

(1929) 11 BOM CK 0025
In the Bombay High Court
Case No : First Appeal No. 61 of 1926

Govind Narayan Kakade

APPELLANT

Vs

Rangnath Gopal Rajopadhye

RESPONDENT

Date of Decision : 20-11-1929

Acts Referred:

Companies Act, 1913 — Section 235

Citation : AIR 1930 Bom 572 : (1930) 32 BOMLR 232 : (1930) ILR (Bom) 226

Hon'ble Judges : Patkar, J; Amberson Marten, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Amberson Marten, Kt., C.J.—This is an appeal by Govind Narayani Kakade, respondent No. 5, against the decree of the learned District Judge of Sholapur finding him liable for misfeasance or breach of trust as a director in the sum of Rs. 12,000 jointly with respondents Nos, 1, 2, 3 and 4 on an application made by the petitioner as liquidator of the Sholapur Bank, Limited, u/s 235 of the Indian Companies Act "1913.

2. The main defences are that the appellant not having been guilty of any wilful neglect or default is protected by the articles of association of the bank from this claim : or alternatively, that he has acted honestly and reasonably and ought fairly to be excused u/s 281 of the Indian Companies Act. Another main ground of defence is that in any event the claim against the appellant is barred by limitation.

3. The history of the bank and the main facts of the case have been set out in the judgment of my brother Patkar which I have had the advantage of reading, and also in the judgment of the Court below. I, therefore, need not detail them.

4. Essential dates to bear in mind are that the bank was registered in 1903 and that it was not till 1913 that any apparent trouble arose. There was then, however, a run on the bank, due, it is said, in part to the well-known crisis in

Bombay which arose from the failure of the Indian Specie Bank and other Indian as opposed to European banks. The bank paid out a sum of two and a half lacs of rupees; but on April 23, 1914, it was forced temporarily to suspend payment. On September 9, 1914, there was a petition to the Bombay High Court to sanction a scheme of arrangement, which provided shortly that the creditors should give time to the bank for payment of their debts. This scheme was sanctioned by the Court on January 23, 1915, and the bank resumed business. But on June 2, 1917, the bank went into voluntary liquidation. Subsequently, there was an order for the winding up of the bank under the supervision of the Court, but this supervision order has not been shown to us. The present application by the liquidator u/s 235 was filed on November 18, 1920. A part of the intervening time was occupied by the criminal prosecution of respondents Nos. 1 and 2, who were partners in the firm of K. B. Kale and Company, secretaries, treasurers and agents, i They were convicted of frauds on the bank, and were sentenced.

5. It is important to observe that this firm was the villain of the piece, and primarily responsible for the defalcations that were caused to the bank. Unfortunately as is the case with so many Indian concerns, these agents were not only the promoters of the bank, but also succeeded in establishing themselves as its managing agents for a term of thirty years or longer as fixed by Clause 7 of the memorandum and articles 117 to 119 of the articles of association. Although article 100 provided that the business of the bank should be managed by the board with the assistance of the agents, and article 120 that the directors should cause true accounts to be kept, yet by article 119 the agents were given power to make all purchases, sales, loans, and advances for and on behalf of the bank and also to employ and dismiss all the staff. Consequently, in practice the combined effect of these various clauses was likely to vest all real power in the agents and to enable them to usurp the position which the Companies Act intended should be occupied by the directors.

6. One member of the agency firm was ex officio a director, but as regards the present appellant respondent No. 5, though he was a director from the beginning, he had no connection with the firm, and the learned trial Judge has found expressly that he was guiltless of any fraud. Indeed the charge of fraud was withdrawn in the Court below, and though some attempt was made to revive it here, we held this not to be permissible, having regard in particular to the admissions of the liquidator in the Court below. The subsisting charge then against the appellant is one of wilful negligence, and as to that he undoubtedly has a difficult case to meet.

7. As regards the general position of the Sholapur Bank, Limited, I may observe that though this concern is called a bank, its title is misleading. In fact it more resembled what Mr. Justice Walsh in *In the matter of the Union Bank, Allahabad, Limited* ILR (1925) All. 669 describes as "a sort of glorified money lender or bania." Its initial working capital was only some Rs. 3,885, and even in its most prosperous days that capital only amounted to about Rs. 20,725. With these

slender resources the bank proceeded to receive deposits and make loans on an extensive scale ; and indeed as regards one fortunate firm of borrowers in Bombay, in which 1 the agents were personally interested, viz., Mhalsadas Vithal and Company, the advances to them in the course of one year alone amounted to over four lacs of rupees,

8. It is, here, important to note that the three primary objects with which the bank was established as set out in its memorandum are as follows :-

3. (a) To encourage the habit of saving money.

(b) To facilitate small but safe investments at reasonable rates of interest.

(c) To carry on the trade, and business of bankers in all its branches, and dealings in bullion, money, notes, bills, hundees, or other securities. To receive and employ moneys on loans or deposit, to advance money on substantial personal securities, and securities of all denominations, to conduct and manage exchange operations and such other operations, undertakings and enterprises of a financial character, as the Directors of the Company may think fit.

9. As regards sub-clause (f) which runs, "Generally to transact any business of a Merchant or Capitalist either as Principal or Agent" this is obviously too wide, and would have to be cut down to conform with the main objects of the company (see the judgment of Baggallay and Lindley L. JJ. in *In re German Date Coffee Company* (1882) 20 Ch. D. 169 *Stephens v. Mysore Reefs (Rangundy) Mining Company, Limited* [1902] 1 Ch. 745 and *Pedlar v. Road Block Gold Mines of India, Limited*. [1905] 2 Ch. 427. With all respect, therefore, to the learned trial Judge, I do not attach the importance to sub-clause (f) which he appears to have done in para. 20 of his judgment.

10. It was argued for the liquidator that the expression " personal securities" in sub-clause (o) would not include advances on note of hand without any specific security. But even if this argument is incorrect,, the word "substantial" has yet to be noted. On the other hand, as the learned Judge points out, the opening words in sub Clause (c) extended to "the trade and business of bankers in all its branches." I may here observe that the final words contemplated " other enterprises of a financial character," being such as the Directors might think fit. In fact, as I shall presently show, the directors did little but leave everything to the agents. The latter indeed opened a new branch in Bombay without any clear antecedent consent of the directors. They also made large advances without any specific security, and in my judgment the liquidator has established his contentions that many advances were to unsubstantial people, including the impecunious friends of the agents, and that other advances were to the agents themselves directly or indirectly, I further think that the liquidator has established his case that but for the gross negligence and want of supervision by the directors, substantial debts due to the bank would either not have been made at all or if made would not in all cases have been lost or barred by limitation.

11. As regards the position and duties of the directors of this so-called bank, I may refer to what Mr. Justice Romer says in *City Equitable Life Insurance Co., Re* [1925] 1 Ch. 407:-

It is indeed impossible to describe the duty of directors in general terms, whether by way of analogy or otherwise. The position of a director of a company carrying on a small retail business is very different from that of a director of a railway company. The duties of a bank director may differ widely from those of an insurance director, and the duties of a director of one insurance company may differ from those of a director of another...The larger the business carried on by the company the more numerous, and the more important, the matters! that must of necessity be left to the managers, the accountants and the rest of the staff. The manner in which the work of the company is to be distributed between the board of directors and the staff is in truth a business matter to be decided on business lines.... In order, therefore, to ascertain the duties that a person appointed to the board of an established company undertakes to perform, it is necessary to consider not only the nature of the company's business, but also the manner in which the work of the company is in fact distributed between the directors and the other officials of the company, provided always that this distribution is a reasonable one in the circumstances, and is not inconsistent with any express provisions of the articles of association.

