the Tribunal under the Displaced Persons (Debt Adjustment) Act against a Bank and all other incidental matters arising therefrom such as attachment are matters within the exclusive jurisdiction of the Court that has directed winding up proceedings of the Bank.

In *Jaini Ali v. Narayana Pillai*, 1961 31 Comp Cas 276 (Ker), it was held that the question whether the debtor of a banking company should be adjudicated an insolvent is not a question which relates to the winding up of the creditor banking company. It was pointed out in that decision that the proposition enunciated in *Jadunath Roy and Others Vs. Bank of Calcutta Ltd.*, that all proceedings taken during the winding up of a banking company to which the liquidator becomes a party arise in the course of the winding up of the company, is too widely stated. It was observed in that decision that any such wide interpretation would only defeat the object of S. 45-B of the Banking Companies Act as disclosed by the heading of the Chapter in which it appears, "Special provisions for speedy disposal of winding up proceedings" and that would make an octopus of the section with more octopuses in its train, dragging to this court a volume of litigation sufficient to smother it. But in *AIR 1958 Mad 403*, *Ramaswami J.* has pointed out that it may be that in its practical working as envisaged by the learned Advocate General, several unlooked for developments may arise clogging rather than facilitating the speedy winding up of the banking company, that it is a question of balance of convenience, and inconvenience and as the French proverb has it "we cannot make an omlette without breaking or scrambling a few eggs". The learned advocate for the respondents relied on the decision in *Malli Selva Iyer v. Madras Mercantile Bank Ltd.*, 1962 32 Comp Cas 47 (Mad), where it was held that the High Court did not have exclusive jurisdiction over the claim proceedings under S. 45-B of the Banking Companies Act.

It was held in that case that claim proceedings are merely incidental to the execution proceedings and if execution proceedings are entertained by a court other than the company court, claim proceedings should also be capable of being entertained by that court. But in the earlier portion of the judgment it is pointed out that a claim to property attached in execution of a

decree obtained by the Bank would be a claim arising in the course of winding up of the company affecting as it would do the realisation of assets held by the bank. The claim of the Hanuman Bank in liquidation to proceed against the properties covered by the settlement deed in favour of the respondents is clearly a claim which would fall under S. 45-B of the Banking Companies Act.

(9) The learned advocate for the respondents contended that even in a claim under S. 45-B of the Banking Companies Act, the requirements of S.

53 of the Transfer of Property Act should be complied with. He argued that the applicants will not be creditors within the meaning of S. 53 of the

Transfer of Property Act, till they obtain a decree for compensation against the respondents. But the applicants will become creditors as soon as

they obtain a decree for compensation claimed by them. The question whether the release deed is a fraudulent transfer has to be considered only

after the applicants succeed in their claim for compensation. The learned advocate for the respondents relied on the decision in *Thaher Unnissa*

Begum Vs. Sherfunnissa Begum, , where it was held that S. 53 of the Transfer of Property Act will apply only when the transfer is made with intent

to defeat or delay the creditors of the transferor and not one single known creditor and that one the executing decree-holder. It is true that the

intention must be to defeat or delay creditor generally, and not to prefer one creditor to another. The meaning of S. 53 of the Transfer of Property

Act is that the debtor must not fraudulently retain any benefit for himself. If *Dewan Bahadur N. Swaminatha Iyer* had executed the release deed in

favour of his sons in order to screen the properties from being proceeded against for his subsequent acts of breach of trust, I fail to see how the

transfer cannot be avoided. The term "creditor" in S. 53 of the Transfer of Property Act includes not only creditors at the time of the transfer, but

also those who subsequently became creditors. In *Stileman v. Ashdown*, 1742 2 ATK 477 , Lord Hardwicke said:

It is not necessary that a man should actually be indebted at the time he enters into a voluntry settlement to make it fraudulent, for if a man does it

with a view to his being indebted at a future time it is equally fraudulent and ought to be set aside.

But the question whether the release deed executed by *Dewan Bahadur N.*

Swaminatha Iyer is void could be considered in the enquiry under S.