12. In the present case one very striking circumstance is the small attention which the appellant gave to the affairs of this company. I appreciate to the full the evils of the appointment of managing agents with powers like those in the present case. But unless the Companies Act is to be a dead letter, and the directors' names a mere trap for the unwary public, it must, I think, follow that directors have still their duties to perform, and that if they fail to perform them, they must take the financial and other consequences of their negligence.

13. In the present case it is startling to find that over a series of years there were only two effective directors' meetings per annum. We have had the figures taken out from the directors' minute book (Exhibit 66) for the years 1910 to 1915, and they show that there was only one effective meeting in 1910; two in 1911; two in 1912 ; two in 1913 ; three in 1914; and three in 1915. There were some further meetings called in 1911 or 1912, but they were adjourned, we are told, for want of a quorum. Moreover, it will be observed that 1913, 1914 and 1915 were all periods of what one may call acute financial anxiety for the bank. In effect it would appear that the main directors' meeting in each year was for the purpose of passing the balance sheet, and that apart from that, little substantial business was done at those meetings.

14. Nor apart from the directors', meetings does the evidence establish that the directors exercised any effective supervision over the affairs of the bank, or even made any effective inquiries. No general rules were laid down for the guidance of the agents in making advances. And when in August 1912 the directors resolved that the deposits should be reduced as being too large for the subscribed capital,

and that a memorandum of the amounts due to the bank " on personal credit" should be laid before the directors at their next meeting in September, nothing further appears to have been done except that the annual balance sheet, prepared as usual by the agents, was once more passed and issued, and a dividend again paid.

15. As regards the appellant himself, his evidence seems to me to be of a halting and self-condemnatory character, even after making all allowances for the fact that he was giving evidence in 1925 of matters which had taken place many years before. And though when financial troubles overtook the bank, some investigation was at last made, the conduct of the directors continued in my opinion to be open to adverse comment. The balance sheet, Exhibit 62, for the year ending May 31, 1913, which appears to have been published about October 16, 1913, shows no bad debts, and states that debts considered good for which the bank holds no securities amounted to Es. 1,19,207. In the following year the balance sheet, Exhibit 63, as at August 31, 1914, shows the figure of Es. 1,36,212 for a similar item, viz., debts considered good for which the bank holds no security, but adds for the first time an item of no less than Es. 81,926 for "debts considered bad or doubtful." And on the other hand the secured debts in the 1913 balance sheet amounting to nearly two and a quarter lacs have dwindled in the 1914 balance sheet to a mere Es. 21,352. On the facts before him the trial Judge has held that the 1913 balance sheet was false as the figure for secured debts was false as was also the figure for unsecured debts considered good (see judgment para 23). In my judgment this finding was correct in both particulars.

16. I also think that the petition (appeal Exhibit AA.) which was presented to the High Court in 1914 for obtaining confirmation of the scheme of arrangement was inaccurate and misleading in its financial details, and did not represent the then true position of the bank. We have thought it right that this petition and the subsequent proceedings should be in evidence, but as in the lower Court the appellant was not cross-examined on the petition, I do not propose to lay stress upon the fact that he was one of the petitioners.

17. It would also appear from the balance sheets from 1910-. 1913 and other documents, that ostensible profits were shewn in each year, and that the following dividends were paid, viz., Rs. 869 in 1910, Rs. 1093 in 1911, Rs. 1804 in 1912, and Rs. 1554 in 1913. I think it reasonably clear that if the accounts had been properly kept and a proper allowance made for bad debts, a loss would, have been shewn and not a profit. Consequently, the dividends paid must have been paid out of capital, and in breach of the general law and incidentally of article 140 of the articles of association. But as the liability of the appellant has not been based specifically under this heading in the Court below, I need not pursue the point further.

18. This then being the general position, how has the learned Judge arrived at the amount of Rs. 12,000 for which he has held the appellant liable ? He has first

found the agents liable for Rs. 1,06,000, in respect of the aggregate losses amounting to Rs. 1,27,869 enumerated in Exhibits 107, 108 and 109. These Exhibits are lists filed respectively by the liquidator of

(a) advances for Rs. 72,906, without security to the agents or their friends or relatives or to bogus companies which the directors and agents would have discovered with ordinary care and diligence,

(b) advances for Rs. 43,408 without security which have become time-barred but which could have been recovered with ordinary care and diligence by the agents and directors, and

(c) advances for Rs. 11,555 without security to persons of no means which have become time-barred, and in respect of which the agents and directors were grossly negligent in making the advances and in taking no steps to recover them.

The learned Judge has next held that roughly half this loss of Rs. 1,06,000 might have been avoided if the directors had exercised any control and supervision over the agents. He accordingly held that the directors were responsible to make good at least Rs. 53,000 to the liquidator. But as regards two of the directors, they had compromised for Rs. 15,000. So, as regards the appellant, the Judge thought it fair to reduce the Rs. 53,000 to Rs. 38,000 as his strict liability. The Judge then went one step further, and held that under all the circumstances he could reduce the appellant's actual liability to one-fourth of Rs. 48,000, viz., Rs. 12,000, as the appellant was only one of a board of five directors, and one director had retired in 1913 and paid Rs. 5000, thus reducing the above Rs. 53,000 to Rs. 48,000. In making that reduction he in part relied on Section 281 of the Indian Companies Act.

19. It will be seen, therefore, that in the result the appellant has only been ordered to pay about one-ninth of the above aggregate losses of Rs. 1,06,000 as found by the learned Judge. There is, therefore, a very wide margin allowed for difficulties of proof as regards some individual items. Accordingly, it is not surprising that the appellant has not disputed before us the question of quantum, if once his negligence and legal liability are established. On the other hand no cross-appeal has been tiled by the liquidator, and so it is unnecessary to consider whether a larger amount should have been awarded. In fact, this case does not permit of mathematical accuracy. It is essentially a case where, as the learned Judge indicates, one has to assess the damages on broad lines. In the present case we have the advantage of the chain of reasoning which led the learned Judge to fix Rs. 12,000. If the case had been tried with a jury, we should only have known the figure, and in my opinion there would have been ample evidence to justify a verdict by a jury for that amount of damages or compensation.

20. I will next deal with the legal liability of the appellant, if any, to answer any part of these losses. Negligence, I think, is amply proved, despite Mr. Nadkarni's earnest and able argument to the contrary. But does this negligence amount to "wilful negligence" or "his own personal wilful act, neglect or default" within the

exceptions to the indemnity conferred upon him by articles 98 and 99 of the articles of association ? In my judgment it does. The cases of City Equitable Fire Insurance Co., In re [1925] 1 Ch. 407 and Davey v. Cory [1901] A. C. 477 in each of which the directors successfully disputed their liability, were much relied on by the appellant to prove the contrary. In the former case there was a special indemnity clause. In the latter there was not. But as regards the facts it is difficult to compare the diminutive Indian company and its supine directors before us with the heavily capitalised English corporations and their active directors in the cases cited. The only real point of comparison is that both East and West had to deal with, a rogue as one of the CO" directors.

21. But as to the law the judgment of Lord Justice Sargant in the former case seems to me the more helpful for present purposes. In City Equitable Fire Insurance Co., In re, he says (p. 528) :-

That being so, we have to consider how the matter would stand if the company itself was suing the auditors, and for this purpose we must deal with the question as to what is the extent of the protection given to the auditors by reason of the latter half of Article 150. What is the meaning of the exception " wilful neglect or default" in that article ? Romer J. has analysed with great care the cases on the subject, and in my" opinion he has, as a result of that analysis, come to a correct conclusion. I think that the word " wilful" in this phrase is of importance, and means that the officer in question is consciously acting, or failing to act, in a reprehensible manner. It may no doubt be for him to show that this is not so, and I do not think he would be protected if he simply failed to give any consideration at all to the question of his duties, if he acted recklessly and without caring whether he was fulfilling them or not. But, in my judgment, these words excuse an officer if through mere inadvertence or error of judgment, and while endeavouring honestly to carry out his duty he does or omits to do something which apart from these words might have rendered him liable. I need not carry the definition further, for as will be seen this is enough, having regard to the view I take of the facts.

The reason for this last sentence arose from the special facts of the case. The learned Judge goes on to state that there were two circumstances on which special stress should be laid. The first was the very great care exercised by Mr. Lepine (the auditor in question) in the performance of his duties, a circumstance to which marked attention was drawn in the judgment of the Court below. The second was that Mr. Lepine was dealing " with a most unusual state of things, a combination in Mr. Bevan of exceptional ability, exceptional reputation and quite exceptional roguery."

22. In the present case the facts are essentially different as regards the care exercised by the directors. Nor have we to deal with a financier of Mr. Bevan's exceptional qualities. In my judgment then the conduct of the appellant in the present case would be wilful as explained by Sargant L. J. in the City Equitable case, viz., " as consciously acting or failing to act in a reprehensible manner."

There it was expressly found by all the Judges that the directors had not been wanting in diligence. In the case before us, I think a director could hardly take less effective care than the appellant did; and in my judgment he must have been fully conscious of his want of attention to the bank's affairs. True it is that at a late stage, viz., 1918, he appears to have proposed that the C. I. D. should be called in (see his evidence and para. 9 of Exhibit 70.) But in 1912 he took no steps to enforce the directors' resolution for information as to the bank's debtors, and in 1914 he unsuccessfully opposed the proposed production of the accounts of the Kolhapur branch to a committee of shareholders and depositors. Exhibit 67 shews that this committee suspected fraud, and though according to the appellant this committee finally did inspect the accounts, yet in his cross-examination he says:-

I do not remember if its report came ultimately before us. There was no correspondence between the committee and directors, I did not inquire what that committee did. We directors told the agents to do the needful. We did not further investigate into allegations of confusion in Kolhapur accounts.

23. I quote this because the Kolhapur branch made heavy losses-about half the total losses according to the liquidator's evidence-and because the appellant's conduct in this matter appears to me to be typical of his general conduct as a director. He also admits that he never went to Kolhapur to see about the work of that branch, nor was any other director sent, apart from the agents. Further the accountant Sadashiv (Exhibit 97) deposes that the accounts of the Kolhapur branch were never reconciled with those at Sholapur, and in his report Exhibit 72, he sets out the detailed figures year by year. In his opinion the object of this omission was to conceal the misappropriations by the agents. As to the excuse put forward by the appellant that in 1915 he asked the agents for certain information and did not get it, this seems to me to be insufficient. According to the liquidator, the appellant was the editor of a newspaper, the agent of a life insurance company and a man well versed in business. And no suggestion was made to us that at any time his physical or mental powers were impaired, although he gave his age at the trial as 69. So I see no adequate excuse for his inaction. Further, according to the liquidator, the period of limitation in the Kolhapur Courts was only three years, although in Akalkot it was six years. So some diligence was particularly desirable.

24 Taking then the case as a whole, it more resembles *In the matter of the Union Bank, Allahabad, Limited* ILR (1925) A11. 669 and *The New Fleming Spinning and Weaving Company, Limited v. Kessowji Naik* ILR (1885) 9 Bom. 373 than any other cited. In the former case directors who trusted a manager blindly were held liable to make good dividends paid out of capital. The main differences are that no agents were appointed as here, and that the articles expressly put the management under the directors ; and that the misfeasance was in respect of the above dividends and not by way of general damages for loss of assets, and that there was no special indemnity clause. The similarities are that the

ostensible profits out of which dividends were paid did not in fact exist owing to the loss of assets caused by the frauds of the manager: and that this loss in its turn was held due to the slackness and inaction of the directors. In *The New Fleming Spinning and, Weaving Company, Limited v. Kessowji Naik*, directors were held liable by Mr. Justice Scott; for gross negligence in permitting loans to the agents whom they had also appointed to be the company's bankers. There at p. 413 it was said of the directors :-

They certainly were not appointed to be mere dummies (luring those fifteen months ; nominally to watch over the interests of the shareholders, but in reality to supply without enquiry the wants of the agent, find sanction blindly all his acts. If they drifted into such a position through their confidence in him, I hold that they failed to perform their duty, and ran the risk of being-held liable to any losses caused by the misconduct of the agent, which would not have accrued had they exercised the duties clearly imposed upon them by the articles I have cited.

The learned Judge tells us at p. 412 that the articles provided that the business of the company was to be managed by the board with the assistance of the agent : and pages 375 and 376 show that the agents had power to enter into all contracts and to appoint and dismiss employees. This resembles our articles 100 and 119. On the other hand there were no special indemnity clauses such as our articles 98 and 99.

25. But, as pointed out by Lord Macnaghten in *Dovey v. Cory* [1901] A. C. 477 each case of this nature depends largely on its own facts. Thus he says (p. 488) :-

And I do not think it desirable for any tribunal to do that which Parliament has abstained from doing-that is, to formulate precise rules for the guidance or embarrassment of businessmen in the conduct of business affairs. There never has been, and I think there never will be, much difficulty in dealing with any particular case on its own facts and circumstances ; and, speaking for myself, I rather doubt the wisdom of attempting to do more. I understand from my noble and learned friend Lord Shand that he also takes this view.

Then at p. 489, Lord Davey quotes the judgment in *Ranee's Case* (1870) L.R. 6 Ch. 104 of Lord Romilly as follows:-

The learned judge explained what he meant by a fraudulent payment: " I mean one where the person who makes it or is concerned in making it is at the time aware of the impropriety of making it, but does so in order to obtain a benefit for himself." And he adds : "The director may be ignorant of this fact, but if his ignorance arises from his wilfully shutting his eyes to the facts which are before him, he is equally guilty".

And then Lord Davey proceeds (p. 490):-

I think that this statement of the law is very nearly, "but not quite, accurate. In my opinion it is not necessary that the motive of the improper payment should

be to obtain a benefit for the director himself, I also understand Lord Romilly to include in the expression "wilfully shutting his eyes", culpable negligence or reckless indifference by the director in the performance of his duties.

Then, after citing the judgment of Stirling J. in *Leeds Estate, Building and Investment Company v. Shepherd* (1887) 36 Ch. D. 787 Lord Davey continues :-

My Lords, I agree in this statement of the law, and I do not think it inconsistent with that of Lord Romilly, properly understood, and subject to the observation which I have already made upon it. It is by this standard that the conduct of the respondent must be judged in this case.

26. No case precisely on all fours as regards the facts had been cited to us. But in my judgment the expression "wilfully shutting his eyes", as explained by Lord Davey, aptly applies to the conduct, or rather I should say to the misconduct, of the appellant in the present case. For as pointed out by Romer J. in *City Equitable Fire Insurance Co., In re* [1925] 1 Ch. 407 quoting Lord Justice Bramwell's definition of "wilful" in *Lewis v. Great Western Railway Co.* (1877) 3 Q. B. D. 195 the misconduct, not the conduct, must be wilful."

27. The result is that in my judgment the appellant's defence, so far as it is based on the protection given him by the articles of association, must fail, for in his case the exceptions stated in articles 98 and 99 have been established against him.

28. I would also hold that his defence u/s 281 of the Indian Companies Act must fail. That section is not meant to cover gross neglect of a director's ordinary duties over a long series of years. In the gross neglect shown by the appellant in the present case he has not, in my opinion, acted "reasonably, nor ought he" fairly to be excused." With all respect, therefore, I do not think the lower Court was entitled to apply Section 281 as was done in para. 33 of the judgment.