45-B of the Banking Companies Act, in case the applicants obtain a decree for compensation.

(10) The learned advocate for the respondents relied on the decision in Nanakchand v. Sardar Singh, AIR 1938 Lah 577, in support of his

contention that the present application is barred by the principles of res judicata as Dewan Bahadur N. Swaminatha Iyer was specifically

exonerated in Appln. No. 2826 of 1950 on the file of this Court. It was held in that decision that where proceedings have been taken under S. 235

of the Companies Act, against a director for negligence, fraud or misfeasance, subsequent suit against him for compensation for fraud or

misfeasance is incompetent on the principle of res judicata. But in Appn. No. 2826 of 1950, Dewan Bahadur N. Swaminatha Iyer was not

exonerated. It was held in that application on the strength of the decision in In Re: Peerdan Juharmal Bank (in liquidation) by Joint Official

Liquidator, , that the proceedings against Dewan Bahadur N. Swaminatha Iyer cannot be continued after his death and his liability cannot be

enforced against his legal representatives in the said application. The claim against Dewan Bahadur N. Swaminatha Iyer was made under S. 235 of

the Companies Act of 1913, which was saved by S. 647(11) of the Companies Act of 1956. In considering S. 214 of the Companies Act of

1882, there was an explanation making it quite clear that proceedings could not be taken under that section against the representative of a

deceased officer. Neither S. 235 of the old Companies Act of 1913, nor S. 543 of the Companies Act of 1956 is followed by any such

explanation. Even in England by the Law Reform (Miscellaneous) Provisions Act of 1934 (24 and 25 Geo V 41) on the death of any person all

causes of action subsisting against him survives against his estate. But so far as proceedings taken under S. 235 of the Companies Act of 1913 and

the correspond-section 532 (sic) of the present Companies Act it has been held in the above decision in In Re: Peerdan Juharmal Bank (in

liquidation) by Joint Official Liquidator, and in the decisions of other High Courts that they cannot be continued against the representatives of a

director or other officer against whom they were initiated in case he died during the pendency of the proceedings and it is not open to me to

question the correctness of the above decision of this court.

In *Official Liquidators Vs. Jugal Kishore and Others*, , it was held that the proceedings under S. 235 of the Companies Act, 1913, brought by the

Official Liquidator against a director during his life-time cannot be continued after his death against his personal representative or heirs by bringing

their names on record and that S. 306 of the Succession Act also did not entitle the Official Liquidator to continue the proceedings against the

personal representatives of the deceased. In *In re, Supreme Bank of India Ltd.*, 1964 34 Com Cas 34 (Mys), it is pointed out that S. 235 of the

Companies Act of 1913 (now re-enacted as S. 543 of the Companies Act of 1956), is copied from S. 165 of the English Companies Act of

1862, and that having regard to the decisions both under the English and the Indian Law misfeasance proceedings under the said section are of a

special nature and are available only against the persons expressly mentioned therein as the persons whose conduct may be investigated into by the

court on an application made pursuant to that section and that the misfeasance proceedings taken against the persons mentioned in that section

cannot be continued on their death against their legal representatives. The question as to whether the liquidator has got any other right of recourse

against such legal representatives was not considered, but was left open in that case. Thus even in the decision in *Official Liquidators Vs. Jugal*

Kishore and Others, , it was pointed out that in proper cases there is nothing to prevent Official Liquidators instituting a regular suit against the legal

representatives or heirs of a deceased director. The mere fact that the person against whom proceedings have been lawfully taken under S. 235 of

the Companies Act of 1913 dies during the proceedings, would not take away the right of the Official Liquidator to proceed against his legal

representatives in cases where the right to sue survives. There is, therefore, no substance in the plea of *res judicata* raised by the respondents.

(11) The learned advocate for the respondents relied on the decision in *Phillips v. Homfray*, 1883 24 Ch D 439 and the maxim *actio personalis*

moritur cum persona in support of his contention that the cause of action, if any, which the Official Liquidator had against Dewan Bahadur N.