29. This leaves me with the defence of limitation to deal with. This is based on Sub-section (3) of Section 235 of the Indian Companies Act, which enacts that "the Indian Limitation Act shall apply to an application under this section as if such application were a suit." It is a pity that the Legislature did not make this sub-section more explicit. As it is, no less than four different Articles of the Indian Limitation Act have been relied on in one or other of the rival arguments before us, as being the Article which the Legislature intended to apply to misfeasance applications by a liquidator. The appellant has put forward Article 36 or alternatively Article 115. The liquidator has put forward Article 120 or alternatively Article 116. The appellant relies on the judgment of Mr. Justice Harrison and Mr. Justice Fford in *Shim Singh v. Liquidator, Union Bank of India* ILR (1926) Lah. 107 holding that Article 36 is the appropriate Article in such a case, and dissenting from the judgment of Sir Cecil Walsh and Mr. Justice Mukerji in *In the matter of the Union Bank, Allahabad, Limited* ILR (1925) All. 669. The liquidator relies on the latter case where it was held that Article 120 is the appropriate Article, and that Section 235 of the Indian Companies Act confers a

new right of action upon the liquidator. That case in its turn dissented from the view taken by the Lahore High Court in the case of *The Bank of Multan v. Hukam Chand A. I. R. (1923) Lah. 58* not reported in the authorised reports. My experience in the Bombay High Court is that no Act has given rise to more differences of judicial opinion than the Indian Limitation Act. And in the present case I regret to find that, with all respect to the learned Judges who decided these two reported cases, I am unable to adopt entirely the interpretation of the Act given either in the one case or the other.

30. As regards Article 36 I feel no difficulty. In my judgment the present claim against the directors for misfeasance or breach of trust is clearly not "independent of contract" and consequently Article 36 does not apply. In this respect, therefore, I agree with the view of the Allahabad High Court in *In the matter of the Union Bank, Allahabad, Limited*, in preference to that expressed by the Lahore High Court in *Bhim Singh v. Liquidator, Union Bank of India*. I say this because the relations between the bank and its directors are in part governed by numerous articles in the articles of association, including their qualification shares and remuneration, and indeed the very indemnity which they are relying on in this case. In my opinion these articles constitute part, though not the whole, of a contract between the company and its directors.

31. In support of this view I may refer to what was held in *City Equitable Fire Insurance Co., In re [1925] 1 Ch. 107* already cited. There at p. 520 Lord Justice Warrington dealt expressly with this point and held, that Article "150 in that case giving an indemnity to directors and auditors, formed part of a contract between the company and its auditors. He said :-

In the first place, I think that that article, as the learned judge has held expressly in the case of the directors and impliedly, if not expressly, in the case of the auditors, does in such, a case as the present form part of the contract between the company and the auditors, and for the reason that auditors are engaged without any special terms of engagement. When that is the case, then if the articles contain provisions relating to the performance by them of their duties and to the obligations imposed upon them by the acceptance of the office, I think it is quite plain that the articles must be taken to express the terms upon which the auditors accept their position. Of course, if the terms of their employment are expressed in a separate document, then that document must be taken to define the conditions of their engagement, and it would not be proper to assume any implied terms either from the provisions of the articles or elsewhere. But in the present case I think it is quite plain that the terms of Article 150 do, according to their proper construction, whatever that may be, effect a modification in what would prima facie be, but for that article, the obligation and liability of the auditors.

32. So, too, in *Molineaux v. London, Birmingham and Manchester Insurance Company [1902] 2 K. B. 589* Lord Justice Cozens-Hardy, in delivering the judgment of the Court of Appeal, said (p. 595):-

On principle, and apart from authority, it seems to us that a person who accepts an appointment as director, knowing that the holding of a certain number of shares is a necessary qualification, and acts as director, must be held to have contracted with the company that he will, within a reasonable time, obtain the requisite shares either by transfer from existing shareholders or "directly from the company.

And then at p. 596 he said :-

The articles, though not themselves a contract between the company and the director, must be regarded as shewing the terms upon which on the one hand he agrees to act as director, and on the other hand the company agree to pay him remuneration for his services.

And in *Brazilian Rubber Plantations and Estates, Limited, In re* [1911] 1 Ch. 425 Mr. Justice Neville after citing these observations said (p. 440):-

And, having regard to the above decision, I do not see how to escape from the conclusion that this immunity was one of the terms upon which the directors held office in this company.

This decision of Neville J. was in its turn followed by Romer J. in *City Equitable Fire Insurance Co., In re* [1925] 1 Ch. 407 without expressing any opinion of his own ; and though counsel for the liquidator intimated his intention to question it in the Court of Appeal, there was, eventually, no appeal as regards the directors, and the appeal failed as regards the auditor as I have already shown.

33. Having regard to these decisions of the Court of Appeal, I do not think that I need consider in any detail the judgment of Astbury J. in *Hiclemun v. Kent or Romney Marsh Sheep Breeders' Association* [1915] 1 Ch. 881. The actual decision was that an article providing for the reference of disputes to arbitration was a sufficient submission in writing within the English Arbitration Act, 1889, as between the association and its members. In the course of his judgment the learned Judge reviewed the various authorities as to the effect of Section 14 of the English Companies (Consolidation) Act 1908 (corresponding to Section 21 of the Indian Companies Act 1913), and came to the conclusion at p. 900 that the articles do constitute a contract between a company and its members in respect of their ordinary rights as members, but not in any other capacity as, e. g., a director, nor do they constitute a contract between the company and a third person. In so far, if at all, as the opinion expressed by the learned Judge is inconsistent with the above decisions of the Court of Appeal, I would respectfully follow the latter,

34. In the present case the appellant was one of the original directors named in Article 85. But under article 87 he had to retire at the first general meeting, and article 88 provided for the subsequent retirement of directors by rotation. Under article 89 it was for the general meeting to appoint successors and in default the retiring directors were to continue to act until successors were duly appointed by

a subsequent general meeting. We have looked at the original of the company's minute book, Exhibit 67, and it appears therefrom that the appellant was formally reappointed a director in each of the years 1909, 1912 and 1916. Accordingly there must at various times have been something in the nature of an offer by the appellant to serve further, and an acceptance of that offer by the company or vice versa, either express or implied. And so the whole contract was not in the articles.

35. As regards the directors' remuneration, we have required the Registrar of Joint Stock Companies to produce to us the original memorandum and articles which had been returned to the witness Kashinath (Exhibit 52). This original shows that the amount fixed for remuneration by article 84 was Rs. 5 per meeting, and that the copy Exhibit 53 is incorrect in omitting that figure. This is confirmed by the evidence of the liquidator (Exhibit 65, para. 45), and of the accountant, Exhibit 97. Accordingly that term in the contract between the company and the directors is to be found in the articles.

36. There is no evidence before us to shew that there was ever any formal written contract independent of the articles. Consequently, the possible exception which Warrington L. J. had in mind in the city Equitable case at p. 521 above cited need not be considered here. I may also add that although one would gather from the evidence of the witness Kashinath (Exhibit 52) that the appellant as an original director named in Article 85 was one of the original signatories to the memorandum and articles, yet the production of the original shows that this was not so. But even if he had been an original signatory, I would not have attached importance to it in the present case.