Swaminatha Iyer could not survive against the respondents as the legal representatives. It was pointed out in the above decision that where the

wrong-doer acquires no gain to himself at the expense of the sufferer as in the case of beating or imprisoning a man etc., the person injured has

only a reparation for the delictum in damages but where besides the delict, property is acquired which benefits the wrong-doer then an action for

the value of the property shall survive against his heir. In *Joint Stock Discount Co. v. Brown*, 1869 8 Eq Cas 381, directors were held liable for

unauthorised investments which are ultra vires of their powers on the basis of breach of trust. The fact that a director was not present at all the

meetings in which unauthorised investments were sanctioned was held to be no defence. In *In re, Sharpe; Bennett Masonic and General Life*

Assurance Co. v. Sharpe, 1892 1 Ch D 154, it was held that the payment of interest out of the capital when there were no profits was ultra vires

notwithstanding the clause in the articles of association, that the directors being in the position of trustees, the statute of limitations were no bar to

the action and that the defendants in that case were liable to make good out of the estate of the deceased director in their hands the payments of

such interest wrongfully made.

In *In re, Exchange Banking Co. Ltd.*, 1882 21 Ch D 519 it was held that the payment of dividends out of corpus was ultra vires the company and

incapable of ratification by the shareholders, that the claim against the directors was for a breach of trust and that the statute of limitation could not

be set up. It was gravely argued in that case that because one of the respondents had become a bankrupt, no order can be made against him or his

estate, inasmuch as all that he did was to commit a tort. But this argument was repelled on the ground that the act was a breach of trust and not a

mere tort. In *Ramskill v. Edwards*, 1885 31 Ch D 100 the directors of a company advanced moneys of the company upon an unauthorised

security. It was held in that case that the liability of the directors was incurred by means of a breach of trust and that the said liability survived

against the estate of the deceased director. It appears from page 111 of the decision that it was contended that inasmuch as the director George

Long was dead, his estate cannot be made liable. But this contention was repelled in the following words:

It was undoubtedly a bold contention, and if it succeeded, the result would be that any defaulting trustee would have only to die, and his estate

would cease to be liable for the misfeasance. Not only is there no authority for such a proposition, but it seems to me that it would be most pernicious to allow it.

The learned advocate for the respondents relied on the decision in *V. Narasimha Aiyangar, Official Liquidator of the City Hygienic Milk Supply*

Co. Ltd. Vs. The Official Assignee of Madras and Others, in support of his contention that the directors of the company were not express trustees.

The question that was considered in that case was whether the directors were express trustees within the meaning of S. 10 of the Limitation Act

and it was answered in the negative. It is clear from that decision that reliance was placed on the decision of Kay L. J. in *In re Faure Electric*

Accumulator Co., 1888 40 Ch D 141 . It is however clear from that decision that the directors are trustees of assets which have come into their

hands or which are under their control, but they are not trustees of a debt due to the company. There are averments in the report filed in support of

the application that the managing committee had full control of the business of the bank and that on his own admission the conduct of the business

of the Bank by the Managing Director was with the full knowledge of Dewan Bahadur N. Swaminatha Iyer. The applicants have filed documents

to support their contention that Dewan Bahadur N. Swaminatha Iyer had effective control over the Bank and that the misapplication of the funds

by the managing director was made with his full knowledge. The learned advocate for the applicants relied on the resolution dated 19-8-1946

about the formation of a committee consisting of the President, Managing Director, Manager and one other director to sanction loans and referred

to several letters written by one of the directors Sadasiva Mudaliar, and the replies sent by Dewan Bahadur N. Swaminatha Iyer as supporting his

contention. These are matters which have to be gone into fully only after taking evidence. But the facts stated above clearly show that the

applicants have a prima facie case to proceed against the estate of Dewan Bahadur N. Swaminatha Iyer in the hands of the respondents to recover

the amounts in respect of which N. Swaminatha Iyer committed breach of trust by being a party to the misapplication of the funds. There are

averments in the application supported by documents to show that Dewan Bahadur N. Swaminatha Iyer, as a member of the managing committee,

had large powers of management and control vested in him over the moneys of the Bank and that he was liable for misappropriation of such

moneys. The fact that there is no plea that he enriched himself by the acts of such misappropriation or breach of trust cannot also affect either his

personal liability or the liability of his estate to be proceeded against in the light of the above decision. The decision in 1883 24 Ch D 439 relied on

by the learned advocate for the respondents has been clearly and rightly distinguished in *People Bank of Northern India Ltd. v. Desraj*, AIR 1935

Lah 705. Though the principle of *actio personalis moritur cum persona* has been inflexibly applied in regard to all actions based on tort, the profits

arising from a wrong done by a deceased person can be followed against his estate where such profits take the shape of property or the proceeds

or value of property withdrawn from the rightful owner and acquired by the wrong-doer. It was held in the above decision in AIR 1935 Lah 705

that where a director of a company has been guilty of misconduct in sanctioning a loss fraudulently and in violation of the rules, a suit against him by

the company for compensation is not one merely for tort committed, but is one for breach of fiduciary obligation towards the company and hence

the right to sue survives on his death against his legal representative. I am, therefore, unable to uphold the plea of the respondents that the claim

against Dewan Bahadur N. Swaminatha Iyer did not survive his death on account of the principle of *actio personalis moritur cum persona* and the

decision in (1883) 24 Ch D. 439.

(12) The main question for decision in this case is whether the claim against the respondents is barred by limitation. The learned advocate for the

applicants relied on S. 10 of the Limitation Act in support of his contention that there could be no bar of limitation in this case. But there is no plea

in the application that late Dewan Bahadur N. Swaminatha Iyer was an express trustee in whom the moneys of the Hanuman Bank Ltd. had vested

in trust for any specific purpose within the meaning of the words in S. 10 of the Limitation Act. S. 10 of the Limitation Act could in terms apply

only to "trust for any specific purpose", that is, to cases of express trusts and could have no application to implied trust, that is such trust as law

implies from the existence of particular facts or fiduciary relationship. S. 10 of the Indian Limitation Act applies to cases of what in English law are

called express trusts and not to constructive trusts. The doctrine of the well known case of *Soar Ashwell*, 1893 2 QB 390 namely, that the rule of

limitation will not be applied to certain kinds of constructive trusts has no applicability to India. I have already referred to the decision in *V.*

Narasimha Aiyangar, Official Liquidator of the City Hygienic Milk Supply Co. Ltd. Vs. The Official Assignee of Madras and Others, cited by the

learned advocate for the respondents in support of his contention that the directors of the company are not express trustees. In *Kathiawar Trading*

Co. v. Virchand Dipchand, ILR 18 Bom 119, it was held that the directors were liable to replace the moneys of the company which they had

misapplied by applying them to a purpose which was ultra vires, but that the claim against them could not be saved by invoking S. 10 of the

Limitation Act as they were only quasi-trustees and that it would be unduly straining the language of S. 10 of the Limitation Act, to say that they are

persons on whom the property of the company is vested as contemplated by that section. The statement in *In re, Oxford Benefit Building and*

Investment Society, (1886) 35 Ch D 502 that it is settled by authorities that directors are quasi trustees of the capital of the company, that

directors who improperly pay dividends out of capital are liable to repay such dividends personally upon the company being wound up and that

such an act is a breach of trust and the remedy is not barred by the statute of limitation, is referred to in the above decision. But it is pointed out in

that decision that whereas directors of a company are precluded, in England, from pleading the bar of the statute by virtue, either of a general rule

of the court of Equity applicable to all trustees or quasi-trustees or else by the Judicature Act of 1873, which is applicable to all persons ""holding

property upon trust, the question, whether they are precluded in this country, would depend exclusively upon whether they can, in the language of

S. 10 of the Statute of Limitations, be regarded as ""persons in whom the property of the company is vested in trust for a specific purpose"". Hence

the applicants are not entitled to invoke S. 10 of the Limitation Act in this case.