37. My conclusions then in the present case are that following the decision in the City Equitable case there was a contract between the company and each of its directors, and that the terms of such contract are to be found mainly in the articles of association, but partly dehors the articles. I have already held that Article 36 of the Indian Limitation Act does not apply, and in my opinion the better view is that neither Article 115 nor Article 116 applies either. I say that Article 116 does not apply because the whole of the contract was not in writing registered. A more difficult question then arises as regards Article 115. The conflicting arguments were that if Article 116 did not apply, then Article 115 must, for the contract must either be "in writing registered " or " not in writing registered." One answer made to this argument was that Article 115 would not apply either, because part of the contract was " in writing registered," via., in the articles of association. For this purpose the decision of Sir John Wallis and Mr. Justice Seshagiri Ayyar in Ripon Press and Sugar Mitt Co., Ltd. v. Kama Venkatarama Chetty ILR (1918) Mad. 33 was relied on to the effect that the expression "registered" includes articles of association registered under the Indian Companies Act, and that accordingly a suit by a shareholder to recover dividends from the company was governed by Article 116. This case was followed by Mr. Justice Mukerji in In the matter of the Union Banle, Allahabad, Limited ILR

(1925) All. 669 It was, however, dissented from by the Madras Full Bench in *Rama Seshayya v. Sri Tripurasundari Cotton Press, Bezwada* ILR (1923) Mad. 468 where it was held that such a suit was governed by Article 120 and not by Article 115 or 116. The view of the Full Bench was that a dividend was a debt, and that no Article expressly applied to a debt. There Coutts Trotter C. J. said (p. 478) :-

The Indian Limitation Act is one of those unfortunate pieces of Indian legislation which by trying to provide for everything conceivable very often ends by leaving out cases of the most glaring description. I might take this as a very good instance, for there is no article which provides simpliciter for a debt due, such a debt as would have been the subject of the old common law action in debt, although, oddly enough, provision is made by article 63

for money payable for interest upon money due from the defendant to the plaintiffs";

so that a special article is enacted for the interest and nothing is said whatever about the principal debt.

Maneldal Mansukhbhai v. The Suryapur Mills Co., Ltd. ILR (1927) 52 Bom. 477 was a suit by a company against a shareholder based on the forfeiture of his shares and his consequent liability under an express article to pay all moneys then payable. The Court held that there was an express) or implied contract to pay and that Article 115 was the appropriate Article. Mr. Justice Crump negatived Article 116 because he agreed with the view of the Madras Full Bench that the word "registered" in Article 116 of the Indian Limitation Act was confined to registration under the Indian Registration Act, 1908. My judgment in that case left that particular point open, but negatived Article 116 because in any event the whole of the contract was not in writing registered. It does not, however, appear that the point was ever taken that Article 115 could not apply either because part of the contract was in writing registered. That point is, however, now taken, and on the whole I think it should succeed, as I prefer the view expressed by Sir John Wallis in *Ripon Press and Sugar Mill Co., Ltd v. Nama Venkatarama Chetty* as to the meaning of the word " registered " to any of the judgments which conflict with it.

38. Another answer to the argument on Article 115 is that the misfeasance to be established in the present case must be a breach of trust or misfeasance in the nature of a breach of trust as pointed out by Lord Macnaghten in *Cavendish Bentinck v. Fenn* (1887) 12 App. Cas. 652 and that Article 115 is not strictly applicable to a misfeasance of that character, nor is Article 116, as " breach of contract" is not the sole liability sued on, nor is it the usual nomenclature for a breach of trust whether specific or quasi. But whichever answer is adopted, this leaves us only with Article 120. Accordingly in my judgment Article 120 is the appropriate Article to adopt, and in this respect I arrive at the same conclusion as that in *In the matter of the Union Sank, Allahabad, Limited*. So, too, in

Kathiawar Trading Company v. Virchand Dipchand ILR (1893) 18 Bom. 119 Sir Charles Sargent's judgment treats Article 120 as the appropriate Article for a suit against directors for misapplication of the company's funds in ultra vires transactions, though the actual decision was that the suit was barred by laches.

39. Applying then Article 120 to the present case, the period of limitation was six years from the time when the right to sue accrued. The present application was made OH November 18, 1920, and it was argued by the liquidator in reliance on In the matter of the Union Bank, Allahabad, Limited, that the right to sue accrued at the date of liquidation, viz., June 2, 1917. But, with all respect to the view of the Allahabad High Court and of the learned trial Judge in the present case, I am unable to accept this solution of the difficulty. Accordingly on this point I agree with the view of the Lahore High Court in Bhim Singh v. Liquidator, Union Bank of India ILR (1926) Lah. 167 and would follow Cavendish Bentinck v. Fenn, where Lord Macnaghten held that (p. 669):-

it has been settled, and I think rightly settled, that that section creates no new offence, and that it gives no new rights, but only provides a summary and efficient remedy in respect of rights which apart from that section might have been vindicated either at law or in equity.

That was also the view expressed by the Court of Appeal in the City Equitable case (see the judgment of Pollock M. R. at p. 507.)

40. The case of Cavendish Bentinck v. Fenn also shews that a misfeasance application, to be successful, must establish that actual loss resulted to the company from the misfeasance. But by Section 24 of the Indian Limitation Act, in the case of a suit for compensation for an act which does not give rise to a right of action unless some specific injury actually arises therefrom, the period of limitation is to be computed from the time when the injury results. So, too, u/s 23 in the case of a continuing breach of contract, a fresh period of limitation begins to run at every moment when the breach continues.

41. Now in the present case the losses arose from the various causes I have already mentioned, but I think they were not definitely ascertained prior to the balance sheet for the period June 1, 1913, to August 31, 1914, which was laid before the company at its general meeting on February 28, 1915, together with the directors' 10th Annual Report (See Exhibit 63/2). This balance sheet includes amongst the assets Rs. 81,926 for "debts considered bad or doubtful," but the contra amount "reserved for bad debts" is only Rs. 5,700, and even then a loss of Rs. 5,418 is incurred. The directors' report is significantly silent as to the Rs. 81,926 for bad or doubtful debts.

42. I would take, therefore, February 28, 1915, as being the earliest date "when the specific injury actually arose" within Section 24, and consequently the date when the right to sue accrued. In this connection I think that "injury" in Section 24 includes a legal injury;; and that the present application is clearly one for "compensation," which is the expression used in Section 285 of the Indian

Companies Act itself. And in so far, if at all, as the case is not covered by Section 24 I think it comes within Section 23. As I have already held, there was here a breach of contract by a director, and in my opinion it was a continuing breach of contract right down to the above meeting of February 28, 1915, and later.

43. Under these circumstances it follows that in my judgment the liquidator's application of November 18, 1920, was brought in time, and that consequently the appellant's defence based on limitation entirely fails. I may add that a similar result would be arrived at if, contrary to the view I hold, Article 116 was regarded as the appropriate Article to apply. The period of limitation in that Article is also six years, and the Article contains by reference a provision for continuing breaches of contract.

44. In the result, therefore, I agree with the conclusion arrived at by the learned trial Judge and would dismiss this appeal with costs.

45. I should like to acknowledge the special assistance which the arguments of Mr. Coyajee and Mr. Nadkarni for the appellant and of Mr. Kane for the liquidator have given us in the present case, and to regret the delay which my absence on leave has caused in delivering judgment.

46. I would also like to add that in my opinion this appeal shews the desirability of some amendment of the Indian Companies Act 1913, so as to nullify the existing differences of opinion in various High Courts as to the effect of Section 235 of that Act, and also to nullify the wide indemnities given by such articles of association as articles 98 and 99 in the present case. In this connection I would draw attention to Section 152 of the new English Companies Act 1929, which in effect makes articles of that nature void. That Act also makes other important amendments for the protection in England of the investing public. This, however, is a matter for the Indian Legislature to decide on here. Fools cannot wholly be protected from the wiles of company promoters, and agents, but the path of the latter may be made more difficult by the Legislature, and particularly so in a case like the present, where, thanks to the managing agents and the directors, the expressed objects of the company, viz., "to encourage the habit of saving money and to facilitate small but safe investments", have been sadly falsified in actual practice.

Patkar, J.

47. [His Lordship after setting out facts proceeded :] It is urged on behalf of the appellant with reference to articles 98 and 99 of the articles of association, Exhibit 53, that defendant No. 5 is indemnified in respect of any act done by him in execution of his office, or by reason of any error in judgment on his part except only through his wilful fraud or negligence, and that he is responsible only for any liability occasioned by his own personal wilful act, negligence or default. It is further urged that under article 119 of the articles of association, the secretaries, treasurers and agents had the general management of the business of the company and they were empowered to make purchases, sales, loans, and

advances for and on behalf of the company, Reliance has been placed on the decision of Romer J. in *City Equitable Fire Insurance Co., In re* [1925] 1 Ch. 407 which lays-down the duties of the directors and defines the scope of wilful neglect or default. Reliance is also placed on the decision of the House of Lords in *Dovey v. Cory* [1901] A. C. 477 and particular stress is laid on the remarks of Lord Macnaghten that when all charges involving moral obliquity against the director Mr. Cory were withdrawn the case was at an end. It is further urged that the appellant took all reasonable care in the discharge of his duty and was not responsible for the fraudulent conduct of the agents on whom he relied and by whose statements he was misled. It is also urged that the application u/s 285 is barred by limitation under Article 36 of the Indian Limitation Act.

48. The first question in this appeal is whether the appellant, original defendant No. 5, is liable in this case on the ground of breach of trust, negligence and misfeasance resulting in the loss to the bank. In *City Equitable Fire Insurance Co., In re*, it was held that, in discharging his duties, a director must act honestly, and must exercise such degree of skill and diligence, as would amount to the reasonable care which an ordinary man might be expected to take, in the circumstances, on his own behalf; and that his duties are of an intermittent nature to be performed at periodical board meetings, and at meetings of any committee to which he is appointed, and though not bound to attend all such meetings he ought to attend them when reasonably able to do so. With regard to wilful neglect or default, it was held that an act, or an omission to do an act, is wilful where the person who acts, or omits to act, knows what he is doing and intends to do what he is doing, but if that act or omission amounts to a breach of that person's duty, and therefore to negligence, he is not guilty of wilful neglect or default unless he knows that he is committing, and intends to commit, a breach of his duty, or is recklessly careless in the sense of not caring whether his act or omission is or is not a breach of his duty. At page 428 it was held that the care which a director is bound to take has been described by Neville J. in *Brazilian Rubber Plantations and Estates, Limited, In re* [1911] 1 Ch. 425 as "reasonable care" to be measured by the care an ordinary man might be expected to take in the circumstances on his own behalf. In *City Equitable Fire Insurance Co., In re*, the learned Judge was satisfied from the evidence adduced before him that each one of the directors was willing and anxious to give of his best to the company and at all times took as active a part in the work of the board as the circumstances would reasonably permit (p. 444), and at page 426 it was laid down that the duties of a bank director may differ widely from those of an insurance director, and the duties of a director of one insurance company may differ from those of a director of another. The case of *City Equitable Fire Insurance Co., In re*, related to insurance directors whereas in the present case we are concerned with a bank director.

49. The duties of a bank director have been considered in *In the matter of the Union Bank, Allahabad, Limited* ILR (1925) All. 669 it was held:-

It may well be that a director or a body of directors having apparently an honest manager cannot be, u/s 281, called upon to keep a constant watch and check upon a fluctuating stock like yarn which is going in and out of the "mill and which is being" used daily in the handling of the company's business. To impose such, a duty upon directors, as the Courts have said, would lead honest men to refuse to undertake such a responsibility. But that is a very different thing from a Hank director taking no steps whatever to see that the manager does not lend, the funds and the depositors and shareholders' capital to worthless debtors and to persons who offer no security.

50. Walsh J. has distinguished the case of *Davey v. Cory* [1901] A. C. 477 and the remarks of their Lordships of the Privy Council in *Prefontaine v. Grenier* [1907] A. C. 101 and held that a director who honestly trusted a fraudulent manager is not necessarily free from all liability.

51. The question of the appellant's liability has to be considered on the evidence in the case. Under article 120 of the articles of association the directors are required to cause true accounts to be kept of all the transactions, and article 123 requires the directors to lay before the company at least once in every year a statement of income and expenditure. It is urged on behalf of the liquidator that no control was exercised by the directors including the appellant over the agents and the treasurers. A branch was opened at Bombay without any resolution of the directors. From 1915 to 1917 no balance sheet was issued and the debts were allowed to become time-barred, and bad debts were shown at Rs. 81,000. The agents were allowed to advance bad debts to relatives without inquiry, and balance-sheets, Exhibits 62, 63 and 64, were false in fact, and the directors did not exercise proper supervision over the agents of the bank.

52. Exhibit 66 shows that there were in all thirteen meetings held in six years, and though the appellant in his evidence says that he looked to the business and exercised supervision, there is no reliable evidence on the record to establish the truth of his story. Though in August 1912 a list of loans was asked for from the agents, no further steps were taken by the directors although the agents did not supply the list. The number of meetings held by the directors is indicative of the lack of control exercised by them over the agents. In *City Equitable Fire Insurance, Co., In re*, the directors were men of integrity and high business capacity and were willing and anxious to give their best to the company, and at all times took as active a part in the work of the board as circumstances would reasonably permit. The learned District Judge says in his judgment in this case (paragraph 28) that the measure of the directors' supineness and lack of any attempt to control the agents may be gathered from the fact that the agents even opened a branch at Bombay practically in spite of the directors and yet the directors did nothing.

53. Three statements were filed by the liquidator, Exhibits 107, 108 and 109. Exhibit 107 is the list of money advanced to bogus companies, minors and relatives and friends of the agents and the agents themselves without security.

The total of these loans comes to Rs. 72,906. Exhibit 108 is the list of the items amounting to Rs. 43,408 advanced without any security which could have been recovered with ordinary care and diligence. Exhibit 109 is the list of irrecoverable advances made to persons of no means without any security to the extent of Rs. 11,555. Exhibit 107 represents the list of fraudulent loans, Exhibit 109 is the list of negligent loans or loans advanced without any proper care which could be expected of a prudent manager, and Exhibit 108 represents the list of items which were lost to the company on account of negligence in not recovering them though the amounts were recoverable. In the list Exhibit 107 there is one khata called Mhalsadas Vithal & Co., No. 91. It appears from the evidence that Mhalsa was the name of the wife of defendant No. 2 Dhondo, and Vithal was the name of his son, and that the company was a bogus company carried on in the name of the wife and the son of defendant No. 2. It appears from Exhibit 72 at page 185 that between March 1910 and February 1911, within a space of twelve months, Rs. 4,08,663-13-0 were advanced to this bogus company. The appellant as the director of the bank ought to have enquired of the standing and the position of a company which was described as Mhalsadas Vithal & Co. to whom an amount of over four lakhs was advanced during the course of a year. With regard to another bogus company called Triple & Co. the appellant admits in his evidence that the agents explained that Moghe Brothers were the proprietors of Triple & Co. and he was satisfied with that explanation though he knew nothing about Moghe Brothers himself. It appears from the evidence of Sarangdhar, Exhibit 92, at page 48, that no register of references, showing the position and standing of customers, was forthcoming though it is usually kept by banks to ascertain the position of the constituents of the bank. The appellant admits in his evidence at page 65 that as a director he was bound to see that the business of the bank was conducted in a proper manner and that he was responsible to see that the accounts were properly kept though he was not responsible to see that the loans were made to proper persons. No rules were laid down by the directors as to the persons to whom loans were to be advanced whether on khatahs or on promissory notes, and whether acknowledgments of the debts were to be taken within the period of limitation. It appears from the evidence of the liquidator that the major portion of the amount lost was from the Kolhapur accounts and that neither were suits filed nor acknowledgments taken to keep the debts within limitation. It appears from the evidence of Damodar Vaman Lohokare, Exhibit 100, at page 62, that he looked through the books and did not find a single acknowledgment taken on Khatahs. It also appears from the evidence that there was total lack of any system under which the agents were allowed to work the affairs of the bank. It appears from *Davey v. Cory* [1901] A. C. 477 that there was no allegation in that case that there was neglect or default by reason of the absence of some system under which, if honestly carried out, the interests of the bank would have been in that respect secured. See also the remarks of Walsh J. in *In the matter of the Union Bank, Allahabad, Limited* ILR (1925) All. 669 referred to above. The appellant admits in his evidence, Exhibit 115, at page 70, that the agents were to work on the lines laid down by the directors but they