(13) The view that there is no limitation for causes of action based on breach of trust militates against the express language of S. 235 of the

Companies Act of 1913 and the corresponding S. 543 of the Companies Act, 1956, which specifically refer to breach of trust and provide a

period of limitation.

(14) The respondents in this case are proceeded against only as the legal representatives of the late Dewan Bahadur N. Swaminatha Iyer. Section

10 of the Limitation Act could not be invoked against the respondents who are only the legal representatives of the late Dewan Bahadur N.

Swaminatha Iyer, as the claim is not for following the property of the trust in the hands of the trustee, but is only for compensation.

(15) The learned advocate for the respondents relied on the Arts. 36, 98 and 120 of the Limitation Act as the relevant Articles applicable to a suit

to enforce the claim made in this case. Art. 36 of the Limitation Act is a general article for suit for compensation for acts and omissions amounting

to torts which are not provided for elsewhere. It is clear from the first part of the Article that in order to invoke the article the subject-matter of the

suit should be one for compensation for any misfeasance, malfeasance or non-feasance independent of contract and not specially provided for. The

words ""Malfeasance, misfeasance and nonfeasance"" are equivalent to and have the same significance as the word tort. I have already pointed out

that the claim against late Dewan Bahadur N. Swaminatha Iyer was not founded on tort, but on breach of trust. In Govind Narayan Kakade Vs.

Rangnath Gopal Rajopadhye, , it was held that Art. 120 of the Limitation Act applied to an application under S. 235(3) of the Companies Act and

right to sue accrues on the day on which loss is first ascertained. The loss was first ascertained even prior to the filing of Appn. No. 2826 of 1950

against Dewan Bahadur N. Swaminatha Iyer and others on 26-7-1947. But N. Swaminatha Iyer died on 16-8-1959 and the three years period

from the date of his death expired long prior to the filing of the present application. The learned advocate for the applicants relied on the decision in

The Official Liquidator Vs. N. Krishnaswami Iyengar and Others, , where it was held that the Limitation provided in S. 235(1) of the Companies

Act must be regarded as governing all proceedings under the section and a defence of limitation, which might have been available to a person

charged if a suit had been filed, will no longer be available to him. But S. 235(1) of the Companies Act of 1913 provided only for a period of

limitation of three years from the date of the first appointment of liquidator in the winding up or of the misapplication retainer or misfeasance or

breach or trust as the case may be, whichever is longer, and even the said period has expired. But the learned advocate for the applicants relied on

the special period of limitation provided in S. 45-O of the Banking Companies Act of 1949, as an answer to the plea of limitation raised by the

learned advocate for the respondents.

(16) Sub-section (1) of S. 45-O of the Banking Companies Act provides that in computing the period of limitation prescribed in the Limitation

Act, or in any other law for the time being in force, the period commencing from the date of the presentation of the petition for the winding up of

the banking company shall be excluded. In (1964) 34 Com Cas 225 , it was not disputed that S. 45-O of the Banking Companies Act was

retrospective in its operation especially in view of sub-section (3) thereof. I have already referred to the fact that the relevant article of the

Limitation Act applicable to a claim against directors for recovery of compensation etc. like the present one, is Art. 120 of the Limitation Act,

which provides a six year period of limitation. The six year period of limitation would have ceased to run on 26th July 1947, when the winding up

petition was filed in this case. But the learned advocate for the respondents relied on the decision in (1964) 34 Comp Cas 225 (Mys) & (1964) 34