were not to work under their directions in each individual matter, but admits at page 65 that the board of directors had not laid down any general rules of the nature, of business to be done by the bank.

54. It is urged on behalf of the appellant that the bank came to grief in 1913 as there was failure of other banks in Bombay. It appears, however, from the evidence of the liquidator, Exhibit 65, paragraph 54, that the Sholapur Bank had deposits in only two banks that failed during the crisis, viz., the Burma Bank and the Bombay Banking Co., that the deposits were not large, not more than Rs. 10,000 in each, and that the deposit in the Burma Bank was recovered in full, and that in the Bombay Banking Co. was recovered fifty per cent. But if there was a failure of other banks in 1913, there was greater reason for the bank's directors to probe more deeply into the concerns of the Sholapur Bank. But in 1914 when an application was made to the High Court for an order to continue the bank the appellant stated that the debts were good and recoverable and that the bank should be continued. The appellant admits in his evidence, Exhibit 115, at page 68, that there was a resolution to the effect that a committee should be appointed to examine the Kolhapur accounts, that there was a committee appointed by the depositors and shareholders to examine the Kolhapur accounts and the committee asked for the accounts for examination, and that the appellant objected to the proposal to examine the accounts by that committee.

55. It is urged on behalf of the appellant that he took such care of the affairs of the bank as he would have taken of his own property, that he took part in filing a suit against Valsankar for recovery of the money and in paying off creditors under Rs. 10, that he moved a resolution to place the matter in the hands of the Criminal Investigation Department for inquiry into the bank's affairs, and that as a proof of his bona fides he kept his own deposits in the bank and that of a minor under his control. It appears from the evidence of the liquidator, Exhibit 65, paragraph 37, that the opponent deposited Rs. 800 on February 1, 1913, for four months but the deposit was not renewed, and that he had a current account which showed a balance of Rs. 19-9-7 on April 28, 1918, and that the money remained unpaid. The appellant admits in his evidence, Exhibit 115, at page 70, that his own deposits were a few hundreds only, and the amount was withdrawn before the crisis began, that the funds of the Valcstrutvottejak Mandal were withdrawn about the panic time, and that only the minor Thite's money remained in the bank. It appears also from the evidence of Sharangdhar, Exhibit 97, at page 57, that if the directors had taken ordinary care, there would not have been any difficulty for them to have ascertained that moneys were being advanced to relatives and friends of agents and to bogus Ickatas.

56. It is further urged on behalf of the liquidator that the balance sheets were false in two particulars (1) in showing an exaggerated amount of debts for which securities were held, and (2) in showing debts as good which were really not so. Exhibit 62 is the balance-sheet from June 1, 1912, to May 31, 1913, and Exhibit 63 is the balance-sheet from June 1, 1913, to August 31, 1914. It appears from

Exhibit 62 that the total amount of debts due to the bank was Rs. 3,67,209-4-5 which consisted of Rs. 2,24,271-0-7 as debts considered good for which the bank held securities, and Rs. 1,19,207-2-7 as debts considered good for which the bank held no securities. In Exhibit 68 the total amount comes to Rs. 241,034-9-10 which shows a recovery of Rs. 1,26,174-10-7 of debts during the period covered by Exhibit 63. It appears from the evidence of the accountant and auditor Sharangdhar, Exhibit 97, at page 56, and the statement produced by him that the bank paid about Rs. 2,20,000 to its creditors in the period covered by the balance-sheet of 1914. This was made up by (i) recovering the loans to the extent of Rs. 1,26,000 and odd ; (ii) by reduction of the assets in col. 15, Government Promissory Notes by Rs. 29,000 and odd; (iii) by reduction of cash with bankers in col. 18 by over Rs. 56,100 ; and (iv) by reduction of cash in hand in col. 19 by Rs. 25,000. These items total up to Rs. 2,36,000 and odd which was more than the amount paid to the creditors. He further deposes that if the item of Rs. 2,24,000 in the balance-sheet of 1913 had been really fully secured as stated in it, it could have been realised within a period of fifteen months. He, therefore, infers that the item of Rs. 2,24,000 in the balance-sheet of 1913 could not have been secured debts because only Rs. 21,000 appear as secured debts in 1914 and the total realization in the interval did not amount to more than Rs. 1,26,000, and that no one could have realised secured debts and given out unsecured loans at such a time of crisis. In Exhibit 62 the secured debts are said to be Rs. 2,24,271 while in Exhibit 63 for the succeeding year the secured debts are Rs. 21,352, whereas the amount of debts considered good for which no security was held was reduced from Rs. 1,19,207 to Rs. 36,212, and a new item of debts considered bad or doubtful, was entered in the balance-sheet, Exhibit 63, as amounting to Rs. 81,926. The learned Judge has discussed the effect of the balance-sheets and has correctly drawn an inference that the item shown in Exhibit 62 as debts for which the bank holds security was fictitious and inflated by something like Rs. 80,000 at the very least, and that most of the debts shown in Exhibit 62 as loans without security, amounting to Rs. 1,19,000 were not good debts as stated in the balance-sheets. He, therefore, came to the conclusion that he was satisfied that the balance-sheet of 1913 was false in at least two particulars, namely, in showing an exaggerated amount of debts for which securities were held and as showing debts as good which really were not so, and that the agents must have known and the directors could have with ordinary care ascertained that the balance-sheet was false in these respects. It appears that no certified auditors and accountants were engaged to audit the accounts. It appears from the evidence of the liquidator, Exhibit 65, in paragraph 40, that it was in 1913 only that there was an audit by a professional auditor and subsequently in 1914 by Sahasrabudhe who is a certified accountant. Most of the debts were prior to 1913 as would appear from the evidence of the liquidator in para. 10. Therefore, there was no adequate reason for describing the debts differently in the different balance-sheets. The liquidator in his evidence, para. 25, says that the debts unsecured amounting to about Rs. 40,000 had become time-barred by the time the balance-sheet for 1912-13 was published, and he

has put in Exhibit 79, a statement to that effect. It would, therefore, follow that the description in the balance-sheet for 1912-13 that the debts considered good for which the bank held, securities amounted to Rs. 2,24,271 and that the debts considered good for which the bank held no securities amounted to Rs. 1,19,207 was not justified, and that the directors should have satisfied themselves that those statements were correct. Defendant No. 5 in his evidence at page 66 admits that he made no inquiries at that time about the figures shown in the balance-sheet, Exhibit 62, as due to the bank, and that he signed the balance-sheet showing that the amount of good debts was Rs. 3,67,000. He also did not make inquiries when he signed the balance-sheet, Exhibit 63, for 1913-14. The only explanation which he has given with regard to the amount of Rs. 81,926 shown as bad debts is that he was satisfied with the explanation of the agents that owing to crisis it was feared that the debtors would fail to pay.