Comp Cas 34 (Mys) where it was held that sub-section (2) of S. 45-O deals specially with claims against directors dividing them into three

categories, namely, (1) claims for recovery of calls on shares (2) claims based on contracts express or implied and (3) all other claims, and hence

there is no scope for invoking Clause (1) of S. 45-O of the Banking Companies Act. There is no bar of limitation so far as claims falling under the

first two categories are concerned. But there is a period of limitation only in respect of the third category of claims. It is provided in sub-section (2)

of S. 45-O of the Banking Companies Act, that the period of limitation in respect of the third category of claims shall be 12 years from the date of

accrual of such claim, or five years from the date of the first appointment of the liquidator, whichever is longer. Both these periods have expired in

the present case. But the expression ""all other claims"" appearing in sub-section (2) of S. 45-O of the Banking Companies Act would include only

claims which do not fall under the earlier two categories such as claim for compensation for misfeasance. The Bank of Meenachil Ltd. Vs. Chacko

Chacko Kalayakkathil and Others, it was held that claims based on the misfeasance can lie only in respect of acts committed within the twelve

years period preceding the presentation of the application, or five years from the date of the first appointment of the liquidator, whichever is longer,

and that there is no bar of time in respect of claims against the directors based on contractual liability. In Govind Narayan Kakade Vs. Rangnath

Gopal Rajopadhye, it was held that an application by the liquidator under S. 235 of the Companies Act of 1913 was not barred under Art. 36, or

115 or 116 of the Limitation Act and that it was governed by Art. 120 of that Act. At page 246 of the decision (ILR Bom): (at p. 582 of AIR),

while discussing the applicability of Art., 36 of the Limitation Act, Marten C. J. has observed that the claim against the directors for misfeasance or

breach of trust was clearly not independent of contract and consequently Art. 36 did not apply. It is mentioned at page 247 of the decision (ILR

Bom): (at p. 582 of AIR) that the articles of association constitute part, though not the whole, of a contract between the company and its directors.

The following passage in the Indian Company Law by K. M. Ghosh, part I, page 125, para 227 is relevant for the present discussion:

The articles establish a contract between the members and the company, and although there is no contract in terms between each individual

member and every other, the articles regulate their rights inter se. But this contract is not for the benefit of strangers or even of members in some

other capacity, for the articles are not contracts with outsiders. A statement in the articles that a particular person shall be the secretary, manager or

other officer of the company, will not amount to a contract with him; but where on the footing of the articles the directors are employed by the

company and accept office, the terms of the articles impliedly form a contract between the company and the directors.

Thus the possibility of supporting part of the claim for compensation on the basis of an implied contract could not be ruled out, and in that case, the

claim against the deceased N. Swaminatha Iyer, who was the director of the Bank, would not be barred by limitation.

(17) In 1964 34 Comp Cas 34 (Mys) Narayana Pai, J. held that a claim for misfeasance fails within the expression ""all other claims"" in S. 45-O(2)

of the Banking Companies Act and that an application referred to in sub-section (1) of S. 45-O of the Banking Companies Act can never be a

misfeasance application. He has interpreted S. 45-O(1) of the Banking Companies Act thus:

The period to be excluded under sub-section (1) of S. 45-O is one which commences from the date of the presentation of the winding up petition.

Hence, the period to be computed must necessarily be one which commenced prior thereto. Therefore, the suit or application mentioned in sub-

section (1) of S. 45-O must necessarily relate to a cause, the right to sue or the right to make an application in respect of which accrued before the

date of presentation of the winding up petition. It is obvious that the right to make a misfeasance application which could be made only in the

course of winding up of a company arises only after a winding up order is made which is necessarily subsequent to the presentation of the winding

up petition. It follows therefore that an application referred to in sub-section (1) of S. 45-O can never be a misfeasance application.

With great respect to the learned Judge, I find difficulty in accepting this interpretation. No doubt a misfeasance application cannot be presented

before a winding up order has been made. But the claim in respect of it has accrued long before, namely, on the date when the misfeasance was

committed, and S. 543(3) of the Companies Act which says that the application must be made within five years from the date of the misfeasance

would become meaningless if the above interpretation were adopted. There is a distinction between a right to make a misfeasance application and

claim against the director for misfeasance. S. 45-O (1) of the Banking Companies Act like S. 543(3) of the Companies Act, 1956 and S. 45-O(2)

of the Banking Companies Act deals with the latter and not with the former. The period of limitation for misfeasance application has already

commenced before the winding up, though the application can be presented only later and S. 45-O(1) thus applies to such an application.