57. Having regard to these facts, I am not prepared to differ from the conclusion of the learned Judge that the appellant did not exercise reasonable care which was to be measured by the care an ordinary man might be expected to take in the circumstances on his own behalf. Though there is no allegation of any complicity in the fraud of the agents, it cannot be held in the circumstances disclosed in the evidence in this case that the appellant acted both honestly and reasonably, but on the other hand the evidence shows that he was recklessly careless.

58. The next question is whether the application of the liquidator u/s 235 of the Indian Companies Act on November 18, 1920, is within time. Under Clause (8) of Section 235, the Indian Limitation Act shall apply to an application under this section as if such application were a suit. The appellant contends that the application is barred by Article 36 of the Indian Limitation Act and relies on the remarks in the case of *Mangun Jha v. Dolhin Golab Koer* ILR (1898) Cal. 692 and the decision of the Lahore High Court in *Bhim Singh v. Liquidator, Union Bank of India* ILR (1920) Lah. 167. The remarks in the case of *Mangun Jha v. Dolhin Golab Koer* were obiter as the point did not arise for decision in that case. In *Bhim Singh v. Liquidator, Union Bank of India*, it was held that Section 235 of the Indian Companies Act does not create new rights, but merely provides a summary remedy of enforcing existing rights, which apart from that section might have been vindicated by means of a suit, and that an application under that section, made more than two years after the act of misfeasance complained of, is alleged to have taken place, is barred by Article 36 of the Indian Limitation Act. Article 36 of the Indian Limitation Act refers to a suit for compensation for any malfeasance, misfeasance or nonfeasance independent of contract and would refer to actions founded on torts or such wrongs as are distinguishable from breaches of contract. In *In the matter of the Union Bank, Allahabad, Limited* ILR (1925) All. 669 it was held that the liquidator's application to make the directors liable for the sums which the manager, through their negligence, has been enabled to make away with, is governed as to limitation by Article 120 of the Indian Limitation Act, and that the time begins to run from the date when the

liquidation takes place, that is, when the liquidator first has a right vested in him. It was held that Article 36 would not apply as the claim is not independent of contract, and Articles 115 and 116 would not apply when there was no specific breach of a specific contract made by one or more individuals with the person making the claim, and that Article 115 refers to successive breaches or continuing breaches and it was difficult to apply the Article to a claim by a liquidator. It is further held that if the Legislature intended that the liability of a director for breach of trust and misapplication of funds should be barred, either from the point of view of tort after two years, or from the point of view of breach of contract after three years, they might just as well not have enacted Section 235 at all. In the case of *Kathiawar Trading Company v. Virchand Dipchand* ILR (1893) 18 Bom. 119 it was suggested that Article 120 would apply to such a suit as the present. In *The New Fleming Spinning and Weaving Company, Limited v. Kessowji Naik* ILR (1885) 9 Bom. 373 Scott J. held (p. 398):-

Misfeasance of a director constitutes a breach of trust. It is more than mere negligence, which consists in the omission to do something which, a reasonable man would do, or the doing something which a reasonable man would not do. Negligence depends upon the public duty which is incumbent upon every one to exercise due care in his daily life ; but a breach of trust depends upon the neglect of some special duty undertaken in regard to some specified person or body of persons.

59. The liability, therefore, of a director of a bank is of a person whose relations with the company were not independent of contract and who occupies the position of a quasi trustee. A suit, therefore, for any misfeasance against a director would not fall under Article 36 nor would it fall, under Article 115 or 116 for the suit is not for a specific breach of any specific contract with the person making the claim, i.e., the liquidator. The liability of the defendant is based not on a breach of contract but on a breach of duty amounting to a breach of trust. It is not, therefore, necessary to go into the question whether the word "Registered" in Article 116 means registered according to the Indian Registration Act. I think, therefore, that the residuary Article 120 would apply. This view is supported by the decision in *In the matter of the Union Bank, Allahabad, Limited*.

60. The next question is when the right to sue or apply u/s 235 under the Indian Companies Act accrued in the present case. If under Clause 3 of Section 235 of the Indian Companies Act, the Indian Limitation Act would apply to an application under that section as if such application were a suit, I am not prepared to follow the view of the Allahabad High Court in *In the matter of the Union Bank, Allahabad, Limited*, that time begins to run from the date when the liquidator first has the right vested in him. In *City Equitable Fire Insurance Co., In re* [1925] 1. Ch. 407 it was held that Section 215 of the Companies (Consolidation) Act, 1908 (8 Edw. VII, c. 69) corresponding to Section 235 of the Indian Companies Act, was a procedure section only and created no new or additional liability and that it provided a summary mode of enforcing existing

rights. See the judgment of Pollock M, B. at page 507, following the cases in *Coventry and Dixon's case* (1880) 14 Ch. D. 660 ; *Brazilian Rubber Plantations and Estates, Limited, In re* [1911] 1 Ch. 425; and *Cavendish Bentinck v. Fenn* (1887) 12 App. Cas. 652 In the last case Lord Herschell observes (p. 661):-

I think that in order to establish a claim to relief it would be necessary not only to shew a breach of duty but to shew a breach of duty -which resulted in pecuniary loss to the company.

61. In Halsbury's Laws of England, Vol. V, page 479, paragraphs 814 and 815, it is laid down:-

The statutory provision [relating to misfeasance] does not...create any new liability or new right; it only provides a summary mode of enforcing rights which must otherwise have been enforced by the ordinary jurisdiction of the court.

Misfeasance includes a breach by an officer of his duty to the company, the direct consequence of which has been a misapplication or loss of its assets for which he could be made responsible in an action. A misfeasance summons, however, cannot be sustained even where nominal damages could be recovered in an action for the breach of duty alleged, unless the breach has resulted in loss to the company's funds and assets, and the applicant has a direct pecuniary interest in the success of the application. Nor can it be sustained in the case of non-feasance, even where it is a breach of trust, unless loss to the assets has resulted therefrom, although the court may order the respondents to a misfeasance summons, even where the liquidator establishes no money claim against them, to pay the costs.

62. u/s 24 of the Indian Limitation Act in the case of a suit for compensation for an act which does not give rise to a cause of action unless some specific injury actually results therefrom, the period of limitation runs from the time when the injury results.

63. The question, therefore, in this case is when the loss was occasioned to the company by misfeasance on the part of the appellant. It is clear on the evidence that dividends were declared up to the year 1913. It was not, therefore, possible for the shareholders or the company to know that any loss had resulted to the company by the action of the directors. It is only when the balance-sheet for 1914 was published that the shareholders could be in a position to know that the company sustained a loss. Exhibit 64 shows that the meeting of the directors to consider the balance-sheet for the year 1914 was held on February 28, 1915, and it must have been published thereafter, and that the balance-sheet for the year ending on August 31, 1915, was considered at the meeting held on July 11, 1916. It was only in the balance-sheet for the year 1914 that Rs. 81,000 were shown as bad debts. Even taking the earliest period at which the company could have known of the loss to the company on account of the misfeasance on the part of the directors, the date could not have been earlier than February 28, 1915, the date on which the meeting of the directors was held to consider the

balance-sheet for the year ending in August 1914. The present application was made on November 18, 1920, that is, within six years from that date. I think, therefore, that the application by the liquidator in the present case under B. 235 of the Indian Companies Act against the appellant is within time. If the appellant is guilty of wilful default and if the claim of the liquidator u/s 235 is within time, it is not contended before us that the amount of Rs. 12,000 awarded against the appellant is excessive.

64. On these grounds, I would confirm the of the lower Court and dismiss the appeal with costs.