Applying the above meaning, the present application would be in time under S. 45-O(1) of the Banking Companies Act if it is not barred on the

date of the presentation of the winding up petition which it was obviously not.

(18) There is, however, another objection to the applicability of Clause (1) of S. 45-O of the Banking Companies Act, when there is a specific

provision in respect of claims against directors in Clause (2) of S. 45-O of the Banking Companies Act. The principle of S. 45-O(1) of the

Banking Companies Act suspending the period of limitation from the date of winding up petition would be inconsistent with the provision in S. 45-

O(2) of the Banking Companies Act that a claim could be made against a director only for five years after the first appointment of liquidator in

cases where the 12 year period from the date of accrual of claim is over. That could be reconciled only by holding that suspension of limitation in

Clause (1) is only subject to the five year period mentioned in Clause (2) of S. 45-O of the Banking Companies Act. It stands to reason that when

there is a specific provision in respect of claims against directors in Clause (2) of S. 45-O of the Banking Companies Act, there is no scope for

invoking Clause (1) of S. 45-O of the Banking Companies Act. But if Clause (2) of S. 45-O of the Banking Companies Act could not be invoked

for some reason or other, there is no reason for not invoking the general provision contained in Clause (1) of S. 45-O of the Banking Companies

Act. The claim made in the present case is not against directors but against the legal representatives of a deceased director. No doubt, the cause of

action against the legal representatives is the same cause of action as the one against the deceased director. But the claim against the deceased

director, Dewan Bahadur N. Swaminatha Iyer was made in time by filing application under S. 235 of the Companies Act, 1913. But Dewan

Bahadur N. Swaminatha Iyer died on 16-8-1959, when both the periods mentioned in Clause (2) of S. 45-O of the Banking Companies Act had

expired. It does not stand to reason that the claim against, Dewan Bahadur N. Swaminatha Iyer which did not abate but survived his death, could

not be prosecuted on the ground that the death took place after the period mentioned in Clause (2) of S. 45-O of the Banking Companies Act. In

my opinion, the claim against the respondents, as the legal representatives of the late Dewan Bahadur N. Swaminatha Iyer, arose only after the

death of the latter and it is not governed by Clause (2), but Clause (1) of S. 45-O of the Banking Companies Act. In this view, the claim is within

time.

(19) The learned advocate for the respondents argued that the period of six years provided under Art. 120 of the Limitation Act expired even

prior to 24th October 1953, when S. 45-O of the Banking Companies Act came into force and hence the application is barred by limitation. The

learned advocate for the respondents relied on the decision in *Km. Kr. Kr. Ramanathan Chettiar Vs. N.M. Kandappa Goundan (died)* and

Others, where it was held that if a right to sue had become barred by the provisions of the Limitation Act then in force on the date of the coming

into force of a new Act or amendment, then such a barred right is not revived by the application of the new enactment. The principle of this

decision cannot be disputed. In *Jwala Prasad Vs. Official Liquidator Jwala Bank Ltd.*, it was held that S. 45-O of the Banking Companies Act

which came into force on 24th October 1953 could not be attracted to a case in which the right to apply under S. 235 of the Companies Act of

1913 had already become time barred as there was nothing in that section to show that it was intended to be retrospective in effect in the sense

that it revived remedies which had already come to an end. But the learned advocate for the applicants disputed the fact that the claim was barred

prior to S. 45-O of the Banking Companies Act coming into force. He contended that by virtue of S.45-F of the Banking Companies Act of

1949, as amended by the Banking Companies Ordinance of 1949, which was replaced by the Banking Companies Act of 1950, published in the

Gazette on the 18th March 1950, in computing the period of limitation the period of one year immediately preceding the date of the order of the

winding up of the banking company shall be excluded. Section 45-F of Act 52 of 1953 was repealed and replaced by the present section 45-O of

the Banking Companies Amendment Act of 1953. The learned advocate for the applicants contended that if the said one year period is excluded

the claim made by the applicants would be alive on the date 30-12-1953, when the Act 52 of 1953 came into force. His contention is supported

by several decisions.

In *Pioneer Bank Ltd. v. Bamandev Banerjee*, 21 Comp Cas 90 (Cal), it was held that S. 45-F of the Banking Companies Act 1949 inserted in the

Act in March 1950 is a provision dealing with the procedure and applies to past events. The Banking company in that case was ordered to be

liquidated in July 1949 and it filed a suit in November 1949 on a promissory note executed in October 1945, more than three years after the

execution of the note. It was held in that case that S. 45-F of the Banking Companies Act of 1949 providing for the computation of a special

period of limitation, applied, and therefore the suit was not barred. It is pointed out in the decision that the effect of S. 45-F of the Act 20 of 1950

amending the Banking Companies Act is to suspend the running of limitation for the period of one year prior to the winding up petition. It is clear

from that decision that it is not a case of retrospective operation of an Act, but a provision in a statute dealing with procedure applying to past

events. In *Kalipada Banerjee Vs. Sree Bank Ltd. (In Liquidation)*, it was held that Banking Companies which were ordered to be wound up

before the Banking Companies Act 1949 came into force, were entitled to the benefit of the special period of limitation provided by S. 45-F. It is

pointed out in that decision that the expression "which is being wound up" in S. 45-O(1) of the Act appears to include all banking companies in the

process of winding up whether they be banks ordered to be wound up before or after the Act, so long as the winding up is proceeding. The

banking company in that case was ordered to be wound up on 3-8-1948, and the Official Liquidator of the Bank instituted proceedings for the

recovery of amount due from a customer in respect of an overdraft account. It was held that the proceedings were not barred by time by virtue of

S. 45-F of the Banking Companies Act of 1949 read with Art. 85 of the Limitation Act. Thus the claim of the applicants, or at least that portion of

it which arose within seven years prior to 30-12-1953 was alive when Act 52 of 1953 containing S. 45-O of the Banking Companies Act came

into force on 30-12-1953. The decision of this Court by Balakrishna Aiyar J. in the matter of *Agr. In the matter of Agricultural and Industrial Bank*

Ltd., is also in conformity with the above decisions, and it supports the contention of the learned advocate for the applicants. The bank concerned

in that case was wound up on a petition filed on 18th February 1953 before Act 52 of 1953 came into force. The liquidator filed a claim against

the shareholder for the amount of unpaid calls on 12-1-1956. It was held in that case that though under the Limitation Act the claim would have

been barred within three years from 4th January 1950, which is the date on which the directors of the bank declared that those shares had been

forfeited, the claim was within limitation as the claim was alive on 30th December 1953 when Act 52 of 1953 came into force by reason of S. 45-

F of Act 20 of 1950 and S. 45-O gave a further period of limitation commencing from the date of the presentation of the winding up petition. Thus

it could not be held in this case that the entire claim of the applicants is barred by limitation.

(20) It is true that the question of limitation is not free from difficulty. It is only after taking evidence in this case and coming to the definite findings

of fact on the relevant questions this Court can determine finally as to whether the entire claim or only portion of it is within time. The learned

advocate for the applicants stated that he will file an additional report or a statement stating specifically the several claims which the applicants want

to enforce against the respondents in these proceedings and giving the necessary particulars so that the scope of the enquiry might be restricted. In

filing such an additional report or statement, the liquidator should take into account the claims which would be barred by limitation as pointed out in

the above order and confine the claims to those which are prima facie within time. The applicants are granted two weeks" time to file the necessary

additional report or statement giving the necessary particulars. In the previous enquiry under S. 235 of the Companies Act, evidence was recorded

by the Official Referee. But the enquiries which were being done by the Official Referee are now conducted by practitioners selected and included

in the panel for doing the work. Post this on 23rd September 1964 to appoint a member of the panel or any other person agreed to by the parties

to record the evidence in this case.

(21) Order accordingly.